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Assumptions of Freedom:

Racial Neoliberalism and the Human Rights of Migrant Domestic Workers

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Abstract: *Why do the laws of prosperous neoliberal economies tolerate systemic human rights violations even as the economy is valorized for possessing the legal features of a sophisticated liberal society? This thesis interrogates the impact of racial neoliberalism on the adjudication of the human rights of migrant domestic workers in Hong Kong, a zone of neoliberal exception under successive nondemocratic British colonial and socialist Chinese sovereignty. Understanding neoliberalism as more than a negative, deregulatory program of non-interventionism, this work proceeds from the approach of contemporary Law and Political Economy scholarship to problematize the systemic deficit in the human rights protection of migrant domestic workers as a positive vision of the neoliberal state to encase migrant domestic labor in regulatory frameworks that subordinate the human rights of migrant domestic workers' to a racial capitalist legal regime. Foregrounded by the racial ideology that buttressed colonial capitalism and the modern racialization of labor, landmark court judgments since the 2000s have consequentially foreclosed future human rights claims for migrant domestic workers relying on Hong Kong's international human rights obligations to the ICCPR and ICESCR. Capitalist inequality becomes embodied in racialized and gendered migrant domestic labor through a colonially compromised legal institution symptomatic of the precarity of universal human rights protection under the normative success of global neoliberalism.*

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Introduction: Migrant Labor, Neoliberalism, Human Rights

Why do the laws of a prosperous neoliberal economy tolerate systemic human rights violations even as the economy is valorized for possessing the legal features of a sophisticated liberal society? The institutionalization of the migrant domestic worker economy in Hong Kong accompanied the ascent of global neoliberalism in the 1970s, whose "prescription of privatization, deregulation and state retreat from social provision" had, as historians and international lawyers have argued, defined a concurrent renewal of the international human rights movement.[1] In this view, "the history of human rights cannot be told in isolation from developments in the history of capitalism."[2] At the same time, as critics have noted, there are distinctions between concurrence, causality, and complicity. Leaving rations of concurrence to historians, causality to economists, and complicity to the reader's judgment, this thesis takes up the less examined connections between the legacy of colonial law and racial neoliberalism that have become internalized to the depreciation of human rights development in the global migrant domestic worker economy.

Amongst South Asian states in particular, the hyper-free market economy of post-war Hong Kong was formed in a nexus of economic prosperity enabled by Euro-American extractive colonialism in the region, the lingering cycles of global financialization and uneven capitalist development, and the mirage of capitalist modernity envisioned by the fathers of neoliberal thought. In tandem, the racialization of the colonially ruled, undemocratic polity underpinning the region's economic success works against the assumption of political liberalization following economic liberalization. I posit that as a modern political economy shaped by a mutant history of colonialism and Cold War ideology, racial neoliberalism in Hong Kong since the 1970s and the accompanying depreciation in the protection of migrant domestic workers' human rights are entrenched by normative neoliberal values into the law, consequentially limiting the role of the legal institution in progressively realizing the fulfillment of universal equal human rights as enshrined in the ratified international human

[1] Pheng Cheah, "Posit(Ion)Ing Human Rights in the Current Global Conjuncture," in *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Cambridge, United States: Harvard University Press, 2007), 145–77. Susan Marks, "Four Human Rights Myths," in *Human Rights*, ed. David Kinley, Wojciech Sadurski, and Kevin Walton (Cheltenham; Northampton: Edward Elgar Publishing, 2013), 217–35, https://doi.org/10.4337/9781781002759.00015. Samuel Moyn, "A Powerless Companion: Human Rights in the Age of Neoliberalism," *Law and Contemporary Problems* 77, no. 4 (2015): 147–69, https://scholarship.law.duke.edu/lcp/vol77/iss4/7.

[2] Moyn, "A Powerless Companion."

rights covenants, the ICCPR and the ICESCR, especially the economic and social rights of groups most vulnerable to cycles of exploitation in an era of global interdependence.

An entrepôt at the southern edge of China ruled by the British colonial administration from 1842–1997 and under the sovereignty of the People's Republic of China since 1997, Hong Kong's economic restructuring towards the manufacturing, service, and financial sectors after the Second World War transformed the patriarchal society by mobilizing women to enter the workforce and enabling double-income families. The void of traditionally feminized caregiving labor in the domestic sphere previously occupied by the women of the family, waged domestic servants, or unfree servitude became filled by migrant female workers from the Philippines, as the neoliberal regime of the newly independent country under Ferdinand Marcos's dictatorship sought overseas labor relief from domestic economic crises and underemployment pressure. Living and working in "the world's freest economy" under a common law jurisdiction with, until recently,[3] a high degree of judicial independence and strong rule of law, migrant domestic workers in Hong Kong enjoy the normative protection of a comprehensive labor regulatory framework. Migrant workers are protected by local statutes, employment laws, a suite of anti-discriminatory ordnances,[4] and the limited domestic implementation of international labor and human rights conventions under a dualist system. Judicial remedies for the rights violations and abuses of migrant domestic workers can be claimed in the lower courts and the higher courts can be accessed relying upon the protection of constitutional guarantees in the Basic Law and the ICCPR-implementing Hong Kong Bill of Rights, in addition to provisions in the Standard Employment Contract mandatory for all migrant live-in domestic workers in Hong Kong. In a handful of landmark judicial review cases, migrant domestic workers have challenged the constitutionality of SEC provisions and discriminatory legislative infringement on their fundamental rights such as the right to family and the right to just and favorable work conditions, relying on the Basic Law and HKBORO while invoking the ICESCR and ILO conventions.

[3] The broad scope of the National Security Law enacted in 2020 has been viewed as a threat to the rule of law and judicial independence in Hong Kong. See Lydia Wong and Thomas Kellogg, "Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis" (Georgetown Center for Asian Law, 2021), https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf.
[4] Sex Discrimination Ordinance, cap. 480 (1996). Disability Discrimination Ordinance, cap. 487 (1996). Family Status Discrimination Ordinance, cap. 527 (1997). Race Discrimination Ordinance, cap. 602 (2008).

However, the private nature of live-in caregiving work, the precarity of migrants' immigration status, exploitative employment contracts, and transnational legal loopholes conspire to limit the rights claims of migrant domestic workers where they suffer human rights abuses that often have no legitimate remedial avenues between the inadequate judicial reach of their home country and the stringent, exclusionary laws of their employment country. Migrant domestic workers are highly susceptible to physical abuse, sexual assault, wage theft, coercive labor, trafficking, and financial exploitation by employers, recruiters, and employment agencies, in additional to the risks of occupational hazards, health threats, and other injuries and rights deprivations out of regulatory reach.[5] Their precarious immigration status bound to their employment status systemically discourages migrant workers from reporting their employers' abuses and violations to local law enforcement for the fear of losing employment or the possibilities of further punishment. There is a wide and unreliable discrepancy between official data, civil society surveys, and informal history on the experience of migrant workers employed as domestic workers.[6]

The commodified social reproductive labor and exploitative conditions of migrant domestic employment have been described as "modern slavery" by human rights organizations and UN bodies.[7] *Modern*, in this case, should be underscored as more than a marker of temporal distance from the New World slave trade that had been abolished by Britain and most countries by the early 1900s. Considering Marx's incomplete late thought on colonialism as summarized by Ntina Tzouvala, "what distinguishes 'modern' colonialism from ancient practices of conquest and pillage were its profoundly transformative functions and its long-term effects in incorporating an ever-growing range of territories into the circuits of capitalist production and exchange."[8] In this light, modernity in Hong Kong was a colonial process of capitalist domination secured by the principles of private property and the freedom of contract between free and equal individuals that enables market liberalism as the cornerstone

[5] Elisa Menegatti, "Protecting Migrant Domestic Workers: The International Legal Framework at a Glance " (ILO Labor Migration Branch, 2016), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/briefingnote/wcms_467722.pdf.
[6] Elisa Menegatti, "Migrant Domestic Workers: Promoting Occupational Safety and Health" (ILO Labor Migration Branch, 2016), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/briefingnote/wcms_467720.pdf.
[7] Gulnara Shahinian, "Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences" (UNHRC, June 18, 2010), https://digitallibrary.un.org/record/685518?ln=en. Shih Joo Tan, Gendered Labor, Everyday Security and Migration (Taylor & Francis, 2022).
[8] Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (Cambridge, United Kingdom: Cambridge University Press, 2020), 26.

of the colonial political economy,[9] and later, the ideal preconditions for an unencumbered, neoliberal market economy envisioned by Friedrich Hayek and Milton Friedman, the deans of neoliberal thought, who profoundly influenced the financial policies of post-war Hong Kong.[10] Low tariffs, low income tax, low labor protection, and the privatization of social welfare have been institutionalized as the core tenets of Hong Kong's neoliberal governance. As a more specific form of racial capitalism, a concept first articulated by critical race theorists in the Black Radical Tradition to demonstrate how racialization is a legally embedded system of race-making and profit-making fundamental to capitalist exploitation,[11] the racial ideology of colonial governmentality and the free market ideology of neoliberalism combine to constitute racial neoliberalism in Hong Kong's modern political economy.

This thesis interrogates the impact of racial neoliberalism on the adjudication of the human rights of migrant domestic workers in Hong Kong. Understanding neoliberalism as more than a negative, deregulatory program of non-interventionism, this work proceeds from the approach of the contemporary Law and Political Economy scholarship to problematize the systemic—that is, legally sanctioned—deficit in the human rights protection for migrant domestic workers as a positive vision of the neoliberal state to encase migrant domestic labor in regulatory frameworks that subordinate migrant domestic workers' rights to a racialized labor regime. Foregrounded by the racial ideology that buttressed colonial capitalism and the modern racialization of labor, a series of landmark court judgments since the 2000s have consequentially foreclosed future human rights claims for migrant domestic workers relying on Hong Kong's international human rights obligations to the ICCPR and ICESCR. Capitalist inequality becomes embodied in racialized and gendered migrant domestic labor through a colonially compromised legal institution symptomatic of the precarity of universal equal human rights protection under the normative success of global neoliberalism. The extremities of capitalist inequality become embodied in racialized and gendered migrant domestic labor

[9] The term "political economy" in this thesis follows the legal realist understanding of the relations of politics to the economy in that "the economy is always already political in both its origins and its consequences." See Jedediah S. Britton-Purdy et al., "Building a Law-And-Political-Economy Framework: Beyond the Twentieth-Century Synthesis," *The Yale Law Journal* 129, no. 6 (March 2, 2020): 1784–1835, https://www.yalelawjournal.org/feature/building-a-law-and-political-economy-framework.

[10] Jamie Peck, Rachel Bok, and Jun Zhang, "Hong Kong – a Model on the Rocks?," Territory, Politics, Governance 11, no. 1 (November 6, 2020): 100–119, https://doi.org/10.1080/21622671.2020.1837221. Jamie Peck, "Milton's Paradise: Situating Hong Kong in Neoliberal Lore," *Journal of Law and Political Economy* 1, no. 2 (January 9, 2021): 189–211, https://doi.org/10.5070/lp61251592.

[11] Carmen Gonzalez and Athena Mutua, "Mapping Racial Capitalism: Implications for Law," *Journal of Law and Political Economy* 2, no. 2 (August 1, 2022), https://doi.org/10.5070/lp62258224.

through a colonially compromised legal institution symptomatic of the precarity of universal human rights under the normative success of global neoliberalism. Vulnerability at the bottom reflects unfreedom at the top.

Reflecting alongside critical Marxian theory that conjoins race and capital in the formation of extractive colonial norms, Part 1 historicizes the racial ideology of colonial governance and the role of the law and judiciary that helped institutionalize a racial capitalist social order in colonial Hong Kong. Part 2 introduces the socio-economic centrality of migrant domestic labor in Hong Kong since global neoliberalization in the 1970s that intimated interdependent labor import-export markets in South Asia and draws from the dialogue between Hong Kong's human rights treaty reporting obligations and the UN treaty monitoring bodies to explicate the challenges the incumbent migrant domestic labor regulatory framework poses to the human rights protection of migrant domestic workers in Hong Kong. Finally, Part 3 culminates in a series of landmark cases concerning the fundamental rights violations of the migrant domestic labor regulatory framework and immigration policies governing the employment and immigration status of migrant domestic workers, revealing the essential deficits in the domestic implementation of the ICCPR and ICESCR. Underlying the structural limits to the equal implementation of the ICCPR and ICESCR is the nondemocratic economic sovereignty of Hong Kong as a legal and political zone of exception—as a British colony and as a Special Administrative Region in the People's Republic of China—empowering the racial neoliberal labor regime that inadequately domesticated human rights instruments are ultimately ill-advised to improve.

Approaches to Scholarship on Migrant Domestic Workers and Human Rights

Migrant domestic labor and workers' rights encompass issues of race, gender, labor, social reproduction, employment laws, immigration policies, and human rights, and have been studied and theorized across the disciplines of sociology, anthropology, law, political science, and race and gender studies. As a gendered and racialized form of migrant labor, the connections between gendered caregiving work and low-waged migrant labor in South Asia

have been considered from the perspectives of globalization,[12] transnational labor markets,[13] and the racial politics of social reproduction.[14] The work conditions of migrant domestic workers, their treatment, and state compliance with international standards in Hong Kong have been extensively reported, documented, and discussed by scholars, civil society, and international human rights and labor organizations.[15] In addition, the migrant labor regulatory framework and landmark cases for migrant domestic workers' rights claims have been analyzed in the context of Hong Kong's rule of law development and migrant rights' struggles,[16] while the constitutional protection for fundamental rights and the role and implementation of the ICCPR and ICESCR in Hong Kong have been periodically reviewed by legal scholars.[17] In particular, my analysis of the judicial review cases concerning the fundamental rights of migrant domestic workers and the UK's reservation on the two human rights treaties in their application in Hong Kong relies on Michael Ramsden's guidance in his series of studies on the treaties' status in the Hong Kong courts.[18]

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[12] Helma Lutz, "At Your Service Madam! The Globalization of Domestic Service," *Feminist Review* 70, no. 1 (April 2002): 89–104, https://doi.org/10.1057/palgrave.fr.94000.

[13] Odine de Guzman, "Overseas Filipino Workers, Labor Circulation in Southeast Asia, and the (Mis)Management of Overseas Migration Programs," *Kyoto Review of Southeast Asia*, no. 4 (October 2003), https://kyotoreview.org/issue-4/overseas-filipino-workers-labor-circulation-in-southeast-asia-and-the-mismanagement-of-overseas-migration-programs/.

[14] Evelyn Nakano Glenn, "From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor," *Signs: Journal of Women in Culture and Society* 18, no. 1 (October 1992): 1–43, https://doi.org/10.1086/494777. Rhacel Salazar Parreñas, "Migrant Filipina Domestic Workers and the International Division of Reproductive Labor," *Gender & Society* 14, no. 4 (August 2000): 560–80, https://doi.org/10.1177/089124300014004005.

[15] Amnesty International, "Exploited for Profit, Failed by Governments: Indonesian Migrant Domestic Workers Trafficked to Hong Kong" (Amnesty International, November 21, 2013), https://www.amnesty.org/en/documents/asa17/029/2013/en/. Norman Uy Carnay, "Pictures from the Inside: Investigating Living Accommodation of Women Migrant Domestic Workers towards Advocacy and Action" (Hong Kong: Mission for Migrant Workers, May 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/CFI-COVID/SubmissionsCOVID/CSO/Pictures.pdf. Nicole Constable, "Jealousy, Chastity, and Abuse," *Modern China* 22, no. 4 (1996): 448–79, https://doi.org/10.1177/009770049602200404. Nicole Constable, *Maid to Order in Hong Kong*, 2nd ed. (Ithaca: Cornell University Press, 2017). Akm Ahsan Ullah, "Abuse and Violence against Foreign Domestic Workers. A Case from Hong Kong," *International Journal of Area Studies* 10, no. 2 (December 1, 2015): 221–38, https://doi.org/10.1515/ijas-2015-0010.

[16] Germain Haumont, "Foreign Domestic Helpers' Struggle for Recognition in Hong Kong: Time to Go beyond the Rule of Law?," *Revue Interdisciplinaire d'Études Juridiques* 79, no. 2 (2017): 289, https://doi.org/10.3917/riej.079.0289.

[17] Johannes M. M. Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence," *International and Comparative Law Quarterly* 47, no. 2 (April 1998): 306–36, https://doi.org/10.1017/s002058930006187x. Karen Kong, "Adjudicating Social Welfare Rights in Hong Kong," *International Journal of Constitutional Law* 10, no. 2 (March 30, 2012): 588–99, https://doi.org/10.1093/icon/mor072. Dinusha Panditaratne, "Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse since 1997?," *Human Rights Law Review* 8, no. 2 (January 1, 2008): 295–322, https://doi.org/10.1093/hrlr/ngn004.

[18] Michael Ramsden, "Using the ICESCR in Hong Kong Courts," *Hong Kong Law Journal* 42 (2012), https://ssrn.com/abstract=2160777. Michael Ramsden, "Reviewing the United Kingdom's ICCPR Immigration Reservation in Hong Kong Courts," *International and Comparative Law Quarterly* 63, no. 3 (June 17, 2014): 635–63, https://doi.org/10.1017/s0020589314000190. Michael Ramsden, "Judging Socio-Economic Rights in

Across the social sciences, the case studies approach remains prevalent and crucially preserves the agency and lived experience of subaltern individuals, while intersectionality emphasizes the interdependent crises that condition the reality of migrant domestic work. However, privileging individual experiences and their ethnographic limits—nationality, access, language, methodology, to name a few—on the individual worker or particular labor-sending or receiving state call into question how systemic economic exploitation and human rights abuses can be understood within a greater logic constructed to naturalize such exploitation. As an analytic, intersectionality's dependence on identity as categories of representation (e.g. race, gender, nationality, class) also risks providing a conceptual retreat to essentialize victimhood or to frame human rights violations as the unique suffering of subaltern groups ghettoized as the Other,[19] while legal analysis remains too narrowly focused to account for the full dynamism of law's structuring force in society. In turn, this field of vision has yet to fully connect with the potential implications of the decades-long impasse in migrant domestic workers' human rights protection.[20] If human rights instruments are to be of practical consequence, there comes a point of saturation in critical labor studies when both workers' actions and academic research reach a certain impasse: efforts over a long period of time have not secured pivotal, major victories[21]; studies become repetitive and generate fewer effective insights; theories exhaust their horizon of relevance; exploitative policies become entrenched into a way of life.[22]

This thesis situates the legal analysis of the domestication of international human rights treaties within the political economy that conditions their implementation. To problematize the dearth of human rights protection for migrant domestic workers as a constitutive *feature* of racial neoliberal governance, the objective of this thesis points to the need for an analytical

Hong Kong," *International Journal of Constitutional Law* 16, no. 2 (April 2018): 447–69, https://doi.org/10.1093/icon/moy024.

