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Carol G. S. TAN (陳玉心)
Reader in Law, School of Law
Academic Staff, Centre of South East Asian Studies
Member, Centre for Migration and Diaspora Studies

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Migrant Domestic Workers as Litigants in Hong Kong**

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Professor Mark R Thompson

Southeast Asia Research Centre

The City University of Hong Kong
83 Tat Chee Avenue
Kowloon Tong, Hong Kong SAR
Tel: (852) 3442 6330
Fax: (852) 3442 0103
<http://www.cityu.edu.hk/searc>

How Dewi Became a Litigant: Migrant Domestic Workers as Litigants in Hong Kong

Carol G.S. Tan (陳玉心) *

I. Introduction

When migrant domestic workers feature in the press in Hong Kong, they are likely to be portrayed as victims of exploitation or as law breakers. This has been particularly evident in the past year and a half. 2013 was the year in which several domestic workers¹ were detained for infringing the live-in rule that requires them to live in the households of their employment.² 2014 has so far seen many press reports on the case of Erwiana Sulistyaningsih, whose employer is now charged with a number of crimes perpetrated against Erwiana.³ In addition to being victims at the hands of their employers, domestic workers are also portrayed as the victims of employment agencies to whom they owe large sums of money for debts incurred in the process of coming to Hong Kong to work. What might be praised as 'enterprising' – domestic workers selling phone cards or clothing – can, in this discourse of victimhood, be invoked as evidence of

* School of Law and Centre of Southeast Asian Studies, SOAS, University of London. The interview of 'Dewi' was made possible by a research grant from the Faculty of Law and Social Sciences, SOAS, University of London.

¹ I use the more universal term of 'migrant domestic worker' even though the local term of 'foreign domestic helper' is a more accurate repository for the multiple subordinate statuses of such employees.

² A few of the MDWs who had been living in Nim Shue Wan village close to the family-oriented, multinational residential area of Discovery Bay on Lantau Island were arrested in July 2013. Some employers prefer their MDW to live elsewhere for reasons of their own privacy or lack of space in their home and though their employers were potentially equally in breach of the law none of the six MDW's employers were arrested: 'Six "stay-out" Filipinas arrested' *Hong Kong News* 1 Aug 2013: <http://hongkongnews.com.hk/six-stay-out-filipinas-arrested/> accessed on 18 April 2014. Changing the live-in rule is part of an on-going campaign that, in 2014, appears to have become louder than ever.

³ *South China Morning Post*, Hong Kong's main English language broadsheet, has carried a number of articles on Erwiana. These reported on police action against her employer, of Erwiana's recovery in hospital in Indonesia and in due course, of Erwiana arrival in Hong Kong to help police with their enquiries. Erwiana's plight has also been reported in the *Guardian* newspaper in the United Kingdom.

the activities domestic helpers are driven to because of these debts.⁴ It is in this discourse too that the press also provides expression, however well-intentioned, of the need for medical surveillance masquerading as 'protection'.⁵ The same, well-meaning, call for 'protections' for domestic workers characterised as a 'vulnerable' group is sometimes present even in more enlightened commentary.⁶

Less likely to make the headlines is the fact that, every year and for well over a decade now, many migrant domestic workers sue their employers. Whilst the conditions of work for MDWs can and need to be improved, Hong Kong's MDWs, in fact, possess socioeconomic rights to a degree not found elsewhere in Asia and the Middle East. Many of these rights are embodied in the employment contract between the domestic worker and her employer and litigation is thus the main route through which a domestic worker can enforce those rights. It follows that, if campaigners succeed in winning more rights, litigation will become yet more important. Involving as it does the individual domestic worker, litigation is a process through which the agency of MDWs may be observed and is one of several ways in which the discourse of victimhood can be challenged. Great are the structural constraints – described briefly below – faced by MDWs when it comes to suing their employers. Yet some MDWs do manage to sue. Litigation is thus also a prism through which insights to correct the over-determinism of structural analyses – including structures created and embodied in law – might be gained.

