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**HUMAN RIGHTS AND MIGRANT DOMESTIC WORK:  
A COMPARATIVE ANALYSIS OF THE SOCIO-LEGAL STATUS OF  
FILIPINA MIGRANT DOMESTIC WORKERS IN CANADA AND HONG KONG**

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A dissertation submitted to the Faculty of Graduate Studies in  
partial fulfilment of the requirements  
for the degree of  
Doctor of Philosophy

Graduate Programme in Law  
York University  
North York, Ontario

March 2004



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*Your file* *Votre référence*

ISBN: 0-612-99235-7

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ISBN: 0-612-99235-7

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**Canada**

This work is dedicated to my dear parents,  
Presca Pascual and Reynaldo Santos

## **Abstract**

On a general level, this research project concerns ways in which the domestic and international laws relating to the situation of migrant domestic workers (MDWs) are shaped by broader socio-political and economic factors. More specifically, this dissertation examines the human rights situation of Filipina MDWs who participate in Canada's Live-in Caregiver Program (LCP). It attempts to meet these objectives, in part, by undertaking a limited comparison of the situation of these Filipina MDWs and the Filipina MDWs in Hong Kong. The comparison is meant to further test and validate the arguments and proposals presented in this dissertation regarding the socio-legal status of Filipina MDWs under Canada's LCP. This was done through an analysis of existing data on Filipina MDWs, and a consideration of the ways in which the relevant laws and policies in these two jurisdictions affect, create and/or perpetrate the status quo in this area of social life.

The main explanatory theoretical framework that is deployed is the Third World Approaches to International Law or the TWAIL theory. Among the findings of this research is that the ill-treatment of Filipina MDWs in Canada and Hong Kong is sanctioned by migrant domestic worker policies designed to fill the need for cheaper alternatives to state-sponsored childcare and home support services. The ill-treatment does not necessarily consist solely of physical or psychological abuse, but is also manifested in the systemic exploitation of MDWs from poor, third world countries. This systemic exploitation of MDWs from poor, third world countries such as the Philippines to richer countries of employment, is best explained by a colonial type of extractive relations, the various implications of which are most effectively analyzed using the TWAIL framework.

Thus, the most appropriate remedies to ameliorate the current situation are those which take into careful consideration this extractive relationship and which are geared towards ensuring a more equitable international socio-economic and political scenario among countries of origin and countries of employment in particular and throughout the whole world in general.

## Acknowledgments

This dissertation would not have been accomplished without the help of many people. I owe them a debt of gratitude, but would like to apologize in advance if I fail to acknowledge each by name. Nonetheless, their kindness, generosity, assistance and support toward this endeavour had been, and will always be deeply appreciated. Credit is due to all the Filipina migrant domestic workers whose courage in the midst of adversities is truly admired, as well as to the many authors and activists whose earlier efforts have not only helped set the stage for this research project, but also greatly aided my understanding of the complex issues involved.

To my supervisor, Prof. Obiora Chinedu Okafor, I am immensely grateful for his brilliant insights, his extremely patient mentoring, generous support and assiduous guidance in completing this dissertation. His dogged pursuit for excellence is balanced by a cheerful and gentle nature as well as a contagious sense of humour, which make the most difficult and challenging tasks seem a lot easier. I am also grateful to him for introducing me to Third World Approaches to International Law (TWAIL) scholarship and for allowing me the privilege of coordinating the successful international TWAIL conference held at Osgoode Hall Law School in 2001.

To another kind mentor and supervisory committee member, Prof. Michael Lanphier, I express utmost gratitude. He not only taught me the theoretical underpinnings of the study of international migration but has also diligently pored through drafts of this dissertation and offered meticulous and constructive feedback amidst his busy schedule. Thanks are also due to Prof. Luin Goldring who co-taught this very stimulating international migration course with him.

Many thanks are owed to Associate Dean Craig Scott who, as previous member of my supervisory committee, patiently reviewed earlier drafts of this dissertation, suggested resources and other useful ideas, despite his incredible workload and tight schedule. As the former graduate programme director, he had been instrumental in my having secured some generous funding. These included scholarship grants, graduate assistantships and a teaching position as Adjunct Professor in a global classroom course at Osgoode called Law, Individual and the Community: a Cross-Cultural Dialogue.

A big thank you to Prof. Ikechi Mgbeoji, who readily agreed to replace Prof. Scott in my supervisory committee, despite his heavy workload, and for his very insightful comments for improving the dissertation.

Sincere thanks to Prof. Liora Salter, graduate program director, for her tireless efforts to assist graduate students in accomplishing our goals. Her generous words of encouragement, expert guidance and sincere concern have been truly helpful in overcoming my personal struggles while working on this dissertation.

I am also thankful and honored that Prof. Vijay Agnew, Prof. Sonia Lawrence and Prof. Audrey Macklin have kindly agreed to become part of my oral examination committee, and for their constructive comments, questions and suggestions for improving this dissertation.

Heartfelt thanks are due to Lea Dooley (Osgoode graduate programme coordinator), Roberta Castellarin and Donelda McLean (graduate programme assistants), Hazel Pollack and Miriam Spevack (faculty assistants), and to all the librarians and staff of the Law library and IT helpdesk, for all the efficient and timely assistance, responses to my endless queries and overall guidance in various aspects of my graduate student life at Osgoode.

Many thanks as well, to the York Faculty of Graduate Studies, for the various forms of financial assistance and scholarships which helped make my graduate student life a bit more comfortable and less stressful. The same appreciation goes to the Ontario government for the generous award of the Ontario Graduate Scholarship for the past two terms which helped ease financial anxieties while writing this dissertation.

I also thank all the academics, practitioners and fellow graduate students whom I had the pleasure of meeting at the various conferences and summer courses where I presented certain parts of this dissertation. Although too numerous to mention, this is to recognize their valuable insights and queries which helped shape the contours of this research project. Special thanks are extended to the esteemed participants of the TWAIL conference at Osgoode whose intellectual energy, enthusiasm and creativity inspired me to pursue this scholarly endeavour.

My life at Osgoode would not have been as enjoyable if not for the collegial and friendly interaction with fellow graduate students, most especially my friend, carrel roommate, co-researcher and LIC co-instructor, Xue Yan. I thank her and several graduate student colleagues for the intellectual support and camaraderie.

While space is running out, I cannot end this without thanking all the other wonderful people in my life outside of Osgoode Hall or York University. They include my dear friends and mentors in Canada, Philippines, Hong Kong, Sweden, U.S.A., Italy, Spain and others, my kind and generous relatives in Toronto (especially cousin Grace Victoria), and dearest family in Manila - who are nearest to my heart even though we are physically apart. I thank them for the unconditional love and understanding, moral support, fervent prayers and best wishes.

Most of all, I offer my most profound gratitude to God almighty for everything.

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## **List of Acronyms**

AMC: Asian Migrant Center

BORO: Bill of Rights Ordinance (Hong Kong)

BWI: Bretton Woods Institutions

CEDAW: Convention on the Elimination of Discrimination Against Women

CERD: Convention on the Elimination of All Forms of Racial Discrimination

CFO: Commission on Filipinos Overseas

CIC: Citizenship and Immigration Canada

CLS: Critical Legal Studies

CMR: Coalition for Migrants' Rights

CRC: Convention on the Rights of the Child

CRT: Critical Race Theory

ESA: Employment Standards Act

FDM: Foreign Domestic Movement Program

FLT: Feminist Legal Theory

DFA: Department of Foreign Affairs (Philippines)

DFAIT: Department of Foreign Affairs and International Trade (Canada)

DHMWP: Domestic Helpers and Migrant Workers Programme

DOLE: Department of Labour and Employment (Philippines)

FMDW: Filipina Migrant Domestic Workers

HK: Hong Kong

HKCoRE: Hong Kong Coalition for Racial Equality

HKSAR: Hong Kong Special Administrative Region

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ID: Immigration Department (Hong Kong)

ILO: International Labour Organization

IMF: International Monetary Fund

INTERCEDE: International Coalition to End Domestics' Exploitation

IRPA: Immigration and Refugee Protection Act

LCP: Live-in Caregiver Program

LD: Labor Department (Hong Kong)

MDW: Migrant Domestic Worker

MP: Member of Parliament

MWC: Migrant Workers Convention or the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

NAPWC: National Alliance of Philippine Women in Canada

NCS: New Conditions of Stay

NGO: Non-Governmental Organization

NIE: Newly Industrializing Economy

OFW: Overseas Filipino Worker

OHIP: Ontario Health Insurance Plan

OWWA: Overseas Workers Welfare Administration

PR: Permanent Resident

PROC: People's Republic of China

PWC: Philippine Women's Center

SEC: Standard Employment Contract

TWAIL: Third World Approaches to International Law

UDHR: Universal Declaration of Human Rights

UNHCHR: United Nations Office of the High Commissioner for Human Rights

UNHCR: United Nations Office of the High Commissioner for Refugees

UNIFIL: United Filipinos in Hong Kong

WB: World Bank

## **Prologue**

Before anything else, I must confess a lingering guilt: a guilt for somehow having taken part in a system that has facilitated the exploitation of domestic workers. Having been raised in a four-children household where both parents worked full time, child care and other household chores were mostly accomplished through the invaluable assistance of live-in domestic workers. Thus, their enormous contribution to our family life for all those years cannot be overemphasized. Yet, I did not, while growing up, realize that there must have been moments when these domestic workers were deprived of the freedom they deeply yearned, of adequate compensation for their priceless contributions to the family, or even of the full dignity that they deserved.

When I began traveling abroad, and on a number of occasions that I introduced myself as a Filipina, the immediate response was often something like, “Oh, my nanny/domestic is also a Filipina.” Such encounters led to my awareness of the plight of Filipina MDWs, followed by my heightened curiosity about the same issue, and later on, by my advocacy for their rights. This initial awareness of the growing reputation of Filipinas as “quintessential” domestic workers led to revelations about the dismal conditions and systemic ills that characterize the situation of Filipina MDWs around the world. Having listened to and read about countless heart-rending stories, cases of abuse clamoring for justice, and even numerous reports of Filipina MDWs dying mysteriously and coming home in cold caskets, I was led to this dissertation project. The journey has not been easy, and the destination is yet to be ascertained. Thus far, this dissertation, as

part of this journey, has sought to find the most appropriate theoretical explanations for the rampant ill-treatment of MDWs. Along the way, the works of other authors have given this academic hitchhiker a ride of many unforgettable miles. The view was sometimes scenic, at other times, depressing. In any event, it is worth noting here that the earlier works on this very subject matter contributed much to my own comprehension of the situation of MDWs. They have also given a more level-headed view in that they reminded me that any form of advocacy (whether academic or militant) can only gain effective and lasting results if solidly backed by objective and dispassionate evidence.

This is also to clarify at the outset that I come from a position which some may consider as privileged (for having benefited from the services of domestic workers) but at the same time belonging to a disadvantaged class (people of color in general or Filipinas in particular). This apparent “double consciousness” has nonetheless greatly assisted in refining my analysis in this dissertation since I had the opportunity of viewing the situation from different fields of the spectrum. However, it is also recognized that, as an individual, I can only see a little slice of reality. This research work therefore, does not in any way claim that I have obtained a totally comprehensive view of the issues involved nor could I propose the ultimate solutions to the many problems raised. However, while it is true that I may not have been able to cover all shades of the socio-legal continuum as far as the Filipina MDWs are concerned, there was a sincere effort to understand the situation from all possible sides. This will also help to explain the reason why I have, in various parts of this dissertation, tried to emphasize that this work is not meant to view the Filipina MDWs as essentialized “victims” because of a clear

recognition of their individual and collective agency. Therefore, even as the migrant domestic worker programs in Canada and Hong Kong are characterized as exploitative and inherently problematic, it is not denied that many Filipinas choose to apply for them, mainly as a means of improving their economic situation. And while the subject of agency deserves an entirely new dissertation project on its own, this area of the debate is definitely not ignored here. The only reason this was not extensively dealt with is the fact that it is just impossible to adequately discuss all relevant issues in this single piece of work without being overwhelmed or losing focus on the main thematic objectives. Hence, it is hoped that this work will be an impetus to other research projects which will give justice to this significant and complex issue of agency, as well as to other equally important facets of the lives of Filipina MDWs.

While there are apparently a good number of scholars who have already helped raise public awareness of the plight of MDWs, this dissertation will hopefully serve to provide an alternative ride, hopefully a richly rewarding one, which will not only fill the gaps in the existing literature, but will also prescribe some novel and useful recommendations for the protection and promotion of the rights of Filipina MDWs in particular and MDWs in general.

## **Chapter 1**   **Introduction and Conceptual Framework**

### **A. Statement of the Research Problem**

This project's overarching goal is to undertake a critical socio-legal analysis of the various complex ways in which global and local political, social and economic forces work to produce and propel the deplorable conditions in which far too many Filipina (and other categories) of migrant domestic workers (MDWs) find themselves. It is hoped that the mapping and explanation of these complex relationships will advance the quest for greater justice and fairness in the treatment of Filipina and other MDWs the world over.

Thus, on a general level, this project concerns ways in which the domestic and international laws relating to the situation of MDWs are shaped and influenced by broader socio-political and economic factors.

More specifically, this dissertation examines the human rights situation of Filipina MDWs who participate in Canada's Live-in Caregiver Program (LCP). It attempts to meet these objectives, in part, by undertaking a limited comparison of the situation of these Filipina MDWs and the Filipina MDWs in Hong Kong. The comparison is meant to further test and validate the arguments and proposals presented in this dissertation regarding the socio-legal status of Filipina MDWs under Canada's LCP. This will be done through an analysis of existing ethnographic data on Filipina MDWs, and a consideration of the ways in which the relevant laws and policies in these two

jurisdictions affect, create and/or perpetuate the status quo in this area of social life. The explanatory theoretical framework that is deployed is TWAIL theory.<sup>1</sup>

This socio-legal analysis of the situation of Filipina MDWs will not be complete without a prior discussion of the relationship between human rights and migration. Thus, a brief overview of this relationship and its implications will be discussed below.

## **B. The Linkages Between Human Rights and Migration**

Law and human rights have often been used one in conjunction with the other. That is, human rights norms are often made effective and enforceable through legislation. However, it has also been strongly asserted that human rights are inherent in every individual and that they are “universal, indivisible, interdependent and interrelated.”<sup>2</sup> As such, laws are more the consequence rather than the cause of the existence of human rights. But due to the factors that shape the creation of so-called “human rights laws”, this dissertation advocates a view that goes beyond simply accepting the conventional wisdom regarding the nature of human rights. There is a need to look deeper into the ways that existing laws make or unmake human rights. For it is unfortunate that the law appears to have been used more to the detriment, rather than for the benefit of the most vulnerable sectors of society.

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<sup>1</sup> Please see Chapters 2 and 7.

<sup>2</sup> *World Conference on Human Rights: Vienna Declaration and Programme of Action* (25 June 1993) UN Doc. A/CONF.157/23, part I, para.5. However, many critical assertions have been posed, and they are to be discussed further in relevant chapters of this dissertation (Chapters 2, 3 and 7).

The need to question the conventional wisdom in this area also stems from the disconcerting fact that human rights violations persist despite the existence of a large body of laws meant to protect these rights. And because of their supposed inherent nature, it becomes inevitable that a more comprehensive view of human rights that extends well beyond their legal underpinnings, be made part of any study on this subject matter (this brief discourse on the link between human rights and migration included).

Throughout history, humans have, for various reasons, migrated around the world. In the past, such movements were not regulated nearly as vigorously by international law concepts such as “sovereignty”, “territoriality”, “jurisdiction”, “citizenship” and the like – at least not in the same manner that they exist today. As international and national laws evolved, these very concepts were deployed toward the imposition of various kinds of restrictions on human migration. Consequently, migrants have been classified into a hierarchy of sorts, with diplomats, multinational expatriates, and moneyed tourists often enjoying privileged treatment, and refugees and undocumented migrants (who are often much less welcome) occupying the lower ends of the hierarchy. For varied reasons ranging from economic and political expediencies, demographic issues, to plain racism, migration intake is, too often, deemed subject to the discretion of the given state. Since the so-called right of everyone to “freedom of movement”<sup>3</sup> is a qualified entitlement, a

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<sup>3</sup>Article 13 of the Universal Declaration on Human Rights (UDHR) states that: “1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own and to return to his country.” Similarly, articles 12 and 13 of the International Covenant on Civil and Political Rights (ICCPR) allows freedom “to leave” any country including one’s own and the “freedom of movement and residence” only to those who are “lawfully” within a state’s territory. Furthermore, article 13 of the ICCPR even allows the expulsion of an “alien lawfully within the territory” of a state under certain conditions and in accordance with law. Nowhere is it stated that “freedom of movement” includes the freedom “to enter” another country’s territory. In

“gatekeeping”<sup>4</sup> attitude often prevails among the relevant state officials. Economic migrants often occupy the middle of these “privileged” and “unprivileged” sectors of the immigration hierarchy. At the bottom rung of this economic class of migrant workers are those deemed as “low-skilled”, “unskilled” or those willing to work in jobs deemed “dirty, difficult and dangerous” and which most legal residents and citizens alike would rather avoid.

A variety of migration theories have been deployed to comprehend the trajectories of migratory flow and treatment of migrants. Some of these include labour migration theories such as the “dual-labour market”<sup>5</sup> and the “split-labour market”<sup>6</sup> which deal with the racialization of certain unwanted jobs. The economic-based “push-pull theory”<sup>7</sup> and “new household economics approach”<sup>8</sup> on the other hand, have mainly relied on

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*Universal Declaration of Human Rights*, 10 December 1948, U.N. G.A. Res. 217A (111) art. 13; and *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 12 & 13.

<sup>4</sup> “Gatekeeping” is being used here to mean the attitude of immigration officers, as representatives of the state, to guard the territorial borders by imposing strict rules on who may be allowed to enter the country.

<sup>5</sup> The “dual labour market” theory is an employer-driven model. That is, it views the active migration of labourers from poorer to richer countries as having been spawned by the active recruitment of employers to fill a specific type of job – usually low-paying ones which the citizens and local residents normally shun. The labour market is thus divided into two sectors – the primary sector (largely reserved for citizens and local residents) and the secondary sector (normally reserved for migrants). Please see M. Piore, *Birds of Passage: Migrant Labour and Industrial Societies* (Cambridge: Cambridge University Press, 1979) at 15-49.

<sup>6</sup> The “split-labour market” theory is a worker-driven model. It characterizes the tension between resident and migrant labourers as one which is often exclusionary and racialized, in favor of citizens and resident labourers, and exploitative of “cheap” migrant labour. Please see S. Sassen-Koob, “Capital Mobility and Labour Migration” in S. Sanderson, ed., *The Americas in the New International Division of Labour* (New York/London: Holmes and Meier, 1985) at 228-249.

<sup>7</sup> The “push-pull” theory views migration as the outcome of poverty and lack of employment opportunities in the countries of origin, driving people to seek better opportunities in the countries of destination. Hence, the “push factors” include “economic, social and political hardships in the poorest parts of the world” while “pull factors” are those “comparative advantages in the more advanced nation-states” and the promise of better living conditions, which lure prospective migrants. Please see A. Portes and J. Böröcz, “Contemporary Immigration: Theoretical Perspectives On Its Determinants and Modes of Incorporation” (1989) 23:3 *International Migration Review* 606 at 607.

<sup>8</sup> The “new household economics” approach is sometimes referred to as the “new economics of migration” theory. The main idea behind this approach is that “migration decisions are not made by isolated individual

structural forces to explain the influx of labour migration to countries of reception or employment. The “world systems theory”<sup>9</sup> takes into account the uneven development and power structures among nations as well as market penetration across boundaries, as a mode of explaining the same phenomena.<sup>10</sup> However, the various critiques to these theories often pointed out their lack of attention paid to the dimensions of gender, class, ethnicity and/or racialization. Taken independently of other relevant theories therefore, they are deemed inadequate explanations for various types of migration phenomena such as those of Filipina MDWs to Canada and Hong Kong or elsewhere.

### C. Migrant Domestic Workers: Most Exploited, Least Protected

Domestic or caregiving work is widely regarded as one of the least respected forms of migrant labour.<sup>11</sup> Partly owing to its peculiar nature,<sup>12</sup> this type of work has

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actors, but by larger units of related people – typically families or households - in which people act collectively not only to maximize expected income, but also to minimize risks.” In D. Massey et al., “Theories of International Migration: A Review and Appraisal” (1993) 19:3 Population and Development Review 431 at 436.

<sup>9</sup> The “world systems theory” states that, “migration is a natural outgrowth of disruptions and dislocations that inevitably occur in the process of capitalist development.” Hence, as the rich capitalist countries (comprising “the core”) increasingly control the world market economy, labour migration inevitably flowed from the poor, “peripheral” countries to these “core” countries. Please see D. Massey et al., *supra* at 445.

<sup>10</sup> For a more extensive discussion of these migration theories, please see D. Massey et al. , “Theories of International Migration: A Review and Appraisal” (1993) 19:3 Population and Development Review at 431-446.

<sup>11</sup> Some examples of excellent literature on the topic of migrant domestic labour include: S. Arat-Koc, “Immigration Policies, Migrant Domestic Workers and the Definition of Citizenship in Canada” in V. Satzewich, ed., *Deconstructing a Nation: Immigration, Multiculturalism and Racism in the '90s Canada* (Halifax: Fernwood Publishing, 1992) at 229-242; A. Bakan and D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada*. (Toronto: University of Toronto Press, 1997); B. Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (London: Zed Books, 2000); R. Parrenas, *Servants of Globalization: Women: Migration and Domestic Work* (Stanford: Stanford University Press, 2001); N. Constable, *Maid to Order in Hong Kong: An Ethnography of Filipina Workers* (New York: Cornell University Press, 1997); D. Gatmaytan, “Death and the Maid: Work, Violence and the Filipina in the International Labour Market” (1997) 20 Harv. Women’s L.J. 229; A. Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37 McGill

been the subject of many controversies and debates, academic analyses, and policy formulations. Yet the abuse of MDWs has continued over the years. The endemic nature of this abuse is not at all surprising given the fact that the vast majority of such workers are all too often caught in vulnerable situations arising from their gender, class, racialization, immigration/legal status, and the “postcolonial conditions”<sup>13</sup> within their countries of origin. Moreover, the perception that domestic work is “non-productive work” that requires little skill has made many of these workers “less likely to be protected by national legislation and institutions of receiving countries, as well as subject to provisions that are conducive to various forms of abuse.”<sup>14</sup>

For a “labour sending” country such as the Philippines, MDWs comprise a major proportion of its migrant worker population.<sup>15</sup> These workers have in fact been dubbed “modern day heroes”.<sup>16</sup> Deprived of employment at home, they venture to work in foreign lands. With the help of placement agencies, they readily find “suitable” jobs

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Law Journal 681; D. Young, “Working Across Borders: Global Restructuring and Women’s Work” (2001) 2001 Utah L. Rev. 1.

<sup>12</sup> “Peculiar” in the sense that it occurs inside a private home, instead of a “regular” workplace hence difficult to monitor for compliance with labour standards. This and other characteristics of migrant domestic work will be further discussed in succeeding chapters.

<sup>13</sup> The phrase “postcolonial conditions” here refers to the socio-economic and political repercussions to a nation after it has supposedly cut-off colonial ties with or declared formal independence from the colonizing state. Some of these conditions possibly include a mounting foreign debt, unequal distribution of wealth, political corruption, general demoralization, and others which sadly manifest or necessitate a continuing dependence on or subservience to the dictates of the former colonizing power. Please see generally, “Postcolonialism, Globalization and Law” (1998-1999) Third World Legal Studies 1-234 .

<sup>14</sup> N. Grandea, *Uneven Gains: Filipina Domestic Workers in Canada* (Toronto: The Philippines-Canada Human Resource Program and The North-South Institute, 1996) at 1.

<sup>15</sup> For a discussion on the phenomenal growth of the Philippine migrant labourers abroad, please see Catholic Institute for International Relations, *The Labour Trade: Filipino Migrant Workers Around the World* (London/Manila: CIIR/Friends of Filipino Migrant Workers, 1987).

<sup>16</sup> Please see for e.g., R. Rodriguez, “Migrant Heroes: Nationalism, Citizenship and the Politics of Filipino Migrant Labour” (2002) 6:3 Citizenship Studies 341 at 341-356; and J. Bautista, “An Indefinite Ban on Modern Day Heroism” *Asian Analysis* (June 2003) online: Asean Focus [http://www.aseanfocus.com/asiananalysis/article.cfm?articleID=650>](http://www.aseanfocus.com/asiananalysis/article.cfm?articleID=650)

after investing a fortune in placement fees, travel documents, and transportation costs. They then send home a major portion of their incomes to repay debts and support family members. The country of origin is most grateful for these remittances as the continuing flow of foreign currency helps buoy the economy and ease the nation's crippling debt burden.<sup>17</sup>

To achieve this however, these MDWs toil in other people's homes in faraway lands, take care of other people's children, and leave their own families behind. They perform work that local residents would rather avoid. They endure various forms of abuse and exploitation. They are in such high demand that special programs are often put in place to facilitate their entry into the countries of employment. Yet, such programs are meant to ensure that these countries of employment benefit from their domestic labour and does so at the least possible cost. As such, institutional barriers are put in place to discourage them from entering the "mainstream" labour force. A "deskilling" process takes place which leaves them with very little choice but to remain in domestic work for the rest of their working lives.<sup>18</sup>

MDWs are neither here nor there. In states of employment, they are categorized and treated as "economic migrants", not as full-fledged "citizens". In their states of

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<sup>17</sup> On this and other social and economic costs of Philippine labour migration, please see for example J. Opiniano, "Maximizing Benefits of OFW remittances" in *Philippine Daily Inquirer* (14 May 2003) online: Inquirer/GMA7 <[http://www.inq7.net/opi/2003/may/14/opi\\_commentary1-1.htm](http://www.inq7.net/opi/2003/may/14/opi_commentary1-1.htm)>; and J. Jimenez , "5 Million Jobless Filipinos" in *Philippine Daily Inquirer* (27 June 2002) online: Inquirer/GMA7 <[http://www.inq7.net/bus/2002/jun/28/bus\\_10-1.htm](http://www.inq7.net/bus/2002/jun/28/bus_10-1.htm)>.

<sup>18</sup> Please see for e.g., Filipino Nurses Support Group, Statement on "Discrimination Against Filipino Nurses Enslaves Nurses in Domestic Work Despite Critical Nursing Shortage" (Vancouver, 31 July 2003) [copy on file with author].

origin, they are regarded as absentee citizens<sup>19</sup> who do not have significant roles to play other than to remit funds from their states of employment to these states. Over all, MDWs are most valued when they are most exploited.

#### **D. In Search of an Effective Regime for the Protection of the Rights of Migrant Domestic Workers**

This is not to say that no attempts at all have been made in the past to improve the social and legal conditions of these workers. One major such attempt was the adoption of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (MWC).<sup>20</sup> The process of drafting this treaty was as complicated as it was difficult. The overwhelming preoccupation of most of the negotiating parties with advancing (what they considered to be) their narrow state interests resulted in watered down provisions concerning certain crucial rights claimed by migrant workers and their families.<sup>21</sup> Some examples include the distinctions made between migrants with legal status (who are granted more rights) and those deemed “irregular or in an undocumented situation”.<sup>22</sup> Another is the limitation of the definition of “migrant worker” to exclude students, refugees and stateless persons, non-resident

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<sup>19</sup> Although the Overseas Absentee Voting Act of 2003 (Republic Act 9189) (Manila, 13 February 2003) was recently enacted by the Philippine Legislature after much clamor by migrant groups, it remains to be seen if this will significantly affect the socio-political conditions in the Philippines.

<sup>20</sup> Also known as the Migrant Workers Convention (MWC), this treaty was adopted by the United Nations General Assembly without a vote on 18 December 1990 as U.N.G.A. Res. 45/158. The full text can be found in 30 ILM 1517 (1991) or online: United Nations Office of the High Commissioner of Human Rights <[http://www.unhchr.ch/html/menu3/b/m\\_mwctoc.htm](http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm)>.

<sup>21</sup> A thorough discussion of this matter can be found in R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997) at 137-204.

<sup>22</sup> Cholewinski, *supra* at 138.

seafarers.<sup>23</sup> With regard to specific rights, compromises were reached in the drafting of certain labour rights such as free choice of employment,<sup>24</sup> trade union rights,<sup>25</sup> and social rights such as health,<sup>26</sup> housing,<sup>27</sup> and family reunification.<sup>28</sup> These compromises were reached to appease the countries of employments' concerns on preserving their sovereignty and discretion over these matters.<sup>29</sup>

More than a decade after the adoption of the MWC, the negative impact that narrow conceptions of state interests can have, continues to afflict this treaty. This is true even though the treaty has recently entered into force, having been ratified by the required number of states.<sup>30</sup> *For instance, not even a single one of the states that have ratified this treaty is a significant state of employment, and none is a rich or 'developed' state!*<sup>31</sup> Even thus far, it is obvious that there is a political economy logic to the ill-treatment of migrant workers in general and MDWs in particular. Concomitantly, were one to diagnose effectively the nature of this pathology, one would be a step closer to identifying better courses of action in search of a more just regime for the protection of the rights of MDWs. One of the objectives of this dissertation is to offer such an effective diagnosis.

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<sup>23</sup> MWC, *supra*, inclusions to the definition of “migrant worker” in Article 2 and exclusions in Article 3.

<sup>24</sup> MWC, Article 53.

<sup>25</sup> MWC, Articles 26 and 40.

<sup>26</sup> MWC, Articles 28, 43(I)(e) and 45(I)(c).

<sup>27</sup> MWC, Articles 43 (I)(d) and 43 (3).

<sup>28</sup> MWC, Article 44 (2)

<sup>29</sup> Please see Cholewinski, *supra* at 137-204.

<sup>30</sup> Guatemala became the 20<sup>th</sup> country to ratify the Migrant Workers’ Convention. The other ratifying countries are: Azerbaijan, Belize, Bolivia, Bosnia & Herzegovina, Cape Verde, Colombia, Ecuador, Egypt, Ghana, Guinea, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Uganda, Uruguay. The MWC entered into force on 1 July 2003.

At this juncture however, some initial clarifications are in order. First, it is important to understand that the international human rights system does not consist of a fixed set of norms that are applicable across the board in all situations and in varying settings. It is important therefore, to subject “universal” notions to constant scrutiny without diluting the essential objective of respecting each and every person’s human dignity. Moreover, the development of the international human rights regime in the past half-century does show that while progress may often be slow, it is possible.

Second, states tend to pursue their perceived interests, as defined by the ruling political party or ideology. Consequently, the labour migration policies of the states of employment of MDWs have tended to be driven primarily by economic and labour-market needs that cannot be filled by the local population. As such, these policies hardly take into *careful* consideration the needs and welfare of MDWs, who are in the first place already disadvantaged by their gender, race, class, migrant and legal status.

Third, a simplistic and condescending view of MDWs as largely passive victims must be avoided. Any scholarly attempt towards a holistic understanding of the situation of MDWs will have to deal with the complex and dynamic processes of agency, citizenship, individual and collective advocacy, migration and diaspora. These are among the vital areas that need to be considered in the process of promoting MDWs’ human rights within the context of globalization, and with all its concomitant ironies.

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<sup>31</sup> The term, “rich state”, here refers to a country which is deemed “industrialized”, “first world”, “highly-developed” or such other characteristics which make it an attractive destination for migrant workers in general, mainly for economic reasons.

In light of the above caveats, this dissertation will undertake the arduous task of trying to make sense of the seeming paradoxes and complexities involved in the current research problem, as already described.

Since an adequate consideration of the situation of all MDWs the world over is neither possible nor desirable within the scope of a dissertation like the present one, I will conduct a case study of the situation of Filipina MDWs both in Canada and Hong Kong. However, as will become apparent, the main focus of this study is the situation of Filipina MDWs in Canada. The situation in Hong Kong will be discussed only to the extent that significant insight is derivable from comparing it with the situation in Canada.

#### **E. Reasons for the Comparative Dimension of the Study**

Filipina MDWs (FMDWs) have become the most ubiquitous MDWs around the world. So numerous have they become that the word “Filipina” had been used to mean “housemaid” or “nanny” in places like Hong Kong. This situation has also led attempts by certain dictionary publishers at embedding this into formal usage.<sup>32</sup> The cases of Flor Contemplacion (hanged in Singapore and widely believed to have been wrongfully convicted) and Sarah Balabagan (whose death sentence was commuted to lashing after

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<sup>32</sup> Oxford dictionary reportedly planned to enter the word “Filipina” to mean “a female citizen of the Philippines; a servant or an *amah*”. In N. Constable, *Maid to Order in Hong Kong: An Ethnography of Filipina Workers* (New York: Cornell University Press, 1997) at 38-39, citing L. Layosa, “Come to Think of It” *Tinig Filipino* (19 January 1990) at 19. The derogatory entry was later shelved after then Philippine President Corazon Aquino filed a formal complaint against the publishers of Oxford dictionary through the British Embassy in Manila.

A Greek dictionary was also said to have used “Filipina” to mean “domestic servant; someone who performs non-essential auxiliary tasks”. In G. Ebron, “Not Just the Maid: Negotiating Filipina Identity in Italy” (October 2002) 8 *Intersections*, online: Murdoch University website <<http://www.sshe.murdoch.edu.au/intersections/issue8/ebron.html>> (Citing G. Babiniotis, *The Dictionary of the Modern Greek Language*, 1998).

having been convicted for killing a Saudi Arabian employer who had attempted to rape her) are two of the well-publicized events that have brought the plight of FMDWs to international attention.<sup>33</sup>

The comparative case study of FMDWs in Canada and Hong Kong is meant to provide the empirical backdrop for much of the conceptual discussion that is engaged in this dissertation. Canada and Hong Kong were chosen in particular because of the existence in those two countries of highly controversial domestic worker policies, as well as due to their reputation as two of the relatively more popular destinations for Philippine migrant workers in general and FMDWs in particular.<sup>34</sup>

What is more, despite claims to the contrary, FMDWs in both jurisdictions constantly encounter serious violations of their human rights and are often left with no effective means of legal redress, in their countries of employment and in their country of origin.

Thus, it is hoped that the analytical comparison of the status of FMDWs in these two jurisdictions will serve to systematically expose the social, political and economic factors and ideologies that shape the legal responses of countries of employment to the situation of FMDWs.

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<sup>33</sup> At this point it may be worth noting that the author is also very much aware of the deplorable conditions faced by Filipina migrant domestic workers in other “hot” destinations such as Singapore, Malaysia, Italy, the U.S. and many Middle East countries like Saudi Arabia. However, the two countries (Canada and Hong Kong) were particularly chosen for this comparative study for practical considerations as distance and resource availability, on top of the heuristic factors discussed above.

<sup>34</sup> Please see Annex “D” showing number of Overseas Filipino Workers in selected countries, 2000-2001. Meanwhile, latest statistics obtained from Citizenship and Immigration Canada indicate that 76% of those who came in under the Live-in Caregiver Program (LCP) in 2000 are from the Philippines while data issued by the Hong Kong Immigration Department indicate that 73% of those who came in as foreign domestic helpers (FDH) or MDWs in 2000 were from the Philippines.

Moreover, the discipline of comparative legal studies will benefit from the findings since this whole exercise is novel. For one, this dissertation is the first major piece of scholarship that attempts to compare the status of FMDWs in both jurisdictions. What is more, traditional comparative legal studies have simply tended to compare formal legal systems or institutions of *different cultural contexts*. Rarely, if at all, have these comparative analyses been applied or related to the experiences of people within the respective territories but coming from yet another cultural context. In this case, these are the FMDWs who are presumed to come from a similar socio-political, economic and/or racial background, that are almost entirely different from their respective countries of employment whose socio-legal orders are subject of the comparison.<sup>35</sup> The only other major comparative work in this regard<sup>36</sup> is mainly sociological and ethnographic, and not legal in orientation.

## **F. Research Questions**

In seeking answers to the project's overarching research problem, the following clusters of questions will be asked:

1. How were existing MDW policies developed? What are the main features of these policies?
2. What ideology or ideologies drive/s existing MDW policies, and what are their main characteristics? What type of political economy does it support and who benefits from

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<sup>35</sup> Please see also Chapter 6.

such a framework? How is the international law relating to MDWs shaped by this dominant ideological framework?

3. What is the situation of Filipina MDWs in Canada and Hong Kong? How can their present situation be improved?

4. Why are cases of abuse and exploitation of MDWs tolerated despite their clear contravention of so-called universal standards of justice and human rights? Why do state responses to global traders seem to take opposite trajectories from state responses to migrant labourers?

5. How are individual MDWs particularly affected by existing regimes? To what extent can they expect that their basic human rights will be respected and protected in the context of the present global dialectics?

6. How are individual MDWs able to exercise their agency and advocacy to promote their human rights?

7. What alternatives can be advanced, especially in the field of human rights protection, which would level the playing field and ensure the more humane treatment of MDWs?

8. What are the obstacles faced in trying to achieve these objectives?

## **G. Expected Findings**

The primary arguments that are made and sought to be proven in this dissertation are as follows:

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<sup>36</sup> Please see Parrenas, *supra*, which compares Filipina MDWs in Rome and Los Angeles.

1. The ill-treatment of Filipina MDWs in Canada and Hong Kong is sanctioned by migrant domestic worker policies designed to fill the need for cheaper alternatives to state-sponsored childcare and home support services. The ill-treatment does not necessarily consist solely of physical or psychological abuse, but is also manifested in the systemic exploitation of MDWs from poor, third world countries.
2. This systemic exploitation of MDWs from poor, third world countries such as the Philippines to richer countries of employment, is best explained by a colonial type of extractive relations, the various implications of which are most effectively analyzed using the TWAIL framework.
3. Thus, the most appropriate remedies to ameliorate the current situation are those which take into careful consideration this extractive relationship and which are geared towards ensuring a more equitable international socio-economic and political scenario amongst countries of origin and countries of employment in particular and throughout the whole world in general. These remedies are discussed in more detail in the final chapter of this dissertation

## H. Brief Review of Literature

In the last few decades, there has been an impressive growth in the academic literature sets relating to women, human rights and development;<sup>37</sup> economic migration;<sup>38</sup> trade, migration and globalization;<sup>39</sup> transnationalism;<sup>40</sup> immigration and racism;<sup>41</sup>

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<sup>37</sup> Some of these are: C. Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics* (London: Pandora Press, 1989); H. Charlesworth, "The Public-Private Distinction and the Right to Development in International Law" (1992) 12 Australian Yearbook of International Law 190; A. Byrnes, "Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?" (1992) 12 Australian Yearbook of International Law 205; R. Cook, ed. *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994); J. Connors, "NGOs and the Human Rights of Women at the United Nations" in P. Willetts, ed. *The Conscience of the World: The Influence of Non-Governmental Organizations in the United Nations System* (Washington DC: Brookings Institution, 1996) 147; D. Otto, "Holding Up Half the Sky, But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women" (1996) 6 Australian Feminist Law Journal 7; A. Gallagher "Ending the Marginalisation: Strategies for Incorporating Women into the United Nations Human Rights System" (1997); *Women's Human Rights Step By Step* (Washington DC: Women, Law and Development, 1997); N. Yuval-Davis, "Women, Ethnicity and Empowerment" in A. Oakley and J. Mitchell, eds., *Who's Afraid of Feminism? Seeing Through the Backlash* (New York: The New Press, 1997) 77; A. Goetz, "Getting Institutions Right for Women in Development (London/New York: Zed Books, 1997); A. Sen, *Development as Freedom* (New York: Alfred A. Knopf, 1999).

<sup>38</sup> M. Piore, *Birds of Passage: Migrant Labour in Industrial Societies* (Cambridge: Cambridge University Press, 1979); S. Sassen-Koob, "Capital Mobility and Labour Migration" in S. Sanderson, ed., *The Americas in the New International Division of Labour* (New York/ London, Holmes and Meier, 1985) 226-252; A. Portes and M. Zhou, "Gaining the Upper Hand: Economic Mobility Among Immigrant and Domestic Minorities" (1992) 15:4 Ethnic and Racial Studies 491; J. Carens, "Aliens and Citizens: The Case for Open Borders" in W. Kymlicka, ed., *The Rights of Minority Cultures* (New York, Oxford: Oxford University Press, 1995) at 331-349; S. Castles and M. Miller, *The Age of Migration* (New York, London: Guilford Press, 1998); S. Castles and A. Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (New York: Routledge, 2000); P. Stalker, *Workers Without Frontiers: The Impact of Globalization on Economic Migration* (London: Lynne Rienner Publishers, 2000).

<sup>39</sup> G. Goodwin-Gill, "International Law and Human Rights: Trends Concerning International Migrants and Refugees," (1989) 23 International Migration Review 526; M. Kritz, L. Lim, and H. Zlotnic, eds., *International Migration Systems: A Global Approach* (London: Oxford University Press, 1992); D. Massey et al., "Theories of International Migration: A Review and Appraisal" (1993) 19:3 Population and Development Review 431-446; A. Simmons, ed., *International Migration, Refugee Flows and Human Rights in North America: The Impact of Free Trade and Restructuring*, New York: Center for Migration Studies, 1996); S. Castles and M. Miller, *The Age of Migration* (New York, London: Guilford Press, 1998); P. Stalker, *Workers Without Frontiers: The Impact of Globalization on Economic Migration* (London: Lynne Rienner Publishers, 2000); S. Sassen and A. Appiah, *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (New York: The New Press, 1998).

<sup>40</sup> Basch, L., Glick-Schiller, N., and Szanton-Blanc, C. *Nations Unbound: Transnational Projects, Post-colonial Predicaments and Deterritorialized Nation-States* (New York: Gordon and Breach, 1994); Y.

politics of caregiving;<sup>42</sup> all of which touch, in one way or another, the many issues relevant to the lives of FMDWs. In the last few years, specific case studies of the status of MDWs in jurisdictions such as Canada<sup>43</sup>, Europe and/or the UK<sup>44</sup>, the United States<sup>45</sup>, Hong Kong<sup>46</sup>, and Malaysia<sup>47</sup> have been published. A comparative ethnography of FMDWs in Los Angeles and Rome<sup>48</sup> has also recently appeared in print. These books

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Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994); A. Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham and London: Duke University Press, 1999); D. Young, "Working Across Borders: Global Restructuring and Women's Work" (2001) 2001 Utah L. Rev. 1.

<sup>41</sup> S. Ramcharan, *Racism: Nonwhites in Canada*, (Toronto: Butterworths, 1982); V. Satzewich, ed., *Deconstructing a Nation: Immigration, Culturalism and Racism in the '90s Canada* (Halifax: Fernwood Publishing, 1992); A. Richmond, *Global Apartheid: Refugees, Racism and the New World Order* (Toronto: Oxford University Press, 1994); N. Harris, *The New Untouchables: Immigration and the New World Order* (London: I.B. Tauris Publishers, 1995); E. Laquian, A. Laquian, and T. McGee, eds., *The Silent Debate: Asian Immigration and Racism in Canada* (Vancouver: Institute of Social Research, University of British Columbia, 1998).

<sup>42</sup> E. Abel and M. Nelson, eds., *Circles of Care: Work and Identity in Women's Lives* (Albany: State University of New York, 1990); T. Schecter, Race, Class, Women and the State: The Case of Domestic Labour in Canada (London: Blackrose Books, 1998); J. Beach, J. Bertrand, & G. Cleveland, *Our Child Care Workforce: From Recognition to Remuneration, A Human Resource Study of Child Care in Canada, More Than a Labour of Love* (Ottawa: Child Care Sector Study Steering Committee, 1998); M. Harrington Meyer, ed., *Care Work: Gender, Labour, and the Welfare State* (New York: Routledge, 2000); S. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice, and Everyday Life* (New York: Oxford University Press, 2000); E. Nakano Glenn, "Creating a Caring Society" (2000) 29:1 Contemporary Sociology 84.

<sup>43</sup> A. Bakan & D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997); S. Arat-Koc with F. Villasin, *Caregivers Break the Silence: A Participatory Action Research on the Abuse and Violence, including the Impact of Family Separation Experienced by Women in the Live-in Caregiver Program* (Toronto: INTERCEDE, 2001); N. Grandea, *Uneven Gains: Filipina Domestic Workers in Canada* (Ottawa: The Philippines-Canada Human Resource Program and The North-South Institute, 1996).

<sup>44</sup> B. Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (London: Zed Books, 2000); N. Gregson and M. Lowe, *Servicing the Middle Classes: Class, Gender and Waged Domestic Labour in Contemporary Britain* (New York: Routledge, 1994).

<sup>45</sup> P. Hondagneu-Sotelo, "Immigrant Women and Paid Domestic Work; Research, Theory and Activism" in H. Gottfried, *Feminism and Social Change: Bridging Theory and Practice* (Urbana and Chicago: University of Illinois Press, 1996); D. Young, "Working Across Borders: Global Restructuring and Women's Work" (2001) 2001 Utah L. Rev. 1.

<sup>46</sup> N. Constable, *Maid to Order in Hong Kong: Stories of Filipina Workers* (Ithaca/ London: Cornell University Press, 1997).

<sup>47</sup> C. Chin, *In Service and Servitude: Foreign Female Domestic Workers and the Malaysian Modernity Project* (New York: Columbia University Press, 1998).

<sup>48</sup> R. Parrenas, *Servants of Globalization; Women, Migration and Domestic Work* (Stanford: Stanford University Press, 2001).

and articles present poignant illustrations of the many disadvantages and injustices with which MDWs are faced.

However, it is worth noting that legal analyses of the status of MDWs have been much rarer.<sup>49</sup> Most of the works that constitute the above literature sets are either largely sociological or mostly ethnographic in nature. Much of that literature is also constituted by multidisciplinary treatises in the social science fields of migration, gender, and development studies. Although human rights issues and arguments inevitably arise in many of these works, there has so far been very little focus in these literature sets on the possible contributions of the *international legal regime* to the struggle to secure the human rights of MDWs in general, and FMDWs in particular.

Parrenas' book<sup>50</sup> is undoubtedly a very important contribution to the fields of comparative studies, sociology of migration, anthropology, and women's studies. It effectively utilized the experiences of FMDWs in Rome and Los Angeles as case studies that demonstrate the "parallel dislocations"<sup>51</sup> among Filipina domestic workers in different geographical locations".<sup>52</sup> As Parrenas has explained, her choice of Rome and Los Angeles as her comparative case studies was partly informed by the "colonial ties" that link the Philippines with the countries of these two cities and which contributed immensely to their popularity as migration destinations. (The United States was a direct

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<sup>49</sup> For e.g., D. Young, "Working Across Borders: Global Restructuring and Women's Work" (2001) 2001 Utah L. Rev. 1; and A. Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 McGill Law Journal 681.

<sup>50</sup> *Ibid.*

<sup>51</sup> Parrenas used the term, "parallel dislocations" to mean, the similar disadvantages and exploitation experienced by FMDWs whether working in a North American city like Los Angeles or in a European metropolis such as Rome.

<sup>52</sup> Parrenas, *supra* at 3.

colonizer of the Philippines at the turn of the 19<sup>th</sup> century, and Italy, particularly Rome, is the bastion of Roman Catholicism, which remains to be the predominant religion in the Philippines today).

Aside from the fact that it is not ethnographic in nature, my own study deals with Canada and Hong Kong, two jurisdictions that have not had formal and direct colonial ties with the Philippines, but that nonetheless maintain their popularity as destinations for Overseas Filipino Workers (OFWs), particularly FMDWs. My choice of Canada and Hong Kong is, however, informed by the fact that these two jurisdictions have created and maintained “colonial-type”<sup>53</sup> relationships with human labour resources from the Philippines.

While the relevant segment of the human rights literature<sup>54</sup> does help to clarify many of the issues raised here, much of it is too general to deal comprehensively with the specific concerns of this dissertation. By far, the most comprehensive study of the human

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<sup>53</sup> “Colonial-type” is being used here to refer to the extractive power relationship between countries of origin and employment as analogous to the traditional forms of colonialism. This topic will be discussed further in Chapters 2 & 7.

<sup>54</sup> U. Baxi, *Human Rights and Inhuman Wrongs: Unconventional Essays* (New Delhi: Har Anand Publications, 1994); R. Cook, ed. *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994); R. Abella, “A Generation of Human Rights: Looking Back to the Future” (1998) 36:3 Osgoode Hall L.J. 599; C. Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?” (1999) 10 Constitutional Forum 97-111; C. Scott, “Reaching Beyond (Without Abandoning) the Category of ‘Economic, Social and Cultural Rights’” (1999) 21 Human Rights Quarterly 633-660; M. Jackman, and B. Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights Under the Canadian Human Rights Act” in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada Policy Research Fund, 1999); P. Alston and H. Steiner, *International Human Rights in Context :Law, Politics, Morals : Text and Materials*, (Oxford: Oxford University Press, 2000); M. Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights” (2001) 42 Harv. Int’l. L. J. 201; A. Eide, C. Krause and A. Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 2nd rev. ed. (Den Haag: Kluwer Law, 2001); U. Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2002).

rights of migrant workers in international law is that of Cholewinski's 1997 book.<sup>55</sup> This outstanding book examines the question of the observance of the human rights of migrant workers and of their families in their countries of employment. It focuses in particular on their economic, social, cultural, political, and residence rights. It lays out quite extensively the relevant international human rights instruments, using the international law on the treatment of aliens as a starting point. The book also asserts that the protection of migrant workers in their countries of employment is only a "partial solution to the human rights problems generated by international labour migration."<sup>56</sup> Thus, he introduces the need to focus on the right to development of the countries of origin as a way of providing long-lasting solutions to the problems arising from international labour migration, namely "brain drain", maltreatment and exploitation, increasing inequality of nations, among others.<sup>57</sup>

However, the scope of Cholewinski's work is limited by the fact that it focuses on the situation in Europe, and does not distinguish between sub-categories of migrant workers. The book is also somewhat limited in terms of its lack of interdisciplinarity. It focuses on statutes, treaties and case law, and does not substantially engage with the existing multi-disciplinary literature concerning migrant workers. This is not to disparage Cholewinski's work, however, as it is indeed a very valuable and pioneering doctrinal work in the field of the human rights of migrant workers. For instance, his meticulous historical approach towards the drafting and interpretation of some relevant international human rights instruments and provisions is extremely helpful. Moreover,

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<sup>55</sup> R. Cholewinski, *Migrant Workers in International Human Rights Law* (Oxford: Clarendon Press, 1997).

his extensive use of European case law provided real life illustrations of the legal doctrines and statutory provisions that are discussed throughout the work.

The socio-legal approach adopted by Bakan and Stasiulis is an example of the kind of methodology that will mainly be applied in this dissertation. These two authors are among the leading scholars in the area of migrant domestic work in Canada.<sup>58</sup> They have carefully situated empirical data on the lived experiences of MDWs within their political, economic and legal context, enabling them to flesh out the resulting implications on the citizenship rights of these mostly female MDWs. Being sociologists by profession, their works are not steeped in technical legal details and contrasts rather sharply with the formal legal approach adopted by Cholewinski.

The edited volume, “Not One of the Family: Foreign Domestic Workers in Canada”, contains highly informative and analytical pieces not only by Bakan and Stasiulis (the co-authors and co-editors of the book) but by other similarly prolific authors. Arat-Koc, Daenzer and Fudge discuss in separate, but equally informative articles, some of the sociological, historical, and legal aspects of the admission into, and stay of MDWs in Canada. The last two chapters of this edited collection also feature first hand accounts by former MDWs<sup>59</sup> concerning their experiences as MDWs in

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<sup>56</sup> Cholewinski, *supra* at 31.

<sup>57</sup> *Ibid.*

<sup>58</sup> The works they have co-authored include: A. Bakan & D. Stasiulis, eds. *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press., 1997); D. Stasiulis & A. Bakan, “Negotiating Citizenship: The Case of Foreign Domestic Workers in Canada” (1997) 57 Feminist Review 112; and A. Bakan & D. Stasiulis, *Foreign Domestic Worker Policy in Canada: An Anomalous Case of Non-Citizenship?* (Toronto: University of Toronto Feminism and Law Workshop Series, 1993).

<sup>59</sup> M. Elvir, “‘The Work at Home is Not Recognized’: Organizing Domestic Workers in Montreal” and P. Velasco, “‘We Can Still Fight Back’: Organizing Domestic Workers in Toronto” both in A. Bakan

Canada. Overall, the book argues that the experiences of MDWs in Canada “differ only in degree rather than in kind from the intolerable treatment received by migrant household workers the world over.”<sup>60</sup> Furthermore, the authors assert that such “intolerable treatment” and non-compliance with aspects of the applicable legal regime is often masked by the deceptive claim that these MDWs are treated as “one of the family”. This very readable and highly-informative book provides very useful resources for many issues raised in this dissertation.

In her other works, Arat-Koc has likewise raised the problematic aspects of Canada’s Live-in Caregiver Program.<sup>61</sup> Particularly emphasized in her most recent work<sup>62</sup> are the problems that MDWs encounter as a result of the live-in requirement, family separation and in attempting family reunification.

Audrey Macklin has also produced a highly significant article on Canada’s Live-in Caregiver Program.<sup>63</sup> Her work critically views the program’s legal components, namely the live-in requirement and conditional immigration status of MDWs, while examining the negative social impact that these features have had on MDWs.

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and D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) Ch. 5 at 147-156 and Ch. 6 at 157- 164, respectively.

<sup>60</sup> Bakan & Stasiulis (1997) *supra* at 7.

<sup>61</sup> S. Arat-Koc, “Immigration Policies, Migrant Domestic Workers and the Definition of Citizenship in Canada” in *Deconstructing a Nation: Immigration, Multiculturalism and Racism in the ‘90s Canada*. Satzewich, V. ed. (Halifax: Fernwood Publishing, 1992) at 229-242; S. Arat-Koc & W. Giles, eds. *Maid in the Market: Women’s Paid Domestic Labour* (Halifax: Fernwood Publishing, 1994); S. Arat-Koc with F. Villasin, *Caregivers Break the Silence: A Participatory Action Research on the Abuse and Violence, including the Impact of Family Separation Experienced by Women in the Live-in Caregiver Program*. (Toronto: INTERCEDE, 2001).

<sup>62</sup> Arat-Koc (2001) *supra*.

<sup>63</sup> A. Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37 McGill Law Journal 681.

The abovementioned authors have undoubtedly inspired and paved the way for this research work. However, this dissertation hopes to build on their valuable contributions by viewing the situation of FMDWs from an international legal perspective, with the goal of seeking a theoretical framework/s that will best explain the conditions that these authors have meticulously analyzed in earlier works. And while specific case studies of Filipinas and the international labour market, and of FMDWs<sup>64</sup> have been offered, none of these works comprehensively link the international human rights regime, and its domestic implementation to the issue of the status of FMDWs. In any case, none of these authors has undertaken a comparative study of the situation of FMDWs in Canada and Hong Kong as a way of demonstrating their broader points about the nature and explanations for the sorry state of the protection of the human rights of such workers. Thus, this dissertation will attempt to fill these existing gaps in the literature.

## **I. The Significance of the Dissertation and its Original Contribution to Legal Scholarship and Public Policy**

While each of the existing literature sets in the areas of globalization, migration and development studies has largely been enlightening and impressive, there appears to be very little discussion within those literature sets on the legal dimensions of the human

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<sup>64</sup> R. Parrenas, *Servants of Globalization: Women: Migration and Domestic Work* (Stanford: Stanford University Press, 2001); N. Constable, *Maid to Order in Hong Kong: An Ethnography of Filipina Workers* (New York: Cornell University Press, 1997); D. Gatmaytan “Death and the Maid: Work, Violence and the Filipina in the International Labour Market” 20 Harv. Women’s L.J. 229 (1997); N. Grandea, *Uneven Gains: Filipina Domestic Workers in Canada* (Ottawa: The Philippines-Canada Human Resource Program and The North-South Institute, 1996).

rights of migrant workers in general, and of MDWs in particular.<sup>65</sup> Rather, these literature sets have tended to focus on issues such as gender politics and globalization; redefining citizenship; family reunification and other socio-economic factors; and certain other areas of resistance and adaptation.

The critical *third world approaches to international law* movement<sup>66</sup> will be most useful to, and shall provide a pivotal perspective for, this study. However, scholars who write in this tradition and idiom have, so far, not tended to grapple with or explore in

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<sup>65</sup> Some of the many useful works include: On migration generally: S. Castles and A. Davidson, *Citizenship and Migration: Globalization and the politics of belonging* (New York: Routledge, 2000); M. Piore, *Birds of Passage: Migrant Labour in Industrial Societies* (Cambridge: Cambridge University Press, 1979); Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994); S. Sassen & A. Appiah, *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (New York: The New Press, 1998); A. Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham and London: Duke University Press, 1999); On migrant domestic workers: A. Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 McGill L.J. 681; S. Arat-Koc, "Immigration Policies, Migrant Domestic Workers and the Definition of Citizenship in Canada" in V. Satzewich, ed., *Deconstructing a Nation: Immigration, Multiculturalism and Racism in the '90s Canada*, (Halifax: Fernwood Publishing, 1992) at 229-242; A. Bakan & D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada*. (Toronto: University of Toronto Press, 1997); B. Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour*. (London: Zed Books, 2000); J. H. Momsen, ed., *Gender, Migration and Domestic Service* (London: Routledge, 1999); N. Piper and M. Roces, eds., *Wife or Worker? Asian Women and Migration* (Oxford: Rowman and Littlefield, 2003); D. Young, "Working Across Borders: Global Restructuring and Women's Work" (2001) 2001 Utah L. Rev. 1 ; B. Ehrenreich and A. R. Hochschild, eds., *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (New York: Metropolitan Books, 2003); and Filipina migrant domestic workers specifically: R. Parrenas, *Servants of Globalization: Women: Migration and Domestic Work* (Stanford: Stanford University Press, 2001); N. Constable, *Maid to Order in Hong Kong: An Ethnography of Filipina Workers* (New York: Cornell University Press, 1997); D. Gatmaytan "Death and the Maid: Work, Violence and the Filipina in the International Labour Market" (1997) 20 Harv. Women's L.J. 229; N. Grandea, *Uneven Gains: Filipina Domestic Workers in Canada* (The Philippines-Canada Human Resource Program and The North-South Institute, 1996).

<sup>66</sup> Please see generally: K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16 Wis. Int'l. L.J. 353; A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 Harvard Int'l L. J. 1; O. Okafor "After Martyrdom: International Law, Sub-State Groups and the Construction of Legitimate Statehood in Africa" (2000) 41 Harvard Intl L. J. 503; C. Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41 Harvard Int'l L. J. 381; B. Rajagopal, "From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions" (2000) 41 Harvard Int'l L.J. 529; and A. Anghie, B. Chimni, K. Mickelson & O. Okafor, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003).

adequate ways, issues and questions relating to the status of MDWs. It is therefore hoped that this work will help enrich this tradition as well.

Similarly, despite their growing numbers, and inspite of the abuses being rampantly committed against them, the wealth of knowledge offered by the existing human rights literature<sup>67</sup> has so far failed to pay adequate attention to the distinct situation of FMDWs.

It is hoped that a comparative study of the situations in Canada and Hong Kong will aid the exploration and explanation of the theoretical underpinnings of the ill-treatment of FMDWs around the world. And as earlier stated, the field of comparative legal studies will benefit from the findings since this will be the first time the Canadian and Hong Kong legal systems have been compared in the present respect.

This research project hopes not only to fill the existing gaps in the scholarly literature, but also to provide practical guidelines for policy reforms that will be aimed at improving protection of human rights of MDWs. Its consideration of the situations of FMDWs in Canada and Hong Kong will serve as the starting point in its attempt to plug the gaps in the relevant literature regarding the protection of MDWs in general.

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<sup>67</sup> Please see generally: U. Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2002); M. Mutua, "Savages, Victims and Saviors: The Metaphor of Human Rights" (2001) 42 Harv. Int'l. L. J. 201; P. Alston and H. Steiner, *International Human Rights in Context :Law, Politics, Morals : Text and Materials*, (Oxford: Oxford University Press, 2000); R. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994); On human rights of migrant workers in particular: R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997); G. Battistella, ed., *Human Rights of Migrant Workers: Agenda for NGOs* (Quezon City: Scalabrin Migration Center, 1993); V.

## **J. Data, Sources and Research Methodology**

Given the many disciplines and areas of study that it implicates, this dissertation will be based on an interdisciplinary set of data, sources, and research methods. This dissertation will benefit very much from, and constructively engage, the existing literature in the fields of sociology, anthropology, political science and geography. It will of course also pay much attention to the legal literature.

A range of methods will be deployed. This dissertation research will involve analyses of existing legal instruments, policy documents, and official pronouncements. It will also involve the review of relevant literature, as well as the conduct of a few unstructured personal interviews aimed at supplementing and verifying the available empirical data.

A comparative analysis is also entailed by the project design. The comparison is expected to serve as a rich source of analysis owing to the many similarities and contrasts (i.e. in terms of immigration policies, socio-political and economic background, etc.) between the Canadian and Hong Kong situations.

As a good number of excellent empirical social science studies on the experience and status of FMDWs in Canada, Hong Kong and other parts of the world already exist, I will rely a great deal (albeit only in part) on these studies as the empirical bases for my legal analysis. There will be no need to reinvent the wheel here – no need to create from scratch much of the evidence on which this dissertation is founded.

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Nanda, “The Protection of the Rights of Migrant Workers: Unfinished Business” (1993) 2 Asian and

This work is therefore not merely a doctrinal study of the human rights of migrant workers. Aside from the fact that a comprehensive study has recently been published in this area,<sup>68</sup> this study is more broadly crafted and oriented. This is not of course to say that the dissertation is non-legal in nature. It is in fact squarely situated within the discipline of international human rights law.

## K. Terminology

Despite the multiplicity of meanings ascribed to the key terms that are in use in the migration literature, such terms will be used in consistent senses in this dissertation.

Although the term *migrant workers* could be used in a broad sense to cover even permanent residents and citizens in the countries of employment, this term will be used in this dissertation to refer to nationals of another country who live, and are employed, temporarily in the country of employment. Unless otherwise indicated, “irregular or undocumented” temporary workers are included in this category.

The phrase *overseas Filipino workers (OFWs)* will be used to refer to Filipino men and women who are working outside of the Philippines on a temporary basis and who have a clear intention of returning home after the expiration of their contracts and/or upon retirement. Because of the frequent changes in the terminology used within the Philippine context, some official reference to “overseas contract workers” or OCWs, or such other similar terms, should be understood to refer to OFWs. Again, while

permanent residents may also fall under this category, the limited scope of this study dictates that focus be given on the “temporary” migrant workers.

The phrase *migrant domestic workers* (MDWs) will be used to refer to “foreign domestic workers/helpers”, “foreign nannies/amahs” and “live-in caregivers” (especially in the context of Canada’s Live-in Caregiver Program) or those who migrate to foreign countries of employment to perform domestic work in individual households. Frequent reference will also be made to “Filipina migrant domestic workers” (FMDWs or Filipina MDWs).

The expression *country of origin* refers to the effective country of nationality of MDWs, while the state in which MDWs live and work will be referred to in this dissertation as their *country of employment*.<sup>69</sup>

The International Convention for the Protection of Migrant Workers and Members of their Families<sup>70</sup> will be referred hereto as the *Migrant Workers Convention* (or *MWC*).

## L. The Outline of the Dissertation

The dissertation is divided into eight independent yet interrelated parts. This chapter sets out the research problem, literature review, research questions and methods,

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<sup>68</sup> Cholewinski, *supra*.

<sup>69</sup> Existing migration literature also use the terms “labour-sending country” and “labour-receiving country”. However, these terms connote value-laden judgments, i.e., that the states play an active role in “sending/exporting” or “receiving/recruiting” migrant workers. Thus, the more “neutral” terms “country of origin” and “country of employment” are used in this dissertation.

<sup>70</sup> Adopted by the United Nations General Assembly on 18 December 1990 through U.N.G.A. Res. 45/158.

the limitations of the study, and an overview of the socio-political, economic and historical basis of labour emigration from the Philippines to the other countries.

The second chapter will conduct a survey of and discuss selected theoretical paradigms which seem to offer the best explanation for the situation of FMDWs. It will also introduce and discuss the “third world approaches to international law” (TWAIL) literature and argue that the TWAIL perspective will likely offer the best explanation of the situation in which most FMDWs (and other MDWs) find themselves in Canada and Hong Kong (as well as around the world).