[19] The thinking that indexes human rights based on civil and political rights criteria is widely reflected in media, industry, and civil society reports: 'While far from [democratic] ideal, Hong Kong is generally considered an oasis of human rights in the region.' https://apmigration.ilo.org/news/hong-kongs-hidden-shame

[20] Wayne Palmer and Carol S. Tan, "I'm Keeping My Baby: Migrant Domestic Worker Rights at the Intersection of Labor and Immigration Laws," *TRaNS: Trans-Regional and -National Studies of Southeast Asia* 10, no. 2 (February 25, 2022): 1–11, https://doi.org/10.1017/trn.2022.1.

[21] Mercedes Hutton, "Hong Kong 25: Migrant Domestic Workers Have Long Fought against Reversals of Their Rights. They're Not Stopping," Hong Kong Free Press, July 3, 2022, https://hongkongfp.com/2022/07/03/hong-kong-25-migrant-domestic-workers-have-long-fought-against-reversals-of-their-rights-theyre-not-stopping/.

[22] Lydia Wong and Thomas Kellogg, "Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis" (Georgetown Center for Asian Law, 2021), https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf.

framework that attends to the constitutional limits of the economy on human rights in domestic law. Growing out of the legal realist tradition of the twentieth century and observing a pattern of neoliberalism's embrace of law as an instrumental domain to "encase economic and other structural forms of inequality from answerability to the principle of equality; identify liberty with certain forms of market participation; and assimilate the political activity of democracy to market paradigms,"[23] the contemporary law and political economy framework seeks to restore legal scholarship's sensitivity to the dynamics of structural inequality and the interaction between market relations and citizenship.[24] It calls for a critical mode of the law that centers 'the ways in which economic and political power are inextricably intertwined with racialized and gendered inequity and subordination', and reorients the dubious ideal of the neutrality of the law in service of neoliberal governance towards an ideal of equality.[25] As such, it requires asking how '"status"—meaning the differentiation of citizens according to categories—persists and is reproduced in the age of contract. How might law operating in a highly unequal political economy recreate an ordering according to status, now produced by or at least laundered through contract?'[26]

Human rights, as enshrined and agreed to in the two international covenants, is thus grounded as a horizon of equality in the following law and policy analysis of Hong Kong's migrant domestic labor regime. Refusing to take for granted the neutrality of neoliberal hegemony and attuning to the political nature of the economy—colonial governance, in this case—the law and political economy approach of this thesis argues that the paradoxical participation of the migrant domestic worker in the economy and the depreciation of their human rights in the political system—the acceptance of their economic productivity and disposability on the one hand, and the 'outright rejection and criminalization' of their racialized bodies'[27] on the other—needs to be understood as the rational outcome of the neoliberal system working as it has been constructed, rather than as an aberration of humanity.

[23] Britton-Purdy et al., "Building a Law-And-Political-Economy Framework," 1807.
[24] Britton-Purdy et al., "Building a Law-And-Political-Economy Framework," 1812.
[25] Britton-Purdy et al., "Building a Law-And-Political-Economy Framework," 1824.
[26] Britton-Purdy et al., "Building a Law-And-Political-Economy Framework," 1825.
[27] Shui-yin Sharon Yam, "Towards a Transnational Analysis of Racialization, Affect, and Neoliberal Capitalism," *Quarterly Journal of Speech* 109, no. 1 (January 2, 2023): 94–98, https://doi.org/10.1080/00335630.2023.2165236.

1. Mapping the Standards of Racial Neoliberalism

Racial Capitalism and the Techniques of Colonial Governance

How do race and capital become implicated in normalizing unequal human rights and why is the law necessary to legitimize a racial capitalist regime? This chapter contours the modern political economy of Hong Kong, founded as a British colony in 1842, by restoring an account of colonial capitalism that centers racialization as an essential social construct that stabilizes capital, legitimizes colonial rule, and enables state prosperity. Drawing on Foucault's theory of biopolitics and a lineage of colonial governance techniques, racialized class relations emerge as a distinct and discriminatory organizational principle in colonial governance as a direct consequence of the efforts by white European imperial powers to safeguard their profitability and maintain a perceived sense of civilizational superiority. In turn, the intricate legitimization of a racial capitalist order previews how the liberal rationality of law—contract law in particular—perpetuates the abstraction of labor and the exclusion of coerced or forced labor from legal recognition.

Writing in 1858, Marx observed the abundant evidence of global capitalism's uneven development in the United States as the pinnacle of modernity:

> Indifference towards specific labors conforms to a form of society in which individuals can with ease transfer from one labor to another, and where the specific kind is a matter of chance for them, hence of indifference… Such as a state of affairs is at its most developed in the most modern form of existence of bourgeois society—in the United States. Here, then, for the first time, the point of departure of modern economics, namely the abstraction of the category 'labor', 'labor as such', labor pure and simple, becomes true in practice.

The nascent United States' extraordinary economic success and accumulation of wealth were owed to the legalized Atlantic slave trade and the commodification of the Black body, where the essence of slavery was to coerce human life to pure property and pure labor as a resource for capitalist production.[28] The Black slave trade established the conditions for imperialist primitive accumulation and hastened capitalism's normative capture in the world market

[28] David Harvey, *A Companion to Marx's Capital* (London: Verso, 2018), 291.

where the "treasures captured outside Europe flowed back to the mother country."[29] As capitalism was exported from Europe to the rest of the world through imperial colonialism, the capitalist state matured to consolidate a global division of labor between the "civilized" imperial core and the "periphery of undeveloped countries."[30] Within this capitalist modernity, the concept of racialized class relations emerged in the intervention for the white European imperial powers to maintain their profitability and civilizational superiority.[31] As Frantz Fanon posits, "The originality of the colonial context is that economic reality, inequality, and the immense difference of ways of life never come to mask the human realities […] In the colonies the economic substructure is also a superstructure."[32]

Modern racialization, branded by the body from "undeveloped countries" or economies representing the labor value extracted from them, became "a defining and organizing principle for the historical production of difference, inequality, and hierarchy within the global labor regime of capitalism."[33] Commodifying labor by racialization allows the extraction of profit from social reproduction at a global scale—a modern world system built on slavery, imperialism, and violence that Cedric Robinson named *racial capitalism*.[34] Capitalism is necessarily *racial* because as a structuring force, racial difference sustains capitalism's endless drive to expand markets and maximize profit through differentiating value wherever it can. Racialization is thus the "sociohistorical process by which racial identities are created, lived out, transformed, and destroyed."[35] On a global scale, the world system becomes programmatically transformed by racial capitalist infrastructures that include:

> The recruitment, training, and disciplining of labor, the transportation of goods and raw materials, the political and legal structures of regulation and trade, the physical and commercial apparatus of markets, the organization and instrumentation of

[29] Robert Knox, "Valuing Race? Stretched Marxism and the Logic of Imperialism," *London Review of International Law* 4, no. 1 (February 24, 2016): 81–126, https://doi.org/10.1093/lril/lrw004.
[30] Knox, "Valuing Race?," 7.
[31] Knox, "Valuing Race?," 5–8, 18–19.
[32] Frantz Fanon, *The Wretched of the Earth* (Cape Town: Kwela Books, 1963), 40.
[33] Nicholas de Genova, "A Racial Theory of Labor: Racial Capitalism from Colonial Slavery to Postcolonial Migration," *Historical Materialism* 32, no. 2 & 3 (May 31, 2023), https://www.historicalmaterialism.org/articles/racial-theory-labor.
[34] Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Chapel Hill: University Of North Carolina Press, 1983), 27–30.
[35] Michael Omi and Howard Winant, *Racial Formation in the United States*, 3rd ed. (New York: Routledge, 2015), 109.

> communication, the techniques of banking and finance, these too would have already had to be of a character that could accommodate increased commodity production.[36]

As a marker of class in Hong Kong, the circuit of migrant domestic servitude unites race and gender as the economic superstructure regulating the "human realities" in the colony. In combination with the colonial governance mandated by the administration's imperial imperatives, racialization is manifested in local administrative measures whose power to discipline and regulate a mobile, heterogenous population in constant flux functioned in line with Foucault's biopolitics.

As Foucault understands the imperatives of biopolitical management amidst the population explosion in urbanization and industrialization in eighteenth-century Western Europe, a new, diffused technique of state power became necessary to govern masses of human bodies as a *species* characterized by their susceptibility to the biology of life itself: birth, death, reproduction, and illness.[37] When corporeality is rendered a threat—sick bodies 'shortened the working week, wasted energy, and cost money'—the power of biology becomes an object of state knowledge and control that require techniques for information organization: statistics, reports, indexes, ratings.

To this end, Foucault distinguishes between technologies of discipline for the body and technologies of regulation for the population, which can be mutually constitutive in a society. The former focuses on controlling and manipulating the individual body into a useful and docile force for state productivity and prosperity; the latter sees individual bodies as a pulsating whole. Modern governmentality delegates the state to secure society against its own mass by 'control[ing] the series of random events that can occur in a living mass' and "predict[ing] the probability of those events by modifying it, if necessary), or at least to compensate for their effects."[38] Driven by the security paranoia and productivity demands of the modern state, racialization can be seen a regulatory technique to differentiate bodies for market legibility and governmental efficiency: "One could think of immunity as the other

[36] Robinson, "Black Marxism," 30.
[37] Michel Foucault, *Society Must Be Defended: Lectures at the College de France, 1975-76*, ed. Mauro Bertani, Alessandro Fontana, and Arnold I. Davidson (New York: Picador, 2003), 266.
[38] Foucault, "Society Must be Defended," 247–249.

side of community, a sort of *exclusionary inclusion*, an internal separation of what is deemed foreign or other."[39]

Driven by a similar and compatible impulse of the "political arithmetic" of colonial governance developed from the English colonization of Ireland,[40] demographic stratification and categorizing as a biopolitical management technique can be seen a rational response to racial capitalism's goal of the accumulation of wealth and power. In Robinson's rewiring of Marx's account of the roots of capitalism, racialization was used to manage the exploitation of the Irish immigrant waged labor in England, when "the Irish worker having descended from an inferior race, so his English employers believed, the cheap market of his labor was but its most rational form."[41] The intra-European "racial" differentiation between the English and the Irish coerced by the capitalist colonial state signaled for Robinson a genesis of racism that is intrinsic to capitalism, compelled to valorize all differences in its path to global expansion.

In this light, Marx's universalistic account of the creation of capitalism based on class struggles in the British industrial centers ignores, or takes for granted, the ways European civilization itself had been constructed by antagonistic differences among racial, cultural, and regional particularities,[42] a tumor that would spread to contaminate how racially heterogenous societies are governed in the colonies. In the contemporary postcolonial context, a racial capitalist theory of migrant labor is thus required to locate capital's guilt and the law's complicity in the subjugation of human life to the maintenance of the capitalist modern state:

> Capital's apparently (economic) indifference to, or disregard for, the specificities of the terms of conditions for extracting the maximum surplus value has only ever been sustained in practice through the actual (political) struggles that *differentiate* living labor toward the very instrumental end of maximizing its subordination and exploitation. Such a politics of difference at work within the genesis of abstract labor

[39] Mackenzie Wark, "Jackie Wang: Ghosts of the Civil Dead," *Verso* (blog), March 19, 2018, https://www.versobooks.com/en-gb/blogs/news/3695-jackie-wang-ghosts-of-the-civil-dead.
[40] Charlotte Sussman, "The Colonial Afterlife of Political Arithmetic: Swift, Demography, and Mobile Populations," *Cultural Critique* 56, no. 1 (2004): 96–126, https://doi.org/10.1353/cul.2003.0065.
[41] Robinson, "Black Marxism," 39.
[42] Robinson, 10.

> has always been inextricable from the real history of racial subjugation, for which slavery remains a primal scene.[43]

In this economy, the liberal rationality of law allows labor to become abstracted from the lived reality of the "politics of difference" between races in the colony.[44] Building on the colonial foundation of the common law system in Hong Kong and morphing into the ideal neoliberal state, the modern free market economy becomes sustained by the rule of law, in particular the paradigm of contract law that governs employment between free and equal individuals. In the realm of abstraction, the primacy of property and contract law is privileged by neoliberal governance for it

> provides merely a framework for private action, leaving the identity of the parties, and the price and other terms of the contract, to private determination. That is, contract law abstracts from all the particulars of people's voluntary interactions and so maximizes their freedom, their "spontaneity."[45]

Thus, as postcolonial legal scholarship has observed, "to leave this seeming neutrality of the rule of law unchallenged is to concede to a subtler form of colonialism—legal colonialism."[46] The legal humanity of New World Black slaves has taken centuries to reconstruct, at the same time as the global migrant labor market mutates into other coerced or exploitative forms to suit contemporary, transnational neoliberal needs. As the court decisions will show in later chapters, in the view of the neoliberal rule of law, "modern slavery" remains descriptive for migrant domestic workers only as analogy because the modern employment contract between free and equal individuals that governs the entry and exit of the migrant workers' employment and immigration status categorically precludes the possibility of such legal employment as coerced or forced labor.

Foucault's limited focus of race in the context of European militarism has omitted the centrality of colonialism in implicating modern governmentality at a global scale and inscribing new kinds of borders that created a new grammar for new population flows and the immigration regime needed to regulate them. A distinct form of racial capitalism emerged

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[43] De Genova, "A Racial Theory of Labor."
[44] David Scott, "Colonial Governmentality," *Social Text*, no. 43 (1995): 191–220, https://doi.org/10.2307/466631. Wai Man Sin and Yiu Wai Chu, "Whose Rule of Law? Rethinking Post-Colonial Legal Culture in Hong Kong," *Social & Legal Studies* 7, no. 2 (1998): 147–69, https://doi.org/10.1177/096466399800700201.
[45] Richard A. Posner, "Hayek, Law, and Cognition," *NYU Journal of Law & Liberty* 1, no. 0 (2005): 147–66, https://chicagounbound.uchicago.edu/journal_articles/1914/.
[46] Sin and Chu, "Whose Rule of Law."

from Hong Kong's colonial governance that relied on the socio-economic negotiations between biopolitical racial segregation and liberal collaboration with local capital. While it is beyond the scope of this thesis to detail this canon of law and policies that have undergirded the colonial social fabric over the course of 150 years,[47] the legacy of a discriminatory colonial legal system emblematizes how race and class became entwined in the law to discipline, normalize, and preserve a racialized social order in the logic of capitalist modernity.

The Laws of Segregation: Racial and Economic Logics

Racial class relations in colonial Hong Kong were intimately bound with the laws that governed racial segregation with an economic logic that was not always apparent on the face of the law because of the way racial capitalism has already internalized the valorization of racial differences, while the biopolitical logic of colonial governance also masked the economic impetus of racial injustice. Together, the economic consequences of a racially discriminatory justice system and the racial motivations behind a series of protectionist zoning laws defined a social order based on racial differentiation. Ambiguous legal language and obscured discourse normalized a rule of law entwined with the executive, creating a colonial regime that was neither fully discriminatory nor fully rational.

Early colonial Hong Kong was intended to function as a free port with no taxation on trade and there was no effective immigration control. The early British colonial administration was plagued by the free flow of movement from the Chinese border to the surrounding open sea, which resulted in a fluid, growing population of traveling merchants, migrants, and refugees from mainland China and off-loaded, vagrant European sailors. Capitalist racialization was 'the rule of colonial difference'[48] that sustained the superiority of whiteness and the British 'divide and rule' strategy in the colonies to discipline non-European populations.[49] Low

[47] See Collaborative Colonialism by Law Wing Sang, Anglo-China: Chinese People and British Rule in Hong Kong, 1841-1880 by Christopher Munn, and Building Colonial Hong Kong: Speculative Development and Segregation in the City by Cecilia Chu.
[48] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993), 10.
[49] Richard Morrock, "Heritage of Strife: The Effects of Colonialist 'Divide and Rule' Strategy upon the Colonized Peoples," *Science & Society* 37, no. 2 (1973): 129–51, https://www.jstor.org/stable/40401707.

administrative presence and reliance on intense policing made the justice system the largest point of contact between the government and the inhabitants.[50]

The adaptation of a dual British-Chinese legal system at the founding of Hong Kong effected a paradox that exemplifies the racial-economic impulses of capitalist modernity. Europeans in the colony arguing for a unitary, equal application of English law asserted that although "the large bulk of the population was Chinese and mostly of the worse class, still the British laws were admirably suited to their necessities and fully adequate to all their moral and social exigencies."[51] Reasoning the universality of English laws, the Chinese population should adopt "*our* customs, manners, and languages" and become "amendable to British laws, and to none other whatsoever." Proponents for a dual system, however, supported differentiated treatments in punitive criminal law. Rather than reconciling these internal contradictions in the colonial logic, a racialized legal order was imposed to protect the liberal rights that are native to English law and essential for free trade on the one hand, while disciplining the foreignness of non-European bodies on the other. In addition to its expected adjudicative duties, a core function of the Magistrate was to enforce "race-respect," a criminal justice system based on discrimination, inequality, and segregation.[52]

A body of discriminatory laws against the Chinese population was passed, with particular consequences for labor and the working class. The Contagious Diseases Ordinance of 1867 segregated the sex industry along racial and class lines in order to protect the British military customers from the perceived venereal diseases threat of Chinese prostitutes.[53] Modeled after the English laws against Irish rebellions, Peace Preservation Ordinance of 1884, 1886, and 1911 preempted the Chinese population for the public order risks they posed as Chinese.[54] For the first 60 years of British administration in Hong Kong, the Light and Pass Ordinance

[50] May Holdsworth and Christopher Munn, *Crime, Justice and Punishment in Colonial Hong Kong: Central Police Station, Central Magistracy and Victoria Gaol* (Hong Kong: Hong Kong University Press, 2020).
[51] Christopher Hutton, "The Tangle of Colonial Modernity: Hong Kong as a Distinct Linguistic and Conceptual Space within the Global Common Law," *Law Text Culture* 18 (2014): 221–48, https://ro.uow.edu.au/ltc/vol18/iss1/13.
[52] "Magistracies in Colonial Hong Kong by Dr. Christopher C. Munn (Online)," *The Chinese University of Hong Kong*, October 29, 2021, https://www.law.cuhk.edu.hk/app/magistracies-in-colonial-hong-kong-by-dr-christopher-c-munn-online/.
[53] Philip Howell, "Race, Space and the Regulation of Prostitution in Colonial Hong Kong," *Urban History* 31, no. 2 (August 2004): 229–48, https://doi.org/10.1017/s0963926804002123.
[54] Mike Brogden, "The Emergence of the Police—the Colonial Dimension," *The British Journal of Criminology* 27, no. 1 (1987): 4–14, https://doi.org/10.1093/oxfordjournals.bjc.a047651.

(suspended in 1897, repealed in 1930) applied a curfew for all Chinese in the colony.[55] Other laws continue to be in force today, such as the Emergency Regulations Ordinance of 1922 that gives the executive the power to legislate "any regulations whatsoever which he may consider desirable in the public interest" during a state of emergency.[56] Originally aimed at a seamen's union strike in 1922, the ERO was revived most recently in 2019 to enact an anti-mask ban to crack down on a months-long mass protest movement for democracy.