⁴ Phila Siu 'Thousands of Filipino maids forced to pay illegal fees' *South China Morning Post* 15 Oct 2013 www.scmp.com/print/news/hong-kong/article/1331723/thousands-filipino-maids-forced-pay-illegal-fees accessed on 16 April 2014.

⁵ L. Chang 'Compulsory Medical Exam Could Prevent Abuse of Helpers' SCMP Editorial *South China Morning Post* 2 April 2014 www.scmp.com/comment/letters/article/1462675/compulsory-medical-exam-could-prevent-abuse-helpers accessed on 16 April 2014. This editorial puts forward the suggestion that a domestic helper should undergo an annual medical examination at the employer's expense and with the medical report being submitted to the Labour Department.

⁶ See for instance, Paul Yip 'Hong Kong must address the social costs of hiring domestic helpers' 3 *South China Morning Post* 3 Feb 2014, www.scmp.com/comment/insight-opinion/article/1419267/hong-kong-must-address-social-costs-hiring-domestic-helpers accessed on 16 April 2014 which appeared in the print edition with the title 'Hidden Pain'. Arguably, even when the press report action expressing the solidarity of domestic workers, as they did with a march attended by thousands of domestic workers in January, the message of workers organising themselves and galvanising their resources is overshadowed by a focus in the report on further victims coming to the fore: Phila Siu 'New Employee Abuse Victims Emerge as Thousands March for Justice for Erwiana' *South China Morning Post* 19 Jan 2014 www.scmp.com/news/hong-kong/article/140897/new-victims-emerge-maids-rally-justice-erwiana-sulistyarningsih#com accessed on 16 April 2014 which appeared under the title as 'New Victims Emerge as Maids March for Justice' in the print edition.

In this paper, I look at the journey experienced by Dewi (not her real name), an Indonesian MDW from West Java.⁷ I turn first to the context for the presence of migrant domestic workers in Hong Kong and the law that facilitates and regulates them.

II. Migrant domestic workers in Hong Kong

There are currently around 320,000 full time, migrant domestic workers in Hong Kong. The vast majority of them are Southeast Asians, with Indonesians and Filipinas constituting 49% and 48% respectively of the MDW population in recent years. Among the remainder are women from Thailand, Sri Lanka, Nepal and Bangladesh.⁸ The policy of the Hong Kong government of allowing the immigration of women into the territory for domestic work is a long-standing one. Its origins are thought to lie in the immigration of professional and highly skilled professionals into the territory and in a shortage of domestic workers in Hong Kong during the 1970s. Such 'expats' were allowed to employ domestic workers and it was their needs, particularly for English-speaking domestic workers, push factors elsewhere and the active part played by the Philippine government that accounted for the arrival of women from the Philippines.⁹ Women from Indonesia have in the past few years gradually overtaken Filipinas to make up the largest nationality group of MDWs.

As is commonly recognised, migrant women are part of an intra-Asia migration of workers as well as a part of the widely-observed feminisation of migration, itself a part of the commoditisation of labour for household chores and care in the family. In recent years, it has been estimated that one in eight households in Hong Kong employs a migrant woman for her domestic labour, with the number of migrant domestic workers far outweighing the number of

⁷ Dewi is one of a number of MDW-litigants who were interviewed as part of a project on MDWs who sue their employers.

⁸ According to one study, Indonesian domestic helpers began arriving in Hong Kong 'around 1985' but numbers remained small until the 1990s, when the governments of Hong Kong and Indonesia began cooperating more closely: Asian Migrant Centre et al, *Underpayment 2: The Continuing Systematic Extortion of Indonesian Migrant Workers in Hong Kong* (Hong Kong: Asian Migrant Centre, 2007). MDWs from Bangladesh began arriving in 2013 but within a few months several of them had returned to Bangladesh citing a number of complaints regarding their treatment.