The third chapter will deal with the human rights situation of migrant workers in general and MDWs in particular. The discussion will be situated within the international human rights framework and its implementation in a national context such as Canada. It will be argued that the human rights of MDWs are all-too-often sacrificed at the altar of political and economic expediency and for the ultimate benefit of the elite segments of the population in the countries of employment.

In this regard, some of the contending paradigms in the interpretation and implementation of human rights will be tackled. Attention will also be given to formal international legislation relating to the human rights protection of migrant workers in general and MDWs in particular. The utility (or otherwise) of the Migrant Workers Convention, the relevant ILO Conventions and Reports of the UN Special Rapporteur on the Human Rights of Migrant Workers will be analysed in light of the particular situation of MDWs.

The fourth chapter will, *inter alia*, focus on a discussion of Canada's immigration law and policy in general, and Citizenship and Immigration Canada's Live-in Caregiver Program (LCP) in particular. A historical and socio-legal approach will be taken in trying to achieve a holistic and balanced view, vis-à-vis the many complex factors at play in the program's implementation. Among other points that will be made, it will be shown that Canada's benevolent claims of upholding everyone's human rights are belied by its very poor treatment of migrant workers in general and FMDWs in particular.

The fifth chapter will discuss the situation of FMDWs in Hong Kong. It will consist of a brief overview of the situation of MDWs in Hong Kong, the relevant laws and regulations governing their stay and conditions of work, as well as the various other relevant aspects of their social condition that are needed to determine whether there are similarities and/or differences in their treatment in Canada and Hong Kong. The discriminatory policies and the way that the domestic and international community has viewed Hong Kong's performance in these aspects will be emphasized.

The sixth chapter will deal with a comparison of Canadian MDW policies and laws with those of Hong Kong. The chapter's objective is to provide a substantive (although not necessarily comprehensive) comparison of the situation in both countries of employment, and seek ways in which they converge or diverge. It will be argued that no matter how different these two systems may at first seem, a common thread runs through their treatment of FMDWs and other migrants from third world countries. These migrant workers are looked on as outsiders who are therefore undeserving of equal treatment with the "native" population in the countries of employment. This comparison

and socio-legal analysis will also cover the transnational and international spheres, how globalization and its concomitant ironies affect domestic conditions and influence laws and decision making. It will be argued that these mainly female MDWs are caught in the sad ironies of globalization and the cruel consequences of multiple discrimination. Likewise, issues of agency and choices made by MDWs will be discussed in their proper and respective contexts. It is hoped that these analyses will reveal the political economy logic that fuels the existing scenario.

The seventh chapter will conduct a TWAIL analysis in trying to explain the pervasive ill-treatment of FMDWs in Canada and in Hong Kong. It will be argued that the current situation of FMDWs (and other MDWs) could best be explained as a sophisticated and morphed kind of colonialist exploitation of the human resources of “third world” countries like the Philippines. In this case, highly skilled individuals of “third world” extraction are being underpaid and overworked (i.e. exploited) to further the economic well-being of highly-developed countries of employment, such as Canada and Hong Kong. The human capital of a “third world” country is thus being extracted in an exploitative manner.

The eighth and final chapter will reiterate the conclusions of the dissertation and offer some policy recommendations based on the TWAIList analysis that was conducted in the preceding chapter. Some workable proposals will be put forward in the hope of making a significant difference in the lives of FMDWs (and other MDWs) the world over.

## **M. The Context**

Before proceeding to discuss the situation of MDWs in Canada and Hong Kong, it is important to provide an overview of the context in which the exodus of these workers from the Philippines is happening in the first place. This is necessary because it provides not only a clearer understanding of the socio-economic and political situation in the FMDWs' country of origin, but also of the seeming pattern in the growth of labour migration from this country. For if trends are to continue, there is an even greater chance of exodus of FMDWs in the years to come.

Considering the current world population of about six billion and the estimated seven million Filipinos working overseas, this makes a ratio of about 1:1000 or at least one Filipino in the midst of every 1,000 inhabitants in any part of the world. Moreover, with the Philippine population of about 70 million, this translates to a 1:10 ratio or at least one out of every ten Filipinos working or residing abroad.<sup>71</sup> Recent statistics indicate that not only have overseas Filipinos exceeded seven million, they are also dispersed in more than 170 countries all over the world.<sup>72</sup> The same data break down the total of 7.38 million overseas Filipinos as follows: 2.99 million overseas Filipino workers (OFWs) (temporary); 2.55 million permanent residents and 1.84 million irregular

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<sup>71</sup> B. Domingo, "Filipinization of the Globe" (December 1999) 2:4 Philippine Journal on Diplomacy and Development 1 at 20.

<sup>72</sup> Commission on Filipinos Overseas (CFO), Statistical Data on "Estimated Number of Overseas Filipinos" (as of December 2000) (copy on file with the author); and CFO, *Handbook for Filipinos Overseas* 5th ed. (Manila: Department of Foreign Affairs, 2000) at 13-14.

migrants.<sup>73</sup> Although it is admitted that all three categories are actually OFWs, the temporary workers and irregular migrants are the most vulnerable of the lot and as such, it is their situation that demands more effective protection measures from their country of origin, the Philippines.

This is not to deny however, the fact that Filipinos who have turned permanent residents in other countries may also experience similar obstacles in fully integrating into the labour market in particular and in their new society in general.

## **1. Historical Overview of Philippine Migration**

Migration from the Philippines has often been divided by researchers into three major waves. The first wave occurred during American colonial rule from the 1900s to the 1940s, when Filipinos were brought to work in plantations in Hawaii, vegetable and fruit farms in California, and fish canneries in Alaska.<sup>74</sup> The second wave of migrants involved professionals such as nurses, doctors, dentists and medical technicians, who from 1946 to the 1960s worked in the United States health industry to practice their

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<sup>73</sup> CFO, *supra*. For comparative purposes, it might be interesting to note that as of 2000, the Philippines ranks third to Mexico and China in the number of foreign born migrants to the US; fourth in Canada (after China, India and Pakistan); and the third Asian country in Australia (after Vietnam and China). While it is not easy to obtain reliable estimates of total migrants from other countries of origin, some systematic data exist on inflows to certain known countries of employment such as the members of the OECD (Organization for Economic Cooperation and Development). More detailed comparative statistical data on migration to OECD countries may be obtained online at <[http://www.oecd.org/document/36/0,2340,en\\_2649\\_33931\\_2515108\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/36/0,2340,en_2649_33931_2515108_1_1_1_1,00.html)>.

<sup>74</sup> Grandea, *supra* at 10; B. Domingo, "Filipinization of the Globe" (2000) 2:2 Phil. Journal on Diplomacy and Development 1 at 30; E. A. Tan, "Labour Market Adjustments to Large-Scale Emigration: The Philippine Case" (2001) 10:3 &4 Asian and Pacific Migration Journal 379-400 at 382.

respective professions.<sup>75</sup> Likewise, the recruitment of Filipino women to work in the declining garment industry in Canada, particularly in Winnipeg, occurred during this period.<sup>76</sup> Moreover, the number of Filipino seamen working in international vessels increased during the same era. So did the numbers of those recruited to work in the plantations and timber industries of Malaysia and North Borneo, and construction projects in Vietnam, Thailand and Guam. The third wave of Filipino/Filipina emigration occurred in the 1970s when the economic prosperity of oil-producing Middle Eastern countries led to a construction boom and an overall rise in income levels in those countries, as well as to a labour gap that was significantly filled by Philippine migrant labour.<sup>77</sup>

Interestingly, the labour supply was segregated by gender, with men being recruited mainly for construction work, and women being hired to perform domestic labour. Filipina MDWs freed the women in their countries of employment from household work, enabling them to join the “mainstream” labour force. This pattern was not limited to the Middle East but was apparent in other regions of the world as well.

At around the same period, the rise of newly-industrialized economies in Asia gave impetus to the increasing demand for domestic workers, which could not be satisfied by the local residents. As a result, Filipinas became major providers of this type of work in those newly industrialized Asian countries, such as Hong Kong, Singapore, and Malaysia. Others went to older industrialized states such as Canada and

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Grandea, *supra*, at 1; Tan, *supra* at 383.

Britain.<sup>78</sup> While countries like Canada have had specific programs<sup>79</sup> meant to bring in MDWs, the recruitment and admission policies of many other countries were less explicit.

## 2. Labour Export Policy

It has been argued that “the deployment of overseas contract workers (OCWs) is an important but contested strategy in contemporary economic development policies in the Philippines.”<sup>80</sup> For one, the annual remittances from overseas Filipino workers (OFWs) has become a major source of foreign currency for the national economy aside from raising the living standards of countless families.<sup>81</sup> But while the financial benefits of a “labour exporting economy” are clear, the negative consequences are likewise palpable. These negative consequences range from racial discrimination to various forms of abuse and domestic stress arising from the prolonged absence of family members.<sup>82</sup> The departure of talented and educated females to perform domestic work abroad, leaves

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<sup>78</sup> Grandea, *supra* at 10.

<sup>79</sup> Known as the Live-in Caregiver Program (LCP) in Canada’s Immigration and Refugee Protection Act, 2002. This program will be discussed in greater detail in Chapter 4 and through a comparative analysis in Chapter 6.

<sup>80</sup> L. Law & K. Nadeau “Globalization, Migration and Class Struggles: NGO mobilization for Filipino domestic workers” (1999) 14:3 & 4 *Kasarinlan* at 54. (*Kasarinlan* is the Tagalog translation of “sovereignty”)

<sup>81</sup> However, some authors have contested this by arguing that migration has actually worsened the poverty situation in the country. For instance, please see J. Opiniano, “Migration Contributes to Inequality in RP – Study” *Philippines Today Online Edition* (15 Nov - 14 Dec 2002) online: Philippines Today <[http://www.philippinestoday.net/ofwcorner/ofw11\\_1.htm](http://www.philippinestoday.net/ofwcorner/ofw11_1.htm)>. In this article, Opiniano cites a 2002 study by S. Go entitled “Migration, Poverty, and Inequality: The Case of the Philippines” presented at a conference in Fiji Islands, where she argued that, “the economic benefits of international labour migration ‘have not trickled down to the poor and less developed regions in the country.’”

<sup>82</sup> Law & Nadeau, *supra*.

a huge skills gap in the country of origin. Moreover, the remittances sent to educate the migrant workers' children may result in their desire to leave and work abroad as well.

Notwithstanding widespread perception that the Philippines has a policy of encouraging the export of its labour force, there is a continuing refusal on the part of the Philippine government to formally acknowledge the same. For instance, the Philippine Labour Attaché in Toronto has articulated the Philippine government's official stand as follows:

“There is no explicit Labour Export Policy. We believe that it is more of a migration phenomenon where people go out voluntarily, seeking greener pastures. And since it (the right to travel) is guaranteed by our Constitution, we cannot prevent a Filipino citizen from going anywhere.”<sup>83</sup>

However, the succession of laws and policy pronouncements relating to this migration phenomenon seems to belie this official claim. For instance, in 1978, a directive<sup>84</sup> announced the government's new “corporate export strategy” designed to encourage groupings of overseas employment contracts and grant incentives to contractors participating in the scheme. In 1980, another law<sup>85</sup> was issued requiring government-to-government arrangements for the recruitment of workers. And in 1982, the Philippine Overseas Employment Agency was created<sup>86</sup> which granted it comprehensive authority over migrant workers.

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<sup>83</sup> R. Young, Philippine Labour Attaché, Interview (22 February 2001, Toronto).

<sup>84</sup> *Presidential Letter of Instruction 852* (Manila, Philippines, 1978).

<sup>85</sup> *Presidential Decree 1691* (Manila, Philippines, 1980).

<sup>86</sup> *Executive Order 797*, “Reorganizing the Ministry of labor and Employment, creating the Philippine Overseas Employment Administration and for other purposes”, (Manila, Philippines, 1982).

After much clamor, a law entitled, *Migrant Workers and Overseas Filipinos Act of 1995*<sup>87</sup> was passed. It states, among others, that it shall “afford full protection to labour, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.” To achieve such objectives, the State also guaranteed the provision of “adequate and timely social, economic and legal services to Filipino migrant workers,”<sup>88</sup> thereafter providing various mechanisms by which this can be realized.

Nonetheless, as so many tales of abuse and exploitation have been reported and documented in the media,<sup>89</sup> doubts have been expressed by many as to whether this law is having any positive effect at all.<sup>90</sup> Moreover, with the Philippine socio-economic trends<sup>91</sup> not getting any better, the law’s main objectives of providing protection to local and overseas labour and promoting full employment opportunities, appear to be very far from realization.

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<sup>87</sup> Republic Act 8042, signed into law on 7 June 1995 in Manila, Philippines by former President Fidel V. Ramos. It is worth noting that the Migrant Workers and Overseas Filipinos Act was enacted in the same year that the government ratified the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families in the wake of the public furor over the case of Flor Contemplacion, a Filipina domestic worker accused of and sentenced to death for the murder of another Filipina domestic worker in Singapore.

<sup>88</sup> *Ibid.*, s. 2(b).

<sup>89</sup> Aside from numerous newspaper articles, many of the widely-publicized cases were depicted in the video documentary, *Modern Heroes, Modern Slaves* (Montreal: Telefilm Canada, 1997).

<sup>90</sup> The United Nations Special Rapporteur on the human rights of migrants even noted that, “in spite of the existence of a sophisticated labour-export management system aimed at protecting the human rights of Filipino migrants, incidents of abuse and exploitation against overseas Filipino workers (OFWs) throughout the migration process continue to be reported.” Please see Report on Special Rapporteur’s visit to the Philippines, UN Doc. E/CN.4/2003/85/Add.4 (21 November 2002) paras. 10-11.

<sup>91</sup> According to the most recent official Philippine government statistics, the current (as of July 2003) unemployment rate is 12.7% and the underemployment rate is 20.8%. Meanwhile, the labour force participation rate is pegged at 67.4%. online: National Census and Statistics Office <<http://www.census.gov.ph>>. Hence, unofficial estimates claim up to 40% effective unemployment rate. Also in R. Esguerra, “On Filipinos in Toronto, A Situationer,” Address to the Consultative Forum (Toronto, 24 February 2001) (copy on file with the author).

Hence, there is a general perception, and also a unanimous view among organizations advocating for migrant workers' welfare, that while originally meant to be a temporary answer to the country's poverty, unemployment and serious balance of payments problems, the export of labour has become an institutionalized and pervasive aspect of the Philippine political economy.<sup>92</sup> A documentary film on Canada's Live-in Caregiver Program (LCP) reiterated this fact by stating that "people are the country's most profitable export and the government's main source of foreign currency, sending \$2 B every year, about half of which is used by the government to pay off foreign debts."<sup>93</sup>

Official government data state that the remittances of overseas Filipino workers reached US\$5.7 billion in 1997, \$4.9 billion in 1998, \$6.79 billion in 1999, and \$6.05 billion in 2000.<sup>94</sup> For the period from 1990-2000, total remittances of overseas Filipinos reached US\$41.86 billion.<sup>95</sup> By comparison, the Philippines' average gross national product (GNP) for the same period is approximately US\$20 billion per annum.<sup>96</sup>

On top of these remittances, overseas Filipinos have also sent donations and other forms of financial assistance to the country via the relevant government agencies or non-governmental organizations (NGOs). These donations fund activities relating to relief

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<sup>92</sup> T. Alegado, "The Political Economy of International Labour Migration from the Philippines", unpublished and undated Ph.D. Dissertation, University of Hawaii (Manoa), cited in D. Forman, "Protecting Philippine Overseas Contract Workers" (1994) 16 Comparative Labour Law Journal 26.

<sup>93</sup> *Brown Women, Blonde Babies* (Montreal, Le Videographe, 1991).

<sup>94</sup> Sources: Commission on Filipinos Overseas (CFO) *Handbook for Filipinos Overseas* (Manila: Department of Foreign Affairs, 2000) at 13; Philippine Overseas and Employment Agency, online: Philippine Overseas Employment Agency <<http://www.poea.gov.ph/ar1998.pdf>>; and online: Central Bank of the Philippines <<http://www.bsp.gov.ph>>.

<sup>95</sup> *Ibid.*

<sup>96</sup> Based on data from the National Statistical Coordination Board, "GNP and GDP by Expenditure Shares at Constant Prices" (last updated June 2003). At current prices, the annual GNP would amount to around US\$1 billion per annum. Statistical tables available at the Philippine Institute for Development Studies (PIDS) online: PIDS <[http://dirp.pids.gov.ph/cgi-bin/st2?es\\_nia\\_co1.tbl](http://dirp.pids.gov.ph/cgi-bin/st2?es_nia_co1.tbl)>.

and rehabilitation, education and scholarships, health equipment/facilities, medical missions, water and sanitation facilities and livelihood assistance. For the same ten-year period (1990-1999), an estimated \$869.12 million has been donated by overseas Filipinos through the CFO's *Lingkod sa Kapwa Pilipino* (Service to Fellow Filipinos) or LINKAPIL program for projects in 85 provinces and cities.<sup>97</sup>

### **3. Factors Contributing to Philippine Labour Migration**

Due to the phenomenal rise and continuing flow of labour emigration from the Philippines, a wealth of literature has developed concerning the causes and consequences of this migration trend.<sup>98</sup> Discussions have ensued and theories proposed in an attempt to explain and understand these questions. While it would be difficult to point out which accounts or theories are most acceptable and useful for this research, some common views run through most analyses and will be briefly discussed here.

The tendency of Filipinos to emigrate and work abroad had been largely attributed to the domestic economy's inability to absorb its rapidly expanding labour force. Other reasons cited range from demographic or population issues, to such socio-economic reasons as landlessness, and the highly inequitable wealth distribution in the Philippines,

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<sup>97</sup> CFO, *supra*.

<sup>98</sup> For e.g., Catholic Institute for International Relations, *The Labour Trade: Filipino Migrant Workers Around the World* (London/Manila: CIIR/Friends of Filipino Migrant Workers, Inc., 1987); F. V. Aguilar, Jr., ed., *Filipinos in Global Migrations: At Home in the World?* (Manila: Philippine Migration Research Network and Philippine Social Science Council, 2002); "Filipinos as Transnational Migrants", (1996) 44 Philippine Sociological Review Nos. 1-4; J. Gonzales & R. Holmes, "The Philippine Labour Diaspora: Trends, Issues and Policies" in *Southeast Asian Affairs* (Singapore: Institute of Southeast Asian Studies, 1996); B.V. Carino, ed., *Filipino Workers on the Move: Trends, Dilemmas and Policy Options* (Quezon City: Philippine Migration Research Network and Philippine Social Science Council, 1998).

structural adjustment programs (SAPs) imposed by international creditor institutions like the World Bank and International Monetary Fund.<sup>99</sup> For instance, wage restrictions, the general erosion of labour standards in a bid to attract foreign investment, public sector lay-offs, the removal of subsidies, and the displacement of indigenous industries by the influx of imported commodities, have had negative effects on the economy, resulting in inflation, reduced incomes, and increased poverty. These in turn pressure ordinary citizens to emigrate and work abroad.<sup>100</sup>

Education and enculturation have also been pointed out as factors in luring Filipinos to foreign lands. Since the present educational system began during the Spanish and American colonial regimes, aspirations and perceptions have somehow been conditioned in terms of seeking opportunities in Western countries and imbibing the so-called “colonial mentality”.<sup>101</sup> Concomitantly, it has been observed that, “as urbanization and industrialization proceed, cultural changes have occurred that create a younger generation with very different value orientations, career horizons and ambitions from their parents” with a consequence being overseas emigration for many.<sup>102</sup>

However, it is worth noting at this point that the strongest and most prevalent view relating to migration from the Philippines is the perception that it is the government’s “labour export policy”, whether explicit or implicit, which is mainly

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<sup>99</sup> Grandea, *supra* at 11, citing R. Pertierra, “Lured Abroad: The Case of Ilocano Overseas Workers” (1994) *Sojourn: Journal of Social Issues in Southeast Asia* at 57; and A. Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37:3 *McGill Law Journal* 681.

<sup>100</sup> Grandea, *supra*.

<sup>101</sup> *Ibid.*

<sup>102</sup> P. Kelly, *Landscapes of Globalization* (New York: Routledge, 2000) at 103.

responsible for the growth of the country's labour migrants.<sup>103</sup> "Material and ideological dislocations alone," as Sassen suggests in her work, "cannot account for Filipino migration. The state's intervention to cope with the economic and political instability those dislocations give rise to was more critical."<sup>104</sup> It has reached the point that, "labour export has become a central feature of Philippine economic development"<sup>105</sup> strategy. It has even been admitted that one of the key roles of Philippine Labour Attachés deployed in various parts of the world is that of marketing Filipino labourers to prospective foreign employers.<sup>106</sup>

#### **4. Shortcomings of Philippine State Protection**

Republic Act No. 8042 or the *Migrant Workers and Overseas Filipinos Act* of 1995 was enacted in June 1995 "to concretize government's commitment to protect the rights and promote the welfare of migrant workers, their families, and other overseas Filipinos in distress".<sup>107</sup> It also provides the framework for concerted government action

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<sup>103</sup> Please see D. M. Forman, "Protecting Philippine Overseas Contract Workers" (1994) 16 Comparative Labour Law Journal 26; R. Rodriguez, "Striking Filipino Workers in Brunei: Globalization, Migrant Workers, and Migration Policy in the Labour Sending State" (Paper submitted to the Asia Pacific Migration Research Network, Feb 2002) (copy on file with the author).

<sup>104</sup> Rodriguez, *supra*. Please see also S. Sassen, *The Mobility of Labour and Capital: A Study in International Investment and Labour Flow* (New York: Cambridge University Press, 1988) at 5.

<sup>105</sup> Rodriguez, *supra*. Please see also T. Alegado, "Labour Export Industry and Post 1996 Philippine Economic Development" in *Third European Conference on Philippine Studies* (Aix en Provence: Institute for Research on Southeast Asia of the National Center for Scientific Research and the University of Provence, 1997) at 6.

<sup>106</sup> Rodriguez, *supra* at 6, citing interview with the Philippine Labour Attaché in Brunei, 2001.

<sup>107</sup> Commission on Filipinos Overseas, *Handbook for Filipinos Overseas* (Manila: Department of Foreign Affairs, 2000) at 21.

in dealing with the difficulties faced by Filipinos abroad while seeking to protect their rights and interests through specific policies and services.<sup>108</sup>

Under the Labour Code of the Philippines,<sup>109</sup> regulatory jurisdiction over the “overseas labour export industry” lies with the Department of Labour and Employment (DOLE). The Department of Foreign Affairs (DFA) plays a subsidiary role not only in the promotion of employment opportunities but also in the protection of OFWs.<sup>110</sup> However, this division of responsibility sometimes leads to “conflicts in policy formulation and divergent responses to emerging problems.”<sup>111</sup> For instance, although DFA embassy personnel are more aware of the problems which need to be addressed, (since they are the ones who directly deal with the OFWs based abroad), they can only suggest appropriate remedial action to the actual decision makers in the Philippines. They cannot readily enforce appropriate remedies without the express approval of the government officials concerned. These are only some of the factors which often render such regulatory jurisdiction ineffective.

Even worse is the fact that OFWs often prefer not to approach the government when there is a likelihood of deportation or termination of their employment. Likewise, the government may also decide that it is “not in its best interest” to pursue an individual complaint against the state of employment.<sup>112</sup>

Aside from the regulatory jurisdiction of the DOLE and DFA over OFWs, other attached agencies specifically deal with the situation of migrant workers from the

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Presidential Decree No. 442* (As amended) (Manila, Philippines, May 1974).

<sup>110</sup> Forman, *supra* at 39.

<sup>111</sup> *Ibid.*

Philippines. These include the Philippine Overseas Employment Administration (POEA), the Overseas Workers Welfare Association (OWWA), and the Commission on Filipinos Overseas (CFO). The CFO deals mainly with those who have become permanent residents in other countries but who maintain ties with the Philippines, in one way or another. Hence, the functions of the POEA and the OWWA are most relevant to this study.

The POEA was created a) to facilitate immigration processing and the search for new markets; b) to screen placement or recruitment agencies and help prosecute abusive ones; and c) set standard wage rates and placement (recruitment) fees, among others.<sup>113</sup> The OWWA on the other hand, deals with welfare and protection issues involving migrant Filipinos and their families and maintains Filipino Resource Centers in major destinations (such as Saudi Arabia and Singapore) to serve their social and legal needs.<sup>114</sup>

One way in which the Philippine government protects migrant workers is by requiring a common procedure for registration with both the POEA and OWWA. Registration with these agencies allows OFWs to avail themselves of various services and privileges such as exemption from payment of travel tax and customs tariffs (to the Philippine government), to on-site services like counselling, skills training and compensation for injury and death.<sup>115</sup>

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<sup>112</sup> *Ibid.*

<sup>113</sup> Tan, *supra* at 382.

<sup>114</sup> *Ibid.*

<sup>115</sup> M. Villalba “Legal Protection of Filipino Migrant in Hong Kong” in *Legal Protection for Asian Women Migrant Workers - Strategies for Action* (Manila: Ateneo Human Rights Center, LAWASIA and Canadian Human Rights Foundation, 1997) at 145.

The OWWA also provides credit to its members who opt to return and start their own businesses in the Philippines. It likewise helps OFWs who run into trouble at their work places, facilitates the repatriation of stranded OFWs who are its members, and even ensures the return to the Philippines of the corpses of those who die overseas.<sup>116</sup>

Another important means by which the government provides protection is through the “certification of their employment contracts”.<sup>117</sup> This certification procedure is meant to ensure that employment contracts conform with Philippine labour standards. The contract is also meant to ensure that the Philippine government can intervene on behalf of workers in the event of a contractual dispute with their employers.<sup>118</sup>

However, a recurring dilemma for governments has been articulated as follows:

“Governments involved in predicaments linked to OFWs in distress are caught in a balancing act. On one hand, they must protect the rights of their nationals and on the other, bilateral relations should be kept harmonious for security and economic reasons. In between, the peering eyes of the public, media and concerned sectors of the society with the militants ready to mobilize rallies, are glued to any development particularly when unfavorable circumstances arise.”<sup>119</sup>

Consequently, the relationship that must be maintained by the state of origin with the migrant worker, the foreign employers and states of employment can become complex and even contradictory. On the one hand, the state exports labour to provide employment, and to gain economic benefits in the form of remittances sent by migrants

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<sup>116</sup> Villalba, *supra*

<sup>117</sup> *Ibid*; Article 21 ( c), *Labour Code of the Philippines*, Presidential Decree 442, as amended (1 May 1974).

<sup>118</sup> *Overseas Filipino Workers Handbook* (Mandaluyong City: Philippine Overseas Employment Administration [POEA], 1996).

<sup>119</sup> A. S. Corvera, “Massive Presence of Filipinos Overseas - An Accident Waiting”, *Philippine Star* ( 2 September 2002) online: Philippine Star <<http://www.philstar.com>>.

to their families back home. Thus, efforts to expand overseas employment means engaging in particular kinds of relationships with foreign states and employers to increase the country's share in the highly-competitive global labour market. On the other hand, the state of origin must intervene to protect its nationals working abroad, potentially against the interests of foreign governments and employers. These conflicting interests often lead to detrimental effects on the lives of OFWs whose rights tend to be negotiated away by the very government that is supposed to protect them.<sup>120</sup>

In a recent visit to the Philippines, the United Nations Special Rapporteur on the Human Rights of Migrants<sup>121</sup> also noted that:

“The Philippines has concluded bilateral agreements with a number of countries of destination. However, States with the highest incidence of abuse and violence are the most reluctant to enter into bilateral agreements. In some cases, even where bilateral agreements exist, the Special Rapporteur was informed that they are not respected or enforced.”

Moreover,

“Following reports of abuses, in 1988 the Government imposed a ban on all domestic workers, which could be lifted on a case-by-case basis after negotiations with the receiving country on improved labour conditions.”<sup>122</sup>

The ban was lifted in 1991 in respect of over 50 countries after having provoked negative reaction from Filipino women. In any case, countries of employment had ignored it in practice.<sup>123</sup>

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<sup>120</sup> Rodriguez, *supra*.

<sup>121</sup> G. Rodriguez Pizarro, United Nations Special Rapporteur on the Human Rights of Migrants, in her Report of her visit to the Philippines on May-June 2002, UN Doc. E/CN.4/2003/85/Add.4 (21 November 2002), para. 26. Please see also N. Diaz, *Violence against Women Migrant Workers and their Protection under International Human Rights Law* (London: University College London, 2001), cited in Rodriguez Pizarro, *supra*.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

## **5. Recent Trends in Philippine Labour Emigration**

The following trends have been observed in labour emigration from the Philippines starting in the nineties: “a) increasing prominence of Asia as a work destination; b) increasing demand for service workers and the re-emergence of production and related workers in the skill composition of international labour migration; and c) the increasing feminization of international contract migration.”<sup>124</sup>

Among the top Asian countries, Hong Kong has received the most migrant workers from the Philippines.<sup>125</sup> While the numbers of MDWs and other service workers have increased, those of professional, technical and related workers have considerably decreased.<sup>126</sup> Although the service sector covers a wide range of occupations, the biggest proportion of workers under this category are MDWs, most of whom are women.<sup>127</sup> The predominance of Filipino women in vulnerable occupations as domestic helpers in Hong Kong, Singapore and Middle East countries, and as entertainers in Japan has been a cause for much concern for activists and scholars. This is mainly due to the fact that the nature of their employment makes these women easy prey to exploitation and abuse.<sup>128</sup>

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<sup>124</sup> S. P. Go, “Towards the 21<sup>st</sup> Century: Whither Philippine Labour Migration?” in B. Carino, ed., *Filipino Workers on the Move: Trends, Dilemmas and Policy Options* (Quezon City: Philippine Migration Research Network, 1998) at 10.

<sup>125</sup> Please see Table 2, “Top 10 host countries for overseas Filipino workers, 1975-1995,” in Carino, ed., *supra*, at 13. Also attached hereto as Annex “B”.

<sup>126</sup> Please see Table 3, “Skills distribution of overseas Filipino workers (percentages)” in Carino ed., *Filipino Workers on the Move*, at 15. Also attached hereto as Annex “C”.

<sup>127</sup> Go, *supra*, at 17.

<sup>128</sup> Go, *supra* at 20-21.

The gender differentials in the occupation of OFWs are also striking.<sup>129</sup> The annexed table on distribution of OFWs by occupation and gender shows that females far outnumber males in the “sales and services / elementary occupation” sector where migrant domestic work is classified. Here, female OFWs comprise about 80-85% of the total numbers in 2000 and 2001. Males, on the other hand, dominate the “trades and related workers” as well as the “plant and machine operators and assemblers” categories where they comprise nearly 90% of the yearly totals.

The above overview of characteristics and trends in Philippine labour emigration point to an even greater chance that more FMDWs will leave the country in the years to come. Thus, it is hoped that the present study will be highly significant not only in trying to understand the phenomenon, but also in formulating policy reforms that will address the reasons for the outflow as well as prevent further abuses committed against those already in the foreign countries of employment.

## N. The Generalizable Benefits of the Dissertation

While this dissertation research focuses on the experiences of FMDWs in Canada and in Hong Kong, the applicability and relevance of the analysis to both FMDWs in other lands and to MDWs in general can hardly be denied, much less ignored. Aside from the fact that migrant workers from the Philippines are scattered in many countries

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<sup>129</sup> Please see Table A, “Number of Overseas Filipino Workers, by Occupation and by Sex: October 2001 and 2002” in Annex “A”.

worldwide,<sup>130</sup> their experiences almost always converge (in a broad sense) and are shaped by many common factors that affect their status in their countries of employment. Moreover, FMDWs are as affected by the same disadvantages that are experienced not only by the MDWs of other nationalities but also by different types of migrant workers worldwide.

Because of this, it is important to note that while this dissertation focuses on the specific situation of FMDWs in Canada and Hong Kong, the broader objective is to diagnose, explain, and offer guides to short-term and longer-term remedies to the many problems faced by MDWs in particular and migrant workers in general. The search for an alternative approach to the international law of migrant domestic work is meant to address the many gaps that are left unaddressed by the current system. It is hoped that new and alternative modes or approaches of analyzing the situation of FMDWs and migrant workers in general, particularly from the perspective of the often-neglected “third world”, will produce a truly effective regime for the protection and promotion of human rights. Consequently, the focus on the international human rights system relating to migrant workers is meant to benefit not only this particular sector, but all of humanity as well.

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<sup>130</sup> Please see Table D, “Number of Overseas Filipino Workers, by Place of Work and by Sex: October 2001 and 2002” in Annex “D”.

## **Chapter 2**

### **The Theoretical Foundations Relating to the Situation of Filipina MDWs**

This chapter will conduct a general survey of the theoretical approaches that seem to offer the best chance of explaining the situation of ill-treatment of Filipina migrant domestic workers (MDWs) in Canada and in Hong Kong. The theoretical approaches that will be discussed are critical legal theory, critical race theory, feminist legal theory, intersectionality theory, dependency theory, postcolonial theory, and third world approaches to international law (TWAIL).

#### **A. A Survey of Alternative Approaches to International and Domestic Law**

##### **1. Critical Legal Theory**

Liberal ideology has long dominated all spheres of western society including the legal field. In legal discourse, the standard modes of analysis employed by liberal legal scholars emphasized “the rule of law, formalism, neutrality, abstraction and individual rights.”<sup>1</sup> In the 1970s, a group of radical legal scholars from the United States sowed the seeds of the critical legal movement and fundamentally challenged the above canons and tenets of liberal legal thought. These scholars perceived “the rhetoric of the rule of law” as a tool used by “the more powerful to oppress the less powerful in society and to

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<sup>1</sup> C. Aylward, *Canadian Critical Race Theory* (Halifax: Fernwood Publishing, 1999) at 19.

maintain the existing political, social and economic status quo.”<sup>2</sup> Hence, critical legal scholars insist that, the rule of law as defined by liberal legal theorists (i.e. as a mode of legal analysis that is independent and distinguishable from politics or morality) is non-existent due to the impossibility of separating “moral and political choices in a pluralistic society.”<sup>3</sup> Critical legal scholars contend that it is all too easy for those in power to impose their selfish moral and political agenda on everyone else.<sup>4</sup> Moreover, critical legal analysis rejects the “doctrine of rights analysis” because of its alleged role in perpetuating the inequitable distribution of power in society.<sup>5</sup> On this note, Prof. Duncan Kennedy, one of the key critical legal scholars, has contended that “rights discourse is a trap.” He explains that,

“Rights are by their nature ‘formal’, meaning that they secure to individuals legal protection for, as well as from, arbitrariness – to speak of rights is precisely not to speak of justice between social classes, races or sexes. Rights discourse, moreover, simply presupposes or takes for granted that the world is and should be divided between a state sector that enforces rights and a private world of “civil society” in which atomised individuals pursue their diverse goals. This framework is, in itself, a part of the problem rather than of the solution.”<sup>6</sup>

Kennedy further characterizes rights discourse as “logically incoherent and manipulable, traditionally individualist and wilfully blind to the realities of substantive inequality.”<sup>7</sup>

Thus, many critical legal theorists try to deconstruct or even “trash the tenets of legal liberalism” and various legal rules and principles, while disputing the utility and

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<sup>2</sup> Aylward, *supra* at 19-20. Please see also, A. Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990) at 9-16.

<sup>3</sup> Aylward, *supra* at 21.

<sup>4</sup> *Ibid.*

<sup>5</sup> Aylward, *supra* at 24.

<sup>6</sup> D. Kennedy, “Legal Education as Training for Hierarchy”, Excerpt from D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Cambridge, Mass.: Afar, 1983).

effectiveness of legal doctrine, especially rights doctrine, to bring about meaningful social reforms. As part of its Utopian ideal, i.e. a society where there are no hierarchies, class differences, laws and legal principles to regulate human interaction, critical legal theorists envision that “the concept of individual rights is replaced with the concept of an ‘interdependent community’”.<sup>8</sup>

Critical legal studies had been greatly influenced by the “radical political culture” from the 1960s onwards. That is,

“[I]t seeks to provide an environment in which radical and committed scholarship can thrive in diversity with no aspiration to lay down a ‘correct’ theory or method.”<sup>9</sup>

Similarly, its emphasis on the “politics of law” is meant to articulate how law is strongly influenced by politics which in turn shapes the whole gamut of factors affecting the social fabric.<sup>10</sup>

In one of the first Critical Legal Studies conferences,<sup>11</sup> the participants’ agenda was pronounced as follows:

“The central focus of the critical legal approach is to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations. Critical theory works to develop radical alternatives, and to explore and debate the role of law in the creation of social, economic and political relations that will advance human emancipation.”<sup>12</sup>

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* at 25.

<sup>9</sup> P. Fitzpatrick & A. Hunt, “Critical Legal Studies: Introduction” in P. Fitzpatrick & A. Hunt (eds.) *Critical Legal Studies* (Oxford/New York: Basil Blackwell, 1987) at 1.

<sup>10</sup> *Ibid.*

<sup>11</sup> This particular conference was held in 1976 at the University of Wisconsin-Madison, USA.

<sup>12</sup> Fitzpatrick & Hunt, *supra* at 1-2.

Accordingly, it is claimed that one of the major distinctions between a critical legal approach and many ‘social’ approaches to law is the former’s tendency to “take legal doctrine and judicial reasoning seriously.”<sup>13</sup> Therefore, critical legal theorists are always keen on putting forward an alternative perception of the law and legal systems.<sup>14</sup>

While critical legal theory seems very promising for our present purposes in that it provides an enlightening perspective on the law, it is still limited by a number of crucial factors. First, its extremely pessimistic view of rights is an important reason that makes it an inappropriate framework of analysis in the context of this dissertation. For, despite all the shortcomings and criticisms lodged against the legal system, a critical human rights approach nonetheless provides a valuable *tool* and *resource* for the most disadvantaged sectors of society. Thus, totally eschewing rights analysis flies in the face of this cautiously hopeful agenda. As Upendra Baxi has correctly noted:

“Human rights languages are perhaps *all that we have* to interrogate the barbarism of power, even when these remain inadequate to fully humanize the practices of politics”<sup>15</sup>

Second, as pointed out by the critical race theorists, a reactionary and critical approach proves counterproductive if not accompanied by meaningful and substantive alternatives. While the critical legal theorists may have the best of intentions in pointing out the shortcomings of the status quo and even aiming for “radical alternatives”, the process and method of reconstruction are sadly lacking in its otherwise meticulous analysis.

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<sup>13</sup> *Ibid.* at 2-3.

<sup>14</sup> A. Hunt, “The Critique of Law: What is ‘Critical’ about Critical Legal Theory?” in Fitzpatrick & Hunt, *supra* at 6.

Last, and most importantly, a balanced South-North geopolitical perspective is an unfortunate gap in critical legal studies so far conceived. Oloka-Onyango and Tamale have aptly pointed out that, “even the best critical legal studies scholars begin and end their analyses within the western context.”<sup>16</sup> The fact that this theoretical framework is borne of the western experience and says very little of the various injustices suffered by people of a different race and economic status (among other forms of distinction), are crucial limitations indeed.

## 2. Critical Race Theory

Initially, scholars of colour were attracted to the critical legal studies movement because it challenged the laws that oppressed people of colour, and advocated the idea that legal concepts are capable of being manipulated by those with wealth and power.<sup>17</sup> However, these scholars later began criticizing the critical legal studies movement on a number of grounds: a) for ignoring the specific realities of people of colour; b) for its lack of analysis on the role that racism plays in legitimating inequitable distributions of wealth and power; and c) for its “inability to go beyond ‘trashing’ to the crucial next stage of ‘reconstruction’.”<sup>18</sup> For these and other reasons, many legal scholars of colour

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<sup>15</sup> U. Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2002) at 2-3. (Emphasis in the original).

<sup>16</sup> J. Oloka-Onyango and S. Tamale, “‘The Personal is Political’ or Why Women’s Rights are Indeed Human Rights: An African Perspective on International Feminism” (1995) 17:4 *Human Rights Quarterly* 691 at 721.

<sup>17</sup> C. Aylward, *supra* at 26.

<sup>18</sup> *Ibid.*

rejected the critical legal studies movement and started another scholarly movement referred to as the “Critical Race Theory” (CRT).

Critical race<sup>19</sup> theorists such as Richard Delgado claim that in a utopian society envisioned by the critical legal theorists, decision-making will be “decentralized”, in that the rules are constantly renegotiated and agreed upon by members of the community.<sup>20</sup> However, because people of colour have historically not been treated as equals, there is no guarantee that they will readily “merge” into such a community-oriented strategy to negotiate and resolve problems. Neither could there be any assurance that racism would never again rear its ugly head.<sup>21</sup> Delgado further argues that:

“if racism were to surface in a CLS-style Utopia, there would be no rules, rights, federal statutes or even courts to counteract it...Utopian society would empower Whites, giving them satisfaction currently denied, and disempower minorities, making life even less secure than it is today...If we jettison rules and structures, we risk losing the gains we have made in combatting racism.”<sup>22</sup>

Thus, instead of focusing entirely on “trashing”, to which critical legal theorists are inclined, critical race theorists have tried to offer solutions, even as they “challenged the ability of conventional legal strategies to deliver justice.”<sup>23</sup> In their analysis, law still plays a crucial role in the age-old struggle against racism.

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<sup>19</sup> It is admitted that “race” is still a rather ambiguous term in social science discourse. Even CRT scholars seem to have no clear definition of the term. Hence, for purposes of this discussion, the literal meaning of the word “race” will be used, i.e. “a division of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type.” In Merriam-Webster’s Collegiate Dictionary Eleventh Edition online: <<http://www.m-w.com>>.

<sup>20</sup> Aylward *supra*, at 29. Please see also R. Delgado, “The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?” (1987) 22 Harv. C.R.-C.L. Law Rev. 301 at 313- 314.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Aylward, *supra* at 30.

It therefore appears that the main theme of CRT is that the law is not only a “product and promoter of racism” but that legal discourse has conveniently disregarded if not totally denied the existence of this pernicious social reality.<sup>24</sup> Thus, Matsuda argues that “law becomes a locus of struggle.”<sup>25</sup> That is, “struggle can change law, and law can aid struggle.”<sup>26</sup> Therefore, as distinguished from critical legal studies, critical race theory is concerned not only with criticizing the status quo, but also in presenting a rather optimistic view on the “possibility of human social progress.”<sup>27</sup>

In brief, Aylward summarizes the dominant themes of CRT as follows:<sup>28</sup>

- “1. the need to move beyond existing rights analysis.
2. an acknowledgement and analysis of the centrality of racism, not just the White supremacy form of racism but also the systemic and subtle forms that have the effect of subordinating people of colour.
3. a total rejection of the ‘colour-blind’ approach to law, which ignores the fact that Blacks and Whites have not been and are not similarly situated with regard to legal doctrines, rules, principles and practices.
4. a contextual analysis which positions the experiences of oppressed peoples at its centre.
5. a deconstruction which asks the question: How does this legal doctrine, rule, principle, policy or practice subordinate the interests of Black people and other people of colour? And ultimately,
6. a reconstruction which understands the “duality of law, recognizing both its contribution to the subordination of Blacks and other people of colour and its transformative power.”

Thus, CRT advocates the need for innovative approaches to deal with the “complex relationships among race, racism and the law.”<sup>29</sup>

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<sup>24</sup> *Ibid.* Please see also M. Matsuda, *Where is Your Body? And Other Essays on Race, Gender and the Law* (Boston: Beacon Press, 1996) at 22.

<sup>25</sup> Matsuda, *supra* at 52.

<sup>26</sup> *Ibid.* at 52-53.

<sup>27</sup> Aylward, *supra* at 34; Matsuda, *ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Aylward, *supra* at 39.

By taking the critical legal analysis a step further, CRT appears to be a more effective way of addressing deeply-rooted injustices in the legal system. For not only is racism widely pervasive, it is also often taken for granted if not altogether denied in many previous and contemporary societies. But since racism is likewise often complicated by other forms of biases which further entrench systemic injustices, this theoretical standpoint might not on its own be adequate to confront the challenges faced by the Filipina MDWs subject of this study. However, the main deficiency of this theoretical approach is the general lack of a systematic analysis of the south-north divide.<sup>30</sup> Yet this is the central locus in which the Filipina MDWs are situated. Moreover, CRT's emphasis on racialization may potentially overshadow the equally important forms of discrimination and oppression that Filipina MDWs face in their countries of employment, such as gender, class and postcoloniality.

### **3. Feminist Legal Theory**

As with feminist theory in general, feminist legal theory arose from the belief that the unequal and subordinate status of women stems from the patriarchal character of existing societal structures. While feminist jurisprudence derives some of its analysis

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<sup>30</sup> However, it must be noted that there has been at least one attempt to extend critical race theory to the global context. Described as "the first symposium to address comprehensively how Critical Race Theory ("CRT") might inform, and be informed by, an international perspective," the essays and articles from this conference were compiled in a special issue: (2000) 45 Villanova Law Review 827. In R. Gordon, "Critical Race Theory and International Law: Convergence and Divergence, Foreword" (2000) 45 Villanova Law Review 827 at 827.

from critical legal theory, its focus is on the concrete and immediate experiences of women and the law's role in creating and perpetuating gender inequality.<sup>31</sup>

However, it bears emphasis that there is no single “feminist legal theory.”

Feminism is defined as:

“a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of political conclusions about the oppression of women.”<sup>32</sup>

While feminist theories of law had been classified as *liberal*, *cultural* or *radical*, *empirical* or *postmodern*, most feminist scholarship include characteristics which overlap, rather than fall neatly under any of these categories.<sup>33</sup> Postmodern feminism, for one, is more inclined towards analysing the “fractured identities of modern life” rather than adopting the so-called modernist or universal theoretical explanations of women’s oppression.<sup>34</sup> Thus, aside from emphasizing the specific realities of women’s lives, the postmodern approach prefers activism at the level of micropolitics rather than the often unstable route called “law reform”.<sup>35</sup> Concomitantly, many third world feminists have been wary of attempts toward an across-the-board application of western feminism to the developing world. These third world feminists have argued that even as they agree that gender and class distinctions are important factors leading to women’s oppression, third

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<sup>31</sup> H. Charlesworth, C. Chinkin & S. Wright, “Feminist Approaches to International Law” (1991) 85:4 Am. J. Int’l. L. 613 at 613.

<sup>32</sup> N. Hartsock, “Feminist Theory and the Development of Revolutionary Strategy” in Z.R. Eisenstein, ed., *Capitalist Patriarchy and the Case for Socialist Feminism* (New York/London: Monthly Review Press, 1979) at 58-59.

<sup>33</sup> H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 38.

<sup>34</sup> S. Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986) at 28-29.

<sup>35</sup> *Ibid.* at 45.

world women are also faced with the additional effects of racialization and imperialism.<sup>36</sup>

Thus, it had been stressed that the failure of international feminist analyses to fully consider third world perspectives will only lead to “partial solutions to the problem of universal marginalization of women.”<sup>37</sup>

In the sphere of international law, feminist legal theory seeks to challenge the gendered nature of the latter’s operation and context, and contribute towards its “progressive development.”<sup>38</sup> Moreover,

“a feminist account of international law suggests that we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve male elites, while basic human, social and economic needs are not met. International institutions currently echo these same priorities. By taking women seriously and describing the silences and fundamentally skewed nature of international law, feminist theory can identify possibilities for change.”<sup>39</sup>

Feminist legal theory sees international law as not only “androcentric”, but likewise “Euro-centered” in origins. International law is deemed to have assimilated many assumptions about law and the place of law in society from predominantly patriarchal western legal thinking.<sup>40</sup> Moreover, feminist legal theory seeks to debunk assumptions that the law is:

“...objective, gender-neutral and universally applicable, and the societal division into public and private spheres, which relegates many matters of concern to women to the private area regarded as inappropriate for legal regulation.”<sup>41</sup>

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<sup>36</sup> *Ibid.* at 46-47; Please see also C. Johnson-Odim, “Common Themes, Different Contexts: Third World Women and Feminism” in C. Mohanty, A. Russo & L. Torres, eds., *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991) at 314.

<sup>37</sup> Oloka-Onyango and Tamale, *supra* at 703.

<sup>38</sup> Charlesworth et al., *supra* at 615.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* at 644.

<sup>41</sup> *Ibid.*

The international legal system is characterized as “gendered”, with rules that have evolved from the needs and perceptions of elite males. Thus, not only is there a need to question these long-held assumptions but also to turn the tables around by incorporating the female point of view and addressing their effective invisibility in legal discourse.<sup>42</sup>

Feminists have traditionally been sceptical about legal reforms and on the practice of “attributing too much power to law to alter basic political and economic inequalities based on sex.”<sup>43</sup> Thus, it is hoped that a redefinition of this conventional reach of international law will be a step towards recognizing women’s interests and pave the way for “reimagining possibilities for change.”<sup>44</sup>

This theoretical approach is clearly vital to a study as the present one since women constitute over 90% of those working as MDWs the world over. It is insufficient on its own however, because it does not generally focus on the south-north dimensions of the issues that it deals with. Rather, western feminist theory is often as Eurocentric and culture-bound as the very patriarchy that it rejects. Thus, the limited set of values which feminist theorists represent have the tendency to exclude marginalized sectors as the MDWs. Although exceptions (such as the work by Oloka-Onyango and Tamale<sup>45</sup>) of course exist, this is the general trend. However, it is worth reiterating that there is no single feminist theory. Women are affected by various modes of oppression, and not just by forms of oppression that are linked to their gender. In this regard, it had been pointed out that a feminist analysis which merely deals with gender and only “adds on” other

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<sup>42</sup> *Ibid.*; Charlesworth & Chinkin, *supra* at 50-51.

<sup>43</sup> C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 25, 81-82.

<sup>44</sup> Charlesworth et al., *supra* at 645.

issues as race and class, is inadequate in grasping the complex interplay of these factors.<sup>46</sup> Any prescription based on this unidimensional analysis will thus be ineffective especially for third world women such as the Filipina MDWs. Therefore, an approach which not only discusses the inherent dilemma pointed out, but also moves feminist analysis further by adequately accounting for the multi-layered nature of the problem, is discussed below.

#### **4. Intersectionality Theories**

Increasingly, all of the theories discussed above have attempted to turn their attention to intersecting and multiple layers of marginalisation, rather than focusing only on one category. The linkages between racialization, ethnicity and gender have also been scrutinised so as “to expose the complex system of dependence and independence between them.”<sup>47</sup> Gender-related concepts are deemed intertwined with issues and hierarchies of race and class.<sup>48</sup> In view of this, it has been argued that:

“...eliminating gender discrimination in itself does not remove the contortion blighting the lives of women whose colour, race, national origin, or economic marginalization causes them such pain...Until white feminists discover how to see the insidious way that racism constricts the lives of millions of women, they cannot oppose it. Worse, they may blindly fail to perceive how their ancestry positions them to benefit

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<sup>45</sup> *Supra*, fn 16.

<sup>46</sup> T. Schecter, *Race, Class, Women and the State: The Case of Domestic Labour in Canada* (London: Blackrose Books, 1998) at 11.

<sup>47</sup> Charlesworth & Chinkin, *supra* at 19. Please see for example, A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (New York: Routledge, 1995) at 1-17, 352-389.

<sup>48</sup> Charlesworth & Chinkin, *supra* at 19.

passively from racism's perpetuation, and remain oblivious to the racialized nature of gender.”<sup>49</sup>

Many third world feminists have therefore argued that feminism must expand its reach beyond the traditional elimination of “oppression based on sex or gender.” Instead, closer attention must be given to the complex interplay not only of gender, race and class, but also of colonialism and global capitalism. Women from the first world are thus urged to recognize the benefits that they themselves reap from the oppression of the third world.<sup>50</sup>

Third world feminists then argue that a shared global feminism can only be achieved if it is equally recognized that “racism and economic exploitation” have also contributed to the inferior status of a great number of women the world over.<sup>51</sup> They are concerned with the “multiple, fluid structures of domination which intersect to locate women differently at particular historical conjunctures”<sup>52</sup> and opt for a more meticulous study of these intersecting and varied forms of oppression traditionally preached by “first world feminisms.”<sup>53</sup>

To avoid the pitfalls and criticisms against so-called essentialism or unqualified universalism, Chandra Mohanty has borrowed and deployed Benedict Anderson’s

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<sup>49</sup> Aylward, *supra* at 36. Please see also K. Cleaver, “Racism, Civil Rights and Feminism” in A. K. Wing, ed., *Critical Race Feminism: A Reader* (New York: New York University Press, 1997) 35 at 39.

<sup>50</sup> Charlesworth & Chinkin, *supra* at 47-48. Please see also A. Russo, “‘We Cannot Live Without Our Lives’: White Women, Antiracism and Feminism” in C. Mohanty, A. Russo & L. Torres, eds., *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991) at 297-313.

<sup>51</sup> Charlesworth & Chinkin, *supra* at 48; C. Johnson-Odim, “Common Themes, Different Contexts” in C. Mohanty et al., *supra* at 325.

<sup>52</sup> C. Mohanty, “Cartographies of Struggle: Third World Women and the Politics of Feminism” in C. Mohanty et al., *supra* at 13.

<sup>53</sup> Charlesworth & Chinkin, *supra* at 48.

concept of an “imagined community”<sup>54</sup> in the context of women’s interests in an international context. In this regard, Mohanty suggests an “‘imagined community’ of third world oppositional struggles” which involve “potential alliances and collaborations across divisive boundaries.”<sup>55</sup> Another strategy that might ameliorate the same problem is that of “reflective solidarity”. Jodi Dean suggests, for example, that this notion can reconcile the conflict between universality and difference by “emphasizing a ‘universalism of difference’... where identity is not opposed to universality, but is rather dependent on it.”<sup>56</sup>

As will be seen in later chapters of this dissertation, the situation of Filipina MDWs is a clear illustration of those caught in the kinds of “intersections” that are referred to in this analysis. Not only do they consist mostly of women who have left their much poorer homeland to seek greener pastures in other, far richer countries, they also encounter prejudicial treatment arising from their racialized, economic and social status, at the countries of employment.

However, the kind of “imagined community” suggested by Mohanty may not be easily achieved in the case of the Filipina MDWs for the very reasons of gender, racialization, social and economic disadvantage experienced in their respective countries of employment. That is, the potential source of solidarity between the Filipina MDWs and their women employers for instance, may be hindered by the most fundamental

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<sup>54</sup> Based on B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London/New York: Verso, rev. ed. 1991).

<sup>55</sup> Mohanty, *supra* at 4. Additionally, Mohanty wrote: “[I]t is not colour or sex which constructs the grounds for these struggles. Rather it is the way we think about race, class and gender – the political links we choose to make among and between struggles.” *Ibid.*

issues of expediency and survival. It is difficult to conceive a “strategic political alliance” among sectors whose interests and concerns are constantly pitted against the other. As explained in later chapters, women employers are among the foremost beneficiaries of the invaluable services rendered by MDWs, due to the state of employment’s endemic failure to provide adequate state support for child/elderly care and other domestic services. This is not to completely eschew however, the possibility of transcending what appears to be diametrically opposed interests in favour of a truly encompassing human rights agenda. However, until such an equitable agenda is achieved, this approach remains insufficient on its own, even as this dissertation will surely benefit from many of its useful analytical insights. Nevertheless, insufficient as it is on its own, the dissertation will likewise benefit from this valuable theoretical approach.

Lastly, this intersectional approach will likely raise serious methodological concerns within a strictly legal framework. Being cast in the level of abstract values, their legal implementation may prove to be a big challenge. For instance, it may be argued that concepts such as the “universalism of difference” and “imagined community” defy operationalization into a legal frame. However, the next section will attempt to address these same limitations and concerns.

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<sup>56</sup>Charlesworth and Chinkin, *supra* at 53; J. Dean, “Feminism and Universalism” in *Solidarity of Strangers: Feminism after Identity Politics* (Berkeley: University of California Press, 1996) at 140-174.

## 5. Dependency Theory

Viewed as a neo-Marxist theory, dependency theory's main argument is that "the sources of underdevelopment are to be found in the history and structure of the global capitalist system."<sup>57</sup> That is, the history of colonialism and its aftermath brought about and sustained a highly exploitative system whereby developed countries imposed trade and economic systems most beneficial to the latter and highly prejudicial to the developing or colonized states. Aside from the exploitation of the natural resources and domestic labor of colonized states, the colonizers continued to benefit from the developing countries' incorporation into the (western) world market. Their continued economic dependence on their former colonizers forced the developing countries into joining the world market despite their many disadvantages. Thus, it has been suggested that the image projected by dependency theory is that of a Western core and a developing periphery, whereby the wealth of the former is based upon keeping the latter in a state of permanent dependency and underdevelopment.

While the paradigm relied upon by dependency theory could well be a powerful and credible analytical tool for having "integrated a disparate set of social, economic and political phenomena and provided a single, comprehensive explanation",<sup>58</sup> there is very little reliance within it on law and legal systems. Tamanaha explains that, in line with the Marxist view of law as "mere superstructure to the economic base", dependency

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<sup>57</sup> B. Tamanaha, "The Lessons of Law-and-Development Studies" (1995) 89 Am. J. I. L. 470 at 477. For a more comprehensive discussion of law and dependency theory, please see F. Snyder, "Law and Development in the Light of Dependency Theory" (1980) 14 Law and Society Rev. 723.

<sup>58</sup> *Ibid.*

theorists tend to believe that “legal forms and ideas are secondary and ultimately derivative.”<sup>59</sup> For dependency theorists, legal discussions focus mostly on the “nature of the state and its relation to society.”<sup>60</sup> However, dependency theory nonetheless served as the inspiration for the “law of development” movement and the introduction of a “third generation” of international human rights, called the right to development. The international law of development:

“involves a drive to secure for developing countries preferential treatment and entitlement to development assistance, usually related to trade preferences, debt relief, low interest loans or outright grants and low-cost transfer of technology.”<sup>61</sup>

Dependency theory’s greatest contribution therefore, is not only the act of challenging conventional theories in the social sciences such as economics and sociology by asserting that “contact with capitalism led to underdevelopment rather than to development” but most importantly, it “opened our eyes and made us see the world from the perspective of oppressed peoples living in its ‘distant’ corners.”<sup>62</sup>

The perspective that this theory provides is indeed crucial in understanding more accurately the global, socio-political and economic scenario. The labor migration phenomenon, particularly in relation to MDWs, had been seen as a consequence of core-periphery relations that this theory purports. The “brain drain” effects, or the fact that the educated and skilled labor force of people from Third World countries like the Philippines are toiling in and benefiting the well-developed economies of their countries

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<sup>59</sup> F. Synder, “Law and Development in the Light of Dependency Theory” (1980) 14 Law and Soc’y Rev. 723 at 781.

<sup>60</sup> *Ibid.* at 761.

<sup>61</sup> Tamanaha, *supra* at 479.

of employment, illustrates this skewed relationship. A number of authors have compared the current situation of MDWs with the imperialist plunder of the resources of the south by the colonizers from the north.<sup>63</sup>

For instance, Hochschild observes that in the past, the colonial forces facilitated the exploitation of material resources such as gold and other minerals and raw materials. Today, what is extracted is not only human labor, but also the “love and care” that these MDWs provide their employers’ homes. Consequently, the MDWs’ own families are deprived of this very same human resource.<sup>64</sup> While coercion does not operate “by physical force or through the barrel of a gun, but through sheer economic pressures,” the yawning gap between rich and poor countries is viewed as a form of coercion in itself which pushes third world mothers to seek work in the first world for lack of options in their own countries. But given the prevailing free market ideology, such migration has been viewed by too many as stemming from a “personal choice” and its consequences have been seen as “personal problems.”<sup>65</sup>

Daenzer similarly claims that Canada’s Live-in Caregiver Program (LCP) and its predecessor, the Foreign Domestic Movement (FDM) Program<sup>66</sup>, are “both characterized by neo-colonial features.”<sup>67</sup> She sees the situation in which women from third world nations are recruited to work in an occupation largely avoided by Canadians, as

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<sup>62</sup> R. Peet & E. Hartwick, *Theories of Development* (New York/London: The Guilford Press, 1999) at 122.

<sup>63</sup> Please see for instance, A. R. Hochschild, “Love and Gold” in B. Ehrenreich & A. R. Hochschild, eds., *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (New York: Metropolitan Books, 2003) 15 at 26-27; and P. Daenzer, “An Affair Between Nations: International Relations and the Movement of Household Service Workers” in A. Bakan & D. Stasiulis, eds. *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: Toronto University Press, 1997) at 81.

<sup>64</sup> Hochschild, *supra* at 26-27.

<sup>65</sup> *Ibid.*

<sup>66</sup> These programs are to be discussed further Chapters 4 and 6.

”reminiscent of indenture.”<sup>68</sup> The lack of citizenship rights and the oppressive conditions that MDWs face further characterize this program as objectionable, on the balance.

However, dependency theory has likewise been criticized for being “mechanical” and “formalistic” in often leading to sweeping generalizations regarding “core-periphery” relations.<sup>69</sup> Without discounting its significance in many other respects, the theory’s limited reliance on the law and legal structures makes it a most valuable but still incomplete tool of analysis in the context of this dissertation.

## 6. Postcolonial theory

Various forms of postcolonial thinking are sensitive to the critical view that some have taken against the so-called “structuralist” modes of thinking such as the Marxist and dependency theories. Thus, the proponents of postcolonial thinking also utilize “hybrid, in-between positions, drawing on several traditions of thought, including Western reason and poststructural criticism.”<sup>70</sup>

Thus, akin to dependency theory, the main arguments of postcolonial development theory are based on the analysis that “colonizing states in the North transformed Southern economies into satellites of the Northern economies.”<sup>71</sup> This mode

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<sup>67</sup> Daenzer, *supra* at 81.

<sup>68</sup> *Ibid.*

<sup>69</sup> Peet & Hartwick, *supra*, at 118-119.

<sup>70</sup> *Supra* at 132.

<sup>71</sup> C. Thomas, “Critical Race Theory and Postcolonial Development Theory: Observations on Methodology” (2000) 45 Vill. L. Rev. 1195 at 1200.

of analyzing the colonial and neo-colonial relations between rich and poor countries, or what is sometimes referred to as the south-north divide, is anchored on the following observations: First, that colonizing countries of the North reorganized traditional economic patterns in the Southern states to enable the colonizers to exploit the natural resources of the South. Second, this rapacious exploitation of resources and markets not only further enriched the North, but even “underdeveloped” the Southern economies by transforming their previously “self-reliant econom[ies] to one dependent on both imports from and exports to, Northern markets.” Third, “political independence” failed to reform this system but in fact led to the perpetration of neo-colonial relations whereby Northern economies profited not only within the Southern economies, but also in the wider global market.<sup>72</sup>

Thomas adds that many postcolonial theorists have pointed out the way that “Western culture has produced and perpetuated an ideological conception of the ‘South’ as an amalgam of inferior characteristics.”<sup>73</sup> This concept is then used to justify the patronizing attitude of the North towards the South and the resulting inequality in international relations.<sup>74</sup>

For instance, Mohamed Bedjaoui, who can be characterized as a well-known postcolonial legal scholar, wrote that the legal objections of Western countries to the “new international economic order” (NIEO) (an attempt at reforming international economic law) were primarily meant to “perpetuate the supremacy of the developed

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<sup>72</sup> *Ibid.* at 1200-1201.

<sup>73</sup> *Ibid.* at 1215-1216.

<sup>74</sup> *Ibid.*

countries...[and a] certain type of unequal relationship.”<sup>75</sup> Bedjaoui denounced the “philosophical and methodological absurdity” of the arguments that their proposals for reform were anti-law. He said that “such an attitude is merely a manifestation of legal imperialism, a logical component of imperialism pure and simple.”<sup>76</sup>

Despite the supposed universality of norms in such fields of law as human rights, many of their so-called “universal” standards may actually be “culturally specific and allied to dominant regimes of power.”<sup>77</sup> It has been argued that the current geopolitics of power has revealed a change in the defining elements of the universality of human rights. Otto asserts that the debate about “whether universality can be qualified by cultural differences, is directly related to the current struggle for global economic dominance.”<sup>78</sup> Thus, Otto claims that a result of the current polarization of the mainstream universality debate is that “transformative” critiques seeking to alter dominant global economies and practices of power are silenced by the uncompromising positions of both sides. She cites these “transformative critiques” as including the:

“feminists, postcolonial and subaltern groups, lesbians and gay men, critical race theorists, and indigenous peoples, as well as many other local expressions of dissent that are erased by the dominant debate.”<sup>79</sup>

Hence, Otto concludes that the only way universality can have a place in a transformative paradigm is for it to be understood “as dialogue, in the sense of struggle,

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<sup>75</sup> M. Bedjaoui, *Towards a New International Economic Order* (London) Holmes and Meier, 1979) at 100.

