1−5. 雇用社会の崩壊

他方、労働者派遣や派遣類似の就労・雇用形態が急速に拡大するとともに、労働組合の力が後退する中で、日本の職場の多くが、1. 非正規雇用（不安定・差別雇用）の増加、2.過労死・過労自殺につながる違法・不払い残業の蔓延（年間3000時間以上働く「過労死予備軍」労働者が700万人に達している）、そして、3.労働組合の無力・形骸化という点で共通した特徴を有する「労働法のない世界」になってしまった。

1−6. 市場原理主義と労働法の破壊、労働契約法の動向

1995年頃から、経済界や政府には「市場原理主義」が強い影響を与えている。労働分野の規制緩和を推進して、労働者保護法制に対して「最後通牒」を与えようとしている。現在の焦点は、市場化テスト法によって「職業安定行政の民営化」である。

現在、政府内部では「労働契約法」の制定が準備されている。2005年9月15日に発表された「今後の労働契約法制の在り方に関する研究会報告書」は、労働契約法の制定を提言した。これは一面では、従来不明確であった労働契約関連の法規制を明確化することを目的にしており、経営者側からは労使の義務の明確化などについて規制強化だと反発があるが、逆に「解雇の金銭解決制度」「変更解約告知制度」「労働時間規制適用除外（white collar exemption）などの導入を提言している点で労働側からの強い反発を受けている。日本における労使の力関係を考えると、労働側に不利な点だけが立法化される危険性が少なくない。

1−7. 労働者全体を代表する新たな労働者団結への期待

日本は争議行為が極端に減少し、最近10年間で10分の1に激減している。労働組合は、こうした状況を率直に振り返り、生まれ変わる必要がある。非正規職を中心として多くの労働者が無権利のまま放置されている。ようやく、各地で地域労働組合によって、派遣労働者など非正規職労働者の権利擁護の活動が広がろうとしている。日本の労働組合運動には、従来の組織や活動とはまったく異なった、労働者全体を代表する新たな労働組合活動が緊急の課題となっている。

【表1】雇用・労働分野の規制緩和関連略年表

1981年　臨時行政調査会による「行政改革」（臨調行革）開始
1983年　職業安定行政再編（パートバンク(part−bank)設置）
　・不安定雇用を労働行政が「追認」
1984年　経済同友会提言
　★「中間労働市場」論
1985年　男女雇用機会均等法制定＋労働基準法改正
　★「保護ぬき平等」論
　労働者派遣法の制定
　・「間接雇用」の一部「合法化」
　・戦後労働法体系、解体への出発点
1988年　労働基準法改正（労働時間規制の弾力化、各種変形労働時間制導入）

　★「週40時間導入経過措置」論
1995年　「雇用の安定」から「雇用の流動化」への転回
　★日経連「雇用の三分化論」（「新時代の『日本的経営』」）
　・経営者団体が「日本的雇用」そのもの見直しへ踏み切る
　・労働行政の転回・変質＝「労働市場法論」の公認
　・労働基準法、労働者派遣法、職業安定法の全面見直しへ
　・新自由主義的労働市場法論の急激な台頭
1996年　労働者派遣法の一部改正（対象業務の追加）
1998年　労働基準法の大改正（有期契約の上限延長、新裁量労働制等）
1999年　職業安定法・労働者派遣法の大改正（派遣業務の原則自由化）
2003年　労働基準法改正（有期契約の上限3年原則、新裁量労働制規制緩和）
　職業安定法・労働者派遣法改正
　（物の製造業務への派遣拡大、派遣期間の延長）
2004年　日本経団連 正社員雇用の相対化
　★多様化する雇用・就労形態における人材活性化と人事・賃金管理（'04/05/18）
2005年　「職業安定所の民営化」
　「労働契約法」制定の動き
　「今後の労働契約法制の在り方に関する研究会報告書」

2. 非正規職労働者の現実 派遣労働者を中心に

2−1. パートタイム労働・アルバイトと派遣労働の違い

2−2. 派遣労働者・非正規雇用労働者の急増

厚生労働省の「労働者派遣事業報告」（2005年2月18日発表)によれば、2003年度に、実際に派遣された派遣労働者数は2,362,380人で、対前年度比は10.9％増であった。法改正以降では、1999(平成11)年度が1,067,949人(＋19.3％)、2000(平成12)年度が1,386,364人(＋29.8％)、2001(平成13)年度が1,747,913人(＋26.1％)、2002年度2,129,654人（＋21.8％）と前年度比2割から3割近くになり、わずか4年間で派遣労働者数は2倍に達したことになり、少し増加率は低くなったが依然として急増している。

2−3. 違法な雇用慣行：偽装請負（違法派遣）の横行

さらに重要なことは、この統計には違法派遣が含まれていないことである。工場などの製造現場を中心に、厳格な請負の基準に照らせば、請負の実体が疑わしい事例が広がっており、労働者数は数百万に達すると推測されるが、その数は明確ではない。労働行政が違法派遣摘発をする必要があるのに、行政としての怠慢のために偽装請負による違法派遣が蔓延している現実がある。こうした業務請負形式で急成長した「クリスタル・グループ（crystal group）」は、年間2000億円もの売り上げがあって注目されている。そして、「週刊東洋経済」や「日経ビジネス」などの著名な経済雑誌では、労働者派遣法や職業安定法に違反する「ルールに反する違法雇用慣行」の広がりだとして、警告をする論調も現れている。

2−4. 「雇用主」の実体がない労働者派遣業者（派遣元）
この２０年間に派遣会社が急増し、雇用主の実体がない零細派遣会社が続々と生まれている。その理由は、労働者派遣事業の許可基準が余りにも緩やかであるためだ。例えば、労働者派遣事業の許可を受けるために必要な事務所の規模は、わずか２０平米で良いとされている。また、ドイツでは、派遣部門以外に実業部門をもつ企業が派遣会社を兼業している例が多いということだが（大橋範雄教授の指摘）、派遣先（使用事業主）企業の子会社や系列会社であって、企業としての独立性のない派遣会社が多い。

2−5. 派遣先（使用事業主）企業の横暴・労働者の人権侵害
派遣先（使用事業主）企業は大企業が多いが、派遣労働者に対する人権無視と言える悪辣な雇用管理を行っている。とくに、「事前面接」「直接面接」「競合」「トライアル」など、採用段階での雇用管理への介入や、事実上の解雇にあたる労働者派遣契約の中途解約も些細なことを理由に行われている（例：加齢、容姿、セクシャルハラスメントの被害申告、病気での欠勤、有給休暇などの権利主張）。
最近、東京地方裁判所は、2005年10月4日、派遣先（使用事業主）会社と派遣元会社の暴力による人権侵害が争点となったヨドバシカメラ事件で判決を下した。本来の始業時間の30分前に出勤することを強要し、それに10分遅れたことを理由に、派遣会社と派遣先（使用事業主）企業の上司が労働者を殴る等の暴行で脅迫し、出勤を拒否した労働者の自宅に押しかけて、母親の前で殴る蹴るの暴行を加えて重傷を負わせた。東京地方裁判所は、原告（派遣労働者と母親）の請求を認め、派遣先（使用事業主）、派遣会社と上司らに合計約560万円の損害賠償の支払いを命じた。

2−6. 有期雇用（登録型派遣）の弊害
派遣労働の多くは、有期契約による「登録型派遣」である。次の契約更新がない可能性があるので、登録型派遣労働者は、労働基準法等に定められた最低基準の権利行使さえ困難である。

2−7. 差別賃金
派遣会社は、派遣労働が人件費を数分の一に削減する点で有用であることを宣伝している。まさに、日本の派遣労働は世界でも異常な「同一労働差別待遇」を生みだしている。

2−8. 性差別の雇用形態差別へのすり替え
1985年労働者派遣法制定のときに、男女雇用機会均等法が制定された。この19年間、労働における男女平等は後退し、女性労働者の多くが派遣労働者化している。経営者は、女性を派遣労働者化することで「性差別の禁止」を「雇用形態差別」ですり抜けてきた。また現実には、女性派遣労働者には35歳を超えると仕事がなくなるという意味での「35歳の壁（35歳定年制）」が存在している。一方では、育児休業制度が法制度としては充実してきたが、派遣労働者は実際には対象外となっており、産前産後休業や育児休業を取得する派遣労働者、とくに登録型派遣労働者は皆無に近い。

2−9. 青年労働者の酷使

2005年2月、NHKは「フリーター漂流―製造現場を転々とする百万人の若者たち」という番組を放映した。青年労働者が、北海道から九州までの全国各地から栃木県の通信機器メーカーに集められ、民間アパートを借り上げた狭い寮から、毎朝、バスで工場に送り込まれる。メーカー側の都合で仕事や工場が次々に変わる。将来の展望や技能養成もない「使い捨て」の働かせ方のために半数の若者が契約期間の半年もしないで辞めている。また、正社員以上に厳しい労働環境の中で健康を壊す例が増えている。

3. 日本的労働者派遣法自体の問題点・矛盾

労働者保護の視点から見れば、日本の労働者派遣制度は世界最低である。要約的に指摘すれば、次の5点である。

3−1. 長期の派遣（一時的労働）
派遣労働は、本来、一時的労働(temporary work)のことであるが、日本では、これを「派遣労働」(dispatched work)として導入された。「派遣から常用へ（temporary to permanent）」が、労働者派遣制度の内在的な要請であるが、この点が不明確なまま、派遣労働者が10年以上も同一の派遣先（使用事業主）企業で就労する例も存在している。1999年、2003年の法改正で、派遣期間が無制限にされる業務が増え、大多数の業務は1年から最長3年に延長された。経済界は、派遣の長期化・無期化を要望し続けている。
3−2. 派遣先（使用事業主）への自動直接雇用規制の欠如
無許可などの違法派遣や、派遣期間が終了したときには、派遣先（使用事業主）に自動的に直接雇用されるというのが、欧州の派遣法に共通した規制であったが、この点がまったく明確でない。
3−3. 同一労働差別待遇の容認
派遣労働者の待遇は、派遣先（使用事業主）の同一業務担当労働者の数分の一でしかない。欧州の派遣法のような同一待遇の保障もなく、韓国法の均等待遇の努力義務規定も存在していない。この点は日本労働者派遣法の最悪の特徴である。
3−4. 企業別正社員のみ代表する労働組合・労働協約
法制定のときから、企業別労働組合が派遣労働者を組織対象としないことが懸念された。産業別に労働協約を未組織労働者にも拡張する慣行をもつ欧州諸国と異なり、日本の労働組合は、同じ職場で働く派遣労働者は、別会社の従業員だとして、その団結力や労働協約を拡張しないという慣行を維持したままである。
3−5. 派遣労働者の集団的権利について特別な保障規定なし
日本の労働者派遣法は、韓国法と異なり、派遣労働者保護法ではなく、労働者派遣事業を規制する事業法の性格が強い。派遣労働者の保護は、労働基準法や労働組合法など一般の労働法規制しかない。一般の労働者以上に不利な間接雇用形態である派遣労働者のための特別な保護規定が必要であるのに、特別な保障が欠けている。
3−6. 違法派遣に対する厳格な規制不明確
労働者派遣法では、違法派遣に対する規制が不明確であり、実際の運用でも労働者派遣法違反として罰則を適用される例は、19年間でも、きわめて少数であり、皆無に近い。1996年法以降

に導入された悪質「企業名公表」制度も利用されたことは皆無である。

4. 派遣労働者・有期雇用労働者の現実を無視した不利な法運用

政府は、労働基準法、社会・労働保険法等については正規雇用を対象とした運用を維持しているために、派遣労働者や有期雇用労働者にはきわめて不利な扱いが少なくない。法施行後、19年間も経過したが、労働者の声が小さいために改善されていない。

4−1. 時間外労働協定

労働基準法第36条が定める時間外労働に関する事業場協定が、派遣元事業場を単位で締結されることになっている。しかし、多数の派遣先（使用事業主）事業場で就労する派遣労働者が派遣元事業場で過半数代表を選出することは不可能である。これは「虚構」としか言えない制度である。

4−2. 中間搾取をめぐる行政解釈の変更

労働基準法第6条は、就業に際しての第三者の中間搾取を禁止しているが、労働者派遣法導入時に、政府は、派遣労働者の場合、派遣会社は「雇用主」であって「第三者」ではないから「中間搾取」を行う立場ではないとして、中間搾取規定の適用を事実上否定した。

4−3. 勤務継続によって有利になる権利（有給休暇等）

年次有給休暇は、半年勤務で10日（週5日労働）、さらに勤務を継続すると1年で1日または2日増加して最大20日まで保障されている（労働基準法第39条）。しかし、登録型派遣労働者の場合、複数の派遣会社に登録していて、派遣先（使用事業主）が変わる度に有給休暇日数が0日に戻ってしまう（reset）。

その他、「平均賃金」の算定（労働基準法第12条）、雇用保険の運用、社会保険の運用等、正社員に比較して、有期雇用という点から不利に扱われる法運用が少なくない。

5. 2003年派遣法改定

5−1. 改定内容

1999年法改定で、新自由化業務について派遣期間を1年に限定するという規定が設けられたが、経済界はこれに反発していた。2003年改定は、経済界の要望に応えて規制緩和を拡大した。

2003年の労働者派遣法改正の概要は次の通りである。

【表2】2003年労働者派遣法改正の主な内容

a. 紹介予定派遣の法文化・制度整備

(1)紹介予定派遣の定義規定　(2)労働者派遣契約の必要記載事項　(3)労働者特定行為からの除外　(4)紹介予定派遣の明示　(5)管理台帳の調製

b. 派遣期間の延長

(1)派遣期間1年を最長3年に延長:派遣先（使用事業主）事業場の過半数代表による派遣期間設定　(2)派遣期間の制限のない業務

c. 派遣対象業務の拡大

(1)物の製造業務　(2)派遣禁止業務

d. 派遣先（使用事業主）の雇用申し込み義務

(1)派遣期間終了後の直接雇用優先努力義務　(2)派遣期間を超えたときの雇用申込み義務　(3)3年を超えた派遣受け入れの雇用申込み義務　(4)厚生労働大臣の勧告と企業名公表

5−2. 労働者派遣制度の「独自の論理」喪失

この2003年改定は、労働者派遣制度に内在的な「独自の論理」自体を失わせるもので、日本の労働者派遣制度を従来以上に矛盾に満ちた訳の分からない制度に変えてしまった。

主な問題点は、次の3点である。

a. 事前面接容認・紹介予定派遣制度の導入

これは派遣先（使用事業主）の労働者採用段階への介入を容認するものである（採用管理）。その結果、派遣会社は採用について責任を持たない形骸的存在化する。他方で「中間搾取」否定通達（前述）は、派遣会社が実体的にも雇用主であることを理由としていることと矛盾する。

b. 労働者派遣の長期化（無期限化）

前述の通り、一時的労働というのが本来の特徴であるのに派遣を長期化して、派遣から常用へという原則を否認する。派遣労働が常用労働に代替することを一層促進する。

c. 同一労働差別待遇の追認と拡大

派遣労働者と派遣先（使用事業主）従業員の待遇差別については一切改善事項がない。

この結果、日本的労働者派遣制度は、大きな矛盾や問題点を有していたが、それが解決されるのではなく、矛盾を拡大し、問題点を深刻化する改定であった。

労働者派遣制度の「独自の論理」さえ失った日本の労働者派遣法は、世界的にも異常な経営者にのみ有利な制度であり、労働者保護に反するものである。派遣制度自体の弊害が極限に達する危険性が大きいので、私は、日本の労働者派遣法は、これを廃止するするのが適当であると考えている。

6. 非正規労働者の権利闘争と裁判例

以上の通り、過去20年間、日本では非正規雇用形態が経済界や政府によって、一貫して拡大されてきた。労働組合の主流も、労使協調主義と正社員主義を基調として経済界や政府に対決する姿勢を欠いてきたので、非正規労働者は無権利のまま放置されてきた。

しかし、裁判闘争を中心に非正規労働者の権利闘争が展開されてきた。労働者が実際に就労する企業の企業別労組が支援する例は少数であり、個人加盟方式の地域労働組合や地域の産業別労働組合が支援したり、労働弁護士等の法律家の援助で非正規労働者個人が裁判を闘う例がほとんどである。

6−1. 間接雇用における元請事業主又は使用事業主の責任

6−1−1. 団体交渉応諾義務を認めた事例

集団的労働関係で、派遣労働者の労働組合・労働組合員に対して、派遣先（使用事業主）の不当労働行為責任を認める1995年の最高裁判所判決が、現在も重要な意味を持っている。

○朝日放送事件事件・最高裁判所1995年2月28日判決

「請負3社は、朝日放送とは別個独立の事業主体として、テレビの番組制作の業務につき、その雇用する従業員を朝日放送の下に派遣してその業務に従事させていたものであり、もとより、朝日放送は右従業員に対する関係で労働契約上の雇用主に当たるものではない。しかしながら、前記の事実関係によれば、朝日放送は、請負3社から派遣される従業員が従事すべき業務の全般につき、編成日程表、台本及び制作進行表の作成を通じて、作業日時、作業時間、作業場所、作業内容等その細部に至るまで自ら決定していたこと、請負3社は、単に、ほぼ固定している一定の従業員のうちのだれをどの番組制作業務に従事させるかを決定していたにすぎないものであること、朝日放送の下に派遣される請負3社の従業員は、このようにして決定されたことに従い、朝日放送から支給ないし貸与される器材等を使用し、朝日放送の作業秩序に組み込まれて朝日放送の従業員と共に番組制作業務に従事していたこと、請負3社の従業員の作業の進行は作業時間帯の変更、作業時間の延長、休憩等の点についてもすべて朝日放送の従業員であるディレクターの指揮監督下に置かれていたことが明らかである。これらの事実を総合すれば、朝日放送は実質的にみて、請負3社から派遣される従業員の勤務時間の割り振り、労務提供の態様、作業環境等を決定していたのであり、右従業員の基本的な労働条件等について、雇用主である請負3社と部分的とはいえ同視できる程度に現実的かつ具体的に支配、決定することができる地位にあったものといいうべきであるから、その限りにおいて、労働組合法7条にいう「使用者」に当たるものと解するのが相当である。」