⁹ Text on the Labour Department's website offers an explanation that is based on the shortage of 'local full-time live-in domestic helpers' felt during the 1970s: www.labour.gov.hk/eng/plan/iwFDH.htm accessed on 17 April 2014. The migrant domestic worker population in Hong Kong is overwhelmingly female.

non-migrant domestic workers. The government of Hong Kong has retained strict control over such migrant labour and has, in recent years, fought off a challenge to the permanent 'guest' nature of such workers who, unlike skilled migrants, cannot attain formal residency through years of working continuously in Hong Kong.¹⁰

III. The law framing migrant domestic work

Hong Kong offers some of the best terms and conditions an MDW will find in Asia. That is to say that, by law, her employment, which must be evidenced by a written standard-form contract, is subject to a number of minimum terms and conditions. She is entitled to a rest day of 24 hours' duration in every seven day period, statutory holidays, progressive annual leave, adequate food or a food allowance, the cost of travel to her place of origin upon termination of the contract and limits on the deductions that can lawfully be made from her salary.¹¹ In addition, there is a minimum wage for MDWs (known as the 'minimum allowable wage')¹² and statutory limits on how much she may be charged for services rendered by an employment agency. Her contract shields her from being asked to work in premises other than the employer's single residence named in her contract or from being asked to do work other than domestic work. Each contract is for a two year period and without any probationary period. Early termination of the contract is possible at the initiative of either party and with a month's notice.¹³ MDWs are also entitled to long service payments, medical expenses and employment protection for pregnancy and

¹⁰ See the judgment of the Court of Final Appeal in *Vallejos Evangeline Banao and Domingo Daniel L. v Commissioner of Registration and Registration of Persons Tribunal* FACV 19 of 2012, reported in [2013] 2 HKLRD 533; (2013) 16 HKCFAR 45.

¹¹ Many of these rights are express terms of the government-prescribed domestic helper contract ID407 which can be found on the Immigration Department's website.

¹² This wage is amended from time to time. It was revised downwards after the Asian financial crisis of 1997 after which it has been increased a few times. It currently stands at HK\$4010. This is not the statutory general minimum wage which was introduced only in 2011 (1 May) and from which migrant domestic workers were excluded. It has been estimated that an MDW would earn about 50% more of her current wage were the statutory minimum wage to apply. Inclusion in the minimum wage is one of the reforms sought by some campaign groups.

¹³ Concerns in 2013 over 'premature termination' of contracts by MDWs acting in concert with employment agencies led to a greater scrutiny of applications for new visas for MDWs. Those considered to have terminated their contracts for 'job-hopping' purposes may be refused a new visa. See Press Release 'Immigration Department Implements Measure to Deter Abuse of Arrangements for Premature Termination of Contract By Foreign Domestic Helpers' 30 Aug 2013:

www.infor.gov.hk/gia/general/201308/30/P201308300757_print.htm accessed on 17 April 2014.

childbirth. These terms and conditions are the product of mandatory and overlapping contractual terms, employment legislation, immigration law and administrative provisions. In this constellation of laws and of immediate importance to the domestic worker is the contract of employment, enforcement of which lies with the employee. Whilst both employer and employee are placed in a web of law and regulations that also involve duties owed vertically to the state, without the MDW making a complaint, the employer is unlikely to face any action by the state. In pursuing her dispute with her employer, the MDW will, depending on amount of her claim, either start an action in the Minor Employment Claims Tribunal or the Labour Tribunal.

A brief word on certain aspects of the socio-legal environment in Hong Kong relevant to the enforcement of rights should be made. These too are comparatively good. First, there is a relative absence of extortion and abuse by the personnel of the authorities (police, immigration and labour departments and the relevant tribunals). Dewi, for instance, was accompanied by the police when she returned to her employer's home in order to retrieve her belongings and her passport. Second, the dispute resolution mechanisms are relatively efficient (and free to the parties) so that claims come to a conclusion without too long a delay.¹⁴ Third, civil society is vibrant so that there are now a variety of resources for MDWs. These include migrant worker trade unions, advocacy groups, NGOS and informal migrants' societies.