<sup>76</sup> Bedjaoui, *supra* at 101. Please see also Thomas, *supra* at 1218.

<sup>77</sup> D. Otto, “Rethinking the ‘Universality’ of Human Rights Law” (1997) 29 Columbia Human Rights L. Rev. 1 at 5.

<sup>78</sup> Otto, *supra* at 2.

<sup>79</sup> *Ibid.*

rather than as a disciplinary civilizing mission of Europe.”<sup>80</sup> She concludes that this entails “revealing issues of power and pluralizing difference”, consistent with poststructural thinking.<sup>81</sup> “Transformative dialogue” must also be based on an ethical commitment to address the material aspects of human dignity thus promoting global economic justice and substantive equality.<sup>82</sup>

In other words, the transformative paradigm advocates for a position whereby the universalizing tendency of human rights is tempered by a continuous process of dialogue, questioning and change in accordance with the particular context, which does not necessarily depend on the geographical notions of local or particular vis-à-vis the global or universal. The transformative paradigm also suggests a decentering of the state, of giving more voice to “coalitional strategies” and recognizing the law’s limitations as a means of change. While these steps entail challenging the status quo, they also recognize the importance of utilizing the existing tools even as it seeks to develop a more contextually responsive, open-ended and ethically accountable social and legal order.<sup>83</sup>

In all, postcolonialism’s objective is thus to reject and rectify views supportive of imperialist and colonialist principles which have predominated in modern-day civilizations. It is said that “postcolonialism took much of its initial impetus in its

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<sup>80</sup> Otto, *supra* at 24-31.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid* at 34.

<sup>83</sup> *Ibid* at 43.

rejection of colonialist and developmentalist appropriations of the universal. Its rejection of the unashamedly imperial is obvious enough.”<sup>84</sup>

While the postcolonial movement began in the cultural and literary field, its influence in the understanding of law is increasing. The birth of the critical “third world approaches to international law” (TWAIL) movement is a clear instance of its depth and breadth, but which had likewise spawned a distinct mode of analyzing the very same systemic ills that postcolonial thinking has initially pointed out.

## **B. The Third World Approaches to International Law (TWAIL) School as the Most Promising Explanatory Resource**

### **1. What is ‘Third World Approaches to International Law’ (TWAIL)?**

TWAIL arose out of the realization that “mainstream” international law is largely a construct of the western world and has not fully taken into consideration the particular needs and conditions of “third world” states. TWAIL scholars approach international legal studies from an interdisciplinary perspective, utilizing the various fields to understand and problematize the existing structures and concepts governing the international and domestic legal spheres. As Upendra Baxi succinctly states: “if there

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<sup>84</sup> P. Fitzpatrick & E. Darian-Smith, “Laws of the Postcolonial: An Insistent Introduction” in E. Darian-Smith & P. Fitzpatrick, eds., *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) at 3.

exists at all the possibility of a subaltern voice, it lies in the enunciation of Third World perspective on global justice.”<sup>85</sup>

In a nutshell, the main tenets/principles of the TWAIL school of thought can be summarized as follows:

1. The current era of globalization is bearing witness and contributing to the growing *south-north*<sup>86</sup> divide.
2. This growing divide has fortified the claim of the *northern, western* or *first world* states to power over the *southern, eastern* or *third world* states.
3. International Law is the main tool for propagating and reinforcing this hegemonic claim.
4. The western world maintains its power through the construction of the rest of the world as its inferior “other”.

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<sup>85</sup> U. Baxi, “Operation Enduring Freedom: Towards a New International Law and Order?” in A. Anghie, B. Chimni, K. Mickelson and O. Okafor, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden/Boston: Martinus Nijhoff, 2003) Ch. 3 at 46. The article was also based on Baxi’s Keynote Speech at the conference of the same title (as the book), held at Osgoode Hall Law School, York University, Toronto, Ontario in October 2001.

<sup>86</sup> The “south-north” division may at times also be referred to as the “east-west” or “first-third world” divisions whereby the north/west/first world refer to the richer, more powerful, capitalist states of Europe and North America while the south/east/third world consists of the poorer, less powerful, formerly colonized states. But please note that these terms are being used for their metaphorical value, rather than as a fixed mode of characterizing the world. As had been noted by Otto, care must be taken that we do not easily fall into the trap of “homogenizing difference” or fixing “identities in precise, dualistic and unidimensional categories”. Please see D. Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” (1996) 5:3 Social and Legal Studies 337 at 348-354, 358.

Some authors distinguish the “north-south” division (which refers to the dichotomy between rich and poor nations) from the “east-west” ideological cleavage between communist and capitalist states of the Cold war era. [Please see M. Bedjaoui, *Towards a New International Economic Order* (New York/London: Holmes and Meier, 1979) at 34. ] There appears to be general agreement however, that the “third world” refers to a “geopolitical concept based both on inclusion in a geographical area - the Southern hemisphere (mainly Africa, Asia and Latin America) - at the historical period of colonization, and on the economic situation of underdevelopment.” In Bedjaoui, *supra* at 25-26.

5. This hegemonic status dates back to the era of *colonialism*<sup>87</sup> when western states occupied and exploited erstwhile uncharted territories mainly for economic gain.
6. Such economic gain translated into political and social domination at both the domestic and international levels, which are carried over to the present in multifarious ways (known as “neo-colonialism”<sup>88</sup>).
7. The present *neo-colonial* status of the *third world* is manifested in various forms, ranging from political patronage, economic manipulation, to discriminatory and racist governmental policies.
8. The continuing subordination of the formerly colonized states makes the practical application of international law concepts such as sovereignty, territoriality and human rights, highly problematic.
9. The various international law norms and other related factors which contribute to this unjust world order must be revisited, unpacked, questioned, and reformed.
10. These efforts must lead to reconstructive measures and meaningful alternatives that will not only eradicate existing prejudicial and hierarchical norms, but also their negative manifestations in the *third world* such as poverty, racism, social

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<sup>87</sup> A traditional definition of “colonialism” refers to it as the “involuntary exploitation of or annexation of lands and resources previously belonging to another people, often of a different race or ethnicity, or the involuntary expansion of political hegemony over them, often displacing, partially or completely, their prior political organization. In essence, colonialism of one people over another represents the antithesis of the legal notion of self-determination for all peoples.” Please see R. Clinton, “Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law” (1993) 46 Ark. L. Rev. 77 at 86.

<sup>88</sup> An apt definition of “neo-colonialism” as the term is used here is articulated as follows: “The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside.... Neo-colonialism is also the worst form of imperialism. For those who practice it, it means power without responsibility and for those who suffer from it, it means exploitation without redress.” In K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (New York: International Publishers, 1965) at ix, xi.

inequality, impunity, graft and corruption, and various other forms of human rights violations.

The above main tenets of the TWAIL school are gleaned from the growing body of literature being produced by self-identified TWAIL scholars.<sup>89</sup> The first two tenets are consistent with the postcolonial roots of TWAIL theory which perceives the current inequitable world system in terms of a seemingly unending cycle of extraction and exploitation of the resources of the “third world” by the more powerful “first world”. However, TWAIL takes the analysis a step further, in that the third principle focuses on the role of international law within this skewed state of international affairs. Affirming its potent influence, Bhupinder Chimni asserts that *international law*:

“is playing a crucial role in helping legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide. Indeed, international law is the principal language in which domination is coming to be expressed in the era of globalization. It is displacing national legal systems in their importance and having an unprecedented impact on the lives of ordinary people.”<sup>90</sup>

On the other hand, Makau Mutua expresses in even stronger terms the context by which TWAIL presents itself as a “broad dialectic of opposition to international law” as presently conceived, when he states that:

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<sup>89</sup> Some of these are: K. Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 Wis. Int’l. L.J. 353; A. Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 Harvard Int’l L. J. 1; O. Okafor “After Martyrdom: International Law, Sub-State Groups and the Construction of Legitimate Statehood in Africa” (2000) 41 Harvard Intl L. J. 503; C. Nyamu, “How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?” (2000) 41 Harvard Int’l L. J. 381; B. Rajagopal, “From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions” (2000) 41 Harvard Int’l L.J. 529; and A. Anghie, B. Chimni, K. Mickelson & O. Okafor, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003).

<sup>90</sup> B.S. Chimni, “Third World Approaches to International Law: A Manifesto” in A. Anghie, et al., *supra*, Ch. 4 at 47-48.

“The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World.”<sup>91</sup>

It follows from the third principle, and as elaborated in the fourth, that, although international law plays a crucial role in the propagation of western hegemony, this has *developed over time* and through a *fusion of several factors*. In this regard, Karin Mickelson identifies at least three relevant and distinct characteristics of emerging TWAIL perspectives:

“1. an emphasis on interconnectedness of subject areas, illustrated by an unwillingness to draw rigid boundaries between various areas of the law (such as economics, human rights, or the environment); 2. an emphasis on considerations of morality, ethics and justice; in other words, an unwillingness to separate law from wider concerns or to define law in a narrow ‘legalistic’ fashion; and 3. an emphasis on history, typified by an unwillingness to look at any problem as ahistorical or to separate law from the historical context within which it developed.”<sup>92</sup>

And consistent with the approaches taken, Mickelson emphasizes the fact that these characteristics are likewise interconnected.<sup>93</sup>

The fourth principle is also underscored and clarified by Mutua when he asserts that, earlier efforts to universalize international law were deemed necessary for the exploitation and subordination of non-Europeans and in support of “European conquest and domination.”<sup>94</sup>

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<sup>91</sup> M. Mutua, “What is TWAIL?” (2000) 94 Am. Soc’y Int’l L. Proc. 31 at 31.

<sup>92</sup> K. Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 Wis. Int’l. L.J. 353 at 397.

<sup>93</sup> *Ibid.*

<sup>94</sup> Mutua, *supra*.

To counter this, Dianne Otto aptly recommends that, “[t]he imperialist urge to *improve* the world by standardization must be dislodged.”<sup>95</sup> Moreover, we must not fall into the same trap of essentializing difference by adopting a similarly unidimensional view. She adds that:

“Instead, we need to develop ways of being that would enable us to live with the inconsistency and instability of human multiplicities and the accompanying discomfort and uncertainty.”<sup>96</sup>

Meanwhile, colonialism itself has been the subject of extensive scholarly attention.<sup>97</sup> In this regard, Antony Anghie has done groundbreaking work on the relationship between colonialism and international law, the topic of the fifth tenet. In a language clearly steeped in the human rights principles of self-determination and non-discrimination, Anghie argues that, “the colonial encounter, far from being peripheral to the making of international law, has been central to the formation of the discipline.”<sup>98</sup> And in contrast to its positivist characterization, he asserts that the international law concepts currently being used are not only “far from neutral” but are also “racialized

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<sup>95</sup> D. Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” (1996) 5:3 Social and Legal Studies 337 at 359.

<sup>96</sup> *Ibid.*

<sup>97</sup> For e.g., N. Dirks, ed., *Colonialism and Culture* (Ann Arbor: University of Michigan, 1992); M. Doyle, *Empires* (Ithaca: Cornell University Press, 1986); D. Fieldhouse, *Colonialism 1870-1945* (London: MacMillan, 1981); E. Hobsbawm, *The Age of Empire, 1875-1914* (London: Weidenfeld & Nicolson, 1987); W. Mommsen & J. Osterhammel, eds., *Imperialism and After: Continuities and Discontinuities* (London: Allen and Unwin, 1986); V. Kiernan, *The Lords of Human Kind: European Attitudes to the Outside World in the Imperial Age* (Harmondsworth: Penguin, 1972); G. Prakash, ed., *After Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton: Princeton University Press, 1995); J. Osterhammel, *Colonialism: A Theoretical Overview* (Princeton: Markus Weiner, 1997).

<sup>98</sup> A. Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 Harvard Int’l L. J. 1 at 78; Please see also A. Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5:3 Social and Legal Studies 321-335.

from [their] inception”, thus raising crucial issues relating to the manner in which sovereignty functions.<sup>99</sup>

Justice Christopher Weeramantry (formerly of the International Court of Justice), himself affirms this line of analysis when he states that:

“In some of its applications, international law can achieve international justice in a very visible fashion. Yet, it can also entrench international injustice when it is too legalistically applied, unless we look deeper, beyond the black letter, to the underlying spirit of justice that governs and animates it... In the whole enterprise of colonialism, that underlying spirit was often lost sight of through emphasis on legalism and form. International law, studied and applied legalistically, became one of the principal supports of colonialism.”<sup>100</sup>

James Gathii reinforces the same view by emphasizing that concepts, norms and doctrines of international law, including human rights law, are “constructed and contingent”<sup>101</sup>. In this regard, he characterizes TWAIL scholarship as:

“like allied approaches to the study of law, [TWAIL] has a long tradition of examining the promises of such concepts as the norm of sovereign equality of states against the existing reality of economic hierarchy and subordination between nations. Such an analysis does not throw legal concepts overboard, but rather foregrounds the existing reality of economic hierarchy and subordination between nations in relation to the norm of sovereign equality.”<sup>102</sup>

Meanwhile, the various manifestations of neo-colonial influence and their enormous implications are the broad themes of the sixth, seventh and eighth principles. On this, Balakrishnan Rajagopal’s work on the role played by “third world” social movements (including human rights activists, non-governmental or civil society

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<sup>99</sup> Anghie, *supra* at 79.

<sup>100</sup> C. Weeramantry and N. Berman, “In the Wake of Empire” (1999) 14 Am. U. Int’l. L. Rev. 1515 at 1557.

<sup>101</sup> J. Gathii, “Rejoinder: TWAILing International Law” (2000) 98 Mich. L. Rev. 2066 at 2071.

organizations) in the expansion of international institutions, is instructive. In particular, he critically looked into the experience of the Bretton Woods Institutions (BWIs) such as the World Bank and International Monetary Fund (WB-IMF), and concluded that:

“the invention of poverty and the environment as terrains of intervention show how the resistance of the Third World feeds the proliferation and expansion of the BWIs and how simultaneously in that process, Third World resistance itself gets moderated and acted upon.”<sup>103</sup>

Similarly, through an analysis of the complex relationship between gender, culture, development and human rights, Celestine Nyamu has pointed out the ways by which formal legal institutions helped legitimize a form of “gender hierarchy”. She therefore urges that, “situations in which culture is deployed to end political debate and pre-empt the questioning of unjust social arrangements must be challenged.”<sup>104</sup>

And in an engaging analysis of the debates surrounding the wearing of veil or headscarf by some Third World women, Vasuki Nesiah has argued that the plurality of issues and reactions to this particular practice reflects a “fetishistic absorption” which in turn “excludes or marginalizes other political priorities”.<sup>105</sup> She cites as examples those “questions of pressing economic re-distribution, … subaltern aspirations not captured by the anti-colonial struggle, … [or] the interrogation of the production of knowledge in the social sciences and humanities.”<sup>106</sup> Thus, Nesiah urges us to move from the prevailing tendency of simply trying to determine whether human rights discourse empowers or

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<sup>102</sup> Gathii, *supra* at 2068-2069.

<sup>103</sup> B. Rajagopal, “From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions” (2000) 41 Harvard Int’l L.J. 529 at 576.

<sup>104</sup> C. Nyamu, “How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?” (2000) 41 Harvard Int’l L. J. 381 at 417-418.

disempowers women, “to critically examining how human rights discourse interpolates the very articulation of claims.”<sup>107</sup>

Lastly, the ninth and tenth principles deal with the critical and reconstructive aspects of the TWAIL analysis. A critical view is exemplified in the approach taken by Obiora Okafor in his work on the legitimacy of African statehood. He argues that, if international law has served “to encourage, excuse, justify, facilitate or rationalize the coercive practices of nation-building which have led to internecine conflict,” then the same international law principles which facilitate these processes must be reformed.<sup>108</sup> There is no doubt these concerns were borne out of the egregious human rights violations arising from such conflicts and other complex human rights implications stemming therefrom. Thus, Okafor asserts that,

“far from being a neutral, unproblematic arbiter of state-building conflicts in Africa, as is often portrayed, international law has been implicated in the very genesis of such problems. ..its involvement and contributions to the very formation of these problems must be better appreciated and accepted if they are to be identified, tackled, and if at all possible, rooted out. Only by viewing the law in this critical way can its more problematic effects be better understood and more satisfactorily addressed.”<sup>109</sup>

Another creative instance where the TWAIL optic has been used towards the same end is Makau Mutua’s work on the savages-victims-saviours (SVS) metaphor to

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<sup>105</sup> V. Nesiah, “The Ground Beneath Her Feet” in A. Anghie, B. Chimni, K. Mickelson and O. Okafor, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden/Boston: Martinus Nijhoff, 2003) Ch. 7 at 134.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Nesiah, supra* at 138.

<sup>108</sup> O. Okafor “After Martyrdom: International Law, Sub-State Groups and the Construction of Legitimate Statehood in Africa” (2000) 41 Harvard Intl L. J. 503 at 525.

<sup>109</sup> *Ibid.* at 528.

describe the current international human rights system.<sup>110</sup> This metaphor uses a provocative imagery in relation to the character of the dominant human rights discourse. Mutua asserts that, “the human rights corpus, though well-meaning, is fundamentally Eurocentric and suffers from several basic and interdependent flaws”<sup>111</sup> captured in the SVS metaphor. Mutua posits that the “savages” metaphor refers to the cultural foundation of a state which allows the perpetration of acts and situations which are deemed a deviation of the present cultural norm of human rights.<sup>112</sup> The “victim” analogy on the other hand, refers to the powerless and helpless individual whose “dignity and worth” are violated by the cultural foundations of the state.<sup>113</sup> Lastly, the “savior” metaphor refers to the human rights corpus itself, with the United Nations, the international non-governmental organizations, western charities and governments as the actual “redeemers of a benighted world.”<sup>114</sup> In the human rights narrative, the savages and victims are generally non-white or non-western while the saviors are often white or coming from the western world.

But while Mutua argues that the use of this damning metaphor is not meant to be a wholesale rejection of the idea of human rights nor is it a mere plea to be more sensitive to non-western cultures, he clarifies that this is rather an attempt at locating the “normative edifice of the human rights corpus” from a philosophical, cultural and

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<sup>110</sup>Please see M. Mutua, “Savages, Victims and Saviours: The Metaphor of Human Rights” (2000) 42 Harvard Int’l L. J. 201.

<sup>111</sup>*Ibid.*

<sup>112</sup>Mutua, *supra* at 202-203.

<sup>113</sup>*Ibid.* at 203-204.

<sup>114</sup>*Ibid.* at 204.

historical standpoint.<sup>115</sup> It is high time, he argues, for the human rights movement “to rethink and re-orient its hierarchical, binary view of the world in which the West leads and the rest of the globe follows.”<sup>116</sup> The quest, as he puts it, must be for the construction of a human rights movement that wins for all.

Anghie reiterates the above analysis and emphasizes that, “seen in a larger perspective, TWAIL does no more than to make real the promise of international law to transform itself into a system based, not on power, but justice.”<sup>117</sup>

In this regard, Rajagopal clarifies that states are far from becoming irrelevant and remain “a powerful site of ideological and political contestations in most Third World countries and an important source of strength and defense in international law.”<sup>118</sup> However, the arrival of social movements only emphasizes the importance for “international law to rethink its categories and learn how to take the local more seriously in its problematic and contested relationship with the Third World.”<sup>119</sup>

Concerns have also been raised about the seeming ambivalence of Third World writers towards the law’s potential as an instrument of change. Karin Mickelson regards this as one of the factors that contribute to the apparent inability to come up with viable and coherent alternatives. She writes:

“Third World writers are frequently characterized as having tremendous faith in the ability of law in general, and international law in particular, to institute social justice. Yet these writers are well aware of the ways in which law has been made to serve the interests of the powerful, and there

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<sup>115</sup> *Ibid* at 206-207.

<sup>116</sup> *Ibid* at 245.

<sup>117</sup> A. Anghie, “What is TWAIL - Comment” (2000) 94 Am. Soc’y of Int’l L. Proceedings 39 at 40

<sup>118</sup> Rajagopal, *supra* at 578.

<sup>119</sup> *Ibid.*

is something quixotic in their attempts to transform what is perceived as an essentially oppressive discourse into a liberatory one.”<sup>120</sup>

Mickelson observes that the same scholars are opposed to the simplistic notion of merely setting up an alternative system in place of the old or existing one. “Their focus is on process, on creating structures and a normative foundation for bringing about a just international order.”<sup>121</sup> Thus, Mickelson asserts that despite the initial setbacks, it is still worth pursuing a Third World approach as it:

“expands the debate about particular legal issues or areas by forcing a confrontation with the full panoply of historical, political, economic and cultural debates which surround them, and thus offers an enriched understanding of the discipline as a whole.”<sup>122</sup>

Mutua has likewise offered an overview on the nature of TWAIL. He admits that TWAIL’s line of analysis is not entirely new and traces its roots to the decolonization movement after World War II, and more specifically to the Bandung conference.<sup>123</sup> He also notes that TWAIL is both “reactive” and “proactive” in that, aside from its critique of Western imperialism, it likewise “seeks the internal transformation of conditions in the Third World.”<sup>124</sup> That being said, Mutua reminds us that TWAIL:

“...is not simply an intellectual trend, an academic pursuit [but] a political and ideological commitment to a particular set of views. That is why *TWAIL is fundamentally a reconstructive movement* that seeks a new compact of international law... All factors that create, foster, legitimize, and maintain harmful hierarchies and oppressions must be revisited and changed.”<sup>125</sup>

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<sup>120</sup> Mickelson, *supra*, at 413-414.

<sup>121</sup> *Ibid.* at 414.

<sup>122</sup> *Ibid.*

<sup>123</sup> The Bandung conference, which brought together the first independent Asian and African states, took place in Indonesia in 1955 and sought to form a coalition of independent Third World states that will put forward their economic and political concerns to the international arena. In Mutua *supra* fn 91 at 31.

<sup>124</sup> Mutua, *ibid.*

<sup>125</sup> *Ibid* at 38 (Emphasis in the original).

It has been shown here that the TWAIL perspective, although not necessarily based on a fixed set of ideas, tools and prescriptions for change, embodies some common underlying principles. A common theme running through these principles is the recognition that although international law has been misused to serve the interests of a few powerful and rich states, it can still be reformed towards achieving true and lasting justice for all. Hence the need to continuously unpack, criticize and problematize the various international law concepts and doctrines which have spawned the subservience and exploitation of “third world” countries. This can be done through the most basic and crucial tasks of giving voice to the voiceless, empowering the marginalized, redistributing power and giving way to alternative perspectives (other than the usual western-based concepts) of international law and justice. Looking back to the dark history of, and recognizing the detrimental effects of colonization and neo-colonization are thus indispensable areas of concern for TWAIL or in any viable alternative perspective to international law. TWAIL then seeks to supplement the relevant theories of law discussed earlier, and to reconcile its main tenets with the interdisciplinary application of international law using third world perspectives.

## **2. Why Use TWAIL in this Dissertation?**

None of the various alternative theoretical approaches already canvassed offers as much promise and relevance to the study of the human rights situation of Filipina MDWs

in Canada and Hong Kong as the TWAIL optic. And although the rich analyses and extensive contributions of the various alternative theories earlier discussed in this chapter offer useful insights and tools, none has yet to provide a comprehensive and effective means for explaining the many complexities arising from the sorry human rights situation of Filipina MDWs.

The main arguments in this thesis relate to the gross power imbalance and extractive relationship not only between the “first world” employer and the “third world”<sup>126</sup> employee (the MDW in this case) but also to such imbalances among countries of origin and countries of employment. Because of the exploitative South-North character of these relationships, and the resulting injustices that arise, I have chosen to adopt TWAIL as my explanatory framework. The choice was motivated by the following factors: the country of origin of Filipina MDWs is a “third world” country; the relevant countries of employment (Canada and Hong Kong) are much richer and much more powerful countries than the Philippines; there is an extractive relationship

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<sup>126</sup> The term “first world” is not being used here to simply refer to the conventional reference to the “west”, “developed”, “north” or rich states, as opposed to the “third world” as comprising the “east” “underdeveloped”, “south” or poor states. In accordance with TWAIL analysis, the use of the term “third world” also signifies a “counterhegemonic” sense in that it reveals a hierarchical ordering rooted in colonialism and imperialism. The counterhegemonic stance is meant to allow us “to interrogate and contest the various ways in which power is used” and to “rupture received patterns of thinking”. Please see B. Rajagopal, “Locating the Third World in Cultural Geography” (1998-99) *Third World Legal Studies* at 1-20.

For instance, Dianne Otto has used the term “third world”, “advisedly” because “it reflects the self-assumed superiority of the First and Second World countries of Europe” and that “it became the symbol of unity and solidarity for postcolonial states in their struggle to resist European dominance.” Please see D. Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*” (1996) 5:3 *Social and Legal Studies* 337 at 361.

Hence, considering the various limitations and criticisms lodged against the traditional ways by which “third world” has been defined, the use of the term is also meant to emphasize that the “relative disadvantage experienced by Third World countries is seen not only in descriptive but in normative terms, as an intolerable situation that demands a response.” Please see K. Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 *Wis. Int'l L. J.* 353 at 360.

between this “third world” country and each country of employment - the “product” being the human labour resources of the Philippines; and the TWAIL optic has provided a rich body of writing that throws much light on the nature of such relationships and their linkages to international law and relations. What is more, there is a gap in the TWAIL literature that this dissertation fills. This is that self-identified TWAIL scholars have thus far not applied their theoretical models to the issues dealt with here.

The succeeding chapters will thus venture into the application of these perspectives to the particular situation of Filipina MDWs in Canada and Hong Kong. The next chapter will commence this undertaking through a discussion of the current international human rights system and its relevant implications to the research problems posed. A more detailed legal analysis of the situation of Filipina MDWs in Canada and in Hong Kong using the TWAIL framework will be undertaken in Chapter 7.

## **Chapter 3**

### **International Human Rights Norms and Migrant Domestic Workers**

*“The promotion of human rights is certainly not a panacea, nor is it a substitute for a wider program of global reform. At the same time, taking human rights seriously is one dimension of that wider shift in consciousness entailing the gradual displacement of statist modes of political organization and their replacement by a new repertoire of local and global orientations.”*

- Richard Falk<sup>1</sup>

*“...[T]he model of universal human rights for all human beings contradicts the idea that all human beings, without exception, have a right to be human.*

...

*[T]he very logic of rights in a liberal capitalist framework of the state and the law, while allowing for emancipatory struggles for the oppressed and impoverished, creates potential for the egoistical exercise of freedom of lawfully harming others.”*

- Upendra Baxi<sup>2</sup>

#### **A. Rationale for the Chapter**

This chapter will be devoted to a discussion of the international human rights system as it affects migrant workers in general and migrant domestic workers (MDWs) in particular. One objective of this dissertation is to illustrate how the international human

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<sup>1</sup> R. Falk, *Human Rights and State Sovereignty* (New York: Holmes and Meier Publishers, 1981) at 7.

<sup>2</sup> U. Baxi , *Inhuman Wrongs and Human Rights: Unconventional Essays* (New Delhi: Har Anand Publications, 1994) at 8, 12.

rights system has often failed to uphold the human rights of MDWs. Among the manifestations of this failure include the arduous negotiations and watered down provisions of the Migrant Workers Convention; the very slow process of its ratification; and the general failure of countries of employment in becoming parties to this important human rights instrument. The weak implementation of existing human rights standards and the often conflicting interests and agendas of countries of origin and countries of employment, are some of the other factors that impede the full realization of these rights.

In this regard, the history, nature and various critiques of the international human rights system will be briefly discussed. Thereafter, the issues surrounding the implementation of human rights within a national legal system (such as Canada's) will be examined. This case study will support the argument that the human rights of MDWs have all-too-often been sacrificed at the altar of political and economic expediency for the benefit of their countries of employment.

However, as implied in the above quotations from Baxi and Falk, it is important to be careful about treating human rights at face value without critically examining the factors that shape their creation and implementation. These scholars also remind us that, important as it is, the implementation of human rights standards and instruments is but one facet of the broader struggle to defeat the evils of, and end the many injustices perpetrated by, the status quo. This study of the particular situation of MDWs, as workers and as human beings, will not only serve to expose the vulnerability of this particular sector but also of those countless others that have been as marginalized.

## **B. International Migration in Context: Human Rights Wronged?**

It might well be one of life's saddest ironies that the very period in which the international human rights system has produced its greatest quantity of humanist enunciations in the form of treaties, covenants, declarations and other standard-setting instruments,<sup>3</sup> has also been the period in which the most number of humans have been killed, abused, exploited and dehumanized.<sup>4</sup> The wiping out of entire populations due to famine, genocidal conflicts, religious fundamentalist wars, are known to have produced far more deaths than World Wars I and II combined.<sup>5</sup> At the same time, the numbers of refugees and migrants have vastly increased; the populations of persons displaced from their homelands due to economic, political, religious or environmental reasons have grown greatly; and heinous acts of prejudice and discrimination are likewise becoming much more pervasive.<sup>6</sup> The continuing disparity of wealth between the North and the South, the swift and sudden changes brought about by economic globalization, and the consequent inequitable distribution of the world's wealth, all contribute to the complex global scenario that we currently face.

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<sup>3</sup> For a complete listing and full text documentation of all United Nations human rights documents enacted from 1948 to the present, please see the Office of the High Commissioner for Human Rights website: <<http://www.unhchr.ch>>.

<sup>4</sup> U. Baxi, "Voices of Suffering and the Future of Human Rights" (1998) 8 *Transnat'l L. & Contemp. Probs.* 125-169 at 125.

<sup>5</sup> For statistics on casualties of the 20<sup>th</sup> century's worst atrocities, please see M. White, "30 Worst Atrocities of the 20<sup>th</sup> Century", online: <<http://users.erols.com/mwhite28/atrox.htm>>; M. Cherif Bassouni, states in an article in the *Chicago Tribune*, 25 October 1998, that "86 million have been killed since World War II" from "conflicts of a non-international character, internal conflicts and tyrannical regime victimization", as cited in M. White, "Deaths by Mass Unpleasantness: Estimated Totals for the Entire 20<sup>th</sup> Century", online: <<http://users.erols.com/mwhite28/warstat8.htm>>.

As such, it is clear that the *ideals* of human rights, along with those of peace and justice, have often taken a back seat in the formulation of policies and decisions in the field of domestic and international relations. Instead, a particular kind of economic globalization has elevated the market to the status of the prior and supreme social goal. This logic has perpetuated a grievous paradox in which goods are increasingly allowed free passage across territorial boundaries while human beings are increasingly restricted from moving across the same boundaries. Sadly, refugees and so-called economic migrants are foremost among those victimized by the current ideological climate. For instance, lingering fears of “terrorism” exacerbated by the September 11 tragedy, has not only raised suspicions against refugees and migrants, these fears have also led to the increased use of discriminatory tactics such as racial profiling<sup>7</sup> against refugee claimants and refugees. While those who are outside the relevant territorial boundaries can hardly get in, those already within these boundaries are often subjected to the strictest forms of surveillance and scrutiny. These measures range from non-recognition of foreign work

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<sup>6</sup> Please see United Nations High Commissioner for Refugees (UNHCR), *The State of the World's Refugees* (Geneva: United Nations, 2000). For this and other relevant information including annual statistics of refugees and displaced persons, please visit the UNHCR website at <<http://www.unhcr.ch>>.

<sup>7</sup> It might also be relevant to note that “racial profiling” has been defined in the literature in at least two ways: using a narrow definition and a broad definition. “Under the narrow definition, racial profiling occurs when a police officer stops, questions, arrests, and/or searches someone solely on the basis of the person’s race or ethnicity... Under the broader definition, racial profiling occurs whenever police routinely use race as a factor that, along with an accumulation of other factors, causes an officer to react with suspicion and take action.” J. Cleary, “Racial Profiling Studies in Law Enforcement: Issues and Methodology,” MN House of Rep. Research Info. Br., at 5-6 (June 2000), quoted online: Racial Profiling Analysis website <[http://www.racialprofilinganalysis.neu.edu/bg\\_glossary.php](http://www.racialprofilinganalysis.neu.edu/bg_glossary.php)>. It must be noted however, that “racial profiling” is not confined to police forces. Rather, the police are agents of the state who use such categorizations by the latter against persons or groups.

and education credentials,<sup>8</sup> to increasing resort to deportations and/or detentions, to various forms of subtle or express acts of discrimination.

The situation is especially difficult for migrant workers. One of the main reasons for these encountered difficulties is that many of them hold temporary work permits. As such, they are most often caught in limbo - neither are they permanent residents under the protection of their host state, nor are they completely unprotected. But the fact remains that they do not generally enjoy the “protection” that they are entitled to receive from either their country of origin or their country of employment. Thus, temporary migrant workers are more often than not, faced with multiple barriers to achieving full recognition and equality with the citizens of their countries of employment.<sup>9</sup> What then does this scenario tell us about the current human rights regime and its effectiveness (or inutility?). More importantly, what can be done to remedy this situation? Before proceeding to discuss some possible answers in the specific context of MDWs, a brief overview of the international human rights regime is in order.

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<sup>8</sup> Some examples of the many articles written on this issue are: M. Toneguzzi, “Time to Recognize Credentials, Feds Told” *Calgary Herald* (27 August 2003); N. Keung, “Rare Job Interviews, A Bittersweet Affair” *The Toronto Star* (14 December 2003) at A11. This article is part of a series of stories about “the struggles of a class of foreign-trained professionals seeking similar employment in their new country”. The article topics range from language-learning skills, to résumé-writing, to job interviews and other factors in the job-application process faced by immigrants in Canada.

<sup>9</sup> Obtaining the status of “equality” with citizens is deemed a desirable goal since it will provide social, economic and political entitlements that are traditionally denied to non-citizens, and which are often indispensable in leading secure and respectable lives within the same society.

### C. Brief History and Nature of the International Human Rights Regime

One of the fundamental bases of international law is the principle of national sovereignty which:

“reserves to each sovereign State the exclusive right to take any action it thinks fit, provided only that the action does not interfere with the rights of other States, and is not prohibited by international law on that or any other ground.”<sup>10</sup>

In the field of migration, a typical court ruling in this regard has held that:

“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”<sup>11</sup>

Consequently, all matters falling under “domestic jurisdiction” (including what a State does to its own citizens), were considered “beyond the reach of international law or legal intervention by other States.”<sup>12</sup> However, this principle also provided an interesting exception. It entitled states to demand respect for their nationals abroad, such that any maltreatment of their own citizens by a foreign state could constitute a violation of the “personal sovereignty” of the state to which these nationals belonged.<sup>13</sup> As a result, traditional international law entitled states to “demand substantial protection for aliens

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<sup>10</sup> P. Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 11.

<sup>11</sup> *Nishimura Ekiu v. United States* (1892) 142 U.S. 651, 658; This is consistent with the court ruling in the key Canadian case of *Canada v. Chiarelli* (1991) 1 S.C.R. 712 at 714-715, where the court held that:

“The most fundamental principle in immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. The common law recognizes no such right and the *Charter* recognizes the distinction between citizens and non-citizens.”

<sup>12</sup> Sieghart, *supra* at 11. Please see also J.P. Humphrey, “The International Law of Human Rights” in *The Present State of International Law and other Essays* (The Netherlands: Kluwer, 1973).

within a State while demanding none for the State's own citizens.”<sup>14</sup> However, since this right flowed from the state's national sovereignty, any form of compensation was only due to the state and not to the individual/s affected. Whether the state will in turn compensate the affected individual was left to the state's judgment and was deemed beyond the purview of international law.<sup>15</sup> This was due to the fact that traditional international law only granted legal personality to the state and not to the individual. However, this doctrine of state responsibility for its nationals abroad has been viewed as ineffective in many instances.<sup>16</sup>

The “sovereignty” doctrine on which these principles are founded is itself controversial. On the one hand, there are those who believe that sovereignty is an absolute right of every state. It is considered as the only remaining weapon of equality in an otherwise highly skewed state of international relations. Those who advocate this belief argue therefore, that the principle of humanitarian intervention will serve to nullify this instrument of equality, aside from re-establishing once more, the power imbalance among states.<sup>17</sup>

On the other hand, there are those who insist that respect for human rights is supreme and trumps sovereignty claims. As such, humanitarian intervention should be allowed in cases where there are widespread violations of human rights committed by or

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Sieghart, *supra* at 12.

<sup>16</sup> R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997) at 45. For a more detailed account of the history and development of international law with respect to aliens, from its ancient origins to the concept of state responsibility (vis-à-vis grant of equal treatment and/or imposition of international minimum standards) to the modern-day human rights treaties granting specific individual rights, please see Cholewinski, *supra* at 40-76.

with the knowledge and consent of the incumbent authority. Those who adhere to this view argue that international law should recognize the principle of “humanitarian intervention” in cases where states are committing atrocities against their subjects which “shock the conscience of mankind.” The atrocities committed by the Ottoman empire in the late 1800s and those committed under the National Socialist Germany in the late 1930s to the 1940s were incidents that were pointed to as justifications for the development of a doctrine of humanitarian intervention. Allowing a strictly positivist view of the concept of national sovereignty was seen as dangerous in the circumstances.<sup>18</sup>

However, the supposed benevolent motives behind “humanitarian intervention” had been questioned as being “certainly not immune to countervailing considerations of state.”<sup>19</sup> Franck and Rodley cite as examples the rather inconsistent application of humanitarian objectives in the European intervention in Ottoman affairs, the U.S. interventions in various countries in Latin America, and many other similar cases in Asia and Africa. That is, powerful and wealthy states intervened when it was in accordance with or helpful to their political and economic agenda but conveniently ignored similarly prevalent violations of human rights when such intervention was perceived to be inimical to their vested political and economic interests.<sup>20</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> Sieghart, *supra* at 13.

<sup>19</sup> T. Franck and N. Rodley, “After Bangladesh: The Role of Military Intervention by Military Force” (1973) 67:2 Am. J. of Int’l L. 275 at 281.

<sup>20</sup> For a more extensive discussion, please see Franck and Rodley, *supra* at 279-305.

Nonetheless, the principle of humanitarian intervention is seen by some as supported by the practice of the United Nations Security Council.<sup>21</sup> That is,

“The suggestion that respect for sovereignty is conditional on respect for human rights has been reflected in the practice of the Security Council. Article 2(7) of the United Nations Charter prohibits the UN from intervening ‘in the domestic jurisdiction of any state.’ Nevertheless, since the end of the Cold War, the Security Council has ‘availed itself of a right of humanitarian intervention’ by adopting a series of resolutions which have progressively expanded the definition of a ‘threat to international peace and security’ under Article 39 of the Charter to allow for Security Council-mandated military intervention to respond to grave humanitarian crises, even where such crises have been purely domestic in nature.”<sup>22</sup>

Thus, many international legal scholars have strongly asserted that individual states or regional organizations do not have a legal right to intervene in the affairs of another state without clear authorization from the U.N. Security Council.<sup>23</sup> The use of force in such instances must follow the strict legal principles of necessity and proportionality, i.e. “a humanitarian operation must be executed at a level commensurate to the evil it seeks to curtail.”<sup>24</sup> Nonetheless, it remains a highly contentious issue whether international law has accepted any use of force in the name of humanitarian intervention. In fact, it has been raised that “the gap between the norms and the reality in

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<sup>21</sup> P. Simons, “Humanitarian Intervention” Ploughshares Working Paper 01-2 (Waterloo: Institute of Peace and Conflict Studies, 2003) online: Ploughshares website <<http://www.ploughshares.ca/content/WORKING%20PAPERS/wp012.html>>.

<sup>22</sup> Simons, *supra*. Please see also C. Guicherd, “International Law and the War in Kosovo” (1999) 41:2 Survival 19 at 22-23; M. O’Connell, “The UN, NATO, and International Law After Kosovo” (2000) 22 Human Rights Quarterly 57 at 68-69.

<sup>23</sup> Simons, *supra*.

<sup>24</sup> *Ibid.* Please see also C. Chinkin, “Kosovo: A ‘Good’ or ‘Bad’ War?” (1999) 93 American Journal of International Law 841-847; R. Falk, “Kosovo, World Order, and the Future of International Law” (1999) 93 American Journal of International Law 847-857; R. Gordon, “Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti,” (1996) 31 Texas International Law Journal 43-56.

human rights and humanitarian law has always been wide.”<sup>25</sup> For in practice, it is widely known that unilateral actions by states or regional organizations have been launched in the name of “humanitarian intervention”, whether or not such actions were authorized by the U.N. Security Council.<sup>26</sup>

Amidst and inspite of these debates, the body of international human rights laws flourished. That is, the history of “modern” international human rights law began with the adoption of the Universal Declaration of Human Rights (UDHR)<sup>27</sup> in 1948. The UDHR was adopted by the United Nations General Assembly, and specified in detail the nature of the rights protected under Articles 55 and 56 of the United Nations Charter.<sup>28</sup> This was followed by the adoption of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and a host of other international human rights treaties, including regional human rights instruments in Europe, Africa and America.<sup>29</sup>

These international human rights treaties and instruments mainly impose obligations on governments by specifying how such regimes should treat individuals subject to their jurisdiction. Thus, it was stated that the strict doctrine of national sovereignty:

“...has been cut down in two crucial respects: first, how a State treats its own subjects is now the legitimate concern of international law.

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<sup>25</sup> T. Meron, “The Humanization of Humanitarian Law” (2000) 94:2 American Journal of International Law 239 at 278.

<sup>26</sup> *Ibid.*

<sup>27</sup> G.A. Resolution 217A (III), UN Doc A/810.

<sup>28</sup> Please see I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1998) at 7-11.

<sup>29</sup> These include the Convention on the Elimination of all forms of Racial Discrimination (CERD), Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), among others.

Secondly, there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign states within their own territories and in the exercise of their own internal jurisdictions, and may therefore be regarded as ranking in the hierarchy of laws even above national constitutions.”<sup>30</sup>

It has been argued that these international human rights standards are, for the most part, unenforceable.<sup>31</sup> This, the argument goes, is largely due to the lack of a supranational body with some kind of mechanism to compel compliance, even by those who have ratified or signed on to particular human rights instruments. However, experience has shown that pressure from the international community can sometimes encourage, if not force, many states to make their domestic laws conform with these international human rights standards. Moreso, scholars have argued that these international human rights standards can also be advanced in other ways that do not involve the coerced compliance of states.<sup>32</sup>

#### **D. Migrant Workers in International Human Rights Law**

##### **1. Beginnings: The International Labor Organization**

The international community’s concern for migrant workers was initially manifested towards the end of World War I and through the establishment of the

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<sup>30</sup> Sieghart, *supra* at 15.

<sup>31</sup> Please see for e.g., J.S. Watson, *Theory and Reality in the International Protection of Human Rights* (New York: Transnational Publishers, 1999) at 1-15.

<sup>32</sup> Please see for e.g., M. Mutua, Book Review of *Theory and Reality in the International Protection of Human Rights* by J.S. Watson (1999) 95:1 Am. J of Int’l Law (2001) at 255; and O.C. Okafor, "Do International Human Rights Institutions Matter? The African System on Human and Peoples' Rights,

International Labor Organization (ILO). At its first session in Washington D.C. in October 1919, the International Labor Conference adopted ILO *Recommendation No. 2* (concerning reciprocity of treatment of foreign workers). This instrument called for “equality of treatment of migrant workers vis-à-vis nationals regarding social protection and freedom of association on conditions of reciprocity.”<sup>33</sup>

Further instruments were adopted in 1939 such as ILO *Convention No. 66* and *Recommendation No. 61* concerning the “recruitment, placing and conditions of labour migrants for employment” and *Recommendation No. 62* concerning “cooperation between states relating to the recruitment, placing and conditions of labour migrants for employment”. But since *Convention No. 66* never came into force, the ILO adopted *Convention No. 97* and *Recommendation No. 86* concerning migration for employment.<sup>34</sup> In 1955, ILO adopted *Recommendation No. 100* concerning the “protection of migrant workers in underdeveloped countries and territories” followed by the *Equality of Treatment (Social Security) Convention No. 118* in 1962.

In response to problems of international trafficking in labour, clandestine migration, and intensifying discrimination against migrants in many parts of the world, the International Labor Conference adopted, in 1971, a resolution to review the existing instruments and to cover the gaps concerning protection of migrant workers in social and labour matters. After further deliberations, the ILO also adopted in 1975, *Convention*

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Quasi-Constructivism, and the Possibility of Peacebuilding within African States” (2004) 8 International Journal of Human Rights (forthcoming).

<sup>33</sup> International Labor Organization (ILO) *Conventions and Recommendations Adopted by the International Labor Conference 1919-1966* (Geneva: ILO, 1966); and ILO, “The First Session of the International Labor Conference” ILO Official Bulletin 1:408-50.

*No. 143* concerning “migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers,” together with *Migrant Workers Recommendation No. 151*.<sup>35</sup>

*Convention No. 143* obligates state parties to respect the “basic human rights of all migrant workers”<sup>36</sup> including those who are not legal migrants, and to prosecute those engaged in the trafficking of labour. *Recommendation No. 151* on the other hand, provides for the protection of the health of migrants, their protection from expulsion upon loss of employment, social services, as well as to facilitate family reunification.<sup>37</sup>

Cholewinski has argued that although the various ILO standards for the protection of migrant workers have been largely ignored in practice, they remain significant “in theory” and “in many respects superior to the provisions” of the Migrant Workers’ Convention. He adds that the “tripartite contribution of government, employers and workers to the content of ILO standards” not only make them a “worthy foundation on which to build further safeguards” but also “a welcome reminder of our moral obligation to choose the dignity of human labour over the pursuit of a blind economic expediency.”<sup>38</sup>

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<sup>34</sup> ILO, *Conventions and Recommendations Adopted by the International Labor Conference 1919-1966* (Geneva: ILO, 1966) 743-69; 120 U.N.T.S. 71.

<sup>35</sup> V. Nanda, “The Protection of the Rights of Migrant Workers: Unfinished Business” in G. Battistella, ed., *Human Rights of Migrant Workers: An Agenda for NGO* (Manila: Scalabrinii Migration Center, 1993) at 255-256.

<sup>36</sup> Article 1, ILO Convention No. 143.

<sup>37</sup> Article 13, ILO Recommendation No. 151 and in Nanda, *supra* at 256.

## **2. The Migrant Workers' Convention: A Long and Difficult Road**

In the early 1970s, the United Nations began to pay special attention to the welfare of migrant workers when the Sub-commission on the Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights requested Ms. H.E. Warzazi of Morocco to prepare a report on illicit and clandestine labour trafficking.<sup>39</sup> The resulting Warzazi report led the United Nations Economic and Social Council to conclude that the existing international conventions and recommendations (particularly the ILO instruments) are not adequate to protect the various rights of migrant workers. Hence, it was recommended that a United Nations instrument of “wider applicability” be drawn. Thereafter, a working group was established to draft the *United Nations Convention on Migrant Workers*.<sup>40</sup> The International Labor Organization coordinated closely with the working group in drafting the Convention.

Based on the principle of non-discrimination and the universal application of human rights, there are certainly other existing instruments which could well be used to protect the rights of migrant workers.<sup>41</sup> Nonetheless, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

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<sup>38</sup> R. Cholewinski, *Migrant Workers in International Human Rights Law* (Oxford: Clarendon Press, 1997) Ch. 3 at 136. For a thorough discussion of the nature, history and specific rights protection under the ILO regime, please see Cholewinski, *supra* at 79-136.

<sup>39</sup> V. Nanda *supra* at 256-257, citing the Report of the Secretary-General Prepared Pursuant to Paragraph 1 of Commission Resolution 21B “Measures to Improve the Situation and Enhance the Human Rights and Dignity of All Migrant Workers,” U.N. Doc E/CN.4/1325 (1978)

<sup>40</sup> Please see UN A/RES/32/120 (1977); A/RES/33/163 (1978); G.A. Res. 34/172, 34 U.N. GAOR Supp. (No. 46) at 188-189, U.N. Doc. A/34/46 (1979).

<sup>41</sup> Some of which are the Universal Declaration on Human Rights 1948 (UDHR) International Covenant on Civil and Political Rights 1966 (ICCPR), International Covenant on Economic, Social and Cultural Rights

(hereafter referred to as Migrant Workers' Convention or MWC)<sup>42</sup> has been perceived as the most promising source of international legal rights for migrant workers. This has been so despite the fact that the International Labor Organization (ILO) had previously enacted labour standards prior to the MWC, which specifically dealt with the concerns of migrant workers.<sup>43</sup>

On a more general level, it has been argued that while migrant workers and refugees share a common feature in international law as being “aliens in the host society”, the former have “traditionally been provided with far less attention and protection...even though they outnumber the refugees considerably.”<sup>44</sup> One illustration is the fact that there have been Refugee Conventions in existence at both the international and regional levels since 1951,<sup>45</sup> while until recently none existed to meet the specific needs of migrant workers. Thus, the enactment of the MWC was deemed necessary and propitious.

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(ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and pertinent International Labor Organization (ILO) Conventions.

<sup>42</sup> Adopted on 18 December 1990 through United Nations GA Res. 45/158.

<sup>43</sup> As briefly discussed earlier, these include: ILO Convention No. 97 concerning Migration for Employment, 1949; Convention No. 143 concerning Migrant Workers, 1975; Recommendation No. 86 concerning Migration for Employment, 1949; Recommendation No. 100 concerning Protection of Migrant Workers in Underdeveloped Countries, 1955; and Recommendation No. 151 concerning Migrant Workers, 1975.

<sup>44</sup> Cholewinski, *supra* at v. However, aside from the fact that this assertion raises complicated issues, it would be difficult to verify this claim since uncertainties in applying the existing definitions of “migrant workers” and “refugees” make it almost impossible to distinguish one from the other especially in the current socio-economic and political scenario. The statement is thus being used for its metaphorical value.

<sup>45</sup> 1951 Convention Relating to the Status of Refugees and its 1967 Protocol; the 1969 Organization for African Unity Convention Governing Specific Aspects of Refugee Problems in Africa; and the 1984 Cartagena Declaration on Refugees.

However, the process of drafting this treaty<sup>46</sup> was as complicated as it was difficult. The overwhelming preoccupation of most of the negotiating parties with advancing their narrow state interests resulted in a watering down of some provisions concerning a number of the crucial rights claimed by migrant workers and their families.<sup>47</sup> These tensions, as well as the compromises reached are evident in the final treaty and in the *travaux préparatoires*. As a result, the text of the MWC “constitutes a delicate balance between the protection of migrants’ rights and the principle of state sovereignty.”<sup>48</sup>

More than a decade after the adoption of the MWC, the negative influence of narrow conceptions of state interests and the stubborn insistence on the “sovereign” right to determine who should be let in and who should be kept out, continues to afflict this treaty. Needing only 20 ratifications to come into force, the MWC took almost thirteen years to do so.<sup>49</sup> With Guatemala’s ratification in March 2003, the MWC finally entered into force on 1 July 2003. And while the much-needed and much-awaited 20<sup>th</sup>

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<sup>46</sup>The drafting process itself took ten long years from the time the United Nations General Assembly adopted a resolution in December 1979 creating a Working Group to draft the MWC. Please see also C. Dias, “Human Rights of Migrant Workers: A House is Not a Home” *Canadian Human Rights Foundation Vol. XIV No. 1* (1999). online: December 18 website <<http://www.december18.net/paper13HRofMigrantWorkers.htm>>.

<sup>47</sup>A very detailed and thorough discussion of the drafting process as well as the specific human rights in the MWC may be found in Cholewinski, *supra* at 137-204.

<sup>48</sup>Cholewinski, *supra* at 146.

<sup>49</sup>The MWC was adopted without a vote and opened for ratification on 18 December 1990. While ratification had been slow, pressure emanating from non-governmental organizations has aided in somehow accelerating the ratification process since 1997. For instance, as of November 1996, only seven states have ratified this international instrument. The rate of accession somehow speeded up in the last few years leading to its entry into force in 2003. So far, the states which have ratified the MWC are: Azerbaijan, Belize, Bolivia, Bosnia & Herzegovina, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Uganda and Uruguay. The 19<sup>th</sup> state, Ecuador, ratified on 5 February 2002. Guatemala, the 20<sup>th</sup> state, ratified on March 14, 2003. El Salvador, the 21<sup>st</sup> state, ratified on March 21, 2003.

ratification had finally been achieved,<sup>50</sup> not even one of the current states parties to the MWC is a significant state of employment, and none is a rich, industrialized state. As had been argued, “if only sending countries ratify, the Convention would lose its practical meaning.”<sup>51</sup>

At this point however, the prospect of ratification by traditional countries of employment does not look very bright. For example, a German diplomat had signified at the drafting stage that it is “highly unlikely that...Germany would ratify the Convention.”<sup>52</sup> During the drafting process, alignment of state interests was very evident since “many of the controversial provisions came about as a result of compromises between the different country groupings.”<sup>53</sup>

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<sup>50</sup> Please see December 18 website <<http://www.december18.net/UNconvention.htm>>.

<sup>51</sup> S. Hune and J. Niessen “Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects” (1994) 12 Netherlands Quarterly HR 393 at 404.

<sup>52</sup> Cholewinski, *supra* at 203, fn 285, quoting the UN Working Group Report (Oct. 1987) wherein a German representative stated that: “[The German] delegation maintained its substantive reservations with respect to the need for the adoption of a new convention on the protection of the rights of migrant workers, since, in its view, such protection was already amply afforded by the Universal Declaration of Human Rights and the International Covenants on Human Rights, which should not be diminished through the elevation of supplementary rights to the rank of human rights. As regards rights relating to employment, social security and the stay of migrant workers, the International Labour Organization was the competent organization. Apart from such substantive reservations ... the delegation had reservations to a great many provisions adopted on second reading. The most important of these objections related to the fact that migrant workers in an irregular situation should become subjects of an international convention and that such a convention should accord them too many rights and that Article 2, paragraph 2, included within the scope of the [draft] Convention categories of persons which ... were not truly migrant workers. *In light of all these objections, it seemed highly unlikely that ... Germany would ratify the Convention.*” (Emphasis supplied)

<sup>53</sup> Cholewinski, *supra* at 144-145. There were four main country groupings that emerged at the drafting stage of the MWC: the MESCA group consisting of Finland, Greece, Italy, Norway, Portugal, Spain and Sweden (while France participated in this group’s deliberations, it took an independent position); the Group 77 composed of sending countries from Asia, Africa and Latin America namely, Algeria, Barbados, Egypt, Mexico, Pakistan, Turkey, the former Yugoslavia, India and Morocco (the last two also pursued independent policies); the former socialist countries of Central and Eastern Europe; and finally, the fourth group was composed of those industrialized countries outside of MESCA: Australia, Canada, Denmark, Germany, Japan, the Netherlands and the USA.

The MWC is perceived to be the most comprehensive universal codification of the rights (civil and political as well as economic, social and cultural) of migrant workers and their families<sup>54</sup> and providing the most comprehensive definition of “migrant workers” including those in an “irregular” situation<sup>55</sup>. However, it is also burdened with numerous critiques mostly connected to the tension between the notion of state sovereignty and provision of specific rights to those deemed as “outsiders”. Among the many critiques that have been made of this treaty are: the distinction that it makes between migrant workers with legal status from those in an irregular/undocumented situation; the fact that migrant workers with legal status were given more rights; the jurisdictional conflict between the United Nations and the International Labour Organization; the family reunification provisions which grant an extraordinary amount of discretion to states; the many exclusions in the general definition of migrant workers (e.g. students, non-resident seafarers etc.); specific exclusions in certain provisions; and the lack of attention to the specific concerns of women.<sup>56</sup>

An especially controversial provision is Article 79 which reads:

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<sup>54</sup> The International Labour Organization has limited competence to deal with concerns such as culture, education and political participation.

<sup>55</sup> While this is implicit in earlier human rights instruments, the politics of sovereignty and citizenship have often been invoked to limit their application to nationals and permanent residents. The MWC, with all its current limitations due to the many compromises reached at the drafting stage, has the potential of somehow altering this political climate. However, it is worth noting that among the objectives of the MWC is to arrest the growth of “illegal migration” using the principle that if they are granted human rights entitlements, employers will be discouraged from hiring them. Thus, problems will expectedly ensue in the practical application of such conflicting objectives as recognizing the full human rights of “illegal migrants” and hindering their growth.

<sup>56</sup> Please see Cholewinski, *supra* at 137-180; S. Hune, “Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families” (1991) 25 International Migration Review 800; Y. Kitamura, “Recent developments in Japanese Immigration Policy and the United Nations Convention on Migrant Workers” (1993) 27 UBC L.Rev. 113; and H. Mattila, “Protection of Migrants’ Human Rights: Principles and Practice” (2000) 38 International Migration 53.

“Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.”

How to balance the rights of migrant workers and members of their families with the “sovereign rights” of states in such an atmosphere remains a big question.<sup>57</sup>

Many of these outstanding critiques were in large part due to the strong objections of industrialized states to many provisions which resulted in practically watered-down versions of various rights. Foremost among these is the almost blanket refusal to grant any rights to “undocumented migrants” who are deemed “illegal” by most major countries of employment. As a compromise, clear distinctions were made between migrants with legal status (who are granted more rights) and those deemed “irregular or in an undocumented situation”.<sup>58</sup> Another is the limitation of the definition of “migrant worker” to exclude students, refugees and stateless persons, and non-resident seafarers.<sup>59</sup> On specific rights, compromises were reached in the drafting of certain labour rights such as free choice of employment,<sup>60</sup> trade union rights,<sup>61</sup> and social rights such as health<sup>62</sup>, housing<sup>63</sup>, and family reunification<sup>64</sup>. These compromises were reached to

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<sup>57</sup> *Ibid.*

<sup>58</sup> Cholewinski, *supra* at 138.

<sup>59</sup> MWC, *supra*: inclusions to the definition of “migrant worker” in Article 2 and exclusions in Article 3.

<sup>60</sup> MWC, Article 53.

<sup>61</sup> MWC, Articles 26 and 40.

<sup>62</sup> MWC, Articles 28, 43(I)(e) and 45(I)(c).

<sup>63</sup> MWC, Articles 43 (I)(d) and 43 (3).

<sup>64</sup> MWC, Article 44 (2)

appease the concerns of countries of employments to preserve their sovereignty and discretion over these matters.<sup>65</sup>

Nonetheless, a senior migration specialist at the International Labor Organization has observed that,

“other States have already utilized provisions in the 1990 Convention as a guide to elaborating national migration laws. A notable example is Italy, which based much of its comprehensive national migration law adopted in March 1998 on the provisions and standards of the 1990 Convention.”<sup>66</sup>

Thus, despite its so-called “drafting flaws,” the MWC carries the potential of putting at the forefront the many difficulties that migrant workers face and which are peculiar to their disadvantaged situation. Hence, it would be helpful if major countries of employment like Canada would ratify the instrument thereby assist in promoting the migrant workers’ cause. If ratification is truly not possible, then the example of Italy in utilizing the MWC as a framework for recognizing the human rights of migrant workers in accordance with their specific situation, would be a viable alternative in the meantime.

While this is not to claim that ratification of the MWC is a panacea to the many problems confronting migrant workers worldwide, this serves to illustrate the argument that state response to an international instrument is indicative of its general attitude towards the individuals targeted for protection. And any conclusions and findings made in this regard will undoubtedly have significant implications on the specific concerns of MDWs, whether in Canada, Hong Kong or other countries of employment.

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<sup>65</sup> Please see Cholewinski, *supra* at 137-204.

<sup>66</sup> P. Taran, “Foundations of Dignity: Current Dynamics of Migration and the Response of International Standards” *WCRX Parallel Events International Parliamentary Union: The Action Of Parliaments And Their Members Durban, 2 September 2001.* online: December 18 website <<http://www.december18.net/UNWConfNGO16.htm>>.

### **3. Migrant Workers and Regional Human Rights Protection**

Ideally, regional human rights bodies would provide added, if not a more effective, protection for migrant workers within each relevant region. However, due to the nature of migrant work, individuals affected are often nationals of countries which are not even part of the region where they are employed. This then reduces their bargaining power since countries of origin, which may wish to pursue the interests of their migrant worker nationals, theoretically has no voice within the relevant regional human rights body. And in the case of the Philippines, there is not even an existing regional human rights body or mechanism that can be invoked on behalf of its millions of migrant workers toiling in Asia and the rest of the world.

Nonetheless, there is still much to learn from the way that other regional human rights bodies have attempted to use creative ways to protect and promote the human rights of migrant workers. These lessons may in turn be applied to the situation of MDWs.

The European system is a rich source of experience in this regard. A very useful example of the way that human rights of migrant workers could be effectively protected in international law is illustrated by the Committee of Independent Experts' interpretation and application of the European Social Charter with respect to the enjoyment of the right to housing by migrant workers. For instance, Craig Scott used what he has referred to

as the “multiple normative relations approach”,<sup>67</sup> in analyzing relevant case law of the committee. First, Scott identifies the following five kinds of such normative relations: 1) interdependence of rights; 2) interrelationship of persons; 3) concretization of general rights; 4) particular forms of universal rights; and 5) intersectionality.<sup>68</sup> To illustrate his point, Scott analyzed the way that the committee arrived at a just and more humane resolution in favor of the right of migrant workers to housing. He explained that a favourable decision was achieved by interpreting the “family reunification” provision of the Charter as requiring the effective provision of adequate means to be reunited with one’s family, which in turn necessitates the provision of adequate and proper housing. A contrary interpretation would negate the “family reunification” principle, as proven by the actual experiences of migrant workers who were discriminated against despite the existence of formalistically “non-discriminatory” laws in the relevant jurisdiction.<sup>69</sup>

However, not only had the MWC’s drafting experience proven that this type of “radical” interpretation may be fiercely opposed, it is also quite apparent that there is a political economy logic to the treatment of migrant workers. Concomitantly, were one to diagnose effectively the nature of this logic, one would be a step closer to identifying better courses of action in search of a more just human rights regime for this specifically vulnerable group. But what is this logic all about and how could its rules be unmasked? It is here argued that a TWAIL perspective will greatly assist not only in answering this

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<sup>67</sup> C. Scott, “Reaching Beyond (Without Abandoning) the Category of ‘Economic, Social and Cultural Rights’” (1999) 21 Human Rights Quarterly 633 at 656-659.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.* The same article also provides a very insightful account of the way these multiple normative relations relate to, and could be applied to the various human rights treaty provisions.

particular question but also in countering the criticisms raised and problems faced in the current scenario. These are further elaborated in the succeeding section.

## **E. Migrant Domestic Workers: Excluded from the International Human Rights Regime?**

### **Modes of Exclusion**

While the international human rights regime and its specific standards for the protection of migrant workers are admittedly relevant and applicable to the lives of MDWs, they are rendered ineffective largely because of the following:

- a. The lack of specific sensitivity to the intersectional discrimination faced by MDWs based on their gender, race, class and immigration status;
- b. The already problematic and inconsistent application of general human rights standards makes it doubly hard for MDWs to invoke their rights under the existing regime; and
- c. The socio-political, economic and cultural problems associated with the implementation of international human rights standards at the local level, severely limit the MDWs' bargaining power and ability to stand up for their specific rights;

While it cannot be denied that the international human rights regime has made some efforts to address the specific concerns of MDWs within the general framework of migrant workers' rights, these efforts have tended to be rather tokenistic. Some of these institutional efforts are discussed below.