There was little administratively concerted effort to understand or harmonize existing Chinese customs and legal norms under the Qing Code with the British common law system. Upon landing in Hong Kong in 1841 (before the formal treaty cession), the British had issued two proclamations that allowed Chinese law and customs to be practiced provided that they did not contravene English law. Rather than a conscious effort to construct or integrate a pluralist colonial society (as the case of India and other colonies), the approach in Hong Kong was more aimed at keeping the local peace and preventing revolts from interfering with trade activities.[57] "Chinese" expectations and "unfamiliarity with English law" were thus invoked to justify violations of due process and fair sentencing.[58] The 1844 ordinances sanctioned the judicial branch to punish Chinese subjects according to Chinese law, which promulgated public corporal punishment over the English practice of fines and imprisonment.[59] The right to due process was not always guaranteed for Chinese offenders: trials by jury were denied in favor of summary judgments; judicial and law enforcement authorities could not communicate in Chinese; prisoners were asked to sign forms in English, a language they could not read.[60]

The discriminatory justice system not only failed to deter crime rates amongst an unstable migrant population, it produced a class of Chinese convict population that cycled between poverty, crime, punishment, inability to integrate into respectable livelihoods, and falling

[55] Richard Klein, "Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong," *Hastings International and Comparative Law Review* 18, no. 2 (1995), https://repository.uclawsf.edu/hastings_international_comparative_law_review/vol18/iss2/1.
[56] *Emergency Regulations Ordinance*, cap. 241, article 2(1) (1922).
[57] Cho Kiu Chiang, "Beyond Legal Pluralism: Chinese Customs and Customary Laws in Colonial Hong Kong (1841–1997)," *Translocal Chinese: East Asian Perspectives* 17, no. 1 (April 10, 2023): 58–82, https://doi.org/10.1163/24522015-17010004.
[58] "Magistracies in Colonial Hong Kong by Dr. Christopher C. Munn (Online)."
[59] Klein, "Law and Racism in an Asian Setting," 249–51.
[60] Frank Dikötter, "A Paradise for Rascals: Colonialism, Punishment and the Prison in Hong Kong (1841-1898)," *Crime, Histoire & Sociétés* 8, no. 1 (August 1, 2004): 49–63, https://doi.org/10.4000/chs.515.

back into criminal activities. Because of the large income disparity between the Chinese manual labor workforce, European inhabitants, and an emerging Chinese middle class, the working class who could not afford to pay their fines could exchange their dues for a prison sentence. Contrary to the equally if not more disturbing public nuisance of lower-class Europeans (drunken and publicly violent sailors, for example), the unusually high rate of incarceration and criminalization of Chinese migrant laborers stratified the European and Chinese lower classes where the Chinese lower class was not only punished for being Chinese, they were being punished for being poor in a Chinese way, and they remained poor because they were Chinese and poor.

Naturalizing a Racial Capitalist Social Order

Racial difference along color lines alone did not fully explain the discriminatory legal regime, when European merchants and the colonial administration had identified early on the necessity to collaborate with Chinese merchants and middlemen in order to facilitate trade on the Chinese coast. The cultivation of a "naïve bourgeoisie" at the intersection of race and class contagion complicates the racial hierarchy between white colonizers and non-white populations. Biopolitical regulatory techniques had to be employed to demarcate and manage the subordination of Chinese economic power to European standards to protect the imperial interest of the colony and regulate relations between those who were useful and those who were noise. The racialized economic impetus behind a series of residential discriminatory laws in the late 1800s is a prescient case of how the legal obfuscation of economic and racial prejudice works to sustain an order of white supremacy in the colony. Over time, this racializing process was naturalized to the extent that it was only recently that scholarship began to address the presumptions of racial factors in discriminatory residential zoning laws that had obscured their economic genesis.

To be clear, there was no mistake about the explicit racial language in these legislations, but the overt prejudice against individual, colored bodies should not shift the focus away from the economic motivations driving segregation. The governor reasoned the enactment of the earliest of the residential zoning laws, the European District Reservation Ordinance of 1888, as a necessary protection for the "health" of Europeans from the contamination of the crowding of the Chinese population that drove up housing prices:

> The rapid influx of Chinese into this Colony, where they find facilities of acquiring, and especially of retaining property, which are, to say the least, not universally present in their own country, creates an increasing temptation to land-owners to pull down houses adapted for European habitation, and to erect Chinese houses in their place, which, as providing for a far larger number of people within the same area, offer the prospect of greater profits from rent. This substitution is now going on at such a rate that, in the absence of some effective check, the time is being brought within measurable distance when all but the richer European who can afford the occupation of land of exceptionally high value, will be driven altogether out of the town of Victoria, or compelled to live there under conditions far more prejudicial to their health than those already presented by the tropical climate. In view of the fact that a large leaven of Europeans is, and (in so far as can be foreseen) for a very long time will be, necessary to the well-being of the Chinese themselves, the practical exclusion from the principal town of Hongkong of those whose liberal institutions and whose indomitable energy and preseverance [*sic*] has transformed a bare uninhabited rock into a beautiful city and an emporium of trade second to very few others in the world, would be not merely a sentimental grievance, but a real calamity to all persons without exception who are concerned in the welfare of the Colony.[61]

The European District Reservation Ordinance of 1888, the Hill District Reservation Ordinance of 1904, and the Peak District (Residence) Ordinance of 1918 created zones that barred Chinese inhabitants from purchasing land, building residences, and residing in prestigious, low density, hilly areas right below and around Victoria Peak, the highest mountain on the original British settlement. According to the 1888 Ordinance, the law was needed to protect a suitable habitat for the "health and comfort of Europeans in a tropical climate," while the constant influx of Chinese migrants threatened to encroach upon this habitat. The owner of the hospital in this district stipulated in his will that his hospital shall be "reserved for British, American and European patients, with some very limited discretion for the directors, but excluding Chinese, Portuguese and Japanese."[62] While the governor was given the power to grant exceptions, no Chinese person was granted discretionary permission to reside in the reserved district until the final law was repealed in 1946.[63]

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[61] *Legislative Council, No. 11*, meeting minutes (March 27, 1888), https://www.legco.gov.hk/1887-88/h880327.pdf.
[62] Lawrence W.C. Lai, "Discriminatory Zoning in Colonial Hong Kong," *Property Management* 29, no. 1 (February 8, 2011): 50–86, https://doi.org/10.1108/02637471111102932.
[63] Lai, "Discriminatory Zoning in Colonial Hong Kong," 58.

The language of the ordinances oscillated between the covert and overt aims of discrimination. Before the racial prejudice was made more explicit in the 1904 Ordinance,[64] provisions in the 1888 Ordinance were cleverly engineered to outlaw Chinese residents from the European districts based on the *type* of property they would inhabit—"Chinese tenements" was defined as any architectural form "usually designed for the inhabitation by Chinese other than domestic servants."[65] As one scholar puts it, "it was hard for Chinese people to argue that the building they sought to build was a non-Chinese tenement."[66] In other words, anyone may live in a "lawful tenement" in the European districts, but Chinese tenements were not lawful, and any tenements built for Chinese people were Chinese tenements. The broadly construed but narrowly encircled language would become characteristic of colonial lawmaking that draws from the power of innuendo rather than blunt brutality. One could argue that the law was not designed in the genre of discrimination against people, only buildings. The same logic would reprise in the discriminatory labor policy against migrant domestic workers that took aim at their *a priori* immigration status, rather than as individual migrants or workers.

The residential segregation cultivated the lasting effects of the "Peak mentality" that defines the visible horizon of upward mobility in Hong Kong today, where the affluent who lives in the Peak district "looks down on everything and everybody. The lower levels look up to the Peak." [67] Employment conflicts resulting from the perils of racial segregation also perpetuated the unequal treatments of European and Chinese in the justice system. English laws, as applied to the colony, overwhelmingly focused on punishing employee actions against their employers rather than protecting the terms of employment,[68] when employers had criminal law at their disposal to enforce their end of the contract, and employees could

[64] "It shall not be lawful (save in accordance with the provisions of this Ordinance) for any owner, lessee, tenant or occupier of any land or building within the Hill District to let such land or building or any part thereof for the purpose of residence by any but non-Chinese or to permit any but non-Chinese to reside on or in such land or building." *Hill District Reservation Ordinance*, Section 3 (1904).
[65] *European District Reservation Ordinance* (1888), via Lai, "Discriminatory Zoning in Colonial Hong Kong," 54.
[66] Lai, "Discriminatory Zoning in Colonial Hong Kong," 55.
[67] Lai, "Discriminatory Zoning in Colonial Hong Kong," 66.
[68] Christopher Munn, "Hong Kong, 1841-1870: All the Servants in Prison and Nobody to Take Care of the House," in *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955*, ed. Douglas Hay and Paul Craven (Chapel Hill: University Of North Carolina Press, 2004), 384.

only sue for wage disputes in civil courts.[69] However, punity could be easily circumvented by an easy escape back to mainland China, where there was no extradition treaty between the British and the Qing government to return suspects and culprits to Hong Kong. Rather than relying on official justice, it was more common for domestic employment conflicts to resolve privately or out of court, often in favor of European employers even if they were at fault.[70]

What is less explicitly acknowledged—and less documented—is the economic reasoning and consequences of the zoning laws. Namely, the residential zoning laws were enacted to protect European housing prices from Chinese speculation, who had equal if not greater economic power than the European community.[71] Prima facie, for a Crown government that had been trying to perfect the "political arithmetic" of systematizing population management and maximizing economic growth in colonies around the world, no matter how personally racist European colonial administrators could be, economically, racism was irrational as the basis for land-use and town-planning policies considering land revenue constituted a significant proportion of government revenue for a colony that depended on tax-free trade and did not enact a personal income tax until 1947 (right after the protectionist zoning laws were abolished when the government needed revenue to recover from the war). Throughout Hong Kong's history, racial discrimination was accepted by colonial officials, policymakers, historians, and the public as the impetus for the discriminatory zoning laws, until a recent theory of price control introduced the suspicion that the introduction and repeal of discriminatory zoning laws were more motivated by economic calculations (land speculation suppression) than noneconomic considerations (racism).[72] The hypothesis is supported by discursive and statistical studies on the land use and governmental correspondence at the time that showed political reasons to obscure, or self-censor, the real motivations behind the laws.[73]

The "real" intentions behind the discriminatory zoning laws thus encompass a ratio of racial and economic logics that powerfully conditioned the racial terrain of the colony by legal and

[69] Common prosecutable offenses included quitting without warning, willful disobedience, abusive or insulting behavior, or damage of employer's property. Munn, "Hong Kong, 1841-1870," 387.
[70] Munn, 386.
[71] Lai, "Discriminatory Zoning in Colonial Hong Kong." Lawrence W. C. Lai and Marco K. W. Yu, "The Rise and Fall of Discriminatory Zoning in Hong Kong," *Environment and Planning B: Planning and Design* 28, no. 2 (2001): 295–314, https://doi.org/10.1068/b2720.
[72] Lai and Yu, "The Rise and Fall of Discriminatory Zoning in Hong Kong."
[73] Lai, "Discriminatory Zoning in Colonial Hong Kong."

social means. Naturalized as the outcome of racial prejudice, residential segregation installed the founding lore of aspirational European superiority in the shared imagination and the prototypical production of a racialized economy. Even though land purchase statistics would suggest that as a class, Europeans were not as wealthy as the Chinese as they were perceived, the segregation visibly erased the possibility in the social imaginary that the European and Chinese lower class could look up to a Chinese elite at the top, when it was always Europeans at the top of the hierarchy by design.

The ambiguous language and obscured discourse also normalized a rule of law entwined with the executive in a regime that was neither totally discriminatory nor totally rational. Legally, residential permission was up to the governor's discretion, and in effect, the law really was followed to its end. The conjoined racial and economic logics of the discriminatory residential zoning laws point to the formation of a racial capitalist order through the way regulating land speculation artificially inflates the value of race. It is intriguing that land price control, a much more rational line of reasoning than racism, would be shielded in favor of racial discrimination as the dominant explanation of repressive British government behavior. It is even more striking that the early British colonial government would rather be remembered as racists than economic protectionists, or that it was more acceptable to use race as a scapegoat for potentially controversial economic policies.

Constituting a Neoliberal Zone of Exception

Having explicated the racial construction of capitalism, the naturalization of a racial capitalist social order aided by the obscured logic of segregation laws, I now turn to the last tenet of Hong Kong's political economy that depends on the encasement of the law—namely, the economic constitution creating and governing the Special Administrative Region (SAR) since the territory's sovereignty was transferred from the United Kingdom to the People's Republic of China in 1997. The rarefied political economy of Hong Kong's state of exception is a combination of its geopolitical precarity as a British colonial enclave at the edge of a large socialist Chinese state and, post-Handover, as a liberal jurisdiction at the frontier of a modern socialist empire.[74] As Quinn Slobodian argues for the integral significance of

[74] Ching Kwan Lee, *Hong Kong: Global China's Restive Frontier* (Cambridge, United Kingdom: Cambridge University Press, 2022), 8–14.

exception to the global neoliberal regime since the 1970s, "the world of nations is riddled with zones—and they define the politics of the present in ways that we are only starting to understand." [75] Part of this contribution is to question the assumptions of freedom underpinning Hong Kong's neoliberalization as normative modern success, when its racial capitalist constitution is motorized to corrode universal full and equal human rights.

Neoliberalism is a term used to a diverse range of economic, political, and academic meanings and definitions depending the discipline of its deployment. The notion is often associated with a generative renewal of classical economic liberalism in the 1970s capitalist hemisphere that reasserts the laissez-faire doctrine of market fundamentalism and the guarding of market imperatives against state intervention.[76] The proto-neoliberal practice of zoning creates the ideal conditions for the neoliberal pillars of positive non-interventionism, mandate for economic growth, and constitutional austerity. Accredited by 'many small acts of refusal',[77] the zone of exception defies international discipline because it combines its inheritance from colonial capitalism's racializing impulses and neoliberalism's minimalist state design to offer centralized nation-states, bloated with obligations, the relief of a pure state of capitalist ascendance: the exception *makes* the new rule of civilization.

One could only imagine how Marx would have revised his superlative assessment of American modernity if he had been alive a century later to witness the explosive economic growth in Hong Kong after the Second World War. According to Milton Friedman, Hong Kong had achieved in three decades 'what had taken the United States 200 years to accomplish' owing to "the extensive use of free private markets" and the benefit of learning from the Western experience, "borrowing the common-law tradition along with technologies and skills, and thereby shorten[ing] the development process."[78] The cosmopolitan entrepôt had initially presented an enigma for the Chicago School economist who visited Hong Kong for the first time in 1953. Milton subsequently radically influenced the colonial financial secretary John Cowperwaithe with his free market doctrine and would devote the rest of his career to championing Hong Kong for his neoliberal cause. Shepherded by the standards of

[75] Slobodian, "Crack-up Capitalism," 11.
[76] David Singh Grewal and Jedediah Purdy, "Introduction: Law and Neoliberalism," *Law & Contemporary Problems* 77, no. 4 (2014): 1–23, https://scholarship.law.duke.edu/faculty_scholarship/3141.
[77] Slobodian, 15.
[78] Jamie Peck, "Milton's Paradise: Situating Hong Kong in Neoliberal Lore," *Journal of Law and Political Economy* 1, no. 2 (January 9, 2021): 189–211, https://doi.org/10.5070/lp61251592.

Friedman's economic theory, for 25 years, Hong Kong has been ranked by libertarian think tanks and the *Wall Street Journal* as the "freest economy in the world" in the annual Heritage Foundation's index, endowing the city-state as the de facto measure of global free-market governance with the authority of modern arithmetic.[79] But far from being a product of pure market freedom, as Friedman later credits the success of Hong Kong in his memoir, Hong Kong's economic ascendance depended as much on the colonial capitalist governance that decapitated its democratic potential from the start:

> What made Hong Kong free was that free markets were imposed on Hong Kong. There are restrictions on assembly and on movement imposed by geography but there are no other restrictions on personal freedom so that Hong Kong has both civil freedom and economic freedom. [Yet it] does not have what is called political freedom, the freedom to vote for self-government, and that raises a problem that I find exceedingly troubling and something of a paradox.[80]

Friedman's observation allowed him to finally conclude the paradox between political and economic freedom is that "while economic freedom is essential and necessary for both civil freedom and political freedom, political freedom itself may ultimately be dangerous to economic and civil freedom."[81]

The relationship between economic and political freedom deserve elementary attention because Hong Kong, a semi-autonomous city-state in its raw political form, was constitutionally founded as a tactical free trade frontier, first through a series of treaty cessations from the Chinese Qing government to the British, and then as an SAR under the socialist PRC's national economic liberalization plan in the late 1970s.[82] Hong Kong's contemporary administrative and jurisdictive form as a SAR is constituted by a hybrid legal architecture incorporating Article 31 of the 1982 PRC Constitution[83] and the 1984 Sino-British Joint Declaration into a local constitution, the Hong Kong Basic Law, enacted by the PRC's National People's Congress in 1990 to come into effect on 1 July 1997. The

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[79] Peck, Bok, and Zhang, "Hong Kong – a Model on the Rocks?"
[80] Milton Friedman and Rose D. Friedman, "The Tide in the Affairs of Men," in *Milton Friedman on Freedom: Selections from the Collected Works of Milton Friedman*, ed. Robert Leeson and Charles G. Palm (Hoover Institution Press, 1988), 207.
[81] Peck, "Milton's Paradise," 200.
[82] For the treaty history of Hong Kong's territorial sovereignty, see *Treaty for a Lost City: The Sino-British Joint Declaration* by C.L. Lim.
[83] *Constitution of the People's Republic of China*, article 31 (1982): "The state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People's Congress."

relationship between the PRC and SAR is cemented by the "One Country Two Systems" framework subordinating the regional government to the central government, except in areas sanctioned for high autonomy such as commerce, economic, and social policies.[84]

The Basic Law stipulates for a "capitalist system and way of life" in Hong Kong for at least 50 years[85] after the transfer of sovereignty from the UK to the PRC in 1997. Crucially, written at the time of Cold War antagonism, the article's emphasis on the capitalist system is such that "the socialist system and policies," as they were maintained in mainland China, shall not be practiced in the SAR.[86] Far from arbitrary, the 50 year term was calibrated to the PRC's own modernization reforms envisioned by the CCP leader Deng Xiaoping during the Sino-British negotiation for the sovereignty transfer.[87] In turn, the government of Hong Kong is mandated to "provide an a appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial center."[88] Fiscally autonomous, Hong Kong is constitutionally bound to "strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.[89] In practice, the local administrations since 1997 have governed close to the pillars of low tax, budget surplus, and positive non-interventionism that encourage privatization and enable market freedom.