Despite the presence of the relatively good formal parameters outlined above, infringements of the socioeconomic rights of MDWs are common. Many domestic workers are paid little or no salary for the first few months on the excuse that the wages are re-directed towards the repayment of loans arranged for the migrant worker, ostensibly to pay for the costs of migrating for work. Thereafter, many MDWs are paid a wage less than the minimum mandated by the law. Results of surveys carried out in 2004 and 2005, for instance, showed between 42% and 67% of respondents stating that they had not been paid their full salary.¹⁵

¹⁴ Though note the complaints of delay and other complaints reported in Christy Choi and Joanna Chiu 'Maids Get a Raw Deal in Labour Tribunal' *South China Morning Post* 5 August 2012: www.scmp.com/article/1008563/maids-get-a-raw-deal-labour-tribunal accessed 17 April 2014.

¹⁵ See Asian Migrant Centre *Underpayment: Systematic Extortion of Indonesian Migrant Workers in Hong Kong* (Hong Kong: Asian Migrant Centre, 2005) and also Asian Migrant Centre et al *Underpayment 2: The Continuing Systematic Extortion of Indonesian Migrant Workers in Hong Kong* (Hong Kong: Asian Migrant Centre, 2007).

Other regular breaches of the law include not granting rest days or payment in lieu of rest days forsaken.

IV. Structural constraints faced by MDWs

When it comes to suing one's employer, the combination of migrant status, the costs of migration and other factors provide for the MDW a formidable set of constraints which may have a bearing on her agency or its exercise. In this regard, four facts associated with her employment militate against an MDW instituting a claim.

First, underpayment of wages is a common breach. As already mentioned, many MDWs do not receive much money at all for several months.¹⁶ This fact may account for why an MDW may feel that she has to work until she has repaid her loans and accumulated some wages. The risk of unemployment is likely to weigh heavily when an MDW considers her choice between continuing employment in sub-contract conditions and terminating her employment.¹⁷

Second, there is the 'two week rule' of the Hong Kong Immigration Department which again, militates against an MDW bringing a claim. This rule applies whether it is the MDW or her employer who terminates the employment. If the MDW exercises her right to terminate her employment, she risks having to leave Hong Kong before she starts the process of becoming an MDW with her new employer. This is expensive and is thought to deter a migrant worker from terminating her contract for breaches of contract by her employer.¹⁸

Third, the MDW resides in her employer's home.¹⁹ In practice, this means that the choice is between continuing in employment or bringing a claim. Paralegal advice centres routinely

¹⁶ See text and notes at n 15. See also the author's 'Why Rights are Not Enforced: The Case of Foreign Domestic Helpers' (2000) 30 *Hong Kong Law Journal* 354 which discusses inter alia the structural difficulties and common breaches perpetrated by employers with Indonesian migrant domestic workers in mind.

¹⁷ See, for instance, the circumstances of Sringatin, the MDW who is the current Vice-Chair of the Indonesian Migrant Workers Union, a union whose members are made up almost exclusively of Indonesian domestic helpers: Danny Lee 'Helper Moved to the Fore as Migrant Workers' Champion' *South China Morning Post* 27 Jan 2014: www.scmp.com/news/hong-kong/article/1414266/helper-moved-for-migrant-workers-champion. Sringatin completed her two year contract despite breaches of her employment contract by her employer having been advised by her sister that it would be hard for her to find a new job.

¹⁸ See n 13 regarding the risks of the tougher attitude of the Immigration Department announced in 2013.

¹⁹ Migrant domestic workers have for some years been required to live with their employers. One of the campaign demands of domestic workers and support groups is for the abolition of this rule. See for example

advise MDWs not to return to the employer's residence except to collect their belongings. It is likely that few women give notice before leaving and being a live-in employee, if she gave notice, it is likely that her employer would require her to leave immediately.