6−1−2. 安全配慮義務を認めた事例

次のニコン(Nikon)熊谷製作所事件では、東京地方裁判所2005年3月31日判決が、派遣労働者の過労自殺事件では、派遣元（雇用事業主）だけでなく、派遣先（使用事業主）の安全配慮義務違反を理由に損害賠償責任を認めている。

○ニコン(Nikon)熊谷製作所事件 →参考資料1

6−1−3. 派遣先（使用事業主）による直接雇用をめぐる事例

労働者派遣法では、違法派遣や派遣期間を超えたときの、派遣先（使用事業主）による直接雇用義務が明確ではない。労働者派遣法や職業安定法違反が認められる場合、「黙示の労働契約」が労働者と派遣先（使用事業主）の間に存在するかが争点となる。裁判所は、労働者派遣法制定以前は、黙示の労働契約成立を認めるものも少なくなかったが、次第に、成立を認めることに消極的な傾向を示している。しかし、就労の実態を重視して、最近でも労働者側が勝訴

した事例もある。

○センエイ事件・佐賀地方裁判所武雄支部（第一審）1997年3月28日決定

A社に雇用された労働者らが、A社との業務請負契約に基づきB社で就労していたが、解雇されたため、労働者らがB社との間に「黙示の労働契約」が成立したことを根拠に地位保全と賃金仮払いの仮処分を申立てた。裁判所は、B社と労働者らとの間には、使用従属関係が存在し、賃金の支払者は実質的にはB社であり、かつ労務提供の相手方もB社であるという関係が成立しているとして労働者らの申立てを認容した。

○安田病院事件・大阪高等裁判所1998年2月18日判決

付添婦紹介所に雇用され、そこから病院に派遣されていても、採用の際に病院の面接を受け、紹介所の関与を受けておらず、業務についても病院から指揮命令を受け、給料も病院から支払われている等の状況にあれば、付添婦と病院との間には実質的な使用従属関係があるといえ、黙示の労働契約の成立が認められる。

●伊予銀行・いよぎんスタッフサービス事件　松山地方裁判所（第1審）2003年5月22日判決（労働判例856号45頁）。

A社（派遣会社）に派遣労働者として雇用され、使用事業主であるB銀行（被告）の支店業務に従事していた原告（派遣労働者）が、A社から雇用契約の更新を拒絶されたことから、この更新拒絶は権利濫用として許されない等とし、被告らに対し、労働契約上の地位確認等を求めた。判決は、原告の雇用継続に対する期待は、派遣法の趣旨に照らして合理性がなく、保護すべきものとはいえないとして請求を棄却した。

●大誠電機工業事件・大阪高等裁判所（控訴審）2003年1月28日（労働判例869号68頁）

JR西日本とA社との請負契約により事業場内下請を行っていた労働者（A社の従業員）が、JR西日本からの受注打ち切りによってA社から整理解雇された。この解雇の効力を争い、本来はJR西日本に雇用されるべきであるのに、形式上A社に雇用されて違法な就労形態を強いられたと主張して損害賠償（慰謝料）の支払いを求めた。判決は、業務の遂行がA社と労働者の間の雇用契約に基づく労務の提供であり、JR西日本との雇用契約の両立は不可能であること、請負契約が直ちに労働者派遣ないし労働者供給行為に該当するとは言えず、下請労働者とJR西日本との間の雇用契約成立を認めることはできないとして、慰謝料請求は理由がないとした。

○ナブテスコ事件・神戸地方裁判所明石支部2005年7月22日判決

自動車制御機器メーカーB社の子会社A社に雇用されたパート女性2名が、解雇されたのはB社が神戸公共職業安定所から「違法な偽装請負」と指摘されてA社との契約を打ち切ったからであるとして、B社の従業員としての地位確認を求めた事件である。：裁判所は、「就労の当

初から、原告とB社の間には黙示の雇用契約が成立しており、現時点においても継続している」と判断し、派遣先（使用者事業主）に派遣労働者の雇用責任を認めた。

6−2. 有期契約をめぐる争点

6−2−1. 反覆更新拒否をめぐる裁判例

有期契約については、「連鎖契約」の法理を踏まえた、東芝柳町工場事件・最高裁判決が大きな影響力を維持している。つまり、有期契約であっても、反覆更新されたときには、「期間を定めない労働契約」と実質的に同様に考えて、解雇法理を適用するという考え方である。その後の類似の事例（三洋電機事件定勤社員整理解雇事件等の）で同様な考え方が維持されている。

○三洋電機定勤社員事件・大阪地裁1991年10月20日判決（労働判例595号9頁）

円高不況で定勤社員（パート、一年更新）全員が雇い入れめされた事案について、（a）期間の定めがない契約に転化あるいは異ならない状態で存在したともいえないが、（b）解雇法理が類推され、「経営内容の悪化により操業停止に追いやられる」ような特段の事情がある場合に限って雇止めできるとし、（c）定勤社員を最初に人員整理の対象とすることも不合理とはいえないとしつつ、定勤社員といえども雇止めについては人員整理の方法程度につき慎重な考慮すべきであり、雇止めを回避すべき相当の努力を尽くすべきであるとした。そして（d）定勤社員内で希望退職募集や個別事情考慮などを雇止めを最少にする努力をせず全員の雇止めをしたことは、十分な回避努力を書いて合理的理由がない、と雇止めを無効とした。

また、判例の中には期間を定めた契約の第1回目の更新についても、雇用継続についての、合理的期待を重視し、更新の実績や正規労働者への登用の実態などから、労働者が「雇用の継続に合理的期待」を持っている場合には更新を拒絶することが相当と認められるような特段の事情がない限り更新拒否は信義則違反とするものがある（龍神タクシー事件・大阪地方裁判所1991年1月16日（労働判例581号36頁））。

さらに、1年契約の非常勤務講師の事件で1年の契約期間は自主的には使用期間であるとして更新拒否を認めなかった例がある(神戸広陵学園事件・最高裁判所第3小法廷判決1990年6月5日（労働判例564号7頁））。

ただ、大きな問題として解決されていないのは、「非正規職公務員」の場合であり、反復更新を繰り返しても公務員法の特殊性に基づいて、派遣先（使用事業主）に任用されることがないとされている。

6−2−2. 有期労働契約の立法的拡大

その後の大きな変化は、労働基準法改定による有期労働契約の範囲の拡大である。

労働基準法14条1項は、有期労働契約（期間の定めのある労働契約)の契約期間の上限を原則1年としていたが、1998年改定で①新商品、新技術の開発等のための業務、②新規事業への展開を図るためのプロジェクト業務に必要とされる高度の専門的な知識、技術又は経験を有する者が不足している事業場において、当該業務に新たに就かせるために締結する労働契約、③満60歳以上の労働者との間に締結される労働契約について、契約期間の上限を3年とする特例が導入された。

さらに、2003年改定で契約期間上限の原則を従来の1年から3年に改めた。198年改正で3年上限が認められた特例の場合のうち、①専門的な知識、技術又は経験であって高度のものとして厚生労働大臣が定める基準に該当する専門的知識等を有する労働者との間に締結される労働契約、②満60歳以上の労働者との間に締結される労働契約については、契約期間の上限を5年に延長することとした。

反覆更新については、明確な条文化はされず、厚生労働省から指針が出されたに過ぎない。

6−3. 労働法上「労働者」概念についての判断基準の変化

労働者性については、従来から、外務員（証券外務員・集金人）、芸能員・スポーツ選手、嘱託などで争われてきたが、最近では、さらに委託販売員・集金人、情報処理業務関連の個人請負、傭車契約運転手、フリーの記者・カメラマン、在宅勤務者、研修医、登録型ホームヘルパー、有償ボランティア、僧侶、従業員兼務取締役など、多様な類型で問題になっている。

これらは、「偽装雇用」とも呼ばれており、その狙いは、集団的労働関係を嫌って労働者を個別分断化しようとする「労働関係の個別化」や、労働法・社会保険法の潜脱、税の軽減等等の、使用者側の脱法的意図によると考えられる。

1985年に出された「労働基準法研究会報告」は、労働基準法上の労働者性については、「使用従属性」を中心に判断するとし、その判断要素として、①仕事の依頼,業務従事の指示等に対する諾否の自由の有無、②業務遂行上の指揮監督の有無、③勤務場所、勤務時間に関する拘束性の有無、④労務提供の代替性の有無、⑤報酬の労働対償性をあげている。さらに判断の補強要素として、⑥事業者性の有無(機械・器具の負担関係,報酬の額,業務遂行上の損害に対する責任など)、⑦専属性の程度などを挙げている。

労働行政と労働判例は、それぞれの事例の特殊性に応じた実態判断を重視しており、消極的な判断を示す例もあるが、逆に、労働者性を積極的に認める例も少なくなく、全体として大きな変化はないと言える。

○関西医大事件・最高裁判所第2小法廷2005年6月3日判決
関西医科大学付属病院（大阪府守口市）で研修医が過労死した事件で、研修医が労働者に当たるかどうかが争われた。判決は、「病院の指揮監督下で医療行為に従事する場合は、研修医は労働基準法上の労働者に当たる」「臨床研修の教育的な側面を認める一方、医療行為に従事す

れば、病院開設者のために働いているということになる」とする判断を示し、法で定められた最低賃金を下回る「奨学金」しか払っていなかった大学側に差額の支払いを命じた1、2審判決を支持した。

この点では、労働契約法をめぐる議論にも関連して学説上の議論がある（2005年10月労働法学会等）。主な論点は、「労働者」という統一性のある労働法上の概念と考えるか否か、また、労働者と自営業者の間に「中間的カテゴリー」を認めるべきかどうかである。

7. 非正規職労働者の権利保障のための法制度改善の方向

非正規職労働者の権利保障について、基本的な考え方を要約的に指摘したい。
なお、「連合」の連合総合生活開発研究所が、「労働契約法試案－ワークルールの確認とさらなる充実を求めて－」（2005年10月11日）を発表している。

7−1. 違法派遣の厳格な規制

日本では、職業安定法や労働者派遣法違反が野放しにされている。こうした違法状態を改めること、厳格に法を遵守させることが最優先の課題である。

7−2. ＩＬＯ条約・勧告、各国の派遣法に近づく労働者保護

非正規労働者の権利保障のためには、ＥＵ諸国の労働者保護法、労働協約、ＩＬＯ条約（181号条約、契約労働（contract　　labor）規制）などが定める規制や基準を参考にする必要がある。
派遣労働については、日本では原則として廃止するべきであるが、存続するとしても、きわめて例外的な規制であることを確認する必要がある。

7−3. 労働者の概念（労働者性）

労働法の適用を受ける「労働者」の概念を拡大するべきである。その具体的な手法としては、現在の「非労働者」の拡大は、使用者に脱法的意図があることを推測させる場合（例：事業場における労働基準法違反の存在、以前は「労働者」と扱われていた者、社会保険不加入等）を列挙して、それに該当する場合には、使用者側に立証責任を転換するなどの方法が考えれる。

7−4. 常用代替制限への有効な規制

労働者を雇用する使用者（企業）の雇用責任を常用雇用原則を確認し、非正規雇用・有期雇用は例外的な事情がある場合に、短期間に限定する。
具体的には、①リストラ事業所への導入規制、②一時的・臨時的事由に派遣や有期雇用を限定、③派遣期間・契約期間後に（派遣先（使用事業主）への）直用する義務の明確化が重要である。

7−5. 労働者保護の抜本的強化

非正規職に相応しい規制が、間接雇用については、①派遣先（使用事業主）の連帯責任の明確化、②登録型労働者の保護の強化

7−6. 同一価値労働同一待遇原則の適用

7−7. 団結活動の実質的保障

①派遣先（使用事業主）の団体交渉応諾責任を法律で明文化するとともに、②労働協約について同一事業場の派遣労働者にも拡張適用する法規制を設ける。
また、イタリア法等を参考に、派遣労働者の集団的権利の具体的保障措置を設ける。
派遣労働者の団結活動保障を定める「イタリア全国派遣労働協約」参照

参考資料

資料1. ニコン(Nikon)(Nikon)熊谷製作所事件・東京地方裁判所判決　派遣労働者の過労自殺と使用者企業の責任（脇田滋）

東京地方裁判所は、2005年3月31日、ニコン(Nikon)熊谷製作所で検査業務に従事していた派遣労働者の過労自殺について、受け入れ企業であるニコン(Nikon)と請負会社に安全配慮義務違反の責任があることを認め、遺族である母（原告）に対して損害賠償を命じた。この判決は、新聞やテレビなどのマスコミでも取り上げられ、注目を浴びている。

派遣労働者の上段勇士さん（1975年生まれ、死亡当時23歳）が、独身寮で電気コードを首に巻いて自殺しているのが発見されたのは、下請会社に入社し、ニコン(Nikon)で働き始めてから1年4ヶ月後の1999年3月であった。ニコン(Nikon)熊谷製作所で、半導体製造機械「ステッパー」の最終検査を担当し、昼夜2交替勤務や海外出張等も行っていた。余りの過重労働に疲れて退職を申し出たが、会社からは返事も貰えないまま、無断欠勤をしてから2週間後に、心配した母親が訪ねたところ、一人暮らしのアパートで自殺体で発見された。遺書等はなく、ホワイトボードに一言、「無駄な時間をすごした」とだけ書かれていた。

勇士さんの死後、お母さんを中心に遺族は、派遣元会社のネクスター、受入企業のニコン(Nikon)が、勇士さんの勤務状況、自殺にいたる原因等について話し合いを持った。しかし、両会社からは満足できる回答が得られず、彼の自殺にいたる過程が全く分からなかった。

このため、遺族は、当時開設されていた「過労死110番」に相談し、原告側弁護士、川人博氏に依頼し、勇士の勤務状況等の資料の開示を求めて民事調停を求めたが、ニコン(Nikon)、ネクスターとも応じなかったので、2000年7月18日、東京地方裁判所に対して2社を被告として、勇士さんが過労による自殺であり、両社に使用者責任があったとして損害賠償を求める訴えを起こした。

裁判では、主に次の4点が争われた。（1）請負会社ネクスターは偽装請負の違法派遣会社であって、作業現場で実際の指揮命令はニコン(Nikon)が行っていたのか、（2）勇士さんが、派遣社員という弱い立場のために過重な労働に従事していたのか、（3）そうした過重労働の結果、勇士さんは「うつ病」を発生して自殺するに至ったのか、（4）両社は、勇士さんの健康を配慮して仕事をさせる義務があるのに、それを怠ったのであり、そのことに対して損害賠償

しなければならないのか。

双方から多くの証拠や証人が出され、裁判は4年以上かかってようやく結審した。裁判所の判断は、要約すると次の通りであった。まず、（1）違法派遣かどうかはともかく、ニコン(Nikon)も実際に労働者を指揮命令していた。（2）検査業務は、納期直前のためいつも時間的余裕がなかった。クリーンルーム(clean room)での作業は立ったままで神経を使うものであった。顧客との折衝があり負担が大きい海外出張もあった。長時間労働が続き、休日なしでの15日連続勤務まであった。勇士さんは、正社員と同様以上の過酷な業務を担当していたが、ニコン(Nikon)の人員削減の方針のために、退職者が続出して雇用不安と労働過重が強まった。（3）医師による明確な診断はなかったが、証拠から明らかになった状況を斟酌すると、勇士さんは「うつ病」にかかったと認めることができる。

そして判決は、「ニコン(Nikon)製作所に勤務する外部からの就労者は、人材派遣あるいは業務請負等の契約形態の区別なく同様に、ニコン(Nikon)の労務管理のもとで業務に就いていたといえる。」そして、勇士さんも、「シフト変更、残業指示及び業務上の指示をニコン(Nikon)社員より直接受け、それに従って業務に就いていたのであるから、ニコン(Nikon)の労務管理のもとで業務に就いていたといえる」とし、「ニコン(Nikon)が、従事させる業務を定めて、これを管理するに際し、業務の遂行に伴う疲労や心理的負担等が過度に蓄積して勇士さんの心身の健康を損なうことがないよう注意する義務を負担していた」と結論づけた。さらに、ネクスターにも同様な健康配慮義務があったとして、東京地方裁判所は、両社に義務違反に伴う損害賠償責任を認め、原告に対して連帯して2488万円を支払うことを命じたのである。

日本の若年労働者は、いまでは正社員になることが難しい。派遣労働という、不安定な雇用形態しか選択できず、無権利で非人間的で過酷な労働で苦しんでいる。さらに、労働組合もなく、厳しい競争のなかで孤立していて、うつ病から、自殺にまで追いやられる現実は例外的なものではない。