Despite the increasingly chokehold on civil and political rights in Hong Kong, its economic constitution and distinction from China's socialist economy foundational to the legal origin of the SAR jurisdiction remained accepted or unchallenged owing to the economic success correlated to the common law and liberal values under the British colonial administration. The common law system, rule of law, and an independent judiciary have been commonly celebrated as the British "gift" or legacy to Hong Kong, despite a racial discrimination laws,

[84] *HKBL*, article 2, 105–135, 136, 150–52 (1990).
[85] *HKBL*, article 2 (1990).
[86] *HKBL*, article 5 (1990).
[87] At the time, the vigor of PRC's embrace of market principles after decades of internal political chaos and a closed market had inspired the optimistic assumption for eventual political liberalization following the model of Hong Kong's economic ascendance. However, as recent history shows and confirms Milton's theory, political freedom has not followed economic liberalization in the region. See Rebecca E. Karl, "The Flight to Rights: 1990s China and Beyond," in *Culture and Social Transformations: Theoretical Framework and Chinese Context*, ed. Tianyu Cao et al. (Leiden: Brill, 2014), 167–83, https://doi.org/10.1163/9789004260511_009.
[88] *HKBL*, article 107 (1990).
[89] *HKBL*, article 105 (1990).

draconian public order regulations, and an inaccessible, English-language justice system.[90] Aside from the surface similarities of a judicial system harmonized for international free trade, from the beginning, Hong Kong had been ruled by an executive-led government appointed by the Crown (and after 1997, by the PRC central government) and a non-popularly elected legislature that featured a colonial invention for collaborative rule with the local elite. The functional constituency system within the Legislative Council (LegCo) is made up of representatives from selected industries who wield the majority power on lawmaking in the LegCo, which de facto ensures pro-business policies can be passed unsuccessfully challenged by labor representation.

If the British formal colonial project was premised on treaty justifications for the legal subjugation of the colonized to the colonizer to profit the empire, the neo-colonial zoning of the SAR follows from the legal pluralism of the PRC Constitution that governs a diverse, sprawling empire through what it views as an uneven legal terrain unified by an internal socialist legal logic.[91] While the "One Country Two Systems" arrangement of zoning Hong Kong as a capitalist enclave was originally devised for the PRC's eventual "reunification" with Taiwan, the modernization of China's economy in the past four decades has led to an extractive neo- or internal colonial policy in frontier regions like the Xinjiang Uighur Autonomous Region[92] and Hong Kong through which China becomes incorporated into the global neoliberal system.[93] The "golden goose" of Hong Kong as an international financial center was designed to irrigate the PRC's domestic economy, while Hong Kong depends on China for a continuous, vast supply of cheap labor and material. As Hong Kong entered the global ranks of highly developed economies, with its independent membership in international organizations such as the WTO, the "civilized" markers of free trade, rule of law, and independent judiciary cements the SAR's differentiation from the poverty, planned economy, and authoritarianism in the PRC.

[90] John M. Carroll, "Colonial Hong Kong as a Cultural-Historical Place," *Modern Asian Studies* 40, no. 2 (April 18, 2006): 517–43, https://doi.org/10.1017/s0026749x06001958. Ming K. Chan, "The Legacy of the British Administration of Hong Kong: A View from Hong Kong," *The China Quarterly* 151 (September 1997): 567–82, https://doi.org/10.1017/s0305741000046828.
[91] Lei Tian, *Using Past as Prologue: The Institutional Landscape of Constitutional Politics in China* (Guangxi, China: Guangxi Normal University Press, 2021), 53–83.
[92] Gerald Roche, "Transnational Carceral Capitalism in Xinjiang and Beyond," *Made in China Journal* 4, no. 1 (March 2019), https://doi.org/10.22459/mic.04.01.2019.01.
[93] Lee, "Hong Kong," 17–32.

Imagined as a "controlled experiment" by Friedman, the construction of Hong Kong's free market economic success is the combination of a nondemocratic colonial capitalist mandate and socialist-directed economic liberalization design. The British colonial administration's legacy of laissez-faire, "benign neglect" is benign insofar as it extolls the virtues of negative freedom as the necessary conditions for its free market needs, while the virtues of its liberalism are tolerated by the Chinese authoritarian regime insofar as they facilitate China's participation in the world economy. In tandem with colonialism's role in universalizing capitalist modernity, the "standards of civilization" becomes a structuring force that is constantly adaptable and resilient to new developmental horizons.[94] As Frantz Fanon had already diagnosed in the late 1960s, even post-independence, the curse of imperialist white supremacy would haunt the decolonized Global South, rendering their nationhood "a receptacle for ethnic and tribal antagonisms, ultranationalism, chauvisim, and racism."[95] If the initial stages of formal imperialism established the notion of "civilization" to segregate between who or who doesn't international law apply to in order to rationalize conquests for capitalist expansion,[96] in the postcolonial context, the standards of civilization measured by progress in terms of developmental indexes becomes internalized in social, political, and legal institutions conditioned by coloniality to demarcate between respectable productivity native to the logic of improvement and disposable productivity subject to the conditional inclusion of their foreign bodies.

Biologically Chinese but not grammatically *Chinese*, Hong Kong is thus offered the opportunity for inclusion in a Western-led liberal civilization by virtue of the territory's economic and legal exemptions from *Chinese* socialist illiberalism, while its biologically determined populace requires the maintenance of colonial discipline—that is, the denial of full political rights. Viewed through the lens of Edward Said's *Orientalism* deconstructing the way Europe's encounter with the rest of world was ultimately more concerned with the construction of European identity, the Eurocentric differentiation rooted in imperialism rendered China's lack of conformity to a state-constraining liberal legal order as unrecognizable to Western capitalist modernity.[97] By the end of the Cold War, the triumph of neoliberalism over state socialism would further neutralize the language and values of

[94] Tzouvala, "Capitalism as Civilization," 5.
[95] Pankaj Mishra, "Frantz Fanon's Enduring Legacy," *The New Yorker*, November 29, 2021, https://www.newyorker.com/magazine/2021/12/06/frantz-fanons-enduring-legacy.
[96] Tzouvala, 45.
[97] Teemu Ruskola, *Legal Orientalism* (Cambridge, United States: Harvard University Press, 2013), 12–13.

capitalist modernity. The "rule of law" became a shorthand for the promotion of freedom, democracy, and free market economy,[98] allowing for the prospect of economic growth and first-world inclusion, and the standards against which illiberal, undemocratic states would be measured. However, the exceptionalization of Hong Kong would problematize the relationship between the presumptive connections between capitalism and liberal democracy. Hong Kong emerges as a catalogue of contradictions and exceptions, a quintessential expression of capitalism's nimble and resilient survival in the cracks of nation-states punctured by alternative political arrangements and freed from democratic oversight[99]: economically privileged by free trade, market-friendly policies and exempted from state socialism; legally included in the common law system and excused from oriental despotism. The next chapters will elaborate on the implications of Hong Kong's legal state of exception in its exclusion from universal equal human rights protections.

[98] Ruskola, "Legal Orientalism," 12–13.
[99] Slobodian, "Crack-up Capitalism," 13.

2. Human Rights Under Racial Neoliberal Jurisprudence

Domestic servitude has long historical roots in feudal, agricultural Chinese societies. Female domestic servants performed social and reproductive duties integral to the maintenance of the traditional family clan unit, and ritual female subordination preserves the stability of a Confucian, patriarchal social order.[100] However, the modernization of domestic labor through the liberal legitimacy of the employment contract marked a radical break from the pre-modern social relations of female domestic servitude born by mothers, wives, and hired or bonded servants. This chapter sketches the centrality of paid female domestic labor as a socio-cultural institution in Hong Kong society against the backdrop of global neoliberalization since the 1970s that cements the economic inevitability of the interdependent migrant domestic labor market. As a transnational labor institution confronted with known human rights abuses for decades, why does domestic live-in caregiving persist in Hong Kong in the first place?

As a historical institution in pre-modern Chinese societies, unfree domestic servanthood was later transposed to the Chinese community in Hong Kong after the colony became a commercial and criminal enclave from mainland China. Under the *mui tsai* system of bonded servitude, pre-teen girls from poor families would be offered by their parents to be adopted into a wealthy family for a price, where they would become part of the household hierarchy as domestic servants until they reached a suitable age for marriage to be arranged by their masters. Girls could also be abducted and trafficked into servitude or prostitution by mercenary profiteers in the first place.[101] This pre-modern form of quasi-slavery, proto-human trafficking was officially abolished in China by law in 1910, but despite transnational legal reform efforts, abolition movements, and humanitarian campaigns in the UK and Hong Kong, the practice persisted in Hong Kong until it fizzled out after the Second World War.[102] Rather than the outcome of any effective legislative measures, economic restructuring that transformed the local female labor force propelled *mui tsai* to become replaced by other types of paid domestic help such as *amahs*, a role that combined the nurse, the nanny, and the

[100] Nicole Constable, "Jealousy, Chastity, and Abuse," *Modern China* 22, no. 4 (1996): 448–79, https://doi.org/10.1177/009770049602200404.
[101] Constable, Maid to Order in Hong Kong, 49-52.
[102] Harriet Samuels, "A Human Rights Campaign? The Campaign to Abolish Child Slavery in Hong Kong 1919–1938," *Journal of Human Rights* 6, no. 3 (August 22, 2007): 361–84, https://doi.org/10.1080/14754830701560764.

domestic servant in the household that became the occupational model for Southeast Asian migrant live-in domestic workers in the late twentieth century.[103]

Modernization theories have hypothesized that society's demand for paid domestic workers will decline as modern economies develop,[104] while macrosociology suggests that it is the level of income inequality and the enduring significance of class in a society rather than its level of modernization that determine the size of its waged female domestic labor force.[105] As the modern birth of Hong Kong's racial capitalist regime and the strength of its modern migrant domestic labor market testify, the signposts of modernity did not follow a predictable civilizational logic in Hong Kong. As Tala Asad wrote, the liberal changes that modernization has brought about

> do not reflect a simple expansion of the range of individual choice, but the creation of conditions in which only new (i.e. modern) choices can be made. The reason for this is that the changes involve the re-formation of subjectivities and the re-organization of social spaces in which subjects act and are acted upon. The modern state—imperial, colonial, post-colonial—has been crucial to these processes of construction/destruction.[106]

As an attempt to restructure colonial social relations for humanitarian values before the advent of international human rights, the failure of *mui tsai* legal reforms foregrounds the inherent tension between capitalist modernity and equal human rights in Hong Kong's racialized economy as a colony and a capitalist frontier. Replacing *mui tsai* as the exploited underclass of non-native gendered labor, the human rights struggles of Southeast Asian migrant domestic workers productively exposes the historical continuum from colonial governmentality to neoliberal rationality in the making of migrant domestic workers naturalized as economic subjects without political subjectivity within a racialized, authoritarian capitalist order.

Background: The Global Neoliberal Regime and Migrant Labor

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[103] Constable, Maid to Order in Hong Kong, 52-62.
[104] Ruth Milkman, Ellen Reese, and Benita Roth, "The Macrosociology of Paid Domestic Labor," *Work and Occupations* 25, no. 4 (November 1998): 483–510, https://doi.org/10.1177/0730888498025004004.
[105] Milkman, Reese, and Roth, "The Macrosociology of Paid Domestic Labor," 502–3.
[106] Tala Asad, "Conscripts of Western Civilization," in *Dialectical Anthropology: Essays in Honor of Stanley Diamond Vol. 1*, ed. Christine Ward Gailey, vol. 1 (Gainesville, United States: University Press of Florida, 1992), 333–51.

The explosive growth of the Asia-Pacific "maid trade" corridor since the 1980s was the outcome of the tides of global financialization that gave rise to the export-led 'East Asian economic miracle' and devastating debt crises in newly independent Southeast Asian countries like the Philippines, a former U.S. colony, and Indonesia, a former Dutch colony. Post-independence in 1946, shifting from an agrarian to an industrial economy, the Philippines maintained close trade and labor ties with the United States[107] and rode the euphoric wave of globalization through the mid-1980s, lowering trade barriers and enmeshing its domestic financial market with low-interest international loans encouraged by the IMF and the World Bank in an American-led world economy based on the Bretton Wood system, petrodollar dependency, and liberalization of international financial markets.[108]

Under the Marcos dictatorship, the neoliberal reforms of the Philippines followed a course of privatization and austerity measures to maintain minimal inflation, budget deficits, and social welfare spending, while accumulating foreign debt that produced inflated domestic economic growth lending temporary legitimacy to the authoritarian government.[109] But by the 1980s, the cascading effects of the acute shocks to the global economy left the Philippines in high underemployment, high sovereign debt, and loss of confidence culminating in the national crisis of sovereign default and the assassination of Benigno Aquino, Marcos's opposition, in 1983.[110] In response to the Philippines' worsening economy, the Marcos regime instituted a labor export policy for Filipino 3-D jobs—dangerous, dirty, and difficult[111]—overseas, relying on their relief from domestic employment pressure and remittances for contribution to foreign reserve and GDP.[112]

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[107] Rolando B. Tolentino, "Macho Dancing, the Feminization of Labor, and Neoliberalism in the Philippines," *TDR/the Drama Review* 53, no. 2 (June 2009): 77–89, https://doi.org/10.1162/dram.2009.53.2.77.
[108] Julianne Ams et al., "Chapter 1: The 1980s Debt Crisis," in *Prevention and Resolution of Sovereign Debt Crises*, (USA: International Monetary Fund, 2018), https://www.elibrary.imf.org/view/book/9781484371329/ch001.xml.
[109] Robert S. Dohner and Ponciano Intal, Jr., "Introduction to 'Developing Country Debt and Economic Performance Volume 3: Country Studies - Indonesia, Korea, Philippines, Turkey,'" in *Developing Country Debt and Economic Performance, Volume 3: Country Studies - Indonesia, Korea, Philippines, Turkey*, ed. Jeffrey D. Sachs and Susan M. Collins (University of Chicago Press, 1989), 373–400, https://core.ac.uk/download/pdf/6778258.pdf.
[110] Dohner and Intal, Jr., "Introduction to 'Developing Country Debt and Economic Performance.'"
[111] Global neoliberalization created an analogy for precarious, low wage, and socially undesirable workers across Asia. In Japan, the dangerous, difficult, and dirty jobs are '3K': *kiken*, *kitsui*, and *kitani*. See Hironori Onuki, "The Neoliberal Governance of Global Labor Mobility," *Alternatives: Global, Local, Political* 41, no. 1 (February 2016): 3–28, https://doi.org/10.1177/0304375415570198.
[112] Tolentino, "Macho Dancing," 78.

In contrast, remade in Milton Friedman's vision for "the most libertarian major civilized community in the world today,"[113] Hong Kong's post-war economic boom owed to the government's defense of a laissez-faire policy opened up its manufacturing and service industries to women mobilized to enter the workforce.[114] Throughout the late 1970s and 1980s, the income level and wealth of double-income Hong Kong Chinese households grew as Hong Kong reached full employment, and state prosperity consolidated for the first time in the colony a professionalized, upwardly mobile middle class. Today, women made up 53% of the local labor force participation.[115] However, increasing gender equality in the workplace did not activate equal transformations of socio-cultural values; the role of the homemaker in a conservative patriarchal society was still expected to be filled by the wife or female labor.[116]

Following the burgeoning practice of expatriates who relocated to Hong Kong with their Southeast Asian domestic staff and the increasing shortage of live-in domestic labor in positions formerly taken up by the women of the family or hired help such as *mui tsai* and *amah*,[117] the Hong Kong government began to admit live-in domestic workers from the Philippines in the early 1970s with the expressed purpose to "relieve domestic families of household chores."[118] The labor importation policy for Foreign Domestic Helper (FDH)—the official term for migrant domestic workers admitted under the policy—was formalized in 1973 by the establishment of a Minimum Allowable Wage (MAW) and a two-year Standard Employment Contract (SEC) prescribed for all FDHs and their employers. Contracted under the consolidated policy, FDHs are governed and protected by local laws including the Employment Ordinance, the Immigration Ordinance, and Employee

[113] Peck, "Milton's Paradise," 190.
[114] Delegation of the Legislative Council of the Hong Kong SAR, "Report on the Duty Visit to the Asian Parliamentary Assembly Conference on Principles of Friendship and Cooperation in Asia and the Ad Hoc Committee Meeting on Protection of the Rights of Migrant Workers in Asia Held in the Republic of Indonesia," 2011, https://www.legco.gov.hk/yr11-12/english/hc/papers/hc1202ls-12-e.pdf.
[115] "Table 210-06201 : Labour Force and Labour Force Participation Rate by Age and Sex," *Census and Statistics Department*, 2023, https://www.censtatd.gov.hk/en/web_table.html?id=210-06201.
[116] "For Hong Kong, FDHs can release local females from housework for productive work in the job market, making an invaluable contribution to economic development." See Research Office at the Legislative Council Secretariat, "Foreign Domestic Helpers and Evolving Care Duties in Hong Kong ," July 2017, https://www.legco.gov.hk/research-publications/english/1617rb04-foreign-domestic-helpers-and-evolving-care-duties-in-hong-kong-20170720-e.pdf.
[117] Research Office at the Legislative Council Secretariat, "Policy Protecting the Rights of Foreign Domestic Helpers in Selected Places," July 2019, https://app7.legco.gov.hk/rpdb/en/uploads/2018-2019/RT/RT09_18-19_20190726_en.pdf.
[118] Delegation of the Legislative Council of the Hong Kong SAR, "Report on the Duty Visit to the Asian Parliamentary Assembly Conference."

Compensation Ordinance, covering issues from workplace discrimination to visa conditions to employment agency fee regulations. FDHs enjoy the equal protection of the Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance, and Race Discrimination Ordinance. While there is no gender and country specification in the labor importation policy, 99% of FDHs admitted in Hong Kong are women from the Philippines (and since the 1990s, Indonesia and Thailand).

The uncoordinated but interdependent timing of Hong Kong and the Philippines' neoliberalization opened up a migrant labor market for an influx of high-school and college-educated, married and single Filipina women to seek employment as domestic workers abroad.[119] One year after Hong Kong, the Philippines government implemented its labor export policy in the 1974 Labor Code to ease the economic crisis at home.[120] The Labor Code created the Overseas Employment Development Board to systematically promote the overseas employment of Filipino workers, protect their rights to fair and equitable employment practices, and to recruit and place workers for overseas employment on a government-to-government basis.[121] No employer may hire Filipino workers for overseas employment except through the authority of the development board and the Secretary of Labor, while the Philippines Overseas Employment Administration regulates immigration controls to release migrant Filipino workers.[122] Even though the contracting and hiring of foreign domestic workers in Hong Kong are facilitated by recruitment, training, and employment agencies in the private marketplace, the domestic labor importation policy relies on close cooperation with foreign governments. (For example, during Covid-19 pandemic, the Philippines government imposed a travel ban for domestic workers to Hong Kong, and the low supply caused a surge in wages to meet local demands.[123]) At the same time, regulatory loopholes in the transnational market have been known to expose migrant workers to violence and exploitation by mercenary brokers and traffickers.