## **1. The United Nations Special Rapporteur on Migrant Workers' Rights**

An international mechanism which has somehow attempted to address the particular concerns of MDWs' rights is that of the Special Rapporteur on the Rights of Migrant Workers.<sup>70</sup>

In June 2002, when United Nations Special Rapporteurs and Chairpersons of human rights treaty bodies met to discuss the follow up to the Durban Declaration and Programme of Action,<sup>71</sup> the Special Rapporteur on the human rights of migrants said that she "considers the follow-up to the World Conference to be a priority of her mandate." In this regard, the Special Rapporteur supported "the organization of a migrant domestic workers' summit which can be considered as part of the follow-up to Durban." The Special Rapporteur has tried to give special attention to the situation of MDWs. In her most recent report to the United Nations General Assembly on the "Human Rights of Migrants,"<sup>72</sup> she reported that:

"37. During the three years in which she has exercised her mandate, the Special Rapporteur has paid particular attention to the situation of migrant women domestic workers. She has given visibility to the situation of that sector in all forums in which she has participated, and has pointed out that in order to protect the rights of such workers it is essential that domestic work be recognized. She has emphasized the problem of the under recording of violations of the human rights of such women and the need to create accessible reporting and protection mechanisms for domestic workers. Violations of the human rights of domestic workers occur in

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<sup>70</sup> Special Rapporteur Gabriela Rodriguez Pizarro of Costa Rica, was appointed by the United Nations Commission on Human Rights on 6 August 1999, pursuant to Resolution 1999/44 passed at its fifty-fifth session.

<sup>71</sup> Adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa in September 2001. The follow up meeting is documented in UN HRI/MC/2002/Misc.4.

<sup>72</sup> U.N. G.A. Doc. A/57/292 (9 August 2002).

“private” and this makes it very difficult to report them or to speak of them with anyone since the boss or employer has absolute power. This is often made worse when the employer keeps the domestic worker’s documents as a means of coercion and pressure.

38. Fear, lack of documentation, the debt bondage to which they are subject in the country of origin in order to pay for the journey, lack of information in the country of origin, fear of being reported to the authorities by the employer and isolation, added to feelings of low self-esteem, cause women migrant workers to become very depressed and deny them access to basic worker’s rights.

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64. The Special Rapporteur draws attention to the feminization of migratory flows, the particular vulnerability of migrant women and the many forms of discrimination to which they are exposed, especially those engaged in domestic work.

...

78. In the case of domestic and other women workers, the Special Rapporteur recommends that States of origin should provide broad consular protection on a humanitarian basis, particularly for its more disadvantaged migrant nationals or those in irregular situations.”

While the Special Rapporteur has recognized and pointed out some important areas of concern in the situation of MDWs, the recommendation to “provide broad consular protection on a humanitarian basis” is very tokenistic and rather short-sighted. Without discounting the value of such a recommendation however, it is hoped that more long term and comprehensive policy directives be formulated that will effectively address the many complex issues involved.

## **2. Other United Nations and Intergovernmental Organizations**

Aside from the various initiatives of the Special Rapporteur on the Human Rights of Migrants, other United Nations bodies such as the Commission on Human Rights, the Commission on the Status of Women, the Office of the High Commissioner on Human Rights, the International Labor Organization, to name a few, have also expressed concerns regarding the plight of MDWs and have made various recommendations in United Nations official documents/reports.<sup>73</sup>

The above-mentioned reports mainly relate to various forms of abuse and exploitation committed against MDWs, from “trafficking of women and children,” to “bonded domestic labour,” to confiscation of passports by employers. As will be seen in later chapters, Filipina MDWs in Canada and Hong Kong may or may not experience these particular forms of abuse, but their plight nonetheless speaks of similarly unjust treatment.

Hence, it may be concluded that MDWs have not been completely excluded from the international human rights framework, at least not at the formal level. It is notable that attention seems to have even increased in the past few years, in a number of important human rights bodies and instrumentalities. Yet, much remains to be done. It is quite apparent that such attention has not led to substantial improvements in the lives

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<sup>73</sup> Please see UN Doc. A/54/342, “Violence Against Women Migrant Workers: Report of the Secretary-General” (10 September 1999); UN Doc.A/54/227, “1999 World Survey on the Role of Women in Development: Globalization, Gender and Work” (18 August 1999); Sub-commission on Human Rights Resolution Nos. 2000/19, 2001/14, 2002/27 “Report of the Working Group on Contemporary Forms of Slavery” (18 August 2000; 15 August 2001; 14 August 2002); A/57/134, “Protection of Migrants:

of the MDWs nor to greater and concerted efforts in the promotion and protection of their rights by the countries of employment or by their countries of origin.

It is therefore argued here that the type of exclusion that MDWs suffer from stems from the apparent lack of effective follow up mechanisms as well as clear and realistic standards by which to invoke human rights protection. The existing modes of protection as expressed in the various reports, recommendations, resolutions and surveys, are obviously inadequate to address the many complex facets of migrant domestic work. While admittedly a good way to start, these hortatory statements should move on to or help create more concrete and unambiguous standards that will not only bind states but individuals (whether employers, recruitment agents or migration and other government officials) as well. Hopefully, these will greatly assist in realizing the objective of upholding the human rights of MDWs.

#### **F. Country Case Study: Canada**

At this point, this dissertation will present a brief case study of how international human rights standards related to migrant workers are applied (or not applied) in domestic jurisdictions. The case study is aimed at helping us to understand the nature of the notorious exclusion of and widespread disadvantage suffered by MDWs vis-à-vis the current international human rights regime.

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Report of the Secretary General" (2 July 2002); E/CN.4/2002/WP.4 "Comments submitted by the International Labor Organization to the Commission on Human Rights" (19 March 2002).

It is well known that Canada has long taken pride in its role as a world leader in human rights protection and promotion. It is less well known however, that this country has consistently refused to ratify the Migrant Workers' Convention. In its latest official communication on the matter,<sup>74</sup> a government representative stated that, "Canada has decided not to become a party to the Convention because it does not reflect the Canadian situation." With apparent self-contradiction (since the statement precisely expresses what one would deem a reason to ratify the Convention), it added that,

"the vast majority of persons who would be considered as migrant workers under the definition of the Convention generally enter Canada as permanent residents...(who) enjoy similar legal rights and social benefits as Canadian citizens."

As to "temporary workers" given permits to stay and work in Canada for limited periods, "it would be inappropriate under existing Canadian laws to provide these temporary workers with rights such as the right to educational, housing and unemployment benefits, as suggested in the Convention."<sup>75</sup>

Nonetheless, the letter stated that,

"the human rights of migrants, whether in Canada temporarily or permanently, are protected in Canada under the Canadian Charter of Rights and Freedoms and by virtue of various international human rights instruments to which Canada is a party such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination."<sup>76</sup>

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<sup>74</sup> Letter of 9 April 2001 signed by C. Siminowski, Acting Director of the Human Rights, Humanitarian Affairs and International Women's Equality Division of the Department of Foreign Affairs and International Trade (DFAIT) in reply to P. Taran and M. de Feyter, Co-ordinators of the Global Campaign for the Ratification of the Convention on the Rights of Migrants.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

Lastly, the same letter asserts that the MWC “contains serious drafting flaws, including extra-territorial obligations, that States could not validly fulfil under existing international law.”<sup>77</sup> Sadly, the same letter failed to explain this assertion.

The above statements are from a later version of an earlier document obtained in 1997 via the Freedom of Information Act by the Canadian Council of Refugees.<sup>78</sup> The earlier document, dated April 1996, lists the following objections of the Canadian government to the MWC:<sup>79</sup>

1. Problems of migrants are not problems for Canada.
2. A migrant worker imprisoned would have to be told his or her rights and police would have to be trained in international human rights.
3. If a migrant worker was imprisoned, the Convention might make Canada responsible for the dependents – presumably healthcare, education and social assistance for a spouse and children.
4. The Convention provides a “right” to family reunion.
5. The Convention provision granting a migrant worker the “right to life” might exclude the possibility of capital punishment.
6. Canada would be examined by a treaty Committee and shortcomings could be a source of international embarrassment.

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<sup>77</sup> *Ibid.*

<sup>78</sup> Please see T. Clark “Why it Makes Sense for Canada to Reconsider Ratifying the Migrant Workers Convention” (1999) online: December 18 website <<http://www.december18.net/paper12CanadaConvention.htm>>.

<sup>79</sup> *Ibid.* at 2. The reasons were obtained through a request for information in 1997 under the Freedom of Information Act by the Canadian Council of Refugees. The request resulted in a correspondence (dated April 1996) from the Department of Foreign Affairs and International Trade (DFAIT).

Based on these responses, it is rather evident that the Canadian government is not really keen on providing the full range of basic human rights to migrant workers, nor is it at all interested in understanding the reasons why the Convention needs to be ratified. While the reasons adduced by Canada range in orientation from the fallacious to the dogmatic, the underlying apathy towards the plight of a most vulnerable sector within its society is most appalling. For, if it truly cares for and understands this sector, then its approach would be totally different from the current one. The path of mechanically invoking the Charter of Rights and Freedoms and other international human rights instruments to which Canada is a party in view of the many obstacles faced in obtaining remedies through these avenues, is almost as ineffective as ignoring this sector altogether.

Moreover, it is worth noting that the United Nations Special Rapporteur on the Rights of Migrants, shortly after her appointment, made her first official country visit to Canada. She visited Canada on September 17 to 30, 2000, and subsequently wrote a report outlining the observations gathered and recommendations given to the Canadian government. During her visit, made upon the invitation of the Canadian government, the Special Rapporteur not only met with government officials, but also took some time to discuss various issues with NGOs and migrant workers themselves.

In her report,<sup>80</sup> the Special Rapporteur documented some of the complaints of MDWs or live-in caregivers in Canada. These complaints included the employers' abuses concerning hours of work, living conditions and wages, as well as their inability

to invoke their rights for fear of being unable to find another employer or losing their chance at becoming permanent residents in Canada. In her conclusions, the Special Rapporteur “commended” the Canadian government for the LCP, which, she says, “clearly sets out the rights of persons concerned.” She quickly clarified this however by saying that despite the clarity of the program, unexpected situations occur which are not covered and which leave beneficiaries in a vulnerable position with respect to employers who do not abide by the rules. The Special Rapporteur then recommended “a well-targetted information campaign on the rights of these workers.” Lastly, the Special Rapporteur urged the Canadian government to ratify the Migrant Workers Convention.

The recommendation for an information campaign is consistent with the laments of many NGOs that the Canadian government “is not pro-active in providing the domestic workers with all the information they will need, letting it fall on the latter’s responsibility to find out for themselves.”<sup>81</sup>

The recommendation to ratify the MWC is much more problematic and continues to be unacceptable to the Canadian government. As earlier mentioned, among Canada’s objections to the Convention include the following: “Canada will be examined by a treaty committee and shortcomings could be a source of international embarrassment”; and that “many of the problems are not problems for Canada”.<sup>82</sup> On the surface, these

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<sup>80</sup> G. Rodriguez Pizarro, Report of the Special Rapporteur on the Human Rights of Migrants, submitted pursuant to resolution 1999/44 of the Commission on Human Rights: Visit to Canada, U.N. Doc. No. E/CN.4/2001/83/Add.1 (21 December 2000).

<sup>81</sup> P. Velasco, “‘We Can Still Fight Back’: Organizing Domestic Workers in Toronto” in Bakan and Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 2001) at 157.

<sup>82</sup> Similar to the Canadian Council for Refugees cited above, this official response was obtained by the Canada-Asia Working Group (CAWG) by using the Freedom of Information Act. The Canadian government’s responses were published in CAWG’s undated newsletter entitled, “Campaign for the

objections are clearly non-viable arguments for not ratifying an international human rights instrument that is meant to protect long suffering migrant workers worldwide. The subtext of these objections, however, is that Canada is not only overly-conscious of its international image, but that it also continues to turn a blind eye to the many problems facing its migrant workers (in general) and those who arrived here under the Live-in Caregiver Program (LCP) (in particular).

Recent developments have shown that Canada is nowhere near changing its mind in this regard. At the recently concluded 59<sup>th</sup> session of the UN Commission on Human Rights, Canada has reiterated its position that it does not need to ratify the MWC because its national migration policies concerning permanent residents are allegedly “much better.”<sup>83</sup>

It is indeed very disappointing that the Canadian government continues to refuse performing even the symbolic act of ratifying an international instrument as the MWC. While it is well-known that these human rights treaties are often not implemented or clearly ignored in some jurisdictions, the more disturbing aspect is that Canada’s act of non-ratification only reinforces, instead of alleviates, the exclusionary tendencies of governments and societies.<sup>84</sup>

This seeming act of antipathy likewise feeds the perception, at least in the area of MDWs’ rights, that:

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Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families” (released September 2000).

<sup>83</sup> G. Gencianos, “Migrant Rights International (MRI) Report on Highlights of the 59<sup>th</sup> Session of the Commission on Human Rights re: Migrants” (MRI: Geneva) E-mail of 7 May 2003.

<sup>84</sup> Please see for e.g., S. Castles and A. Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (New York: Routledge, 2000) at 1-15.

The anomalous features of the foreign domestic program do not mean that it is a racist and sexist policy in contrast to other Canadian policy areas that are impartial, fair and universal. Rather, it is anomalous only in the degree of its transparency, revealing ideological and institutionalized processes that are normally hidden.<sup>85</sup>

Moreover, Canada's reasons for refusing to ratify the MWC express a lack of inclination to taking a "multiple normative relations" approach to human rights protection as explained by Scott in the context of the European Court of Human Rights' interpretation of the migrant workers' right to adequate housing.<sup>86</sup>

This likewise seems incongruous to the fact that Canada has been a party to virtually every human rights treaty in existence. After all, the MWC is simply a "particularization" of universal rights already enunciated in earlier treaties it has ratified such as the ICCPR<sup>87</sup>, ICESCR<sup>88</sup>, CRC<sup>89</sup> and CEDAW<sup>90</sup>. It should thus be a matter of formality that Canada ratify the MWC. However, the apprehension over unduly granting rights to "irregular" migrants is a sad manifestation of Canada's apparently shallow commitment to the human rights of aliens, despite its perennial and vocal claims to the contrary.

And considering its highly-touted "family reunification" objectives, a similar conclusion as that reached by the Committee of Independent Experts in applying the

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<sup>85</sup> A. Bakan and D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 39.

<sup>86</sup> C. Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'" (1999) 21 *Human Rights Quarterly* 633 at 656-659.

<sup>87</sup> International Covenant on Civil and Political Rights, 1966, U.N.G.A. Res. 2200A (XXI), entered into force 23 March 1976.

<sup>88</sup> International Covenant on Economic, Social and Cultural Rights, 1966, U.N.G.A. Res. 2200A (XXI) entered into force 3 January 1976.

<sup>89</sup> Convention on the Rights of the Child, 1989. U.N.G.A. Res. 44/25, entered into force 2 September 1990.

relevant European Social Charter provisions is not difficult to reach in the context of Canada. For, if it is truly sincere in its multi-pronged immigration objectives of “family reunification” as well as promoting adequate socio-economic welfare for its population, a simple act of ratifying the Convention will be a highly symbolic illustration of such noble intentions.

Thus, the prevailing attitude of a country of employment such as Canada towards an international human rights instrument for migrant workers in general leaves the more specific group of MDWs in an even more precarious situation. As will be discussed in greater detail in the next chapter, the federal Live-in Caregiver Program is a clear manifestation not only of the country of employment’s lackadaisical attitude towards MDWs’ rights, but also of the MDWs’ vulnerability in many respects.

## **G. Filipina Migrant Domestic Workers and Human Rights: An Illusion?**

International human rights guarantees currently appear meaningless to most Filipina MDWs who routinely endure violations of their basic rights in exchange for the promise of the economic upliftment for themselves and their families. (Unfortunately for many, such promise usually ends up to be superficial and fleeting.) Whether in the context of national sovereignty or of intensifying globalization, migrant workers face formidable barriers in their drive to have their human rights fully recognized and upheld. In the specific case of Filipina MDWs in Canada, this struggle has been weakened by the

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<sup>90</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1979, U.N.G.A. Res.

prevailing sentiment that international campaigns for the advancement of the rights of MDWs seem very taxing yet futile as progress is slow and concrete individual cases are often not fought, much less won, at the international level.

While the efforts aimed at protecting the rights of migrant workers at the international level provide some encouragement, the reality of their situation still leaves much to be desired. MDWs in particular become very much prone to abuse and exploitation not only due to their peculiar conditions, i.e. working usually alone and in the “privacy” of their employers’ homes, but more importantly due to the country of employment’s tendency to prioritize its socio-economic and political interests over the welfare of those deemed “outsiders” such as the MDWs.

Debates surrounding the nature and various implications of international human rights law and third world approaches to international legal scholarship, all point to the economic interests of states as a major factor that shapes their willingness to respect and promote the human rights of specific sectors of their population such as MDWs.

For instance, the specific responses of the Canadian government with respect to the Migrant Workers Convention reveal an attempt to protect its economic “interests” in exploiting the cheap labour of these workers. Even if the lack of economic means and similar arguments are put forward to justify the “progressive realization of certain rights”, this does not render impossible their recognition and promotion. The example of the way that the ECHR creatively linked the implementation of the right to adequate housing

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34/180, entered into force 3 September 1981.

with the right to family reunification, shows that the full protection of the rights of MDWs is possible if only there is political will to do so.

To reiterate, this is not to assert that the ratification of the MWC is a panacea to the woes of migrant workers in general and MDWs in particular. However, ratification would definitely be a significant step towards the right direction. Thus, some elements of the existing international human rights system such as the MWC may provide a useful framework through which the human dignity of every migrant worker, whether a domestic or farmworker, student or seafarer, can be respected and promoted. It could also provide a valuable resource to pressure countries of employment for more just conditions for migrant workers. Thus, while the international system is notorious for churning out tomes of reports, documents, treaties, recommendations, conclusions, etc., it is high time that attention be given to the way that these texts actually affect the human beings they are meant to benefit.

Although states have long been, and do remain, the major subjects of international law, with the advent of human rights law, the individual is now entitled to fair treatment and attention both at the national and international levels. However, as the drafting history of the MWC shows, the interests of individuals are still overshadowed by the presumed political and economic agenda of the states that negotiate these instruments at the international level. From total indifference to subtle acts of evasion or refusal, the effects of such state behaviour is to prejudice the human rights and dignity of individual victims.

From a TWAIL perspective, some strengths of the MWC would include the fact that it is the first international instrument that consolidated the specific rights of migrant workers most of which are already contained in other international human rights instruments. Moreover, it expanded the grounds for non-discrimination to include, “conviction...ethnic origin...nationality, age, economic position...marital status”.<sup>91</sup> Another strength is the express inclusion of members of migrant workers’ families within the protection of the MWC. Likewise, the MWC recognizes not only the difficult situation faced by undocumented migrant workers, but also their entitlement to certain fundamental rights regardless of their status in the country of employment. However, these strengths are accompanied by a number of weaknesses that were reflected from the drafting stage to the ratification process, mainly due to the vastly differing interests of the states of origin and states of employment. For instance, the interest of states of employments in preserving their sovereign right over people coming in to work in their territories often resulted in the neglect of or direct refusal to recognize some significant rights of the individual migrant workers. On the other hand, the interest of states of origin to secure employment opportunities for its migrant workers abroad, often resulted in its general ineffectiveness as advocates for their migrant workers’ rights.

Some specific provisions illustrating these shortcomings include the limited (excluding refugees, students, seafarers, etc.)<sup>92</sup> and qualified (hierarchy of rights among documented and undocumented migrants)<sup>93</sup> definition of migrant workers. The voluntary nature of treaty ratification also results in the frustrating reality that only countries of

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<sup>91</sup> MWC, Articles 1 and 7.

origin (and not a single major country of employment) have in fact ratified and acceded to the MWC. If countries of employment of the migrant workers refuse to perform the simple act of ratifying this instrument supposedly meant to uphold migrant workers' rights, then one can hardly expect these countries to actively promote the rights and welfare of a severely disadvantaged sector as the migrant workers. Consequently, the colonial-type extractive relationship between the countries of origin and employment that the TWAIL argument purports, is thus affirmed in the problematic process that an international human rights instrument such as the MWC had gone through and continues to face.

The international human rights system, as exemplified by the MWC, is thus a stark illustration of the ways in which global economic, social and political forces function to advance the self-centered interests of wealthy states in the so-called developed or first world. Meanwhile, Filipina MDWs continue to straddle the boundaries of being peddled as “labour export” by their home country on the one hand, and being treated as “cheap labour” by their respective countries of employment on the other. Having been situated in this transnational context, the application of international human rights standards to MDWs becomes an enormous challenge for all concerned.

In the succeeding chapters, the Canadian and Hong Kong MDW programs will be analyzed in order to offer concrete evidence of the nature of the poor human rights performance of countries of employment with respect to MDWs.

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<sup>92</sup> MWC, Article 3.

<sup>93</sup> MWC, Articles 5 and 36-56 (listing rights for documented workers only).

## **Chapter 4**

### ***“Good Enough to Work, Good Enough to Stay”<sup>1</sup>? Canada’s Live-in Caregiver Program and Its Questionable Features***

#### **A. Canada and Migration: A Brief Overview**

Canada ranks high among the few western countries that are viewed as “receptive” of migrants. This is partly due to its relatively large influx of immigrants in the business, skilled worker and family sponsorship categories, and partly due to the admission of a relatively large number of persons under its temporary work programs. The newly enacted Canadian Immigration and Refugee Protection Act<sup>2</sup> enumerates the country’s immigration policy objectives – the basis on which the admission of immigrants is founded. These objectives range from pursuing the “maximum social, cultural and economic benefits of immigration”<sup>3</sup> to respecting the “federal, bilingual and multicultural character of Canada.”<sup>4</sup> They also include the promotion of “family

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<sup>1</sup> Borrowed from the slogan that migrant domestic workers (MDWs) in Canada have used, when campaigning for changes to the Live-in Caregiver Program. Please see A. Macklin, “On the Inside Looking In: Foreign Domestic Workers in Canada” in W. Giles and S. Arat-Koc, eds., *Maid in the Market: Women’s Paid Domestic Labour* (Halifax: Fernwood Publishing, 1994) c. 1 at 17; and J. Fudge, “Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario” in A. Bakan and D. Stasiulis, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) c.4 at 125.

<sup>2</sup> “An Act Respecting Immigration to Canada and the Granting of Refugee Protection to Persons Who are Displaced, Persecuted or in Danger” known as Bill C-11 or the “Immigration and Refugee Protection Act (IRPA)” assented to on 1 November 2001, Statutes of Canada 2001, Chapter 27. The law and selected regulations took effect on 28 June 2002.

<sup>3</sup> Section 3 (1)(a), IRPA.

<sup>4</sup> Section 3 (1)(b), IRPA.

reunification,”<sup>5</sup> as well as maintaining “the health and safety of Canadians” and the “security of Canadian society.”<sup>6</sup>

As some scholars have reported, about 14.9 million immigrants were added to Canada’s population in the last 145 years.<sup>7</sup> An estimated 1.2 million of these immigrants came between 1992-1997, two-thirds of whom are from Asia.<sup>8</sup> Official data from Citizenship and Immigration Canada (CIC) show that immigration reached its peak in the early 1900s (between 1910 and 1920) when some 400,000 individuals were admitted into Canada. Meanwhile, the average annual intake during the 1990s was somewhere between 200,000 and 250,000.<sup>9</sup> The same source also reported that in recent years, most immigrants to Canada came from Asia and the Pacific.<sup>10</sup> Canada has likewise seen a consistent growth in the number of temporary residents consisting of refugee claimants, foreign students, and temporary workers.<sup>11</sup>

While Canada’s immigration policies and their implementation processes are interesting subjects of discussion, this particular research project is limited to Citizenship and Immigration Canada’s *Live-in Caregiver Program* (LCP). The reasons for this are:

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<sup>5</sup> Section 3 (1)(d), IRPA.

<sup>6</sup> Section 3 (1)(h), IRPA. It is interesting to note that unlike the old *Immigration and Refugee Protection Act* which had only one set of general objectives under Section 3, the new one provides separate set of objectives for immigration and for refugees (Section 3(1) and 3(2) respectively of IRPA). Two common objectives are noticeably present in both sets however: first, “to protect the health and safety of Canadians and to maintain the security of Canadian society”; and second, “to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are (add “serious” for refugee objectives) criminals or security risks”.

<sup>7</sup> From the time Statistics Canada started publishing records, in 1852, to 1997. As cited in A. Laquian and E. Laquian, “Asian Immigration and Racism in Canada – A Search for Policy Options” in E. Laquian, A. Laquian and T. McGee, eds., *The Silent Debate: Asian Immigration and Racism in Canada* (Vancouver, B.C.: Institute of Asian Research, Univ. of British Columbia, 1998) at 3.

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

<sup>9</sup> Please see CIC Facts and Figures at <http://www.cic.gc.ca>. Selected graphs and statistical data are attached hereto as Annexes “E” to K”.

<sup>10</sup> *Ibid.*

first, the LCP can be viewed as a notable microcosm of the many perceived inadequacies and anomalies faced by MDWs at the global level; second, the LCP’s history speaks of a record of racialized and exploitative treatment towards women coming from developing countries in the Caribbean, and more recently, from the Philippines as well.<sup>12</sup>

## B. The Live-in Caregiver Program (LCP)

Formerly known as the Foreign Domestic Movement (FDM), the LCP is a modified form of the latter immigration program. It came into force on April 27, 1992.<sup>13</sup> This program was introduced into Canada’s immigration policy to fill the acute shortage of domestic workers in Canada and to provide child care alternatives for more well-off Canadian families.<sup>14</sup> Under the LCP, a “live-in caregiver” is deemed to be “a person who provides child care, senior home support care or care of the disabled without supervision in a private household in Canada in which the person resides.”<sup>15</sup> However, most of these caregivers or migrant domestic workers (MDWs) are also required by their

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<sup>11</sup> *Ibid.*

<sup>12</sup> For a more detailed account of the history of the Live-in Caregiver Program (LCP) and other related issues, please see A. Bakan and D. Stasiulis, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997); S. Arat-Koc, “Immigration Policies, Migrant Domestic Workers and the Definition of Citizenship in Canada” in V. Satzewich, ed., *Deconstructing a Nation: Immigration, Multiculturalism and Racism in the '90s Canada* (Halifax: Fernwood Publishing, 1992); A. Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37 McGill L.J. 681; N. Grandea, *Uneven Gains: Filipina Domestic Workers in Canada* (The Philippines-Canada Human Resource Program and The North-South Institute, 1996).

<sup>13</sup> Macklin (1994) *supra* at 18-26.

<sup>14</sup> Bakan and Stasiulis, *supra* at 41.

<sup>15</sup> *Immigration and Refugee Protection Act (IRPA) Regulations*, SOR/2002-227, s. 97.

employers to perform various types of household chores such as cleaning, cooking, washing, shovelling snow, etc.<sup>16</sup>

Successful applicants to the LCP receive an employment authorization which specifies the name of the employer and the period of employment covered. If they complete two years of employment within three years of arrival in Canada, LCP participants can thereafter apply for permanent resident status.

To qualify under the LCP, the applicant must first satisfy three basic requirements: 1) education, 2) training and experience, and 3) language skills. The educational level required is that equivalent to successful completion of Canadian secondary school.<sup>17</sup> This requirement is meant to allow the applicant to be competitive in the general labour market once the caregiving period is over. However, doubts have been raised whether this requirement will fulfil its avowed objective since foreign (i.e. “from non-Western universities”) educational attainments are hardly recognized or are “frequently discounted” in the Canadian job market anyway.<sup>18</sup> The fact that most former MDWs continue to perform domestic work (both live-in and live-out) even after they have become landed immigrants is highly instructive in this regard.<sup>19</sup>

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<sup>16</sup> S. Arat-Koc, *Caregivers Break the Silence: A Participatory Action Research on the Abuse and Violence, Including the Impact of Family Separation Experienced by Women in the Live-in Caregiver Program* (Toronto: INTERCEDE, 2001) at 36-57.

<sup>17</sup> IRPA Regulations, *supra*, s. 112 (b).

<sup>18</sup> R. Ng & A. Estable, “Immigrant Women in the Labour Force: An Overview of Present Knowledge and Research Gaps” (1987)16:1 Resources for Feminist Research 29 at 30-31.

<sup>19</sup> C. Diaz, Counsellor, *Intercede*, Interview on 21 December 2000, Toronto, Ontario, Canada.

The training/experience requirement is that applicants must have completed “six months of full-time training in a classroom setting.”<sup>20</sup> As an alternative, they may show that they have completed

“one year of full-time paid employment, including at least six months of continuous employment with one employer, in that field or occupation within the three years immediately prior to the day on which they submit an application for a work permit.”<sup>21</sup>

It must be noted that the required “one year full-time paid employment” in lieu of the six months full-time training requirement was only introduced a year after LCP was created, and only after MDWs’ organizations<sup>22</sup> lobbied for it.<sup>23</sup>

The language requirement is such that the applicant is expected to speak, read and write in either English or French “at a level sufficient to communicate effectively in an unsupervised setting.”<sup>24</sup> Knowledge of the English language is expected to enable them to contact doctors, firefighters or police in emergency situations.

Once admitted, the MDW and the employer sign an employment agreement outlining the general terms and conditions of employment. However, monitoring of the employer’s compliance with the terms of the agreement is lacking, or even nonexistent. It had also been admitted that “the enforceability of the employer-employee agreement has

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<sup>20</sup> *IRPA Regulations, supra.*, s. 112 (c) (i).

<sup>21</sup> *Ibid.*, s. 112 (c) (ii).

<sup>22</sup> One of these organizations was “INTERCEDE for the Rights of Domestic Workers, Caregivers and Newcomers,” a non-governmental organization based in Toronto which advocates for issues on behalf of migrant domestic workers, immigrant newcomers and their families.

<sup>23</sup> All other proposed changes such as the removal of the live-in requirement, monitoring of employers’ compliance with employment contracts, and equal treatment with other skilled immigrants to Canada, were largely ignored hence still the subject of continuous lobbying efforts.

<sup>24</sup> *IRPA Regulations, supra* s. 112 (d).

never been the subject of a court challenge.”<sup>25</sup> Moreover, although it is within the government’s power to deny future requests from an employer to hire a MDW if the latter has been found violating the agreement, the government has never done so.<sup>26</sup> In a recent query addressed to a CIC official, its position was clarified as follows:

“While a signed employment contract is a legal requirement of the LCP, and is intended to provide the fairest working arrangement possible for both the caregiver and the employer, the Government of Canada is not a party to the contract. We have no authority to intervene in the relationship between the employer and the caregiver, or to enforce the conditions of employment.”<sup>27</sup>

On the other hand, when the MDWs have been found violating any of the terms of their employment contract, or any of the LCP conditions, the threat of deportation will soon follow. Experience of some MDWs has shown that the deportation proceedings are often executed by the CIC without delay. Some of the well publicized cases in which MDWs would have met this fate if not for the intervention of advocacy groups include those concerning Leticia Cables<sup>28</sup> and Melcah Salvador.<sup>29</sup> And while the employment agreement is itself administered by the federal government, the labour standards that apply to the treatment of MDWs are regulated by the provincial governments. Thus,

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<sup>25</sup> Please see Macklin, *supra* (1992) at 723, citing an interview with Barbara Stewart, Canada and Employment Commission (Policy Branch) 2 May 1991. Although the interview may be a bit dated, this claim still holds true. As of July 2003, there was no listed case in the federal or provincial courts challenging the enforceability of the LCP employment agreement.

<sup>26</sup> *Ibid.* This was somehow confirmed by T. De Kir, Program Specialist, Citizenship and Immigration Canada Social Policy Programs, Ottawa, Ontario, Canada in an e-mail dated 2 September 2003 (copy on file with the author).

<sup>27</sup> T. De Kir, *supra*.

<sup>28</sup> News stories on Leticia Cables’ case were published in national dailies: “Nanny Loses Battle to Live in Canada” *The Globe and Mail* (14 February 2000); “Hardworking Nanny Wins Reprieve” *The Globe and Mail* (27 December 1999); “Nanny Faces Deportation for Doing Too Many Jobs” *The Globe and Mail* (20 July 1999); and “Hardworking Filipino Nanny to be Deported” *The National Post* (14 February 2000).

<sup>29</sup> Melca Salvador’s story and campaign updates can be found online:  
<<http://page.infinit.net/ugay/melcah.htm>>.

labour standards may vary from one province to another. MDWs who are new to the Canadian system are therefore forced to undertake the daunting task of weaving through a highly confusing web of legal rules and regulations to assert their rights. Understandably, this can often lead to the denial of, or practical absence of effective means of enforcing the rights of these MDWs.

Hence, the LCP does not only perpetuate the disturbing anomaly arising from the gender, race and class divisions inherent in domestic work; it also does not provide for the adequate monitoring and regulation of the terms of employer-employee contracts.

### C. Filipinas in the LCP: Diasporic Trends or Institutional Racialization?

Currently, nearly 80% of the entrants to the Live-in Caregiver Program (LCP) come from the Philippines.<sup>30</sup> Thus, this dissertation will mainly deal with the experiences of Filipina MDWs whose lives portray the disadvantaged position that

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<sup>30</sup> Official data obtained from Brian Johnson of *Citizenship and Immigration Canada* (CIC) showed the following rates of entrants into the Live-in Caregiver Program (employment authorization) originating from the Philippines: 1996 – 76.51%; 1997 – 77.82%; 1998 – 79.87%; 1999 – 79.35%; 2000 – 76.35% (data received on 25 May 2001). For more recent statistics and graphs covering the years 2000-2002, please see CIC Facts and Figures in Annexes “E” to “K”.

Previously, 74.6% of those admitted on a temporary work permit under the LCP for 1995 list the Philippines as the “source country”. The term “source country” however, may either refer to the country of citizenship and/or the country of last permanent residence (CLPR). The importance of making this distinction should be carefully noted especially in the case of Filipinas, most of whom initially worked as domestic helpers in Hong Kong, Singapore, the Middle East or Europe, before coming to Canada, hence may list any of those places as their CLPR. Please see N. Grandea, *Uneven Gains: Filipina Domestic Workers in Canada* (The Philippines-Canada Human Resource Program and The North-South Institute, 1996).

MDWs in Canada are placed in because of the intersection of their gender, race and class.<sup>31</sup>

Canada's controversial LCP is the primary means by which Filipina MDWs come to Canada. Through this program, mostly university-educated Filipinas<sup>32</sup> apply for work authorizations to perform live-in domestic service in Canadian households for at least two years. The LCP provides for the maintenance of certain basic standards such as the payment of a minimum wage, the prior signing of an employment contract that outlines the terms of the employment, and the provision of pension and healthcare benefits. If they satisfy the two year live-in work requirement as well as other eligibility criteria for independent immigration, the MDWs may be admitted as permanent residents in Canada. As permanent residents, these MDWs are presumably free to choose work in fields other than the domestic or caregiving sector. There is a growing realization however, that a substantial number of Filipina MDWs that are eventually admitted as permanent residents

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<sup>31</sup> For more extensive discussions on "intersectionality", please see generally, C. Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'" (1999) 21 Human Rights Quarterly 633 at 654-55; K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) Univ. of Chicago Legal Forum 139; and N. Teo and M. Visnjic, "Domestic Workers: Indentured Laborers at the Intersection of Gender, Race, Class and Immigration Status" (1997) paper submitted for Intensive Programme in Poverty Law, Osgoode Hall Law School, York University (copy on file with the author).

<sup>32</sup> To prove educational attainment, please see Citizenship and Immigration Canada (CIC) Facts and Figures covering the years 2000-2002 in Annexes "E" to "H". The graphs indicating educational attainment clearly show that majority (approximately 55%) of LCP permanent residents have trade certificates, diploma and/or university degrees. Although lumped under the category of "other classes", LCP applicants and their dependents comprise approximately 90% of those falling under this category.

Moreover, while not providing exact numbers to substantiate this claim, there had been academic authors who have stated that "very few women who do not have a college education are accepted for the program [LCP]." And that "immigrant Filipinos, men and women, are more likely to have a university degree (29 percent do) than native-born Canadians." Please see D. McKay, "Filipinas in Canada – Deskilling as a Push Toward Marriage" in N. Piper and M. Roces, eds. *Wife or Worker? Asian Women and Migration* (New York: Rowman and Littlefield, 2003) c. 2 at 27, 32 (also citing statistics from Citizenship and Immigration Canada).

in Canada remain in the caregiving or domestic sector.<sup>33</sup> They do so for a number of reasons. What stands out among these reasons is the often-encountered demand for prior “Canadian experience” in the new field which they want to pursue. What is more, their skills, academic credentials, and experience are hardly ever recognized on the basis that these were acquired in their country of origin and not in Canada.<sup>34</sup> Hence, many MDWs do not anymore feel motivated enough to go through the “upgrading” procedures which are seen as difficult, costly and time-consuming.<sup>35</sup>

Furthermore, it has been documented that the British and other European MDWs who came in the early years of Canada’s domestic worker programs were immediately granted landed immigrant status upon entry to Canada. However, this immigration policy became more restrictive upon the influx of non-white women who were admitted to work as migrant domestics in Canada.<sup>36</sup> This served as the precursor to the overt and covert racist attitudes towards the current stream of MDWs who mostly hail from “third world ” countries, such as the Philippines.<sup>37</sup> These are also some of the issues that are often ignored in the superficial pronouncements that are often made regarding the supposed benefits of Canada’s LCP.<sup>38</sup>

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<sup>33</sup> C. Diaz, Counselor, INTERCEDE for the Rights of Domestic Workers, Caregivers and Newcomers. Interview (Toronto, December 2000). While there is no existing systematic study to provide exact rates of those remaining in domestic or caregiving work, INTERCEDE’s wide network of former MDWs has led Ms. Diaz and other advocates to this conclusion.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> For a more comprehensive discussion of the history of the LCP and its predecessor programs, please see S. Arat-Koc, “From ‘Mothers of the Nation’ to Migrant Workers” and P. Daenzer, “An Affair Between Nations” in A. Bakan & D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 53-79 and 81-118 respectively.

<sup>37</sup> Please see CIC Facts and Figures covering the years 2000-2002 in Annexes “E” to “H”.

<sup>38</sup> *Ibid.*

The various critiques of the LCP, the feminist debates about the undervaluing of paid and unpaid domestic work, and the historical and policy context in which the LCP and prior MDW programs had been implemented, reveal a double standard in human rights promotion and protection in Canada. For, while it cannot be denied that Canada is conscious of its responsibility in upholding international human rights standards,<sup>39</sup> it is becoming evident that it is unable to guarantee adequate protection for all. This is clearly exemplified by the experience of Filipina MDWs coming in under the LCP.

Moreso, the Filipina MDWs' situation illustrates the fact that the very labour migration policies of a country of employment such as Canada that attract these MDWs are primarily driven by the perceived self-interest of such countries of employment. These interests include the economic and labour market needs unmet by the local population, such as those for jobs deemed "dirty, difficult and dangerous" where domestic or household work is often classified.

Thus, the failure of the international human rights regime to adequately address the multiple disadvantage of Filipina MDWs may partly be attributed not only to the diametrically opposed interests of states of origin and states of employment but also to the clear disparity in power at various levels. The diasporic trends that seem to be manifested by Filipinas entering Canada under the LCP do not seem to be hindered by the institutional racialization that they continue to face. Both processes coincide and almost conspire to produce an inherently exploitative situation where employers who are

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<sup>39</sup> A brief and general statement on Human Rights and Canada's Foreign Policy can be found online: Department of Foreign Affairs and International Trade (DFAIT) website <<http://www.dfaid-maeci.gc.ca/human-rights/fopol-e.asp>>. It states, among others, that "Canada is

citizens of rich states are meeting their needs at the expense of MDWs and their families.

#### **D. Working Towards a Common Good: A Closer Look at Some NGOs in Toronto Assisting MDWs**

The discussion that follows deals with some of the dynamic and growing number of organizations which were created to assist not only MDWs but also newcomers facing difficulties in adjusting to a new life in Canada. Their invaluable services have proven vital not only in ensuring survival, but also in maintaining the dignity and self-worth of those who are often in the brink of losing all hope. A look at their work is an important way of capturing the full reality of the experiences of MDWs under the LCP. But in addition to the realities faced by Filipina MDWs as seen from the eyes of the non-governmental organizations (NGOs) that assist them, other systemic factors which overlap with and further complicate their existing situation, are discussed in other parts of this dissertation.

Among the many NGOs which had been advocating for the rights of MDWs, a group called INTERCEDE has now established a strong and influential presence. The organization started as a lobby group for domestic workers<sup>40</sup> but later expanded. The expanded group came to be known as “INTERCEDE for the Rights of Domestic Workers, Caregivers and Newcomers”. Due to its origins, a great majority of its clients

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recognized as a world leader in building international institutions for the advancement of human rights, and the government is committed to enhancing that leadership.”

<sup>40</sup> INTERCEDE initially stood for “International Coalition to End Domestics’ Exploitation”. In Diaz, *supra*.

are live-in caregivers / MDWs and members of their families.<sup>41</sup>

INTERCEDE offers client services, conducts education and training activities, as well as organizes advocacy campaigns. While the organization is open to people of any gender, ethnicity, class or legal status, 87% of its clients are from the Philippines.<sup>42</sup> Of this number, about 85% have temporary status.<sup>43</sup> The services rendered include immigration-related matters involving the extension of temporary work permits, applying for permanent residence and sponsoring family members and labour-related problems. The labour problems include matters involving wages and wage calculation, tax and other deductions, vacation and overtime pay, and finding a new employer. INTERCEDE also assists in social service-related issues such as housing, health and OHIP coverage, education and upgrading.<sup>44</sup> Through its education and training component, INTERCEDE holds regular monthly meetings and workshops on various issues relating to the MDWs' situation (e.g. child care skills, financial management, violence against women, human rights, family reunification, immigration and citizenship laws). Likewise, INTERCEDE continuously networks with other organizations and government agencies to lobby for human rights, immigration, labour, and other issues. Through the years, INTERCEDE counselors have developed some expertise in issues commonly raised by the MDWs. As such, they provide advice on various matters to MDWs or refer them to proper agencies or volunteer lawyers. INTERCEDE has also directly advocated for MDWs whose immigrant applications may have been denied. In

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<sup>41</sup> INTERCEDE for the Rights of Domestic Workers, Caregivers and Newcomers. Report to Members at Intercede Annual General Meeting - covering the period April 1999 to March 2000 (Toronto, 2000).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid* and Diaz, *supra*.

this regard, INTERCEDE either assists in seeking for a reconsideration of the application or helps draft a new application based on humanitarian and compassionate grounds.<sup>45</sup>

Pura Velasco, who was a former domestic worker and first Filipina president of INTERCEDE in the early 1990s, is now actively involved with an organization called Migrante<sup>46</sup> Women’s Collective (hereafter, “Migrante WC”). Formerly known as the Coalition for the Defense of Migrant Workers’ Rights, this organization evolved from a group of organizations that included the United Filipino Mothers; Caregivers’ Cooperative; Katipunan ng Manggagawang Kababaihan (Coalition of Female Workers); and a number of others. Since they found it difficult to sustain a coalition of organizations with varying objectives, Velasco and her colleagues decided to form Migrante WC into an independent organization of individuals. Unlike INTERCEDE which obtains most of its funding from the Immigrant Settlement Assistance Program (ISAP) of CIC, Migrante WC is relying purely on the volunteer services of its members and the occasional logistical support from a worldwide organization of OFWs called Migrante International. The mandate of Migrante WC is to defend the rights and welfare of OFWs and those from other ethnic groups or nationalities. However, 99% of its membership still remains Filipina. Among its LCP-related campaigns are the removal of the \$975 landing fee for MDWs, the scrapping of the live-in requirement, and/or the initial admission of all MDWs as permanent residents.<sup>47</sup> They have also assisted

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> “Migrante” is the Filipino translation for “migrant”.

<sup>47</sup> It is recognized that these two proposals (scrapping of live-in requirement and grant of permanent resident status) go together since permanent residents in Canada are generally not restricted in their choice of jobs or working conditions.

domestic workers who are already permanent residents but who continuously become victimized by various forms of exploitation and abuse.<sup>48</sup>

While its campaigns to reform the LCP form an important priority for Migrante WC, the organization also regularly conducts education, training and advocacy campaigns on other related issues such as women's rights.

Gene Lara, who was formerly with INTERCEDE, later became actively involved with the Our Lady of Lourdes Parish Social Ministry, where she acts as a community outreach worker. The ministry was created in the year 2000 to take care of social justice issues within the parish community, particularly St. James Town. St. James Town is deemed to be the most densely populated area in Toronto,<sup>49</sup> if not in the entire North America.<sup>50</sup> Since this is a parish community outreach program open to all regardless of gender, religion, age, ethnicity or legal status, Lara's organizing is neither limited to MDWs nor to Filipinas. Nonetheless, she maintains that a great majority of their clients are Filipino immigrant families many of whose mothers or sisters came to Canada through the LCP. Although the parish also conducts advocacy campaigns and provides individual services, it inculcates a spiritual dimension in their services. Since in her view, most of the depression that arises from family separation and the live-in requirement "is aggravated by the lack of a spiritual anchor," Lara's ministry also tries to

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<sup>48</sup> Interview with P. Velasco, Organizer, Migrante Women's Collective, Toronto (16 February 2001).

<sup>49</sup> It has been pointed out that the 18 high-rise buildings at St. James Town house from 30,000 to 35,000 people. In F. Dunleavy, "St. James Town woefully neglected by city" Letters to the Editor, *The Toronto Star* (20 April 2001).

<sup>50</sup> G. Lara, Community Outreach Worker, Our Lady of Lourdes Parish Social Ministry. Interview (Toronto, 13 February 2001).

help them in this regard.<sup>51</sup>

Another organization assisting FMDWs is the Philippine Women's Center of Ontario (PWC Ontario) which was formalized in October 2000. It is closely-affiliated with the Philippine Women's Center in British Columbia which was conceived in 1986 and formally launched in 1990.<sup>52</sup> Among the initial activities of this organization was a series of film showing and discussion sessions on the plight of Filipina MDWs in Canada. Another major activity was the joint launching of the "Purple Rose Campaign" and the publication entitled, *Canada: The New Frontier for Filipino Mail-Order Brides*.<sup>53</sup> The "Purple Rose Campaign" is an international campaign to end all forms of trafficking of Filipino women, including the mail-order bride phenomenon increasingly spreading throughout Canada. The LCP was mentioned in these campaigns as one of the means through which Filipinas are recruited to come to Canada but who eventually end up marrying their male employers (for the perceived economic security) or being trafficked into the "mail-order bride business".<sup>54</sup>

While PWC Ontario intentionally limits its mandate to Filipina women and their various concerns, there is an open recognition that these issues are vitally linked to historical antecedents and present global developments. The organization wishes to highlight the collective reality of Filipinas in Canada in an attempt to change the situation

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<sup>51</sup> *Ibid.*

<sup>52</sup> The organizational profile of the Philippine Women's Center can be viewed at <<http://pwc.bc.tripod.com/aboutpwc.htm>>

<sup>53</sup> Philippine Women's Center (PWC) (Ottawa: Status of Women Canada, 2000). A copy of the article, *Canada: The New Frontier for Filipino Mail Order Brides* is also available online: Status of Women Canada website <[http://www.swc-cfc.gc.ca/pubs/0662653343/200011\\_0662653343\\_2\\_e.html](http://www.swc-cfc.gc.ca/pubs/0662653343/200011_0662653343_2_e.html)>.

<sup>54</sup> PWC, *supra*. The "mail order bride" phenomenon basically involves the recruitment of women from third world countries like the Philippines to meet the demand of western men for "submissive" and "industrious" wives.

whereby despite being considered to be among the most highly-educated and highly-skilled immigrants to Canada, Filipinas are still among the lowest paid, and often left to do the “dirty, dangerous and difficult jobs.”<sup>55</sup> It also points to the “deskilling” of Filipinas that results from their being confined to domestic work by the institutional prejudice in Canada against foreign credentials.<sup>56</sup>

Most recently, an organization called National Alliance of Philippine Women in Canada (NAPWC) was formed in March 2002 and has member organizations in five major cities.<sup>57</sup> It acts as a coordinator of education and advocacy activities across the provinces in Canada. The NAPWC presently focuses on four priority issues, namely, the LCP (which it considers as “racist and anti-woman”); the deskilling and exploitation of Filipino nurses performing domestic work; the trafficking of Filipinas as mail-order brides and prostitutes; and violence against women in all forms.<sup>58</sup> In June 2003, representatives of the organization met with MP Jean Augustine to voice their concerns, foremost of which are the:

- “- negative impact of over 20 years of the Foreign Domestic Movement (FDM) and the LCP on the human rights and equality of the Filipino women in Canada;
- failure of Canada (particularly CIC) to critically review the LCP; and
- need for Status of Women Canada to take a leadership role in facilitating this review, which must have genuine community input (particularly from NAPWC).”<sup>59</sup>

From the above, it can be gleaned that these organizations have proven to be a

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<sup>55</sup> PWC, *supra*.

<sup>56</sup> *Ibid.*

<sup>57</sup> These five major cities are Montreal, Ottawa, Toronto, Vancouver and Winnipeg.

<sup>58</sup> NAPWC, Briefing Note to the Secretary of State Responsible for Multiculturalism and the Status of Women (9 June 2003). Also supplied by E. Calugay, Interview (Montreal, 10 October 2003).

<sup>59</sup> *Ibid.*

rich source of insights and data on the themes discussed in this research project. They have created plenty of opportunities for direct contact with the Filipina MDWs themselves through various activities conducted over the years. Thus, they are undoubtedly providing valuable services to the otherwise neglected FMDWs, as well as helping put the MDWs' concerns to the social policy agenda.

## E. The LCP and Administrative Discretion

Audrey Macklin has aptly noted that, “[i]mmigration is one of the least controllable aspects of government activity. Not only is it fraught with bureaucratic discretion, but its subjects are, *ex hypothesi*, politically powerless.”<sup>60</sup> It is hardly disputable that discretion plays a huge role in deciding the fate of non-citizens who wish to enter Canada.

For purposes of this dissertation, discretion will be defined as:

“an area, a sub-system of authority usually delegated by one set of officials to another, where the latter have substantial autonomy and finality in settling the standards on which decisions are to be based, and on their application to specific situations”<sup>61</sup>

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<sup>60</sup> A. Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37 McGill L.J. 681 at 745 .

<sup>61</sup> D.J. Galligan, “Arbitrariness and Formal Justice in Discretionary Decisions,” in D.J. Galligan, ed., *Essays in Legal Theory* (Melbourne: Melbourne University Press, 1984) at 145.

However, it is important to note that “discretion is not absolute.”<sup>62</sup> The courts have often ruled that discretion should primarily be “used to promote the policies and objects of the governing act.”<sup>63</sup>

## 1. Charter Guarantees in General

In the landmark case of *Singh v. Canada*,<sup>64</sup> the Supreme Court ruled that it is no longer acceptable to justify arbitrary or unfair treatment of immigrants and even foreigners on the grounds that "immigration is a privilege and not a right."<sup>65</sup> In support of this ruling, Justice Wilson stated that:

“The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the Canadian Bill of Rights .... I do not think this kind of analysis is acceptable in relation to the Charter. It seems to me rather that the recent adoption of the Charter by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the Canadian Bill of Rights ought to be re-examined.”<sup>66</sup>

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<sup>62</sup> *Re Multi-Malls Inc., et al. and Ont. (Minister of Transportation and Communication) et al.* (1976), 73 D.L.R. (3d) 18 at 29. Also cited in S. Blake, *Administrative Law in Canada* (Toronto: Butterworths, 1992) at 87.

<sup>63</sup> Please see for example, *Padfield v. Minister of Agriculture, Fisheries & Food* (1968) A.C. 1997 at 1030 (H.L.), applied in *Oakwood Development Ltd. v. St. Francois Xavier (Rural Municipality)* (1985) 61 N.R. 321 at 331 (S.C.C.); and *Re Doctor's Hospital and Minister of Health et al.* (1976), 12 O.R. (2d) 164 at 175 (Div. Ct.). Also quoted in Blake, *supra* at 87-88.

<sup>64</sup> *Singh v. Canada (Minister of Employment and Immigration)* (1985) 1 S.C.R. 177.

<sup>65</sup> *Ibid* at 209. A similar ruling was also rendered in the case of *Canada (Minister of Employment and Immigration) v. Chiarelli* (1991) [1991] 1 S.C.R. 712 at 714-715 . In this case, the Supreme Court held that: “The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. The common law recognizes no such right and the *Charter* recognizes the distinction between citizens and non-citizens.”

<sup>66</sup> *Singh v. Canada, supra* at 209.

It was concluded in the same case that “the procedures for determination of refugee status claims of the Immigration Act did not afford refugee claimants fundamental justice in the adjudication of those claims and were thus incompatible with section 7 of the Charter.”<sup>67</sup>

Section 7 of the Charter<sup>68</sup> states that:

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

Although it was expressly ruled in the *Singh* case that protection under section 7 of the Charter applies not only to refugee applicants who are physically present in Canada but also to persons seeking to enter Canada to claim Convention refugee status, it was also expressly stated that the decision refers only to refugee claimants, and leaves other kinds of interests for subsequent cases.<sup>69</sup>

Thereafter, in the case of *Chiarelli v. Canada*,<sup>70</sup> Justice Sopinka of the Supreme Court of Canada held that: "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".<sup>71</sup> He added that:

“The distinction between citizens and non-citizens is recognized in the Charter. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6 (2), only citizens are accorded any right "to enter, remain in and leave Canada" in s. 6 (1). Thus Parliament has the right to adopt an

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<sup>67</sup> *Ibid* at 216.

<sup>68</sup> *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*].

<sup>69</sup> *Singh v. Canada* at 212, where the court held that: “It is unnecessary for the Court to consider what it would do if it were asked to engage in a larger inquiry into the substantive rights conferred in the Act.”

<sup>70</sup> *Chiarelli v. Canada (Minister of Employment and Immigration)* (1992) 1 S.C.R. 711.

<sup>71</sup> *Ibid.* at 714-715.

immigration policy and to enact legislation prescribing the condition under which non-citizens will be permitted to enter and remain in Canada. It has done so in the Immigration Act...”<sup>72</sup>

At this point, it may be relevant to cite subsection 15 (1) of the Charter<sup>73</sup> which provides that:

“Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

In this regard, the Federal Court of Appeal, in *Singh v. Canada*<sup>74</sup> recognized the jurisdiction of the Canadian Human Rights Commission to inquire into allegations of discrimination by Canada’s Immigration Department (now the CIC). In doing so, the Court ruled that human rights legislation “is to receive a large, liberal and purposive interpretation,” and decided that “the preferable course for the Court is to leave the Tribunal free to carry out its inquiries and not to prohibit it save in a case where it is clear and beyond doubt that the Tribunal is without jurisdiction to deal with the matter before it.”<sup>75</sup>

In view of the court ruling in the above-mentioned case of *Singh v. Canada*, the Canadian Human Rights Tribunal held in *Naqvi v. Canada*<sup>76</sup> that:

“A proper interpretation of the legislation requires that Canadian immigration officials exercise their discretionary powers in accordance with the CHRA<sup>77</sup> whether they are doing so within Canada or abroad.

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Charter*, s. 15(1).

<sup>74</sup> *Singh v. Canada (Department of External Affairs)* (1988) 51 D.L.R. (4th) 673 (F.C.A.) at 440.

<sup>75</sup> *Ibid.* at 437, citing *Attorney General of Canada v. Cumming* [1980] 2 F.C. 122 (T.D.) at 131-133.

<sup>76</sup> *Naqvi v. Canada (Employment and Immigration Commission)* (1993) C.H.R.R. D/139.

<sup>77</sup> Canadian Human Rights Act (R.S. 1985, c. H-6) online: Department of Justice Canada <<http://laws.justice.gc.ca/en/H-6/>>.

Foreign service officers posted in other countries are representatives of Canada. There is no reason why the principles of the CHRA should not apply to their activities.”<sup>78</sup>

In ruling against Canada Immigration in *Naqvi*, the Human Rights Tribunal emphasised that the legislation must be administered in a non-discriminatory manner:

“Canadian immigration policy, as set out in Part I of the Immigration Act, 1976 (the legislation in effect at the time) recognized in s. 3, that the rules and regulations made under the Act were to be designed and administered recognizing the need ... (f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate on grounds of race, national or ethnic origin, colour, religion or sex.”<sup>79</sup>

It can be gleaned from these developments that the application of Charter guarantees to immigration applicants is often a highly controversial issue that is difficult to resolve without looking into the particular circumstances of each case. The landmark case of *Singh* may have expressly broadened that coverage of the Charter guarantees to refugee applicants, but the impact of this ruling has yet to be explicitly extended to other applicants who are similarly deserving of such protection. However, the court ruling in the second *Singh* case and the judgment by the Ontario Human Rights Tribunal in the *Naqvi* case have somehow given a glimmer of hope that the Charter and human rights guarantees can be extended to immigration and visa applicants previously excluded.

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<sup>78</sup> *Ibid.* at 40-41.

## **2. Charter Guarantees as Applied to the LCP**

Although the Foreign Domestic Movement (FDM) Program has since been replaced by the LCP, the case of *Karim v. Canada*<sup>80</sup> (which was decided on the basis of the earlier program) is still relevant. According to the court in that case:

“The Minister and his servants must follow the policy and the guidelines of the F.D.M. program in order to be fair. I acknowledge that the decision of whether to grant permanent resident status to an applicant or not must be ultimately made by the Minister and his servants, but it is open to this Court to review the manner in which the decision is made and to ensure that the terms and the spirit of the stated policy are respected.”<sup>81</sup>

In connection with the fair pursuit of policy objectives, and the immigration officer’s exercise of discretion, in deciding whether the live-in caregiver or MDW has satisfied the requirements for landing, the court has ruled in the case of *Turingan v. Canada*<sup>82</sup> that:

“ It should be recognized that *the primary purpose of the Live-in Caregiver Program is to encourage people to come to Canada to fill a void which exists in our labour market.* As consideration for their commitment to work in the domestic field, the Program’s participants are virtually guaranteed permanent residence status provided that they work the required 24 month period. The immigration officer, therefore, has limited discretion to refuse permanent residence status once it has been determined that the participant has worked the required 24 months.”<sup>83</sup>

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<sup>79</sup> *Ibid* at 8.

<sup>80</sup> *Karim v. Canada (Minister of Employment and Immigration)* (1988) 6 Imm. L.R. (2d) 32 (F.C.T.D.).

<sup>81</sup> *Ibid.* at 36.

<sup>82</sup> *Turingan v. Canada (Minister of Citizenship and Immigration)* (1993) 72 F.T.R. 316 (Fed. T.D.).

<sup>83</sup> *Ibid.* at 317 (emphasis supplied).

Following the above ruling, the judge of the same court further clarified in the case of *Bernardez v. Canada*<sup>84</sup> that:

“As I previously stated in *Turingan v. Minister of Employment and Immigration* (1993), 72 F.T.R. 316 (T.D.), the purpose of the Live-in Caregiver Program [which on April 27, 1992 replaced the Foreign Domestic Program] is *to facilitate the attainment of permanent resident status for foreign domestic workers* and therefore, *it is incumbent on the Immigration Department to adopt a flexible and constructive approach in its dealings with the Program's participants. Failure to do so undermines the purpose of the Program.*”<sup>85</sup>

### **3. Conflicting Applications of LCP Policy**

In line with these liberal interpretations of the requirements of the LCP, the court in the case of *Peje v. Canada*<sup>86</sup> set aside the immigration officer’s decision to disqualify the applicant from becoming a permanent resident for failure to fulfil the 24-month employment within the three-year period. After finding that the main reason for the applicant’s failure to satisfy this requirement was the government’s refusal to grant her a work permit, the court reasoned that:

“the applicant appears to have been trapped in a situation where she was afraid to work without the required authorization and yet unable to obtain the necessary permit from the Minister. The Respondent surely must bear some portion of the responsibility for her failing to meet the conditions of the program.”<sup>87</sup>

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<sup>84</sup> *Bernardez v. Canada (Minister of Citizenship and Immigration)* (1995) 101 F.T.R. 203 at 207 (Fed. T.D.).

<sup>85</sup> *Ibid.* at 207 (emphasis supplied).

<sup>86</sup> *Peje v. Canada (Minister of Citizenship and Immigration)* (1997) F.C.J. No. 274 (Fed. T.D.).

<sup>87</sup> *Ibid.* at penultimate paragraph.

Curiously, a similar set of circumstances did not merit a similar ruling from the court in another case. That is, in *Laluna v. Canada*,<sup>88</sup> the court deemed that the doctrine laid down in *Turingan* is not applicable in this particular case because the MDW failed to meet the required 24 months of live-in domestic work. Therefore in *Laluna*, the MDW was denied permanent resident status without the court even considering the reasons for such failure. The court emphasized that the 24-month requirement involves a ministerial and not a discretionary duty on the part of the immigration officer assessing the applicant.<sup>89</sup> Hence the automatic denial once it is found that this requirement is not satisfied.

This is a clear case of inconsistency with the *Peje* judgment. Both cases involved very similar key facts. In *Laluna*, the applicant was only three months short of the 24-month employment required. What is more, there was at least a four month delay in the issuance of her work permit needed to be legally employed by her second employer. Part of her inability therefore, to fulfil the 24-month requirement was due to the delay or temporary lack of a work permit, just like in the case of *Peje*.

The difference in treatment could only be attributed to the inherent vulnerability of the LCP rules to varying interpretations. Aside from the varying court interpretations and rulings on the decisions of immigration officers, all-too-often, the actual decisions of the immigration officers also reflect a shocking lack of sensitivity to the situation of applicants under the LCP. This is illustrated below.

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<sup>88</sup>*Laluna v. Canada (Minister of Citizenship and Immigration)* 2000 F.C.J. No. 271, Doc. IMM-1914-99

#### **4. Three Cases: Melca, Leticia and Marisa**

In addition to the court cases cited above, described below are three more cases which may not have created judicial precedents, but which have nonetheless caught media attention partly due to the efforts of advocates. They further illustrate the vulnerability of women participants in the LCP despite the supposed protections and advantages that the program supposedly provides.

Case No. 1: Melca Salvador came to Canada seven years ago under the Live-in Caregiver Program. Soon after arriving in Canada, she discovered that she was pregnant. The employer who sponsored Melca considered her condition a liability and dismissed her after five months and only after being given an hour's notice. After she has given birth, Melca worked with another employer which likewise dismissed her after six months, since a family member arrived to do the job. Thereafter, Melca found it extremely difficult to land another live-in caregiving job which resulted in her failure to fulfil the 24-month requirement under the LCP. Moreover, during those periods of employment, Melca experienced various forms of abuse which included verbal harassment (e.g. threats of being reported to immigration officials for non-compliance with employer's demands, or being "highly indebted" to her employers for having been saved from her "miserable condition" in the Philippines), many hours of unpaid overtime work, being forced to perform tasks not related to caregiving (e.g. comprehensive spring

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(Fed. T.D.).

<sup>89</sup> *Ibid.*

cleaning of wall, ceilings, chandeliers and swimming pool) on top of her duties to take care of her employer's children.

Despite having endured all these, the fact that she has a son born in Canada and has proven her adaptability and resourcefulness (she never went on welfare and has paid the Canadian government the total amount of \$4500 in taxes and application fees) amidst her difficult situation, the government still denied her application for permanent status and threatened her with deportation when she refused to leave the country.<sup>90</sup> Only after more than a year of continuing protests and lobbying efforts by NGOs and activists on her behalf, was Melca finally granted permanent resident status on humanitarian and compassionate grounds.<sup>91</sup>

Case No. 2: Leticia Cables, dubbed by Canadian newspapers as "the hardworking nanny,"<sup>92</sup> was ordered deported after the Immigration Department found out that she worked for other employers in violation of her contract under the LCP. Leticia's quandary arose after her employer terminated her employment because the employer's wife decided to stay at home and take over Leticia's work. Upon reconsideration, she was again admitted by the same employer but only on a limited basis. To make up for her lost wages therefore, Leticia decided to do odd jobs for neighbors upon the advice and encouragement of her lawyer-employer. When found out by the CIC, she was

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<sup>90</sup> Information obtained from the Melca Salvador website online: <<http://pages.infinit.net/ugay/melca.htm>>; and from E. Calugay of The Filipino Women's Organization in Quebec, e-mail of 1 October 2003.

<sup>91</sup> E. Calugay, The Filipino Women's Organization in Quebec, e-mails dated 1 & 2 May 2002.