この裁判では、ニコン(Nikon)という世界的企業のなかで、前近代的で、違法な偽装請負による派遣労働が横行しており、企業利益が優先され、若者の健康や生命が軽視されていることが明らかになった。日本では1986年の労働者派遣法施行後20年を経過したが、政府の新自由主義的な労働法の規制緩和路線に基づく、労働行政の怠慢のもとで、一流企業でさえ違法派遣を導入してきた。

その結果、企業のなかで、実際に現場で働く労働者の健康や労働条件、さらには人間性を無視する労務管理が強まる傾向にある。労働者の健康を無視する企業ほどが、パフォーマンスの良い企業として市場で評価される。企業家の道徳は地に落ちてしまった。

そうした嘆かわしい雇用社会に対して、今回の判決が、受入企業（派遣先）のニコン(Nikon)に派遣労働者に対する健康配慮義務があることを正面から認めたことは注目に値する。本来、請負や派遣のような間接雇用は、実際に労働者を利用して大きな利益をあげている企業が、最低限の労働者に対する使用者の責任を逃れるためのものでしかに。今回の判決は、もはや派遣労働などの間接雇用形態は廃止するしかないことを再確認させることになった。

裁判の詳しい内容については、派遣社員過労自殺裁判ホームページ(http://www10.ocn.ne.jp/~karoushi/) 参照。

資料2. イタリア全国派遣労働協約の概要（抄訳）1999年全国労働協約

（労働者派遣事業協会－三大労組CGIL・CISL・UIL間の協約）

○前置き

この全国労働協約は、部門の特殊性を規制するために1993年7月23日議定書と97年法律196号に基づいている。

当事者は以下の点について合意する。すなわち、

(1)労使関係のより前進した制度

(2)派遣労働の発展と法的なより一貫した規制のために提案を行うこと

(3)それぞれの当事者による完全な遵守

(4)当事者の間で対立が生じた場合（15日以内に）解決すること

◎労使関係の諸制度

○第1条 情報の諸権利

毎年共同して以下のことについて検討する

・雇用の動向

・職業訓練部門

・組織モデルの必要性

○第2条 全国的範囲

当事者は以下の制度を設立することについて合意する

・全国監視委員会

・全国労使二者委員会

（それぞれの構成メンバーは6：派遣事業者協会、3大労組及びその随員）

○第3条 全国監視委員会

・派遣業部門と雇用の展望・見込みに関して報告を準備すること

・職業訓練及び職業の資格付に関する分析を行うこと

○第4条 地域的事業所的範囲

○第5条 全国労使二者委員会

同委員会は次のことを実施するために3カ月以内に設立される

(1)合意の尊重の担保 (2)協約の更新 (3)協約上の紛争の調査

◎紛争の調停

○第6条 手続き

すべての紛争 調停前置（労働者派遣事業協会）

労働者からの提起 組合組織を通じて調停を申請

派遣団体に書留郵便で紛争通告

使用者からの提起の場合 当該労働者に書留で通告。8日以内に労働組合にも

10日日以内に当事者を召喚
調停は90日以内に解決
○第7条 労使二者委員会

◎組合活動権
○第8条 組合代表［職場委員］
派遣労働者保護の目的で三大労組による統一代表［職場委員］制度を設立
統一代表［職場委員］が、ある派遣期間に活動するとき
→少なくとも3日前に派遣会社に通告
派遣労働者の労働時間1700時間毎に、派遣会社は1時間の組合休暇（1時間あたり15000リラ）を総集時間として与える
1月と7月中に［半年毎に］時間数の集計
→企業は、時間数を通知し、労働者派遣事業協会の口座に振り込み
→協会から翌月中に関係代表［職場委員］に支払

○第9条 組合役員
執行委員会（全国、州、地域）メンバー
→少なくとも6ヵ月の勤続する労働者から選出
すべての会社は、毎年48時間の有給組合休暇を保障
組合休暇の利用は 3日前に通告
有給の金額は、「組合役員」口座に振り込み

○第10条 全員集会
労働者は、労働時間外でも、企業が使用を認める場所で集会する権利を有している。
派遣労働者は、派遣先企業の全員集会に参加する権利を有している。
集会→少なくとも5日前に文書で召集→参加する労働組合の組合役員の名前で通告
全員集会に参加するための個々の労働者への有給時間保障（月あたり）
労働時間数×10 / 1800 ［例：月180時間の場合、1時間］

○第11条 組合掲示板
すべての職場と支店・支所

○第12条 組合費
組合費天引き（チェックオフ）→賃金1%相当額

○第13条 契約費用
チェックオフのための手数料 各労働者ごとに3000リラを支払

○第14条 安全衛生
安全衛生に関する94年法(626号)、97年法(196号)
派遣労働者には、法令の定める文書で、特別な危険、訓練など情報を伝えること

全国労使二者委員会の役割
(1)地域委員会の調整
(2)安全教育のモデル等

◎労働者の分類
○第15条 職業格付け（分類）
グループA 管理職
グループB 上級職 特殊技能者
グループC 労働者

○第16条 分類の発展
労使委員会で、新たな状況に対応して管理

○第17条 採用
文書で決めるべき事項
・期間を定めた労働契約の場合
(1)派遣労働利用の理由
(2)派遣会社と登録番号
(3)97年法（196号）所定の義務［安全衛生関連］
(4)派遣先企業と関係者
(5)派遣先企業の産業分類
(6)職務と格付け
(7)（もしあるとすれば）試用期間
(8)就業場所
(9)労働時間
(10)集団的経済待遇
(11)適用全国労働協約と補充規定
(12)全国協約第2条による規範的待遇
(13)就労開始日と終了日
(14)安全措置
(15)個人情報利用の許可

・期間を定めない労働契約の場合
採用時、上の(2)、(3)、(5)、(7)、(15)項目を定めた文書
待期手当、(1)、(4)、(6)、(8)、(9)、(10)、(12)、(13)、(14)を定めた文書の交付
・採用のための文書 労働票、税金番号、住民票、その他身分証明書類

○第19条 賃金
・派遣先企業の従業員の賃金を下回らない賃金
・派遣先企業の部門の全国労働協約に対応した労働時間を基準にした賃金支払
・給料明細書に示すべき事項

・賃金は翌月の15日までに支払うこと
・ボーナスは、有給労働時間に比例して、期間要件を計算

◎病気・労働災害
○第20条 規範
・労働者は24時間以内に通告しなければならない。
・使用者は、産業医を派遣することができる。

○第21条 労働者の義務
・派遣先企業に3日以内に診断書を送付すること
・24時間以内に（病休の）延長を通知すること
・医者の指示と診察時間の尊重
・場合によっては、居住地の変更の通告

○第22条 [病気による職場保持] 猶予期間
試用期間でないとき、労働者は最長180日の職場保持権を有する
文書での申し出と、医者の証明書を要件に、120日の延長が可能
この期間は、無給

○第23条 病気時の経済保障
労働者は、試用期間でないとき、使用者の負担により、全国社会保障公社から次の給付 [傷病手当金] を受けることができる。
a) 期間を定めた労働契約の場合
最初の3日　100%
4日から20日目まで　75%
20日以上　100%
b) 期間を定めない労働契約の場合
a) と同じ給付
派遣期間が終了すれば、待期手当の権利を有する

○第24条 病気の場合の経済的待遇の喪失
医者の証明書が遅れたとき等

○第25条 労働災害
派遣会社は、全国労働災害公社による従業員のための労災保険に加入する。
労働者は、いかなる災害についても使用者に直ちに通告しなければならない。
そうでなければ、使用者は責任を免除される。
職場保持については、病気の場合に準ずる。

○第26条 労働災害の経済的待遇
使用者は、労働災害日については、全日の賃金を支払う義務を負う

その後の日数については、全国労働災害公社から次の給付がある
最初の3日まで　60%
4日目から20日目まで　90%
21日以降　100%

◎契約
○第27条 欠勤労働者の代替の場合
[以下の者が欠勤したときに] 事前の予告で、代替者を採用できる最長期間
グループA 管理職　1ヵ月
グループB 上級職・特殊技能者 2週間
グループC 労働者　1週間

○第28条 [派遣期間の] 延長
・最大4回、最長でも24ヵ月
・延長は、労働者に5日前に文書で通告（緊急の場合は2日前）

○第29条 派遣の中断 [中途解約]
・正当事由や試用期間以外の理由による労働関係の中断の場合、労働者は
(1)別の派遣先への派遣就労、　(2)教育訓練過程、　(3)派遣会社自体の業務に従事することができる。
・もし、それが履行されないときには、派遣先企業は、喪失所得の50%相当の金額を支払わなければならない。

○第30条 待期中の労働者
・待期中の労働者は70万リラを受ける権利を有する。
・労働者は、所在を明確にし、他の派遣会社で働いてはならない。
・待期期間は、年次有給休暇、労働時間の減少、ボーナスなどには算入されない。

○第31条 懲戒
○第32条 労働関係の終了
・期間の定めのない労働契約の場合
正当な動機、正当な事由（契約義務不遵守、業務上の争い、財産侵害など）
・期間を定めた労働契約の場合
正当な事由は適用
差別的解雇の無効（性別、宗教、政党・労働組合加入）
○第33条 期間の定めのない労働契約の解雇予告期間（略）
○第34条 期間の定めのない労働契約の解雇予告手当（略）
○第35条 協約の有効期間（略）

（参考）イタリア労働総同盟ロンバルディア支部
ラッファアエレ・マッジ編（脇田 試訳）

Irregular Workers' Past and Future in Asia

Apo Leong
/ Asia Monitor Resource Center

You shall not abuse a needy and destitute labourer, whether a fellow countryman or a stranger in one of the communities of your land.
- Deuteronomy 24:14

Introduction

Gone are the days when hundreds of Hong Kong workers gathered early in the morning outside the main gate of Taikoo Dockyard waiting for their daily calls for manual labour. These daily labourers together with their more fortunate buddies who worked as regular workers were all kicked out by the management when the precious dockyard land was transformed into a middle class estate in the 80s. The major difference is that these daily labourers did not get any compensation when the unpredictable redundancy was made, whereas after long and hard struggle the regular Taikoo Dockyard workers got more favourable compensation. The lucky and unlucky Taikoo workers all became irregular workers in other sectors as the golden days of ship repair industry was gone.

The sad thing is, the same story is happening more often today, and will last in the foreseeable future. The labour law regime is more and more deregulated in favour of the capital, but not the working people which it is supposed to serve.

Definition

There is no clear cut or commonly accepted definition of irregular work. The usual dichotomy between 'regular' and 'irregular', 'permanent' and 'temporary', 'formal' and 'informal', 'core' or 'peripheral' workers are often used. The former group of workers used to be protected by the labour law, used to have an indefinite contract of service, better pay, benefits and working conditions than the latter group.

Irregular workers are also called under different names or used under various forms, such as 'flexi', 'atypical', 'outsourced', 'agency', 'self employed', dispatched', 'casual', 'home based', 'subcontract', 'freetors', 'seasonal', 'part time', or 'contingent' workers. You name it, they have it.

Trends and development

Irregular work is nothing new in the 21st century, but its number is growing phenomenally. For example, after the 1997 financial crisis in our region, the capital has found ways to reassert its power over workers. They try to get around direct employment relationships, and through aggressive anti-worker restructuring of the workplace and privatization, they make greater use of so-called atypical employment, including dispatched workers. The present day Hong Kong government has successfully outsourced most of its cleansing and security work to profit making private

companies. The change of 'welfare' to 'workfare' government policy has generated more and more low pay jobs for welfare recipients, particularly single parent family members.

On the other hand, the rapid transformation of former communist countries such as China leading to massive layoffs or downsizing under the rational banner of 'increasing efficiency by redundancy'. It was estimated that the total number of xiaogang workers accumulated to more than 30 million in the last 5 years. Government and enterprises are encouraged to rehabilitate these workers by offering flexible employment mostly found in community services but they no longer enjoy the same basic rights as state sector workers in the past.

It is commonly acknowledged that informal economy is rampant in the rural sector, as many farmers would look for odd jobs during the slack period between planting and harvesting. The surplus labour from the rural areas is another major push factor for them to look for jobs in the cities. As newcomers to the urban areas, they cannot compete with the higher educated, better socially connected urban people. Many of them have to turn to casual, subcontract, seasonal work. For example, the males find work in construction sites whereas their female counterparts work in food catering or small workplaces as garment workers.

Subsequently, the number of irregular workers has grown and occupied a dominant share in the whole work force. One research in China found that this sector was 48%, another one in Korea would say 50%, and the OECD reported Japan's percentage was 26%.

There is an ongoing debate on the positive and negative aspects of this form of employment. From the employers' point of view, irregular employment helps to minimize costs and maintains competitiveness amidst cyclical economic fluctuations, an uncertain operational environment, and a changing product market. Government always boasts irregular employment helps to provide a large number of employment opportunities and meets the needs of workers who have family and educational commitments. Moreover, workers are provided with substantiated types of work and job satisfaction. It was pointed out that a win-win situation is created.

Legal Protection

Under international human and labour rights, all workers should enjoy basic rights. However, due to the rise of the informalisation of employment, some international instruments seem to be outdated. The ILO and some regional bodies are trying to come up with new thinking and ways to address this issue. For example, the ILO has enacted new conventions to protect atypical workers (ILO C175 on part time work, C177 on home based work). Regrettably, up to now only 10 and 4 countries respectively have rectified, and none of them comes from Asia.

Another conventional instrument is through collective bargaining. In the old days the collective bargaining agreement would benefit closed shop workers so workers have to

join trade unions or pay agency fees to enjoy the same protection and benefits. Reciprocally unions have to work hard to restraint the employment of irregular workers, or to impose terms and conditions that these workers would become regular ones in a short period of time, for example, not more than six months, or as a supplementary nature.

Individual contracts can be another instrument to specify clearer rights and obligations between both parties. But under the unbalanced power between the capital and labour, workers are pressured to sign contracts that are robbing their rights, or to turn their contracts as contracts for service.

Labour law is a field where minimal labour standards should be respected. However, through international and local pressure, transnational companies and local business people keep demanding to deregulate labour protection as these measures are 'too rigid' or 'scare away investment' or 'not competitive'. Impounded by multilateral or bilateral trade systems such as WTO, IMF, WB and others, national governments broke the social contract and complied with the demands from the structural adjustment programmes. In the mouth of one pro-business Indian academic, he says, 'firms employing more than 100 people need permission from the state government to fire workers, based on a modified law dating back to 1947. Changing laws like this would greatly boost employment.'

Lastly, the new development of corporate social responsibility movement is worthwhile monitored. Many codes of conduct claim to have derived from international labour standards, which tend to provide better public relations for the TNCs. The difficulty of tracking down the supply chain and their irregular workers is another issue of concern.

There are many more areas of concern for the labour movement in dealing with irregular employment –

1/ Contract of service or for service, self employed
All caddies in a Hong Kong golf club were required to sign contracts identifying themselves as self employed persons so as to avoid paying employees' compensation, holiday pay, etc.
2/ Short term or life long employment
It is a common practice in the Philippines not to renew or to suspend a contract for export processing zone workers as they will be protected under labour law for more than six months' employment.
3/ Continuous contract, working hours
The HK Employment Ordinance will provide workers with certain rights after completion of a minimum requirement of service (eighteen hours per week for four consecutive weeks). Many employers prefer to offer a contract for less than the basic working hours.
4/ One workplace, two to three systems
It is quite normal to find dispatched workers, contract staff working alongside with regular workers doing the same work or longer hours with heavier workload but without the same entitlements.

5/ Social security
Migrant workers in China usually do not enjoy the same social security rights as the urban workers.
6/ Discrimination
Domestic workers are outside the protection of China Labour Law as there is no 'employing unit' for them.
7/ Right to organize
Many guest workers are not allowed to join unions as they are 'trainees' or having no resident status.
8/ Occupational health and safety
Small workplaces are outside the scope of government inspection, or existing health and safety regulations. Bribery and corruption make inspectors turn a blind eye to the suffering of the irregular workers. Repeated mining accidents in China are a vivid illustration.
9/ Training and promotion
Since irregular workers are not considered as core workers employers would not spend money in training and their promotional opportunities are also limited.

Way out

First of all, we need to debunk the neo-liberal agenda of efficiency and cost saving at the cost of labour rights.

Unions need to revamp the old organizing strategy by adopting new and innovative ways or organizing the new workers, be it irregular, atypical, migrant or informal workers. Breakthroughs have been made in Hong Kong, Korea and these cases should be shared among the activists.

We should maintain a policy of non-discrimination and no exclusion as all workers should be united under one big banner – an injury to one is an injury to all. Our Philippine sisters are fighting for a national law to protect all domestic workers.

We should fight for a comprehensive social security policy and measures for all workers, irrespectively of their origin, or other differences.

The enforcement of labour law should be a primary concern by labour organizations. Malpractices should be exposed and unscrupulous employers should be punished accordingly.

More international instruments should be enacted or rectified to defend the rights of irregular workers.

International solidarity is the best way out to confront this unjust system!

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[Workshop 1]

Rights for Migrant Workers

*Sponsored by the ILO and the KCTU

Migration Law and Practice in Asia and the Pacific in the Context of International and ILO Instruments

Tim De Meyer
/ Specialist on International Labour Standards and Labour Law

1. From the outset, the mandate of the International Labour Organization to promote social justice and decent work has explicitly encompassed the protection of a category of workers particularly vulnerable to exploitation : migrant workers. Article 427 of the Treaty of Versailles, which laid the basis for the ILO in 1919, already saw the need for migrant workers to be protected by law. The Preamble to the **Constitution of the ILO** lays down the obligation for the ILO to improve "protection of the interests of workers when employed in countries other than their own". One of the nine "methods and principles" considered "of special and urgent importance" at the time read :

> "The standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident therein."