[119] Constable, Maid to Order in Hong Kong, 18.
[120] Chenyu Liang, "Maid in Hong Kong: Protecting Foreign Domestic Workers," *The Online Journal of the Migrant Policy Institute*, October 19, 2016, https://www.migrationpolicy.org/article/maid-hong-kong-protecting-foreign-domestic-workers.
[121] *Labor Code of the Philippines*, article 12 (1974).
[122] *Labor Code of the Philippines*, article 18 (1974).
[123] Mei Ling May Wong, "The Impacts of Covid-19 on Foreign Domestic Workers in Hong Kong," *Asian Journal of Business Ethics* 10, no. 2 (November 17, 2021), https://doi.org/10.1007/s13520-021-00135-w.

Rather than dissolving society's dependency on paid domestic labor, the transnational legalization of FDHs replaces the feudal social relations of the *mui tsai* institution and modernizes expropriated female domestic labor with the force of law. While the core duties of FDH work resemble the domestic and social reproductive labor performed by *mui tsai* and *amah*, the sanctioned employment contract and regulatory framework cement the legal basis of the new domestic labor category, while honouring the neoliberal principles of non-intervention and efficiency that leave essential provisions such as maximum work hours and real wages to private agreement between employer and employee. In tandem, a growing transnational cottage industry of recruitment and placement agencies would increasingly professionalize the market, giving the nebulous nature of low-skilled and emotional labor the modern sheen of market standards and individual improvement.[124]

In reality, as reports by the media, workers' union, and human rights organizations have evidenced, the domestic sphere and migrant labor market cannot be effectively monitored and regulated by a laissez-faire labor policy. In addition to the potential threats of brokers and traffickers in the labor sending state, the risks of abuse and exploitation also heighten for migrant workers in the exclusionary zones of restrictive immigration law in the employment host state.[125] As a result, the regulatory discipline of the modern neoliberal state enjoins the migrant domestic workers to become "risk-proof" by taking on "a seeming contradictory mix of superhuman endurance and malleability" in fulfilling the 'strictly economic ethos of neoliberal migration—the financialization of human capital in the form of remittances." Departing from the pre-modern humanitarian ethos to rescue social inequality as poor relief, modern inequality at a global scale demands neoliberal governments to adopt the language of contribution, growth, and success into its governance rationality. The physical, mental, and legal vulnerabilities of migrant domestic workers become normalized for their resilience and 'capacity to adjust, using newly acquired cognitive skills that serve to underline strength—in mind and even in body', and are rewarded for "transform[ing] risk into opportunity and while doing so, provides security to the household she serves."

In spite of the occupational risks of exploitation, abuse, and precarious fundamental rights protection, well-developed international financial infrastructures, rule of law guarantees, and

[124] Liberty Chee, "'Supermaids': Hyper-Resilient Subjects in Neoliberal Migration Governance," *International Political Sociology* 14, no. 4 (April 26, 2020), https://doi.org/10.1093/ips/olaa009.
[125] Amnesty International, "Exploited for Profit, Failed by Governments," 75–76.

relatively comprehensive employment regulations make Hong Kong a preferred destination for Southeast Asian migrant domestic workers.[126] The number of migrant domestic workers in Hong Kong increased from 2,000 in the early 1970s to almost 340,000 in 2021, or 4.59% of the total population.[127] Overseas employment became cast as the fulfillment of the migrant citizen's right to work and the collective right to development in Southeast Asian labor sending countries.[128] Remittances continue to constitute a sizeable part of the labor sending state's GDP. The import and export of migrant domestic workers has created an interdependence between Hong Kong and Southeast Asian countries that, overtime, became naturalized as a welcomed, essential contribution to the economic development for the employment host state and domestic policy solution for the labor sending state.

Regulating a Racial Neoliberal Labor Regime

The labor administration regulating for the work conditions of migrant domestic workers has been steadfastly indifferent to external and internet crises since the 1970s, through the fearsome Handover in 1997, the devasting SARS epidemic in 2003, the tumultuous 2007-2008 global financial crisis, the democracy movements in the mid-2010s, and the decapitation of civil and political rights in the post-2020 National Security Law era. Throughout, migrant domestic workers are defined by "a state of limbo and uncertainty" as a global neoliberal mechanism to perpetuate transnational precarity and exploitation: "They are citizens of one state but residents of another; paid workers hired on the open market but confined to the intimate sphere of the home; earning more than they would back in their country but still at the bottom of the host state's social hierarchy."[129] The functional, economic power of "race" or "racialism" thus has to be restored in the proper analysis of modern capitalist societies as "the legitimation and corroboration of social organization as natural by reference to the "racial" components of its elements."[130]

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[126] Shu-Ju Ada Cheng, "Migrant Women Domestic Workers in Hong Kong, Singapore and Taiwan: A Comparative Analysis," *Asian and Pacific Migration Journal* 5, no. 1 (March 1996): 139–52, https://doi.org/10.1177/011719689600500107. Rachel Silvey and Rhacel Parreñas, "Precarity Chains: Cycles of Domestic Worker Migration from Southeast Asia to the Middle East," *Journal of Ethnic and Migration Studies* 46, no. 16 (April 19, 2019): 1–15, https://doi.org/10.1080/1369183x.2019.1592398.

[127] Immigration Department, "Statistics on the Number of Foreign Domestic Helpers in Hong Kong (English)," *Data.gov.hk* (Office of the Government Chief Information Officer of the Government of the Hong Kong SAR, March 1, 2022), https://www.immd.gov.hk/opendata/eng/law-and-security/visas/statistics_FDH.csv.

[128] Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Cambridge, United States: Harvard University Press, 2007), 168–225.

[129] Phillips, "Repairing (and Exploiting) the Underclass Image," 6.

[130] Robinson, "Black Marxism," 2.

Occupying a compound identity as migrant workers and domestic workers, the rights and status migrant domestic workers in Hong Kong depend on the interplay between employment and immigration laws in the regulatory framework, through which, over time, a pattern of immigration-employment jurisprudence differentiates FDHs as a distinct class of *homo economicus* from normative workers as citizenship rights-bearer. Domestic labor has long existed in the slippage between tradition and modernity, law and customs, responsibility and obligation, attributes of the human and calculations of the contract. The International Labour Conference reported in a survey of international legislations on paid domestic work:

> Bound up as it is with notions of the family and of non-productive work, the employment relationship is thought not to "fit" neatly into the general framework of existing labor laws, despite their origin in the "master-servant" relationship. As a result, in most legislative enactments the specific nature of the domestic employment relationship is not addressed. And yet, at the level of local, informal norms and common assumptions about the work and the workers concerned, that same specificity tends to be relied upon to justify denying domestic workers their status as "real workers" entitled to full legislative recognition and protection.[131]

At the outset, the interchangeable local terminology of "helper," "maid," "auntie," "*jeh jeh*" ("older sister"), or "*bun mui*" ("Filipino girl," regardless of the actual nationality of the worker) renders discursively the migrant domestic worker as an ambiguous member of the family, a partial worker in the household ("you don't have value because you just help"[132]), and a non-native speaker in the local economy. The liminality of their identity is also reflected in the legal construction of migrant domestic workers as a class. The Hong Kong labor administration recognizes the rights of migrant domestic workers insofar as they are legitimate employees working under a legal employment contract, but their legal protection stops short at the intrinsic ambiguity of regulating employment in the domestic sphere.

Legally, FDHs are any non-resident permitted to enter and remain in Hong Kong as a party to the SEC, the only agreement between the local employer and the foreign domestic worker approved and recognized by the Hong Kong government (which necessitates the corollary:

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[131] International Labour Office, *Decent Work for Domestic Workers: Fourth Item on the Agenda* (Geneva: International Labour Organisation, 2010), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_104700.pdf.
[132] Hutton, "Hong Kong 25."

if an FDH is permitted in Hong Kong, they must be contracted by the SEC.) The SEC sets out the material terms of employment and conditions of stay: the MAW, a two-year term, the live-in requirement, the two-week rule, travel and meal allowance, and rest days provisions. The employer is required to provide an informational sketch of the accommodation to meet a minimum "suitable with reasonable privacy" standard by the Labour Department. The expected and defined duties of FDHs under contract include household chores, cooking, child and elderly care, baby-sitting, and window-cleaning.

While there is no standard legislative definition for domestic service in Hong Kong, the standard government literature introduces FDHs as workers who "help Hong Kong families with household chores and taking care of their children and elderly members, thereby allowing more family members to go out and work." The Philippines Labor Code defines domestic service as "service in the employer's home which is usually necessary or desirable for the maintenance and enjoyment thereof and includes ministering to the personal comfort and convenience of the members of the employer's household, including services of family drivers."[133] The Hong Kong government, however, pursuant to the labor importation policy that only permits foreign workers to fill domestic gaps, restricts domestic service to traditionally feminized caregiving and household tasks, which renders drivers and gardeners outside the scope, unless a connection to "domestic duties" serving the members of the household is approved by the Director of Immigration.[134]

Without a standard legislative definition for "migrant workers," the Legislative Council follows the definition in the ILO Migration for Employment Convention, ratified for Hong Kong in 1997, for "a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment."[135] Within Hong Kong's labor import schemes, in view of Hong Kong's special relationship with mainland China and domestic economic demands, migrant workers in Hong Kong are divided into six major classes: professionals and investors under the General Employment Policy; Mainland talents and professionals; overseas mainland

[133] Labor Code of the Philippines, article 141 (1974).
[134] Labour Department, *Be Prepared for Employment in Hong Kong: A Handbook for Foreign Domestic Helpers* (Hong Kong: Labour Department, 2023), 14 and 26, https://www.fdh.labour.gov.hk/res/pdf/Employment_handbook_FDH_English.pdf.
[135] "Migration for Employment Convention (Revised)," adopted by the General Conference of the International Labour Organisation July 1, 1949, *International Labour Organization Convention* C097, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C097:NO.

Chinese professionals; non-local Hong Kong degree graduates; low-skill, short-term imported workers under the Supplementary Labor Scheme introduced in 1996; and FDHs. Each class of individuals become legally coded as differentiated *homo economicus* within the market economy, a differentiation that is at the same time racialized because the differentiated rights conferred are intimately bound to the original nationality of the foreign worker. A 2003 Court of Appeal judgment involving the equal-treatment validity of an employment tax on employers of migrant domestic workers, succinctly summarizes the racialized hierarchy of imported labor in Hong Kong:

> [Labor importation] policy varies according to the category of skill, so that, for example, foreign professionals are welcomed to settle here and in due course become permanent residents; whereas low-skilled workers who are permitted to work here are subject to a tighter regime that insists upon return or periodic return to their places of origin, so that residence here is for the purpose only of temporary employment and not with a view to acquiring permanent residence status. There are also in place particular schemes for the admission of persons from the Mainland, the details of which have no bearing on the present case.[136]

The high-skilled foreign professional class, for example, are governed closer to normative local Hong Kong Chinese workers by sharing the citizenship terms of the General Employment Policy. Mainland professionals are allowed to change employment freely during their stay in Hong Kong, while, pursuant to the "two-week rule," FDHs must return to their home country within two weeks of terminating one employment contract before taking up a new contract.

In spite of historically ambiguous social customs and the close employer-employee bond necessitated by the nature of live-in caregiving work, the undertaking of the SEC guarantees that there is no legal question that FDHs are not unfree or indentured labor, nor should they be mistaken for an adopted member of the family in the *mui tsai* tradition. The government stresses that migrant employees are guaranteed the same protection as local employees under relevant domestic labor and anti-discrimination laws, and equal access to justice at the Labour Tribunal (employment and small claims disputes), the Equal Opportunity Commission (discrimination complaints), and the higher courts. Legal aid from the

[136] *Raza and Others v. Chief Executive in Council in Others*, HCAL30/2003 (2005), https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2003/HCAL000030_2003.doc&mobile=N.

government is available for eligible workers. As Hong Kong is a party to the ICESCR, migrant domestic workers in Hong Kong may enjoy the economic and social rights enumerated in Article 7 of the ICESCR such as fair wages and equal remuneration for work of equal value, safe and healthy working conditions, and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. Article 11 of the ICESCR recognizes the right to adequate standard of living includes "adequate food, clothing and housing, and to the continuous improving of living conditions." Under the Migration for Employment Convention, migrant workers have the right to remuneration, work conditions, holidays, social security, and access to the justice system for employment disputes without discrimination and no less favourable than local workers.

However, while the government promotes a regulatory framework designed for equal protection and minimal interference with the private labor market, the lack of positive protection means that the policy's legitimacy depends on its enforcement by the rule of law of a mature judiciary. The reality of private employment in the domestic sphere and the discrepancy between what is *legal* and what is *equal* are problematized when the law becomes a structural barrier from legal protection in the first place. The core features of the FDH policy and SEC—the two-week rule, the MAW, and the live-in requirement—have been under the scrutiny of the CESCR as discriminatory practices that frame the limited legal presence of migrant domestic workers in the jurisdiction according to an economic rationality that dismisses migrant domestic workers as transient and disposable—their humanity would have to be realized *elsewhere*. However, as the government's reluctance to reform any one aspect of the policy shows, the features of the policy are in fact intrinsically bound to work together to safeguard a racialized labor hierarchy that ensures overall market profitability.

The Two-week Rule

The two-week rule under the New Conditions of Stay Ordinance of 1987, FDHs are the only class of migrant workers who are required to leave Hong Kong within two weeks of completion or termination of their employment contract before beginning a new employment

contract.[137] In its response to the CESCR's concern for the two-week rule's violation of Article 2 of the ICESCR that obliges states to guarantee the economic rights under the covenant "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," the Hong Kong government reasons that

> this "two-week rule" is essential for maintaining effective immigration control and it helps prevent FDHs from changing employers frequently or taking up illegal work in Hong Kong after contract termination. The main purpose of the "two-week rule" is to allow sufficient time for FDHs to prepare for their departure; it is not to assist them to find new employers.[138]

The CESCR Concluding Observations on Hong Kong's periodic report in 1999 had already noted the two-week rule denies "the right of FDH upon expiration of their contract to freely seek employment and to protection from discrimination,"[139] and in 2005, the Committee "urges the State party to review the existing 'two-week rule,' with a view to eliminating discriminatory practices and abuse arising from it, and to improving the legal protection and benefits for foreign domestic workers so that they are in line with those afforded to local workers."[140]

One of the main consequences of the two-week rule dictating the worker's immigration status and the live-in requirement preclude alternative accommodation from an abusive workplace discourages FDHs from reporting abuses and exploitation by their employers[141] (not to mention the social, linguistic, and legal knowledge required to file successful complaints are not always available to FDHs). According to reports by Amnesty International, the two-week rule "further exacerbates migrant workers' vulnerabilities to exploitation by their employer

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[137] Amnesty International, "Submission to the Legislative Council's Panel on Constitutional Affairs on the Third Report by HKSAR under the ICESCR," *LegCo* (Amnesty International, 2014), https://www.legco.gov.hk/yr13-14/chinese/panels/ca/papers/ca0217cb2-850-7-ec.pdf.

[138] UN Committee on Economic, Social and Cultural Rights (CESCR), *List of Issues in Relation to the Second Periodic Report of China (E/C.12/CHN/2), including Hong Kong, China (E/C.12/CHN-HKG/3) and Macao, China (E/C.12/CHN-MAC/2): Committee on Economic, Social and Cultural Rights: Addendum*, E/C.12/CHN/Q/2/Add.2, 2 (March 31, 2014), https://digitallibrary.un.org/record/782285?ln=en.

[139] UN Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: China: Hong Kong Special Administrative Region*, E/C.12/1/Add.58, 4 (May 21, 2001), https://digitallibrary.un.org/record/459549?ln=en.

[140] UN Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao)*, E/C.12/1/Add.107, 13 (May 13, 2005), https://digitallibrary.un.org/record/551193?ln=en.

[141] Amnesty International, "Exploited for Profit, Failed by Governments," 13, 88–90.

and their placement agency" because of the high administrative barriers for an FDH to find a new employer within the two-week period before deportation—"even when you can get a new employer immediately, the approval of working visa by the Immigration Department takes 6-8 weeks. The workers must leave Hong Kong when the 'two weeks' end."[142]

The existing market infrastructure also provides little rational incentives for "job-hopping" practices, when the criteria for legal contract termination are stringent and applications to change employer before the completion of the standard two-year contract are "normally not approved" by the Labour Department apart from "the transfer, migration, death or financial reasons" of the original employer or where "there is evidence that the [FDH] has been abused or exploited." Migrant domestic workers can be beholden to high agency fees for ending their contracts early and a lengthy waiting period for a new work visa.[143] Under the present regulatory framework and market conditions, the two-week rule is a de facto denial of the right to work for migrant domestic workers in Hong Kong when their immigration status is bound to their employment status. Compliance drastically reduces the employment opportunities available to FDHs when they cannot freely seek work that improves upon the standards for just and favourable work conditions.

Minimum Allowable Wage and the Live-in Requirement

The twin pillars of the MAW and the live-in requirement undermine these economic rights of migrant domestic workers when both their wages and their living situation are regulated according to their differentiated labor class. In particular, the government's commitment to the MAW as a wage protection measure triggers a series of cascading insecurities for the fundamental rights of migrant domestic workers in their employment state.

Regardless of nationality of origin, the MAW establishes a wage floor for SEC issued to all migrant domestic workers who seek work as FDH in Hong Kong. Notably, the minimum wage guarantee for migrant domestic worker arrived almost 40 years before a statutory minimum wage bill was passed in 2010 for all workers in Hong Kong. Evidenced in the long workers' struggle for a statutory minimum wage since the first general strike in 1922 and

[142] Amnesty International, "Exploited for Profit, Failed by Governments," 75.
[143] Leung, "Changing Jobs a 'Human Right.'"

through the workers' protests in the 1960s, Hong Kong's labor administration has abstained from regulating wages and maximum work hours in favor of the view that the terms of employment should be a matter of private contract between the employer and employee.[144] As case law will show, this is a view that the courts are inclined to reaffirm in the jurisprudence on the fundamental rights of migrant domestic workers.

Under this administration, the MAW rate cannot be said to be tied to any existing rights-based workers' protection. Instead, consistent with economic principles of the labor importation policy, the MAW is primarily protectionist in two-folds. As a wage floor, the MAW protects the local domestic caregiver market by preventing excessively low wages in competition with migrant caregivers. The MAW also ensures a minimum income level of the employer by stipulating that employers must be able to meet a minimum household income in order to contract FDHs, given the additional requirements to provide the live-in worker with daily meals (or a statutory meal allowance), suitable accommodation, and air transportation both ways, in conjunction with the cost incurred for employment agency fees, immigration fees, and potential medical treatment for work-related injuries.