Fourth, when an MDW, assuming she is no longer in employment, brings a claim, she is usually granted a visa to remain in Hong Kong but which prohibits her from being employed. The ban on working undoubtedly militates against bringing a claim. It makes the costs of seeking redress very high and the availability of free food and shelter for the duration of her unemployment, whilst not making up for the opportunity costs (which cannot be a part of the claim), is critical.

V. How Dewi became a litigant

Dewi was interviewed in September 2010 at a time when she had been living in a shelter for about a month, having run away from her employer in Tsuen Wan. She had in fact run away from her employer once before several months earlier. This was when she had worked for her employer for four months and a week. On that occasion, she had gone to the employment agency that had placed her with her employer. The agency told her to return to her employer, saying that the employer promised to be more appreciative of Dewi, not to speak to her roughly, or drag or hit her (with chopsticks or other kitchen utensils). In the interview, Dewi also explained that, in the first five months of work, she was not given rest days. In the sixth month, she had two rest days but, in the following month, she had no rest days at all. Sometime that month she had told her employer of her wish to terminate her employment but the employer took no heed of this. At the end of the seventh month she ran away for the second time. It was in the evening and seeing that Dewi was in a state of some confusion, another MDW took Dewi to stay the night at her place of work from which her employer was absent on business. The next day she took Dewi to her own employment agency in the Causeway Bay area. Dewi might have stayed at the employment agency's temporary accommodation were it not for making some acquaintances there, one of whom had been in Hong Kong for more than six years and who gave her the

the HK Helpers Campaign launched in 2013 which lists abolition of the live-in rule as one of their three 'simple, winnable, demands': <http://hkhelplerscampaign.com/> accessed on 17 April 2014.

telephone number of an NGO. Dewi described how it was when this MDW told her that her salary constituted underpayment and she noted that Dewi's employer was fond of assaulting her that she realised that her employer had acted wrongfully. That same day she went to that NGO's shelter and, the following day, someone from the shelter took her to a paralegal advice centre. With the help of the paralegal advice centre she was able to retrieve her clothing and her passport from either her employer or the employment agency and to start a claim against her employer for wages for rest days, for work done on public holidays, for the continuous shortfall of wages, for wages in lieu of notice and repatriation costs. Shortly after the visit to the paralegal advice centre, Dewi returned to her employer to collect her personal effects and her passport in the company of the police. Her employer was tearful and pleaded with her to return, promising yet again to treat her with respect and to appreciate her more but Dewi refused her employer's pleas.

V. Some observations

(1) Dewi's claim is for a combination of what I refer to as 'term' rights – recurring rights during the period of employment (unpaid wages, wages in lieu of rest days and public holidays) – and 'end' rights – rights that arise upon or because of termination of the contract (repatriation costs, wages in lieu of notice, salary since her last wage packet). However, although she had once been told by an MDW she met when she went to the market that her salary was less than the minimum wage and that she should report this to the Labour Department, when she runs away the first time, when she informs her employer of her desire to terminate the contract and when she runs away again, it is not the breaches of the 'term' rights that motivate her. It is the fact that she can no longer bear the repeated physical and verbal abuse and the long hours of work (from 6 a.m. till 2 a.m.).

(2) She twice sought assistance from an employment agency. She had also said that when she ran away the first time she did not know where to go to and, moreover, she thought that, if she had problems, it was appropriate for her to seek help from the agency. She also added that the Indonesian consulate had advised her to seek help from the consulate or the agency. Both the employment agencies she contacted fulfilled, or would have fulfilled, two functions. The

employment agency through which Dewi had found her employer acted as a mediator, albeit not an impartial one, between Dewi and her employer. The second employment agency would probably have found her a new employer and helped to ensure that the relevant immigration applications were made. If not for the intervention of a second MDW at the agency, it is likely that Dewi may have done whatever was necessary to start employment with another employer found through that employment agency. This relationship with the second employment agency came to an end when Dewi followed the advice of the second MDW and at a time when she had decided to have her complaints about her employer heard. The other function is that the employment agencies would have been able to offer her temporary accommodation. Dewi not only sought help from the agency she knew but also consented to going to an employment agency known to another MDW. It is also not to be overlooked that this MDW whose help Dewi first received suggested seeking the help of an agency. This was the primary recommendation she made.