The Declaration concerning the aims and purposes of the International Labour Organization, or the Declaration of Philadelphia, adopted in 1944 and incorporated into the ILO Constitution, also makes specific reference to the problems of migrant workers in Paragraph III (c) :

> "The Conference recognises the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve :
> ...
> (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
> (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;"

In 1998, the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work and its Follow-up to reaffirm that four principles are fundamental to ensuring that the economic growth fuelled by an integrating global economy translates into social progress :
(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.
Once again, the Preamble to this Declaration called on the ILO to

"give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation."

2. Setting and supervising the application of **international labour standards** is one of the main means of action of the Organization to carry out its mandate. To date, the ILO has adopted 185 Conventions and 195 Recommendations in total. With the exception of the instruments relating to migrant workers and other special categories of workers, the Conventions and Recommendations adopted by the International Labour Conference are of general application, i.e. they cover *all* workers, irrespective of nationality, even though since the Organization's inception there has been an awareness of the need to adopt instruments providing specific protection for migrant workers. Therefore, although they do not specifically cover migrant workers, the following instruments either contain provisions relating to them, or the Committee of Experts (*see* below) has on occasion referred to the specific situation of migrant workers in supervising their application :

The Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); the Labour Inspection Convention, 1947 (No. 81); the Employment Service Convention, 1948 (No. 88); the Maternity Protection Convention (Revised), 1952 (No. 103); the Indigenous and Tribal Populations Convention, 1957 (No. 107); the Workers' Housing Recommendation, 1961 (No. 115); the Employment Policy Convention, 1964 (No. 122); the Human Resources Development Recommendation, 1975 (No. 150); the Occupational Safety and Health Recommendation, 1981 (No. 164); the Termination of Employment Convention, 1982 (No. 158); the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169); the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); the Indigenous and Tribal Peoples Convention, 1989 (No. 169); and the Private Employment Agencies Convention (No. 181) and Recommendation (No. 188), 1977.

This list is by no means exhaustive. Mention should also be made of the numerous observations formulated by the Committee of Experts during its supervision of the application of the maritime Conventions.[1]

[1] ILO, *International Labour Standards - A Global Approach (Preliminary Version)*, Geneva, 2002, 123 - 124.

3. Eight international labour Conventions elaborate on the **fundamental principles and rights** enunciated in the Declaration on Fundamental Principles and Rights at Work (*see* above) and its Follow-up :

The Forced Labour Convention, 1930 (No. 29);
The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
The Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
The Equal Remuneration Convention, 1951 (No. 100)
The Abolition of Forced Labour Convention, 1957 (No. 105)
The Discrimination (Employment and Occupation) Convention (No. 111)
The Minimum Age Convention, 1973 (No. 138);
The Worst Forms of Child Labour Convention, 1999 (No. 182).

Each of these Conventions is amongst the most widely ratified instruments in the world (ratification charts for the Asia Pacific region will be distributed separately). They articulate the fundamental rights of *all* workers, therefore including migrant workers. This is even true for Convention No. 111. Although nationality is not one of the grounds of discrimination formally prohibited by Convention No. 111 (i.e. that the Convention does not formally prohibit a State to deny a person, for example, access to its labour market because he or she has a different nationality), migrant workers are protected by this instrument in so far as they are victims of discrimination in employment or occupation on the basis of one or other of the grounds of discrimination formally prohibited by Convention No. 111, namely race, colour, sex, religion, political opinion, national extraction or social origin.

The fundamental character of these rights entail, in addition, that a State which has not ratified any of the Conventions concerned, is not entirely free from any obligation: as an ILO member State, it remains bound by the ILO Constitution to realize in good faith the principles underlying the Conventions concerned.

4. Between 1995 and 2002, the Governing Body of the International Labour Office **reviewed all ILO Conventions and Recommendations** on an instrument-by-instrument basis to establish which ones were still capable of providing the impetus to further the ILO's mandate and values in today's world and which ones would have to be revised, or, ultimately, done away with altogether. The table in Annex 1 summarizes the conclusions of the Governing Body with respect to the instruments providing specific protection for migrant workers.

In fact, the International Labour Conference had a dual objective in

adopting instruments on migrant workers : in the first place, the intention was to *regulate* the conditions of migration and, secondly, to provide specific *protection* for a very vulnerable category of workers. In this regard, the ILO's standards have focused on two main directions:
- first, the Conference has endeavoured to establish the right to equality of treatment between nationals and non-nationals in the field of social security, and at the same time to institute an international system for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another;[2]
- secondly, the Conference has endeavoured to find comprehensive solutions to the problems facing migrant workers and has adopted a number of instruments for this purpose (including those containing only a few provisions relating to migrant workers).

5. In sum, two **main ILO Conventions and Recommendations** provide specific protection to migrant workers :

[2] Four Conventions and two Recommendations have been adopted for this purpose: the Equality of Treatment (Accident Compensation) Convention (No. 19) and Recommendation No. 25, 1925; the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48); the Equality of Treatment (Social Security) Convention, 1962 (No. 118); and the Maintenance of Social Security Rights Convention (No. 157) and Recommendation No. 167, adopted respectively in 1982 and 1983.

- the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949
- the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151).

5.1. The instruments deal with migrant workers. A migrant worker is a "person who migrates from one country to another with a view to being employed otherwise than on his own account" or in other words, a person who is a non-national, i.e. holds a different citizenship than that of the country where he or she works. Workers who are nationals, i.e. hold the same citizenship as that of the country where he or she works, are protected against discrimination under the terms of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), even if they or their ancestors are of a different national or ethnic origin ("national extraction").

5.2. The purpose of these instruments is :

- to regulate the conditions in which the migration process takes place ;
- to provide specific protection for a very vulnerable category of workers.

5.3. The purpose of these instruments is ***not*** to guide decisions on whether a particular labour migration policy is warranted by local economic or social considerations. The decision as to whether the country experiences a labour shortage which needs to be filled by importing a foreign workforce, or a labour surplus which may usefully be drained by exporting part of the domestic workforce is based on various economic and social considerations, which are part of a broader "employment policy".[3] A key principle of the ILO is that employment policy (i.e. including migration for employment) should be designed with the fullest involvement of employers' and workers' organizations "with a view to taking fully into account their experience and views and securing their full co-operation in formulating and enlisting support for such policies" (Article 3 of the Employment Policy Convention, 1964 (No. 122)).

Decisions in this respect may be guided by Chapter X of the Employment Policy (Supplementary Provisions) Recommendation, 1985 (No. 169), which calls on member States:
(a) to create more employment opportunities and better conditions of

[3] See W.R.Böhning, Employing Foreign Workers - A Manual on Policies and Procedures of Special Interest to Middle- and Low-Income Countries, ILO, Geneva, 1996.

work in countries of emigration so as to reduce the need to migrate to find employment; and
(b) to ensure that international migration takes place under conditions designed to promote full, productive and freely chosen employment.

R. 86 and R. 169 both recommend countries of employment and countries of origin to conclude bilateral or multilateral agreements covering, in the words of R. 169, "issues such as right of entry and stay, the protection of rights resulting from employment, the promotion of education and training opportunities for migrant workers, social security, and assistance to workers and members of their families wishing to return to their country of origin."

5.4. C. 97 aims to protect workers from discrimination and exploitation while employed in countries other than their own. The Convention deals with ***regular*** migrant workers, and does *not* govern the right to admit or refuse a foreign citizen, nor the issue or renewal of residence or work permits. The Convention contains three types of provisions :

- Regulation of conditions in which migration for employment must occur (e.g. exchange of information, cooperation between employment services)
- General protection provisions, e.g.
  - the maintenance of appropriate medical services (Article 5);
  - permission for migrants for employment to transfer their earnings and savings (Article 9).
  - prohibits expulsion of migrant workers admitted on a permanent basis in the event of incapacity for work
- Equality of treatment between migrant workers and nationals as regards laws and administrative practices on
  - living and working conditions
  - social security
  - employment taxes
  - access to justice

5.5. Article 14 of C. 97 permits a ratifying State, by an express declaration, to exclude from its ratification any or all of the annexes. In the absence of such a declaration, the provisions of the annexes have the same effect as those of the Convention. The first two annexes deal with organized migration for employment, while the third, more general in scope, applies to migration for employment, whether organized or spontaneous. Annex I, consisting of eight Articles, deals with the recruitment, placing and conditions of labour

of migrants for employment recruited otherwise than under government-sponsored arrangements for group transfer. Annex II, consisting of 13 Articles, deals with the recruitment, placing and conditions of labour of migrants for employment recruited under government-sponsored arrangements for group transfer. Annex III, consisting of two Articles, regulates the importation of the personal effects, tools and equipment of migrants for employment.

5.6. The Migrant Workers (Supplementary Provisions) C., 1975 (No. 143) no longer addressed the question of facilitating the movement of surplus labour, but of bringing migration flows under control, and hence eliminating illegal migration and suppressing the activities of organizers of clandestine movements of migrants. It consists of two main parts:

- Part I (Articles 1-9) deals with the problems arising out of clandestine migration and illegal employment of migrants
- Part II (Articles 10-14) substantially widens the scope of equality between migrant workers in a regular situation and nationals, in particular by extending it from equality of *treatment* to equality of *opportunity*.

Part I lays down a general obligation to respect the basic human rights of ***regular*** and ***irregular*** migrant workers. The intention is to affirm, without challenging the right of States to regulate migratory flows, the right of migrant workers to be protected, whether or not they entered the country on a regular basis, with or without official documents. It requires further to :

- determine clandestine movements of migrant workers on the territory ;
- punish organizers of such movements, assistants and employers ;
- take protective measures for migrant workers who have lost employment (e.g. against illegality) or are in an irregular situation.

States ratifying C. 143 may exclude either Part I or Part II from their acceptance of the Convention.

5.7. Worldwide, C. 97 and C. 143 have been ratified by 42 and 18 countries respectively. In Asia Pacific, C. 97 has been ratified by New Zealand, and Sabah (Malaysia) and it is applicable in Hong Kong SAR, China. C. 143 has not been ratified by any of the 27 Asia Pacific member States. The Philippines and Sri Lanka have ratified the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), and

Bangladesh has signed the Convention. The UN Convention entered into force on 1 July 2003.[4]

5.8. In 1997, the International Labour Conference adopted the Private Employment Agencies Convention, (No. 181) and Recommendation (No. 188). Convention No. 181 revised the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) which allowed ratifying States to choose between abolishing private employment agencies or regulating them as complementary to public placement agencies. In principle, C. 181 applies to all categories of workers (except seafarers), i.e. including migrant workers. The new instruments see a more positive role for private placement agencies :

> "These instruments take the position that private employment agencies can make a substantial contribution to efficiency in the labour market and should be allowed to play a complementary role alongside the public service. Private agencies should complement rather than replace public employment services. Such a dual system has the potential to maximize efficiency in labour matching because, while there may be some overlap of the services provided, the key contribution of private services is distinct from that of public services. Private services are able to concentrate their resources in niche areas. Such specialized experience provides them with more detailed information, which they can use to anticipate job growth. Public services, which have a much broader mandate and face greater budgetary constraints, are not in a position to acquire specialized information on particular sectors of the labour market. The public service remains responsible for gathering data on general trends in the labour market and providing for more vulnerable jobseekers, such as retrenched workers, while private agencies are left to concentrate on niche services and to monitor certain labour market trends."[5]

According to Article 7 (1), private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers. Article 7 (2) provides for flexibility, however : "In the interest of the workers concerned, and after consulting the most representative organizations of employers and workers, the competent authority may authorize exceptions to the provisions of paragraph 1 above in respect of certain categories of workers, as well as specified types of services provided by private employment

[4] For a comparison between the ILO Conventions and the UN Convention and the difficulties surrounding the ratification of the UN Convention, *see* UN ECOSOC, *Issue Relating to Migrants - Addendum to "The Rights of Non-Citizens", Working Paper submitted by Mr. David Weissbrodt in accordance with Sub-Commission decision 1998/13*, doc. no. E/CN.4/Sub.2/1999/7/Add.1, and the academic references.

[5] ILO, *International Labour Standards – A Global Approach (Preliminary Version)*, Geneva, International Labour Organization, 2001, 211

agencies."

Similarly, Article 7 (2) of C. 97 provides that "the services rendered by its *public* employment service to migrants for employment are rendered free".

6. The ILO operates a rigorous system of **supervising the application of Conventions and Recommendations**. The lynchpins of the supervisory system are the :

Committee of Experts on the Application of Conventions and Recommendations

The *Committee of Experts* has a membership of 20 legal experts chosen on the grounds of their independent standing, complete impartiality and technical competence. Most prominently, the Committee of Experts examines periodic reports from member States on the effect given to Conventions they have ratified. The regular periodicity is every two years for 12 priority Conventions,[6] and every five years for all other Conventions (including, for example, C. 97 and C. 143).

[6] The so-called *priority* Conventions include the eight fundamental Conventions and four o ther Conventions : Labour Inspection Convention (No. 81), 1947 ; Employment Policy Conv ention (No. 122), 1964 ; Labour Inspection (Agriculture) Convention (No. 129), 1969 ; Trip artite Consultation (International Labour Standards) Convention (No. 144), 1976.

Relevant outstanding comments for member States in Asia Pacific include :

- *Hong Kong SAR, C. 97, Direct Request.* The Government is requested to provide information on :
  - the medical services available for immigrant workers' families
  - statistical data which enable the Committee to establish that the salary of migrant workers of various categories are broadly comparable to the median wages enjoyed by local workers with similar duties
  - the flexible application by the authorities of the "two-week" rule (which requires migrant workers to leave the country no later than two weeks after their employment has been terminated)
  - the definition of "frontier workers" in Hong Kong SAR, general statistical data, activities of labour inspection services and relevant court decisions
  - a confirmation that there is no distinction between local and foreign workers with respect to invalidity, old age and family responsibilities.

- *Malaysia (Sabah), C. 97, Observation.* The Committee draws the attention of the Government that, currently, migrant workers appear to receive treatment which is less favourable than that applied to nationals : as a result of the transfer of foreign workers working in the private sector from the Employees' Social Security Scheme (ESS) to the Workmen's Compensation Scheme, foreign workers are now provided with lump sum benefits the actuarial equivalent of which appears to be lower than the monthly payment to which foreign workers were entitled under the former scheme.

- *New Zealand, C. 97, Direct Request.* The Government is requested to provide information on :
  - how the current trends in migration flows have affected the content and implementation of its national migratory policy and legislation, particularly the adoption of amendments to the Immigration Act, 1987, which aim, inter alia, at improving the effectiveness of the removal regime for persons unlawfully present in New Zealand
  - measures taken or envisaged to ensure that women migrant workers are treated on a par with their male counterparts, foreign or otherwise, in respect of working and living conditions, social security, work-related taxes, and access to the justice system - in view of the growing feminization of migration for employment (a request consistently addressed to ratifying States)[7]

[7] *See* paragraphs 20-23 and 658 of the General Survey of 1999 on migrant workers.

  - measures taken to ensure equal access to social security, particularly cash benefits, for permanent residents as well as temporary or limited purpose permit holders
  - (in response to comments from the New Zealand Employers' Federation) measures it has taken to facilitate access of migrant workers to skilled jobs such as, for example, recognition of occupational qualifications acquired outside the country
  - information on New Zealand nationals working abroad, and the countries of origin of foreigners employed in New Zealand and to communicate the results, if any, of the relevant activities of the labour inspection service, in accordance with the provisions of the Convention

- *Saudi Arabia, C. 29, Observation.* The Committee requests the Government :
  - to take measures in secular law (and not only by applying the Shari'a), for example by way of a code, to provide for penal sanctions for the imposition of forced labour, and, to the extent that the Government indicates that forced labour may be raised in a tribunal, to provide details of any cases in which a tribunal has found a person responsible for forced labour, including any sanctions imposed by a judge

- to reply to the following comments :

Migrant workers

4. The Committee has raised for some years the problem of migrant workers and in particular agricultural and domestic workers. As indicated above, this problem is linked to the points made by the Committee in respect of the absence of a penalty provision as described above. The Committee has previously noted that the Labour Code does not extend to agricultural workers and domestic workers, which has particular significance for migrants who often work in those jobs. The lack of protection for such migrant workers exposes them to exploitation in their working conditions, such as retention of their passports by their employers which in turn deprives them of their freedom of movement to leave the country or change their employment.

5. The Committee has previously noted that, according to information submitted by Anti-Slavery International to the United Nations Working Group on Contemporary Forms of Slavery, it was a common practice by employers to retain the passports of domestic workers in particular, and that such workers had to continue in the service of the employer, sometimes without remuneration, with excessive hours and occasionally subject to physical mistreatment or, for women, even sexual abuse. The Government indicated in an earlier report that it strongly refuted these allegations as going "beyond logic and reality". The Committee takes note of comments recently communicated by the International Confederation of Arab Trade Unions (ICATU) of 15 May 2000, in which reference is made again to the practice of retaining passports of migrant workers by employers which still continues. The Government in its response of 6 November 2000 indicates that, as the result of the previous comments made by the Committee on this topic, it adopted, through Decision No. 166 of 12 July 2000 of the Council of Ministers, a "Regulation governing the relationship between employers and migrant workers". The Committee notes with interest that according to section 3 of the Regulation, "migrant workers may keep their passports or the passports of members of their families and may be authorized to move within the Kingdom as long as they have a valid residence permit". The Committee also notes that section 6 provides for the creation of a rapid mechanism for the examination of conflicts which may arise and for their settlement by the competent authority.