After a statutory minimum wage was introduced in Hong Kong through the Minimum Wage Ordinance (MWO) in 2009,[145] the FDH's catalog of employment terms stipulated in the SEC is reframed by the government as "benefits" that justifies the MAW, conjoining the regulatory ambiguity of domestic work and the rational resilience of a neoliberal labor regime:

> The Committee expressed concern in the previous Concluding Observations that FDHs are excluded from the MWO. All live-in domestic workers, irrespective of their nationality and whether they are local or migrant workers, are exempted from the

[144] Sek Hong Ng and Olivia Ip, "Hong Kong Working Class and Union Organization: A Historical Glimpse," *China Perspectives* 2007, no. 2 (April 15, 2007), https://doi.org/10.4000/chinaperspectives.1733.

[145] Before the statutory minimum wage was introduced for the first time in Hong Kong in 2009, the government's approach on the minimum wage as a protection for the right to just and favourable work conditions was informed by its greater economic philosophy—as explained in the 1999 CESCR state report—"in common with most mainstream economists." Amongst the "mainstream economists" cited are studies by the libertarian think tank Cato Institute, Canada's most influential free trade advocate Richard Lipsey145, the champion of austerity and the dollar-peg Rudiger Dornbusch, and his co-writer, the New Keynesian Stanley Fischer, and the Chicago School economist Bruce Kaufman. Notably, in a timely combination of Keynesian pragmaticism and authoritarian populism, Fischer's work was wielded as theoretical basis for the early 1990s "shock therapy" neoliberalization of post-Soviet economies in Eastern Europe. Since the 1980s, the combined factors of economic restructuring towards the service sector, existing vulnerability to external shocks, the availability of low-wage migrant labor force, weak collective bargaining institutions, and strong pro-shareholder corporate governance have legitimized the official policy to maximize wage flexibility and against setting a minimum wage by law.

> MWO. One of the major considerations for the exemption is that live-in domestic workers reside and work in the employer's home, which renders calculating and recording working hours practically impossible, while SMW is set on an hourly basis. Such exemption does not render FDHs, who are live-in domestic workers, less protected than non-live-in workers. This is because FDHs enjoy, on top of wages, in-kind benefits such as free accommodation, free food (or food allowance) and savings from transport. Thus, the exemption of FDHs from the MWO is fully justified.[146]

By naming standard employment terms as "benefits are not usually available to local workers" in fulfillment of the migrant domestic workers' right to just and favourable work conditions, the government leaves out the immigration mandate of the SEC that leaves migrant domestic workers with no choice or bargaining power for their accommodation and remuneration in entering into the agreement to work as an FDH in Hong Kong. These "benefits" are usually not available to local workers because local workers are also not usually contractually required to live with their employers, work for a fixed term of two years at a time, depend on their employers for meal provisions, or require air transportation to get to their place of work.

Set as an administrative rather than legislative measure and reviewed periodically by the Economic Development and Labor Bureau in consultation with local actors according to "a long-established mechanism and would take account of, inter alia, the general economic condition and employment situation in Hong Kong,"[147] the MAW survives with little democratic accountability and transparency into its formula. Save for periodic wage adjustments, the regulatory power of the MAW has remained largely intact in form since the 1973. Institutionalizing the MAW as a rights protection mechanism through its ritual inclusion in the CESCR reports sustains the neoliberal fiction of employment as developmental aid—the postcolonial word for "philanthropy"—and the worker as a resilient subject whose individual success depends on bearing the cost of exploitation, where a racialized workforce bears the blunt force of unequal development. The government maintains the justification for the MAW's exemption from both minimum wage and living wage standards is that the SEC for migrant domestic workers already stipulates basic

[146] UN Committee on Economic, Social and Cultural Rights (CESCR), Fourth Periodic Report Submitted by Hong Kong, China, Under Articles 16 and 17 of the Covenant, Due in 2019: Committee on Economic, Social and Cultural Rights, E/C.12/CHN-HKG/4, 18 (August 5, 2020), https://digitallibrary.un.org/record/3902729?ln=en.
[147] UN Committee on Economic, Social and Cultural Rights (CESCR). *Fourth Periodic Report Submitted by Hong Kong, China*, 18.

employment terms that allow live-in domestic workers to "enjoy a high level of disposable income compared with non-live-in workers."[148] However, the exemption is based on the worker's status as a *live-in domestic* worker, rather than their status as a *migrant* worker, when other imported workers are covered by the statutory minimum wage.

Standard Employment Contract

The only reason that migrant domestic workers "enjoy" the "benefits" of accommodation, rather than their ICESCR Article 11 right to continuous improvement of living conditions, is because of the SEC mandate for the employee shall "work and reside in the Employer's residence." As "the only contract acceptable to the Immigration Department" for their visas and their employment status under the Employment Ordinance and Employee's Compensation Ordinance, the SEC conjoins and regulates the migrant worker's identity in Hong Kong as *both* migrant worker and domestic worker, a distinctive status not shared by any other type residents or workers in Hong Kong. The live-in requirement is therefore material to the residency and employment of migrant domestic workers in Hong Kong, without which, the labor import policy would lose its competitive advantage. To start, hiring cost would rise dramatically if migrant domestic workers are contractually free to secure their own accommodation in a city where the median monthly rent for a one-bedroom apartment in the private market is HKD$17,900, almost four times the MAW rate.[149]

The SEC effectively keeps migrant domestic workers from participating in the collective bargaining for a statutory minimum wage in order to make a living wage in Hong Kong. As a result, migrant domestic workers have never made a living wage since the labor importation policy was formalized. On average, they make 50% or less than the statutory minimum wage, despite the Hong Kong government's case for equal economic rights rests on the MAW provision and the terms of the SEC. At the time of Hong Kong's most recent CESCR reporting in 2020, the MAW was HKD$4,630 and the food allowance was HKD$1,173. The

[148] UN Committee on Economic, Social and Cultural Rights (CESCR). *Implementation of the International Covenant on Economic, Social and Cultural Rights: Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Hong Kong, China*, E/C.12/CHN-HKG/3, 32 (July 6, 2012), https://digitallibrary.un.org/record/731377?ln=en.

[149] Government of the Hong Kong SAR, "Increase in Minimum Allowable Wage and Food Allowance for Foreign Domestic Helpers," press release, Info.gov.hk, September 30, 2022, https://www.info.gov.hk/gia/general/202209/30/P2022093000326.htm?fontSize=1. "Shrinking Spaces, Rising Costs: Hong Kong Residents Feel the Crunch," *Wall Street Journal*, December 21, 2015, sec. China Real Time Report, https://www.wsj.com/articles/BL-CJB-28374.

concurrent statutory minimum wage for local workers under the MWO was HKD$37.5. A survey by a local employment agency indicates the average monthly salary (excluding food allowance) was HKD$5,257 in the top-five residential districts; the lowest average at HKD$4,726 is 2% above the MAW; and the city-wide average was HKD$5,012, exceeding HKD$5,000 for the first time in 40 years.[150] Based on the common scenario that the employer and worker agree to share meals and forego a cash allowance for meals, on a schedule of a 30-day month, 44-hour work week[151] with one mandatory rest day, the worker would make HKD$22.78 per hour.

The requirement to work and live at their employer's home thus becomes directly linked to the rationale for the MAW as a major prohibition to a fair, liveable wage and the continuous improvement of the worker's living conditions. In the government's view, the "distinctive working pattern" of live-in employment renders "calculating and recording of working hours practically impossible, while the statutory minimum wage is set on an hourly basis."[152] Despite minimal income and accommodation requirement for the employer, there is no monitoring or inspection system to enforce adequate living and working conditions of the domestic worker owing to the Labour Department's admission that "it would be difficult to do so due to the number of workers and the place of work being a private residence."[153] In addition, the 24/7 live-in exposure increases the risks of abuse and sexual assault by their employers, and subject the worker to possible coercion into overwork without any oversight. For migrant domestic workers who are unfairly treated or abused by their employers, the provision keeps them from working while their cases are pending. The prospect of not being able to work while their case is pending deters workers from reporting abuses by their employers. As media and NGO reports have shown, there is a wide discrepancy between official case report numbers and reality for this reason.[154]

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[150] HelperChoice, "HelperChoice 2020 Foreign Domestic Workers Salary & Working Conditions Survey," HelperChoice, 2020, https://www.helperchoice.com/c/press-centre/domestic-workers-salary-survey-hong-kong-2020.

[151] The average working hours of Hong Kong workers in 2020. See Legislative Council Panel on Manpower, "Updated Background Brief Prepared by the Legislative Council Secretariat for the Meeting on 19 May 2020 Standard Working Hours," *Legislative Council*, May 19, 2020, https://www.legco.gov.hk/yr19-20/english/panels/mp/papers/mp20200519cb2-968-6-e.pdf.

[152] UN Committee on Economic, Social and Cultural Rights (CESCR), *Third Periodic Reports Submitted by Hong Kong, China*, 31.

[153] Amnesty International, "Exploited for Profit," 95.

[154] Katrina Kaufman, "Foreign Domestic Worker Abuse in Hong Kong," Coconuts Hong Kong, July 18, 2014, https://coconuts.co/custom-feature/content-hong-kongs-hidden-shame-why-foreign-domestic-worker-abuse-so-rampant/. Cases of overwork, illegal salary deductions, and sexual violence all doubled from 2018 to 2019, and

Assuming Neoliberal Freedom

The CESCR's Concluding Observations on Hong Kong's 1999 periodic report noted that "when the British left the region, they left behind 20 billion dollars in capital and that amount had been doubled now; the success of Hong Kong should benefit all citizens in the society, including women, the elderly, the disabled and other vulnerable members. The Government was expected to equitable society with the wealth it had accumulated."[155] In response to the inadequate implementation of the articles providing for adequate housing, ICESCR's domestic legal effect, and social integration of ethnic minorities, the Hong Kong delegation remarked in part that "Hong Kong [is] a free society without any boundaries to limit the choice of individuals. Although there were nationals from different parts of the world, the process of integration had been left to the individuals themselves."[156] Recalling one definition of neoliberalism has been outlined as

> a set of policies and ideological tenets that include the privatization of public assets; the deregulation or elimination of state services; macroeconomic stabilization and the discouragement of Keynesian policies; trade liberalization and financial deregulation; a discursive emphasis on "neutral," efficient, and technical solutions to social problems; and the use of market language to legitimize new norms and to neutralize opposition.[157]

As this chapter has analysed, the consolidated effects of the interlocking features of the migrant domestic labor policy witholding the progressive realization of migrant domestic workers' economic rights are consistent with the government's neoliberal governance that champions the individual responsibility of liberal economic subjects and resists democratic oversight, legislating for workers' protection, and interventions into private employment negotiations. The lack of workers' protection is a major hindrance to the enjoyment of just and favourable conditions of work according to the standards set out in the ICESCR.

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cases of physical assault jumped from 10% to 15%. See Philips, "Repairing (and Exploiting) the Underclass Image," 4.

[155] OHCHR, "China Presents Report on Hong Kong to Committee on Economic, Social and Cultural Rights," OHCHR, April 27, 2001, https://www.ohchr.org/en/press-releases/2009/10/china-presents-report-hong-kong-committee-economic-social-and-cultural.

[156] OHCHR, "China Presents Report on Hong Kong."

[157] Michael C. Dawson and Megan Ming Francis, "Black Politics and the Neoliberal Racial Order," *Public Culture* 28, no. 1 (December 2, 2015): 23–62, https://doi.org/10.1215/08992363-3325004.

But for policymakers, the abstraction of the economy is its own rationale for non-interventionism.[158]As the government justifies the exclusion of migrant domestic workers from the statutory minimum wage:

> We have, it is true, made a special exception for a few particularly vulnerable groups—foreign domestic helpers and imported workers […] We are aware that minimum wage laws have long been in place in other free market economies. But most of these laws were set up against special historical and political backgrounds, rather than for economic reasons.[159]

In effect, pure economic reasoning banishes the democratic forces in the "special" backdrops throughout the decades since the sovereignty transfer: continued labor activism across sectors, a protest movement against the extension of PRC jurisdiction into Hong Kong, annual city-wide marches for universal suffrage, pressurizing global socio-economic inequality that led to a localized Occupy movement that ended up paralyzing the city's central business district for 79 days, and numerous local demonstrations and protest actions in between.

By outsourcing traditionally private social reproduction and caregiving work to live-in domestic workers, who perform the dual function as the wife's gendered role and as a signifier for the family's dual-income, upwardly mobile wealth,[160] the migrant domestic labor policy not only drives domestic economic growth by enabling higher productivity from the local workforce who has been released from unpaid social reproductive labor, it also effectively subsidizes state social welfare by privatizing and individualizing childcare and elderly care. The pro-business and pro-privatization government's commitment to maintaining an internationally competitive market environment and resistance to labor protection and social welfare directly affect wage-dependent local workers and migrant domestic workers hired to increase the former's productivity.

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[158] Rohan Price and John Kong Shan Ho, "Implementing a Statutory Minimum Wage in Hong Kong: Appreciating International Experiences but Recognizing Local Conditions," *Common Law World Review* 40, no. 2 (June 2011): 95–118, https://doi.org/10.1350/clwr.2011.40.2.0217.

[159] UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Reports Submitted by States Parties Under articles 16 and 17 of the Covenant: China: Report of the Hong Kong Special Administrative Region of the People's Republic of China (4 June 1999)*, E/1990/5/Add.43, 23 (September 20, 1999), https://digitallibrary.un.org/record/412715?ln=en.

[160] "Similarly, the Bracero program implemented as a solution to the agricultural labor crisis in the United States, 'as long as they were disposable, deportable, and docile […] the bodies of Mexican migrant workers carried hopeful affects for the dominant [white] American public as they signified promised happiness." See Yam, "Towards a Transnational Analysis of Racialization."

In turn, the authoritarian colonial governance that has withheld full political rights from Hong Kong residents trickles down to sever migrant domestic workers from progressing towards the full realization of their economic and social rights. While migrant domestic workers have the right to unionize, protest, and strike, they are precluded from the already limited right to vote reserved for Hong Kong residents in local non-legislative district councils. The limited capacity for migrant domestic workers and Hong Kong residents to effect political power shapes their mutual liberal subjectivity within an economic sphere rather than as individual citizens. But relying on the justice system for their human rights claims as a last resort, the economic and social rights of migrant domestic workers would also become disqualified based on their lack of citizenship rights, as the next chapter will elucidate. The government's insistence that migrant domestic workers enjoy the same and full labor rights and benefits as local workers is a legal fiction premised on the acceptance of an *a priori*, constitutional inequality between classes of workers. To borrow the words of a scholar on Hong Kong's introduction of a statutory minimum wage, the labor policy "begs the question of whom, exactly, an economy exists to serve."[161]

Neoliberal economic priorities are reflected in almost all aspects of the migrant domestic labor policy's failure to comply with the human rights standards set out in the ICESCR. By the government's own admission, the government maintains restraint from enacting social policies when they would endanger Hong Kong's standing as an international financial center and tourist destination. The government's belief that social welfare and labor protection would impede economic growth has not been fundamentally challenged. Migrant domestic workers are welcomed into the local job market for as long as they make significant contribution to Hong Kong's economic development, but their corresponding human rights are limited by both colonial and neoliberal policies that approach the ICESCR as aspirational and promotional rather than as obligations.

[161] Price and Ho, "Implementing a Statutory Minimum Wage in Hong Kong," 114.

3. Adjudicating Human Rights for Migrant Domestic Workers

Domestic Implementation of International Human Rights Covenants

> *One of the more than 150,000 Filipino migrant domestic workers in the city in 1997, activist Eman Villanueva, recalled "feelings of uncertainty" preceding that historical moment. "There was a lot of talk about possible changes after the Handover," he told HKFP.*
>
> *"But as it turned out… in the context of migrant domestic workers in Hong Kong, there was really not much change after that," said Villanueva, who arrived in the city in 1991 and is the spokesperson of the Asian Migrants' Coordinating Body (AMCB), a coalition of migrant worker groups and unions.*
>
> *"Most of the problems we faced post-1997 were already there."*[162]

A core tenant of what Stephen Gill terms "market civilization," the neoliberal shift in social reproduction is a vehicle that "subject[s] the majority to market forces whilst preserving social protection for the strong."[163] Critically, the lack of self-reflection and the migrant domestic labor policy's reliance on the legislature and judiciary to justify exploitative practices as customary policy decisions betray the conservative marriage between capitalist colonial governance and Confucian social values, and the triumph of paternalistic, neoliberal governance through the legal institution. The migrant domestic worker institution is modernized through the legitimacy of a regulatory framework backed by a mature judiciary, the primacy of the liberal contract, and the political atomization of racialized migrant labor. As Corinne Blalock asserts, neoliberalism becomes law's problem "because the law is complicit in its legitimation […] The law serves a legitimating function insofar as it hides the politics of the market's logic as merely background rules."[164] The content and effect of the migrant domestic labor importation policy is as much as a cornerstone of modern(ized) Hong Kong's neoliberal priorities as the economic constitution of the Basic Law. How are the limits of human rights tested against a constitution based on economic sovereignty?

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[162] Hutton, "Hong Kong 25."
[163] Stephen Gill, "Globalisation, Market Civilisation, and Disciplinary Neoliberalism," *Millennium: Journal of International Studies* 24, no. 3 (December 1995): 399–423, https://doi.org/10.1177/03058298950240030801.
[164] Corinne Blalock, "Neoliberalism and the Crisis of Legal Theory," *Law and Contemporary Problems* 77, no. 4 (January 12, 2015): 71–103, https://scholarship.law.duke.edu/lcp/vol77/iss4/4.

Adjudicating ICESCR rights is a recent development in Hong Kong jurisprudence. In the absence of effective, democratically motivated legislative changes to persistent human rights complaints of the core features of the FDH labor importation policy, relying on the international convention's domestic applicability is narrowly kept ajar for migrant domestic workers seeking systemic justice for their rights and conditions in Hong Kong as workers. However, the court's approach to the "promotional" and "aspirational" nature of the ICESCR has been a major impediment to the equal application of economic and social rights to improve the lives and labor conditions of migrant domestic workers. In this regard, the remedial force of anti-discrimination statutes is weak in subjugation to the constitutional status of provisions entrenching differentiated immigration based on colonial and economic rationalities.

In reporting to the CESCR for its treaty implementation progress concerning the right to just and favourable work conditions, the Hong Kong labor importation policy emphasizes the equal protection of FDH and local workers by the Employment Ordinance and Employee Compensation Ordinance, in addition to other fundamental rights guaranteed by the Basic Law such as the right to unionize and strike,[165] the right to raise a family,[166] the right to own and keep personal property[167] (e.g. employer maybe not confiscate the passport of the employee) and right to privacy[168] (e.g. employer may not surveil or otherwise monitor employee's phone devices without mutual consent). For non-permanent residents of Hong Kong without the right of abode, the Basic Law guarantees the enumerated fundamental rights of migrant domestic workers admitted for entry under the FDH scheme.[169] However, as the economic and social claims of migrant domestic workers arise without legitimate channels for legislative changes, the court becomes challenged to uphold colonial-era governmentality that exposes the raw neoliberal rationality of the migrant domestic worker economy—"where neoliberal policy tends to transfer power away from democratic control, it finds a worthy partner in legal institutions."[170]

[165] *HKBL*, article 27.
[166] *HKBL*, article 37.
[167] *HKBL*, article 6.
[168] *HKBL*, article 30.
[169] *HKBL*, article 24.
[170] Samuel Aber, "Neoliberalism: An LPE Reading List and Introduction," in *LPE Project*, 2020, 1–20, https://lpeproject.org/wp-content/uploads/2020/07/Neoliberalism-Primer.pdf.