<sup>92</sup> "Nanny Faces Deportation for Doing Too Many Jobs", *The Globe and Mail* (20 July 1999); "Hard-working Nanny Wins Reprieve," *The Globe and Mail* (27 December 1999); "Hardworking Filipino Nanny to be Deported," *The National Post* (14 February 2000); "Nanny Loses Battle to Live in Canada," *The Globe and Mail* (14 February 2000); "Nanny Loses Battle to Live in Canada; Decides to Fly Back Home to RP," *Manila Media Monitor* (February 2000).

ordered deported. Leticia challenged the deportation order before the Federal court, but the latter refused to intervene. While various groups and individuals rallied to challenge her deportation, a deeply disappointed Leticia just decided to go back to the Philippines and be reunited with her family.<sup>93</sup>

Case No. 3: Marisa (not her real name) came to Montreal under Canada's LCP in April 2001. After short stints with earlier employers, she finally landed her latest job in February 2002, which lasted longer than her previous employments. That is, until one day in early 2003, when her employer brought her to the hospital for what the employer said was "something that would be good for her." Thinking that it was for a routine medical check up, she obliged. She later learned however, that her employer arranged for her to have an abortion (after having learned that she was pregnant). Shocked, Marisa refused to undergo the procedure on the ground that it is against her religion. The employer, a married man with two children, feared that he will be greatly inconvenienced if Marisa went on with the pregnancy and eventually gave birth. Because of Marisa's refusal to abort her baby, the employer fired her on 5 March 2003. She later revealed that both her employment agency and her employer threatened to have her deported if she did not agree to have the abortion. Marisa then filed a complaint for illegal dismissal with the Quebec Labour Board and for discrimination with the Quebec Human Rights Commission. The complaint with the Labour Board was settled for a measly sum. Part of the settlement condition was that she had to withdraw her complaint filed with the Human Rights Commission as well. Another condition was that she cannot talk about the

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<sup>93</sup> *Ibid.*

case to media anymore.<sup>94</sup> Meanwhile, Marisa's three-year period to complete the two-year fulltime live-in domestic work looms in the horizon. If she fails to satisfy this requirement and gives birth to her child in the meantime, then another episode similar to Melca's experience may ensue. Otherwise, the threat of deportation may likely be enforced without delay.

As can be gleaned from these three particular case studies, the LCP puts MDWs in a special class of temporary migrant workers who are made vulnerable to abuses facilitated by onerous conditions such as the compulsory live-in requirement and exclusive permit to work with the same employer. Often, these requirements force them to work without a permit and risk deportation, or endure abuse and hardships for fear of losing the chance at becoming permanent residents after two years at the very least. These highly exploitative conditions are apparently overlooked by the immigration officers when evaluating the MDWs' application for permanent residence, and/or when ruling whether or not the MDWs should be deported.

While the cases of *Turingan* and *Bernardez* mandated the use of a "flexible and constructive approach" in dealing with cases of MDWs under the LCP, the experiences of women like Melca, Leticia and Marisa remain the rule rather than the exception. And while cases similar to *Laluna* and *Peje* may be found in the Federal courts, very few cases have actually been filed in court by applicants for permanent residence under the LCP. One of the very few exceptions is the case of *Mina v. Canada*<sup>95</sup> where an

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<sup>94</sup> Details of Marisa's story were obtained from S. Montgomery, "Abortion Becomes Price of a Job" *The (Montreal) Gazette* (18 March 2003); and E. Calugay of PINAY and NAPWC, E-mail (31 October 2003).

<sup>95</sup> *Mina v. Canada (Minister of Citizenship and Immigration)* (2000) F.C.J. No. 1735, Docket IMM-2944-99 (Fed. T.D.).

application for judicial review of the decision of an immigration officer to deny an application for LCP-based permanent residence on the ground that the educational certificates submitted were fraudulent, was made. In this case, the immigration officer tried to authenticate the educational certificate of the applicant by asking questions on the courses taken which the applicant had forgotten about due to a long lapse in time. The court found nothing wrong with the immigration officer's actions and upheld the denial of the LCP-based application for permanent residence.

## **5. Some Proposed Alternatives**

Fears have been expressed that “a more rigorous overseas selection criteria under the LCP also signals a relative fortification of the ‘gatekeeping’<sup>96</sup> role of visa officers abroad at the expense of immigration officials in Canada.”<sup>97</sup> While the present LCP has made it relatively easier for a live-in caregiver or MDW to become a permanent resident by imposing less requirements,<sup>98</sup> it is perceived that the increased qualifications (i.e. 6-month certificate in a related caregiving course, secondary school diploma, language skills) for entry has virtually shut the doors for majority of applicants outside Canada.

Considering the many shortcomings of the LCP and the varied ways by which immigration officers interpret the policy guidelines, what would be the best alternative?

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<sup>96</sup> The term “gatekeeping” is being used here to refer to the attitude of immigration officers, as representatives of the state, to guard the territorial borders by imposing strict rules on who may be allowed to enter the country.

<sup>97</sup> A. Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37 McGill L.J. 681 at 759.

<sup>98</sup> The Foreign Domestic Movement Program required course upgrading, a release letter from the employer, and reapplication from outside of Canada, among others. Now, under the LCP, the only requirement left is for the applicant to have done live-in domestic work for 24 months within a three-year period and an “objective” record of employment from the employer. Moreover, an application for permanent residence can be done from within Canada.

Macklin<sup>99</sup> and many other scholars of MDWs' rights<sup>100</sup> propose that those admitted under the LCP be granted immigrant or permanent resident status at the onset, albeit on condition of two years work in domestic service, whether live-in or live-out. It was argued that a permanent status will "guarantee domestic workers the same job mobility as other immigrants and enable them to sell their services in a free labour market."<sup>101</sup>

Other arguments suggest that work authorizations issued to those admitted under the LCP should not be tied to a specific employer nor imposed with the live-in requirement. Some feminist writers even suggest developing alternative ways to replace domestic work altogether to end the exploitative conditions it perpetrates on women.<sup>102</sup> But the nagging question is, if these same women MDWs will try to be admitted to Canada not through LCP, but through the current "points system" under the skilled worker category,<sup>103</sup> will they stand a chance? Admittedly, any answer to this question at this point will amount to mere speculation. For until domestic work is deemed to be a "skilled occupation" which will merit higher points, MDWs may not even qualify under the "skilled worker" category. While many MDWs have professional degrees and/or years of work experience back home, these do not readily translate to the corresponding points for education and experience (among other criteria for admission for permanent residence in Canada). Hence, given the disadvantages faced by MDWs under the current

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<sup>99</sup> Please see Macklin, *supra* at 746.

<sup>100</sup> Some organizations in Toronto actively working for domestic workers' rights include INTERCEDE, Philippine Women's Center of Ontario, Inter-Church Action, Canada-Asia Working Group, and *Migrante International*.

<sup>101</sup> Macklin, *supra* at 740.

<sup>102</sup> W. Giles and S. Arat-Koc, *Maid in the Market: Women's Paid Domestic Labour* (Toronto: Fernwood Publishing, 1994) at 5.

<sup>103</sup> *Immigration and Refugee Protection Act Regulations* SOR/2002-227 (11 June, 2002) ss. 73-87.

system, the government should take the necessary steps to give the MDW applicants a fair chance in an open and non-discriminatory process.

Indeed, the many complex issues involved cannot be easily understood nor the deeply-embedded problems easily eradicated. However, an open-minded look at the situation and a sincere willingness to consider the nuances of every case in lieu of a straitjacket application of rules will surely be a step towards the right direction. This could be viewed as the very rationale for the exercise of discretion. But as the earlier discussions have illustrated, a careless and often “heartless” exercise of the same discretion could lead to opposite and detrimental results.

#### **E. The LCP and Human Rights**

Human rights standards most often ring hollow for Filipina MDWs in Canada as they continue to face multiple layers of serious disadvantage. On the first level, their specific human rights are often violated with impunity, often with the state’s complicity, and mostly through the untrammeled exercise of administrative discretion by the relevant immigration officers. Foremost among the violated rights are the equality and non-discrimination provisions enshrined in the Canadian Charter of Rights, as well as in relevant international human rights instruments (especially the International Bill of Human Rights).<sup>104</sup> The case for discrimination is illustrated by the fact that the separate

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<sup>104</sup> The International Bill of Human Rights consists of the Universal Declaration of Human Rights, U.N. Doc. A/810 (1948), International Convention on Civil and Political Rights, 999 U.N.T.S. 171 (1966), and the International Convention on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1966). Both Conventions were ratified by Canada in 1976.

program<sup>105</sup> and additional requirements imposed on those who are admitted as MDWs in Canada are not imposed on other types of migrant workers. Provisions on the right not to be enslaved or subjected to other forms of servitude, the right to an adequate standard of living, to fair labour conditions, and to access to effective judicial and administrative remedies, are just some of the rights of Filipina MDWs that tend to be violated in Canada.

On another and even more significant level, it has been asserted that<sup>106</sup>:

“the issue of power has been largely ignored in the human rights corpus... It is equally important that it also address deeply lopsided power relations among and within cultures, national economies, states, genders, religions, races and ethnic groups, and other societal cleavages.”<sup>107</sup>

This is especially true in the case of Filipina MDWs in Canada. It would seem futile then to assess the violations of specific human rights provisions without scrutinizing the basis of their creation and eventual perpetuation in the first place. The power relations between the MDW and the employer and the country of origin and country of employment have greatly contributed to the ease with which violations occur and the resulting impunity of the violators. Thus, an analysis of the human rights situation of MDWs should take such factors into consideration, if truly effective and long-lasting solutions are to be achieved. Merely invoking legal provisions such as those in the Canadian Charter of Rights or the International Bill of Human Rights is not enough. The inherent biases of laws as well as their problematic implementation amidst a complex socio-political and economic scenario must be considered in every case.

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<sup>105</sup> The Live-in Caregiver Program as part of Canada’s Immigration and Refugee Protection Act.

<sup>106</sup> M. Mutua, “Savages, Victims and Saviours: The Metaphor of Human Rights” (2001) 42 Harvard International Law Journal 201.

A similar perspective was encapsulated in the Canadian context by Ontario Court of Appeals Justice Abella when she said that:<sup>108</sup>

‘No one opposes equality of human rights. But their definition and application produce controversy of a fundamental kind.’<sup>109</sup>

On this note, let us proceed to discuss some of the areas where the LCP has been found most wanting in terms of upholding the MDWs’ human rights:

### **1. Violations of the Equality and Non-Discrimination Principles**

As they are, human rights contradictions lie in the very essence of domestic work. First of all, it is a highly gendered phenomenon.<sup>110</sup> At one level, the work of the Filipina MDW frees the woman citizen of the patriarchy-imposed responsibility over domestic or household duties (the so-called private sphere) thus enabling her to work in the formal economy (or the so-called public sphere). Although the female employer and the MDW share the same gender, they are separated by class, ethnicity and immigration status.<sup>111</sup> At another level, the Filipina MDW’s work in the so-called public sphere (i.e. “compensated work”), occurs within the “private” household where she then becomes

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<sup>107</sup> *Ibid.* at 207.

<sup>108</sup> R. Abella, “A Generation of Human Rights: Looking Back to the Future” (1998) 36:3 Osgoode Hall L.J. 597.

<sup>109</sup> *Ibid.* at 599.

<sup>110</sup> Approximately 97% of domestic workers are women, according to Canada Employment and Immigration Commission (Policy Branch), *Foreign Domestic Worker – Preliminary Statistical Highlight Report* (Ottawa: 1991), cited in Macklin, 1992, *supra*. Please see also Annex “F”, CIC Facts and Figures: Other Class By Gender and Category. CIC official data for 2000-2002 show that female live-in caregivers or (MDWs) far outnumber male live-in caregivers with an approximate ratio of 40:1 in favour of females.

<sup>111</sup> Please see A. Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37 *McGill Law Journal* 681. Macklin’s article presents an excellent discourse not only on the “inside/outsider” characteristic of the migrant domestic worker, but also how the contradiction plays out in the lives of two women, whose lives are juxtaposed with each other amidst their subjugated status in a patriarchal system. However, factors such as social class appears to privilege one (the employer) while allowing a sustained exploitation of the other (the MDW).

extremely vulnerable to demeaning or inhumane treatment. Consequently, the “live-in” component of a Filipina MDW’s work under the LCP has all-too-often facilitated the perpetration of sexual, physical and emotional abuse on many such MDWs, as well as the violations of labour code requirements (ranging from unpaid overtime work to extended/flexible hours, etc.)<sup>112</sup>

One concrete example of the kinds of discriminatory treatment that Filipina MDWs experience under the LCP concerns the matter of allowing these MDWs to come to Canada with their dependents. Galloway points out that the “Immigration Manual also reveals a harsh attitude against a person bringing her dependants with her.”<sup>113</sup> He refers to the following pertinent provision of the Immigration Manual:

“Family members should not accompany live-in caregivers. Even when an employer agrees that a family member may reside with the caregiver in the employer’s residence, there are no guarantees that any subsequent employer would agree to the same terms. Live-in caregivers who wish to bring their children should be given the reasons why this is not possible. Visas should not be issued to family members, although the live-in caregiver applicant may be approved.”<sup>114</sup>

Thus, the lengthy separation from their families resulting from the LCP requirements<sup>115</sup> shows how Canada treats them more as “workers” (whose labour is to be exploited) than as human beings (with fundamental rights). Most importantly, these

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<sup>112</sup> Please see S. Arat-Koc, *Caregivers Break the Silence: A Participatory Action Research on the Abuse and Violence, Including the Impact of Family Separation Experienced by Women in the Live-in Caregiver Program* (Toronto: INTERCEDE, 2001) at 36-57.

<sup>113</sup> D. Galloway, *Immigration Law* (Concord: Irwin Law, 1997).

<sup>114</sup> Citizenship and Immigration Canada, Chapter OP-14, Processing Applicants for the Live-in Caregiver Program (03-2003) s. 5.10 at 8. This was the recently amended version of the same section cited in Galloway.

<sup>115</sup> Often, fulfillment of the LCP requirements is not even enough to let them sponsor their families as they also have to satisfy income requirements, their family members have to pass the medical and security clearances, leading to a gap of several years before family reunification is finally realized.

sorts of conditions are not imposed on other categories of foreign workers.<sup>116</sup> These other kinds of workers are readily admitted to Canada as permanent residents and are allowed to come with their families thus raising a clear case of discrimination.

Another glaring feature of the LCP is the fact that an apparent connection may exist between the denial of rights and the fact that nearly 80% of those admitted under the Live-in Caregiver Program are from the Philippines (a “third world” country)<sup>117</sup> with majority of the others coming from Caribbean countries (all of which are equally classified as “third world”).<sup>118</sup> Thus, it has been correctly pointed out that the recent decline in rights of MDWs, including the refusal to grant initial permanent resident status, has coincided with the entry of substantial numbers of women of colour from developing countries.<sup>119</sup> The result has, over time, been that the erosion of the legal status of MDWs has served to confine far too many migrant women of colour to domestic servitude.<sup>120</sup>

## 2. A ‘Dehumanizing’ Program?

“The program (LCP) systematically dehumanizes you. It systematically

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<sup>116</sup> Please see *Immigration and Refugee Protection Act Regulations* SOR/2002-227 (11 June, 2002) ss. 73-87 (for “skilled workers” and “provincial nominees”; ss. 88-109 (for business immigrants consisting of investors, entrepreneurs, and self-employed persons); and ss. 194-209 (for all workers on temporary work authorization other than MDWs).

<sup>117</sup> The term “third world” is not being used here to simply refer to the conventional “east” “underdeveloped”, “south” or poor states as opposed to the “first world” as the “west”, “developed”, “north” or rich states. In accordance with TWAIL analysis, the use of the term “third world” also signifies a “counterhegemonic” sense in that it reveals a hierarchical ordering rooted in colonialism and imperialism. Please see B. Rajagopal, “Locating the Third World in Cultural Geography” (1998-99) *Third World Legal Studies* 1 at 1-20; and K. Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 Wis. Int'l L. J. 353 at 360. For further discussion, please see chapters 2 and 7 of this dissertation.

<sup>118</sup> Please see statistical data in fn 30 as well as CIC Facts and Figures in Annex “H”.

<sup>119</sup> Bakan & Stasiulis, *supra* (1997) at 32, 36.

<sup>120</sup> Teo & Visnjic, *supra*.

erodes your self-esteem.”

- Elsa, a domestic worker<sup>121</sup>

Various critiques on the LCP; feminist debates about the undervaluing of paid and unpaid domestic work; and the historical and policy context in which the LCP is implemented all combine to reveal a double standard at work in the promotion and protection of human rights in Canada. For, while it cannot be denied that Canada seems to be conscious of its responsibility in upholding international human rights standards,<sup>122</sup> it is becoming evident that it is unable to guarantee adequate protection for all, as exemplified by the experience of Filipina MDWs coming in under the LCP.

It has been repeatedly claimed that the two main objectionable features of the LCP are its live-in requirement and the precarious temporary immigration status of the MDWs who arrive here under that program.<sup>123</sup> These features are seen as characteristic of Canada’s exclusionary view of citizenship rights. They also leave MDWs with very little resources to defend themselves from various forms of abuses by their employers.<sup>124</sup> While it may also build the case for a form of “negotiated citizenship,”<sup>125</sup> MDWs’ lives reveal a reality of oppression and disadvantage. The oppressive conditions in which

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<sup>121</sup> In S. Arat-Koc, *Caregivers Break the Silence: A Participatory Action Research on the Abuse and Violence, Including the Impact of Family Separation Experienced by Women in the Live-in Caregiver Program* (Toronto: INTERCEDE, 2001) at 71.

<sup>122</sup> A brief and general statement on Human Rights and Canada’s Foreign Policy can be found in <http://www.dfaid-maeci.gc.ca/human-rights/forpole.asp>. It states, among others, that “Canada is recognized as a world leader in building international institutions for the advancement of human rights, and the government is committed to enhancing that leadership.”

<sup>123</sup> Macklin (1992) *supra*; G. Sadoway, et al., “Position paper on Bill C-11 by the Coalition for a Just Immigration and Refugee Policy,” Toronto, 2001; A. Bakan & D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997); N. Grandea, *Uneven gains: Filipina Domestic Workers in Canada* (Ottawa : Philippines-Canada Human Resource Development Program, 1996).

<sup>124</sup> Bakan & Stasiulis, (1997) *supra* at 37.

<sup>125</sup> Please see D. Stasiulis and A. Bakan, “Negotiating Citizenship: The Case of Foreign Domestic Workers in Canada” (1997) 57 Feminist Review 112-139 at 112.

they live and work outweighs the benefits that could be derived from the LCP by MDWs. As such, viewed from the perspective of Filipina MDWs in Canada, Soysal's notion of a postnational citizenship based on the universality of human rights appears to be an overly idealized and romantic metaphor.<sup>126</sup>

The fact that Filipinas have disproportionately comprised a great majority of those coming in under this program, likewise conjures images of racialized treatment.<sup>127</sup> Justifications have ranged from adequate knowledge of English to the employer's prior experiences or hearsay evidence on the supposed strengths of Filipina MDWs as being "naturally domesticated, good with children, born housekeepers and subservient."<sup>128</sup> Whether or not these stereotypes have adequate basis, they nonetheless imply that the Filipinas voluntarily perform domestic work because of their natural inclination to do so. Lost in these stereotypes of the domesticated Filipina is any kind of understanding of the structural forces such as severe economic need and lack of adequate jobs in the Philippines, which left these women with very little choice other than to perform jobs which Canadians themselves will most likely avoid.

### **3. Labour Rights and Migrant Domestic Workers in Canada**

It has been argued with much justification that, as far as MDWs are concerned, formal rights do not readily translate to substantive protections. This has in the main been due to ideological biases against MDWs as well as the material disadvantage

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<sup>126</sup> Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994).

<sup>127</sup> Please see statistical data in fn 30 and CIC Facts and Figures in Annex "H".

suffered by most of them.<sup>129</sup> For instance, even as the NDP government in Ontario formally included domestic workers in the Labour Relations Act on 1 January 1993,<sup>130</sup> this proved not only symbolic but was also rather short-lived.<sup>131</sup> This law recognized the right of domestic workers<sup>132</sup> to bargain collectively, along with majority of the workers in the province. Nonetheless, it has been admitted that despite the entitlement to some minimum labour standards, “their isolation within private homes renders legal regulation [virtually] ineffective” in practice.<sup>133</sup> Thus, the changes were merely “symbolic.” This is so in light of the NDP government’s failure to eventually lay down implementing mechanisms and concomitant policies which will truly provide the MDWs the benefits of collective bargaining and enforcement of their labour rights.<sup>134</sup> As if this was not enough, such legal regulation has also been made much more precarious by subsequent changes in provincial government (such as when the NDP government was defeated by the Conservative party in June 1995) that resulted in the reversal of the hard-earned victories that MDWs “had won”. For instance, only a few months after the change in government, domestic workers were again expressly excluded from exercising collective

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<sup>128</sup> A. Macklin, “On the Inside Looking In” in S. Arat-Koc & W. Giles, eds. *Maid in the Market: Women’s Paid Domestic Labour* (Halifax: Fernwood Publishing, 1998) c. 1 at 23.

<sup>129</sup> J. Fudge, “Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario” in A. Bakan & D. Stasiulis, eds. *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) c. 4 at 122.

<sup>130</sup> Labour Relations Act Amendments, S.O. 1992, c. 21 as cited in Fudge, *ibid*.

<sup>131</sup> When the Conservative Party won over the NDP government in June 1995, the inclusion of domestic workers was quickly reversed and their exclusion was “re-entrenched in the law” through a law entitled, “An Act To Restore Balance and Stability in Labour Relations and to Promote Economic Prosperity and to Make Consequential Changes to Statutes Concerning Labour Relations”. S.O. 1995, c.1, Schedule A, Labour Relations Act 1995. Please see Fudge, *supra* at 120.

<sup>132</sup> The law does not distinguish between “migrant domestic workers” and “local domestic workers”.

<sup>133</sup> Fudge, *supra* at 119-120.

<sup>134</sup> *Ibid*.

bargaining rights.<sup>135</sup>

As earlier discussed, a group called INTERCEDE was founded in the early 1980's to advocate for the rights of MDWs in Toronto. It devoted much time and energy to pushing for legal and policy reforms in favor of MDWs, on top of rendering various forms of services to its MDW members. Its advocacy efforts resulted, among others, to the inclusion of MDWs in the Employment Standards Act. As a result of pressure from INTERCEDE and other groups, the Conservative government of Ontario in 1981 amended the law to provide minimum daily, weekly and monthly wages for live-in MDWs.<sup>136</sup> However, the latter were still excluded from provisions on maximum hours of work and overtime pay. And despite subsequent lobby efforts and piecemeal changes to the law, a 1989 study of working conditions conducted by INTERCEDE revealed that an alarming number of MDWs are still denied their basic employment rights. One factor contributing to the ineffectiveness of legal labour standards is that their enforcement depends on the MDW's filing of an actual complaint with the Ministry of Labour.<sup>137</sup> Not only is this made difficult by lack of knowledge of one's procedural and substantive rights, but also by the fear of jeopardizing the MDW's immigration status and hopes of becoming a permanent resident in Canada.

Citizenship and Immigration Canada's Overseas Processing Manual for Live-in Caregivers<sup>138</sup> provides a summary of the employment standards legislation in the different provinces of Canada. Some of its main points are that:

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<sup>135</sup> *Ibid.*

<sup>136</sup> Fudge, *supra* at 126.

<sup>137</sup> Arat-Koc and Villasin, 1990, at 5-7 as cited in Fudge, *supra* at 127.

<sup>138</sup> Citizenship and Immigration Canada (CIC) OP 14: Processing Applicants for the Live-In Caregiver

“... Although the *Live-in Caregiver Program* is run by the federal government, employment standards legislation pertaining to caregivers and domestics falls within provincial and territorial jurisdiction. The existing *Canada Labour Code* and Regulations, a federal legislation, applies only to certain specific sectors such as banking, interprovincial and international transportation, telecommunications, broadcasting, grain handling and uranium mines.

... The provisions in provincial and territorial employment standards legislation and their scope may vary from one jurisdiction to another. This means that minimum working conditions prescribed by law are not identical across Canada for live-in caregivers or domestic workers.<sup>139</sup>

... Under the *Immigration and Refugee Protection Act* and Regulations, employers and live-in caregivers must sign an employment contract that clearly defines the rights and responsibilities of both parties. The terms and conditions of the employment contract must by law be consistent with provincial employment standards. In some provinces and territories, employment standards legislation does not, in whole or in part, apply to live-in caregivers. Where there is no minimum wage applicable in a particular province or territory, Human Resources Development Canada (HRDC) determines the wage rate to be paid by employers. In some parts of the country, HRDC requires employers to pay wages higher than the minimum wage rate, based on the prevailing wage paid for this type of work.”<sup>140</sup>

As to specific labour legislation in the individual provinces, it must be noted that most of the labour / employment code provisions such as minimum wage, overtime pay, rest and vacation pay, maternity leave, etc., apply to MDWs. But as had been pointed out and further discussed in other parts of this dissertation, the implementation of these existing laws is another matter.

These standards may be slightly modified in every province. Some of these variations include the amount of minimum wage rate and overtime pay or the definition

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Program, 03-2003. online: Citizenship and Immigration Canada <<http://www.cic.gc.ca>>.

<sup>139</sup> In several provinces, the law makes no distinction between live-in caregivers or MDWs and the more general category of “domestic workers”.

<sup>140</sup> CIC, OP 14, *ibid*.

of domestic worker who shall be entitled to minimum wage, overtime pay and rest day. For example, in Prince Edward Island, one must perform other domestic chores in addition to caring for children, sick or elderly to benefit from these labour standards. Labour laws in Quebec, Saskatchewan and the Yukon Territory likewise exempt MDWs from coverage if the duties performed “simply” consist in taking care of children, the elderly or disabled, and not in performing tasks involving the management and maintenance of a household’s needs (i.e. cooking, cleaning, washing, etc.). The only province where MDWs or those “working in private homes” for any type of work are not at all covered by the labour legislation is in New Brunswick, making the federally-mandated (under LCP) employment contract the sole basis of ensuring respect for the MDW’s labour rights within that jurisdiction.

Below is a summary<sup>141</sup> of the applicable labour standards in three of the most popular destination provinces for Filipina MDWs in Canada (i.e. Ontario, Quebec and British Columbia):

## **ONTARIO**

The provisions of Ontario’s *Employment Standards Act, 2000* apply to domestic workers, which includes persons employed by a householder to provide care, supervision or personal assistance to children, senior or disabled members of the household.

Under the provisions regarding hours of work and rest periods (Part VII of the Act) domestic workers, as is the case for most other employees in the province, are normally entitled to minimum rest periods: 11 hours per day, eight hours between each shift and at least 24 consecutive hours every work week or at least 48 consecutive hours in every period of at least two

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<sup>141</sup> Appendix B, “Fact Sheet on Employment Standard Regulations” in OP 14, *supra*. The information in this document is based on statutes and regulations in effect on June 25, 2002. Source: Labour Law Analysis, Strategic Policy and International Labour Affairs, Labour Program, Human Resources Development Canada (HRDC) (25 June 2002).

consecutive work weeks.

They are also entitled to an eating period of at least 30 minutes for every period of five consecutive hours of work. With the employee's consent, this break may be divided and taken at two different times. The employer must also pay a domestic worker at the overtime wage rate after 44 hours of work in a week or, if the employee and employer agree, on the basis of the average number of hours worked in a given period (generally not to exceed four weeks). If the employee consents, the employer may grant an hour and a half of compensatory time off for each overtime hour worked instead of payment in cash. This compensatory time off must be taken within the following three months or, if the employee agrees, during the following 12 months (s. 22). Lastly, the employer must provide the domestic worker with written particulars respecting the hours of work and hourly rate of pay (s. 19, Ont. Reg. 285/01 — *Exemptions, Special Rules and Establishment of Minimum Wage Regulation*).

Domestic workers are entitled to the minimum wage, currently \$6.85 an hour. With regard to deductions for room and board supplied by the employer, the wages of a domestic worker cannot be reduced to less than would have been received at the minimum wage rate less \$2.55 per meal—

to a maximum of \$53.55 per week—and \$31.70 per week for a private room. (An employer cannot deduct any amount from the wages of a domestic worker for a shared room.) These amounts cannot be deducted unless the employee has taken the meals provided and occupied the room. Moreover, no amount can be required for a room unless it is reasonably furnished and suitable for human habitation, supplied with clean bed linen and towels, and affords the employee reasonable access to a bathroom (s. 19 of the Regulation).

The other working conditions set out in the Act also apply to domestics, including paid public holidays, vacations with pay, maternity and parental leave, the payment of wages, notice of termination and severance pay. Furthermore, an employer cannot withhold or deduct part of an employee's wages for lost property without written consent; in no case can an amount be withheld if persons other than the employee had access to the property (s. 13 of the Act).<sup>142</sup>

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<sup>142</sup> Please see Ontario Ministry of Labour, "Employment Standards for Domestic Workers", online: <[http://www.gov.on.ca/lab/english/es/factsheets/fs\\_domestics.html](http://www.gov.on.ca/lab/english/es/factsheets/fs_domestics.html)>.

## QUEBEC

The *Live-in Caregiver Program* operates differently in Quebec compared to the other provinces and territories. Under the Canada-Quebec Accord, Quebec plays a role in the selection of foreign workers. In order to work in Quebec, caregivers have to obtain a *Certificat d'acceptation du Québec (CAQ)*, which is contingent, in part, on the signing of an employment contract between the employee and the employer. This contract must contain the job description, work schedule, days off, wage rate and residence qualifications. It must also describe the obligations of the employer. Beyond the requirement to comply with the provisions of the *Act respecting labour standards* as applicable, the employer is obliged to provide decent living conditions and facilitate access to French courses outside regular working hours. For further information, contact the *Ministère des Relations avec les citoyens et de l'Immigration*.

The *Act respecting labour standards* does not apply to an employee whose exclusive duty is to provide care, in a dwelling, to a child or to a sick, disabled or aged person (s. 3(2) of the Act).

However, live-in caregivers may be covered by the provisions of the Act if they also do housework that is not directly related to the immediate needs of the care recipient. In such case, they are deemed to be domestics.

Domestics are entitled to annual leave with pay, statutory general holidays, overtime pay, notice of termination and various leaves for family events (leave for a wedding or death in the family, maternity leave, parental leave, absences for obligations to a minor child). Domestics living in their employer's residence are entitled to a minimum salary of \$280 per week (s. 5, *Regulations respecting labour standards*). (This minimum rate will increase to \$288 per week on October 1, 2002 and to \$292 per week on February 1, 2003.) Their employer may not require an amount for room and board (s. 51.0.1 of the Act). The regular work week for domestics is 49 hours. Every additional hour of work must be remunerated at the overtime rate of one and a half times the regular hourly wage; it may also be compensated, at the employee's request, by providing a paid leave equivalent to the overtime worked plus 50% (s. 8, *Regulations*).

Moreover, if an employer requires the wearing of a uniform, he must provide it free of charge to an employee who is paid at the minimum wage rate. He cannot require an amount of money for the purchase, use or maintenance of a uniform if this would reduce the employee's wages below what the latter would have earned at the minimum wage rate (s. 85 of the Act).

It should be noted that a labour commissioner cannot order the reinstatement of a domestic who has been the victim of an unlawful dismissal or a dismissal without good and sufficient cause; however, they can order the employer to pay compensation equal to the wages and other benefits the domestic would have received over a maximum period of three months (ss. 123 and 128 of the Act).<sup>143</sup>

## **BRITISH COLUMBIA**

Provisions regarding minimum employment standards apply to live-in caregivers, who are considered as domestics under the *Employment Standards Act*. These provisions include those pertaining to the recovery of wages, annual vacations with pay, paid general holidays, maternity leave, parental leave, family leave, hours of work and overtime pay (usually after eight hours' work in a day or 40 hours in a week), rest periods (normally eight hours between each shift and 32 consecutive hours per week) and notice of termination. In addition, an employer requiring that a uniform or special clothing be worn has to provide it free of charge to the employee and pay maintenance and cleaning costs (s. 25, *ESA*).

Live-in caregivers are normally entitled to a minimum wage of \$8.00 an hour. However, the minimum wage is \$6.00 an hour for inexperienced employees who had no paid employment experience prior to November 15, 2001 and fewer than 500 hours of paid employment with one or more employers (s. 15, *Employment Standards Regulation*). Moreover an employer cannot charge a domestic more than \$325 a month to cover the cost of room and board (s. 14, *ESR*).

The employer of a domestic has to register the latter with the Registry Office of the Employment Standards Branch. The name, address and telephone and fax numbers of the employer and the employee must be provided. An employer planning to hire a domestic worker from another country must notify the Employment Standards Branch before the actual hiring and before making an application to bring the employee into Canada (s. 15, *ESA*; s. 13, *ESR*)

Finally, on employing a domestic, the employer must provide them with a copy of the employment contract. This contract must clearly state the duties, hours of work, wage and cost of room and board. Any hours

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<sup>143</sup> Please see Commission des normes du travail Quebec, "Who is Entitled to Labour Standards?" online: <[http://www.cnt.gouv.qc.ca/en/lois/coup\\_doeil/qui.asp](http://www.cnt.gouv.qc.ca/en/lois/coup_doeil/qui.asp)>.

worked beyond those stated in the contract must be remunerated (s. 14, *ESA*).<sup>144</sup>

On paper therefore, it appears that MDWs are adequately provided with labour standards protection, at least in the three provinces surveyed. However, enforcement and regulation are another matter. *Owing to the very nature of live-in domestic work and the inability of MDWs to organize and collectively bargain*, it is not surprising that many of the above-stated standards are not being followed, as illustrated by the many complaints and problems documented in the literature discussed.

And while the above discussion does not purport to be an exhaustive listing of the elements and perceived shortcomings of Canada's LCP, it is an attempt to characterize the human rights inconsistencies and potential violations that could arise therefrom. A more extensive discussion on these matters and other problematic features of the LCP will be conducted in Chapter 6. This will not be a mere duplication of what has been discussed here since Chapter 6 will take a different approach, that is, a comparative analysis of some vital aspects of the situation of Filipina MDWs in Canada and in Hong Kong.

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<sup>144</sup> Please see British Columbia Ministry of Skills Development and Labour, "Information for Domestic Workers and Employers", online: <<http://www.labour.gov.bc.ca/esb/domestics/>>.

## **Chapter 5**

### **Some are Less Equal Than Others: The Socio-Legal Status of Filipina Migrant Domestic Workers in Hong Kong**

#### **A. The Context of Migration to Hong Kong**

Hong Kong is widely regarded as “one of the most progressive, cosmopolitan, intensely competitive *cities* in Asia and in the world”, as well as one of the “top migrant-importing *countries* in Asia.”<sup>1</sup> It has been described as “an important and increasingly strategic outpost of global capitalism, articulating much of the South China economy with the rest of the world.”<sup>2</sup> Hong Kong has a significant foreign population of 495,200 or at least 7.2% of the total population.<sup>3</sup> Of this foreign population, about 41% are MDWs coming from the Philippines, Indonesia and Thailand.<sup>4</sup> However, due to its relatively small land area vis-à-vis its growing population, the Hong Kong government

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<sup>1</sup> Asian Migrant Center et al., “Baseline Research on Racial and Gender Discrimination Towards Filipino, Indonesian and Thai Domestic Helpers in Hong Kong” (Hong Kong, Feb. 2001) at 14 (emphasis supplied; copy on file with the author).

Noted here is the seeming confusion as to whether Hong Kong is a “city” or a “country”. Although Hong Kong, strictly speaking, is not a “country” but a “special administrative region” or a territory of China (effective the 1997 handover from the United Kingdom to China), its currently independent political and economic character renders its status almost equal to that of an independent state. And because of its relatively small geographical size and cosmopolitan nature, it has sometimes been referred to as a “city”. Without venturing into the complex nature of Hong Kong’s political status, it will thus be simply referred to as a “country of employment” for purposes of this dissertation.

<sup>2</sup> J. Friedmann, “Where We Stand: A Decade of World City Research”, in P.L. Knox and P.J. Taylor (eds.) *World Cities in a World System* (Cambridge: Cambridge University Press, 1995) at 36 as cited in F. Li, A. Findlay and H. Jones, “A Cultural Economy Perspective on Service Sector Migration in the Global City: The Case of Hong Kong” (1998) 36(2) International Migration 131 at 135.

<sup>3</sup> Estimates of the Hong Kong population are as follows: 1998 – 6.7 million; 1999 – 6.97 million; 2000 - 7.11 million; and 2001 - 7.21 million. Data from CIA homepage at <<http://www.odci.gov/cia>>, and as cited in Asian Migrant Yearbook 2001 (Asian Migrant Center and Migrant Forum in Asia, Hong Kong) and Hong Kong Immigration Department, December 1999 (as cited in Asian Migrant Center et al., *supra* at 14).

attempts to impose tight controls on its population and workforce size in order to sustain its economic growth and high standard of living. Thus the government engages in strict regulation of labour immigration in the form of strict quotas for certain industries, and the imposition of “conditions of stay” for certain sectors such as the MDWs.

MDWs began flocking to Hong Kong in the early 1970's when it was emerging as one of the “newly industrializing economies” (NIEs) in Asia. Some 2,000 Filipina MDWs were initially admitted to work for wealthy Chinese expatriates. As the economy of Hong Kong flourished, the vastly increased demand for labour caused women and senior citizens to enter the workforce. Because of the resulting need for someone to look after the household and young children while both parents worked, the Hong Kong government liberalized the admission of MDWs in the early 1980s such that by 1982, there were some 20,959 MDWs, 96% of whom came from the Philippines.<sup>5</sup>

The ethnic composition of Hong Kong changed significantly in the 1990s in that although the Chinese continued to comprise the greater majority, the largest minority was no longer European or South Asian but Southeast Asian. As noted above, the growing economy enabled the middle class to employ MDWs. Most of these MDWs are Filipinas who are preferred for their English language skills which can be imparted to the employers' children.<sup>6</sup> As of May 2000, there were already 202,900 MDWs in Hong Kong. Of this number, 73% were from the Philippines, 23% from Indonesia, 3% from

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<sup>4</sup> Asian Migrant Center et al., *supra* at 14-15.

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

<sup>6</sup> B. Sautman & E. Kneehans, “The Politics of Racial Discrimination in Hong Kong” (2002) 169:2 Maryland Series in Contemporary Asian Studies 1-80 at 30.

Thailand and 1% from all others.<sup>7</sup> In July 2003, there were 213,891 MDWs in Hong Kong consisting of 60.67% from the Philippines, 35.00% from Indonesia and 2.64% from Thailand. There was thus a 10.97% increase in the total number of MDWs of all nationalities from July 2002 figures.<sup>8</sup>

On the other hand, the International Labour Office in Geneva has stated that, “in 1998, Hong Kong employed about 227,000 foreign workers, with the majority of Filipinos working as live-in domestic workers. They accounted for about 53% of the overseas workforce in the territory.”<sup>9</sup> Despite the seeming disparity in total numbers, it is evident and consistently reported that majority of the MDWs in Hong Kong are from the Philippines.

The following tables show the numbers of Filipina MDWs in Hong Kong and how their numbers grew over the years. The noticeable drop in numbers of Filipina MDWs from 2002 to 2003 may partly be attributed to the “indefinite suspension” in processing employment contracts of Filipina MDWs in Hong Kong declared by President Gloria Arroyo in March 2003.<sup>10</sup> The suspension was in response to the HK\$400 minimum wage cut imposed by the Hong Kong government to offset the HK\$400 levy imposed on MDWs’ employers starting October 2003.<sup>11</sup>

Another table on the numbers of Indonesian MDWs is also presented for comparative purposes.<sup>12</sup>

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<sup>7</sup> Hong Kong Immigration Department (May 2000), as cited in Asian Migrant Yearbook (Hong Kong: Asian Migrant Center and Migrant Forum in Asia, 1998 & 2001).

<sup>8</sup> “Entry of Foreign Domestic Helpers” (last updated October 2003) online: HKSAR website <<http://www.info.gov.hk/info/entry-dom.htm>>.

<sup>9</sup> Asian Migrant Yearbook 2001, *supra* at 124-125.

<sup>10</sup> J. Bautista, “An Indefinite Ban on Modern Day Heroism” Asian Analysis (June 2003) online: <<http://www.aseanfocus.com/asiananalysis/article.cfm?articleID=650>>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Tables were from Sautman & Kneehans, *supra* at 29 & 31. The authors added that: “From the mid-

**Table 1: Populations of Filipina Domestic Workers in Hong Kong, mid-70s-July03**

Year	Population
July 2003	129,768
July 2002	153,670
Early 2002	156,000
2001	150,000 - 155,000
2000	150,000
1999	141,500
1998	140,000
1997	135,000
1996	130,000
1995	126,400
1994	100,000
1993	90,000
1992	75,000
1991	68,000
1990	52,000
1989	42,000
1988	35,000
1987	27,000
1982	20,000
1980	10,000
mid-1970s	2,000

Sources<sup>13</sup>: *UPI* (14 September 1994); *Guardian* (29 May 1987); *Xinhua* (16 March 1988); *IPS* (23 June 1989); *NYT* (28 August 1990); *LAT* (1991); *SCMP* (16 November 1992), (20 April 1993), (28 August 1994), (3 July 1995), (4 September 1996), (27 September 2000), (10 November 2000); *SCMP* (18 February 2002), (26 July 2002); *HKS* (25 August 1997), (23 November 1998); *Gulf News* (31 August 1999); *AFP* (23 July 2001); *HkIM* (18 June 2001).

1990s, many Hong Kong employers began to hire Indonesian FDWs. The vast majority of these workers do not speak English, but are said to be more adept than Filipinas at learning spoken Cantonese. Indonesian FDWs can be illegally hired for less than the minimum wage and worked more onerously than Filipinas, in part because they are more often from rural backgrounds than Filipinas. The number of Indonesian FDWs increased very rapidly; by 2001 they accounted for some 27 percent of all Hong Kong FDWs.” (*SCMP [South China Morning Post]* 17 August 1997, 10 November 2000) (All references to FDWs are taken to mean MDWs for purposes of this dissertation.)

<sup>13</sup> Full citations of newspaper sources in Sautman and Kneehans, *supra*, at 29 - 31. July 2003 data were obtained from the HKSAR government website <<http://www.info.gov.hk/info/entry-dom.htm>>.

**Table 2:Populations of Indonesian Domestic Workers in Hong Kong, 1990-Jul2003**

Date	Population
July 2003	74,861
July 2002	74,760
February 2002	70,890
December 2001	68,880
Nov. 2000	54,600
July 2000	51,000
April 2000	45,300
Dec. 1998	31,800
April 1998	26,650
Dec. 1997	24,700
Oct. 1997	22,500
Dec. 1995	16,400
Dec. 1994	9,873
Jan. 1994	5,000
April 1993	3,806
Dec. 1992	3,541
1990	1,023
1986	246

Sources<sup>14</sup>: *CAN* (12 December1992); *HKS* (1 February 1999), (21 April 1999); *SCMP* (20 February 1994), (2 August 1994), (11 Decembe 1994), (13 October 1997), (24 May 1998), (7 June 2000), (18 June 2000), (10 November 2000), (7 January 2001), (16 July 2001); *SCMP* (4 April 2002), (26 July 2002); *DPA* (17 July 2000); *Jakarta Post* (20 January1999).

#### **B. Exodus of Filipina MDWs to Hong Kong and the General Attitude Towards Them**

Hong Kong does not have a specific program (such as Canada's LCP) for the "recruitment" of MDWs. However, Hong Kong is still quite attractive to migrant

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<sup>14</sup> *Ibid.*

labourers from the rest of the region due to the *comparatively* better socio-economic conditions that it is able to provide (e.g. higher wages, more protective migrant labour policies, more liberal social and political environment and a high number of migrant support groups.)

For the government and the people of Hong Kong, the admission of MDWs is a way of solving the serious labour shortage in that jurisdiction.<sup>15</sup> That is, MDWs:

“provide relief from domestic chores for many women from upper-class or double-income middle-class households. As in many parts of the world, foreign workers allow Hong Kong women to take on more prestigious supervisory roles in the household and permit them the freedom to participate in other activities that are considered more interesting, entertaining or lucrative.”<sup>16</sup>

In contrast to Hong Kong’s rapid economic growth, the economy of the Philippines has continued to worsen. This has shaped its position as the largest labour exporter in the Asia-Pacific region, if not the world over. In addition, there was growing disenchantment in Hong Kong with traditional Chinese amahs<sup>17</sup> who were perceived to be becoming too demanding, domineering and difficult. Most people interviewed by Constable confirmed that,

“the Hong Kong government approved the 1973 policy allowing foreign nationals to come to work as ‘helpers’ in order to encourage locals –

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<sup>15</sup> N. Constable, *Maid in the Market: Stories of Filipina Workers* (Ithaca: Cornell University Press, 1997) at 21.

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

<sup>17</sup> *Amahs* are adult women migrants or refugees from mainland China who were employed as domestic workers and given a nominal wage. They replaced the former *mujais*, young girls of about 10 years old from mainland China who were treated as bonded servants performing various household chores. The practice of hiring *mujais* was declared illegal in the 1920s owing to Britain’s anti-slavery law. This was when *amahs* came to Hong Kong to fill the gap left by the *mujais*. In K. Gibson, L. Law and D. McKay, “Beyond Heroes and Victims: Filipina Contract Migrants, Economic Activism and Class Transformations” 3:3 International Feminist Journal of Politics (2001) 365-386 at 371. Please see also Constable, *supra* at 40-58.

specifically middle-class, literate, and educated women – to enter the labor force.”<sup>18</sup>

At the start, Europeans and western expatriates preferred the English-speaking Filipina MDWs over their Chinese counterparts not only because of their language skills, but also because they were “cheaper.” Later on, however, many English-speaking Chinese also began hiring Filipinas.<sup>19</sup>

While the exodus of Filipino citizens to work abroad both in general, and as MDWs in Hong Kong, is seen as a solution to the huge unemployment problems of their country of origin, studies in Hong Kong have also raised questions on the extent or effectiveness of this so-called “solution”. A survey by Carolyn French in 1986 showed that only 25% of the Filipina MDWs in Hong Kong were unemployed before leaving the Philippines while another survey by Patricia Leahy in 1988 showed only seven per cent were unemployed.<sup>20</sup> It could be deduced therefore, that during the 1980s at least, a majority of the Filipinas who flocked to Hong Kong were already employed back home in the Philippines, hence did not belong to the unemployed cohort that overseas employment is supposed to relieve or absorb. Unfortunately, there are no similar surveys done in recent years to help determine whether this type of situation remains. What is certain however, is that the unemployment rate in the Philippines has not dramatically changed since 1988 to the present and has been averaging at approximately 10%.<sup>21</sup>

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<sup>18</sup> Constable, *supra* at 29.

<sup>19</sup> *Ibid.*

<sup>20</sup> As cited in Constable, *supra* at 33. Carolyn French’s survey included twelve hundred Filipina domestic workers as respondents. One limitation of the study however, is that it did not consider underemployment, albeit in a lesser degree, as a form of unemployment.

<sup>21</sup> Philippine unemployment rates are as follows: 1988 - 9.6%; 1991- 8.6%; 1994 - 9.5%; 1996 – 7.4%; 1997- 7.9%; 1998 – 9.6%; 1999 – 9.4%; 2000 – 10.1%; 2001 – 9.8%; 2002 - 10.2%; and 2003 (as of

As the number of Filipina MDWs in Hong Kong grew in the 1980s and 1990s, hostility against them also increased. They were accused of being “spoiled”, overpaid and being more of a hindrance rather than a help to Hong Kong residents. Their Sunday gatherings at the Statue Square was made the subject of widespread complaints by Hong Kong citizens.<sup>22</sup> A main indication of this discontent was the establishment in 1986, of the Hong Kong Employers of Overseas Domestic Helpers Association. This group of mainly Chinese employers lobbied the government on MDW policies, regulations and salary matters, among other issues. The group sought to protect its employer-members against the “ever-increasing demands and growing problems associated with the ‘foreign helpers’”.<sup>23</sup> However, Constable notes that despite the resulting attempts to replace them with other nationalities such as those from Bangladesh (allegedly “too dark”), Thailand (allegedly “do not speak much English”), Indonesians, etc., the Filipinas remain the most in demand group of MDWs in Hong Kong such that the word “Filipina” has almost become synonymous with “maid” or domestic worker in this territory.<sup>24</sup>

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April 2003) – 12.2%. Sources: M. Amante, “Labor and Socio-economic Updates” in University of the Philippines School of Labor and Industrial Relations (UP SOLAIR) online: UP SOLAIR <[http://up.edu.ph/~solair/phil\\_labor/soc\\_econ.htm](http://up.edu.ph/~solair/phil_labor/soc_econ.htm)>; and the National Statistical Coordination Board (NSCB) online: <[http://www.nscb.gov.ph/stats/mnsds/mnsds\\_unemp.asp](http://www.nscb.gov.ph/stats/mnsds/mnsds_unemp.asp)>.

<sup>22</sup> Aside from the complaints however, this “phenomenon” has also caught the attention of some local and international journalists, e.g. “The Filipina Sisterhood: An Anthropology of Happiness” *The Economist* (20 December 2001). The article discusses how these cheerful Sunday gatherings of Filipina MDWs at the Statue Square in central Hong Kong has become almost a way of life in this territory.

<sup>23</sup> Constable, *supra* at 34-35.

### **C. Hong Kong and Its Compliance with International Human Rights Standards**

Before proceeding to a discussion of the human rights situation of MDWs in Hong Kong, it is fitting to present a brief backgrounder on Hong Kong's general performance and attitude towards the implementation of international human rights standards.

The peculiar political character of Hong Kong as a Special Administrative Region has given rise to some complications in monitoring compliance with Hong Kong's international human rights obligations. For instance, in an introductory statement by Ambassador Qin Huasun, head of the Chinese delegation to the 20<sup>th</sup> session of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 1 February 1999, he pointed out the existence of a "one country, two systems model" within the current Chinese state. Therefore, it was decided that while the hearing on the report of Hong Kong formed part of the hearing on the third and fourth report of China, half a day out of the two days was reserved exclusively for Hong Kong, to ensure that "Hong Kong issues were not submerged by those of Mainland China."<sup>25</sup>

Nonetheless, it must be emphasized that this dissertation will not attempt to go deeper into the political ramifications of Hong Kong's handover to China after having been under British rule for more than a century and a half. Neither is this meant to compare the socio-historical and political status of Canada and Hong Kong in any extensive manner. What is being studied here is the way that MDWs in these

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<sup>24</sup> *Ibid.*

<sup>25</sup> A. Byrnes and M. Erickson, "Hong Kong and the Convention on the Elimination of All Forms of

jurisdictions are constructed and situated, through laws and policies that affect their lives. It is also realized that Canada and Hong Kong may not be equal in terms of their both being sovereign states. Hong Kong is a territory of China,<sup>26</sup> while Canada is in itself a sovereign state. However, these two jurisdictions are not looked at in such terms, but as two separate areas which have distinct programs for MDWs and which attract a substantial number of Filipina MDWs. Thus, while it is admitted that the historical and political context may provide interesting, and perhaps even vital, tools in understanding the scenario better, space and time constraints render it impossible to cover all but only some of its relevant aspects in this work. Hence, these political developments and events will be partly discussed insofar as they substantially affect Hong Kong's compliance with its international human rights obligations, and insofar as they affect the treatment of MDWs.

The reporting procedures of the treaty regime established by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) illustrate some of the human rights implications of the British handover of Hong Kong to China. These are: how the reporting requirements of the CEDAW committee will be met; how the reservations made by Hong Kong and/or China will be handled with respect to the other; and the various implications arising from these and related matters. Byrnes and Erickson have presented an interesting account of how civil society groups have played a

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Discrimination Against Women" (1999) 29 Hong Kong Law Journal 350 at 361.

<sup>26</sup> "Hong Kong became a Special Administrative Region (SAR) of the People's Republic of China on July 1, 1997, after a century and a half of British administration. Under Hong Kong's constitutional document, the Basic Law, the existing economic, legal and social system will be maintained for 50 years. The SAR enjoys a high degree of autonomy except in defence and foreign affairs." online: HKSAR website <<http://www.info.gov.hk/info/hkbrief/eng/ahk.htm>>.

role in shaping Hong Kong's compliance with its obligations under an international human rights instrument such as the CEDAW. However, they have also noted that, the Hong Kong government still feels "considerable unease" about "being held accountable to an international standard as interpreted by an international body such as the CEDAW Committee"<sup>27</sup> While the same authors admitted that:

"…no single United Nations convention or international process can create a fair, just society, to have a vision of that which is just, however, does create momentum towards the achievement of that goal."<sup>28</sup>

It is thus claimed that the CEDAW process, as with the other UN monitoring mechanisms, does just that. That is, they:

"…help to create an environment in which governments must account for their treatment of its citizenry, and it raises an awareness of what it means to incorporate democratic norms and policies into practical government programmes."

However, as applied to Hong Kong, this vision is made problematic in at least two ways. First, the bureaucratic complications created by its current status as a Special Administrative Region of China, makes it harder to pinpoint the locations of accountability and state responsibility. Second, the main focus often given to the protection of "citizens" often leaves out those members of society who are not citizens (e.g. MDWs) but who nonetheless contribute greatly to the social and economic progress attained by Hong Kong.

The problems surrounding Hong Kong's compliance with international human rights standards do not end here. For not too long ago, the United Nations Committee on

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<sup>27</sup> Byrnes and Erickson, *supra* at 367.

<sup>28</sup> *Ibid.* at 368.

Economic, Social and Cultural Rights<sup>29</sup> expressed concerns that the status of economic, social and cultural rights in the HKSAR's domestic legal order is still not on equal footing with that of civil and political rights. This is demonstrated by the fact that while the provisions of the International Covenant on Civil and Political Rights have been incorporated into domestic legislation, those of the International Covenant on Economic, Social and Cultural Rights are not.<sup>30</sup> In this regard, the Committee also stated that it "greatly regrets that some judgments of the High Court in HKSAR express the opinion that the Covenant is merely "promotional"<sup>31</sup> or "aspirational"<sup>32</sup> in nature. As the Committee has confirmed on numerous occasions, "such opinions are based on a mistaken understanding of the legal obligations arising from the Covenant."<sup>33</sup> Moreover, the same Committee noted the "failure of HKSAR to extend the prohibition of race discrimination to the private sector".<sup>34</sup> These observations by an international human rights body vis-à-vis the human rights performance of Hong Kong, reflect the sorry state of its compliance with international human rights standards. In addition to the pointed conclusions and recommendations by an international human rights body such as the ICESCR, the Coalition for Migrants Rights (CMR) and other migrant groups have joined with the Hong Kong Coalition for Racial Equality (HKCoRE) in pushing for the adoption of an anti-discrimination law in Hong Kong. It must be noted that while Hong Kong's Bill of Rights Ordinance (BORO) of 1991 enacted under British colonial rule made racial

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<sup>29</sup> Monitoring body of the International Covenant on Economic, Social and Cultural Rights.

<sup>30</sup> UN CESCR, Concluding Observation of the Committee on Economic, Social and Cultural Rights (Hong Kong): China, UN Doc. E/C.12/1/Add.58 (21 May 2001).

<sup>31</sup> *Mok Chi Hung v. Director of Immigration* (5 January 2001) High Court, HKSAR.

<sup>32</sup> *Chan To Foon v. Director of Immigration* (11 April 2001) High Court, HKSAR.

<sup>33</sup> UN CESCR, *supra* at para. 16

discrimination committed by public authorities illegal, private sector actions were excluded therefrom. This exclusion from the reach of BORO was allegedly due to the insistence of the business community.<sup>35</sup> HKSAR former Chief Executive Mr. Tung Chee Hwa, when asked at the Legislative Council in June 2001 whether Hong Kong has a problem with and needs a law against private sector race discrimination, answered as follows:

“All places, all cosmopolitan cities have racial discrimination. Hong Kong has this problem. But is legislating the best option?... I lived in England for six years, the United States for nine and a half. I feel that their racial discrimination problems are much more severe than ours, even with all their laws against it... [T]he most important thing is to educate... people to know that discrimination is wrong.”<sup>36</sup>

On the other hand, SAR’s second highest official, Donald Tsang Yam-kuen, stated in July 2001 at a meeting of the Hong Kong Chamber of Commerce that, racial discrimination is an “evil” that could potentially tarnish Hong Kong’s reputation but “stressed the problem was not serious enough to warrant legislation.”<sup>37</sup> However, other government officials gave seemingly contrary positions when Secretary of Home Affairs Bureau Lam Woon-kwong said that the government was “open” to enacting an anti-discrimination law, and when Equal Opportunities Commission head Anna Wu Hung-yuk said that, “it is impossible for the victims to continue to suffer while waiting their

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<sup>34</sup> *Ibid.*, para. 15(b).

<sup>35</sup> LAU Wai Hing, “Racial Discrimination’s Ugly Face” *The Statesman* (India) (25 July 2001) as cited in Sautman and Kneehans, *supra* at 2.

<sup>36</sup> “Tung Rejects Anti-Racism Law Idea,” *South China Morning Post* (Hong Kong) (15 June 2001) at 6; *Buzancheng zhengzu qishi lifa*” (Disapproval of Race Discrimination Legislation), *Xin Bao* (Hong Kong) (15 June 2001) at 7, as cited in Sautman and Kneehans, *supra*.

<sup>37</sup> “Don’t Shun Politics, Businessmen Told” *South China Morning Post* (Hong Kong) (28 July 2001), as cited in Sautman and Kneehans, *supra* at 9.

whole lives for cultural education to come into effect.”<sup>38</sup> In fact, Hung-yuk was the only high official in HKSAR who endorsed unequivocally an anti-race discrimination law, after deeming that the problem of race discrimination in Hong Kong as “very serious”.<sup>39</sup>

It must be noted that Hong Kong became a party to the UN Committee on the Elimination of Racial Discrimination (CERD) in 1961 when Britain acceded on its behalf. However, the HKSAR only submitted its first periodic report to the CERD in October 2000. While the government claimed it consulted the public sometime in 1999 and took account of their views in preparing the report, the report was decried as largely a “fairy tale” by certain human rights activists, for having denied the existence of racial discrimination in the HKSAR.<sup>40</sup> The same newspaper account had also reported that many human rights activists feel that racial discrimination itself has actually increased since 1997, affecting both the darker-skinned and “white” ethnic minorities.<sup>41</sup> The CERD itself has concluded that progress towards the elimination of discrimination in Hong Kong has been “unsatisfactory”.<sup>42</sup>

The significance of the issue of anti-discrimination legislation becomes even more palpable in the context of this dissertation when it is considered that the “first biased

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<sup>38</sup> Asian Migrant Center (AMC), “Country Reports: Hong Kong S.A.R.” (2001) Asian Migrant Yearbook at 50.

<sup>39</sup> “Rising Racism Complaints ‘Tip of the Iceberg’ ” *South China Morning Post* (Hong Kong) (29 December 2000) at 5; “Racism ‘Threat to Our International Image’ ” *South China Morning Post* (Hong Kong) (5 March 2001) at 2; “Official Points to Race Law” *South China Morning Post* (Hong Kong) (9 May 2001) at 5; as cited in Sautman & Kneehans, *supra* at 16.

<sup>40</sup> “Racism Report to UN Branded a Fairy Tale” *South China Morning Post* (Hong Kong) (20 October 2000), as cited in Sautman & Kneehans, *supra* at 12.

<sup>41</sup> *Ibid.*

<sup>42</sup> “Rights Activists Step Up Pressure in Geneva” *South China Morning Post* (Hong Kong) (23 July 2001) at 4; “Geneva Meeting to Press for Anti-Racism Law” *South China Morning Post* (Hong Kong) (28 July 2001) at 14; “Racism Law ‘Only When Public is in Favour’ ” *South China Morning Post* (Hong Kong) (1 August 2001) at 4; “‘License to Discriminate’ Blasted” *South China Morning Post* (Hong Kong) (2

practice against ethnic minorities widely discussed in Hong Kong, and which made headlines in the 1990s because of its evident irony”, involved Filipina MDWs.<sup>43</sup> That incident began with a sign written in Chinese and Tagalog<sup>44</sup> that was posted in the elevators of the Tregunter Tower, a upper-class apartment complex. The sign asked “maids” or MDWs to “please use the service lift”, appearing directly below another sign which states that “dogs are not allowed in the lift.”<sup>45</sup> Not only did this raise howls of protest, but likewise brought to wider attention other similar biases such as those signs in parks which state that, “no maids or pets allowed in pool” or bans imposed on MDWs from entering beaches, using toilets in some buildings, or entering clubs. Moreover, such forms of discrimination reflect racial and not just class-based biased. It was also reported that Southeast and South Asians who are not MDWs are often subjected to discrimination themselves in areas involving admission to private spaces, e.g. finding difficulties in renting a flat.<sup>46</sup>

Thus, while Hong Kong faces many shortcomings on the human rights front, as

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August 2001) at 4; “Racism a Problem Among Clergy: Bishop” *South China Morning Post* (Hong Kong) (8 September 2001) at 2, as cited in Sautman & Kneehans, *supra* at 12.

<sup>43</sup> Sautman & Kneehans, *supra* at 37.

<sup>44</sup> Tagalog is the language from which the national language (Filipino) of the Philippines is mainly based. This language is spoken by a great majority of people in the Philippines.

<sup>45</sup> “Outrage at Lift Ban” *South China Morning Post* (Hong Kong) (25 November 1993) at 1; “Obnoxious Bias by Old Colonial Masters” *South China Morning Post* (Hong Kong) (20 February 1997) at 5, as cited in Sautman & Kneehans, *supra* at 38.

<sup>46</sup> “A Little Domestic Strife” *South China Morning Post* (Hong Kong) (25 April 1993) at 2; “Fought Out in Black and White” *South China Morning Post* (Hong Kong) (6 August 1995) at 3; “Racism Row as Club Threatens to Ban Maids” *South China Morning Post* (Hong Kong) (10 September 2000) at 3; “Weak and Confusing Response to Entrenched Racism” *South China Morning Post* (Hong Kong) (6 December 2000) at 21; “Local Racism Out of Character for Chinese” *South China Morning Post* (Hong Kong) (10 February 2001) at 19; “Club Comes Under Fire for Entry Ban on Maids” *South China Morning Post* (Hong Kong) (10 June 2001) at 3; “Domestic Servants Ban the Norm in Hong Kong Clubs” *South China Morning Post* (Hong Kong) (2 July 2001) at 11; “Ban Obviously Aimed at Target Group” *South China Morning Post* (Hong Kong) (5 July 2001) at 15; “Maids’ Ban is Clear Sign of Racism” *South China Morning Post* (Hong Kong) (9 July 2001) at 15, as cited in Sautman & Kneehans, *supra* at 38.

evidenced by comments and observations by international human rights bodies, discrimination seems to form a significant aspect of such failure. Sadly, these acts of discrimination are often directed at the already much-disadvantaged Filipina MDWs.

#### **D. The Human Rights Implications of Hong Kong's Policy on Migrant Domestic Workers**

The Hong Kong government's human rights policy towards MDWs may be gleaned from the discussion in the following section on the latter's legal rights. But since it has also been asserted that human rights are not and should not be limited to legal entitlements, a brief general discussion of the relevant socio-economic and historical factors is also appropriate.

The prevailing attitude of employers, as well as the government of Hong Kong towards MDWs can be deduced from the various policies they attempted to enact relating to the latter. Some of these are discussed below.

Shortly after a five per cent wage cut in 1999, the Association of Employers of MDWs and the government of Hong Kong proposed an amendment to the Employment Ordinance that will allow termination of the employment of MDWs should they become pregnant. This proposal, made in the year 2000, also meant a repeal of the current HK\$100,000 penalty imposed on the employer when guilty of terminating a MDW on grounds of pregnancy. Migrant, labour and women's groups led by the Coalition for Migrant's Rights (CMR), campaigned against the proposal, which was highly criticized

for being “anti-women and inconsistent with international conventions (e.g. CEDAW).”