(3) The importance of other MDWs, in this case both also from Indonesia, is quite plain to see in Dewi's story. The second MDW, whom she encountered at the employment agency, furnished her with contact details for an NGO and appears to have been critical in Dewi's decision to make an official complaint about her employer. However, we note too that the first MDW's solution steered clear of the complaints that Dewi had with the employer from whom she had run away, concentrating instead, on helping Dewi find a new employer.

(4) At the shelter, Dewi is advised to go to a paralegal advice centre. Shelters are of critical importance because they provide accommodation, food, contact with others, and social activities, all of which help to make suing an employer practicable, given that the litigant is prohibited from taking up employment. Migrant workers in Hong Kong are comparatively fortunate in having a number of NGO-run shelters, including some that are run by the same organisations that also provide paralegal advice centres. This means that migrant workers are not solely dependent on their diplomatic missions for safety and refuge, or legal advice.

(5) Dewi becomes a litigant with the assistance of a paralegal advice centre. It is here that the MDW is given advice that she may have a claim and, if that is the case, the amount of her claim, the likelihood of success and how long it might take. It needs to be stressed that it is at the paralegal advice centre that an MDW's experiences are fully mined for their legal possibilities and then articulated as legally intelligible demands against her employer. It is also the paralegal advice centres that carry out the role of petition writers, drafting the vital letters that the MDW takes to the police, the immigration department, the labour department and to her employer. She is then able to collect her belongings, extend her visa, and inform her employer of the action she is taking.

In Dewi's case, the structural constraints outlined earlier appear not to have been operative in the sense that Dewi did not mention that she did not wish to leave on account of not having finished repaying her loans or that she feared having to go back to Indonesia without successfully working in Hong Kong. She did not say that she feared being unemployed while awaiting the end of a claim against her employer. Indeed, until she contacted the shelter, she appears not to have thought about bringing a claim against her employer.

VI. Conclusion

The most critical turning point in Dewi's journey is when she is given advice by an MDW, takes it and goes to a shelter. What makes this possible is her own decision to run away a second time after her employer refused to accept her notice of termination. Next in causative value to the advice by the MDW is the clear advice given by the shelter that she should seek legal advice. If the inquiry is narrowed to her civil claim against her employer, then it is the paralegal advice centre, and more remotely the shelter, that propel her towards becoming a litigant. In fact, Dewi's action in freeing herself from her employer is a response to physical and mental assault and not her employer's breaches of the employment contract. Her story suggests that breaches of contract do not become subject to claims as often as they should. Her story also shows how employment agencies might be critical in persuading MDWs to continue in sub-contract employment conditions. In contrast, Dewi's story tells us that it is worth building capacity amongst MDWs

themselves to advise one another (a process that is well under way) and that it is critical that shelters and advice centres are available as resources for those like Dewi.

As for Dewi's own agency, she ran away twice. She voiced her complaint to the employment agency and later to her employer. She also took the decision to go to the NGO rather than to remain at the employment agency. She had also revealed that she was still a teenager; 19, as opposed to the 26 years of age suggested by her passport. Her assessment of her own power to alter her future, facing squarely yet resisting the limited options for low-skilled migrant workers, emerges in a fitting epilogue to her story:

I would like to go home first and then work again but in a different country. I would like to go to Taiwan. I would work for a few months and then run away whereupon I would work illegally because I have heard that you can earn almost twice as much in jobs other than domestic work. After seven to ten years I would surrender myself to the authorities. I do not have a problem with spending time in prison because a friend told me that prison life in Taiwan is comfortable - it involves only eating and sleeping [author's translation].