6. The Committee also takes note of the decision of the Government of Indonesia of January 1999 to suspend the

migration of workers to Saudi Arabia which was linked to the number of reported cases of torture, rape, non-payment of wages and deprivation of liberty of Indonesian workers in Saudi Arabia.

7. In a summary on the point, the Committee hopes that the Government will provide details regarding the sanctions which may be imposed in case of non-observance of the provisions of the Regulation governing the relationship between employers and migrant workers, and that it will communicate further information on the dispute settlement mechanism which is provided for in section 6 of the Regulation.

- *All States which have ratified C. 29, General Observation.* States are requested to provide information on the enforcement of penal sanctions against those who exploit "legal or illegal migrants, inter alia in sweatshops, prostitution, domestic service and agriculture," be it directly, or in the context of trafficking. The text of the General Observation is attached as Annex 2.

(standing) Conference Committee on the Application of Standards

Following the independent, technical examination on a documentary basis carried out by the Committee of Experts, this Committee provides a forum for representatives of governments, employers and workers to meet and review the manner in which States are discharging their obligations.

For example, in 2003, the Conference Committee discussed allegations that hundreds of under-age boys from South Asia, mainly between 4 and 10 years of age, continue to be used as camel jockeys, and that camel owners who employ the children are not prosecuted for violation of labour laws.

Governing Body of the ILO

Representations. The Governing Body is mandated to examine representations lodged on the basis of article 24 of the ILO Constitution. In November 2003, for example, the Governing Body of the ILO approved the report of the tripartite committee[8] set up to examine the representation alleging non-observance by China

[8] *See* the 288th Session of the ILO Governing Body, doc no. GB. 288/17/2.

of Convention No. 97 with respect to the Special Administrative Region (SAR) of Hong Kong, made under article 24 of the ILO Constitution by the Trade Union Congress of the Philippines (TUCP). The complaint concerned allegations that the Hong Kong administration approved certain measures that were harmful for Filipino workers and in violation of *Article 6 of the Convention* which provides for equality of treatment between migrant workers and nationals as regards remuneration, social security, employment taxes and access to legal proceedings. The specific measures included: (a) the reduction of the Minimum Allowance Wage (MAW) of foreign domestic workers by HK$400, effective April 2003; (b) the introduction of an employees' retraining levy by HK$400 imposed on employers of these workers, effective 1 October 2003; and (c) the possible exclusion of foreign domestic workers, who have not resided in Hong Kong SAR for at least seven years, from subsidized public health care services. The Governing Body asked that the Committee of Experts on the Application of Conventions and Recommendations to continue to examine this matter. In response, the Committee of Experts issued an observation, which is attached as Annex 4.

Committee on Freedom of Association. The Governing Body also adopts recommendations proposed by a standing tripartite committee which examines complaints of violations of freedom of association and the right to bargain collectively (the Committee on Freedom of Association). Given that the principles concerned are enshrined in the ILO Constitution, workers' or employers' organizations, or governments can also lodge these complaints against States which have not ratified any relevant ILO Convention, in particular C. 87 and C. 98. The procedure has given the ILO Governing Body the opportunity to articulate on various occasions the right to organize of migrant workers with a view to defending and furthering their occupational interests. For example :

209. The prohibition of registration of mixed trade unions (consisting of workers of different races) is not compatible with the generally accepted principle that workers, without distinction whatsoever, should have the right to establish and, subject only to the rules of the organizations concerned, to join organizations of their own choosing without previous authorization.
211. With regard to the granting of trade union rights to aliens, the requirement of reciprocity is not acceptable under Article 2 of Convention No. 87.

382. Legislation should be made flexible so as to permit the organizations to elect their leaders freely and without hindrance, and to permit foreign workers access to trade union posts, at least after a reasonable period of residency in the host country.[9]

Formally, the right of trade union membership of migrant workers is referred to in para. 41 of the Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100), Para. 38, and in the Migrant Workers Recommendation, 1975 (No. 151), Para. 8(3); Private Employment Agencies Recommendation, 1997 (No. 188), Para. 9. *See* also Committee on Freedom of Association, Report No. 327 (Vol. *LXXXV, 2002, Series B, No. 1*), Spain (Case No. 2121 of 23 March 2001)

Commission of Inquiry

A Commission of Inquiry is a body of independent and impartial experts set up by the Governing Body to examine a complaint lodged on the basis of article 26 of the ILO Constitution.

The procedure is not frequently used in practice. With respect to migrant workers, a Commission of Inquiry examined allegations of forced labour practices and inadequate protection of wages of Haitian workers migrating to the Dominican Republic for the sugar cane harvest.[10]

7. The ILO Governing Body decided in March 2002 to place the question of *migrant workers* on the agenda of the 92nd Session (2004) of the International Labour Conference. The question will be addressed in a "General Discussion" based on an *integrated approach*, or one that is not immediately aimed at setting new or revising existing standards, but allows consideration of a broad range of approaches, means of action, and instruments available to meet the challenges, problems and opportunities posed by contemporary forms of labour migration. This is in recognition of the fact that migration issues cut across practically all spheres of the normative and technical activities of the ILO.

[9] Paragraph numbers refer to the *Digest of decisions of the Committee on Freedom of Association*, the latest edition of which was published by the Office in 1996.

[10] International Labour Organization, Report of the Commission of Inquiry: Haiti and Dominican Republic, *ILO Official Bulletin*, Vol. LXVI, Special Supplement, 1983.

In preparation for the General Discussion, the Office is now developing a comprehensive report on the trends in migration and the conditions of men and women *migrant workers*, the state of law and practice regarding their treatment, the impact of migration on origin and host countries, and the experience with structures and policies established at national, regional and international levels for regulating migration and the employment of *migrant workers*. The report is drawn up on the basis of a survey. The survey is basically aimed at obtaining the latest information on how migration and the treatment of *migrant workers* are being regulated or managed through laws, policies, administrative measures, specialized bodies of the state, what role is played by bilateral and multilateral treaties and conventions, and how the tripartite partners take part in the process. The General Discussion is aimed at developing a plan of action for ILO activities in this area.

The considerations underlying the decision to put the question of migrant workers on the Conference agenda were summarized as follows :

International labour migration has today become a more complex and diverse phenomenon, involving anywhere from 60 to 65 million people and many more countries than ever before. Much of contemporary migration is organized by private intermediaries, not by states, and there are growing problems with irregular migration, illegal employment and exploitation. The large majority of today's migrant workers are admitted only for temporary periods, which in many instances make them subject to unequal treatment. Unemployment levels among settled immigrants are often much higher than those of native workers, and problems with discrimination and social exclusion are of serious concern even in advanced democratic societies. In response to the low and declining rate of ratification of ILO's existing standards on this subject, the Committee of Experts on the Application of Conventions and Recommendations was requested by the Governing Body at its 267th Session to undertake a General Survey on the state of law and practice. The Committee of Experts clearly saw the need for a general discussion on the subject of migrant workers at a future session of the International Labour Conference, with a view to reviewing and possibly revising the instruments. This view was widely endorsed by members of the Governing Body at its previous two sessions, most recently with many urging an integrated approach to a general discussion that would allow consideration of a range of approaches, solutions, and instruments. To cover these issues the general discussion might be organized along three main themes: (1) international labour migration in the era of globalization; (2) policies and structures for more orderly migration for

employment; and (3) improving migrant workers' protection.[11]

An excerpt containing the conclusions of the Committee of Experts with respect to its *General Survey* of the application of C. 97 and C. 143 in law and practice is attached as Annex 3.

8. *Issue related to migrant workers' rights.* Previous paragraphs highlighted rights-related issues of concern to migrant workers which are already officially addressed through the ILO supervisory system. The following paragraphs by no means aim to exhaustively review all potentially relevant human rights issues, let alone migration policies in their entirety.[12] However, a number of critical issues in Asian Pacific countries (particularly East Asia) merit attention at this juncture.

(1) Coverage by labour legislation.

Migrant workers are frequently excluded from the scope of labour legislation governing matters such as employment contracts, minimum wages, and conditions of work. The exclusion can be direct (e.g. Section 3 (3) (d) of Decree-Law No.24/89/M of Macau SAR (1989) specifically excludes migrant workers from the protection of the labour law), but so can be the inclusion (e.g. the Rules for the Employment of Foreigners in China (1996) limit employment contracts with foreign workers to 5 years, but provide that wage, minimum wage, labour disputes and working conditions of foreign employees are governed by local Chinese law). Migrant workers may be *de facto* excluded (e.g. according to the Free Trade Union of Burma, Thai officials have stated that the minimum wage legislation does not apply to migrant workers). Frequently, migrant workers are indirectly excluded, when the legislation excludes an occupation in which migrant workers make up a majority of the workforce. In the Republic of Korea, for example, domestic workers are expressly excluded from the Labour Standards Act of the Republic of Korea. In Japan, workers entering on a six-month's entertainers' visa are not considered "workers" in the sense of the Labour Standards Act. In Singapore domestic workers are in principle not considered employees for

[11] ILO Governing Body Doc. No. GB.283/2/1 283rd Session , Geneva, March 2002, 27.
[12] There are, however, publication which do precisely that, e.g. Asian Migrant Centre and Mekong Migration Network, *Migration - Needs, Issues and Responses in the Greater Mekong Subregion - A Resource Book*, Hong Kong, 2002

the purposes of the Employment Act, although the Minister may decide to declare certain provisions applicable, or otherwise regulate their employment. In contrast, the Labour Code of Viet Nam explicitly declares the Code applicable to domestic workers.

A good example of legal coverage of migrant workers despite their irregular status is e.g. the Malaysian Workmen's Compensation Act 1952 (Act 273), Part I, 2 (2) :

> "If in any proceedings for the recovery of compensation under this Act it appears to the Commissioner or an Arbitrator or the Court that the contract of service or apprenticeship under which the injured person was working at the time when the accident causing the injury happened was illegal, the Commissioner, the Arbitrator or the Court may, if having regard to all the circumstances of the case he or it thinks proper to do so, deal with the matter as if the injured person had at such time been a person working under a valid contract of service or apprenticeship."

This means that in Malaysia, a foreign worker who was undocumented at the time of his injury, is still liable to receive compensation under the provisions of the Act.

Bilateral or multilateral agreements between labour-sending and labour-receiving countries may provide that the parties will apply national laws to protect the rights of migrant workers For example, an agreement recently concluded between Thailand and Lao PDR contains such provision. According to Article 18 of the same agreement, workers will receive wage and benefits at the same rate applied to national workers based on the principles of non-discrimination and equality on the basis of gender, ethnic identity, and religious identity.

(2) Forced labour

ILO Convention No. 29 defines forced or compulsory labour as "any work or service which is exacted from any person under the menace of a penalty, and for which the said person has not offered him (or her) self voluntarily". There are persistent reports that migrant workers in the Asian Pacific region become systematically trapped in situations in which their free choice of employment is factually or legally constrained to such an extent that their working arrangement is continued to the nearly exclusive benefit of the

employer, and under conditions which bear no resemblance to those generally prevailing on the market. The element of coercion leading a migrant worker to continue the exploitative working relationship can consist of a debt incurred with the job broker or the employer, the confiscation of his or her passport, irregular immigration status and the resulting threat of deportation or expulsion, or simply the threat of abuse. As such, forced labour can be the final stage of a trafficking process, but also of an irregular or even regular migration process. Although precise figures are not available, Thailand, for example, is widely believed to host over a million irregular migrant workers, over 90 percent of whom have crossed the border from Myanmar. The Thai Government manages this immigration flow by regularly organizing registration drives (the costs of which often end up being borne by the worker), and subsequently returning significant numbers of irregular migrant workers. The extreme precariousness of their situation is conducive to forced labour in garment factories, the fishing industry, or at home in domestic work. With the assistance of trade unions, women's organizations and labour solidarity NGOs, workers have started to bring court cases to claim minimum wages, compensation for forced overtime etc, with some success. In 2002, for example, the Foundation for Women sued a garment factory on behalf of 30 ethnic Karen women, many aged under 18, charging that the workers were enslaved, forced to work 14 hours a day for 40 baht a month, with a bonus of 1,200 to 1,500 baht a month for those who stayed a full year. The case, originally claiming 40 million baht, was settled out of court for 2.1 million baht (approx. 50, 000 USD), and criminal charges against the employer were dropped.[13]

(3) Health status and job opportunity/job security.

The recent outbreak of the Severe Acute Respiratory Syndrome (SARS) outbreak in East Asia is once again exposing the vulnerability of migrant workers in the event of crisis. First, SARS puts many migrant workers at risk, especially domestic workers, cleaners, caregivers, and healthcare workers. However, their

[13] Bangkok Post, *Slave Workers Win Historic Court Battle*, 22 August 2002. *See*, for other examples, UN Commission on Human Rights, *Report of the Special Rapporteur on the human rights of migrant workers (Gabriela Rodríguez Pizarro – Addendum - Communications sent to Governments and replies received*, 60th Session, doc. no. E/CN.4/2004/76/Add.1, 16 February 2004

access to preventive information in a language they understand and to medical benefits is often not legally guaranteed. Secondly, departing migrant workers from SARS-affected countries have seen their access to host countries denied, and have reportedly had to forego the often considerable sums of money they have paid or borrowed to secure a job overseas. Thirdly, migrant workers often do not enjoy the full protection, if any, of the labour legislation (*see* above), and are, therefore, often more exposed to stigmatization, dismissal, subsequent expulsion and even discrimination once returned to their home country.

On the issue of dismissal and subsequent expulsion, even where progress is made with the protection of migrant workers, questionable linkages between health status and job security continue to exist in Asian Pacific countries. The Termination of Employment Convention, 1982 (No. 158) does not consider pregnancy, absence from work during maternity leave and temporary absence from work as valid justifications for dismissal, let alone expulsion. Security of residence for permanent migrants and members of their families in case of ill health or injury is a central principle of C. 97. C. 97 and C. 143 entitle temporary migrants to the same treatment as national citizens with respect to employment security and legitimate grounds for dismissal, which includes a right of appeal against arbitrary dismissal.

Yet, for example, a recent draft bilateral cooperation agreement on employment between Cambodia and Thailand provides for termination of employment of the migrant worker if he or she contracted "HIV or any other contagious disease, with expulsion as the result" - quite oblivious to the fact that HIV-positive workers do not pose a direct health threat to their environment, and can carry out their duties normally. According to CARAM,[14] most receiving countries in Southeast and Northeast Asia and in the Middle East require people applying for overseas jobs to undergo mandatory testing for HIV and other infectious diseases. Such testing is not so much used as an epidemiological tool, but appears to be largely based on the discriminatory assumption that migrant workers are prominent vectors of such diseases. In addition, many

[14] CARAM-Asia, *Human Rights, HIV and the Migrant Workers*, FOCUS Asia-Pacific News, Vol. 29, 2002, http://www.hurights.or.jp/asia-pacific/no_29/02caramasia.htm. CARAM-Asia is a regional network of organizations committed to action-research on Mobility and HIV/AIDS in Asia. It has 11 partner-organizations in South, Southeast and the Middle East.

migrant workers are unaware of the fact that they are tested or of the use that will be made of the information, although repatriation is often the result of a positive test.

In Malaysia, Government regulations stipulate that the contract term for migrant workers must be three years, and require the workers to submit an annual mandatory medical examination. Renewal of work permits depends on the results of the medical examination. Migrant workers are tested for HIV/AIDS, tuberculosis, sexually transmitted diseases (STDs), Hepatitis A, Hepatitis B, leprosy, cancer and epilepsy. They also have to undergo a psychiatric evaluation, have their urine tested for cannabis and opiate consumption.[15] In 1998, Singapore amended the Immigration Act to classify non-citizens suffering from AIDS or who are HIV-positive as "prohibited immigrants", and to establish sanctions for refusing to submit to a mandatory medical exam and for harbouring or employing an illegal immigrant. In 1999, the Infectious Diseases Act was amended so that information about a person's HIV status had to be revealed to immigration authorities.

Section 8 of the ILO ILO Code of Practice on HIV/AIDS and the Wo rld of Work provides, as a principle :

> HIV testing should not be required at the time of recruitment or as a condition of continued employment. Any routine medical testing, such as testing for fitness c arried out prior to the commencement of employment or on a regular basis for w orkers, should not include mandatory HIV testing.

(4) Pregnancy Testing

The Maternity Protection Convention, 2000 (No. 183), which applies to migrant workers, lays down the following revised standards on employment protection and non-discrimination in relation to maternity :

> Article 8
>
> 1. It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period

[15] Asian Migrant Centre and Mekong Migration Network, *Asian Migrant Yearbook 2001 - Migration Facts, Analysis and Issues in 2000*, Hong Kong, 2002, 99.

following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.
2. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

Article 9

1. Each Member shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including – notwithstanding Article 2, paragraph 1 – access to employment.
2. Measures referred to in the preceding paragraph shall include a prohibition from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment, except where required by national laws or regulations in respect of work that is:
(a) prohibited or restricted for pregnant or nursing women under national laws or regulations; or
(b) where there is a recognized or significant risk to the health of the woman and child.

Pregnancy testing, inasmuch as it imposes a condition on women workers in the sphere of employment and occupation which it does not impose upon male workers, and inasmuch as it does not relate to an inherent requirement of the job, constitutes discrimination on the basis of sex in the sense of ILO Convention No. 111.