Due to fierce opposition, the proposal did not materialize.<sup>47</sup>

Another controversial issue relates to the MDWs’ right to privacy. This matter arose when Hong Kong’s Privacy Commissioner told employers in Hong Kong that they may use hidden cameras if they suspect wrongdoing by their MDWs. The Commissioner said that the cameras can only be used if child abuse is suspected.<sup>48</sup> Secret filming of MDWs has become increasingly common in Hong Kong since a number of MDWs have been convicted for offences allegedly captured on video.<sup>49</sup> For their part, advocacy groups protest that the hidden cameras are an invasion of privacy.<sup>50</sup>

The above examples are just two of the many attempts made by employer’s groups and the government to propose measures detrimental to the mostly women MDWs in Hong Kong. Other proposals have included reduction of the minimum wage by as much as 32%, the prohibition of “live-out” arrangements between employers and MDWs, the imposition of a levy on employers who hire MDWs and the setting of quotas regarding the number of MDWs that could be admitted to Hong Kong.<sup>51</sup> For their part, non-governmental organizations and advocacy groups have been active and vehement in opposing such proposals for being “discriminatory, insensitive and misplaced.”<sup>52</sup>

Nonetheless, the government’s efforts and proposals illustrate a clear lack of

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<sup>47</sup> Asian Migrant Centre (2001) *supra* at 125.

<sup>48</sup> "Employers in Hong Kong Given Okay to Spy on Maids," *Deutsche Presse-Agentur* (15 June 2000); and 7:7 *Migration News* (July 2000). online: Migration News website <[http://migration.ucdavis.edu/mn/archive\\_mn/jul\\_2000-15mn.html](http://migration.ucdavis.edu/mn/archive_mn/jul_2000-15mn.html)>.

<sup>49</sup> R. Wacks, “Domestic Helpers’ Privacy” (2000) 30 Hong Kong L. J. 361 at 361-362.

<sup>50</sup> Asian Migrant Centre, “ ‘Privacy’ Commissioner Suggests to Spy on Maids” (16 June 2000 Media Release) Asian Migrant Yearbook (2000) at 308.

<sup>51</sup> Asian Migrant Centre (2001) *supra* at 51.

<sup>52</sup> *Ibid.*

regard for the basic human rights of MDWs who are often least prioritized in terms of protection and benefits while being most prejudiced by laws and policies that subvert their rights and dignity as human beings.

This derogatory treatment of MDWs has also been widely documented and presented to various bodies and agencies. Such ill-treatment has often consisted of verbal abuse, excessive work hours and non-payment of overtime, sexual harassment or underpayment by employers. Various forms of discrimination by civil servants and the general public are also experienced for instance, through the often rude and contemptuous encounters they have with the police, immigration and labour officials.<sup>53</sup>

There is also a view that “in general, the foreign domestic helper’s cause is not a popular one.”<sup>54</sup> This is supported by public clamor for the imposition of a wage levy on MDWs’ wages, complaints about “overcrowding” of Central Square, as some of the most common examples. It had been stated that, “her position in Hong Kong society puts her into the weakest place where privacy, gender, race and class intersect.”<sup>55</sup>

From a historical viewpoint, the situation of MDWs in Hong Kong had even been compared to a kind of slave labour. In this regard, it has been asserted that:

“In the former British colony of Hong Kong a discourse of slavery is particularly potent as the cultural practice of acquiring bonded servants, or *muijai* (young girls of around 10 years old), from mainland China to perform the domestic chores of the household was once widespread. This practice was deemed illegal in light of Britain’s anti-slavery legislation

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<sup>53</sup> Hong Kong Human Rights Committee (1997) *Submission to the United Nations Committee on the Elimination of Racial Discrimination on the Fourteenth Periodic Report in Respect of Hong Kong Under the International Convention on the Elimination of Racial Discrimination* (February 1997) online: <[http://www.hkhrc.org.hk/content/publications/UN\\_reports/1997racial\\_report/racial\\_4.html](http://www.hkhrc.org.hk/content/publications/UN_reports/1997racial_report/racial_4.html)>.

<sup>54</sup> C. Tan, “Why Rights are Not Enjoyed: The Case of Foreign Domestic Helpers” (2000) 30 Hong Kong Law Journal 354 at 359.

<sup>55</sup> *Ibid.*

and prohibited by the late 1920s, and the gap was soon filled by an influx of adult women migrants or refugees from mainland China. Popularly known as *amahs*, these women had more autonomy than the *mujai* in that they were not purchased as chattels in a debt bondage market but formally employed by families and given a nominal wage.

Foreign domestic workers in Hong Kong are often compared to *amahs* – they live in, are contracted to work for specified periods during which time they are denied the freedom to change employers, are given little time off and experience restricted personal freedom. Cases of domestic workers who are locked in their employers' flats, work 24 hours a day, are barely given adequate food for sustenance and, in extreme cases, suffer physical violence and abuse, resonate strongly with earlier images of the *mujai* and this connection is used to great effect by NGO activists.”<sup>56</sup>

This image is likewise useful in providing a clearer picture of the way that MDWs in Hong Kong are treated by their employers (and by implication, the state of employment).

This research did not conduct first hand interviews, much less a comprehensive survey of the situation of all Filipina MDWs in Hong Kong, mainly because it is meant to be a conceptual rather than an empirical project. Nonetheless, the reports and secondary data gathered and presented here converge (and with hardly any evidence to the contrary) in showing that: 1) there are serious cases of exploitation of MDWs in Hong Kong; 2) there is a seeming lack of concern for the welfare of MDWs within the government of Hong Kong; and that 3) the existing organizational or civil society support are not enough to ameliorate the overall disadvantaged situation of MDWs within the territory.

With this brief backgrounder on the socio-political and historical realities in Hong

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<sup>56</sup> K. Gibson, L. Law, D. McKay, “Beyond Heroes and Victims: Filipina Contract Migrants, Economic Activism and Class Transformations” (2001) 3(3) International Feminist Journal of Politics 365 at 371. For a more detailed narrative of the cultural practice of hiring *mujais* in Hong Kong, please see N. Constable, *Maid to Order in Hong Kong: Stories of Filipina Workers* (Ithaca: Cornell University, 1997) at 45-58.

Kong that are most relevant to the MDWs' lives, the succeeding sections will discuss some controversial legal issues facing MDWs in Hong Kong.

## **E. The Legal Rights of Migrant Domestic Workers in Hong Kong**

### **1. The Employment Ordinance**

Theoretically, MDWs in Hong Kong are covered by the Employment Ordinance. Hence, they supposedly possess the same legal rights as local workers, including the rights to unionize, organize, and demonstrate, as well as maternity and trade union membership protections. All legal MDWs in Hong Kong are covered by a standard employment contract which formally sets minimum standards regarding their working conditions, while also noting the responsibilities of their employers. They are entitled to one rest day a week, statutory holidays, annual leave and maternity benefits. They are also covered by Employment Agency Regulations (Cap 57A) which limits the recruitment agency fee to not more than 10 % of the first month's wages. A minimum wage applicable to all MDWs is also another form of protection meant to recognize the specific vulnerability of those employed in this sector. The Employment Ordinance defines not only the entitlements of MDWs, but also offers them trade union protection. Thus, if an employer terminates a MDW's employment due to her pregnancy or participation in union activities, such offense carries a penalty of HK\$100,000.<sup>57</sup>

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<sup>57</sup> Tan, *supra* at 355. Asian Migrant Centre, et al., "Baseline Research on Racial and Gender

However, despite these legal entitlements and the fact that MDWs in Hong Kong are relatively well-organized<sup>58</sup> (as compared to those in other countries of employment), MDWs in Hong Kong continue to experience contract violations (illegal termination and underpayment), abuses ranging from exorbitant agency fees, inhuman treatment, other forms of physical or even sexual abuse, and various forms of discrimination.<sup>59</sup> As one author has put it, “they may have the same rights but these are often no more than paper rights.”<sup>60</sup>

## **2. “New Conditions of Stay”**

Foremost among the criticisms against the Hong Kong government is its overt discrimination against MDWs through the imposition of the “new conditions of stay” (NCS) policy in 1987. The NCS specifies, among others, that MDWs: 1) cannot change employers without the approval of the immigration department; 2) cannot shift to non-domestic-work jobs; 3) cannot gain permanent residence; 4) must abide by the “two-week rule,” allowing them only two weeks from their termination date to stay legally in Hong Kong; and 5) will be deported if they stay beyond this two-week grace period

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Discrimination Towards Filipino, Indonesian and Thai Domestic Helpers in Hong Kong” (Hong Kong: Asian Migrant Centre, 2001) at 14-15.

<sup>58</sup> According to the same Baseline Research conducted by the Asian Migrant Center, the first trade union in Hong Kong called the Asian Domestic Workers Union (ADWU) was established in 1989. Now, Filipino and Indonesian domestic workers have their respective trade unions aside from several other groupings and associations.

<sup>59</sup> Asian Migrant Center estimates that the migrant counseling centers in Hong Kong (more than 20 of them) handle at least 1,500 cases a year while the Labour Relations Division of the Labor Department handled 1,447 claims by migrant domestic workers in the first eight months of 2000. (Source: Press Release, Hong Kong Information Services Department, October 2000 as cited in AMC et al., *supra* at 16).

<sup>60</sup> Tan, *supra* at 355.

without finding another employer. What makes these conditions even more objectionable is the fact that these restrictions apply only to MDWs and are not imposed on foreign professionals working in Hong Kong.<sup>61</sup>

On top of the NCS policy, proposals by employers' groups and/or government agencies have included policies that would freeze wages, impose wage deductions, relax maternity protections, and even impose a "service tax" for the use of public facilities by MDWs.<sup>62</sup> Between 1998-2000, mass demonstrations were held by MDW groups to protest these proposals. The protests resulted in the reduction of the proposed wage decrease from 35% to 5% and the shelving of proposals to remove their maternity leave benefits and impose service tax on them. However, these actions did not stop the employers' groups and the government from re-introducing other proposals detrimental to the welfare of MDWs.<sup>63</sup> Some of these policies will be further discussed below.

### **3. Two-week Rule**

Although the "two-week rule" is part of the "new conditions of stay" tackled in the previous section, it also deserves a separate discussion due to the serious implications of this policy alone. This rule states that *MDWs who are terminated must leave within two weeks or at the expiration of their visas, whichever comes first.*

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<sup>61</sup> AMC, et al., *supra* at 16.

<sup>62</sup> Cited in AMC et al., *supra*, based on an interview with the Coalition for Migrants' Rights, January 2001.

<sup>63</sup> The latest of these is the proposed wage deduction of at least 5% and imposition of a HK\$400 levy on MDWs in Hong Kong as a way of raising revenues to cover the government's budget deficit now estimated at HK\$70 billion. In C. Micaller, "Filipinos in HK Lead Rally Over Wage Cut" *Philippine Daily Inquirer* (23 February 2003) online: <<http://www.inq7.net>>.

In a statement submitted to the United Nations Commission on Human Rights earlier this year,<sup>64</sup> a group of NGOs protested the “rigorous enforcement of the Two-Week Rule [which] has exacerbated the harsh and precarious working conditions of women migrant domestic workers (MDWs) in Hong Kong.”<sup>65</sup>

The same report claims that:

“the conditions imposed through the Two-Week Rule jeopardize the bargaining position of MDWs by forcing them to accept inhuman treatment and sub-standard living conditions, so that local employers and the national economy can directly benefit from their under-recognised and undervalued work. The inability of MDWs to access legal remedies in cases of exploitation under the Two-Week Rule, is compounded by the fact that government officials often ignore reports of mistreatment because they occur in the "private sphere"…

In effect, the Two-Week Rule restricts the rights of MDWs to demand fair working conditions, to change employers, and to terminate work contracts in cases of abuse.”<sup>66</sup>

Thus, the APWLD and other NGOs assisting MDWs in Hong Kong, while acknowledging some “positive steps” taken by the HKSAR government towards recognizing domestic work through the application of national labour legislation to include MDWs’ employment contracts, nonetheless:

“call on the HKSAR Government to review its migrant-targeted policies such as the Two-Week Rule, to ensure that these type of policies do not diminish recent efforts to improve the situation of MDWs and to ensure that such policies do not contravene its obligations and commitments under the UDHR, ICCPR, ICESCR, CEDAW, CERD, and the various other UN and ILO conventions to which it is a party. APWLD with its

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<sup>64</sup> UN Doc. E/CN.4/2003/NGO/122 (12 March 2003) submitted to the Fifty-ninth session of the Commission on Human Rights by the Asia Pacific Forum on Women, Law and Development (APWLD) in consultation with its Hong Kong partner organisations Asia Pacific Mission for Migrants (APMM), United Filipinos in HK (UNIFIL-HK), Asian Migrants Coordinating Body (AMCB), Mission for Filipino Migrant Workers (MFMW), and Bethune House Migrant Women's Refuge (BHMWR).

<sup>65</sup> *Ibid* at para. 1.

<sup>66</sup> *Ibid*, paras. 2 and 3.

partners reiterate the statements made by CERD and ESCR committees during their official visits to Hong Kong that the Two-Week Rule is discriminatory and needs to be abolished.”<sup>67</sup>

#### **4. Non-eligibility for permanent residence**

The exclusion of MDWs from the ranks of those allowed to gain permanent residence in Hong Kong is enunciated in its Immigration Ordinance (Cap 115) as an exception to the general rule. The general rule is provided in Article 24(4) of the Basic Law which states that the following are entitled to permanent residence and enjoy the right of abode in Hong Kong:

“persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region”<sup>68</sup>

Section 2(4)(a)(vi) of the Immigration Ordinance (Cap 115) on the other hand, says that “a person shall not be treated as ordinarily resident during any period in which he or she remains in Hong Kong while employed as a domestic helper and who is from outside Hong Kong.” There is another provision in sub-paragraph (v) of the same section dealing with contract workers from outside of Hong Kong who come in under a government scheme to import labour. For reasons that are set out below, such treatment of MDWs is discriminatory and violative of Hong Kong’s domestic and international

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<sup>67</sup> *Ibid.*, para. 7.

<sup>68</sup> A full text of Hong Kong’s Basic Law is available online: HKSAR official website <[http://www.info.gov.hk/basic\\_law/fulltext/](http://www.info.gov.hk/basic_law/fulltext/)>.

human rights obligations.<sup>69</sup>

Hong Kong courts have tried to set the parameters for “difference of treatment” in the case of *R v. Man Wai Keung (No. 2)* where it was held that:

“Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. *To justify such a departure it must be shown:* one, that sensible and fair-minded people would recognize *a genuine need for some difference of treatment*; two, that the *difference embodied in the particular departure selected to meet that need is itself rational*; and, three, that such departure is *proportionate to such need*.<sup>70</sup>”

In the case of MDWs however, the statute providing for an exemption to the general rule has not stated the reason for such difference in treatment. The closest that could be deemed a justification of such different treatment can be gleaned from the Hong Kong Director of Immigration’s Annual Report 1998-1999. In this report, the objectives of immigration control were identified, namely: a) to regulate the entry of immigrants into Hong Kong to keep the population within acceptable limits; b) to control the entry of foreign workers, balancing demand for special skills with the need to protect the local labour force from unfair competition; and c) to facilitate the mobility of tourists and business people to make Hong Kong an attractive tourist and business destination<sup>71</sup>. The difference in treatment seems to be based therefore, on the assumption that MDWs would be a “liability” to Hong Kong and will compete with local workers, while other

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<sup>69</sup> I. Wong, “Foreign Domestic Workers and Hong Kong’s Immigration Policy” (6 June 2002) online: Hong Kong Lawyer <<http://www.hk-lawyer.com/2000-6/June00-29.htm>>.

<sup>70</sup>(1992) 2 HKPLR 164 at 179; (1992) 2 HKCLR 207 at 217, as cited in Wong, *supra*. (emphasis supplied)

<sup>71</sup> As cited and summarized in Wong, *supra*.

classes of migrant workers are believed to be “assets” in that they have “better skills” that would contribute to the economic prosperity and development of Hong Kong.<sup>72</sup> However, as Wong again pointed out, such assumptions are borne more of irrational fear and inherent bias against the work and status of MDWs.<sup>73</sup> It fails to consider the enormous contributions made by MDWs albeit indirectly, by freeing Hong Kong residents of household responsibilities (no easy task!) so that they can join in the general workforce.

On the population issue, Wong counters that “they have been lawfully permitted to enter and work in Hong Kong. Granting them the right of abode would not aggravate the population problem.” And being already gainfully employed, the possibility that they will rely on social welfare and be a burden on the community is not any higher than those of other migrant workers who are equally vulnerable to the risks of unemployment.<sup>74</sup>

Wong therefore raises serious doubts as to whether the difference in treatment can achieve the stated objectives. He concludes that, “the law is directly discriminatory against foreign domestic helpers as it is based on their class or social origin.”<sup>75</sup>

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

## **F. Types of Abuses and Ineffective Remedies**

It has been reported and documented that the most common forms of exploitation reported by MDWs in HKSAR include:

“...[E]xorbitant recruitment fees; coercion into performing extra tasks outside of the standard employment contract; excessive and irregular hours; denial of rest and holidays; underpayment and illegal salary deductions; confinement to the place of work and unreasonable curfews; confiscation of passports and travel documents; psychological intimidation; denial of the right to privacy; and physical and sexual abuse including rape and forced prostitution.”<sup>76</sup>

Meanwhile, the legal remedies available to MDWs in Hong Kong who find themselves exploited, abused and violated in any manner include the following:

- “a. filing a claim with the Labour Department;
- b. applying for a visa extension at the Immigration Department based on an exception to the Two-Week Rule; and filing a civil case with possible support from legal aid.”<sup>77</sup>

However, access to these legal remedies are said to be difficult for MDWs owing to:

- “a. excessive costs of visa extensions (i.e. HK \$135) imposed during a time when MDWs are also barred from working;
- b. uncertain immigration status because of the wide discretion immigration officers exercise in deciding on whether to grant visa extensions required for the MDW to proceed with the legal process;
- c. bias and unwillingness of the police to receive statements or issue memorandums necessary for immigration extensions;
- e. inability to meet strict evidentiary standards, which often require unobtainable written documents and witness testimony;
- f. inability to qualify for legal aid (despite wages often well below minimum wage) because employers do not provide or release

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<sup>76</sup> APWLD, *supra* at para. 3.

<sup>77</sup> *Ibid* at para. 4.

documentation of income; and  
g. pressure and intimidation from employers to drop cases.”<sup>78</sup>

In one instance, a MDW whose employer committed indecent assault against her on five occasions waited more than 20 months and paid over HK\$1,000 for visa extension fees prior to the culmination of her case. However, it is also a sad reality that “even when MDWs receive favourable judgments, their visas generally expire one week after the hearing and they are rarely able to obtain judicially-ordered compensations.”<sup>79</sup>

#### **G. Other Types of Human Rights Violations and NGO Assistance**

Since this dissertation is not concerned with a scientific and anthropological survey of the actual incidences of violations, data to support the ongoing discussion has been sourced from the reports of the work that has already been conducted by various non-governmental organizations (NGOs) in Hong Kong. While strict requirements of scholarly objectivity may demand a careful scrutiny of not only the MDW’s, but also the employer’s, side of each story, it is here admitted that NGOs looked into in this dissertation have the mandate of assisting MDWs and not the employers. The claims of NGOs cited below, though possibly open to dispute, are just part of an overwhelming data on the ill-treatment of MDWs in Hong Kong that have also been published in academic works, newspaper articles and even international bodies such as those earlier discussed in this chapter. Hence, as much as possible, sufficient corroboration by other

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<sup>78</sup> *Ibid.*

credible sources were likewise sought for these NGO accounts.

One of these NGOs is the Domestic Helpers and Migrant Workers Programme (DHMWP) which is “an organization set up by Christian Action to provide a broad range of services to domestic helpers at no charge.”<sup>80</sup> According to this organization, the most prevalent claims filed by MDWs with the Labour Department include: contract termination without wages in lieu of notice; refusal to pay return air fare; underpayment of wages (below the statutory minimum; refusal to pay wages due and failure to provide, or pay for rest days and statutory holidays. In 1999, the organization counselled over 7,000 MDWs most of whom were Filipinas and some Sri Lankans, Indonesians, Indians and Nepalese. By mid-2000, the DHMWP was already handling some 3500 cases consisting of slightly fewer Filipinas and an increasing number of Sri Lankans and Indonesians.<sup>81</sup> Among those handled by the DHMWP include the following two cases involving Filipina MDWs:

- Maria’s contract was terminated after the three years because she became pregnant. She filed for maternity protection but the result was not known at the time of the DHMWP report;
- Zen was unjustly terminated after four years. She refused to sign a receipt for alleged long service payment which she actually did not receive. Fortunately, the Labour Tribunal granted her full claim.<sup>82</sup>

Another active NGO in Hong Kong is the Asian Migrant Center (AMC) which

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<sup>79</sup> *Ibid.*

<sup>80</sup> Asian Migrant Centre, “Hong Kong Update” (2000) *Asian Migrant Yearbook* 131 at 132.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

not only produces a highly-regarded annual Yearbook on Asian Migration<sup>83</sup> but has likewise collaborated with the Coalition for Migrants' Rights (CMR) in conducting a "Baseline Research on Racial and Gender Discrimination Towards Filipino, Indonesian and Thai Domestic Helpers in Hong Kong."<sup>84</sup> While the research survey covered only the three main MDW nationalities (namely, Filipinos, Indonesians and Thais), these three groups constitute over 98% of the total MDW population in Hong Kong. Among the highlights of the research survey's findings<sup>85</sup> are:

- Contract violations involving minimum wage, days off and annual leaves are prevalent and affect *at least a quarter* of all MDWs in Hong Kong.
- Verbal and physical abuses are likewise prevalent, again affecting more than a quarter of the MDW population with a significant incidence of sexual abuses.
- Discrimination in daily life experienced by MDWs, though not as prevalent, are particularly significant in such areas as markets, shops and public transportation.
- Statistical tests establish that these violations are significantly related (95% or 99% confidence level) to both racial and gender discrimination against MDWs.

The research survey's findings thus only confirmed and corroborated the findings of earlier researchers, as well as the allegations of individuals victimized and by organizations providing assistance.

Another active NGO is one dedicated to serving the Philippine migrant

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<sup>83</sup> Heikki Mattila of the International Organization for Migration described the AMC yearbooks as "a highly valuable new tool. It must be the most comprehensive compilation of data and other important migration information on the whole Asian region." (Quoted from the AMY 1999 back cover).

<sup>84</sup> The research was jointly undertaken by the Asian Migrant Center, Asian Domestic Workers Union, Forum of Filipino Reintegration and Savings Groups, Indonesian Migrant Workers Union and Thai Women Association in February 2001, Hong Kong. (Copy on file with the author).

community in Hong Kong: the Mission for Filipino Migrant Workers (MFMW). The organization's daily programs consist in providing pastoral, social welfare and legal assistance services. Most of the cases handled are labour, immigration, criminal and civil cases. Almost half of these cases are the provision of counselling for crisis prevention: cases where the "crisis situation" (e.g. termination of contract, physical abuse) has not erupted and advice and assistance given are meant to "empower and embolden the potential migrant in crisis".<sup>86</sup> Majority (or 64%) of cases handled are termination cases, about one-third of which are "outright terminations" i.e. those which usually involve: 1) the MDW and her personal belongings are thrown out of the employer's house; 2) the MDW does not receive the contractual monetary benefits; and/or 3) the employer does not give any valid reason for the termination.<sup>87</sup> According to the same data, "it is not uncommon to hear about cases where employers accuse their domestic helpers of theft and destruction of property. In many cases, the contracts of these workers are also terminated prematurely and their monetary claims withheld. Cases of maltreatment, physical and sexual abuses remain as threats to the domestic helper."<sup>88</sup>

The Bethune House Migrant Women's Refuge, is yet another organization helping MDWs in distress in Hong Kong. Primarily serving as an "emergency shelter" for MDWs escaping from abusive employers, those with pending court cases or simply those who have nowhere else to go, the Bethune House was opened in September 1986,

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<sup>85</sup> Asian Migrant Centre et al. (2001) *supra* at 2.

<sup>86</sup> Mission for Filipino Migrant Workers (MFMW), 1:2 *Migrant Focus Magazine* (Oct.-Dec. 2000) at 30.

<sup>87</sup> MFMW, *supra* at 31.

<sup>88</sup> *Ibid.*

located in a building of approximately 1000 square feet owned by a church in Kowloon, Hong Kong.

The mandate of the shelter is “to provide free emergency relief, places of refuge, social counseling and other assistance for migrant women workers.”<sup>89</sup> The reasons cited by MDWs who seek refuge at the shelter, for their discharge from or for having been forced to leave employment, are varied. These reasons are often related to: “unfair dismissal by employers, physical and sexual abuse, and sub-standard working conditions (e.g. no day off, underpaid or non-payment of wages, illegal work ).” It is reported that “an average of 18-25 women stay in the Bethune House every night, at occasions the number has reached as high as 35. Each year, approximately 500 migrant women workers seek shelter from the Bethune House.”<sup>90</sup>

The valuable service being provided by Bethune House cannot be discounted. For without these types of shelters, many Filipina and other MDWs forcibly discharged or leaving abusive employers will be forced to spend the nights on the streets.<sup>91</sup>

These NGOs undoubtedly provide invaluable assistance to MDWs within the territory of Hong Kong,” in effect relieving the government of its responsibility to uphold the rights and take care of the needs of people within its jurisdiction. Despite this however, the same NGOs are still made targets of certain forms of attacks which limit their capacity to assist the MDWs .

For instance, the Inland Revenue Department (IRD) terminated the “charitable

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<sup>89</sup> Hong Kong Voice of Democracy, “Save the Bethune House”, online: <<http://www.democracy.org.hk>> (Sept. 1999).

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

status” of Bethune House in August 1999, five years after such status was approved by the government in 1994. In a letter addressed to Bethune House, the IRB said:

“They (Asian migrant women & migrant women workers) are numerically too small to constitute an appreciable section of the community. Whether a person is a poor person must be decided upon consideration of the evidence of his or her means. As such, you have failed to discharge the onus of proving that your activities are compatible with the object of relief of poverty and it will be proper for me to withdraw the approval (for exemption as a charitable institution under Section 88 of the IRD Ordinance)”<sup>92</sup>

Right now, the applicants for admission to Bethune House, though indeed a small fraction of the already over 170,000 foreign domestic helpers in Hong Kong (more than 90% of whom are women), have experienced unfair termination of work contracts or abusive work conditions. With pending labour cases in the courts, they are not allowed to work in the meantime, thus depriving them of the much-needed income for which they came to Hong Kong in the first place. Without this “charitable status” therefore, the Bethune House was in very imminent danger of closing down. As an “independent charitable organization”, Bethune House has relied heavily on overseas funding and individual support. However, without the charitable status, it has been extremely difficult to organize public fundraising activities as donations could not be deducted from taxes of donors, and Bethune House will rarely be seen as eligible for overseas funding. Fortunately, Bethune House has survived this challenge and still manages to assist countless MDWs in Hong Kong to date.<sup>93</sup>

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

The chapter that follows will compare the evidence discussed in this and the previous chapter, as a way of completing the picture regarding the comparative situation of Filipina MDWs in Canada and Hong Kong. Subsequently, an attempt will be made to propose a theoretical framework that will assist towards understanding and ameliorating the plight of Filipina MDWs in these two countries, as well as in understanding and ameliorating the plight of all the MDWs the world over who face similar problems.

## **Chapter 6**

### **A Comparative Survey of the Situation of Filipina Migrant Domestic Workers in Canada and Hong Kong**

*“Wide-scale exploitation of Third World women domestic workers, through their construction as non-citizens, is an intrinsic aspect of globalization.”*

- D. Stasiulis & A. Bakan<sup>1</sup>

#### **A. Overview / Introduction**

This comparative study of the situation of Filipina migrant domestic workers (MDWs) in Canada and in Hong Kong is meant to help shed some light on the common experiences of these MDWs in both jurisdictions. The comparative study will not only deal with the relevant issues outlined in the theoretical legal approaches canvassed in chapter two, but will also lay the groundwork for the more specific application of the TWAIL analysis undertaken in chapter seven. In the process, some degree of repetition of the evidence already presented in earlier chapters is inevitable.

Comparative legal studies had been defined as a field of law which “deals with and analyzes the other, the different”.<sup>2</sup> Thus,

“[c]ontemporary legal and societal issues, as well as contemporary scholarly developments, share with comparative law a focus on the

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<sup>1</sup> In D. Stasiulis & A. Bakan, “Negotiating Citizenship: Foreign Domestic Workers in Canada” (1997) 57 Feminist Review 112 at 132.

<sup>2</sup> V.G. Curran, “Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives” (1998) 46 Am. J. Comp. L. 657 at 657.

different, the other. Consequently, the instructive potential of comparative legal analysis to those areas is manifest.”<sup>3</sup>

As discussed in chapter two, this dissertation’s theoretical framework is informed by and deals with some of these contemporary scholarly developments, e.g. critical legal theory, critical race theory, feminist legal studies, and the TWAIL school of thought. Thus, in addition to the earlier general and specific discussions of the two jurisdictions (Canada and Hong Kong) in previous chapters, the comparative analysis in this chapter will further highlight the relevant issues regarding the socio-legal ill-treatment of Filipina MDWs. It is also hoped that this undertaking will enrich the existing wealth of literature in comparative legal studies for at least two reasons: First, this is the first major attempt at comparing the legal frameworks in Canada and in Hong Kong vis-à-vis the situation of Filipina MDWs. Second, it utilizes a relatively nuanced approach to comparative legal studies. The relative nuance lies in the fact that the subjects of comparison (Canadian and Hong Kong legal systems) are not only being compared in terms of the variations in their respective legal cultures, but also in terms of their effects on a marginalized population (Filipina MDWs) within their respective systems. Generally, comparisons of national cultures tend to take for granted the fact that the populations within legal systems are not always homogeneous in origin or character and that certain sectors, no matter how numerically “insignificant”, are still vital parts of the whole society.<sup>4</sup>

The choice of a comparative framework to analyze the situation of Filipina MDWs was also due to their increasingly growing numbers not only in Canada and in

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<sup>3</sup> *Ibid* at 657-658.

<sup>4</sup> Please see A. Riles, “Wigmore’s Treasure Box: Comparative Law in the Era of Information” (1999) 40

Hong Kong, but also in many other areas of the world. This phenomenon appears to be part of an overall global trend which has generated various transnational and cross-cultural issues requiring further understanding and analysis. Comparative legal scholarship is vital in such understanding and a key “tool for solving the new problems of globalization”.<sup>5</sup>

Thus, the comparative framework is not only being treated as a “method of inquiry” but also as a “substantive field of knowledge.”<sup>6</sup> Riles has taken this a step further by claiming that, more than the method and the body of knowledge, comparativists share a:

“passion for looking beyond, an empathy for differences [and] also for similarities, a faith in the self-transformative task of learning, and an interest in the form of knowledge itself.”<sup>7</sup>

Thus, comparative legal studies should never be just about knowing the intricate details of foreign legal systems, but also about this *passion* for understanding the differences as much as the similarities. Along these lines, it has been argued that:

“An international agreement is more likely to fail, or a possibility for legal reform to go unconsidered, for example, because of a lack of interest, empathy, or faith in the possibility of engagement with difference than because of a lack of information about things foreign.”<sup>8</sup>

The comparison undertaken here seeks to express this passion for the transformative nature of cross-inquiry and analysis. This is then aimed towards making the international human rights system truly benefit a disadvantaged population such as

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<sup>5</sup> Harv. Int'l L. J. 221 at 250-252.

<sup>6</sup> *Ibid.* at 223.

<sup>7</sup> M. Reimann, “Progress and Failure of Comparative Law in the Second Half of the Twentieth Century” (2002) 50 Am. J. Comp. L. 671 at 684.

<sup>8</sup> Riles, *supra* at 229. (emphasis in the original)

the Filipina MDWs in various parts of the world.

This work will be guided by the keen insights of comparative legal scholars, especially in avoiding some of the discipline's commonly perceived pitfalls. It will, as much as possible, cautiously guard against the way that the field of comparative legal studies has tended to be an "ethnocentric enterprise without self-critical discipline" and which "did not seem to make a difference in the real world".<sup>9</sup> Frankenberg has criticized the "mainstream scholars" of comparative law<sup>10</sup> for limiting their analysis to a purely Western viewpoint. He describes this body of work as follows:

"home law is positioned as the natural, normal, or superior standard... Strategic comparisons, by way of assimilation, justify the intellectual and normative superiority of the Western legal world and the necessity to intervene in other legal worlds in the name of the universal ideal law."<sup>11</sup>

While this critical stance towards the predominant Western viewpoint is among the main areas of concern of the TWAIL framework further discussed in the next chapter, this is not to say however, that the comparative analysis will be entirely devoid of any "political" leaning. For it is admitted that comparative legal studies are not only "academic projects, but also political interventions."<sup>12</sup> But as Cossman suggested, a

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<sup>8</sup> *Ibid.* at 282.

<sup>9</sup> G. Frankenberg, "Stranger than Paradise: Identity & Politics in Comparative Law" (1997) 1997 Utah L. Rev. 259 at 260.

<sup>10</sup> Frankenberg classifies the mainstream comparativist scholars into three schools: the classical (or classificatory) comparativist, the better-solution comparativist, and the law & economics comparativist. He distinguishes them as follows: "The classical comparativist will frequently invoke 'evolution' and 'history' or 'ideal law' and 'humanism,' while the better-solution comparativist will refer to 'interdependence' and 'functions' without renouncing 'humanism.' The law & economy comparativist radicalizes the functionalist terminology, relying basically on 'efficiency' to bring law in harmony with 'social change,' toning down humanistic claims as 'social needs.'" Frankenberg, *supra* at 263.

<sup>11</sup> *Ibid.* at 266.

<sup>12</sup> *Ibid.* at 261.

process of “turning the gaze back on itself”<sup>13</sup>, or the awareness of one’s partiality, must also lead to conscientiousness in identifying the ways by which such partiality shapes one’s perception, knowledge and judgment. In the process therefore, even the initial political agenda or preordained theoretical framework ought to be subjected to continuing scrutiny and renegotiation.<sup>14</sup> After all:

“The value of comparative methods has always been in forcing us into sympathetic yet critical knowledge of law in another context, thereby disrupting our settled understandings, provoking us to new judgments, and demanding our response with new decisions, commitments, and actions.”<sup>15</sup>

Taking all of the above into consideration, the comparison undertaken in this chapter will be socio-legal in orientation and character. An initial survey of the relevant laws and policies in Canada and Hong Kong reveals several striking similarities and a few differences. A common thread that runs through the laws and policies relating to MDWs in both jurisdictions is the wide gulf between theory and reality. Filipina MDWs in both jurisdictions constantly encounter similar forms of human rights violations. Despite the existence of relevant laws or policies, these MDWs are often left with no effective means of redress. This is true in relation to both their countries of employment and their country of origin. The rest of this chapter will undertake a detailed comparative analysis of some of the most important issues affecting the lives of MDWs in Canada and in Hong Kong.

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<sup>13</sup> Please see B. Cossman, “Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies and the Postcolonial Project” (1997) 1997 Utah L. Rev. 525.

<sup>14</sup> Cossman, *supra* at 539; and P. Carozza, “Continuity and Rupture in ‘New Approaches to Comparative Law’ ” (1997) 1997 Utah L. Rev. 657 at 663.

<sup>15</sup> Carozza, *supra*.

## **B. Some Common Issues Facing Filipina Migrant Domestic Workers in Canada and in Hong Kong**

### **1. The Commodification and Devaluation of Domestic Work**

The treatment of domestic workers has been viewed as one of the most “vexing problems” of our time by feminist scholars and other people who work for the advancement of women’s rights.<sup>16</sup> Not only is domestic work largely undervalued and mostly unregulated (being associated with women’s “natural tendency towards nurturing”), “the gendered norms defining women’s work are also based on race and class.”<sup>17</sup> Those who perform paid housework are mainly impoverished women of colour who do not have much choice but to accept undervalued wages.<sup>18</sup> This kind of “menial” domestic labour is “devalued because it is strenuous and unpleasant and is thought to require little moral or intellectual skill.”<sup>19</sup> As Donna Young has noted:

“Women’s subordination is, in part, constituted within the processes of social reproduction. Paid domestic workers can be seen as the commodification and disaggregation of one or some of these social reproductive functions.”<sup>20</sup>

In the Canadian context, it seems ironic that while the Labour Export Policy of the Philippines results in the commodification of Filipino women as valuable sources of export dollars, the institutional prejudice of Canada (as the country of employment)

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<sup>16</sup> D. Young, “Working Across Borders: Global Restructuring and Women’s Work” (2001) 2001 Utah L. Rev. 1 at 2-3.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> D. Roberts, “Spiritual and Menial Housework” (1997) 9:1 Yale J. of Law & Feminism 51 at 51.

<sup>20</sup> Young, *supra* at 9.

demeans the value of domestic or caregiving work. This holds true despite the very high demand for such form of labour in Canadian society.<sup>21</sup> One illustration of the low value placed on the contribution of these MDWs is that, unlike other foreign workers who are readily admitted to Canada as permanent residents, MDWs are initially admitted on a temporary basis (and are only allowed to apply for permanent residence after having performed *at least* two years of live-in domestic work).

The treatment of Filipina MDWs in Hong Kong may at first glance seem different, but actually produces the same effect as the treatment in Canada. Even if these MDWs contribute immensely (in direct and indirect ways) to Hong Kong's economic prosperity, they continue to be victims of overt discrimination and ill-treatment in that society. A clear manifestation of this prejudicial treatment is the fact that MDWs are absolutely barred from obtaining permanent resident status in Hong Kong. In contrast, other "skilled" foreign workers are permitted to apply for such status after seven years of living and working in Hong Kong. In fact, the status of MDWs in Hong Kong has been so demeaned that university students in Hong Kong who were asked to rank 45 listed occupations, placed domestic work second from the least prestigious occupation, and lower than prostitution.<sup>22</sup> Thus, it is apparent that the work that Filipina MDWs do in both Canada and Hong Kong have been greatly devalued.

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<sup>21</sup> Please see J. Beach, J. Bertrand, & G. Cleveland, *Our Child Care Workforce: From Recognition to Remuneration, A Human Resource Study of Child Care in Canada, More Than a Labour of Love* (Ottawa: Child Care Human Resources Steering Committee, 1998). This research study of the child care workforce found that "regulated child care is especially lacking for infants, school-age children, children with special needs, rural and isolated communities and families needing part-time and non-standard hours of care. This is primarily attributed to Canada's lack of a national system of child care and even those administered by provincial governments are not mandatory hence planning and provision of services is usually done in an *ad hoc* manner."

<sup>22</sup> "Maids Ranked Below Prostitutes, Hawkers" *South China Morning Post (Hong Kong)* (8 July 1998) at

The fact that MDWs in Canada are eventually allowed to apply for permanent residence is sometimes used to support the claim that MDWs are treated better in Canada than in Hong Kong or even in other countries of employment. While this may be true in one sense, it is also misleading in another. The parallel experience of MDWs in both jurisdictions is clear proof that the working conditions far outweigh the significance of the duration of the MDWs' temporary status. In fact, the permanent residence<sup>23</sup> carrot that is dangled before MDWs in Canada often encourages them to endure violations of their human rights or to forego legal redress.<sup>24</sup> This situation then poses a strong counter-argument to the claim that MDWs in Canada are treated better than MDWs in Hong Kong solely on the basis that Canada allows the possibility for MDWs to obtain permanent resident status.

## **2. Gender Equality and the Displacement of Misery to Third World (especially Filipina) Women**

While the early clamor for equality rights has resulted in more women being empowered to compete with men in the “public sphere” thus veering them away from

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5, as cited in B. Sautman & E. Kneehans, “The Politics of Racial Discrimination in Hong Kong” (2002) 169:2 Maryland Series in Contemporary Asian Studies 1 at 71.

<sup>23</sup> Permanent residence or “landed status” is highly-coveted by MDWs in Canada because it “embodies many of the rights to which other Canadians are entitled. Chief among these would be the right to choose where they live, and the right to change occupations that they found to be oppressive.” In P. Daenzer, “An Affair Between Nations: International Relations and the Movement of Household Service Workers” in A. Bakan and D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: Toronto University Press, 1997) 81 at 90.

<sup>24</sup> In Canada, the MDW may apply for permanent resident (PR) status at least two years from arrival in Canada, while in Hong Kong, there is no such opportunity. Thus, in a way, the period for potential abuse is shorter in Canada than in Hong Kong. However, this may be offset by the fact that the desire for PR status often leads to serious abuses which often go unreported due to the MDWs’ fear of losing such opportunity.

household or domestic duties, a class-based irony has sadly resulted. That is, much more of the burden of domestic work has now been passed on to women of lower economic status. In this case, this burden has been transferred to women of colour from poor, “third world” nations such as the Filipina MDWs.

This reality is true both in Canada and in Hong Kong. Canada is deemed as having not only failed to provide adequate childcare facilities for Canadian children,<sup>25</sup> but also having sanctioned the exploitation of women workers from developing countries. This scenario is not only perpetuating a highly-gendered view of domestic work, but also reveals an utter lack of sensitivity to the fundamental human rights of both Canadian and third world women. In fact, this lack of gender sensitivity has caused Canada to be the subject of severe criticism at the United Nations human rights treaty bodies. These bodies have accused Canada of “neglecting issues of poverty and social and economic rights, *particularly among women.*”<sup>26</sup>

Hong Kong is likewise faced with the above concerns, especially since women far outnumber men among those toiling in the field of migrant domestic work in this jurisdiction.<sup>27</sup> It has also been pointed out that a major reason for the prevalence of discrimination against migrant workers in Hong Kong is the fact that most of them are

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<sup>25</sup> Please see Beach, Bertrand & Cleveland, *supra*.

<sup>26</sup> M. Jackman & B. Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act” in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada Policy Research Fund, 1999) at 45 (emphasis supplied).

<sup>27</sup> Asian Migrant Center, et al., “Baseline Research on Racial and Gender Discrimination Towards Filipino, Indonesian and Thai Domestic Helpers in Hong Kong” (Hong Kong, February 2001) at 20. The sample data, which is based on a 95% confidence level (of being indicative of the overall population), indicated that females comprise 98.6 per cent of the migrant domestic workers in Hong Kong as of 2000.

people from “poor countries”, and much “more often than not, women.”<sup>28</sup> The UN CEDAW Committee has specifically pointed to “the treatment of foreign domestic helpers, including the cut in the minimum wage announced on 2 February 1999 (the very day of the [Committee] hearing)” as among the major issues of concern in relation to the respect and promotion of women’s human rights in Hong Kong.

Although it is beyond the scope of this dissertation to go into an extensive discussion of how the issue of domestic work has given rise to complications among women’s rights advocates and “feminists”, it is worth noting this reality as well. The fact that domestic work privileges women of a higher social status whose “household responsibilities” are passed on to women of a lower social status and/or of a different race, often makes it difficult to reconcile the supposed commonality of their “sisterhood” within these two patriarchal societies. As Young has stated:

“Employers of domestic workers – who by virtue of their citizenship, class and/or race are able to exploit global economic forces that drive women from their homes in search of remunerative jobs in other countries – plainly benefit from the law’s unequal treatment of domestic workers. Many of the employers are women... [proving] that patriarchy works systemically to influence the behaviour and choices of all people, including women. It matters little whether the perpetrators are men or women.”<sup>29</sup>

Another interesting analysis on this very issue of gender vis-à-vis class distinctions, was articulated in this manner:

“The domestic workers policy preserves and reinforces unequal relationships between the employer and servant and thus negates the purely gender-focussed explanation. It has been tempting during the five-

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<sup>28</sup> *Ibid.*; Sautman & Kneehans, *supra* at 71.

<sup>29</sup> D. Young, *supra* at 52.

decade study to reduce the dynamics of the policy to the single issue of class. But the preservation of this class distinction by the policy has more to do with legitimating the existing hierarchical structure of Canadian society than with elevating the private status of women employers. It is a structural dynamic rather than a social one. Nevertheless, middle-class women are significant beneficiaries of its outcome.”<sup>30</sup>

In any case, the problem of gender inequality is clearly related to the issues of commodification of women and devaluation of domestic work. The discriminatory treatment arising from the “intersecting identities of gender, race and class”<sup>31</sup> thus contributes to the increasing bias against migrant women who perform domestic work in states of employment such as Canada and Hong Kong.

### **3. Citizenship Rights and Temporary Status**

The temporary status of MDWs in Canada and in Hong Kong is the main vehicle through which “citizenship”<sup>32</sup> rights are denied. Although this pertains to the denial of formal citizenship rights in the traditional sense, the effects on the social, economic and political status (i.e. their substantive citizenship rights) of these women are wide-ranging and the implications enormous. Adherence to static notions of citizenship based on Canada’s sovereignty over its subjects and territory only entrenches the subordinate

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<sup>30</sup> P. Daenzer, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s* (Toronto: Canadian Scholars’ Press, 1993) at 144.

<sup>31</sup> Please see “Anti-Racism Law Must Not Ignore Violations of Migrant Workers’ Rights” in I Care (21 March 2001) online: ICare News <<http://www.icare.to/21maart.html>>.

<sup>32</sup> “Citizenship rights” is being used here to mean those social, political and economic entitlements granted to people who reside within or are members of a territory. These rights include those normally granted to a nation’s citizens and permanent residents (to a limited degree - in Canada for instance, permanent residents cannot vote or run for public office).

status and double-standard treatment for these women and members of their families. This is one of the main reasons that MDWs in Canada often endure abuses and other hardships in exchange for the permanent resident (PR) status that they much covet. As earlier mentioned, this is the “promise” embodied in the LCP for those who are able to complete the two-year work and live-in requirement within three years of arrival in Canada. PR status is important for at least three reasons: 1) it allows the MDWs who hold PR status to sponsor family members to come and reside in Canada permanently; 2) it allows the MDWs more mobility and freedom to choose the type of work they wish to do, their employer, and the conditions of such work (e.g. whether live-in or live-out); and 3) it provides more rights and privileges than an LCP work authorization does (e.g. health and education benefits, the possibility of applying for citizenship, among others).

Thus, in respect of citizenship rights, Canada may seem much better than Hong Kong in the sense that it is still possible to convert an MDW’s temporary to PR status, after the fulfilment of certain requirements. This option does not exist at all for MDWs in Hong Kong. It is important to note, however, that in both jurisdictions, MDWs still face serious obstacles to the attainment of full citizenship. While Canada’s LCP facilitates the exploitation of the MDWs’ desire to gain PR status in that country, Hong Kong’s blanket refusal to grant PR status to MDWs is only slightly worse in terms of the abusive experiences that temporary status helps force MDWs to endure. For instance, even in Canada, most MDWs are practically denied certain important benefits, such as those flowing from employment insurance and pension plans.<sup>33</sup> Yet, these MDWs are

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<sup>33</sup> The “denial” of these benefits is greatly aided by pragmatic considerations. For employment insurance,

still mandated to make financial contributions to these plans. The result is that the membership of these MDWs in Canadian society, their “citizenship”, is one-sided at best. Moreover, Canadian-born children of these Filipina MDWs are sometimes denied the basic medical and other health-related benefits that are normally granted to the children of Canadian citizens.<sup>34</sup> This has happened in the well-publicized case of Melca Salvador, a Filipina MDW in Montreal (of the Province of Quebec) whose Canadian-born child was refused medical treatment for his respiratory illness because the status of his mother in Canada has expired.<sup>35</sup> Although it is recognized that Ms. Salvador’s expired status technically classifies her to be “outside” of the LCP, the onerous application of the conditions of the program was the reason for her having lost her status. If the LCP requirement of two-year live-in domestic work within three years was not there or was at least applied with a little more flexibility to accommodate situations such as an unexpected pregnancy, then people like Ms. Salvador would not be left in limbo.

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the long bureaucratic delays in applying for this benefit practically makes it an undesirable option for MDWs for fear that long periods of unemployment would negate their “adaptability” and “suitability” to become permanent residents in Canada. With respect to pension plan contributions on the other hand, the temporary work permits issued to MDWs under the LCP provide no guarantee that their pension plan contributions will be enjoyed at all since there’s no assurance that they will reach retirement age in Canada, owing to their temporary worker status. And in case their eventual application for permanent residence is denied after the maximum three years under the LCP, there is no provision requiring the government to reimburse them for their pension plan contributions made during the LCP working period.

<sup>34</sup> Please see *Canada Health Act* ( R.S. 1985, c. C-6 ). Section 3 of this law states the Canadian Health Care Policy as follows: “It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.” It may also be important to note here that Canada follows the principle of “*jus soli*” or citizenship based on one’s place of birth.

<sup>35</sup> Please see Melca Salvador campaign website online: <<http://page.infinit.net/ugay/melcah.htm>>. Fortunately, the persistent lobbying and strong support of activist groups and individuals on behalf of Ms. Salvador bore fruit when her deportation was stayed on humanitarian and compassionate grounds in May 2001. A year later, or in May 2002, she finally received her permanent resident visa allowing her to stay in Canada with her Canadian-born son. Source: Press Releases sent by PINAY / The Filipino Women’s Organization in Quebec, E-mails (11 May 2001 and 2 May 2002).

While the right to medical treatment of such children may be guaranteed in some provinces where health insurance laws and entitlements are different, it is nonetheless a matter of serious concern that the denial of medical attention to the children of MDWs is even possible. It is also a matter that implicates the equality rights that are guaranteed under the Canadian Charter of Rights and Freedoms.<sup>36</sup> The Charter specifically provides that, “(e)very individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”<sup>37</sup> Hence, causing prejudice to the life of even just one child born in Canada for the simple reason that the mother is an undocumented MDW, is one serious violation too many. In fact, this is one of the important concerns which the Supreme Court tried to address in the case of *Baker v. Canada*.<sup>38</sup> In this case, the Supreme Court of Canada held that the interpretation and application of administrative law (including immigration law) should be consistent with international human rights treaties ratified by Canada. This includes the International Convention on the Rights of the Child.<sup>39</sup> Hence, its provisions on the “best interests of the child,” among others, ought to inform the Canadian government’s decisions and policy-making.<sup>40</sup>

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<sup>36</sup> *Canadian Charter of Rights and Freedoms*, s.15, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>37</sup> *Supra*, s. 15 (1).

<sup>38</sup> (1999) [1999] S.C.J. 39.

<sup>39</sup> (1989) U.N. Doc. A/RES/44/25.

<sup>40</sup> Jackman & Porter, *supra* at 57.

The situation in Hong Kong is strikingly similar. In theory, those born in Hong Kong are entitled to the right of abode,<sup>41</sup> yet it is highly improbable that the Hong Kong-born children of MDWs can truly enjoy the benefits of a regular permanent status when their parents are barred by law from ever becoming permanent residents in Hong Kong.

Citizenship rights issues, in the context of migration and transnationalism, have produced extensive theoretical discussions and given birth to various optics and methods of understanding this concept. Among the more prominent authors in this regard include T.H. Marshall whose classic work<sup>42</sup> has defined the elements of citizenship as the possession of civil, political and social rights. Soysal's often-contested arguments regarding postnational membership vis-à-vis the European context<sup>43</sup> and Will Kymlicka's discourse on citizenship in a multicultural context<sup>44</sup> are also quite well-known.

Soysal's assertion that there is an emerging phenomenon of postnational citizenship (mainly arising from the integration of European countries into a single economic and political system and the formal enunciation of "universal" human rights at

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<sup>41</sup> "Hong Kong: Right of Abode" (January 2000) 7:1 Migration News. online: Migration News website <[http://migration.ucdavis.edu/mn/more.php?id=2007\\_0\\_3\\_0](http://migration.ucdavis.edu/mn/more.php?id=2007_0_3_0)>. It was stated that "In December 1999, another Hong Kong judge ruled against the government, holding that children born in Hong Kong to parents without Hong Kong residence rights have the right to live in Hong Kong. Immigration laws give residence rights to all persons born in Hong Kong, but exclude the children of mainland parents — the judge said this exclusion was unconstitutional." It is reasonable to argue that the same ruling may be applied to other sectors such as the MDWs in Hong Kong.

<sup>42</sup> Please see T.H. Marshall, *Class, Citizenship, and Social Development: Essays* (New York: Doubleday, 1965) at 71-134. For a more extensive account of these theoretical discussions on citizenship, please see also G. Shafir, ed., *The Citizenship Debates* (Minneapolis: University of Minnesota Press, 1998).

<sup>43</sup> Please see Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994) at 136-162. Moreover, Soysal admits that her concern is limited to the "organization and articulation of incorporation policy and membership rights, not their implementation and practice." Thus, despite so-called "implementation deficits", the analysis was not designed to address these matters. In Soysal, *supra* at 10, 134.

<sup>44</sup> Please see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 10-33, 173-195.

the global level)<sup>45</sup> is seriously challenged by the situation of Filipina MDWs in both Canada and Hong Kong. For, not only do they continue to be denied “citizenship rights” in their countries of employment, their racial, gender and class distinctions often result in the effective denial of certain crucial rights to them. On the other hand, Kymlicka’s attempt to reconcile the liberal notion of individual rights with the traditionally opposing concept of multiculturalism, may have some relevance if we are to consider the fact that the countries of employment (Canada and Hong Kong) are largely liberal societies which are increasingly becoming more “multinational” and/or “polyethnic”.<sup>46</sup> However, Kymlicka’s analysis is hard to apply to the specific situation of Filipina MDWs mainly because of its inadequate treatment of gender, race and class concerns. Also, Kymlicka does not really address immigration *per se*, but only its consequences.

However, Stasiulis and Bakan have asserted the possibility of a new form of citizenship that might include MDWs; one that needs to recast conceptions of citizenship as a “dynamic” and not a “static” concept.<sup>47</sup> They assert the need for:

“...a re-conceptualization of citizenship as a negotiated relationship. Subject to change, it is acted upon collectively, or among individuals existing within social, political, and economic relations of collective conflict, which are shaped by gendered, racial, class and internationally based state hierarchies.”<sup>48</sup>

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<sup>45</sup> Soysal, *supra* at 1-12, 136-167.

<sup>46</sup> Kymlicka differentiates these two terms as follows: “Multinational” refers to diversity arising from the existence in one state of more than one “nation”, the latter referring to “a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture”. “Polyethnic” on the other hand, refers to diversity arising from individual and family migration where immigrants usually coalesce into loose associations called “ethnic groups”. In Kymlicka, *supra* at 10-11.

<sup>47</sup> D. Stasiulis & A. Bakan, “Negotiating Citizenship: The Case of Foreign Domestic Workers in Canada” (1997) 57 Feminist Review 112-139 at 114-119.

<sup>48</sup> Stasiulis and Bakan, *supra* at 113.

Unlike Soysal who theorizes an expansion of citizenship rights across national borders, Stasiulis and Bakan's analysis of MDWs in Canada "indicates the tenacity of national, territorially based sovereignty to restrict rights to individuals originating from outside a nation-state's borders."<sup>49</sup> Nonetheless, Bakan and Stasiulis argue that far from being "passive", MDWs illustrate the "transformative power of agency"<sup>50</sup> manifested in the following ways:

" They work to negotiate a measure of dignity as well as economic well-being. Through their transnational remittances, and initiation of networks of migration, these migrant women actively develop transnational ties and support transnational families and communities. There is also increasing evidence that migrant domestic workers are collectively contesting the limitations on their human and worker rights through global networking and involvement in increasingly internationalized and multi-focused social movements."<sup>51</sup>

#### 4. Racialization

In addition to the issues of class that attend the privilege of the employers of MDWs and the disadvantage of MDWs themselves, the racialization of most MDWs in Canada and Hong Kong is another factor that affects the mostly negative experiences they encounter in both jurisdictions. The stereotyping of persons belonging to particular

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<sup>49</sup> *Ibid* at 131.

<sup>50</sup> *Ibid* at 133.

<sup>51</sup> *Ibid*. Please see also P. Velasco, "'We Can Still Fight Back': Organizing Domestic Workers in Toronto" in *Not One of the Family: Foreign Domestic Workers in Canada*, Bakan and Stasiulis, eds. (Toronto: University of Toronto Press, 1997) at 157-164.

ethnicities as “ideal domestic workers” has now become almost institutionalized.<sup>52</sup> While there are other factors leading to this trend, certain distinct racial patterns are evident in its generation and orientation.

In Canada, it is important to note that the denial of permanent resident status to MDWs from the start of their employment coincided with the large influx into the MDW ranks of women of colour from the “third world” (mostly the Caribbean and the Philippines).<sup>53</sup> Prior to this, when most MDWs in Canada were from Europe, they were granted landed status immediately upon entry into Canada, were welcomed with open arms, and were deemed part of Canada’s nation-building project.<sup>54</sup> One cannot help therefore, but attribute these stricter immigration conditions to the aim of controlling, if not restricting the entry of people of colour who are increasingly becoming the main source of LCP entrants.<sup>55</sup>

Hong Kong also faces serious racial discrimination issues. Racial discrimination against MDWs in Hong Kong does not only arise from social attitudes and practices, but

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<sup>52</sup> Please see A. Macklin, “On the Inside Looking In: Foreign Domestic Workers in Canada” in W. Giles and S. Arat-Koc eds., *Maid in the Market: Women’s Paid Domestic Labour* (Halifax: Fernwood Publishing, 1994) at 21-23; R. Parrenas, *Servants of Globalization: Women: Migration and Domestic Work* (Stanford: Stanford University Press, 2001) at 61-79; N. Constable, *Maid to Order in Hong Kong: An Ethnography of Filipina Workers* (New York: Cornell University Press, 1997) at 32-39; and N. Grandea, *Uneven Gains: Filipina Domestic Workers in Canada* (Ottawa: The Philippines-Canada Human Resource Program and The North-South Institute, 1996) at 17-21. These books and articles illustrate various modes of constructing Filipina MDWs’ predisposition to performing domestic work.

<sup>53</sup> P. Daenzer, “An Affair Between Nations: International Relations and the Movement of Household Service Workers” in A. Bakan & D. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 81-82.

<sup>54</sup> Daenzer asserts that, “the exploitation of immigrant domestic workers increased when non-white women were included in the program. Prior to the 1940s, the British white domestics who predominated in the program enjoyed citizenship and mobility rights upon entering Canada.” In Daenzer, *supra* at 81.

<sup>55</sup> Please see statistics in Annex “H” which show that the Philippines, for the last three years (2000-2002) consistently topped the list of sources for “other categories” of migrants to Canada. Statistics in Annex “E” on the other hand, show that majority of those falling under “other categories” consist of LCP entrants and their dependents.

is also “structural in character and endemic in legislation and policies of the government.”<sup>56</sup> Social attitudes reflecting racial bias are often manifested through employers’ preference for MDWs of a lighter skin colour or those who speak the Chinese language or cook similar types of food.<sup>57</sup> It may be argued that this type of racialization does not necessarily apply to Filipinas who might be able to speak Chinese or cook Chinese food. However, the preference given to anything “Chinese” regardless of the MDW’s country of origin manifests a racialized view of what are “acceptable” traits that a MDW must possess to work in a Hong Kong household. Racialized attitudes are also often articulated in newspaper articles and editorials.<sup>58</sup>

Previously, domestic work “had few, if any, racial connotations in Hong Kong”.<sup>59</sup> At present however, the term *banmui* or Philippine girl is “used interchangeably with ‘maid’ or ‘servant’”.<sup>60</sup> The attempt by Oxford dictionary to enter the word “Filipina” to mean “a female citizen of the Philippines; a servant or an *amah*”,<sup>61</sup> the production and sale in Hong Kong of a doll with “black hair, wearing a domestic worker’s uniform, carrying a miniature Philippine passport and a lifetime employment contract”,<sup>62</sup> and the

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<sup>56</sup> Asian Migrant Center, “Racial Discrimination Against Migrant Workers in Hong Kong” (October 2001) online: December 18 website <<http://www.december18.net/paper33Hongkong.htm>>.

<sup>57</sup> Please see Constable, *supra* at 36, 71.

<sup>58</sup> *Ibid.* at 35-36, citing M.S. Chow, “The Rising Tide Against Domestics” *Hong Kong Standard* (11 May 1987); M.C. Yuen, Letter, *South China Morning Post* (23 July 1993); G. Lai, Letter, *South China Morning Post* (26 July 1993); K. Sinclair, “Case Against the Filipinas” *South China Morning Post* (12 July 1995); and “Maids Make a Mess at Post Office” Letters, *Hong Kong Standard* (23 May 1992). The letter writer was complaining about the aftermath of regular Sunday gatherings of Filipina and other MDWs at Central Square and other visible public places in the metropolis.

<sup>59</sup> Constable, *supra* at 38.

<sup>60</sup> *Ibid.*

<sup>61</sup> Constable, *supra* at 38-39, citing L. Layosa, “Come to Think of It” *Tinig Filipino* (19 January 1990) at 19. The derogatory entry was later shelved after then Philippine President Corazon Aquino filed a formal complaint against the publishers of Oxford dictionary through the British Embassy in Manila.

<sup>62</sup> *Ibid.* at 39, citing K. Southam, “Domestic Dolls Degrade Us, Say Angry Filipinas” *South China Morning Post* (18 May 1986); K. Southam, “Company Refuses to Change Dolls” *South China Morning*

practice of some Hong Kong children to refer to their domestic workers as “my Filipino”, are but some of the palpable evidence that domestic work in Hong Kong has indeed become racialized.<sup>63</sup>

It does not help that the Hong Kong government continues to implement such discriminatory policies toward MDWs. These policies include the new conditions of stay imposed on this particular group of migrant workers (and not on other migrant occupations) such as the two-week rule and the non-eligibility for permanent residence.<sup>64</sup>

However, the Hong Kong government’s position was expressed in former Chief Executive Tung Chee-hwa’s denial of the existence of racial discrimination against MDWs in Hong Kong. He alleged that, “practices termed discriminatory … are only inadvertent misunderstandings caused by cultural differences. There is thus no need for an anti-discrimination law, which may even result in offended feelings and heightened inter-ethnic tension.”<sup>65</sup> These statements clearly fly in the face of the concluding observations of the United Nations Committee on the Elimination of Racial Discrimination (UN CERD)<sup>66</sup> to the effect that the situation of discrimination in Hong Kong is “unsatisfactory.”<sup>67</sup> The Committee noted its concern, among others, for the lack

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Post (1 June 1986); and “Filipina Maid Doll Insulting” South China Morning Post (24 May 1986). The distribution of these dolls occurred only for a short period in 1986 after outraged protests by the Filipino community in Hong Kong successfully put an end to their production and sale.

<sup>63</sup> *Ibid.*

<sup>64</sup> Please see also related discussion in Chapter 5.

<sup>65</sup> Luk YAU, “Gang ren bing bu qishi waiji nu yong (Hong Kong People Do Not All Discriminate Against Foreign Maids)” *Da Gong Bao* (30 January 2001) at A13, as cited in Sautman & Kneehans, *supra* at 6.

<sup>66</sup> United Nations body monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), U.N. G.A. Res. 2106 (xx) 21 December 1965, entered into force 4 Jan. 1969). Full text online: United Nations Office of the High Commissioner for Human Rights <<http://www.unhchr.ch>>.

<sup>67</sup> United Nations Committee on the Elimination of All Forms of Racial Discrimination (UN CERD), Concluding Observations on China (09/08/2001) at its 59<sup>th</sup> session, 30 July – 17 August 2001: UN Doc.

of a law against racial discrimination “committed by private persons, groups or organizations”<sup>68</sup>; the situation of MDWs from the Philippines, Indonesia and Thailand; and the “discriminatory two-week rule”.<sup>69</sup>

## 5. Live-in Situation

Extremely woeful and poignant tales of physical, emotional, psychological and sexual abuse, isolation and non-compliance with labour standards and contractual provisions, have arisen from the compulsory live-in situation of MDWs. These tales have been reported in newspaper articles, video documentaries,<sup>70</sup> and research studies,<sup>71</sup> not only in Canada and in Hong Kong, but in other jurisdictions as well.

In Canada, INTERCEDE has recently produced what it claims to be the result of the “largest and most comprehensive participatory action research on violence against women of colour who immigrate from less-economically developed countries.”<sup>72</sup> The findings of this research project confirm many cases of abuse arising from the live-in

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A/56/18 paras. 231-255 at 247. Please see also: “Rights Activists to Step Up Pressure in Geneva” *South China Morning Post (Hong Kong)* (23 July 2001) at 4; “Geneva Meeting to Press for Anti-Racism Law” *South China Morning Post (Hong Kong)* (28 July 2001) at 14; “Racism Law Only When Public is in Favor” *South China Morning Post (Hong Kong)* (1 August 2001) at 4; “License to Discriminate Blasted” *South China Morning Post (Hong Kong)* (2 August 2001) at 4; “Racism a Problem Among Clergy: Bishop” *South China Morning Post (Hong Kong)* (8 September 2001) at 2, as cited in Sautman & Kneehans, *supra* at 12.