When the Basic Law came into effect on 1 July 1997, Article 39 provides that the provisions of the ICCPR, ICESCR, and ratified ILO conventions[171] "as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong SAR," reaffirming the dualist presumption that the international human rights covenants do not automatically have domestic legal effect.[172] The ICCPR and ICESCR were ratified by the UK and their application was extended to Hong Kong in 1976, but despite persistent recommendation from the HRC, the two covenants were not implemented in domestic law until the imminent sovereignty transfer came into view for the British government in the early 1980s. While the vision for Hong Kong's future sharply diverged between the British and Chinese governments from the very beginning of the Handover negotiations, both sides agreed that the future legal architecture must be crafted with the principle aim to reassure Hong Kong as much continuity as possible through the transitional period, in order to secure business credibility and investor confidence. After the Beijing government's deadly crackdown on the Tiananmen protests in 1989, public fear for Hong Kong's human rights future motivated the colonial government to formalize a bill of rights in advance of the Handover to safeguard individual rights and freedoms in Hong Kong. The HKBORO was enacted in 1991 to incorporate ICCPR into domestic law, while the provisions of the ICESCR are left open to implementation through individual legislative and administrative measures.

In the greater spirit of political continuity than a principled commitment to indivisible universal human rights protection, reservations to the ICCPR and ICESCR made by the UK government and extended to its dependencies remain in force according to Article 39 of the Basic Law, while later ratifications by the PRC also included its reservations for Hong Kong. Consequentially, key fundamental rights have been suspended in Hong Kong under both British and PRC sovereignty to condition the SAR's economic commitment to the ruling capitalist ideology at the expense of democratisation, labor protection, and migrant rights. The possibilities for universal equal suffrage, free elections, and representative democracy were precluded in colonial Hong Kong by the reservation for "the right not to apply article 25(b) in so far as it may require the establishment of an elected Executive or Legislative

[171] ILO, "International Labour Standards in Hong Kong to Be Continued," ILO, June 17, 1997, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008020/lang--en/index.htm.
[172] Ramsden, "Judging Socio-Economic Rights in Hong Kong."

Council in Hong Kong."[173] The UK's reservation for Hong Kong on Article 7(i)(a) of the ICESCR withholds equal pay for equal work in the private sector. The PRC's reservation on Article 6 provides the SAR government with discretionary power to regulate employment restrictions based on place of birth or residency "for the purpose of safeguarding the employment opportunities of local workers in the SAR."[174]

In principle, the PRC's neglect to ratify the ICCPR has no bearing on the treaty's applicability in Hong Kong, since Article 39 of the Basic Law provides for the continuity according to the UK's application, for as long as the Basic Law is in force. The anxiety that Hong Kong might fail to uphold its UN reporting obligations under PRC sovereignty has been proven unfounded,[175] when Hong Kong has since 1997 continued to submit timely periodic reports to the ICCPR and ICESCR monitoring bodies, in collaboration with the media, public consultation, and NGOs. However, despite its procedural compliance, Hong Kong's reporting reveals an instrumental bias in the government's approach to international human rights standards.

The UN human rights doctrine of indivisibility and interdependence between civil and political rights and economic, social, and cultural rights suggests individual rights and systemic conditions constitute a generative closed loop that is mutually reinforcing. Under both the executive-led colonial administration and SAR administration, the Hong Kong government maintains the view that the rights and obligations under the ICCPR and the ICESCR are of a separate nature that requires differentiated measures of implementation. In Hong Kong's first report to the CESCR in 1996 (and its last under the British colonial government), the governments

> note that the rights proclaimed by the ICESCR and those proclaimed by the ICCPR, though both are concerned with fundamental human rights, are different in nature. It was in recognition of this difference that the rights were set out in separate Covenants with different "enforcement" machinery.[176]

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[173] "International Covenant on Civil and Political Rights," declarations by the United Kingdom upon signature on September 16, 1968, *United Nations Treaty Series* vol. 999 (1976), 12. https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf.

[174] "International Covenant on Civil and Political Rights," communications by the Government of China on April 20, 2001, *United Nations Treaty Series* vol. 999 (1976), 106. https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf.

[175] Panditaratne, "Reporting on Hong Kong to UN Human Rights Treaty Bodies."

[176] UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: Third Periodic Reports Submitted by States Parties Under*

Recalling the bifurcated drafting history of the two covenants as the outcome of the ideological segregation between liberal capitalist countries and the socialist bloc, the Hong Kong government not only attributes but underscores their difference to justify a starkly differentiated treatment of the two categories of rights. According to the government's interpretation of the treaty obligation to "take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means,"

> This language, it is submitted, clearly envisages a progressive process, pursued through a variety of appropriate means, some of which may be legislative measures but some of which, having regard to the nature of the rights concerned, will necessarily, or more effectively, take the form of administrative measures.[177]

However, the Hong Kong government's legislative and administrative approach to economic, social, and cultural rights, as opposed to the legislated HKBORO that enshrined civil and political rights, has shown little progress in maximizing its available resources to protect, promote, and respect the economic and social rights of migrant domestic workers,[178] a labor administration that has remained largely unchanged since 1973. Instead, the courts' jurisprudence has arguably *worsened* the fundamental rights protection of migrant domestic workers by increasing the restrictive power of domestic immigration laws. Over the years, the courts' role in conserving the racialized labor economy and the impasse in its human rights dialogue with the CESCR would reveal a mutual misrecognition of Hong Kong's human rights obligations to migrant domestic workers. There is, in effect, a constitutional incompatibility between Hong Kong's neoliberal labor administration and fundamental rights protection for migrant domestic workers.

Systemic Challenges to Fundamental Rights Violations

The right to abode, right to family, and right to equal remuneration have been challenged in landmark cases at the higher courts for migrant domestic workers' claims to their fundamental rights according to the legitimate expectations of international human rights conventions, expectations that became progressively dismantled as the courts reaffirm the

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Articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland, Hong Kong, E/1994/104/Add.10 (April 3, 1996), 2, https://digitallibrary.un.org/record/214585?ln=en.

[177] UN Committee on Economic, Social and Cultural Rights (CESCR), *Third Periodic Reports Submitted by United Kingdom of Great Britain and Northern Ireland, Hong Kong*, 2.

[178] Research and Library Services Division, "The Implementation of the ICESCR."

primacy of the private contract, expand the discretionary power of immigration controls, and clarifies the legal stratification between classes of racialized import labor. The courts did so in its jurisprudence that gives an ICCPR reservation by the UK government a broad scope of application, entrenching into case law the weight given to public interest in the balance between neoliberal market growth and individual rights, and the denial of international human rights standards for migrant domestic workers.

In Hong Kong's dualist system, international law is not self-executing and can only be given domestic effect through statutes in local law according to the terms set out in Article 39 of the Basic Law, interpreted holistically with the rest of the constitution wherever relevant. Case law has demonstrated a long-standing reluctance of the Hong Kong courts to adjudicate on the constitutionality of economic, social, and cultural rights based on the application of the ICESCR in Hong Kong for the promulgation of rights guaranteed by the ICESCR, either alone or in conjunction with relevant local and international laws such as Employment Ordinances or ILO conventions.[179] In addition, the Hong Kong courts follow the jurisprudence that requires international laws to be given effect through deliberate legislative acts—neither the ratification of a treaty nor mirror language in domestic law can be taken for granted as domestic implementation.

Fundamental rights under the ICESCR were not raised in the courts until 2000, the first case concerning the applicant's right to family reunion under Article 10, which provides that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." Given Hong Kong's position as an entrepot for residents and non-residents of different nationalities, the right to family has been the most frequently invoked for judicial review in an immigration context. In the 2000 case *Chan Mei Yee v Director of Immigration*, the judge cited Robertson & Merrills' *Human Rights in the World* to support the court's view that the ICESCR is "promotional in nature" and that it is "a necessary flexibility device, reflecting the realities of the real world

[179] Ramsden, "Judging Socio-Economic Rights in Hong Kong."

and the difficulties involved for any country ensuring full realization of economic, social, and cultural rights."[180]

For migrants and families of migrants, "the realities of the real world" of Hong Kong and "the difficulties involved" are the fact that

> In light of Hong Kong's small geographical size, huge population, substantial intake of immigrants from the Mainland, and relatively high per capita income and living standards, and given Hong Kong's local living and job market conditions, almost inevitably Hong Kong has to adopt very restrictive and tough immigration policies and practices.[181]

In consequence, "the courts have said repeatedly that they will not lightly interfere with the Director [of Immigration]'s policies or exercise of discretion."[182] In 2011, the court would also support that the Director of Immigration is not obligated to exercise his discretion on humanitarian grounds. It can be reasonably deduced that in following a stringent non-interference stance on matters of immigration, the court is avoiding the floodgate consequences of setting precedents based on individual circumstances. Thus, *Chan Mei Yee*, *Hai Ho Tak*, *Comilang* and numerous other claims for the right of abode on the grounds of their right to family have been unsuccessful based on the legal *class* of migrants the applicants belonged to: mainlanders and migrant workers. Differentiated by their racialization against the normative local Hong Kong Chinese, the immigration status of mainlanders and migrant workers are further differentiated by their status as workers: a mainland Chinese person can enter Hong Kong for a number of reasons, but the migrant domestic worker is only permitted entry on the condition of her employment status.

If it was previously governed as a matter of labor policy, the landmark *Comilang* case in 2011 cements the migrant domestic worker's status in local jurisprudence as a *worker* in a place of work where she is disciplined as a lean, resilient worker discouraged from fulfilling her own social needs—namely, in the *Comilang* case, the domestic worker's right of abode and right to family. Notably, the case reaffirms the court's deference to the Immigration

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[180] *Chan Mei Yee v. Director of Immigration*, HCAL77/1999, 24–5 (2000), https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/1999/HCAL000077B_1999.doc&mobile=N.

[181] *Comilang v. Commissioner of Registration*, HCAL28/2011 (2012), 12, https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2011/HCAL000028_2011.doc&mobile=N.

[182] Comilang v. Commissioner of Registration, 12.

Director's broad discretionary power in balancing between public interest and the fundamental rights of individual migrant domestic workers based on a new link made between ICESCR provisions and the Immigration Reservation made to the ICCPR by the UK government upon ratification in 1976.

The *Comilang* case concerns the future of a child who was born to a Hong Kong permanent resident father and a migrant domestic worker mother, Comilang Milagros Tecson, and thus naturalized as a Hong Kong permanent resident under Article 24(2) of the the Basic Law. The parents had separated, and the Family Court had earlier ruled for the child's custody in favour of the mother. Upon the termination of her FDH contract after reporting abuse by her employer, Comilang faced eminent deportation without the right of abode in Hong Kong, and without the right of abode, she would be unable to raise her child in Hong Kong. Comilang appealed for her right to abode provided by the route to permanent residency under Article 24 of the Basic Law and the right to raise a family freely under Article 37 of the HKBORO, as well as for her child's fundamental right to family guaranteed by the HKBORO.

The court ruled against Comilang by clarifying that the years of Comilang's residency in Hong Kong under her FDH employment contract could not constitute "ordinary residency" for the seven-year naturalization requirement. At the same time, Comilang could have no valid human rights claims under the HKBORO because of the Immigration Reservation, triggered by the fact that her right to family is directly linked to an immigration decision for her right to remain. The Immigration Reservation, entered by the UK upon ICCPR ratification and reflected in Section 11 of the HKBORO, withholds the ICCPR and its domestic implementation—the HKBORO—from having any application or effect on "any immigration legislation governing entry into, stay in and departure from Hong Kong" for "persons not having the right to enter and remain in Hong Kong." The jurisprudence that has followed[183] gives the Immigration Reservation constitutional force by linking Article 39 (international law application) and Article 154(2) of the Basic Law (empowering the

[183] *GA v. Director of Immigration*, FACV7/2013 (2014), https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2013/FACV000007_2013.doc&mobile=N. *Ghulam Rbani v. Secretary for Justice*, FACV15/2013 (2014), https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2013/FACV000015_2013.docx&mobile=N. *Comilang and Another v. Director for Immigration*, FACV9/2018 (2019), https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2018/FACV000009_2018.doc&mobile=N.

government to exercise effective immigration controls) "by necessary implication" to extend the application of the Immigration Reservation to cognate rights in the Basic Law, "whether they are invoked directly or in connection with the enjoyment of another right."[184]

By naming Article 10 of the ICESCR as a cognate right in *Comilang*, the court held that taken together, international law application, immigration controls, and the Immigration Reservation have to be interpreted holistically as "laying down a coherent scheme in the specified immigration context," whereby "whenever one is dealing with someone who has no right to enter and stay in Hong Kong, the Immigration Reservation operates as a constitutional reservation in respect of matters coming within the scope of immigration control."[185] Given the constitutional status of the Immigration Reservation, it would override any claims to the contrary relying on the lesser employment statutes, such as the ordinance against racial discrimination.

The court did not support the idea that a permanent resident's right to family could override an immigration decision based on the Immigration Ordinance, maintaining its view that "like all other human rights, the rights of the family under [HKBORO] is not absolute,"[186] because the Immigration Reservation is "an essential limitation on the general provisions of the international covenant brought about by the reality of Hong Kong's geographical position and economic success."[187] It has been argued that the Reservation's extension to Hong Kong was an oversight that neglected its relevance to local conditions because the original UK reservation was made in light of the British nationality law restrictions in the 1970s to prevent the UK from absorbing an influx of immigrants from newly independent colonies.[188] But in light of all the contemporary reality of Hong Kong's circumstances, the court dismissed the legitimate expectation that Immigration Department decisions will (and must) take the international covenants into account when "the manifest instruction to the Director [of Immigration] is that, in applying Hong Kong's immigration laws, he is not bound by the provisions of the ICCPR and the CRC."[189]

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[184] *Almorin v. Director of Immigration*, CACV112/2018, 18 (2020). https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2018/CACV000112_2018.docx&mobile=N.
[185] Comilang v. Commissioner of Registration, 15.
[186] Comilang v. Commissioner of Registration, 17, 25.
[187] Comilang v. Commissioner of Registration, 17.
[188] Ramsden, "Reviewing the United Kingdom's ICCPR Immigration Reservation in Hong Kong Courts."
[189] *Comilang v. Commissioner of Registration*, 25. The Convention on the Rights of the Child has been ratified but not given domestic effect in Hong Kong laws.

In jurisprudence, the *Comilang* case was notable for establishing that a permanent resident may not rely on their rights under the HKBORO to challenge an immigration decision on a non-permanent resident who does not have the right of stay in Hong Kong. But equally striking are the court's deference to immigration policy in the public's interest and its apparently self-evidentiary position that in the immigration context, family rights are not absolute. To be clear, stringent restrictions on immigration on family reunion grounds also consider the salient issue of mainlanders separated from their Hong Kong family, which is dealt with by a separate immigration permit policy. But in the migrant employment context, the rights to family of Southeast Asian migrant workers under the FDH policy are disadvantaged compared to the higher class of imported "professionals and investors" under the General Employment Policy who are given a path to permanent residency. The court and the Immigration Department's manifested reasoning to safeguard public interest against human rights claims means to minimize migrant workers' burden on state resources and the potential disruption caused to the social fabric.

Foreclosing the Constitutional Protection of the Human Rights of Migrant Domestic Workers

If in 2001, the court has given hope for the development of an ICESCR jurisprudence unencumbered by the Immigration Reservation of the ICCPR,[190] by 2011, that opening has become blocked by a link made in *Comilang* between the HKBORO, and the provisions of the ICCPR and the ICESCR as cognate rights—suddenly, they are "indivisible" when they are convenient for the court. In searching for the widest scope of application against possible implications for giving full fundamental rights to migrant domestic workers, in 2017, the court builds on *Comilang* judgment in *Almorin v Director of Immigration* to deny the right to just and favourable work condition based on the ICESCR.

Since an amendment made to the SEC came into effect on April 1, 2003, all migrant domestic workers have been required to reside in their place of employment—namely, their employer's

[190] "Unlike the two other conventions, there is no reservation in relation to immigration matters. However, the Court of Appeal in Hai Ho-tak held that even in the absence of the reservation the Director is entitled to implement lawful decisions in matters relating to immigration because of the unique position faced by Hong Kong. The decision in Hai Ho-tak is binding on me."

home.[191] In turn, the employer has the obligation to provide suitable and furnished accommodation with reasonable privacy, subject to discretionary government inspection. The so-called "live-in rule" was previously subject to a "live-out" possibility by mutual agreement between the employer and the domestic worker. Under the new law, the employer or employee in breach could be prosecuted for making a false representation to the Immigration Department, a criminal offence under the Hong Kong Immigration Ordinance punishable for up to HKD$150,000 fine and 14 years of imprisonment.[192] If the SEC was previously treated as a simultaneous visa application for the workers' legal entry into Hong Kong, the contractual changes to accommodate the live-in requirement essentially legally binds employment and residency into a single, distinct class of migrant-worker status in Hong Kong. There is no employment without specified residence, and no legal entry without employment with specified residence.

In 2017, Lubiano Nancy Almorin, a migrant domestic worker from the Philippines, lodged an application for judicial review of the live-in clause in violation of the Basic Law and the HKBORO. In *Almorin vs. Director of Immigration*, the applicant challenged the clause on four systemic grounds: 1. the Immigration Department did not have lawful authority to impose the live-in requirement as a condition of stay for work visa approval. 2. Referencing a 2017 judgment on the government's positive obligation under Article 4 of the Bill of Rights to ensure prohibition of forced or compulsory labor,[193] and the domestic applicability of Article 7(b) and (d) of the ICESCR guaranteeing the rights to safe and healthy working conditions, adequate rest, leisure, limitation on working hours, and periodic holidays with pay, and Article 6(1)(a)(i) of the Migration for Employment Convention (MEC) that stipulates non-discriminatory remuneration treatment between migrant and local workers, mandatory employer-employee cohabitation presents disproportionate risks of violations to the employee's above fundamental rights and the enabling live-in clause is therefore unconstitutional. 3. The implementation of the rule discriminates against migrant domestic workers as domestic workers or migrant workers contrary to Article 25 of the Basic Law stipulating "all Hong Kong residents shall be equal before the law." 4. Relying on the anxious scrutiny approach, the implementation without exception is irrational and an unlawful fetter

[191] *Standard Employment Contract*, ID 407, clause 3. https://www.immd.gov.hk/eng/forms/forms/id407.html
[192] *Immigration Ordinance*, cap. 115, section 42 (1972).
[193] *Almorin v. Director of Immigration*, HCAL210/2016, 27 (2019). https://legalref.judiciary.hk/lrs/common/ju/loadPdf.jsp?url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2016/HCAL000210_2016.doc&mobile=N.

of the Immigration Department's discretionary power.[194] The case was also systemic in the sense that it did not rely on the personal circumstances of the applicant, even though she was a victim of abuse by her employer. Dismissed on all four grounds in the first instance, the applicant appealed in 2017 on the basis of an ICESCR Article 7 violation of the live-in clause. The Article 7 right to the enjoyment of just and favourable work conditions is arguably entrenched by Article 39 of the Basic Law into implementation by the rest day regulations in Section 17(1), 19, 20, and 63(2) of the Employment Ordinance.