(4) Pregnancy Testing

Some countries in Asia Pacific subject the job opportunities and job security of migrant women workers to pregnancy testing. In Malaysia and Singapore, for example, foreign domestic workers must undergo a pregnancy test every few months, and in Singapore, they will lose their employment and be expelled if the test is positive. Compromising women's job opportunity/security in this way is highly discriminatory, and it puts family responsibilities and the responsibility for reproduction squarely on the shoulders of women, instead of society as a whole.

(5) Job Security and Residency Status

Restrictions on the free choice of employment of regular migrant workers, and the often related risk of losing residence status as a direct result of loss of employment constitute important reasons why regular migrant workers remain in exploitative work situations.[16] For this reason, ILO instruments contain several provisions relating to the extent to which migrants who lose their employment should be permitted to continue to reside in the host country, and the rights which should be granted to them during this time. The 1999 General Survey on C. 97 and C. 143 summarizes the principles as follows :

> 577. Article 8 of Convention No. 143, states that "(1) On condition that he has resided legally in the territory for the purposes of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorization of residence or, as the case may be, work permit".
>
> 578. Paragraph 30 of Recommendation No. 151 states that regularly admitted migrants ought not be expelled on the grounds of their lack of means or the state of the employment market and the loss of employment should not, in itself, imply the withdrawal of residency permission. Paragraph 31 of the same Recommendation stipulates that migrants who lose their employment should be allowed "sufficient time to find alternative employment, at least for a period corresponding to that during which he may be entitled to unemployment benefit; the authorization of residence should be extended accordingly". Paragraph 18(1) of Recommendation No. 86 discourages States from removing regularly admitted migrant workers from their territory on account of their lack of means or the state of the employment market.

Asia Pacific provides various examples of States which restrict free choice of employment, or where loss of employment implies withdrawal of authorization of residence or work permit. In Hong Kong SAR, for example, foreign domestic helpers have two weeks to find a new employer or leave the country, once their original

[16] Ryszard Cholewinski, *International Human Rights Standards and the Protection of Migrant Workers in the Asia Pacific Region*, http://www.december18.net/paper1standards.htm

contract is terminated (i.e. the "two-weeks rule"). Thailand recently reduced the number of industries/occupations in which migrants can work: land and water transport, mineral mining, pottery and brick making, construction, rice mills, processed crop factories, processed wood factories, processed wood factories and warehouses; fisheries and related industries ; labour-intensive factories such as garments; domestic helpers and laundry shop employees; hot and similar farms; and crop farms, orchards and plantations. The Memorandum of Understanding between Thailand and Lao PDR provides that termination of employment automatically implies loss of work permit.

(6) Freedom of Association.

Obstacles to migrant workers' voice and representation more often flow from ignorance of rights, lack of effective protection against anti-union discrimination by employers and occasional reluctance of trade unions to organize them, than from outright denial of the right to organize by law. In Malaysia, for example, the Trade Unions Act (1959) permits non-citizens to join trade unions, although it bars non-citizens from becoming elected officials. The Malaysian Trade Union Congress (MTUC) which supports the interest of migrants workers, reports, however, that "several attempts have been made by various groups of migrant workers to establish associations for the purpose of collectively protecting their interests, but were rejected by the Government", and that "while the employment contract of some migrant workers stipulate that they should not join a trade union, workers not constrained by their contract are not attracted to the trade unions either out of ignorance or fear of persecution by their employers or authorities"[17] Another commentator notes :

> While the modern constitutions of all Asian countries specify the freedom of assembly for all, many migrant workers are not allowed even to assemble except for sports and physical exercise (Saudi Arabia). In Japan, migrant workers are allowed to join community unions but these have limited bargaining power in the work place.

[17] ILO, *Report and Conclusions of the ILO Asia Pacific Regional Trade Union Symposium on Migrant Workers, 6 - 8 December 1999*, Geneva, 2000, 151 and 152.

> Many migrant workers including undocumented workers have been organised into community unions, e.g. Zentoitsu, who are able to negotiate with individual enterprises. They have successfully pursued money claims and reinstatement of dismissed migrant workers. Singapore prohibits them from organising or simply holding meetings in public places. In Hong Kong SAR, which in many ways is the most liberal in Asia, migrant workers are allowed to organise and register their unions but since most of them are domestic helpers and have individual employers, their effectiveness as a bargaining unit is limited. They may however articulate their common demands to influence public policy relating to conditions of work.[18]

Restrictions of migrant workers' right to organize (and other fundamental human rights) are also known to rest on bilateral agreements between labour-sending and labour-receiving countries. The general Memorandum of Understanding between Malaysia and Indonesia reportedly mentions :

- Indonesian migrant workers are explicitly prohibited from organizing (point 13);
- Indonesian migrant workers are required to submit their passports to their employers (point 2.18);
- Indonesian migrant workers are prohibited from entering marriage with fellow Indonesians as well as with local citizens (point 2.20).[19]

(7) *Children of migrant workers and vulnerability to the worst forms of child labour.*

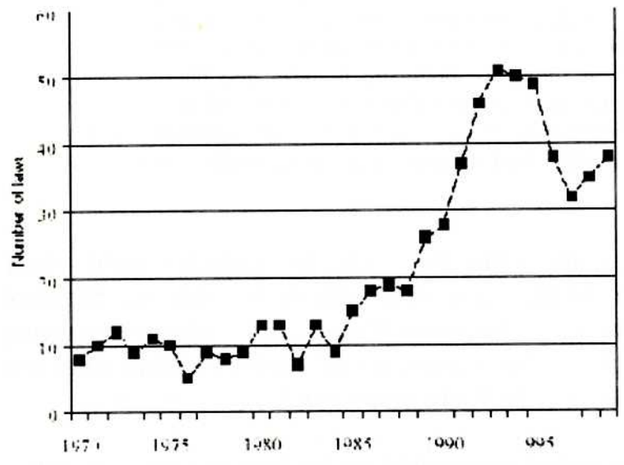
Discussions with the Thai National Human Rights Commission revealed that the Thai Government has no clear policy on registering children of irregular migrant workers from Myanmar born on Thai soil, out of fear that such registration would imply conferral of citizenship at a later stage. The adverse result of this, however, is that children's access to education is seriously hampered and that their vulnerability to child labour, particularly

[18] Maria Villalba, *Combatting Racism Against Migrant Workers - Religion, Culture, and Racial Discrimination against Asian Migrant Workers*, Women in Action, 1-2/2000, http://www.isiswomen.org/wia/wia100/hum00014.html

[19] CARAM Indonesia, KOPBUMI and the National Commission on Violence Against Women (Komnas Perempuan), *Indonesian Migrant Workers : Systematic Abuse at Home and Abroad - Indonesian Country Report to the UN Special Rapporteur on the Human Rights of Migrants*, Kuala Lumpur, 2 June 2002, 13.

the worst forms, is correspondingly higher.[20] For example, reports indicate that young Burmese boys and girls, aged 12 to 16 are sold by brokers to owner of fishing vessels and are kept as "sea-prisoners" for years at a time. Prevented from disembarking at any port, they are threatened with execution at sea by their owners if try to escape.[21]

Figure III. National laws and regulations concerning migration by year of enactment



Source: International Labour Organization (NATLEX)

(8) The increase in national laws and regulations concerning migration.

Worldwide, the number of national laws and regulations increased significantly in the 90's. Based on the entries in the NATLEX database maintained by the ILO, over 100 countries enacted legislation or signed agreements that related to migration during the 1990s (see figure). In comparison, in 1970, there only were around 40 countries employing foreign labour.[22] This development reflects the growing number of countries which have become host to migrant workers, and the increasing need felt by labour-sending and labour-receiving countries to regulate labour migration. Many Governments also have become concerned about the abuse of their nationals employed overseas, and have adopted legislative measures for their protection.

Several countries in Asia Pacific have in recent years taken steps to improve the legal protection of migrant workers in the context

[20] *See*, for example, Nyo Nyo (Burma Lawyers' Council), *Burmese Children in Thailand: Legal Aspects*, LEGAL ISSUES ON BURMA JOURNAL No. 10 - DECEMBER 2001, http://www.ibiblio.org/obl/docs/LIOB10-NyoNyo.htm.

[21] Information provided by the Burmese Labour Solidarity Organization, an NGO organized by former Burmese student leaders which provides assistance to Mae Sot factory workers.

[22] United Nations, *International Migration Report 2002*, Doc. No. ST/ESA/SER.A/220, New York, 2002, 21.

of labour migration sponsored by private agencies. In many cases, the legislative interventions represent a transition from merely facilitating the export of migrant labour with a view to easing domestic unemployment and attracting foreign currency to actively protecting migrant workers. This transition is not yet complete, as may be judged from a critical civil society in the two biggest labour-sending countries, Indonesia and the Philippines.[23]

An anthology :

Indonesia. In 1998, the Minister of Manpower issued the Decree on the Protection of Indonesian Manpower Abroad through Insurance. The Decree requires overseas Indonesian workers to join a protection insurance program, which provides benefits and legal aid in the event of an accident or death of a worker, or in cases of termination of an employment relationship due to accident, sickness, employer bankruptcy, inhuman treatment by employer, or failure of an employer to pay wages or to respect workers' rights. In 2002, a ministerial Decree on Overseas Employment of Indonesian Workers was issued which regulates matters such as the issuing of work permits, terms of employment, and counseling, registration and departure of prospective overseas workers. In February 2003, the Government suspended departures overseas for workers in "informal economy jobs, such as housemaids, baby-sitters and care givers." The decision was reportedly inspired by a concern to protect a category of workers particularly prone to abuse overseas, as well as by an intention to focus more on the "quality rather than the quantity" of migrant workers departing overseas. Civil society groups claim that effective protection of migrant workers is hampered by the lack of a comprehensive policy reflecting the lack of coordination between the various government agencies involved such as the Ministry of Foreign Affairs (handling abused migrant workers abroad), the State Ministry for Women's Empowerment (requests for help by women migrant workers as well as the Health Ministry), the Home Affairs Ministry and Immigration (managing the required documents for departing migrant workers), and the Ministry of Manpower and Transmigration (regulating recruitment agencies).

[23] For Indonesia, *see* CARAM-Indonesia e.a., footnote 14. As regards proposed amendments to R.A. 8042 in the Philippines, *see* Lyra P. Villafana, *Flaws riddle migrant workers law*, http://www.codewan.com.ph/CyberDyaryo/features/f2000_0609_01.htm.

Republic of Korea. In Korea, for example, under the Industrial Training System (ITS) introduced in 1993, most legal foreign workers in Korea were trainees in Korea for up to three years and thus not covered by Korea's wage and other labor laws. As a result, the "trainees" simply constituted a cheap workforce for small and medium-size undertakings. In 2002, an amendment to the Immigration Control Act entered into force with a double effect : (1) after a succesful one-year training, "trainees" can be employed for two years on the basis of an employment contract benefiting from the protection of e.g. the Labour Standards Act ; (2) during the one-year training, labour legislation will not apply, but the system contains guarantees with respect to training allowances worth more than the minimum wage, injuries and disease compensation, and accomodation and meals. Migrant workers entering the country on an entertainers' visa (six months), however, are not protected by the Labour Standards Act, and unlike other categories of migrant workers, are subject to an HIV test.

Mongolia. In 2001, Mongolia adopted a Law on Sending Labour Force Abroad and Receiving Labour Force and Specialists from Abroad, largely confining its regulatory scope to the activities of private agencies.

Philippines. In 1995, the Philippines adopted the Migrant Workers and Overseas Filipinos Act (R.A. 8042) outlining a declaration of policy, establishing conditions for recruitment, and mandating public services such as an emergency repatriation fund, a loan guarantee fund, a resource center and legal assistance overseas. Bills to amend parts of the Act are pending with Congress.

Sri Lanka. Sri Lanka's major policy initiatives to protect Sri Lankan workers going abroad go back to the eighties. They are legally ancho red in the Sri Lanka Bureau of Foreign Employment (SLBFE) Act no 2 1 of 1985 amended by Act No 4 of 1994. The key elements include :

- The registration of all migrant workers at the SLBFE and the licen sing of recruitment agencies in terms of the SLBFE Act.
- The formulation and implementation of a model contract of employ ment which ensures fair wages and standards of employment. In te rms of a series of Memorandums of Understanding (MOUs) signed between the SLBFE and recruitment agents in the Middle East, Sin gapore and Hong Kong, it has become compulsory for employers wishing to hire Sri Lankan housemaids to sign a contract which mu st be endorsed by the Sri Lankan Embassy before a housemaid ma y leave the country.
- The SLBFE stipulates a monthly minimum wage of an amount betw een US$100–150 for unskilled workers, with a minimum of US Doll ars 130 for a domestic worker.
- To overcome the exploitative practices of private money lenders, State banks and financial institutions have initiated schemes to gra nt credit. The Sri Lanka Export Credit Insurance Corporation (SLE CIC), a statutory body of the Ministry of Trade and the Sri Lankan Government. (*See* Malsiri Dias and Ramani Jayasundere, *Sri Lan ka: Good Practices To Prevent Women Migrant Workers From Going Into Exploitative Forms Of Labour*, GENPROM Working P aper No. 9, ILO, Geneva, 2002)

Viet Nam. In 1999, Viet Nam amended legislation adopted in 1995 to strengthen the protection of temporary Vietnamese migrant workers abroad. Decree No. 152/1999/ND-CP[24] regulates the licensing labour export agencies and for registering contracts, provides for the rights and obligations of Vietnamese labourers working abroad, as well as of enterprises that send Vietnamese labourers abroad, and it lays down the responsibilities of the ministries involved.

Annex 5 contains labour legislation guidelines for the protection of migrant workers.

[24] Complemented by a Circular : *Guidelines on the implementation of Decree no. 152/1999/ND-CP on the export of Vietnamese workers and specialists*

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments	(Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)	
Migration for Employment Convention (Revised), 1949 (No. 97)	41	Pursuant to a recommendation by the Working Party on Policy regarding the Revision of Standards, the Committee of Experts on the Application of Conventions and Recommendations carried out a general survey on Convention No. 97, Recommendation No. 86, Convention No. 143 and Recommendation No. 151. This survey was examined by the Committee on the Application of Standards at the June 1999 Session of the Conference. The Conference Committee concluded that this issue should be the subject of a general discussion in order to examine the existing instruments, including their possible revision. This question is the subject of a proposal for the agenda of a forthcoming session of the Conference.
Migration for Employment Recommendation (Revised), 1949 (No. 86)		
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	18	
Migrant Workers Recommendation, 1975 (No. 151)		
Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100)		The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 100.

Outdated instruments	(Instruments which are no longer up to date, this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)	
Instrument	**Number of ratifications (at 01.10.01)**	**Status**
Inspection of Emigrants Convention, 1926 (No. 21)	28	The Governing Body has shelved Convention No. 21 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Migration for Employment Convention (Revised), 1949 (No. 97), if appropriate, and denouncing Convention No. 21 at the same time.
Migration (Protection of Females at Sea) Recommendation, 1926 (No. 26)	–	The Governing Body has noted that Recommendation No. 26 is obsolete and has decided to propose to the Conference its withdrawal in due course.
Migration for Employment Convention, 1939 (No. 66)	–	Convention No. 66 was withdrawn by the Conference at its 88th Session (June 2000).
Migration for Employment Recommendation, 1939 (No. 61)	–	The Governing Body has noted the replacement of Recommendations Nos. 61 and 62 by the Migration for Employment Recommendation (Revised), 1949 (No. 86).
Migration for Employment (Co-operation between States) Recommendation, 1939 (No. 62)	–	
Reciprocity of Treatment Recommendation, 1919 (No. 2)	–	The Governing Body has noted that Recommendation No. 2 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.

Committee of Experts on the Application of Conventions and Recommendations – General Observation concerning Convention No. 29, Published: 2001

Further to paragraphs 72-81 of its General Report, the Committee requests all governments to include in their next reports under the Convention information on measures taken or contemplated to prevent, suppress and punish trafficking in persons for the purpose of exploitation. Having regard to Article 1, paragraph 1, and Article 25 of the Convention, the Committee is seeking in particular information on the following aspects of law and practice.

(1) Provisions of national law aimed at the punishment of:

(a) the exaction of forced or compulsory labour;
(b) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (reproduced in paragraph 73 of the General Report in Part One of this report);
(c) the exploiters of the prostitution of others;

(2) measures taken to ensure that the penal provisions referred to under (1) are strictly enforced against those responsible for the forced labour of legal or illegal migrants, inter alia in sweatshops, prostitution, domestic service and agriculture; in particular, measures required in practice for court proceedings to be initiated and completed, including:

(a) measures designed to encourage the victims to turn to the authorities, such as:

(i) permission to stay in the country at least for the duration of court proceedings, and possibly permanently;
(ii) efficient protection of victims willing to testify and of their families from reprisals by the exploiters both in the country of destination and the country of origin of the victim, before, during and after any court proceedings, and beyond the duration of any prison term that might be imposed on the exploiter; and the participation of the Government in any

forms of intergovernmental cooperation set up for this purpose;
(iii) measures designed to inform victims and potential victims of trafficking of measures under (i) and (ii), with due regard to any barriers of language and circumstances of physical confinement of victims;

(b) measures designed to strengthen the active investigation of organized crime with regard to trafficking in persons, the exploitation of the prostitution of others, and the running of sweatshops, including:

(i) the provision of adequate material and human resources to law enforcement agencies;
(ii) the specific training of law enforcement officers, including those working in immigration control, labour inspection and vice squads, to address the problems of trafficking in persons in a manner conducive to the arrest of the exploiters rather than of the victims;
(iii) international cooperation between law enforcement agencies with a view to preventing and combating the trafficking in persons;

(c) cooperation with employers' and workers' organizations as well as non-governmental organizations engaged in the protection of human rights and the fight against the trafficking in persons, with regard to matters considered under (2)(a) and (b)(ii);

(3) any difficulties encountered by the authorities in seeking to prevent or suppress the exaction of forced labour to which legal and illegal migrants may be subjected in practice, and measures taken or contemplated to overcome these difficulties.