<sup>68</sup> UN CERD, *supra* at para. 247.

<sup>69</sup> *Ibid.* at para. 248.

<sup>70</sup> Some of these films include: *Brown Women, Blonde Babies* (Montreal: Le Videographe, 1991); *Modern Heroes, Modern Slaves* (Montreal: Telefilm Canada, 1998) and *When Strangers Reunite* (Montreal: Multimonde, 1999).

<sup>71</sup> Please see Bakan and Stasiulis, *supra*; Arat-Koc, *infra* fn 69; Constable, *supra*; Parrenas, *supra*, among others.

situation. It also confirms the unanimity among MDW advocacy groups that the LCP's live-in requirement should be repealed. Even the Canadian government has acknowledged the existence of abuse<sup>73</sup> but seems to have done little to solve the problem.

As Arat-Koc has noted:

"One of the most common forms of abuse faced by workers under the LCP is economic abuse. The most typically experienced disadvantage of live-in work, and the one most frequently reported is the very long hours of work associated with living in, which often comes with no overtime pay. When the caregiver lives in the same house with the employer, her services, her hours and her person are taken for granted by an employer."<sup>74</sup>

The common abusive experiences endured by a live-in MDW in Canada is embodied in Aida's case whose "typical day" is from 6 a.m. until 10 p.m., which could even be extended up to 4 a.m. whenever she had to clean up after the dinner guests have left. Her employer's excessive and abusive demands were manifested in various other ways.<sup>75</sup> Unable to bear the abuses any longer, Aida went to the police and filed assault charges against her employer. Almost a year later, the charges were dismissed but the

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<sup>72</sup> S. Arat-Koc with F. Villasin, *Caregivers Break the Silence: A Participatory Action Research on the Abuse and Violence, including the Impact of Family Separation Experienced by Women in the Live-in Caregiver Program* (Toronto: INTERCEDE, 2001) at back cover page.

<sup>73</sup> Please see CIC booklet for employers and live-in caregivers. online: Citizenship and Immigration Canada website <[http://www.cic.gc.ca/english/visit/caregi\\_e.html](http://www.cic.gc.ca/english/visit/caregi_e.html)>.

<sup>74</sup> Arat-Koc, *supra* at 38-39.

<sup>75</sup> The other demands by her employer include the following: 1. Although the employer had a key to the house, she was supposed to wait up and open the door at whatever time her employer returned home; 2. In addition to her heavy workload in the house, she was expected to wash the car two times a week. To do this, she had to carry pails of water from the basement to the driveway because there was no water hose. There was no vacuum cleaner or lawn mower, so she picked up dirt from the floor carpet and rug by hand and used a knife to cut the grass; 3. She was made to sleep in the basement, not given enough food, and was made to account for the toiletries she used; 4. She was prohibited from using the phone; her passport was kept by her employer; was paid a measly \$200 a month; and was not allowed any days off; 5. Her employer regularly abused her physically. She decided to leave after she was accused of stealing a bottle of wine and consequently verbally abused, slapped, hit, pushed and shoved, and her hair pulled, leaving bruises and scratches on her face and body. In Arat-Koc, *supra* at 53-54.

judge stated in his decision that “it was not because the employer proved her innocence but that the Crown was not able to prove Aida’s case ‘beyond a reasonable doubt.’”<sup>76</sup>

It has been admitted that the above story may be indicative of “extreme – but not necessarily the worst – cases of abuse and violence.”<sup>77</sup> However, advocates such as INTERCEDE also note that Aida’s and other similar cases are not isolated or atypical but are actually illustrative of the way that a program such as the LCP allows employers to “take full advantage of the vulnerabilities and possibilities created by immigration and labour policies in a sexist and racist society.”<sup>78</sup>

In Hong Kong, similar cases of abuse such as extended work hours, verbal abuse and sexual harassment, have been documented and recorded in various studies of MDWs conducted there.<sup>79</sup> It has been observed that, controls were not only exercised over the MDW’s labour, “but extend into her most private domains. Her body, her personality, her voice, and her emotions may be subject to her employer’s controls.”<sup>80</sup>

An illustration of such “employer control” is shown in the case of Cathy whose ordeal as a MDW in Hong Kong closely mirrors that of her counterpart in Canada.<sup>81</sup>

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<sup>76</sup> *Ibid.* Unfortunately, the book does not tell what happened to Aida after this court decision dismissing her charges against her abusive employer.

<sup>77</sup> *Ibid* at 53.

<sup>78</sup> *Ibid.*

<sup>79</sup> For example, Constable, *supra*; Asian Migrant Center, et al., “Baseline Research on Racial and Gender Discrimination Towards Filipino, Indonesian and Thai Domestic Helpers in Hong Kong” (Hong Kong, February 2001); Sautman & Kneehans, *supra*.

<sup>80</sup> Constable, *supra* at 83.

<sup>81</sup> Constable narrates: “Cathy’s work followed a rigid daily schedule beginning before seven o’clock in the morning and ending close to midnight. Her duties included washing, marketing, cooking, cleaning Ms. Leung’s flat, and looking after two dogs. In addition to such ‘official’ duties, she was also required to clean Ms. Leung’s mother’s flat, Ms. Leung’s friend’s flat and office, and Ms. Leung’s office and to serve as a messenger. Even on her ‘rest day’ – which was rotated each week, thus curtailing her ability to meet her sister and her friends – she was required to make breakfast, take the dogs out, and do many other household chores.

Another instance of control that seems to be a prevalent practice among Hong Kong employers is that while the employers are free to come and go anywhere as they please, the MDWs are not. Often, MDWs are locked inside the flat or a room in the house and not given a key when the employers leave the house, effectively curtailing the MDW's freedom to move about her place of work and residence, much less, to go out.<sup>82</sup>

Being a stranger in a foreign land by itself could create strong feelings of isolation. This is even aggravated by the fact that the MDW's place of work is also the place of residence. It is not surprising therefore, that the MDW's fear of losing a job is coupled with the fear of ending up in the streets with no roof over one's head. And as the household members where the MDW works increases in number, the MDW's vulnerability to abuse and exploitation likewise increases.<sup>83</sup>

There are also claims that many MDWs are happy with their situation and are not experiencing any of the "horror stories" narrated above. On this, Macklin notes that even though "many (perhaps most) employers choose not to mistreat their domestic workers" [this] does not negate the fact that the system has made that option available.<sup>84</sup>

Macklin reinforces this with a quote from Christina Davidson, adviser to the West Coast Domestic Workers Association based in Vancouver who said that:

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Ms. Leung gave Cathy a detailed list of rules to follow. She was forbidden to wear makeup, fingernail polish, or perfume; she could not wear dresses or skirts, only pants; and her curfew on her day off was strictly enforced. She was not permitted to use the phone, and was threatened with a deduction of HK\$10 from her pay, even for free local calls. Ms. Leung specified the days when Cathy could wash her hair and monitored the length of her showers. When Cathy ate with the family, she was served last. Other times, she complained, she was given leftovers and rarely received enough to eat. The rest of the family slept in air-conditioned quarters but the room where Cathy slept, which also served as a storeroom, was sweltering hot in the summer and leaked when it rained." *Ibid.* at 84-85.

<sup>82</sup>*Ibid.* at 103.

<sup>83</sup>*Ibid.* at 85.

<sup>84</sup>A. Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 McGill

“It’s not that all employers are mean, nasty, dirty, evil people in comparison to lovely domestic workers. The point is, the way the system is set up, it’s very easy to abuse domestic workers because they are in a powerless position.”<sup>85</sup>

While the statement was made in the context of the Foreign Domestic Movement Program, it is still applicable with regard to the LCP. The crux of the matter is that the LCP perpetuates the powerless position of the MDWs while reinforcing the power of the employer and the country of employment, increasing the likelihood of abuse in the process.

## 6. Inadequacy of Remedies

Their precarious immigration status, the “institutional asymmetry”<sup>86</sup> that exists between a MDW and an employer, and between a MDW and the state of employment, are some of the daunting obstacles facing MDWs who are intent on enjoying their legal rights. It therefore comes as no surprise that the technical or formal remedies that may be available do not necessarily ensure the proper treatment of MDWs when their rights are violated.

In Canada, the fear of losing what they perceive as their only chance at becoming landed immigrants or permanent residents is the main reason that very few even attempt to file complaints or vindicate their rights using the formal judicial and administrative

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L.J. 681-760 at 729.

<sup>85</sup> Macklin, *supra*, citing M. Stainsby, “Powerless: The Plight Facing Foreign Domestic Workers in B.C.” *Vancouver Sun* (10 November 1989).

<sup>86</sup> Stasiulis and Bakan, *supra* at 122. In simpler terms, the phrase “institutional asymmetry” could also be taken to mean “power imbalance”.

processes. Many MDWs see the “prize” of permanent resident status as “worth” all the sacrifice that they make. Hence, the lack of a system for the effective monitoring of the working conditions of MDWs is a deplorable void in the LCP, and in effect condones the prevalence of the abuse and exploitation of MDWs in Canada.

There are also a number of remedies offered by the Philippines (as the country of origin) within the territory of a country of employment such as Canada. They range from the convening of orientation seminars for newcomers to Canada, to the provision of various forms of assistance. Some examples of these include activities conducted by the Office of the Philippine Labour Attaché in Canada (based in Toronto) such as mediation, government and non-government agency referrals, and the provision of overall moral support. However, it is also admitted that employers do not always cooperate when the Philippines seeks to intervene, especially since employers are not bound to abide by the Philippine Labour Attaché’s recommendations. Thus, Filipina MDWs are often simply advised to change employers, return to the Philippines, or file the appropriate type of court action.<sup>87</sup>

Macklin’s 1991 interview with an official of the then Canada Employment and Immigration Commission (Policy Branch) yielded an admission that the “enforceability of the employer/employee agreement has never been the subject of a court challenge.”<sup>88</sup> Thus, while it is widely known that a MDW found violating any of the terms of the

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<sup>87</sup> R. Young , Philippine Labour Attaché in Toronto, Interview (2001).

<sup>88</sup> Macklin, *supra* at 723, citing an Interview with B. Stewart of the then Canada Employment and Immigration Commission (Policy Branch, Ottawa) (2 May 1991). In a recent e-mail inquiry to confirm this matter, a Program Specialist at the Citizenship and Immigration Canada (CIC) Social Policy and Programs Division stated that the CIC has “no information” in this regard but added that the employment contract would “fall under provincial/territorial labour legislation.” In T. De Kir, “Re: Inquiry About the Live-in

employment contract is hastily subjected to deportation proceedings, there is yet no known instance of an employer found violating the terms of the contract whose request for another MDW under the LCP has been denied. This statement, originally made in Macklin's 1991 interview with an immigration officer, was confirmed by a current CIC official who said that:

“While a signed employment contract is a legal requirement of the LCP, and is intended to provide the fairest working arrangement possible for both the caregiver and the employer, the Government of Canada is not a party to the contract. We have no authority to intervene in the relationship between the employer and the caregiver, or to enforce the conditions of employment. A sample contract is provided for the information of both employer and caregiver in the guidebook.”<sup>89</sup>

While Macklin's research was conducted in 1991, the above statement shows that nothing much has changed in this regard to this very day. Moreover, Macklin asserts that, “[p]ublic awareness of and concern about immigration issues are nascent and in many ways inchoate, leaving the targets of immigration policy with little recourse to public support.”<sup>90</sup>

In Hong Kong, it is apparent that the situation of Filipina MDWs is not any better than it is in Canada. For one, the discriminatory policies against them reflect the biased attitude of the government and its unwillingness to fully recognize the rights of MDWs. Although there have been many administrative, civil or criminal cases filed by aggrieved Filipina MDWs against their abusive employers (mainly with the assistance of NGO advocates), most of these cases ended up being settled for a measly sum (if at all), either due to the opposing counsel's or employer's delay tactics, or simply because of the

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Caregiver Program” E-mail (02 September 2003).

perceived imbalance of the justice system in favour of the Hong Kong employer and against the Filipina MDW.<sup>91</sup> Moreover, like Canada, and despite the presence of substantial numbers of migrant workers from the Philippines in Hong Kong, there is no bilateral labour agreement between the Philippines and Hong Kong. Within Hong Kong, it is the Labour Department (LD) and the Immigration Department (ID) that regulate the status of migrant workers in that territory. The ID issues employment visas and enforces the conditions of stay, while the LD takes charge of ensuring compliance with the terms of the employment contracts of these MDWs. Consequently, the LD is the agency tasked to resolve disputes arising from breach of employment contracts, including those involving money claims.<sup>92</sup>

According to the ID, the “Standard Employment Contract (SEC)” is the

“only contract acceptable to the Immigration Department of Hong Kong, whenever an application is made by an employer to employ a domestic helper from outside Hong Kong. The contract is covered by Hong Kong laws, in particular, the Employment Ordinance (Cap. 57), the Immigration Ordinance (Cap. 115), and the Employees Compensation Ordinance (Cap. 282).”<sup>93</sup>

However, the SEC is still deemed weak in some areas. For instance, it fails to provide for fixed hours of work, and some of its provisions are also discriminatory and biased in favour of employers. As an example, the grounds for which the employer can terminate

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<sup>89</sup> Macklin, *ibid.*; and De Kir, *ibid.*

<sup>90</sup> Macklin, *supra* at 745.

<sup>91</sup> B. Julve, Philippine Labour Attaché in Hong Kong, Interview (February 2002); This imbalance in the enforcement of legal rules vis-à-vis the employer and MDW is also illustrated in the article of C. Tan, “Why Rights Are Not Enjoyed: The Case of Foreign Domestic Helpers” (2000) 30 Hong Kong L.J. 354 at 358-359.

<sup>92</sup> M. Villalba, “Legal Protection of Filipino Migrant in Hong Kong” in *Legal Protection for Asian Women Migrant Workers – Strategies for Action Conference Proceedings* (Manila: Ateneo Human Rights Center, Lawasia Human Rights Committee and Canadian Human Rights Foundation, 1997) at 144.

<sup>93</sup> Hong Kong Immigration Department 407A (1/92), as cited in Villalba, *ibid.*

the contract without need of notice or salary consists of such vague and general reasons as “disobedience, dishonesty or neglect of duty”, giving much leeway for the arbitrary termination of these MDW employment contracts.<sup>94</sup>

In view of the conditions described above, it will be relevant to state here the observation that:

“[r]esearch internationally and over historical time has found that the single greatest feature of domestic workers’ ability to negotiate or bargain for improvements in the generally oppressive conditions of domestic service is the ability to live out, away from the dictates of the employing family.”<sup>95</sup>

Thus, it is only in the context of a live-out arrangement that a MDW can be more fully empowered and adequately protected. However, it is even more important that the laws meant to protect MDWs’ rights ought to be applied in ways that will take into consideration their inherent and obvious disadvantages.

## **7. Family Separation and Reunification**

“Why are we, third world women, leaving our children to take care of other people’s children?” laments a former MDW.<sup>96</sup> Perhaps the most glaring illustration of the Canadian government’s lack of sensitivity and concern for the MDWs as human beings is its refusal to allow them to bring their families to Canada. Because of conditions such as the live-in requirement, the two-year work period, and the minimum

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<sup>94</sup> Villalba, *supra* at 145.

<sup>95</sup> Stasiulis and Bakan, *supra* at 128. Please see also M. Romero, *Maid in the USA* (New York: Routledge, 1992) at 139.

<sup>96</sup> Jesuit Center for Social Faith and Justice, 5:2 *The Moment* (Toronto, 1991) at 1.

income requirement that is necessary before one can sponsor family members, lengthy separations are endured by the Filipina MDWs and their spouses and children. As a result, family breakdowns, alienation, emotional stress and all forms of family problems imaginable are among the most serious and long-term consequences faced by the MDWs even after they are able to sponsor their families to come to Canada.<sup>97</sup>

In Hong Kong, the reality is even more stark. Unlike in Canada, where the possibility of gaining permanent resident status allows the MDW to eventually sponsor immediate family members, there is no such hope for those working in Hong Kong. Thus, not only can they never become permanent residents, they are also denied the hope of ever reuniting and living with their families in Hong Kong. Sadly, for many, the only other way for families to be reunited in Hong Kong is for those remaining in the Philippines to also become employed in Hong Kong as MDWs. Thus, it is not uncommon for a mother to reveal that after years of toiling as a MDW to send her children to school, the latter also end up going to Hong Kong to do the same kind of work, either due to lack of job opportunities or extremely low salaries back in the Philippines.<sup>98</sup>

## **8. Equality and Labour Rights**

Although closely related to and often overlapping with the other areas discussed, this issue deserves special mention here because of the peculiar treatment accorded to

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<sup>97</sup> Arat-Koc (2001) *supra* at 21-35; *When Strangers Reunite* (film) (Montreal: Multimonde, 1999).

MDWs as workers in many jurisdictions, including Canada and Hong Kong.

Some specific characteristics of the situation of MDWs in Canada are worth emphasizing. First, the LCP has been accused of giving rise to a “two-tiered and convoluted” set of immigration and labour policies with respect to MDWs.<sup>99</sup> That is, while the labour employment contract is required by federal immigration law, labour standards are in fact governed by provincial legislation. Aside from the confusion that can arise from this federal-provincial divide, the different labour standards that exist in different provinces have meant that the quality of labour rights enjoyed by MDWs has not been uniform across Canada. Second, MDWs are among the very few migrant worker groups that must fulfill conditions of employment in Canada before becoming eligible for permanent resident status. Third, this conditional status effectively prevents them from exercising basic labour rights such as the right to unionize and bargain collectively.

Although MDWs were for a short time included (by the then NDP government in Ontario) in the group of workers to whom the Labour Relations Act applied, this nonetheless proved to be a short-lived victory as this provision was soon expunged by the Conservative government which took over.<sup>100</sup> Hence, these very basic omissions in the MDWs’ rights only aggravate their already disadvantaged status for denying them the means by which to negotiate for better conditions. While it may be validly raised that

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<sup>98</sup> A poignant example was narrated in the article, “A Reunion Away from Home” in 1:3 *Migrant Focus Magazine* (Jan-Mar 2001) at 19.

<sup>99</sup> J. Cuenca, “Filipina Live-In Caregivers in Canada: Migrants’ Rights and Labor Issues (A Policy Analysis)” Master of Laws Thesis, University of British Columbia (1998) at 81 (copy on file with the author).

<sup>100</sup> J. Fudge, “Little Victories and Big Defeats” in Bakan and Stasiulis (1997) *supra* at 119-145.

the granting of such rights to MDWs would hardly matter in practice because of the power imbalance and other related factors earlier discussed, it is still significant to note that their marginalization extends to the formal legislative level.

While MDWs in Hong Kong are theoretically entitled to the same labour rights as other workers, they nonetheless experience violations of these same rights that are similar in kind to the violations experienced by MDWs in Canada. One major factor that facilitates these violations is their isolation in their employers' homes, which renders the exercise of collective rights virtually impossible, and their individual rights, very difficult to enforce. And with respect to equal treatment, the Hong Kong government is clearly violating this human right through the imposition of the "new conditions of stay" policy that were applicable to MDWs (and not to other types of migrant workers).

Hence, it can be concluded that MDWs in both Canada and Hong Kong are faced with similar issues with respect to the exercise of their labour rights. This similarity often boils down to their discriminatory treatment in both jurisdictions as second-class citizens and lowly-regarded workers.

## **9. Matters of Agency**

Some authors have insisted on viewing the experiences of MDWs from a perspective that does not *simply* identify and characterize them as helpless victims. One author has, for instance, noted that "these women are far from passive...They reveal the transformative power of human agency, of ordinary people... [who] work to negotiate a

measure of dignity as well as economic well-being.”<sup>101</sup> In Canada, for instance, it has been concluded through a survey of Filipina and Caribbean MDWs that:

“...through their transnational remittances, and initiation of networks of migration, these migrant women actively develop transnational ties and support transnational families and communities. There is also increasing evidence that MDWs are collectively contesting the limitations on their human and worker rights through global networking and involvement in increasingly internationalized and multi-focused social movements.”<sup>102</sup>

In Hong Kong, some MDWs were also found to have succeeded in “negotiating the negative features of their work and redefining their work in positive terms.”<sup>103</sup> More concretely, they:

“...manage to arrange their time so as to pursue other interests and participate in the wider Filipino community; they gain satisfaction from the changes they have brought about in their family’s standard of living and from their work at the mission, at UNIFIL and with other migrant worker organizations.”<sup>104</sup>

It has likewise been asserted that Filipina MDWs are “not simply subject to institutionalized power” but that:

“[t]hey are implicated in a field of discursive power in which they both contest and contribute to alternative versions of reality... Although many of these forms of resistance take place on a discursive level, they provide a domestic worker with at least a temporary sense of satisfaction, pleasure or empowerment.”<sup>105</sup>

The sense of “empowerment” derived from being able to assert one’s individuality and self-worth are themes common to the experiences of MDWs in both Canada and Hong Kong. Manifestations may range from the simple act of defying the

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<sup>101</sup> Stasiulis and Bakan, *supra* at 133.

<sup>102</sup> *Ibid.* For e.g., please see P. Velasco, *supra* at 157-164.

<sup>103</sup> Constable, *supra* at 161.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.* at 203.

odds and retaining one's sanity amidst the disadvantages, to maximizing benefits derived from migrant work and the sending of remittances back home. They could also be manifested through active involvement with advocacy groups working for social change not only for MDWs but also for other vulnerable sectors of society.

While these acts may eventually bring positive results, it is clear that the desired changes are extremely slow in coming. It therefore remains a question whether these acts are indeed means of improving one's situation or are mere coping mechanisms to survive a system that leaves no room for allowing equal and just treatment of migrant workers in general or MDWs in particular.

It is worth noting as well, that active involvement in organizational work seems to be a guiding force and an effective support mechanism for MDWs in both Canada and Hong Kong.

## **10. Organizational Advocacy**

It may seem that MDWs in both Canada and Hong Kong are quite fortunate to have a good number of organizations actively working for improvements in their status. These organizations have done so by deploying various advocacy techniques.

In Canada, for instance, the remarkable success of the efforts made by advocates to prevent the deportation of Melca Salvador was evidence of the enormous power that could be yielded by civil society action. Not only were the individuals and organizations which supported Ms. Salvador able to convince the government that she deserves to stay

in Canada, their campaigns also raised general public awareness on the many shortcomings and injustices arising from this federal immigration program. Another notable example is how years of lobbying by INTERCEDE have brought about piecemeal changes to the LCP, and have empowered many MDWs to be more assertive of and vigilant about their rights.

In Hong Kong, the NGO community appears to be just as vibrant. Organizations such as the Asian Migrant Center and the Mission for Filipino Migrant Workers conduct not only direct services for troubled MDWs, but also various research studies and produce publications in aid of their programs and overall mandate.<sup>106</sup> Moreover, a shelter called Bethune House had been a source of comfort for many troubled MDWs who would not otherwise have any other place to live after having been thrown out of their employers' homes or having left an abusive work environment. While the services of this shelter are not limited to Filipina MDWs, a substantial number, if not the majority are from the Philippines, with most of the others coming from Indonesia, Thailand, Nepal and Bangladesh. The predominance of Filipina MDWs taken in at the shelter is quite proportional to the actual population of MDWs in Hong Kong, the majority of which are Filipinas.

Organizational support has proven to be a major contributing factor in achieving social change for these MDWs. Still, the experience of MDWs in Canada and Hong Kong again proves that even organizational strength and persistent advocacy are not likely to totally eradicate many systemic problems.

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<sup>106</sup> For example, AMC's Annual *Asian Migrant Yearbook* and AMC et al., "Baseline Research on Racial

## **11. Governmental Regulation**

This leads to one of the most intractable issues of all: government regulation. For as quoted in a previous chapter, “[i]mmigration is one of the least controllable aspects of government activity,” with “bureaucratic discretion” dominating its functions and often leading to the prejudice of those who are “politically powerless”.<sup>107</sup>

First of all, which government are we referring to? In the case of a transnational group as the Filipina MDWs, at least two national governments are involved in each situation: the government of the country of origin (the Philippines) and the governments of the country/ies of employment (Canada and/or Hong Kong). There is also the supranational supervision that could be instituted by the various regional or international bodies that govern matters ranging from trade and economics, health, labour standards, migration, and human rights. Therefore, in situations where matters of accountability for protection and/or redress of grievances are at stake, the MDW stands at the mercy of complicated diplomatic, socio-political, economic and legal considerations.

As had been discussed in earlier chapters, the Philippines, as a fast-growing labour exporting country (official denials notwithstanding), has made some efforts to regulate the flow of migrants from its territory to the country of employment. However, the same measures have been the subject of criticisms not only for their utter

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and Gender Discrimination Towards Filipino, Indonesia and Thai Domestic Helpers in Hong Kong” (February 2001); and MFMW’s quarterly *Migrant Focus Magazine*.

<sup>107</sup> Macklin, *supra* at 745.

ineffectiveness but also for being geared more towards attracting the perceived economic benefits for the country rather than ensuring the welfare of Filipino migrant workers struggling in various corners of the world.

The regulatory systems in place in the countries of employment on the other hand (either in Canada or in Hong Kong), are likewise woefully inadequate mainly because they are also more focused on the benefits that these migrant workers will contribute to the economy, rather than the welfare of the workers themselves.

In Canada, specific provisions of the LCP mainly promote the interests of the Canadian government and prospective employers instead of those of the MDWs. First, the fact that enforcement of labour standards are within provincial jurisdiction practically absolves the federal government of any responsibility for monitoring of LCP employment contracts, despite the fact that these contracts emanated from the immigration process (which is a federal matter). Second, the live-in requirement and conditional immigration status more often prevent, rather than encourage, the MDW to seek redress for grievances not only due to the power imbalance vis-à-vis their employers, but also due to the fear of losing their chance at obtaining permanent resident status. These are but some of the main factors which often render the existing legal remedies for MDWs in Canada, largely ineffective.

In Hong Kong, policies such as the two-week rule not only reflect discriminatory treatment of MDWs, but also demonstrate an overly restrictive regulation of matters pertaining to their rights and welfare, resulting in further prejudice to MDWs in an already antagonistic context.

Perhaps it is true that this is just a natural human trait to be more concerned about selfish interests rather than altruistic ends. However, since governments are ideally created for altruistic rather than profit-making objectives, then the former should be made to prevail more often, if not at all times. Sadly, this is not the case in either the country of origin (the Philippines) nor with any of the two countries of employment (Canada and Hong Kong).

## **12. Implications of Globalization**

An excerpt from the report of the Asia Pacific Forum on Women, Law and Development (APWLD) to the United Nations Commission on Human Rights<sup>108</sup> vis-à-vis MDWs in Hong Kong is instructive. The report claims that Asia-Pacific countries “have witnessed a steady increase in labour flows over the last decade,” a large number of whom are women. As a result, “women migrant domestic workers struggle against discrimination based on their race, gender, legal status and type of work.”<sup>109</sup>

Similarly, the situation in Canada has led some sociologists to conclude that,

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<sup>108</sup> UN Doc. E/CN.4/2003/NGO/122 (12 March 2003) submitted to the Fifty-ninth session of the United Nations Commission on Human Rights.

<sup>109</sup> *Ibid.*, para. 5. The same APWLD report states that: “Since the 1997 Asian Economic Crisis, this discrimination has increased as a result of bi-lateral and multi-lateral trade and labour policies that clearly focus on regional economic integration rather than the establishment of basic levels of protection for these migrant workers. The Two-Week Rule is a case in point. Despite the importance socially and economically of MDWs’ work, the Two-Week Rule prevents them from accessing basic legal protection and makes them highly vulnerable to further exploitation and abuse... And, “[r]ather than responding to the change in Hong Kong’s labour needs by increasing social services (such as daycare centres or programmes for the elderly) the HKSAR Government has advocated for the recruitment of MDWs as a solution to the problem and as a source of cheap and flexible labour.” *Ibid.*, paras. 5 & 6.

contrary to the concept of “postnational citizenship” theorized by Soysal<sup>110</sup> and Jacobson,<sup>111</sup> who see a “trend in the emergence of deterritorialized post-national rights for noncitizens,” Bakan and Stasiulis claim otherwise. Instead, they assert an “augmented form of transnationalized female labour”, as manifested in the situation of MDWs.<sup>112</sup> This, they claim, is indicative of the steadfast influence of a “national, territorially based sovereignty” that continues to delimit rights for those who come from beyond a state’s territorial boundaries.<sup>113</sup> Hence, while admitting to the existence of particular “emergent forms of trans-border, regional (e.g. European) citizenship”, this is available only for a few privileged individuals, such as transnational business people. At the same time, more flexible “mobility rights” are granted to “some workers of designated ‘appropriate’ nationalities,” even as “states in the twentieth century have guarded their borders with increasing jealousy.”<sup>114</sup> Thus:

“Wealthier states, whose own capacities to deliver on benefits associated with social citizenship have declined in obeisance to the dictates of transnational capital and neo-liberal deficit-cutting logics, are increasingly ‘wanting a labor force without human beings’<sup>115</sup>, secure in the knowledge of vast reserves of labour willing to migrate from desperately poor countries...”<sup>116</sup>

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<sup>110</sup> Please see Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994) at 136-167.

<sup>111</sup> Please see D. Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996) at 1-17, 126-138. Jacobson stresses that “the state is becoming less a sovereign agent and more an institutional forum of a larger international and constitutional order based on human rights.” Jacobson, *supra* at 2-3.

<sup>112</sup> Stasiulis & Bakan, *supra* at 131.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* Please see also J. Bhabha “Embodied Rights: Gender Persecution, State Sovereignty, and Refugees” (1996) 9 *Public Culture* 3 at 10.

<sup>115</sup> Stasiulis & Bakan, *supra* at 132; P. Hondagneu-Sotelo “Women and Children First: New Directions in Anti-Immigrant Politics” (1995) 25:1 *Socialist Review* 169 at 184-185.

<sup>116</sup> *Ibid.*

Meanwhile, Stasiulis and Bakan also note that the discourse linking citizenship with international migration has also led other scholars to suggest the emergence of “new forms of *global and regional apartheid*.<sup>117</sup> This they owe to the fact that:

“[R]endered largely invisible as a result of their performance of work in the private sphere of the family-household, migrant domestic workers are generally exempted from societal-level employment standards and other forms of protective labour, social security and human rights legislation.”<sup>118</sup>

These observations encapsulize the implications of economic globalization for migrants in general and MDWs in particular, whether employed in Canada, Hong Kong or elsewhere. Indeed, their situation illustrate a disturbing reality that is clearly incongruous with the messianic claims of far-too-many advocates of economic globalization.

### C. Conclusion

The comparative analysis of the situation of Filipina MDWs in Canada and in Hong Kong undertaken in this chapter has confirmed and revealed many gaps and shortcomings at the international and domestic levels, both with respect to policy-making and implementation. Notable among these shortcomings are the clearly discriminatory (based on gender, race or citizenship or immigration status) laws and policies which have prevailed amidst increasing protests by civil society organizations and at times even

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<sup>117</sup> Stasiulis & Bakan, *ibid.* Please see also, A. Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (Toronto: Oxford University Press, 1994) at 216-217; and R. Balibar, “Is European Citizenship Possible?” (1996) 8 Public Culture 355 at 362-363.

<sup>118</sup> Stasiulis & Bakan, *ibid.* (Emphasis supplied).

direct admonition from international human rights bodies. Another interesting facet of these findings is that despite the general perception that MDWs in Canada are treated better than in Hong Kong (particularly owing to the LCP's policy of allowing them to apply for permanent residence after at least two years of live-in domestic work), a closer look at their situation reveals otherwise. In fact, this seeming advantage even turns out to be an insidious disadvantage because of the subtle forms of exploitation that it perpetrates.

In most issues discussed, striking parallels are to be found. They support the view that the inherently unjust nature of migrant domestic work as currently practiced, coupled with ineffective legal systems, are the main causes of the problems identified. For instance, in both jurisdictions, the issues of commodification and devaluation of domestic work were clearly linked to the gender concerns in that migrant domestic work continues to be viewed as a degraded form of occupation in these two societies. Hence, even feminist theorists are somehow befuddled by this particular issue as women (especially those who opt to participate in the "mainstream" workforce) are among those who directly benefit from the recruitment and employment of MDWs. Moreover, many of the problems arising from the live-in requirement, temporary status, family separation and discrimination for instance, are manifestly common to both jurisdictions, regardless of the remarkable variations in socio-political systems and even specific legal approaches taken by the Canadian and Hong Kong governments. There are those who may consider the duration (at least two years in Canada and indefinite in Hong Kong) of the temporary

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status of MDWs as a huge difference. This may be so, especially if seen in isolation. However, the qualitative nature of the exploitation and abuse renders the quantitative difference almost beside the point. Thus while Canada may seem to provide better conditions on the sole basis that it allows the possibility of permanent residence, this is not a reason to deny the existence of problems similar to those experienced by Filipina MDWs in Hong Kong. Rather, Canada's seemingly more benevolent treatment only serves to disguise an equally problematic treatment of MDWs.

The next chapter will proceed to utilize the TWAIL human rights framework in explaining the current scenario discussed in this and in previous chapters. It is hoped that the analyses will not only help us understand the situation of Filipina MDWs better, but will also assist in mapping out the appropriate state, organizational and individual responses.

## **Chapter 7**

### **Explaining the International and Domestic Ill-Treatment of Filipina Migrant Domestic Workers: A TWAIL Analysis<sup>1</sup>**

*"It is in the employment relationship between foreign domestic workers and their employers - in the intimate sphere of the household - that the First World meets the Third World. The social and legal dynamics of this relationship cannot be understood without understanding the global forces that prompt women to migrate to work as domestics, and compel middle class men and women in the West to leave their children and homes in the care of poor women from poor countries. An examination of women's domestic work is therefore incomplete without a global analysis."*

- Donna Young<sup>2</sup>

Previous chapters of this dissertation have analyzed the human rights situation of Filipina MDWs in Canada and in Hong Kong. As demonstrated in those chapters, the existence of various supposedly palliative policies and legislation has not made much difference to the lives of the far-too-many MDWs who continue to experience significant violations of their human rights.

In this chapter, I will attempt to offer a TWAIL analysis of the ill-treatment of Filipina MDWs, and situate such explanation within the relevant empirical data discussed in earlier chapters. And further to the discussion of the main tenets of the TWAIL

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<sup>1</sup> "TWAIL" is an acronym for the third world approaches to international law movement or school of thought. The principles of the TWAIL school and views of its self-identified scholars are discussed in Chapter 2.

<sup>2</sup> D. Young, "Working Across Borders: Global Restructuring and Women's Work" (2001) 2001 Utah L. Rev. 1 at 53.

paradigm conducted in chapter 2, this chapter will first provide a brief discussion of the more specific TWAIL *human rights* optic.

### **A. What is the TWAIL Human Rights Optic?**

As gleaned from the works of TWAIL scholars discussed earlier, the TWAIL human rights optic further distinguishes TWAIL analysis in the following manner:

1. The current international law concepts of so-called “universal” human rights were mainly based on western perception and experience.
2. This western view of human rights not only fails to consider the cultural particularities, but also inadequately addresses the intersections of race, gender, class, postcolonial status and other areas of distinction affecting the majority of the world’s population.
3. International law had not only been used as a tool of domination by the colonizing powers, but had also facilitated the contradictory application of the basic human rights principles of peace, equality, truth and justice.
4. Remedies leading to long-lasting reforms may be found not only in effective governance, but also in the work and intervention of domestic social movements and the individual’s power of agency.

Hence, far from the conventional assertions of the “objectivity” of international human rights law (e.g. the often heard claims that “third world” States have “freely negotiated and ratified” the existing international instruments), TWAIL scholars attempt

to unmask the evident or subtle (yet always pernicious) acts of oppression and subjugation that “third world” governments and their people face in a postcolonial context, and the role of international law in that process. There is a need to be conscious of these hidden modes of subjugation if a truly just and emancipatory human rights regime is to be achieved. With these in mind, TWAIL scholars strive to use the language of international human rights law in a way that could effectively uphold the interests of, and “bring a modicum of welfare to the long suffering peoples of the third and first worlds.”<sup>3</sup> Its emphasis on putting third world perspectives at the forefront, is the TWAIL school’s most important contribution to the field of international human rights law.

Accordingly, human rights advocacy should likewise unearth double standards and hypocritical claims that many countries (whether from the third or first worlds) often make in the international arena. Not only are these anomalies reflected in the universalizing tendencies of the north, but also in the supposed particularities used as justifications for human rights transgressions of dictatorial regimes in the south. As the various areas of TWAIL scholarship have shown, there is an even greater need to be fiercely critical of moves which perpetrate dominant or intolerant attitudes. Conventional and emerging international law doctrines and principles cannot anymore be blindly followed and mechanically applied in all contexts. At the very least, TWAIL analysis

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<sup>3</sup> Chimni, *supra* at 73. Please note here the emphasis on benefiting peoples from *both* the third and first worlds. This is borne by the recognition that the first world countries are not necessarily human rights havens for all within their territories. This is clearly exemplified by the conditions of Filipina migrant domestic workers in Canada and many other first world countries of employment.

demands a constant engagement with and critical examination of the various rules and concepts, paradigms and principles that threaten to dominate our very existence.

These exhortations cannot be more imperative than in the protection and promotion of the human rights of migrant workers in general and MDWs in particular. Not only is it apparent that MDWs are highly vulnerable and much neglected, existing international standards meant for their protection are not fulfilling their objective of protecting or providing legal means of redress for victims.<sup>4</sup> The concerns of this particular sector will be specifically analyzed in the next section.

#### **B. Application of the TWAIL Human Rights Optic to the Situation of Filipina Migrant Domestic Workers in Canada and Hong Kong**

It is worth reiterating that the complexity of the status of MDWs is manifested in the fact of it being multi-layered. These layers include: 1. their transnational status as migrants and workers in a country other than their own (i.e. legal status); 2. their racial, class and gender characteristics intersect to facilitate a multiple disadvantage (i.e. social status); 3. the uneven wealth and power between their country of origin and their countries of employment (i.e. economic status); and 4. the various forms of agency (as individuals, organizations and social networks) that have helped many MDWs overcome

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<sup>4</sup> The use of the term “victim” here is not meant to generalize that all Filipina MDWs are victimized in the pejorative sense. While “victimization” forms an important part of the analysis, particularly with respect to the human rights violations that are rampantly being committed against this particular group, it is also recognized that there are “multiple class processes engendered in transnational labour migration” which enable the very same group to assert their rights and empower themselves in various creative ways. Please see K. Gibson, L. Law and D. McKay, “Beyond Heroes and Victims: Filipina Contract Migrants, Economic Activism and Class Transformations” (2001) 3:3 International Feminist Journal of Politics 365-386.

their difficulties and even successfully integrate in their countries of employment or successfully re-establish in their country of origin (i.e. forms of support and agency).<sup>5</sup>

In view of these characteristics, a TWAIL approach would in the present context require that the international human rights law applicable to the situation of Filipina MDWs be unpacked and evaluated based on the following key areas and issues:

1. The colonial history of the country of origin and its neo-colonial or current quasi-colonial relations not only with the countries of employment but also with the much more powerful countries in the current globalized context;
2. The extent to which the Philippines as the country of origin is “sovereign” vis-à-vis countries of employment such as Hong Kong and Canada;
3. At the microlevel, the relationship between the MDW and the employer which not only mirrors the structure of current global inequalities, but emphasizes the multi-dimensional character of such inequality; and
4. The range of remedial measures available for redress, provision and maintenance of a lasting and sustainable human rights protection.

These key areas also form the most important aspects of the explanation to the international and domestic ill-treatment of Filipina MDWs which this chapter seeks to accomplish. They are thus discussed in more detail using a TWAIL perspective in the succeeding sections.

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<sup>5</sup> Please see for e.g., K. Gibson et al., *supra*, at 378-382, where the authors discussed the “Reintegration

## **1. Colonial History and Status**

The extensive work that TWAIL scholars like Anghie<sup>6</sup> and Okafor<sup>7</sup> have done on the continuing effects of colonization in the post-colonial context, as well as on the ways in which international law has been utilized to advance the colonial project, can be applied by analogy in the case of Filipina MDWs. The analogy is that, Filipina MDWs are the present-day victims of a colonial-style exploitation of their cheapened and highly vulnerable labour.

While there may not have existed a historical colonial relationship between the Philippines and Hong Kong or between the Philippines and Canada, the actual status of a fragile and malleable economy as the Philippines vis-à-vis these two much richer and much more powerful states of employment showcases a kind of dependence that is analogous to the traditional type of colonialism. As defined earlier, traditional “colonialism” refers to the “involuntary exploitation of or annexation of lands and resources previously belonging to another people, often of a different race or ethnicity, or the involuntary expansion of political hegemony over them.”<sup>8</sup> Thus, it is often viewed as the “antithesis” of the principle of “self-determination.”<sup>9</sup> Anghie has characterized

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Programme” of Asian Migrant Center (a Hong Kong NGO) in assisting MDWs achieve their goal of becoming entrepreneurs when they return home to their countries.

<sup>6</sup> Please see A. Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 Harvard Int’l L. J. 1; and “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5:3 Social and Legal Studies 321.

<sup>7</sup> Please see O. Okafor “After Martyrdom: International Law, Sub-State Groups and the Construction of Legitimate Statehood in Africa” (2000) 41 Harvard Intl L. J. 503 at 525.

<sup>8</sup> R. Clinton, “Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law” (1993) 46 Ark. L. Rev. 77 at 86.

<sup>9</sup> *Ibid.*

colonialism as Europe's "civilizing mission," whereby non-Europeans were deemed as "barbarians" who were "both within the reach of the law and yet outside its protection."<sup>10</sup>

Even after decolonization<sup>11</sup>, the effects and consequences of colonialism are still often manifested in the form of "neo-colonialism". Neo-colonialism has been described as a situation wherein the neo-colonized state is:

"in theory, independent and has all the outward trappings of international sovereignty. In reality, its economic system and thus its political policy is directed from outside.... Neo-colonialism is also the worst form of imperialism. For those who practice it, it means power without responsibility and for those who suffer from it, it means exploitation without redress."<sup>12</sup>

This dissertation argues that the situation of MDWs is analogous to these traditional notions of colonialism and neo-colonialism because of the existence of a system which effectively allows a continued extraction and exploitation of resources for economic gain. That is, the relationship between the country of origin (the Philippines) and countries of employment (Canada and Hong Kong) of the Filipina MDWs is clearly one of economic and political imbalance. The endemic poverty and unemployment problems in the Philippines have virtually made this country of origin a promoter of its abundant human resources, i.e. as labour exports to the countries of employment. The countries of employment on the other hand, being economically able and coincidentally in need of cheaper alternatives to domestic labour, readily admits these migrant workers

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<sup>10</sup> A. Anghie, "Francisco de Vitoria and the Colonial Origins of International Law" (1996) 5:3 Social and Legal Studies 321 at 333.

<sup>11</sup> The term "decolonization" is being used to refer to the formal declaration of independence by the previously colonized state.

<sup>12</sup> K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (New York: International Publishers, 1965) at ix, xi.

albeit under conditions that can be viewed as harsh. While it may externally appear that these migrant workers voluntarily migrate for work opportunities, the bigger picture of international affairs proves otherwise. For without the active support and cooperation between the states of origin and employment, and the systems put in place (such as the migrant domestic worker schemes) to facilitate such movement, the population of individual migrant workers could not have possibly grown at such phenomenal rates, despite the many unpleasant experiences of those who have gone ahead and returned.

Moreover, economic globalization has paradoxically led to the increasing fortification of state borders with respect to the admission of non-citizens while opening up the same borders to trade commodities. The effect of this situation on Filipina MDWs is that, while their labour contribution to the country of employment is admittedly in high demand, their entry and stay are ever so strictly controlled at the expense of their human rights. Despite this, severe economic need and the lack of viable alternatives in their country of origin have forced MDWs to endure various forms of abuse and neglect in their countries of employment.

The extraction of human labour of Filipina MDWs by the countries of employment through their Canadian and Hong Kong employers is obvious enough. What may not be as apparent is the fact that the type of labour that they perform has, over time, been constructed as a form of “unskilled labour” which are either unwanted by the local population, or are deemed deserving of inferior compensation. The racist history of Canada’s LCP, as well as the stubbornly discriminatory policies in Hong Kong’s admission of MDWs are some clear examples of this attitude. Thus, like traditional

forms of colonialism, the countries of employment have promoted a hierarchical view of labour where migrant domestic work is placed at the bottom, when such differentiation did not use to exist. The result then is the justification of labour extraction, their exploitation through the deprivation of many rights and privileges, and the maximization of benefits for the privileged employers in the modern day colonizers' territories (Canada and Hong Kong as the states of employment).

Another point that supports the characterization of the exploitation of the labour of Filipina MDWs as “colonial-like” is the fact that the highly-glorified remittances of migrant workers or OFWs to the Philippines end up being used to pay back the ever-mounting foreign debt (mostly in accrued interest) owed to western states by that country. The peddling of this country’s citizens as human exports or “internationally-shared human resource”<sup>13</sup> portrays an utter lack of regard to human dignity and welfare. Yet, global economic inequalities and institutionalized legal mechanisms further strengthen the status quo, thus perpetrating an ever-worsening economic and social burden on the “third world” and its peoples.

As TWAIL scholars have emphasized, the hierarchical and positivist leanings of international law have not only served the interests of a relatively few and powerful states, but has also contributed to the exploitation and immiserization of third world countries and their people. While claiming that the era of colonialism is over, international law has failed to ensure that the pernicious effects of this era are eliminated.

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<sup>13</sup> This was the term once used by former Philippine Labour Secretary Nieves Confesor in describing the Overseas Filipino Workers, reflecting the Philippine's perceived “labour export policy” which the country's officials often deny. Please see L. Timson, “Filipino Export Labour - Modern-Day Slaves”,

Worse, international law has even facilitated and legitimized the neo-colonial status of many of the world's most vulnerable economies. This is evidenced by the continuing dependence of "third world" states on the external debts owed to first world states and institutions and their largely unquestioning (if coerced) obedience to the dictates and loan conditionalities imposed by the more powerful states, regardless of the grave sufferings they inflict on "third world" peoples.

An illustration of these sufferings is embodied in the experiences of the Filipina MDWs.<sup>14</sup> The deteriorating socio-political and economic conditions in their country of origin arising from the pro-capitalist policies dictated (directly or indirectly) by rich creditor countries, have clearly triggered their massive exodus as migrant workers in other countries. However, the gatekeeping attitude and zealous protection of state sovereignty, have resulted in social inequalities such as the non-recognition of foreign education and experience, hence leaving the migrants to work in fields which locals shun or which do not fully utilize their skills and training. This resulted in the stereotyping of migrant workers from the "third world" to what are commonly perceived as "low status" jobs such as migrant domestic work. This line of work is now disproportionately occupied by Filipinas more than any other ethnic grouping, particularly in Canada and in Hong Kong. Worse, the economic desperation and political powerlessness of the Philippines as the country of origin, makes it an ineffective advocate for the rights and welfare of its MDWs in the countries of employment.

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*Signposts to Asia and the Pacific* No. 4 Spring 1995, online: Signposts website <<http://www.signposts.uts.edu.au/articles/Philippines/Population/324.html>>.

<sup>14</sup> Please see chapters 4, 5 and 6 for more detailed discussions on these matters.

Thus, the situation of Filipina MDWs vis-á-vis their employers and the relations between their country of origin and the countries of employments mirror the currently skewed state of international affairs. Not only has the current regime of international law proven ineffective in addressing the economic inequalities among states of origin and employment, but that it has clearly facilitated and at times even sanctioned the pernicious disregard for the individual rights of these Filipina MDWs. While the historical form of colonialism has bred senseless wars, widespread unrest, intolerance and exclusivity arising from hierarchical notions, this present day form of colonialism is reinventing much of the same attitudes, in complete disregard of the substantive gains so far achieved in the fields of international peace, justice and human rights.

## **2. Sovereignty Question**

The issue of sovereignty, while closely related to the country's colonial and neo-colonial status, is nonetheless a significant issue by itself. For as Gathii and other TWAIL scholars have articulated, international legal concepts such as "sovereignty" are primarily "constructed and contingent".<sup>15</sup> Anghie has further argued that the "sovereignty doctrine acquired its character through the colonial encounter."<sup>16</sup> This, he concludes after having analyzed and questioned the manner by which the colonizing European powers of that time decided that the colonized Indians were not "sovereign"

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<sup>15</sup> J. Gathii, "Rejoinder: TWAILing International Law" (2000) 98 Mich. L. Rev. 2066 at 2071.

<sup>16</sup> Anghie (1996), *supra* at 332.

hence subject to their “civilizing mission”.<sup>17</sup> By tracing this historical construction of an international law concept such as sovereignty, Anghie concludes that “the vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures.”<sup>18</sup>

Thus, the question whether or not a state such as the Philippines has become a “sovereign nation” is subject not only to the political and economic expediencies of the time, but also on the identities constructed by other more powerful states, such as the states of employment of its MDWs.

In this case, although the Philippines has formally achieved “independence” from centuries of Spanish colonization and decades of American rule, the reality of its foreign relations marks it as a country that continues to experience the vestiges of colonialism instead of one that is truly sovereign.<sup>19</sup> Moreover, “schools and mass media continue to shape cultural policy geared towards supplying cheap labour for the global market.”<sup>20</sup> It is undeniable that Canada is one of the most active magnets of this growing number of

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<sup>17</sup> *Ibid.* at 333.

<sup>18</sup> *Ibid.*

<sup>19</sup> The Philippines was a colonial territory of Spain for more than 300 years before being turned over to the United States of America in 1898. After nearly half a century, the Philippines officially declared “independence” from the United States colonial rule in 1946. For more on this topic, please see R. Constantino, “The Philippines: A Past Revisited” (Quezon City: Tala Publishing, 1978); and E. San Juan “Postcolonial Theory Versus the Revolutionary Process in the Philippines” in D. Brydon, ed., *Postcolonialism: Critical Concepts in Literary and Cultural Studies* (London: Routledge, 2000) at 358-386.

In San Juan’s words: “[T]he Philippines today suffers from neocolonial bondage. Although nominally independent, its economy is controlled by the draconian ‘conditionalities’ of the IMF-World Bank, its politics by semi-feudal warlords, bureaucrats, and military officials beholden to Washington, its culture by U.S. mass media – in general, by Western information/knowledge-production, monopoly (also known as the culture consciousness industry).” San Juan, *supra* at 364.

<sup>20</sup> San Juan, *supra* at 381.

migrants from the Philippines.<sup>21</sup> Similarly, the overwhelming number of Filipina MDWs in Hong Kong<sup>22</sup> proves that the latter is likewise a popular destination for migrants originating from the Philippines. Although there is a bit more complexity involved in characterizing the sovereignty of Hong Kong owing to its status as a special administrative region of China, it may be deduced that both Canada and Hong Kong are in reality much stronger and more powerful states than the Philippines.

Because the Philippines as a country of origin does not possess equal bargaining power with a wealthy nation and country of employment such as Canada, the former cannot negotiate on behalf of its citizens to be allowed to practice their professions instead of toiling as MDWs in private homes. If sovereignty truly means being an “equal” among a community of nations, then the Philippines is far from exhibiting this in practice, particularly with respect to the countries where its citizens are employed as migrant workers.

Thus, it can hardly be said that the Philippines as a country of origin is adequately equipped politically and/or economically to assert its claim of equal sovereign treatment on behalf of its millions of people working in various countries of employment worldwide, Canada and Hong Kong included. This sad reality not only helps account for the widespread exploitation and ill-treatment of Filipina MDWs, but also helps create a

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<sup>21</sup> J. Brillantes, “The Philippine Employment Program and its Effects on Immigration to Canada” in E. Laquian, A. Laquian and T. McGee, eds., *The Silent Debate: Asian Immigration and Racism in Canada*, (Vancouver, B.C.: Institute of Asian Research, University of British Columbia, 1998) at 137.

<sup>22</sup> It would be relevant to note here that Hong Kong’s declaration of formal “independence” from Great Britain which took place only a few years ago (July 1997), was actually a “hand-over” to another “principal” (People’s Republic of China). Thus, Hong Kong is strictly not even a completely “independent” state and yet was proven capable of exercising power just like a traditional “sovereign colonizer” such as Canada.

mere illusion of protection for MDWs out of the various guarantees embodied in a large number of human rights treaties, statutes and pronouncements.

This unbalanced context should be addressed through an interdisciplinary view of the concept of sovereignty rather than through a narrow legal sense. This is even more imperative in the case of a nation such as the Philippines which was not only colonized for centuries, but which has also remained neo-colonized politically, economically, culturally and even psychologically.<sup>23</sup> Such an analysis will thus be aided by a sustained inquiry into the various dimensions of disadvantage faced by MDWs, further discussed below.

### **3. Multidimensional Injustice**

It has been discussed earlier that the situation of Filipina MDWs is made even more complex by the multidimensional character of their marginalization. Caught in the intersection of gender, race, class and postcolonial disadvantages, they are forced to battle the “enemy” from various fronts. From among the theories canvassed, the TWAIL perspective aids the most in finding the most plausible explanations as well as in prescribing solutions to the Filipina MDWs’ oppression and disadvantage. TWAIL scholarship leads us to critically examine the existing global socio-legal framework

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<sup>23</sup> For instance, “colonial mentality” or the view that anything western (esp. those from the US, colloquially termed, “stateside”) is superior to their eastern or local counterparts, is deemed to be a strongly-held attitude among many Filipinos in the Philippines and abroad. On this, please see for e.g., L. Mendoza Strobel, *Coming Full Circle: The Process of Decolonization Among Post-1965 Filipino-Americans* (Manila: Giraffe Books, 2001).

without rendering the conventional standards entirely useless and irrelevant. As Mutua states:

“the elusive state of perfection in which human rights are fully respected and realized tells us, among other things, that both human rights and democracy are works in progress. They are projects that are essentially infinite, open-ended, and highly experimental in nature.”<sup>24</sup>

It is important therefore, to look back into the historical causes of disadvantage and the context within which rights were granted and violated, before prescribing remedies based on the current international human rights framework. In this case for instance, the disadvantage of Filipina MDWs abroad is largely attributable to the underdeveloped national economy of their country of origin.

And while it is true that the status of Filipina MDWs is but a fraction of the lives of innumerable human beings suffering “worse” injustices the world over, it is worth noting that the injustice inflicted on a single sector, no matter how seemingly “minor”, creates a pattern of impunity which could lead to the infliction of more egregious forms of human rights violations on other members of society. This is even more manifest in a situation where the various areas of oppression intersect and facilitate further marginalization, which is clearly the case for Filipina MDWs in Canada and in Hong Kong. The failure of existing human rights policies and standards of protection to anticipate the complexities arising from these overlapping disadvantages, only serves to worsen their already vulnerable situation.

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<sup>24</sup> M. Mutua, “The Ideology of Human Rights” 36 Va. J. Int’l L. 589 at 593.

This reality then demands that international human rights law be made more sensitive and adaptable to these multidimensional characteristics. As Nyamu urges, we must constantly challenge efforts aimed at stifling political debates on various types of “unjust social arrangements.”<sup>25</sup> The prevalent ill-treatment of Filipina MDWs not only breeds unjust social arrangements, but is likewise symptomatic of the serious lack of regard for their basic human rights. Hence, while formal legal instruments may have proven useful to a certain extent, the process of drafting and formulating international standards and procedures will benefit much more from incorporating the often ignored alternative views of those who had long been marginalized. That said, the perennially problematic areas of implementation of human rights at the local level will necessarily have to follow a similar route and ought to resist temptations of simply adopting standards and procedures imposed from outside, reminiscent of colonial practices. In this light, the nature and implications of existing remedial measures are thus discussed in the next section.

#### **4. Remedial Measures**

All of the critical schools of thought and alternative views discussed in chapter two have at least one thing in common: they touch on how the law in general and international human rights law in particular, have often reflected the interests of those who have the wealth, power and privilege to manipulate the laws, policies and

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<sup>25</sup> Nyamu, *supra* at 417-418.

regulations to their advantage and for their own selfish ends. This is clearly illustrated in the process that the Migrant Workers Convention (an existing key resource for MDW rights) had to undergo before finally entering into force more than a decade from its adoption at the United Nations. Even so, there remains a strong push to preserve the “interests” of rich countries of employment in this sector, as reflected for example, in the fact that none of those who have ratified the MWC so far is a rich state or country of employment. A TWAIL analysis underscores how so-called universal human rights standards systematically exclude norms and orientations that reflect the concerns of weaker states (especially those of the “third world”).

Thus, to be truly universal and relevant to the “third world”, any remedial measure taken in the field of human rights protection and promotion, must allow room for alternative viewpoints (and possible multiplicity of interpretations) informed by a “genuine understanding” of the relevant causes and consequences. It has been noted that:

“universality obtained at the expense of genuine understanding and commitment cheapens and devalues the idea of human rights. Ultimately, such universality is of little normative value in the reconstruction of societies.”<sup>26</sup>

Meanwhile, Rajagopal’s analysis of the role that “third world” and other social movements have played and are continuing to play in the development of international law<sup>27</sup> reveals a potentially powerful means of asserting the rights of the marginalized sectors such as the Filipina MDWs. The power (albeit limited) that civil society

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<sup>26</sup> Mutua, *supra* at 628.

organizations have wielded in the international arena in terms of pressuring the traditionally powerful bloc towards giving up their rapacious ways in favour of truly benefiting the long-suffering masses, should be fully utilized.<sup>28</sup> However, this must also not lead us to forget the individual's potential to decide and determine what is best for her/his well-being. The various creative ways in which Filipina and other MDWs are able to assert their rights and “negotiate citizenship”<sup>29</sup> entitlements, is yet another crucial factor, and an area which even the emerging TWAIL perspectives have yet to fully explore.

As discussed in the previous chapter, the sense of “empowerment” derived from being able to assert one’s individuality and self-worth is a common experience for MDWs in both Canada and Hong Kong. However, these expressions of individual agency appear to yield more lasting fruits if accompanied by organizational support, towards collective and sustained efforts to uproot deeply entrenched injustices.

## 5. Summary of Arguments

In the preceding subsections, I have argued that the situation of Filipina MDWs is analogous to the traditional type of colonialism where the human resources of a “third world” country of origin are “extracted” for economic gain by the rich and powerful

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<sup>27</sup> B. Rajagopal, “International Law and Third World Resistance: A Theoretical Inquiry” in A. Anghie, B. Chimni, K. Mickelson & O. Okafor, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden/Boston: Martinus Nijhoff, 2003) Ch. 8 at 145-172.

<sup>28</sup> Please see M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca/London: Cornell University Press, 1998) at 23.

countries of employment. In other words, the nature and effects of colonialism need not only come from a formal take-over by one state of another (traditional colonialism), or through indirect manipulation of another state's political and economic affairs (neo-colonialism), but may also occur through various modes in today's increasingly globalized and integrated world. For reasons discussed, I argued here that the nature and extent of migration by Filipina MDWs to particular countries of employment as Canada and Hong Kong have indeed reached "colonial" proportions. This colonial-type relations is not only felt at the macro level but at the micro level as well.

I utilized the TWAIL paradigm in support of these arguments which were offered as explanation for the pervasive international and domestic ill-treatment of Filipina MDWs, particularly in countries of employment such as Canada and Hong Kong. These explanations were offered under four headings deemed most relevant in understanding the situation, namely: the colonial history and status, the sovereignty question, multidimensional injustice and remedial measures. The first two are problematic areas as far as the Filipina MDWs' country of origin vis-à-vis their countries of employment is concerned, owing to the existing skewed power relations at the international level. The third and fourth areas on the other hand, are matters directly influencing the conditions of Filipina MDWs but which nonetheless have an impact on the overall human rights situation of all peoples at the national and global levels. These areas were distilled and unpacked using the TWAIL optic, in an attempt to provide a clearer framework of understanding the Filipina MDWs' plight.

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<sup>29</sup> Term adopted from A. Bakan and D. Stasiulis, "Negotiating Citizenship: The Case of Foreign Domestic

Considering the arguments made, how can a TWAIL approach lead to a concrete realization of the human rights and dignity for Filipina MDWs? Admittedly, there are no easy or direct answers to such a question. What is important however, is that the TWAIL optic enables us to view the world from a new and broader perspective, using an alternative analytical tool. The unquestioning and mechanical adoption of conventional human rights policies and standards may have some positive effects in the short term, but will not necessarily be sustainable; and could even be destructive in the long term. Thus, the idea of a continuing “transformative dialogue”<sup>30</sup> may well be applied not only in the process of particularizing human needs and wants, but also in maximizing the benefits that may be derived from universalizing certain aspects of the human condition.

Clearly, it is only through a framework that takes into consideration the historical and structural inequalities among nations, that problematizes the status quo and rejects the deep-seated biases that it carries with it, will a truly just and emancipatory regime be possible. While it may seem quixotic to attempt to reform the system in one sweep or in a much shorter time than it took to develop, it is nonetheless considered a major step forward if awareness along these lines finally enters the mainstream consciousness.

In the case of Filipina MDWs, some recommendations will be made on how institutional, organizational and individual measures can be undertaken towards the realization of a truly effective recognition and protection of their rights. It is here acknowledged that generalized prescriptions may not be possible nor easy to make as Filipina MDWs are not a homogenous entity and that many if not most of them, could

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Workers in Canada” (1997) 57 Feminist Review 112.

very well take care of themselves. However, it must be emphasized that the root of the problem lies with the existing system that directly or indirectly facilitates the ill-treatment, and not on the disparate experiences of the MDWs themselves. To address this and other related concerns, more specific recommendations will be made in the next and final chapter.

## **C. The Contributions of the Dissertation to Existing Scholarship**

### **1. Contributions to the TWAIL Scholarship**

Aside from having benefited from its insightful analytical framework, it is hoped that this dissertation will have contributed as well, to existing TWAIL scholarship in a number of ways. For one, this is the first time that a TWAIL perspective was expressly undertaken to explain the current human rights situation of MDWs. Two, it is also the first study which undertook a comparison of the status of a specific sector in two jurisdictions, namely, that of Filipina MDWs in Canada and in Hong Kong. Three, it is hoped that this comparative study has widened the scope of TWAIL analysis in that, it has chosen to compare two seemingly incommensurate<sup>31</sup> jurisdictions but which have nonetheless proven to be sources of parallel conditions as far as the treatment of Filipina MDWs are concerned. Thus, another contribution to TWAIL analysis is the illustration

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<sup>30</sup> Term borrowed from D. Otto, “Rethinking the ‘Universality’ of Human Rights Law” (1997) 29 Columbia Human Rights L. Rev. 1 at 34.

<sup>31</sup> “Incommensurate” in the sense that Canada and Hong Kong are not normally typical subjects of “conventional” comparison for at least two reasons: 1. Canada is a sovereign country while Hong Kong is a territory (Special Administrative Region) of another sovereign country, China; and 2. Canada is undoubtedly part of the “first world” continent of North America while Hong Kong is technically part of the “third world” continent of Asia despite its fast-growing economy and highly-industrialized state.

that the source of domination and oppression need not always come from the traditionally known “first world” or highly developed and powerful states. For as had been shown here, the “colonizer” can also be a state which has, itself, been formerly colonized (as in the case of Hong Kong)<sup>32</sup>. Lastly, the comparison further deepens TWAIL analysis by proving that the key issue in analyzing colonial-type relationships is not always the race, skin colour or ethnicity of the “colonizer” but the extractive power relations between the poor and rich nations. If traditional colonial and neo-colonial relationships have been shown in the past, to occur between Europeans and non-Europeans, this comparative study has undertaken (and proven) that analogous situations may occur between and among non-Europeans as well (as in the case of Hong Kong and the Philippines which are both Asian countries).

Having listed the dissertation’s possible contributions to the TWAIL school of thought, it is also hoped that it has likewise contributed to the deepening of the other alternative theories canvassed, in ways specified below.