The Immigration Department is first of all given a constitutional responsibility by the Basic Law to "apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions,"[195] which preconfigures its broad discretionary power given by the courts to secure labor import in Hong Kong. The courts do so in case law concerning migrant domestic workers' rights by drawing a firm line between the content of the employment contract and the content of the Immigration Department's "conditions of stay." The former, the court maintains, is strictly a matter of private contract between the employer and the employee, while the latter regulates the individual "activities" or "purposes" for which the foreigner is permitted to enter or remain in Hong Kong.[196] The High Court went as far as to say that even if it weren't the case already, it does not find it objectionable to grant the Immigration Department the power to impose the live-in clause as the migrant worker's condition of stay, or, on the employer's side, to apply the clause as an eligibility criteria to employ a migrant domestic worker "in order to give effect to Hong Kong's labor and immigration policies."[197]

In sum, under the current labor import mechanism, in the court's view, the live-in clause is a matter of private employment contract, and the fully executed employment contract is an undertaking from the employer and employee to the Immigration Department for the government's permission to employ an imported worker and approval for a work visa.[198] Therefore, in the eyes of the Immigration Department, any breach of the live-in clause would be considered making a false statement to the government, rather than breaching the conditions of stay, because the migrant worker's accommodation arrangement in Hong Kong

[194] Almorin v. Director of Immigration (2018), 2.
[195] *HKBL*, Article 154(2).
[196] Almorin v. Director of Immigration (2018), 25.
[197] Almorin v. Director of Immigration (2018), 26.
[198] Almorin v. Director of Immigration (2018), 8.

is not an agreement between the migrant worker and the Immigration Department. Even though the applicant made the initial case that the Immigration Department *does* impose conditions concerning "activities" or "purposes" for which a person is permitted entry and a migrant domestic worker's employment could fall within such "purpose," the High Court retorted that "sleep cannot reasonably be construed as an activity or purpose subject to regulation by immigration powers unless the location where one sleeps can be said to be a necessary function of one's employment."[199] At this point this might sound at least a little bit logically incoherent with the "live-in" precondition of why migrant domestic workers are allowed by the labor import policy in the first place—if to be available around-the-clock isn't part of the point—but the atomization of employment details was not up for contest in this court. The High Court judge concluded:

> A domestic helper working in his/her employer's residence would necessarily be exposed to a risk of ill-treatment by the employer while working there, regardless of whether he/she also lives in the employer's residence […] Where ill-treatment does occur, it seems to me that the real cause of the problem lies in the employer, instead of the fact that the FDH is required to live in the employer's residence.[200]

Arguments linking the domestic labor scheme to "modern slavery" or forced or compulsory labor are therefore disqualified because based on the principle of the worker as a free and equal individual "offer[ing] their service voluntarily for the contractual consideration."[201] Categorically, their work performed does not pass the test of being "exacted under the menace of a penalty and it is undertaken involuntarily."[202] And per the employment contract, based on the fixed two-year term or the employee's termination at will by giving one month's notice or forfeiting one month's wages, the worker's situation does not pass the test for "servitude," defined by the court as "a special, aggravated, form of 'forced or compulsory labor,'" where the worker is compelled to provide services where there is a reasonable and objective basis for their feeling that "his/her condition is permanent."[203]

As the judgment of *Almorin vs. Director of Immigration* reaffirms, while the Court of Final Appeal has allowed for judicial review on the basis of the ICESCR's domestic applicability according to Article 39 of the Basic Law, it has been very difficult for any applicant seeking

[199] Almorin v. Director of Immigration (2018), 23.
[200] Almorin v. Director of Immigration (2018), 45.
[201] Almorin v. Director of Immigration (2018), 44.
[202] Almorin v. Director of Immigration (2018), 30–1.
[203] Almorin v. Director of Immigration (2018), 32–3.

IESCR rights claims to argue for violations of fundamental rights based on violations of similarly worded provisions in the Basic Law or the Employment Ordinance. The reliance on the ICESCR and MEC are therefore dismissed in the first instance because they had not been given domestic effect. Migrant applicants face the additional barrier of a restrictive immigration policy and the Immigration Reservation that limits the applicability of international human rights treaties to non-residents in Hong Kong. The court denied the possibility of claiming an ICESCR right by linking the HKBORO and the ICESCR as cognate rights established in *Comilang*, with the logic that if Almorin could not challenge the live-in clause based on the Immigration Reservation on Article 4 of the HKBORO (protection against forced labor), then it would be incongruent to allow a challenge based on ICESCR Article 7.[204] The constitutional opportunities to realize the human right to just and favourable work conditions as a fundamental right came to be withheld from migrant domestic workers by 2018.

At the end of the day, the court adheres to free market principles by relegating responsibility and risks to the individual worker and employer and maintaining that if the migrant worker does not agree with the material clause to live with their employer, then they should not sign the contract and take the job. This neoliberal line of reasoning conveniently leaves out the fact the material terms of the SEC are non-negotiable on an individual basis. It also ignores the salient, reported risks of contract fraud and exploitation by recruitment and placement agencies, as well as human trafficking. The live-in clause became fortified as a condition that is both within and without the control of immigration law. Its potential violations of fundamental rights guaranteed by the ICCPR and ICESCR are precluded from migrant domestic workers. As a contractual stipulation, it is ruled to be outside of the effective regulation of immigration control which does not have a contractual relationship with the migrant worker signatory. In legal terms, the live-in requirement is therefore *simply* a material component in a two-part, indivisible contractual undertaking that binds the migrant worker equally to the employer and the Department of Immigration. For the migrant domestic worker, their "workplace" is at once the territory of Hong Kong under the control of Immigration and the specified residence of their specified employer as governed by their employment contract. In other words, under current laws, there is no part of Hong Kong territory where the migrant domestic worker can claim juridical personhood *outside* of their

[204] Almorin v. Director of Immigration (2020), 17.

identity as legal migrant affixed by free and equal employment agreement in the full spirit of liberal individual ideals.

As Michael Kearney observes, the highly sophisticated legal architecture for migrant labor manages

> to separate labor from the jural persons within which it is embodied, that is, to disembody the labor from the migrant worker. Capitalism in general effects the alienation of labor from its owner, but immigration policy can be seen as a means to achieve a form of this alienation that increases greatly in the age of transnationalism, namely the spatial separation of the site of the purchase and expenditure of labor from the sites of its reproduction, such that the locus of production and reproduction lie in two different national spaces.[205]

The conceptual point is that to be restored to their full juridical, political, economic, and social personhood, the migrant domestic worker would have to clock out, leave their workplace, and go home at the end of the work day. A work day could be 9AM-6PM for ordinary workers, but for migrant live-in domestic workers, they cannot be released from their two-year "work day" without amending or breaching employment agreement.

[205] Onuki, "The Neoliberal Governance of Global Labor Mobility," 7.

Conclusion: Individual Human Rights and Public Economic Interest

Racial capitalism implicates the racialization of its labor force in the economic rationality of its governance, which requires a legal institution that codifies the value of racial differences into normative social order. An advanced capitalist economy and prosperous society like Hong Kong became economically successfully not in spite of its tolerance for the human rights deficit for its migrant domestic worker class, but *because* the hierarchy of racial difference is built into its economic constitution. Equal labor protection statutory employment and immigration laws become subordinated to the more powerful dictates of constitutional barriers to universal equal human rights that have overtime, consolidated an immigration policy that maintains the racial labor regime that categorically denies the human rights of its collectively essential but individually dispensable underclass.

The core features of the migrant domestic labor policy—the two-week rule, the MAW, and the live-in requirement—also interlocked by the Standard Employment Contract. The Standard Employment Contract legitimizes the socio-historically slippery category of live-in domestic work as modern employment secured by the primacy of the freedom of contract. Despite diminishing work and living conditions, migrant domestic workers are prevented from claiming their full human rights when they are treated by the law as freely contracted individuals who voluntarily entered into employment contract and have the legal power to withdraw from such contract. In turn, the systemic abuses of the migrant labor policy are overlooked by the court that is inclined to consider the migrant domestic worker's immigration and employment situation in Hong Kong as a matter of private employment contract between free and equal individuals.

While labor protectionist measures such as the MAW that prevents a race to the bottom in the domestic caregiving labor market, might seem counterintuitive to free competition doctrine, conjoined as the interlinked features of a consolidated labor regime, the racialization and labor protectionist logic of the migrant domestic labor policy in fact underscore a crucial dimension of neoliberal governance. Neoliberal governance is not limited to non-interventionism and deregulation, but also functions positively as an economic constitutionalism and state design. In this light, migrant domestic workers relying on the judiciary for their human rights claims are pre-empted by the limits of its colonial legacy, most notably the Immigration Reservation made to the ICCPR by the UK that continues to

apply in Hong Kong with a renewed vigor to safeguard its racial labor regime. The migrant labor policy can be seen from the long view as an extreme articulation of a deregulated policy for a privatized domestic caregiving market that is, at the same time, constantly reregulated by the court that toggles between the intensities of applicable immigration and employment laws.

Without any unambiguity, the migrant domestic labor policy is sustained to provide the local population with full-time live-in domestic service is an economic regime to increase local productivity while minimizing cost for the state. The *Comilang* and *Almorin* judgments reaffirm the labor policy's design to minimize necessary state resources to guarantee the full human rights of migrant domestic workers in the employment state, while the live-in domestic worker is expected to fulfil their employment contract without becoming, in the words of the Secretary of Security in 1978, "a burden on the community."[206] According to the courts, such burden would include their demands for housing, social services, and family life.[207] Consistent with neoliberal ideals, migrant domestic workers are valued for their competitive edge: low wage and low external cost. It would be undesirable for the government to continue to the labor importation policy if negative externalities—for example, if migrant workers are not prevented from bearing and raising a family in Hong Kong and compete with housing, health, and education resources—start to overwhelm the benefit of their low wages. By restricting the legitimacy of migrant domestic workers' status to their contributions to the economy[208] and tailoring the law around such stated restrictions of their conditions of stay, the live-in clause also endangers the migrant worker's human rights to family, just and favourable work conditions, and continuous improvement of living condition. But as the alleged human rights violations of the migrant domestic labor policy are tolerated by the judiciary, the individual worker's freedom to voluntarily enter into employment contract would override these concerns in the eyes of the court.

Under this racial neoliberal regime, the artificially cheapened migrant domestic labor depends on the territorial differentiation between Hong Kong's high economic productivity and the less prosperous economies of the workers' home countries. In turn, the differentiation

[206] Almorin v. Director of Immigration (2018), 13.
[207] Almorin v. Director of Immigration (2018), 12.
[208] Ester Gallo and Francesca Scrinzi, "Outsourcing Elderly Care to Migrant Workers: The Impact of Gender and Class on the Experience of Male Employers," *Sociology* 50, no. 2 (April 28, 2015): 366–82, https://doi.org/10.1177/0038038515573688.

allows for the defence of their low wages in violation of the right to fair remuneration to be relatively justified as "riches" when indexed to wages in their home countries rather than to the standards of living in Hong Kong. Legally exceptionalized as a distinct class of migrant workers and a distinct class of domestic worker, migrant domestic workers are left without meaningful coalitional power as political subjects to assert their rights claims where they suffer the most silence by law.

In turn, the racial labor hierarchy is maintained by a differentiated immigration policy. In a reversal of early colonial residential segregation laws, the policy effect of labor segregation is shielding the racial logic of immigration control behind the economic logic of protectionism. In either case, the economic policy upholds the modern capitalist ideology of white supremacy. It is, as Silvia Federici has theorized, an "accumulation of difference and divisions" within the workforce through legalized hierarchies built upon gender, race, and other biological inscriptions that serve to both intensify and conceal exploitation.[209] Prioritizing for the settlement of "foreign professionals"—where "foreign" is coded for Anglo-European countries with advanced economies and financial centers and "professionals" are directed at the financial and service sectors—over the temporary, utilitarian contribution of low-skilled workers is clear graph of the civilizational ambition of racialized human populations according to their labor value. This wording from 2003 also presents the recent complication of increasingly diversifying flow of mainland workers as a result of the PRC's own economic liberalisation, while demarcating this population as *outside* of the negotiation of relations between an existing hierarchy of low-skilled migrant workers, normatively upwardly mobile local residents, and high-skilled foreign professionals.

The systemic challenges to the constitutionality of the live-in clause that has been raised to the Court of Final Appeal in *Almorin v. Director of Immigration* is at its core an appeal to justice for the entrenched exploitation of the migrant labor policy. However, relying on the fundamental rights guaranteed by the ICESCR faces inherent barriers in Hong Kong's dualist system, preconfigured notions of efficiency under the neoliberal regime, and human rights' preoccupation with establishing a minimum floor of protection that has "failed to respond—or even allowed for recognizing—neoliberalism's obliteration of the ceiling on inequality."

[209] Silvia Federici, "The Accumulation of Labor and the Degradation of Women," in *Caliban and the Witch: Women, the Body, and Primitive Accumulation* (New York: Autonomedia, 2004), 64.

As the most recent landmark case in an accumulation of fundamental rights challenges to the labor import policy, *Almorin v. Director of Immigration* reiterates the deficient implementation of the ICESCR in domestic law and the hegemonic political rationality that organizes the social sphere for public interest rather than individual rights. The constitutional exclusion of migrant domestic workers from the right to have rights warns of the ornamentalism of touted protection of anti-discrimination employment laws "in an era in which human rights norms and movements are frequently overloaded with expectation, the best conclusion is that a Band-Aid is not an adequate response to a charnelhouse (even if Band-Aids have their uses)."[210]

Interdependent factors would first have to be conceptually delinked or dismantled before migrant domestic workers would have a chance to claim fundamental rights at court in a territory that is viewed by the system as merely their place of employment—the analogous idea that, rightly or wrongly, the worker "belongs to the company" during work hours and can only make rights claims as workers within company premise. But as the judgment of *Comilang*, *Almorin*, and the Hong Kong human rights jurisprudence show, the right to rights for migrant domestic workers becomes a legal void when the work hours are 24 hours a day, and the "company" is someone else's home in a foreign country.

Neoliberal Futures

Addressing the persistence of colonial-era inequalities that impede the right to development for colonized and indigenous peoples, the 2019 UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Tendayi Achiume has noted the "structural encoding of the racialized division of labor" produced by European colonial capitalist expansion "remains a defining feature of the global extractivism economy, in which labor remains racially stratified."[211] Without being a classical extractivist economy in the sense of colonial exploitation of indigenous natural resources and without the redress of the right to self-determination, the structural inequality of *human* resources in Hong Kong evades the dominant human rights discourse on sovereign inequality, indigenous rights, and

[210] Moyn, "A Powerless Companion," 169.
[211] Tendayi Achiume, "Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance : Note / by the Secretary-General," in *Report of the Special Procedure of the Human Rights Council* series, *UN Digital Library*, August 21, 2019, https://digitallibrary.un.org/record/3827500?ln=en.

retributive justice. Inoculated by colonial-era reservations for the domestic application of international human rights convenants, local economic priorities, neoliberal public interest, and a racialized migrant labor regime of unequal rights, the judiciary is empowered to rule *for* the labor importation policy rather than to rule for the fundamental rights of individual migrant workers. The priority is betrayed by the balance tests at each stage that seek to adjudicate between the rights of migrant workers and the economic benefits of the labor policy, which *a priori* denies an alternative comparative between the equal rights and residency status of migrant domestic workers and the equal rights and residency status of local domestic workers. Following the labor administration's policies, the courts are inclined to instead make the categorical comparison between migrant domestic workers and migrant workers in other industries imported under the Supplementary Labor Scheme. The differentiated immigration status of the migrant domestic worker is therefore sanctioned to take precedent over their worker status, rendering employment discrimination claims atomized and ornamental in the grand scheme of their systemic oppressions.

Between standards of international human rights and standards of modern racial neoliberalism, economic rationality in the Hong Kong jurisprudence maintains the primacy of the law of contract over the rights to free movement, fair labor conditions, and social development. However, to mitigate the burden of equal labor, equal rights on the state, racial logic erects the necessary border between foreign and domestic labor force, which makes it possible for the legal system to deny migrant domestic workers their worker's rights based on their rights-deprived immigration status. Consolidating since the early 1970s, the migrant labor regime has been suspended in continuity through the sovereignty transfer and breakages in Hong Kong's political economy. Situating the state of migrant workers' human rights in consideration of Hong Kong's geopolitical personality as an exceptionalized liberal jurisdiction within socialist China's modernization brings to question the future modulations of an entrenched racial capitalist social order. Already, following profoundly restructured socio-legal norms after a watershed period of renewed antagonism between protracted pro-democratic movements in Hong Kong and the crackdown from the authoritarian central government,[212] there has been proposals for an anti-intra-racial discrimination legislation that aims to regulate a competitive environment for an increasing influx of workers in all sectors

[212] Siu Kai Lau, "The National Security Law: Political and Social Effects on the Governance of the Hong Kong Special Administrative Region," *Public Administration and Policy* 24, no. 3 (October 15, 2021): 234–40, https://doi.org/10.1108/pap-08-2021-0050.

from mainland China to Hong Kong.[213] Rather than enabling mutual recognition through rights empowerment, racial neoliberal imperatives offer pliable rationality for nondemocratic governments to drive inhuman valorization through differentiation.

While it is encouraging that the higher courts remain willing to hear judicial review based on the ICESCR, under the prevailing neoliberal regime, migrant domestic workers who recognize their accumulated disadvantages and seek to challenge the inherent restrictions of the labor importation policy face the insurmountable challenge of arguing against themselves. The invincibility of the migrant domestic worker economy in an interdependent world is analogously wedded by cycles of uneven development and neoliberal hegemony. Reforming the migrant domestic worker policy and the norms that tolerate its human rights abuses would require a radical break with the modern capitalist assumptions that undergird a racialized labor regime at the expense of the full and equal human rights of migrant workers, ostracized at every turn in the legal maze that encases the freedom of the whole society.

[213] Peter Lee, "Hong Kong's Equality Watchdog Mulls Amending Law to Protect Mainland Chinese from Discrimination," Hong Kong Free Press, March 21, 2023, https://hongkongfp.com/2023/03/21/hong-kongs-equality-watchdog-mulls-amending-law-to-protect-mainland-chinese-from-discrimination/.

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