Committee of Experts on the Application of Conventions and Recommendations, Report of the Committee of Experts on the Application of Conventions and Recommendations, Observation, 2003,74th Session

1. The Committee notes that at its 288th Session (November 2003), the Governing Body of the ILO approved the report of the tripartite committee set up to examine the representation alleging non-observance by China of Convention No. 97 with respect to the Special Administrative Region (SAR) of Hong Kong, made under article 24 of the ILO Constitution by the Trade Union Congress of the Philippines (TUCP). The complaint concerned allegations that the Hong Kong administration approved certain measures that were harmful for Filipino workers and in violation of Article 6 of the Convention which provides for equality of treatment between migrant workers and nationals as regards remuneration, social security, employment taxes and access to legal proceedings. The specific measures included: (a) the reduction of the Minimum Allowance Wage (MAW) of foreign domestic workers by HK$400, effective April 2003; (b) the introduction of an employees' retraining levy by HK$400 imposed on employers of these workers, effective 1 October 2003; and (c) the possible exclusion of foreign domestic workers, who have not resided in Hong Kong SAR for at least seven years, from subsidized public health care services (see GB. 288/17/2). The Committee also notes the joint communication by the Indonesian Migrant Workers Union (IMWU), and the Asian Domestic Workers Union (ADWU) dated 15 January 2003, concerning the application of the Convention in Hong Kong SAR, which was sent to the Government of China on 27 February 2003 for its comments thereon, and which it will address in points 5 and 6 below.

2. The Committee notes that the Governing Body concluded that with regard to the proposed measure to exclude in future foreign domestic helpers, who had not resided for at least seven years in Hong Kong SAR, from public health care services, the residence requirement of seven years would be too long and the automatic exclusion of these workers from all public health care benefits would contravene Article 6(1)(b) of the Convention. It urged the Government not to take this particular measure and to take all necessary steps to ensure that the social security provisions of the standard employment contract are strictly enforced.

3. The Governing Body further determined that insufficient information was provided by both the complainant organization and the Government to permit it to reach any definite conclusions as to whether the measures to reduce the MAW of foreign helpers and to impose an employees' retraining levy on the employers of these workers contravened Article 6(1)(a) of the Convention. Nevertheless, the Governing Body believed that the imposition of the same levy on the employers of all imported workers, including domestic workers whose wages are already the lowest amongst migrant workers, while at the same time reducing the MAW wage of these workers with the same amount, would not be equitable. It urged the Government to review the above-described levy and minimum wage policies on imported workers, especially foreign domestic workers, taking into account the requirement of Article 6 of the Convention that non-nationals shall not be treated less favourably than nationals, and the principles of equity and proportionality. It also invited the Government to include detailed information on the wages paid to local domestic workers and any other comparable categories of local employees that would allow comparisons to be made, and to provide updated information on the number of underpayment complaints made by domestic workers, as well as the impact of the measures taken by the Government to encourage these workers to forward such complaints, since the entry into force of the abovementioned measures. The Governing Body asked that the Committee of Experts on the Application of Conventions and Recommendations to continue to examine this matter (GB/288/17/2, paragraph 45).

4. The Committee follows the Governing Body in its conclusions as regards the abovementioned measures taken by the Hong Kong Administration concerning foreign domestic workers. It requests the Government to provide full information in its next report on: (a) the access to public health care services of foreign domestic helpers who have not resided for at least seven years in Hong Kong SAR; (b) the enforcement of the social security provisions of the standard employment contract; (c) any ongoing or planned review of the above-described levy and minimum wage policies on imported workers, especially foreign domestic workers, taking into account the Committee's conclusions and recommendations as to the requirements of Article 6 of the Convention that non-nationals shall not be treated less favourably than nationals, and the principles of equity and proportionality; and (d) the wages paid to local domestic workers and any other comparable categories of local employees, as well as information on the number of

underpayment complaints made by foreign domestic helpers and on the impact of the measures taken by the Government to encourage these workers to forward such complaints.

5. With regard to the comments made by the IMWU and the ADWU, the Committee notes the allegations that foreign domestic workers are particularly vulnerable to abuse and violations of their employment contracts and are facing problems such as payment of excessive fees, long working hours, denial of rest days, and physical, mental and sexual abuse and the underpayment of wages, the latter being particularly problematic for Indian, Indonesian and Sri Lankan domestic workers. The IMWU and the ADWU also allege that certain proposed or existing government policies discriminate against foreign domestic workers, such as the policy restricting employment of migrant workers in domestic work, the rule according to which foreign domestic helpers have to leave Hong Kong within two weeks after the termination of their contract, the proposals to set a quota for foreign domestic workers, the ban on live-out arrangements and the recent tax imposed on the employment of foreign domestic helpers. The Committee notes that the allegations made by the IMWU and AMWU on the underpayment of wages and the imposition on employers of foreign domestic workers of an employees' retraining tax, concern allegations that are related to those made by the TUCP, and which were addressed in points 1, 3 and 4 of the present observation.

6. With regard to the point raised by the AMWU and the IMWU on the rule according to which foreign domestic helpers have to leave Hong Kong within two weeks after the termination of their contract ("two-week rule"), the Committee refers to its previous comment in which it noted the information in the Government's report that the purpose of the "two-week rule" was to deter foreign domestic helpers from overstaying and taking up unauthorized work. It noted that the rule was exercised with flexibility and that in some cases (financial difficulties of, or abuse by, the employer) foreign domestic helpers may be allowed to change employers without returning to their home country. It also noted that foreign domestic helpers were allowed to apply for an extension of stay in Hong Kong (SAR) from the Immigration Department, to facilitate their pursuing claims at the Labour Department or attending civil proceedings in court. The Committee asks the Government to supply further information regarding the practical application of this possibility, including the number of applications for extension and the reasons for refusal by the Immigration Department. It also asks the Government to

provide detailed information on the other allegations made by the IMWU and the ADWU concerning violations of the employment contract of foreign domestic workers and physical, sexual and mental abuse of these workers, as well as the abovementioned existing or proposed policies that are alleged to be discriminatory against foreign domestic workers.

The Committee is raising other points in a request addressed directly to the Government.

[The Government is asked to report in detail in 2004.]

Annex 4

(Excerpt from ILO, *Migrant Workers - General Survey of the Committee of E xperts on the Application of Conventions and Recommendations*, International Labour Conference, 87th Session, Report III (Part 1B), Geneva, 1999, 239 - 248)

...

Section II. Conclusions

A. International labour Conventions and national legislation on migrant workers: Convergence and divergence (Endnote 8)

644. The Committee would like to emphasize first of all that while it welcomes the number of reports received, it regrets nonetheless that many of them merely summarized the legislation in force on the subject of emigration and/or immigration and that very few governments or employers' or workers' organizations supplied information on the application in practice of the different provisions of the instruments under review in this General Survey. (Endnote 9) A number of uncertainties therefore remain as to the manner in which States put into practice the provisions of the instruments.

645. Having reached the end of its review of the legislation, if not the practice, of member States, the Committee is nonetheless in a position to set out the points of convergence and divergence between national laws and regulations and international labour standards concerning migrant workers; it should of course be understood that, for those countries which have not ratified them, these standards create no obligations other than those laid down in article 19 of the ILO Constitution.

646. On the whole the ILO instruments seem to have fulfilled their role in orienting national laws and regulations in certain areas, including the organization of migration flows, (Endnote 10) although the mechanisms for disseminating information between countries and to potential users could be strengthened to enable it to be disseminated as widely and as fully as possible; and the nature of the information that must be disseminated should perhaps be specified. In this respect, under Article 1 of Convention No. 97, the ILO also has a role to play in collecting and disseminating information on policies and legislation, movements of migrant workers and their living and working conditions, as well as on bilateral and multilateral migration agreements -- a role it already plays but which could benefit from being strengthened.

647. Generally speaking, countries tend to follow the provisions made by the instruments in broad terms, but less so when it comes to provisions calling for more specific commitments, in particular with regard to the protection of migrant workers. The points of divergence lie in key areas of the instruments: recruitment of migrant workers, rights afforded to migrant workers in an irregular situation, and the policy of promoting equality of opportunity and treatment.

1. Recruitment procedures

648. The 1949 instruments saw the role of private recruitment agencies as secondary to that which was expected of the public authorities. The global context has changed, however, and there has now been a movement in the other direction in some regions, where the international mobility of workers is increasingly in the hands of private fee-charging recruitment agencies. "In some large labour- supplying countries they now comprise a major service industry, accounting for the recruitment and placement of 60 to 80 per cent of all temporary labour migrants leaving every year, and earn substantial revenues from the business." (Endnote 11) Except where

bilateral agreements on migration have been concluded between sending and receiving countries, the public services today have a minor and shrinking role in the recruitment and placement of migrant workers. Private employment agencies have proven very quick to spot shortages of certain categories of labour on the labour market, find workers to fill the gap and propose flexible solutions that are appropriate given the growing complexity of economies, even managing to overcome the information gaps and institutional barriers that isolate national labour markets from one another. The commercialization of placement has negative aspects, however: (a) advertising, distributing various forms of misleading propaganda, soliciting applications and demanding exorbitant fees (well above the maximum allowed by regulations or the actual cost of recruitment) for non-existent job offers; (b) withholding information or giving false information on the nature of jobs and conditions of employment; and (c) selecting applicants not on the basis of job qualifications but according to the amount they are willing to pay to get the job. Unskilled workers without any particular technical qualifications are particularly vulnerable to malpractices by certain private placement agents organizing international labour migration. Many countries have therefore regulated the activity of private agencies recruiting migrant workers much more closely than other commercial business and have imposed stiff sanctions against certain offences, while others prefer to rely on self-regulation of the industry, thus substantially reducing the administrative workload of investigating and monitoring the agencies. That fraud and malpractices still persist in this area shows how difficult it is to rely on regulation as a means of mitigating the impact of market forces on migratory processes; more importantly, it raises the question of the consequences of the growth of private recruitment agencies to the detriment of public services.

649. The ILO recognized the need for States to ensure that the benefits of private employment agencies do not encroach upon or diminish the rights of workers in the adoption in June 1997 by the International Labour Conference of the Private Employment Agencies Convention (No. 181), which revised the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96). Article 8 of Convention No. 181 provides for the protection of migrant workers recruited or placed by private employment agencies. Article 7 reaffirms the principle that "private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers" but allows exceptions in respect of certain categories of workers and specified types of services provided by private employment agencies. It should equally be recalled that in 1996, that is one year earlier, the International Labour Conference adopted the Recruitment and Placement of Seafarers Convention, 1996 (No. 179), which states in Article 4 that States must "ensure that no fees or other charges for recruitment or for providing employment to seafarers are borne directly or indirectly, in whole or in part, by the seafarer" but specifies that "costs of the national statutory medical examination, certificates, a personal travel document and the national seafarer's book shall not be deemed to be 'fees or other charges for recruitment'". In this connection, the Committee considers that a clearer distinction than that made in the 1949 instruments should be drawn between the free services which should be provided to all would-be migrants and any payment for recruitment and placement services which result in the migrant effectively performing a job that corresponds to the offer made.

2. Rights afforded to migrant workers in an irregular situation

650. The analysis of national law and practice reveals a degree of discrepancy between certain principles laid down in basic texts or ratified Conventions and the measures actually taken and applied to control migration flows with the aim of reducing or even stopping them altogether. Moreover, the protection of fundamental rights of migrant workers in an irregular situation is illusory if there is no precise definition of the basic human rights of all migrant workers as provided by Convention No. 143, and if difficulties bar their access to appeal procedures. (Endnote 12) The lack of a precise definition of fundamental human rights of all migrant workers (notably those in an irregular situation) which member States must respect -- in terms of Article 1 of Convention No. 143 -- represents an important obstacle inasmuch as many countries are concerned that the rights thus recognized for irregular migrants could be widely interpreted by the Committee. Concerning the refusal of many countries to recognize the right of migrant workers in an irregular situation to entitlements arising out of past employment as regards

remuneration, but especially as regards social security, it should once again be emphasized that the enjoyment of these rights, linked to having actually undertaken a job, does not forbid the State concerned from proceeding to deport an irregular worker and that the equality of treatment prescribed in the Convention is to be interpreted as requiring that these workers enjoy equality of treatment not with nationals, but with migrants who are lawfully within the national territory and legally employed.

3. Ensuring equality of opportunity and treatment

651. Although the need to ensure equality of treatment between migrant workers and national workers as regards conditions of work, social security and access to social services does not raise any difficulties in principle, the same cannot be said for the promotion of equality of opportunity and treatment in the areas covered by Convention No. 143 and Recommendation No. 151 (employment and occupation, social security, trade union rights, individual and collective freedoms) for the migrant worker as well as members of his or her family. The provisions of these instruments offer a higher degree of protection than that afforded by national legislation. Except in countries of long-term immigration where their status tends to converge and eventually merge with that of citizens, a migrant is and remains a foreigner. It is clear from government reports that in countries that have a policy of accepting migrants for a fixed period of time and for a specific purpose, promotion of equality of opportunity and treatment is not usually envisaged: a migrant worker taken on for his or her ability to carry out a specified job will leave again at the end of the contract or renew it for a further fixed period, without there being any question of equality of opportunity in the context of free choice of employment, which is the prerequisite for such equality. In countries where migration flows are long established and have led to permanent settlement of migrants, promotion of equality of opportunity and treatment comes into play as a means of facilitating the integration or assimilation of migrants.

652. Another aspect of equality of opportunity and treatment -- and one that had not arisen when the present standards were adopted -- is the impact of regional groupings (the European Union, MERCOSUR and others) on this question. The Committee considers that the fact that the countries concerned often provide better treatment to workers from other countries in the regional grouping, than to workers from outside the grouping, raises difficult questions of principle which need to be addressed.

4. Control of migration

653. The Committee noted in Chapter 4 that the methods by which States carry out their obligation, under Article 3 of Convention No. 143, to "suppress clandestine movements of migrants for employment and illegal employment of migrants", is not covered by the Convention. It notes in practice that the measures taken may in some circumstances constitute violations of the fundamental human rights of workers. This question should be considered in the framework of a Conference discussion on migration for employment.

5. Sanctions

654. The Committee regrets the lack of information provided on the practical application of sanctions. (Endnote 13) This is of concern because such information as indicated in the reports suggests that, in practice, sanctions are taken against irregular-status migrant workers themselves, although Convention No. 143 does not address this issue. The absence of information about the sanctions required of governments pursuant to Article 6 of Convention No. 143 in respect of the illegal employment of migrant workers, the organization of movements of migrants for employment involving abusive conditions, and the knowing assistance to such movements whether for profit or otherwise, would suggest that this Article is not properly applied in practice. The Committee would urge governments to reconsider this problem in light of their obligations.

B. What standards for migration?

655. The Committee recalls (Endnote 14) that Conventions Nos. 97 and 143, which are the subject of this General Survey, are among those for which the Governing Body requested additional information from constituents to enable it to clarify the possible need for revision of these instruments and that it accordingly decided "to request the Committee of Experts to undertake a General Survey". In this regard, the Committee remarks that the questionnaire sent to member States, in accordance with article 19, did not directly pose the question of the appropriateness (or not) of revising Conventions Nos. 97 and 143. This survey was on opportunity for the Committee to examine all the reports submitted by States which have ratified one and/or both Conventions Nos. 97 and 143, under article 22 of the ILO Constitution, with a view to possible normative action. Through this examination it has clearly been seen that the ratified instruments are not fully applied and, above all, a number of difficulties of application reveal misunderstandings of the obligations enunciated by certain provisions of the Conventions.

656. Throughout this survey, it has been remarked that the context in which the international labour standards examined in this survey were adopted is different from that in which migration flows occur today, as can be seen from the following examples.

1.Declining role of state leadership in the world of work

657. The ILO instruments were drafted with state-organized migration in mind, rather than spontaneous migration. For both economic and political reasons, the State no longer plays such a dominant role as it did over 45 years ago in the movement of workers across borders. Faced with the increasing diversity and complexity of international migration compared to previous decades, many countries of emigration are unable to provide efficient employment services free of charge, with the result that private recruitment and placement agencies for migrant workers have moved from a secondary role after the public services to an essential one. This trend has also affected a number of major countries of employment, in particular in Western Europe, which, after hesitating to abandon the monopoly of public employment services in the recruitment and placement of foreign labour, are now giving serious consideration to the advantages offered by the incontestable flexibility and mobility of private agents.