## **2. Contributions to the Other Critical Theories**

In general, this dissertation has contributed to the existing wealth of literature on alternative legal theories by the mere fact of having attempted to embark on this project which takes seriously the conditions of Filipina MDWs as part of an overall desire to improve the human rights conditions of one of the long-suffering and oft-neglected sectors of society. In its quest for the most appropriate theoretical framework, this

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<sup>32</sup> Please see fn. 21, *supra*.

dissertation has attempted to inquire into and engage the various critical theories that, in one way or another, have provided some relevant and useful perspectives. In the process, it is hoped that this work has helped enrich these theories in much the same way that each of them has helped shape the arguments made in this particular project.

In more specific terms, this study has added to critical legal studies by applying the major tenets of critical legal thought to the comparative case study, but at the same time maintaining a healthy optimism towards human rights discourse and relevant legal institutions. It has also attempted to present recommendations for reform, instead of limiting the analysis to criticisms alone. With respect to critical race and feminist theories, the dissertation has tried to emphasize that the analyses of race or gender issues must always be conducted alongside north-south issues, if a truly comprehensive picture is to be achieved. Hence, while the specific comparative case study of Filipina MDWs has raised important issues involving race and gender, it has also exemplified the importance of recognizing the intersection of these issues with a number of others, including the complex factors arising from the north-south divide. Dependency and postcolonial theories on the other hand, despite having been of great use for the theoretical arguments posed, was at times, still suffering from the tendency of essentializing certain important concepts as if the world consists of homogenous models. Thus, this dissertation tried to avoid this shortcoming by taking an interdisciplinary approach even as it recognizes the ultimate importance of international law in shaping the global dialectics. As a whole, the use of a TWAIL framework for this comparative legal analysis of the conditions of Filipina MDWs in Canada and in Hong Kong has

added to each of the alternative theories discussed: a sense of pragmatism that the law, particularly international law, does not exist in isolation; a sense of optimism that social and global divisions, are capable of reform and reconciliation; and that theoretical discourses, though at times bordering on the esoteric, can still be made relevant to the real and mundane. After all, the conclusions and recommendations made in the next and final chapter are the products not of a single perspective (which TWAIL does not purport to be), nor by randomly falling meteors from a vast universe of knowledge, but of judiciously chosen insights that could further guide this ongoing scholarly journey.

## **Chapter 8**

### **The Human Rights of Migrant Domestic Workers: *Quo Vadis?***

#### **A. Summary**

This dissertation has shown that not only is it possible to conduct a comparative analysis of the situation of Filipina MDWs in Canada and Hong Kong; it also proved that such a comparison greatly enhances the understanding of individual cases within the respective jurisdictions. The application of TWAIL and other critical legal approaches had undoubtedly deepened such understanding by providing the tools of inquiry and analysis most relevant for this particular research project.

To achieve its objectives, this dissertation was divided into eight interconnected chapters. The first chapter set forth the conceptual framework including a brief review of relevant literature and the context behind the massive exodus of MDWs from the Philippines. It also adumbrated on the dissertation's organizational structure and asserted that despite the existence of substantial research on the issue, the human rights situation of Filipina MDWs is still a cause for great scholarly concern. The second chapter conducted a survey of relevant theoretical approaches to international legal studies deemed most useful for this project and introduced the TWAIL perspective as the main tool of analysis.

The third chapter examined the international human rights regime and its relevance to the lives of Filipina MDWs. It also conducted a brief case study of the implementation of international human rights standards in a domestic system such as Canada. One of the conclusions reached was that, the international human rights regime has so far failed to provide adequate protection for MDWs. A significant reason for this failure is that the state of employment through which international human rights standards are implemented, had been more concerned with ensuring its political and economic agenda rather than the welfare of disadvantaged sectors such as MDWs. In the fourth chapter, a critical analysis was taken of Canada's immigration law and policy in general, and Citizenship and Immigration Canada's Live-in Caregiver Program (LCP) in particular. Existing empirical data were discussed in support of the argument that Canada's claims of upholding everyone's human rights are belied by its poor treatment of MDWs within its territory.

The fifth chapter was devoted to a discussion of the conditions of Filipina MDWs in Hong Kong. It covered relevant laws and regulations governing the stay of MDWs in the territory, their conditions of work and policies that discriminate against MDWs. It also took note of existing records of Hong Kong's performance as evaluated by NGOs and international human rights bodies. Meanwhile, the sixth chapter conducted a comparative analysis of the Canadian and Hong Kong systems of admitting and treating MDWs within their respective territories. Significant areas of concern were enumerated and discussed. It was argued that as different as these two systems may seem at first glance, a common thread runs through them: that is, their commonality in ill-treating

migrants from third world countries (such as the Filipina MDWs), looked upon as “outsiders” who are undeserving of equal treatment with the “native” population.

The seventh chapter was devoted to the application of the TWAIL analysis to the specific situation of Filipina MDWs as discussed in previous chapters. It was argued that the situation of Filipina MDWs is a modern form of, and the insidious consequence of the traditional forms of colonialism and neo-colonialism experienced by the “third world.” The relationship involves the exploitation and extraction of the valuable human resources of the “third world” country of origin to benefit and further enrich the “first world” country of employment.

Finally, the task of this eighth and final chapter is to summarize the dissertation and make policy recommendations based on the preceding TWAIL analysis in the hope that the proposals will benefit not only Filipina MDWs in Canada and Hong Kong, but all MDWs elsewhere.

In the first chapter, some questions were asked, in aid of the general objectives of this research project. After attempting to address these issues in the previous chapters, the brief and summarized answers to these questions are as follows:

1. How were existing MDW policies developed? What are the main features of these policies?

The MDW policies of both Canada and Hong Kong arose from the need to allow more of their citizens to enter the “formal” workforce and to find people willing to perform household work for relatively minimal pay. These types of program also helped fill the need for cheaper alternatives to these much richer states than providing subsidized

universal daycare for children and home care for the sick and elderly. It is much cheaper for these countries of employment to extract the labour value of third world MDWs than to pay for the same services using government funds.

The main issues and features of these MDW schemes were separately discussed in Chapter 4 for Canada, in Chapter 5 for Hong Kong, and in Chapter 6 for the comparative analysis of both jurisdictions.

2. What ideology or ideologies drive/s existing MDW policies, and what are their main characteristics? What type of political economy does it support and who benefits from such a framework? How is the international law relating to MDWs shaped by this dominant ideological framework?

The prevalent ideology in the field of human rights and elsewhere is the western liberal capitalist ideology. As argued by critical legal theorists, critical race theorists, feminists, postcolonial and TWAIL scholars, this ideology has long adopted western values and perspectives, and ignored or suppressed the existence of other alternative ideologies, to promote western political and economic objectives. The political economy that such an ideology supports is embodied in the current forms of globalization that has, to put it simply and directly, resulted in rich countries getting richer and poor countries getting poorer.

The content of international law, particularly international human rights law, has been for the most part shaped by this currently dominant western liberal capitalist framework. This partly explains international human rights law's inability to facilitate the better treatment of MDWs and to provide a more effective regime for the protection of their human rights.

3. What is the situation of Filipina MDWs in Canada and Hong Kong? How can their present situation be improved?

The present situation of Filipina MDWs in Canada and Hong Kong leaves much to be desired. It is not denied that *not* all MDWs are physically or psychologically abused as there may be MDWs who are satisfied with their situation and are treated well by their employers. However, this does not negate the fact that the current system in both jurisdictions facilitate the exploitation of MDWs from third world nations and that this is a modified form of colonial exploitation of the human resources of these poorer countries. The situation of MDWs can be improved in the short term by utilizing the existing legal and administrative remedies, as well as by exercising their agency in various creative ways. In the long term however, the situation must first be understood at a deeper theoretical level, before truly effective, long-lasting and comprehensive policy changes can be realized. While such an attempt was made in this dissertation, it is also recognized that a project of this magnitude and importance is a constant work in progress. Thus, it is hoped that this dissertation's attempt to discuss the theoretical ramifications vis-à-vis existing empirical data, will hopefully lead policymakers, decision-makers and all parties concerned into the right direction.

4. Why are cases of abuse and exploitation of MDWs tolerated despite their clear contravention of so-called universal standards of justice and human rights? Why do state responses to global traders seem to take opposite trajectories from state responses to migrant labourers?

Cases of abuse and exploitation of MDWs are often overlooked because they occur in countries which are in severe need of people to fill certain “unwanted” jobs and

because people from poor countries are willing to take those jobs due to the extreme poverty that they have had to deal with back home.

The responses of states to trade and labour migration have taken opposite trajectories mainly because rich states do not see it to be in their interests to give up their “sovereignties” in terms of deciding who to let in and who to keep out. It is evident therefore, that selfish economic interests, racism, and paranoia among others, are few of the factors at play in this gate-keeping attitude still prevalent in most rich countries to this day. Yet, these same states continue to coerce and/or persuade poorer countries to give up their own sovereignties over their own economies.

5. How are individual MDWs particularly affected by existing regimes? To what extent can they expect that their basic human rights will be respected and protected in the context of the present global dialectics?

The effects of the current situation on individual MDWs may differ and the intensity and nature of oppression may occur at various levels. As such, there does not seem to be much to hope for MDWs in terms of human rights protection and promotion in the context of the present global dialectics. However, the little hope that is left can still be cultivated and nourished through various counterhegemonic efforts made by all parties concerned. These efforts include the relentless advocacy campaigns of human rights NGOs, the indispensable support of concerned groups and agencies, and the unyielding spirit of the MDWs themselves to stand up for their rights, which in the past, have proven to be among the most effective means of defeating various types of oppression.

6. How are individual MDWs able to exercise their agency and advocacy to promote their human rights?

Individual MDWs exercise their agency either individually or through organizations which assist them in asserting and advocating for their rights. Individually, they manage through such means as the remittance of their earnings back home, generally adapting themselves to the new environment, and subtly asserting their freedom and rights in various creative ways.

7. What alternatives can be advanced, especially in the field of human rights protection, which would level the playing field and ensure the more humane treatment of MDWs?

Some alternatives which could be advanced include those that are recommended in the next section of this chapter.

8. What are the obstacles faced in trying to achieve these objectives?

One of the most difficult obstacles to hurdle is the fact that most states have tended to promote what they perceive as their own interests with much less regard for the welfare of the non-citizens who find themselves within their territory. These states have, in particular, hardly ever had much regard for the consequences of the pursuit of their own policies to the political, social and economic well-being not only of the MDWs but also of their countries of origin.

## **B. The Limitations of the Dissertation**

Admittedly and not unusually, there are some limitations in this dissertation's attempt to be as interdisciplinary and comprehensive as possible, while maintaining focus

on the objective of seeking answers and mapping out strategies for reform. Perhaps one most obvious omission is the lack of substantive, first-hand ethnographic accounts of the MDWs themselves. While there is no intention to ignore the importance of presenting their stories in their own words or hearing from them directly (which was nonetheless attempted through informal interactions during workshops, meetings, group discussions and interviews), extensive ethnographic research has been done by other scholars. Hence, it is on this secondary literature that this dissertation has largely relied for that aspect of the “data”.

Another omission relates to the employers and employment agencies that have undoubtedly played significant roles in the lives of MDWs, and who have definitely been a factor in their (non) enjoyment of human rights. Since the MDW is dependent on the employer not only for employment but also for shelter, food and immigration status, this has conferred enormous power and facilitated the abusive treatment of MDWs, as has often been the case. The employment agencies on the other hand, are mainly responsible for encouraging these women from poor countries into applying for the LCP without adequately informing them of its true character. The exorbitant fees that they collect from these women are a powerful incentive for these agencies not to completely reveal the true conditions of the proposed employment. Thus, their opposing interests to those of the MDWs are nonetheless implicitly covered in many aspects of the analyses undertaken in this dissertation.

As in any research endeavour, it is impossible to cover all issues on any given topic in a single piece of work. This dissertation has attempted to address the areas which are most relevant and useful to meeting the objectives of this initial undertaking.

### **C. Conclusions and Recommendations**

As difficult a pill it is to swallow, it appears that the full realization of the human rights of Filipina MDWs will be a very difficult (although not impossible) achievement in the current globalized scenario. At the international level, attempts at codifying and ratifying international human rights standards for migrant workers has proven not only to be an excruciatingly slow process, it has also failed (so far) to secure even a single ratification from a major country of employment. Diplomatic or fact-finding visits of United Nations Special Rapporteurs, comments, and concluding observations by international human rights bodies and agencies, also seem ineffective in the face of the stubborn insistence of (the much more powerful) countries of employment on their sovereign right to decide exclusively the fate of “outsider” non-citizens within their territory.

This research project did not extensively deal with the specific rights<sup>1</sup> contained in existing international human rights instruments. For that is almost beside the point. The more relevant point here is that, the processes by which these so-called universal

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<sup>1</sup> One controversial example is the right to “freedom of movement” which is applicable only within the borders of each state and to the right to leave any state, including one’s own. Conspicuously absent is the right to enter any other state other than one’s own. Please see Article 13, Universal Declaration of Human Rights; and Art. 12, International Covenant on Civil and Political Rights in *Human Rights: A Compilation of International Instruments* (Geneva: Center for Human Rights, 1994) at 3, 25.

standards were deployed, reflect an overwhelmingly biased tendency to favor the western interests while ignoring, if not altogether blocking the interests of the third world and its long disadvantaged peoples. The existing human rights norms and standards actually serve as tools for first world countries to advance their own agenda, oblivious to the disastrous effects they may be having or have wrought on the third world.

Consequently, the near-feudal structure of the current global economy and the skewed economic effects of current globalization schemes likewise perpetrate further systemic disadvantages on most third world countries and their citizens. As illustrated in the case of Filipina MDWs, highly-skilled and highly educated individuals are lured (if not forced) to seek job opportunities abroad when their country of origin, the Philippines, cannot provide adequate jobs for all, or adequate remuneration for those who may happen to be employed. But in the process of migrating for work opportunities, these individuals are faced with obstacles ranging from racism, to exploitation, and to discrimination of various forms.

However, it is also recognized that not all Filipina MDWs are unhappy about their situation or are constantly being “victimized.” And this work is not meant to ignore or dismiss the experience of these “fortunate” individuals. It is nonetheless evident that the system of recruiting, admitting, and maintaining MDWs, whether in Canada or in Hong Kong, is prone to the commission of serious abuses and injustice. This is the key point. Besides, the perception of some MDWs that they are in full enjoyment of their rights should never be a reason to ignore the suffering of MDWs whose rights are often denied or continuously trampled upon. And because this attitude tends to ignore or miss

out on the systemic nature of the exploitation that MDWs suffer, it can also be counterproductive. For it bears emphasis that, any form of injustice which goes unchecked, will in the end victimize all. This is due to the fact that unjust arrangements will lower the overall quality of life in countries of employment such as Hong Kong and Canada for instance. More specifically, one could easily deduce that if a sector of the population (as the Filipina MDWs) are ill-treated, then economic productivity will also diminish since the ill-treated population cannot perform at their maximum ability. Similarly, the productivity of their employers will also be negatively affected either due to higher stress levels or reduced leisure time if MDWs leave.<sup>2</sup>

It needs to be clarified at this point that the author is also aware of the often raised debate between issues of “human rights” vis-à-vis “jobs”. That is, while researchers such as myself pursue the noble human rights objectives in theory, there is the nagging reality that people are in dire need of economic means to survive. If people, specifically Filipinas, choose to work as MDWs in other countries despite knowledge of the risks involved and the sacrifices entailed, what right do I have to advise them against doing so? Is this not a clear contravention of their agency? In fact there are even authors which assert that Filipinas are considered “privileged” to be given the opportunities and the “encouragement” of their country of origin, to pursue work abroad while other Asian women do not (e.g. women in India). Again, this line of argument raises complex issues which are beyond the scope of this dissertation. It needs to be clarified however,

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<sup>2</sup> While other examples may be given, they need not be dealt with here since doing so will, again, involve another, possibly even larger field of study.

that one important point that can address this concern is that the process of problematizing and unpacking the issues that this dissertation undertook will hopefully lead towards a better informed society. Information may consist in a full disclosure of the actual realities and experiences of other MDWs, as well as of the various resources and remedies that can be used to redress wrongs and fight various forms of injustices.

In a similar vein, another major lesson to be gathered from this dissertation is that the relevant actors cannot rely fully on the state to protect and promote their human rights. Although state agencies are still the “official” implementers of human rights and may thus provide some form of “quality control”, experience has proven that this is often not enough. Empowerment begins with awareness, and awareness can only be achieved through information and education. Since domestic work can be isolating, such education and information campaigns are all the more necessary as a way of countering the sense of isolation that is often felt by MDWs. The work of non-governmental organizations has proven to be very effective in this regard as they have often provided the venue where grievances can be heard, experiences and resources shared, and struggles collectively advanced. They have therefore assisted towards unshackling fears, insecurities and other obstacles to growth. The transnational status of migrant workers in general and Filipina MDWs in particular can also be used to their great advantage. That is, civil society organizations can use the common and varying experiences to learn from each other, to support advocacy efforts and to create a powerful and influential presence not only within their respective locales but also at the international level.

As had been shown in this dissertation, there are some significant similarities as well as differences between the MDW policies of the two territories surveyed. Even as it had been argued that the present conditions can be attributed to the colonial history as well as contemporary colonial-type relations, the two countries have managed to modify their policies and programs to suit their respective ends. For instance, Canada's LCP which allows the MDW to apply for permanent resident status after at least two years of live-in domestic work, is on its face, a clear advantage over those in Hong Kong. Thus, while the LCP is in place, efforts must be directed at ensuring that the MDWs' chances of obtaining PR status will not be affected so as to prevent them from reporting abuses and/or from leaving an exploitative employer. This can be done through vigilant monitoring and information campaigns, relentless advocacy, and persistent lobbying for constructive change alongside with and on behalf of MDWs. Moreover, care ought to be taken that any proposal for change must not be interpreted or responded to with anything less favorable than the current situation (e.g. disqualification from obtaining PR status as in Hong Kong, or arbitrary banning of MDWs altogether).

Advocacy efforts at the international level is also another important facet of the transnational strategies that could be taken advantage of. For instance, in view of Canada's adamant refusal to ratify the Migrant Workers Convention, it may help to be reminded that it is also a party to the other international human rights instruments, which are likewise applicable to MDWs. The non-discrimination provisions in these instruments are especially relevant in this regard. So are the experiences of individual MDWs in Canada, Hong Kong and other jurisdictions, which could well be used as basis

for collective campaigns to protect and promote the rights of MDWs. For instance, the treatment of MDWs in the two jurisdictions surveyed provide adequate basis for the claim that the non-discrimination principle is wantonly violated. The international human rights instruments that could be invoked include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which, with active and persistent advocacy, can be used to achieve the same ends, especially considering that the former is monitored by the United Nations Human Rights Committee which admits individual complaints. However, it bears emphasizing here that specific human rights are not static but are very dynamic and continuously evolving concepts. This may be illustrated in the intersectionality of gender, class, ethnicity, legal and immigration status that are faced by MDWs. The complex issues arising from their situation should lead decision-makers, adjudicators and policymakers into a constant rethinking of what are traditionally perceived as "universal" human rights. While this is obviously not meant to promote uncertainty and flexibility to the point of anarchy, the point is that human rights protection and promotion should be adapted to the particular conditions instead of the other way around, i.e. the conditions being simplistically or carelessly made to fit a pre-existing concept simply because it worked for a particular group of people usually from a different contextual background.

On the other hand, strong and cohesive solidarity with international and domestic organizations advocating similar struggles will be a big boost and help increase their influence in pushing for effective reforms. This however, is not meant to discourage attempts at campaigning for ratification and effective implementation of the Migrant

Workers Convention but simply to emphasize that the struggle for upholding human rights at the international level is never-ending and allows much room for creativity and persistence.

The above is not meant to contradict earlier arguments raised here specifically, that the MWC is inherently defective due to the conflicting interests which arose at the drafting stage and the many compromises reached in the process; and that which states that discussing specific rights are “almost beside the point.” Rather, these are meant to supplement and strengthen such assertions. Campaigning for the ratification of the MWC is part of the overall strategy to put forward the many issues facing migrant workers in general and MDWs in particular. It will also help clarify issues and work towards an improved and more relevant treaty that can effectively address these issues. And while I chose not to conduct a detailed discussion of specific legal rights in this dissertation, this is not to eschew them altogether but mainly to emphasize the various other aspects which are often taken for granted or neglected by traditional legal approaches.

However, we also need to be reminded that although the law may be a powerful tool to effect significant changes, it is all-too-often not enough in and of itself. As had been explained and discussed in previous chapters, the law is often but an instrument that the ruling class or the dominant states use to preserve the status quo. Thus, there is always a need to work towards ensuring that the law works not only for a few privileged members of society but for all, regardless of gender, race, class, ethnicity, legal and immigration status, or economic and political might of the states involved.

Hence, for countries of employment such as Canada and Hong Kong, it is recommended that the LCP and other MDW recruitment programs be abolished in their current forms. Instead, domestic work should be given the appropriate dignity and recognition it deserves, commensurate to its enormous contribution to society. In Canada for instance, domestic work should be included in the list of jobs for which independent skilled immigrants may enter. This will not only give due recognition to the high demand for this type of occupation, but will also be a step towards rendering domestic work its rightful value. Consequently, this recognition will hopefully lead to higher wages as well. While this may provoke a counter-argument that increasing wages may mean that local residents and citizens will begin to have an interest in this type of work hence eradicating the need to hire MDWs, this remains to be proven in practice. For as in the case of other well-paid blue-collar jobs, Canada is always in need of more labourers due to its dwindling population. This is evidenced by the fact that at least in recent years, the independent skilled worker category remains to be the biggest source of immigrants to Canada.<sup>3</sup>

And speaking of Canada's broader immigration policy, it is also recognized that there are currently other hugely problematic areas which likewise demand the government's serious attention. These include other temporary worker programs such as the seasonal migrant farmworkers, and the undocumented workers.<sup>4</sup> The existence of

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<sup>3</sup> Based on official statistics from Citizenship and Immigration Canada (CIC), those who are admitted under the "skilled workers" category comprised more than half of the overall migration intake in the past three years: 52.13% in 2000, 54.75% in 2001 and 53.85% in 2002. Please see Annex 'I', CIC Facts and Figures 2002: Immigration By Level (Principal Applicants and Dependents).

<sup>4</sup> Due to resource constraints, this dissertation did not deal with the issues faced by these sectors, although this author is very much aware of their plight, and greatly sympathetic to their cause. This single piece of

these other problematic sectors though seemingly more disadvantaged than the MDWs in some respects, nonetheless are symptomatic of the systemic ills in Canada's overall immigration policies. Instead of each program being treated in isolation therefore, the conditions of all these disadvantaged sectors should spur solidarity rather than competition or disunity. For any gain made by one of these disadvantaged sectors will surely contribute towards improving the conditions of the others, in direct or indirect ways.

In both Hong Kong and Canada, the discriminatory policies that characterize aspects of their temporary migrant work should be eliminated. Instead, programs should provide that the same treatment and benefits<sup>5</sup> (which other visa workers enjoy) be granted to MDWs.

These reforms must also be coupled with the provision of adequate social services such as a subsidized universal daycare system, institutional and home support care for the sick and elderly, to reduce if not eradicate dependence on domestic workers. While these recommendations may have been perennially raised and simply ignored in the past, the present recommendation differs in at least one important respect. That is, the present call for the provision of adequate and relevant social services should not be rendered for

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work will simply not be enough to articulate and give justice to the more specific issues faced by these other types of disadvantaged migrants as they should be the subject of an entirely new research project altogether.

<sup>5</sup> In Hong Kong for instance, this means providing the option of applying for permanent residence after seven years of work and the abolition of the new conditions of stay including the "two-week" rule. In Canada, this will mean the abolition of the Live-in Caregiver Program and its replacement by the regular work visa scheme along with all other temporary workers, to erase the stigma and inferior treatment given to MDWs. This will also eradicate the anomalous requirement of living in with the employer and being effectively forced to endure abuses for fear of losing a place to live and jeopardizing one's immigration status. And with the proper recognition of their skills, MDWs could eventually choose to apply for permanent resident status and work under terms and conditions that they freely choose.

its own sake but should be accompanied by conscious and sincere efforts to eradicate deeply-ingrained prejudices against a particularly disadvantaged sector such as the MDWs. Hopefully, this is one effective way that such changes can have long-lasting impact, encourage cooperation among members of different societal sectors, and consequently garner wholehearted support from all.

If the employment of MDWs cannot be avoided, not only should non-discriminatory policies be put in place, but the countries of employment must also ensure that they are strictly applied. For instance, if MDWs are to be admitted into a country, strict compliance with the terms of the employment contract should fall equally on the shoulders of both the MDWs and their employers. One way this could be enforced is through adequate screening of employers seeking MDWs, in the same way that certain requirements are imposed on MDWs not only to gain admission, but also to be able to continue working in the country of employment.

In line with these non-discrimination objectives and concomitant with the realization of more just and humane MDW policies and programs, countries of employment must likewise rethink their criteria for evaluating foreign credentials (including academic degrees and work experience). Not only does the current system of near non-recognition of foreign education and experience promote racism and other forms of discrimination, it also does not make sense in a situation where there is a clear shortage of people in some of these vital professions. For example, many MDWs are trained health professionals, yet there is an acute shortage of such professionals in Canada. The government continually refuses to allow foreign-trained professionals to

readily apply their knowledge here without going through the costly and tedious process of returning to school, taking accreditation and/or equivalency exams and other licensing requirements, on top of acquiring “Canadian work experience”. An advocacy group in Canada has documented a growing perception that, “as the nursing shortage deepens, so do the numbers of Filipino nurses recruited as domestic workers by the Canadian government continue to grow.”<sup>6</sup> This also underscores the “brain drain”<sup>7</sup> effects of the LCP on the economy of a third world country such as the Philippines.

For the Philippines as the country of origin of Filipina MDWs, it is recommended that there should be more active intervention and advocacy for the protection and promotion of OFWs in general and the Filipina MDWs in particular. Instances of human rights violations should not be taken as isolated incidences but must be viewed as means to advance effective and meaningful systemic reforms. Vigorous advocacy in intergovernmental organizations such as the United Nations, the International Labour Organization and the like, must be continued, not only for the protection of migrant workers, but also towards achieving a truly just international economic order. Strong political will is needed to assert these claims against the much more powerful rich, first world nations at intergovernmental gatherings, as well as in concluding bilateral agreements with countries of employment which host substantial

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<sup>6</sup> Filipino Nurses Support Group, Statement on “Discrimination Against Filipino Nurses Enslaves Nurses in Domestic Work Despite Critical Nursing Shortage” (Vancouver, 31 July 2003) (copy on file with the author).

<sup>7</sup> The term “brain drain” is being used to mean the massive outward migration of highly skilled individuals from a particular country thereby depriving its economy of the much-needed and valuable human resources. For an interesting discourse on the various aspects of this controversial issue, please see “Outward Bound: Do Developing Countries Gain or Lose When Their Brightest Talents Go Abroad?” (The Economist, 26 September 2002).

numbers of OFWs. These bilateral agreements for instance, should contain provisions clearly and effectively ensuring the human rights protection of the OFWs, especially the most vulnerable ones as the Filipina MDWs.

Moreover specific government functions related to assisting Filipino migrant workers must be seriously reviewed. For instance, the mandate of the Labour Attachès (and similar officials) who are stationed in various diplomatic posts worldwide must be clarified and enhanced towards ensuring full and adequate protection not only for MDWs in distress but for migrant workers in general. Constant audits and performance monitors must be put in place and strictly enforced to ensure that these government officials and representatives are truly performing their mandated duties and responsibilities not only passively (or reactionary) but in more pro-active, forward-looking ways.

Likewise, if the goal is to achieve long-lasting improvements, the only way to reverse the current scenario is to ensure that the existing conditions in the country of origin would make migration not a desperate option, but one which is made out of free and informed choice. To achieve this, the Philippine government could try its best to ensure that employment programs do not only provide jobs, but also adequate and fair compensation at a level competitive with wages and benefits in countries of employment. Needless to say, employment programs must be complemented by efforts to improve the overall welfare of the people within the country. Otherwise, the “brain drain” phenomenon will simply persist: the “brain drain” phenomenon that is being clearly felt in the Philippines, with millions of its professionals and university graduates working as

MDWs or manual construction workers in Asia, Europe, North America and the Middle East. Despite being unable to practice their profession or university training in foreign countries of employment, these OFWs nonetheless choose to “work abroad”, with the inducement of the Philippine government through its “labour export policy.”

That said, the other part of the explanation lies in the current global dialectics. For a country of origin such as the Philippines to be able to effectively realize the ideal solutions suggested above, fundamental changes must first occur at the global level. That is, states must cooperate in creating domestic systems which are truly equitable, just, non-discriminatory, and in accord with human rights and dignity, as a step towards the formation of a “new international socio-political and economic order”<sup>8</sup>. The current uneven economic development among nations not only perpetuates this ignominious trend of exploitation and abuse by the first world of people from third world countries, but likewise entrenches the unending cycle of migration, deskilling,<sup>9</sup> poverty and alienation.

Hence, there is a need to create avenues to level the playing field among nations, in terms of protecting individuals across borders, with emphasis on upholding human dignity and rights, more than the economic concerns that are currently being prioritized. While we must be careful about reposing too much confidence on the effectiveness and

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<sup>8</sup> To paraphrase the term used by renowned international law expert and third world advocate, Mohammed Bedjaoui in M. Bedjaoui, *Towards A New International Economic Order* (New York/London: Holmes and Meier, 1979).

<sup>9</sup> The term “deskilling” is being used here to refer to the state of losing one’s ability to use one’s education and training in a field or profession after having been forced by circumstances to work in low-paying, “demeaned” and “unwanted” jobs – or what had been previously referred to as the “dirty, difficult and dangerous” jobs.

applicability of existing international human rights standards for reasons earlier discussed, it is also not advisable to eschew these human rights standards altogether.

While international law covers more than international human rights and encompasses such broad aspects of governance as socio-political and economic matters, trade and migration, these are all interconnected and affect each other in practice. Thus, the application of a TWAIL perspective should guide the complex and at times difficult application of international legal norms in domestic jurisdictions. One important way is by considering the extent of colonial influence on poor, third world nations, the economic means and cultural considerations, rather than imposing a “standardized” application of international rules. The recognition of past injustices, their rectification and other efforts to prevent their recurrence, are requisites to the realization of the courses of action specified above. Aside from the need to recognize the mistakes of the past and to rectify the same, there must be a genuine desire and a strong political will to make international law work for all and not just for a few powerful and privileged nations.

Finally, no other strategy can be more crucial than the agency of the MDWs themselves. Hence, along with state policies expressly upholding human rights, there should also be widespread and consistent efforts toward empowering individuals to determine their own needs and entitlements. In this regard, the role and important contribution of grassroots and/or non-governmental organizations in mobilizing individuals should be given full support. However, they should also be in some way properly regulated to guard against abuse and manipulation of other people’s naiveté or desperation.

Thus, there is still some room to be optimistic about the future, as the situation, though serious, is not absolutely hopeless. In a world where violence, hatred and despair are stubbornly prevalent, the hope provided by a socio-legal framework that truly considers the various complexities and specificities of the human experience, is not only a welcome respite, but also reason enough to move on with the journey.

This journey, though littered with obstacles and challenges of all shapes and sizes, hindered at times by selfish motives, slowed down by life's distractions or hastened by guilt pangs, is one that is nonetheless worth taking. Wherever it may eventually lead, the lessons learned and horizons explored along the way, had been nothing less than awe-inspiring.

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**ANNEX "A"**

Table A. Number of Overseas Filipino Workers, by Occupation and by Sex:  
October 2001 and 2002  
(In Thousands)

Major and Minor Occupation Group	2002			2001		
	Both Sexes	Male	Female	Both Sexes	Male	Female
<b>Philippines</b>	<b>1,056</b>	<b>554</b>	<b>502</b>	<b>1,029</b>	<b>528</b>	<b>501</b>
<b>Officials of government and special interest organizations, corporate executives, managers, managing proprietors, and supervisors</b>	<b>26</b>	<b>21</b>	<b>5</b>	<b>17</b>	<b>16</b>	<b>1</b>
Officials of government and special interest organizations	-	-	-	-	-	-
Corporate executives and specialized managers	5	4	1	3	2	*
General managers or managing proprietors	3	2	1	2	1	*
Supervisors	18	15	3	13	12	*
<b>Professionals</b>	<b>106</b>	<b>59</b>	<b>47</b>	<b>101</b>	<b>45</b>	<b>56</b>
Physical, mathematical and engineering science professionals	38	37	1	39	29	10
Life science and health professionals	52	17	35	43	10	33
Teaching professionals	6	1	5	2	*	2
Other professionals	10	6	5	17	6	11
<b>Technicians and associate professionals</b>	<b>100</b>	<b>59</b>	<b>41</b>	<b>73</b>	<b>41</b>	<b>33</b>
Physical science and engineering						
Associate professionals	54	49	5	34	31	3
Life science and health associate professionals	5	2	2	3	*	3
Teaching associate professionals	1	-	1	-	-	-
Related associate professionals	40	8	32	36	9	27
<b>Clerks</b>	<b>36</b>	<b>15</b>	<b>21</b>	<b>30</b>	<b>13</b>	<b>17</b>
Office clerks	18	10	8	21	11	10
Customer services clerks	18	5	13	9	2	7
<b>Service workers and shop and market sales workers</b>	<b>116</b>	<b>50</b>	<b>66</b>	<b>116</b>	<b>52</b>	<b>64</b>
Personal and protective services workers	105	45	60	104	47	57
Models, salespersons and demonstrators	11	5	6	12	5	7
<b>Farmers, forestry workers and fishermen</b>	<b>6</b>	<b>6</b>	*	<b>5</b>	<b>5</b>	*
Farmers and other plant growers	1	1	*	1	1	*
Animal producers	-	-	-	*	*	-
Forestry and related workers	2	2	-	*	*	-
Fishermen	3	3	-	3	3	-
Hunters and trappers	"	-	-	-	-	-

<b>Trades and related workers</b>	168	181	19	163	144	19
Mining, construction and related trades workers	42	41	-	37	36	-
Metal, machinery and related trades workers	35	36	-	34	38	-
Precision, handicraft, printing and related trades workers	-	-	-	-	3	-
Other craft and related trades workers	13	12	-	16	14	11
<b>Plant and machine operators and assemblers</b>	155	146	10	173	156	17
Stationary plant and related operators	7	7	-	10	10	-
Machine operators and assemblers	29	20	3	35	20	15
Drivers and mobile plant operators	119	118	1	127	126	2
<b>Laborers and unskilled workers</b>	342	48	294	346	51	295
Sales and services elementary occupations	303	17	186	311	23	282
Agricultural, forestry, fishery and related laborers	4	4	-	3	3	-
Laborers in mining, construction, manufacturing and transport	34	26	3	32	25	7
<b>Special occupations</b>	*	-	*	6	6	*
Armed Forces	-	-	-	2	2	-
Nongainful occupations	-	-	-	-	-	-
Other occupations not classifiable	*	-	*	4	4	*

Source: Income and Employment Statistics Division, Survey on Overseas Filipinos  
 Household Statistics Department  
 Philippines National Statistics Office  
 Manila, Philippines

Note:

Details may not add up to totals due to rounding

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<http://www.census.gov.ph/data/sectordata/2003/of0204.htm>

Table 2. Top 10 host countries for overseas Filipino workers, 1975-1995.

Country	1975-1979	Rank	1980-1984	Rank	1985-1989	Rank	1990-1995	Rank
ALL COUNTRIES	211,878		1,299,086		1,766,703		2,978,517	
TOTAL TOP 10 COUNTRIES	180,660		1,211,855		1,595,071		2,404,666	
Top 10 Countries as % of All	85		93		90		81	
Asian countries in top 10 as % of All	16		10		20		29	
Middle East countries in top 10 as % of All	62		82		70		52	
U.S.A.	9,348	3	11,736	10				
Brunei					51,308		9	
Hong Kong	8,481	4	46,751	4	150,829	2	313,770	2
Indonesia	2,950	9						
Japan	22,996	2	62,085	3	148,368	3	274,301	3
Malaysia					52,938		8	
Singapore			19,778	9	55,868	6	54,679	7
Taiwan							109,230	5
England	5,317	6						
Bahrain	2,880	10	21,300	8	33,571	7		
Iraq	3,576	8	69,109	2				
Kuwait	6,585	5	40,840	6	90,947	5	68,222	6
Libya			32,715	7	29,005	10		
OMAN					29,233	9		
QATAR					32,173	8	50,125	10
Saudi Arabia	113,473	1	864,869	1	925,639	1	1,273,098	1
U.A.E.	5,051	7	42,672	5	99,138	4	156,622	4

\*Data from 1975-1983 refer to processed overseas contract workers.

Data from 1984-1995 refer to deployed overseas contract workers.

Source of data: Philippine Overseas Employment Administration.

## ANNEX "C"

**Table 3. Skills distribution of overseas Filipino workers (percentages).**

Skill category	1975/a	1980/a	1985/a	1987/b	1995/c
Professional, technical and related workers	53.5	15.5	22.5	27.6	20.5
Composers and performing artists	15.4	7.9	5.4	8.9	10.9
Administrative and managerial workers	0.6	0.5	0.4	0.4	0.2
Clerical and related workers	1.8	3.4	4.5	3.6	1.6
Sales workers	0.5	0.3	0.8	1.0	1.0
Service workers	22.0	14.9	27.1	33.7	38.0
Maids and related housekeeping service workers	nd a	nd a	nd a	21.5	29.3
Agricultural, animal husbandry, forestry workers, fishermen and hunters	0.9	1.0	0.4	0.6	0.5
Production and related workers, transport equipment operators and laborers	20.8	64.4	44.4	33.2	38.2
Not classified	0.0	0.0	0.0	0.0	0.1
<b>Grand Total</b>	<b>100.0</b> <b>(12,501)</b>	<b>100.0</b> <b>(157,394)</b>	<b>100.0</b> <b>(337,751)</b>	<b>100.0</b> <b>(382,229)</b>	<b>100.0</b> <b>(214,130)</b>

/a Refers to all processed workers

nd a: no data available

/b Refers to all deployed workers

/c Refers to new hires only

**ANNEX "D"**

**Table D: Number of Overseas Filipino Workers, by Place of Work and by Sex  
October 2001 and 2002  
(In Thousands)**

Place of Work	Both Sexes	2002		Both Sexes	2001	
		Male	Female		Male	Female
<b>Philippines</b>	<b>1,056</b>	<b>554</b>	<b>502</b>	<b>1,029</b>	<b>528</b>	<b>501</b>
<b>Africa</b>	<b>15</b>	<b>13</b>	<b>2</b>	<b>6</b>	<b>5</b>	<b>1</b>
Libya	5	5	-	4	4	1
Other countries in Africa	11	9	2	1	1	*
<b>Asia</b>	<b>808</b>	<b>390</b>	<b>417</b>	<b>804</b>	<b>378</b>	<b>425</b>
<b>East Asia</b>	<b>297</b>	<b>96</b>	<b>201</b>	<b>326</b>	<b>103</b>	<b>223</b>
Hong Kong	122	8	114	123	7	116
Japan	87	41	46	94	49	45
Taiwan	66	30	35	87	29	57
South Korea	16	10	6	19	15	4
China	4	4	-	3	1	1
Other countries in East Asia	2	1	*	*	*	*
<b>Southeast and South Central Asia</b>	<b>106</b>	<b>40</b>	<b>66</b>	<b>101</b>	<b>39</b>	<b>62</b>
Singapore	65	18	47	58	14	45
Malaysia	24	11	13	28	17	12
Brunei	9	6	3	11	6	5
Other countries in SE/SC Asia	8	5	2	3	2	*
<b>Western Asia</b>	<b>405</b>	<b>255</b>	<b>150</b>	<b>377</b>	<b>237</b>	<b>140</b>
Saudi Arabia	271	205	66	266	196	71
Kuwait	39	10	29	32	8	24
United Arab Emirates	41	18	23	43	24	19
Qatar	11	7	4	7	2	5
Bahrain	9	4	5	6	2	3
Oman	3	1	1	3	*	3
Jordan	3	*	3	2	*	1
Lebanon	4	-	4	6	1	4
Other countries in Western Asia	25	9	16	13	3	10
<b>Australia</b>	<b>18</b>	<b>11</b>	<b>7</b>	<b>22</b>	<b>18</b>	<b>4</b>
Saipan	4	1	2	9	6	3
Guam	-	-	-	4	3	*
Australia	6	4	2	6	5	1
Other countries in Australia	8	6	2	4	3	1
<b>Europe</b>	<b>121</b>	<b>78</b>	<b>43</b>	<b>107</b>	<b>72</b>	<b>35</b>
Greece	27	23	5	18	17	1
Italy	32	12	20	30	14	16
Norway	3	3	-	2	1	-
United Kingdom	20	10	-	-	-	-

Germany	12	11	-	-	3	*
France	3	2	-	-	1	*
Netherlands	4	3	-	-	1	*
Other countries in Europe	13	13	-	-	3	*
<b>North and South America</b>	<b>87</b>	<b>56</b>	<b>-</b>	<b>77</b>	<b>49</b>	<b>28</b>
USA	60	32	-	32	35	*
Canada	18	12	-	10	8	*
Other countries in North and South America	9	9	-	11	11	*
<b>Other countries</b>	<b>6</b>	<b>3</b>	<b>-</b>	<b>12</b>	<b>5</b>	<b>7</b>
<b>Country not reported</b>	<b>2</b>	<b>2</b>	<b>-</b>	<b>2</b>	<b>2</b>	<b>*</b>

Source: Income and Employment Statistics Division, Survey on Overseas Filipinos  
 Household Statistics Department  
 Philippines National Statistics Office  
 Manila, Philippines

*Notes:*

\* Less than 500  
 Details may not add up to total due to rounding

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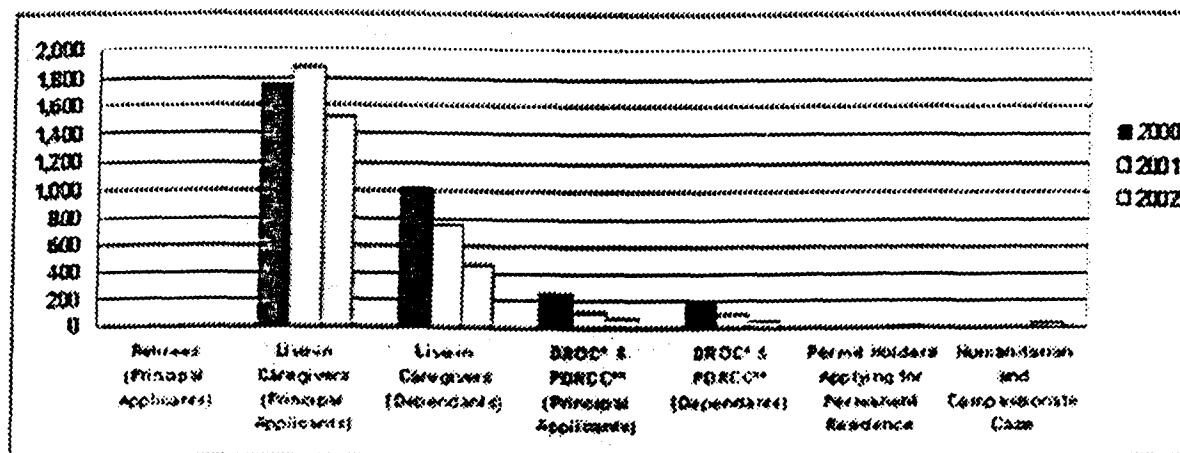
## FACTS and FIGURES 2002

### Immigration Overview



#### Other Class by Category

##### Other Class by Category (Principal Applicants and Dependents)



##### Other Class by Category (Principal Applicants and Dependents)

CATEGORY	2000		2001		2002	
	Num.	%	Num.	%	Num.	%
Retirees (Principal Applicants)	0	0.00	0	0.00	1	0.05
Live-in Caregivers (Principal Applicants)	1,760	54.27	1,874	66.24	1,519	70.82
Live-in Caregivers (Dependants)	1,023	31.54	750	26.51	462	21.54
DROC* & PDRCC** (Principal Applicants)	260	8.02	108	3.82	75	3.50
DROC* & PDRCC** (Dependants)	200	6.17	97	3.43	50	2.33
Permit Holders Applying for Permanent Residence	0	0.00	0	0.00	9	0.42
Humanitarian and Compassionate Case	0	0.00	0	0.00	29	1.35
<b>Total</b>	<b>3,243</b>	<b>100</b>	<b>2,829</b>	<b>100</b>	<b>2,145</b>	<b>100</b>

\* DROC: Deferred Removal Orders Class

\*\* PDRCC: Post-Determination Refugee Claimants in Canada Class

Date Published: 2003-06

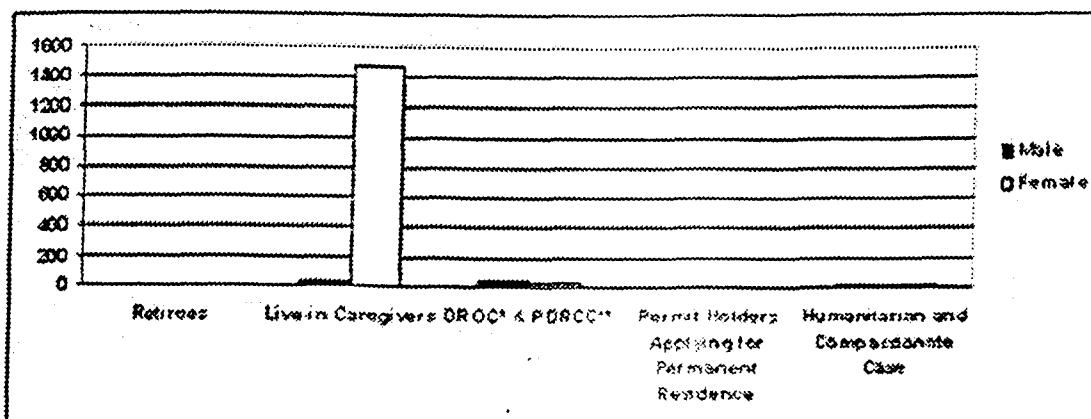


## FACTS and FIGURES 2002

### Immigration Overview

#### Other Class by Gender and Category (Principal Applicants)

##### Other Class by Gender and Category, 2002 (Principal Applicants)



#### Other Class by Gender and Category (Principal Applicants)

GENDER	CATEGORY	2000		2001		2002	
		Num.	%	Num.	%	Num.	%
Male	Live-in Caregivers	39	19.21	52	46.43	43	40.57
	DROC* & PDRCC**	164	80.79	60	53.57	48	45.28
	Permit Holders Applying for Permanent Residence	0	0.00	0	0.00	3	2.83
	Humanitarian and Compassionate Case	0	0.00	0	0.00	12	11.32
	<b>Subtotal</b>	<b>203</b>	<b>100</b>	<b>112</b>	<b>100</b>	<b>106</b>	<b>100</b>
Female	Retirees	0	0.00	0	0.00	1	0.07
	Live-in Caregivers	1,721	94.72	1,822	97.43	1,476	96.91
	DROC* & PDRCC**	96	5.28	48	2.57	27	1.77
	Permit Holders Applying for Permanent Residence	0	0.00	0	0.00	5	0.33
	Humanitarian and Compassionate Case	0	0.00	0	0.00	14	0.92
	<b>Subtotal</b>	<b>1,817</b>	<b>100</b>	<b>1,870</b>	<b>100</b>	<b>1,523</b>	<b>100</b>
	<b>Total</b>	<b>2,020</b>		<b>1,982</b>		<b>1,629</b>	

\* DROC: Deferred Removal Orders Class

\*\* PDRCC: Post-Determination Refugee Claimants in Canada Class



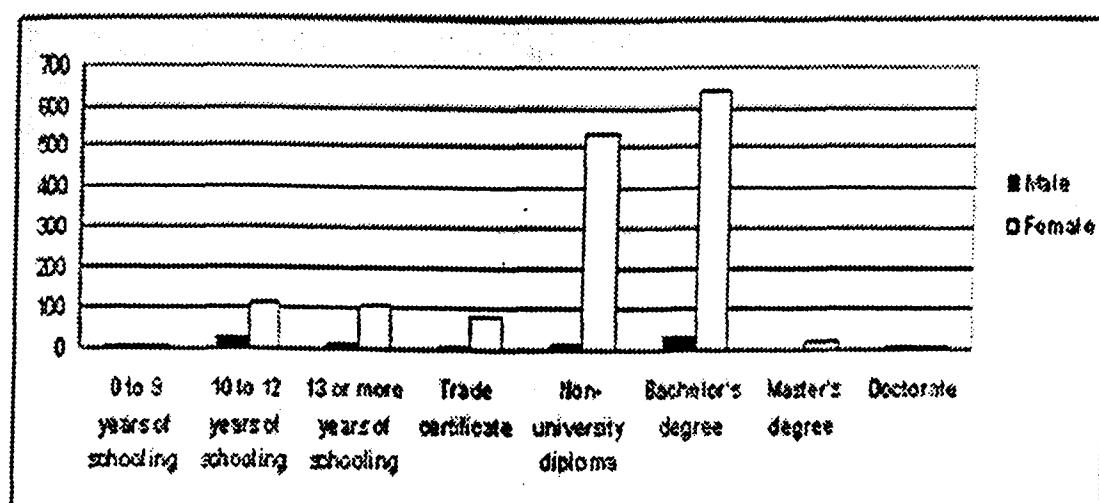
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## FACTS and FIGURES 2002

### Immigration Overview

#### Other Class by Gender and Level of Education (Principal Applicants)

**Other Class by Gender and Level of Education □ 15 Years of Age or Older, 2002 (Principal Applicants)**



**Other Class by Gender and Level of Education □ 15 Years of Age or Older (Principal Applicants)**

GENDER	EDUCATION	2000		2001		2002	
		Num.	%	Num.	%	Num.	%
Male	0 to 9 years of schooling	33	16.67	13	11.71	9	8.49
	10 to 12 years of schooling	55	27.78	18	16.22	24	22.64
	13 or more years of schooling	26	13.13	10	9.01	13	12.28
	Trade certificate	22	11.11	8	7.21	10	9.43
	Non-university diploma	17	8.59	22	19.82	16	15.09
	Bachelor's degree	42	21.21	37	33.33	30	28.30
	Master's degree	3	1.52	3	2.70	1	0.94
	Doctorate	0	0.00	0	0.00	3	2.83
	<b>Subtotal</b>	<b>198</b>	<b>100</b>	<b>111</b>	<b>100</b>	<b>106</b>	<b>100</b>

<b>Female</b>	<b>0 to 9 years of schooling</b>	46	2.53	25	1.34	9	0.59
	<b>10 to 12 years of schooling</b>	178	9.01	147	7.86	119	7.83
	<b>13 or more years of schooling</b>	165	9.09	157	8.40	105	6.91
	<b>Trade certificate</b>	148	8.15	108	5.78	84	5.53
	<b>Non-university diploma</b>	616	33.94	684	36.58	536	35.26
	<b>Bachelor's degree</b>	650	35.81	728	38.93	642	42.24
	<b>Master's degree</b>	11	0.61	17	0.91	19	1.25
	<b>Doctorate</b>	1	0.06	4	0.21	6	0.39
	<b>Subtotal</b>	1,815	100	1,870	100	1,520	100
	<b>Total</b>	2,013		1,981		1,626	

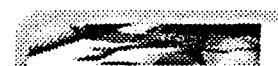
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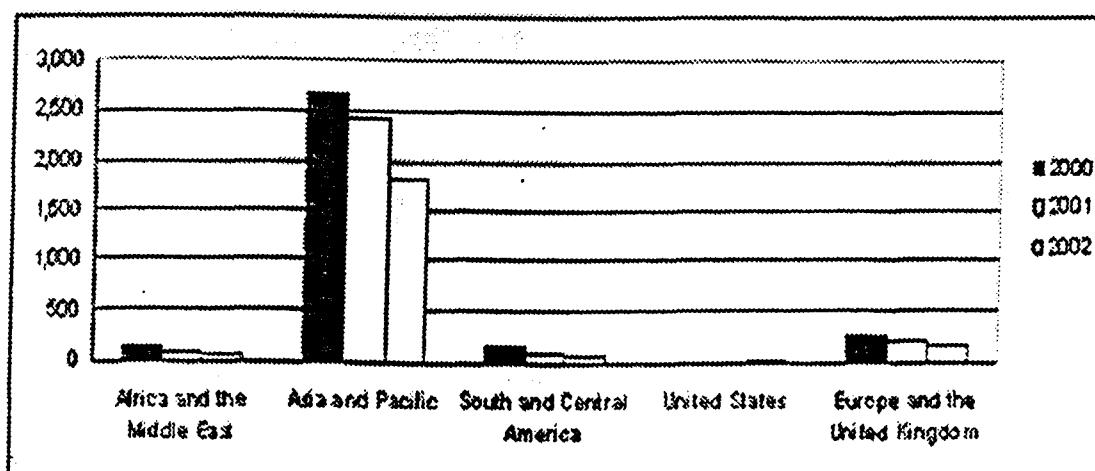
## FACTS and FIGURES 2002

### Immigration Overview



#### Other Class by Source Area and Top Ten Source Countries

##### Other Class by Source Area (Principal Applicants and Dependents)



##### Other Class by Source Area (Principal Applicants and Dependents)

REGION	2000		2001		2002	
	Num.	%	Num.	%	Num.	%
Africa and the Middle East	137	4.22	101	3.57	85	3.96
Asia and Pacific	2,879	82.61	2,416	85.40	1,821	84.90
South and Central America	170	5.24	96	3.39	56	2.61
United States	6	0.19	2	0.07	11	0.51
Europe and the United Kingdom	251	7.74	212	7.49	172	8.02
Not stated	0	0.00	2	0.07	0	0.00
Total	3,243	100	2,829	100	2,145	100

**Other Class by Top Ten Source Countries (Principal Applicants and Dependents)**

COUNTRY	2000			2001			2002		
	Num.	%	Rank	Num.	%	Rank	Num.	%	Rank
Philippines	2,383	73.48	1	2,272	80.31	1	1,706	79.53	1
Slovak Republic	51	1.57	5	65	2.30	2	71	3.31	2
India	58	1.79	2	27	0.95	5	24	1.12	3
Sri Lanka	56	1.73	3	40	1.41	3	22	1.03	4
Iran	18	0.56	16	14	0.49	13	16	0.75	5
United Kingdom	30	0.93	9	29	1.03	4	15	0.70	6
France	39	1.20	6	19	0.67	8	14	0.65	7
Ukraine	13	0.40	19	17	0.60	10	14	0.65	8
Pakistan	36	1.11	7	20	0.71	7	12	0.56	9
Israel	8	0.25	25	8	0.28	20	11	0.51	10
Czech Republic	24	0.74	11	26	0.92	6	7	0.33	15
China, People's Republic of	56	1.73	4	18	0.64	9	7	0.33	16
Ghana	33	1.02	8	9	0.32	18	6	0.28	21
Jamaica	28	0.86	10	14	0.49	12	4	0.19	29
<b>Total for Top Ten Only</b>	<b>2,770</b>	<b>85.42</b>		<b>2,533</b>	<b>89.54</b>		<b>1,905</b>	<b>88.81</b>	
<b>Total Other Countries</b>	<b>473</b>	<b>14.58</b>		<b>296</b>	<b>10.46</b>		<b>240</b>	<b>11.19</b>	
<b>Total</b>	<b>3,243</b>	<b>100</b>		<b>2,829</b>	<b>100</b>		<b>2,145</b>	<b>100</b>	

Date Published: 2003-06

## FACTS and FIGURES 2002

### Immigration Overview

#### Immigration by Level (Principal Applicants and Dependents)

IMMIGRATION	2000		2001		2002	
	Num.	%	Num.	%	Num.	%
Spouse	35,262	15.51	37,727	15.06	35,469	15.48
Parents and Grandparents	17,758	7.81	21,300	8.50	22,502	9.82
Others	7,546	3.32	7,684	3.07	7,306	3.19
<b>Total Family</b>	<b>60,566</b>	<b>26.64</b>	<b>66,711</b>	<b>26.63</b>	<b>65,277</b>	<b>28.49</b>
Skilled Workers	118,510	52.13	137,135	54.75	123,357	53.85
Business Immigrants	13,664	6.01	14,589	5.82	11,041	4.82
Live-in Caregivers	2,783	1.22	2,624	1.05	1,981	0.86
Provincial/Territorial Nominees	1,253	0.55	1,274	0.51	2,127	0.93
<b>Total Economic</b>	<b>136,210</b>	<b>59.91</b>	<b>155,622</b>	<b>62.13</b>	<b>138,506</b>	<b>60.46</b>
Post-Determination Refugee Claimants	163	0.07	82	0.03	74	0.03
Deferred Removal Orders	297	0.13	123	0.05	51	0.02
Retirees	0	0.00	0	0.00	1	0.00
Permit Holders Applying for Permanent Residence	0	0.00	0	0.00	9	0.00
IRPA Other	0	0.00	0	0.00	29	0.01
<b>Total Other</b>	<b>460</b>	<b>0.20</b>	<b>205</b>	<b>0.08</b>	<b>164</b>	<b>0.06</b>
<b>Total Immigrants</b>	<b>197,236</b>	<b>86.75</b>	<b>222,538</b>	<b>88.84</b>	<b>203,947</b>	<b>89.01</b>
Government-Assisted Refugees*	10,666	4.69	8,697	3.47	7,504	3.28
Privately Sponsored Refugees	2,913	1.28	3,570	1.43	3,044	1.33
Refugees Landed in Canada	12,991	5.71	11,896	4.75	10,544	4.60
Dependants Abroad**	3,494	1.54	3,742	1.49	4,019	1.75
<b>Total Refugees</b>	<b>30,064</b>	<b>13.22</b>	<b>27,905</b>	<b>11.14</b>	<b>25,111</b>	<b>10.96</b>
<b>Total Immigrants/Refugees</b>	<b>227,300</b>	<b>99.97</b>	<b>250,443</b>	<b>99.98</b>	<b>229,058</b>	<b>99.97</b>
Backlog***	45	0.02	41	0.02	33	0.01
Not stated	1	0.00	0	0.00	0	0.00
<b>Total</b>	<b>227,346</b>	<b>100</b>	<b>250,484</b>	<b>100</b>	<b>229,091</b>	<b>100</b>

\* Includes Kosovo refugees who arrived in 1999 as part of a special movement and who obtained permanent resident status in 2000.

\*\* Dependants (of a refugee landed in Canada) who live abroad.

\*\*\* In subsequent tables, Backlog cases are included in the category they were landed in. The subtotals may therefore be different from those appearing here.

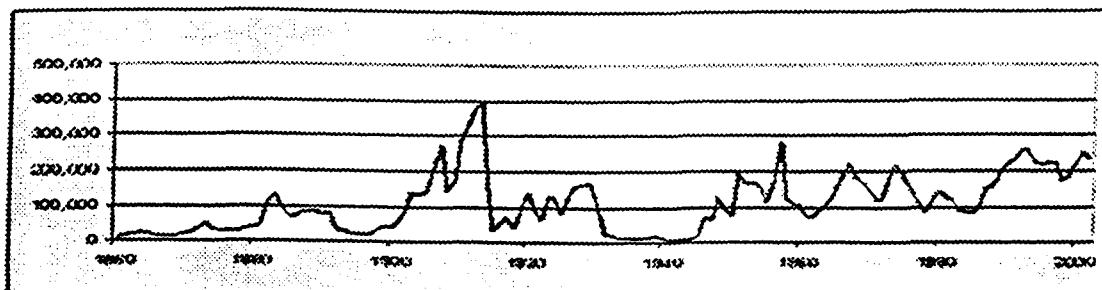


## FACTS and FIGURES 2002

### Immigration Overview



#### Immigration - Historical Perspective (1860-2002)



Year	Num.										
1860	6,276	1884	103,824	1908	143,326	1932	20,591	1956	164,857	1980	143,135
1861	13,589	1885	76,169	1909	173,694	1933	14,382	1957	282,164	1981	128,639
1862	18,294	1886	69,152	1910	286,839	1934	12,476	1958	124,851	1982	121,176
1863	21,000	1887	84,526	1911	331,288	1935	11,277	1959	106,928	1983	89,188
1864	24,779	1888	88,766	1912	375,756	1936	11,643	1960	104,111	1984	88,271
1865	18,958	1889	91,600	1913	400,870	1937	15,101	1961	71,698	1985	84,334
1866	11,427	1890	75,067	1914	150,484	1938	17,244	1962	74,856	1986	99,325
1867	10,666	1891	82,165	1915	33,665	1939	16,994	1963	93,151	1987	151,999
1868	12,765	1892	30,996	1916	55,914	1940	11,324	1964	112,606	1988	161,494
1869	18,630	1893	29,633	1917	72,910	1941	9,329	1965	146,758	1989	191,493
1870	24,706	1894	20,829	1918	41,845	1942	7,576	1966	194,743	1990	216,396
1871	27,773	1895	18,790	1919	107,698	1943	8,504	1967	222,876	1991	232,744
1872	36,578	1896	16,835	1920	138,824	1944	12,801	1968	183,974	1992	254,817
1873	50,050	1897	21,716	1921	91,728	1945	22,722	1969	164,531	1993	256,741
1874	39,373	1898	31,900	1922	84,224	1946	71,719	1970	147,713	1994	224,364
1875	27,382	1899	44,543	1923	133,729	1947	64,127	1971	121,900	1995	212,859
1876	25,633	1900	41,681	1924	124,184	1948	125,414	1972	122,006	1996	226,039
1877	27,082	1901	55,747	1925	84,907	1949	95,217	1973	184,200	1997	216,014
1878	29,807	1902	89,102	1926	135,982	1950	73,912	1974	218,465	1998	174,159
1879	40,492	1903	138,660	1927	158,886	1951	194,391	1975	187,881	1999	189,922
1880	38,505	1904	131,252	1928	188,783	1952	164,498	1976	149,429	2000	227,346
1881	47,991	1905	141,485	1929	184,993	1953	168,868	1977	114,914	2001	250,484
1882	112,458	1906	211,653	1930	104,806	1954	154,227	1978	86,313	2002	229,091
1883	133,624	1907	272,409	1931	27,530	1955	109,946	1979	112,093		

--- Published: 2003-08



## FACTS and FIGURES 2002

### Immigration Overview

#### Immigration by Skill Level and Labour Market Intention

##### Immigration by Skill Level\* and Labour Market Intention (Principal Applicants and Dependents)

SKILL LEVEL	2000			2001			2002		
	Num.	%	%	Num.	%	%	Num.	%	%
Skill Level O	3,911	1.72	3.24	4,872	1.95	3.71	4,147	1.81	3.51
Skill Level A	42,329	18.62	35.10	46,686	18.64	35.55	41,807	18.25	35.42
Skill Level B	16,700	7.35	13.85	18,239	7.28	13.89	16,544	7.22	14.02
Skill Level C	6,619	2.91	5.49	6,930	2.77	5.28	5,860	2.56	4.97
Skill Level D	1,205	0.53	1.00	1,183	0.47	0.90	917	0.40	0.78
New Workers (15 Years of Age or Older)	48,144	21.18	39.92	51,785	20.67	39.43	47,513	20.74	40.26
Industrial Codes (15 Years of Age or Older)	1,697	0.75	1.41	1,632	0.65	1.24	1,228	0.54	1.04
<b>Subtotal - Intending to Work</b>	<b>120,605</b>	<b>53.06</b>		<b>131,327</b>	<b>52.43</b>		<b>118,016</b>	<b>51.52</b>	<b>100</b>
Children under 15 Years of Age	51,146	22.50		57,254	22.86		50,967	22.25	
Students (15 Years of Age or Older)	19,547	8.60		21,856	8.73		20,268	8.85	
Retired (15 Years of Age or Older)	6,541	2.88		7,199	2.87		7,874	3.44	
Other Non-Workers (15 Years of Age or Older)	29,501	12.98		32,831	13.11		31,953	13.95	
Not stated	6	0.00		17	0.01		13	0.01	
<b>Total</b>	<b>227,346</b>	<b>100</b>		<b>250,484</b>	<b>100</b>		<b>229,091</b>	<b>100</b>	

\* Skill levels are based on the National Occupational Classification system.

Date Published: 2003-06