2. Feminization of migration for employment

658. When Conventions Nos. 97 and 143 were adopted, female migrants were mostly to be found in the context of family reunification. Times have changed, and today more and more women migrate not to join their partner, but in search of employment in places where they will be better paid than in their home country. It is estimated that female migrants make up almost half of migrant workers in the world today. (Endnote 15) This "feminization" is sometimes characterized by an over-representation of women migrants in extremely vulnerable positions, in so far as these positions are characterized by a strong bond of subordination between the employer and the employee and, above all, because those sectors are generally excluded from the scope of legal protection on employment, notably from the Labour Code. It can be asked whether new measures ought to be taken by the ILO to ensure protection for this category of workers and, equally, if any revision of the treatment of artistes and members of the liberal professions in the ILO instruments is necessary, particularly in light of the extent of the phenomenon of women migrant workers being recruited for such employment only to find themselves working in the sex sector.

3. Increase in temporary migration in place of migration for permanent settlement

659. While the 1949 and 1975 instruments were originally conceived with a view to covering migration for settlement (immediate or gradual) today a rise in migration for short-term employment can be clearly seen. In their reports, member States emphasized this change, as

well as the repercussions this has for application of the most important provisions of Conventions Nos. 97 and 143. In light of these changes, it can be asked whether it is appropriate to examine the extent to which some provisions of the instruments can be applied only to migrant workers with permanent residence status and to the protection to be given to temporary migrant workers.

4. Increase in illegal migration

660. Since 1975, the date of the adoption of Convention No. 143, which represents the first attempt by the international community to address problems relating to clandestine migration and illegal employment of migrants, which had become particularly acute during the early 1970s, clandestine migration and illegal employment has taken such proportions that countries of immigration -- themselves confronted with rising unemployment, poverty and inequality, and finding it necessary to create a balance between the legitimate claims of their nationals who count upon national preference, and the rights of foreigners -- have chosen to put the accent upon controlling migration flows.

661. This said, the Committee is conscious that for countries facing economic transition and poverty, environmental degradation and massive unemployment, etc., emigration is often a natural result of the search of their citizens for employment and a better life. Emigration may not be the answer in the search for development, but it is a natural economic phenomenon that will continue as long as the reasons given above persist. The Committee therefore considers it vital that measures to suppress illegal migration be supplemented by the kind of measures contemplated in these instruments, to facilitate migration whenever appropriate, and to protect migrant workers in their quest for a better life. These measures will benefit from the kind of dialogue between countries of emigration and immigration that can be observed when such States become partners in controlling the flow of migration, and learn to adapt their policies to each other's needs.

5. Growth of certain means of transport

662. Some of the provisions of the instruments are simply out of date: for example, Article 5 of Convention No. 97, which requires migrant workers and the members of their families to undergo two medical examinations, both at the time of departure and on arrival, does not take account of changes in transportation and the increase in air travel.

663. In addition to the lacunae in Conventions Nos. 97 and 143 due to the evolution of the context in which they were adopted, the process of comparing national legislation with international labour standards relating to migrant workers has made it clear other lacunae exists in these instruments. For example, they do not deal with the elaboration and establishment of a national migration policy, in consultation with employers' and workers' organizations, within the framework of national policy; questions relating to migrant workers' contracts, which are of vital importance in terms of protecting workers, are not addressed in the existing instruments; (Endnote 16) the same can be said of questions touching upon certain aspects of the payment of migrant workers' wages. (Endnote 17)

664. Despite these lacunae and the changing nature of the context in which migration takes place since the adoption of Conventions Nos. 97 and 143, the Committee is convinced that the principles enshrined in these instruments are still valid today: control of migratory flows, cooperation between States, protection of migrants for employment and equality between nationals and migrants with regard to conditions of work. It notes however that many member States still hesitate to ratify instruments that touch on what is often seen as a sensitive subject with considerable political, socio-cultural and even economic ramifications.

665. According to predictions, international migration will continue to increase; it is unacceptable for millions of workers to remain excluded from international protection. The fact has to be faced, however, that neither of these Conventions has obtained many ratifications, while the United

Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in 1990, has not managed to achieve the 20 ratifications needed to enter into force. Many countries, including those most affected by international migration, (Endnote 18) have some difficulty in ratifying very detailed instruments in this area which attempt to regulate every aspect of the migration process and treatment of migrant workers. The Committee has also observed that member States whose legislation and practice are in conformity with the essential provisions of one or both instruments are often unable to ratify it or accept it officially because of comparatively minor divergences between its precise wording and their own legislation, with the result that a large share of migrant workers are denied any international protection.

666. At this stage in its deliberations, the Committee judges that two options are open to it. The first consists of recommending to the Governing Body to maintain the status quo, as experience appears to have shown that in terms of international migration, States are reluctant to ratify any international instrument, regardless of how loose and flexible they are. It can also be stated that the difficulties in application of Conventions Nos. 97 and 143 mentioned in paragraphs 641-643 would persist even if a new instrument was adopted or if the existing ones were revised, as these difficulties relate to the most important underlying principles of the instruments, namely equality of treatment between nationals and foreigners, maintenance of residency rights in case of incapacity to work, protection in case of redundancy and geographical and occupational mobility. This status quo could equally be accompanied by a vigorous promotion campaign, notably in light of the findings of the present survey, in relation to those provisions which have been judged inapplicable by certain States but which in fact appear to stem from a misunderstanding. A variant on this approach would be to elaborate one or several additional protocols (Endnote 19) designed to bridge the gaps in the instruments mentioned above.

667. The second option consists of envisaging a revision of Conventions Nos. 97 and 143. Without wishing to anticipate the final decision to be adopted by the Governing Body, the Committee suggests that the instruments be entirely revised in order to bring them up to date and, in so far as is technically possible, to merge them into a single Convention by the elaboration of a new Convention, designed to bridge the gaps in the current instruments. It would be the for Governing Body and the International Labour Conference to decide whether a framework Convention (Endnote 20) or a single instrument treating the situation of migrant workers in more detail would have the better chance of being ratified and applied in such a way as to ensure the greatest level of protection for the greatest number of migrants possible. By emphasizing universally recognized principles, accompanied by provisions which would enable governments and the social partners to work together to achieve objectives which are adapted to national conditions, it may be possible to obtain wide ratification of the instrument and thus to ensure that the vast majority of migrant workers enjoy an adequate level of protection at work.

668. Whatever the means adopted by the ILO, the Committee considers that much more needs to be done at the international level to address the situation of migrant workers. This is a growing phenomenon in a globalizing economy, and is likely to continue to grow as economies integrate -- and sometimes as they disintegrate. It is, as has been seen recently in the Asian economic crisis, very susceptible to disruption of all types, and the situation of migrant workers tends to deteriorate in times of economic difficulty. This kind of economic crisis generally leads on the one hand to slowing or halting migration into once-flourishing economies, at the same time as it causes an equal reaction of workers desiring to emigrate to countries where the economy is stronger and can absorb an oversupply of labour.

669. Thus there is an urgent need for better mechanisms at both the national and international levels to address this phenomenon. It is up to the International Labour Organization to provide the international framework for this effort, and up to the ILO in concert with its constituents to put into place the other policies and measures that will lead to a better and happier life for migrant workers.

Endnote 8
This title is taken from a report prepared by the Office under the Interdepartmental Project on Migrant Workers, 1994-95 (Picard, op. cit., pp. 38-43).

Endnote 9
For example: court decisions having a bearing on the application of Conventions Nos. 97 and 143, observations of employers' and workers' organizations, activity reports of national authorities responsible for enforcing national legislation and labour inspections, and statistics on the application of the Conventions.

Endnote 10
As was seen above, government-sponsored arrangements for group transfer today have taken on a limited role.

Endnote 11
Protecting the most vulnerable of today's workers, op. cit., para. 102.

Endnote 12
For irregular migrant workers, apart from the difficulties inherent in being a foreigner (language barrier, ignorance of procedures, etc.), a migrant's irregular situation often constitutes a major obstacle deterring him or her from appealing to the judicial authorities, for fear of bringing his or her situation to the attention of the authorities, with the ensuing risk of expulsion.

Endnote 13
See paras. 354-359.

Endnote 14
See paras. 1-2 of this survey.

Endnote 15
For source see footnote 22 in the Introduction.

Endnote 16
Such as the precise information which should appear in an employment contract or other written document delivered to a migrant worker prior to departure (name of the company or employer, nature of the work, duration of employment, wages, holidays, etc.).

Endnote 17
Some aspects of wage protection are dealt with in the Protection of Wages Convention, 1949 (No. 95), whose provisions have been cited before the supervisory bodies of the ILO in cases of expulsion of migrant workers for whom no final settlement of wages had been made (Iraq, Libyan Arab Jamahiriya, Mauritania). Nevertheless, other aspects should be examined in order to adapt protection to the migrant worker's situation (payment intervals, means of payment, deductions from wages for payment of services rendered by private placement agencies, appeals, etc.).

Endnote 18
If the majority of the provisions of Conventions Nos. 97 and 143 ought to be put in place by countries of employment, it should be noted that in practice, the Conventions have essentially been ratified by countries of emigration. It should also be noted that except for Malaysia (Sabah) and New Zealand, no Asian country has ratified these instruments. As the Committee has emphasized throughout this survey, it should be recalled that these instruments -- contrary to the interpretation given by certain emigration countries -- enunciates obligations for both sending and receiving countries.

Endnote 19
A protocol is linked to the Convention to which it is annexed, and a State which has not ratified the Convention may not ratify the said protocol.

Endnote 20
A framework Convention sets objectives and lays down the basic principles to be observed in attaining them. Because its provisions are flexible as to the attainment of its objectives, due account can be taken of the situation prevailing in each country. Under these Conventions, ratifying States undertake to achieve specific objectives which are sometimes difficult to attain through a programme of continuous action. One example of this type of Convention is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

(Excerpted from : *ILO Labour Legislation Guidelines - Prototype version*, available on CD-ROM and on-line at http://www.ilo.org/public/english/dialogue/ifpdial/llg/ch6.htm)

Trafficking in persons and forced labour: prevention and elimination of trafficking and exploitation of migrants

While trafficking in persons does not consist in itself in forced labour, it often is a means of obtaining workers who will be subject to forced labour or results in forced labour extracted to pay off debt. It has been defined in one study to include "all acts involving the capture, acquisition, recruitment and transportation [of persons] within and across national borders with the intent to sell, exchange or use for illegal purposes []".[10] Individuals who have been trafficked are often caught in forced labour situations, such as debt bondage, domestic work under harsh conditions, and circumstances involving forced sexual exploitation. The ILO Global report on forced labour states that "In practical terms traffickers end up using people to generate income from forced labour exacted from them." (Global Report: Stopping forced labour, p. 48)

Trafficking in persons has now been the subject of an agreed international definition. Under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, opened for signature in December 2000, "trafficking in persons" is defined to mean:

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." [Art. 3(a)]

ILO Conventions related to labour trafficking include Conventions Nos. 29 and 105, the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), the Migration for Employment Convention (Revised), 1949 (No. 97), and the Private Employment Agencies Convention, 1997 (No. 181). Other international instruments relating to trafficking, apart

from the Protocol mentioned above, include the United Nations Convention for the Suppression of the Traffic in persons and of the Exploitation of the Prostitution of Others, 1949,[11] and the UN Convention on the Protection of All Migrant Workers and their Families, 1990.

In order to combat labour trafficking, legislation must first prohibit and penalize trafficking in persons. It should also address certain issues of recruitment for work abroad and migration as migrant workers in general are vulnerable vis-à-vis their employer or recruiter, especially if they have entered or are staying in a country illegally. This vulnerability exposes them to work in abusive conditions, including entrapment in trafficking leading to forced labour and other forced labour situations. The ILO Declaration 1998, in its Preamble, refers to the need to give particular attention to migrant workers. The Committee of Experts has also requested that certain governments address issues concerning migrant workers in dealing with labour trafficking.[12] The UN Convention for the Suppression of the Traffic in persons and of the Exploitation of the Prostitution of Others also emphasises the need to protect migrants in confronting trafficking.

The Committee of Experts, in its discussions of the protection of migrants for employment, particularly those in abusive situations such as those involved in situations of trafficking, notes that the protection of migrants is an important means of confronting labour trafficking and protecting the fundamental rights enshrined in the ILO Declaration 1998.[13] The Preamble of Convention No. 143 states that standards regarding the protection of migrants are needed to eliminate trafficking. That Convention deals largely with migration in abusive conditions, which includes trafficking as one of its most serious forms.[14]

Legislation should address all forms of labour trafficking resulting in forced labour, including trafficking for prostitution, agricultural work, construction, and domestic work where such work results in situations of forced labour. While legislation should deal with all types of labour trafficking, law makers should take care to address the special situation of these workers.

Overall, in aiming to eliminate trafficking of persons and the exploitation of migrants, legislation should prohibit and penalize trafficking and should combat migration in abusive conditions. Regulation of the activities of recruiters in the emigration country should be an important part of such legislation. Legislation should also ensure that national laws apply to

migrants in the country of migration and that migrant workers are afforded minimum standards of protection, including respect for their fundamental human rights. As with all legislation aimed at eliminating forced labour, effective enforcement mechanisms are necessary to combat trafficking and the exploitation of migrants.

The following guidelines elaborate on these points.

Legislation prohibiting trafficking in persons

Legislation should prohibit and penalize trafficking in persons.

Legislation to combat migration in abusive conditions

According to Article 2(1) of Convention No. 143, "migration in abusive conditions" includes migration in conditions in which migrants for employment are subjected during their journey, on arrival, or during their period of residence and employment to conditions prohibited by international instruments or national laws or regulations. Labour trafficking is a major form of migration in abusive conditions, and Convention No. 143, Part I is primarily aimed against manpower traffickers.[16]

Abusive practices in the field of migration Malpractices exist where the treatment of migrant workers and members of their family is not in accordance with national laws and regulations or ratified international standards and where such treatment is recurrent and deliberate. Exploitation exists where, for example, such treatment incurs very serious pecuniary or other consequences; migrants are specifically subjected to unacceptably harsh working and living conditions or are faced with dangers to their personal security or life; workers have transfers of earnings imposed on them without their voluntary consent; candidates for migration are enticed into employment under false pretences; workers suffer degrading treatment or women [or children] are abused or forced into prostitution; workers are made to sign employment contracts by go?betweens who know that the contracts will generally not be honoured upon commencement of employment; migrants have their passports or other identity documents confiscated; workers are dismissed or blacklisted when they join or establish workers' organizations; they suffer deductions from wages without

their voluntary consent which they can recuperate only if they return to their country of origin; migrants are summarily expelled as a means to deprive them of their rights arising out of past employment, stay or status. Source: Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, Annex III, para. 1.2.

In order to combat migration in abusive conditions, legislation should: provide for the establishment of mechanisms to detect whether

- there is illegal and abusive employment of migrant workers on the territory of the country in question and
- whether there are any movements passing through or arriving in its territory of migrants for employment, in which the migrants are subjected during their journey, on arrival or during their period of residence and employment, to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations;[17]

  Measures for detection of migration in abusive conditions could include:
  - increasing police checks at borders
  - holding transport companies responsible for verifying passengers' travel documents and residence permits
  - establishing special counters at airports to detect "clandestine departures for employment"
  - establishing special units to combat illicit practices relating to the entry, residence, and exploitation of migrants
  - ensuring the cooperation of employment services which are required to check the validity of foreign workers' residence and work permits, and of workers organizations, hotels, and boarding houses[18]

provide for the establishment of mechanisms within the jurisdiction of the country in question and in collaboration with other states *to prevent or suppress* clandestine movements of migrants for employment and illegal employment of migrants;[19]
Measures to prevent or suppress clandestine migration for abusive work could include:

- ensuring strict compliance with measures governing recruitment of migrant workers[20] (see above)
- the establishment of employment authorization systems in which would-be emigrants go through a system of over-seas recruitment

organized by the public authorities of the sending country or obtain authorization to leave the territory to seek employment[21]

The case of migrant domestic workers A domestic worker provides remunerated services in a private household as a child-minder, cook, housekeeper, garden worker, chauffeur, etc. The great majority of domestic workers are women or children who migrate from rural and economically less-favoured areas either within the same country or transnationally. Often they are victims of trafficking and abusive migration. Many are also trapped in debt bondage, obliged to repay the costs of migration or cash advances made to other family members. In these cases domestic workers are subject to poor living conditions, low wages (if any at all), long working hours and overall lack of respect for their basic rights. Often such workers are unable to leave the household as a result of violence or threats of violence, being locked in, or having had their papers taken away. Under such circumstances domestic work is a form of forced labour. Nevertheless, domestics are often excluded from basic labour legislation, often because governments are wary of extending legislation to reach private households. However, because domestic work is frequently a form of forced labour, legislation should address it. The following recommendations aim to prevent forced labour situations over these vulnerable workers.

Regulation of activities of recruiters in the emigration country

To prevent migration from becoming abusive, legislation should provide that recruitment agencies and other organizers of migration for employment (whether public or private):

- are regulated, authorized and supervised by a public authority;[22]
- are prohibited from supplying or using child labour;[23]
- are prohibited from engaging in unfair advertising practices or providing misleading or false information, including the solicitation of applications for workplaces that, in reality, do not exist;[24]
- are prohibited from knowingly recruiting, placing or employing a migrant worker in a job involving unacceptable hazards or risks or where he or she may be subjected to abuse or discriminatory treatment of any kind;[25]
- give a copy of the employment contract indicating the conditions of

work and the remuneration offered to the migrant;[26]
- are prohibited from charging recruitment fees to migrant workers;[27]
- simplify administrative formalities, provide interpretation services, help safeguard the welfare during the migrant's journey, and provide any necessary assistance during an initial period in the settlement of the migrants and their families;[28]
- co-operate in appropriate cases with the corresponding services of other countries;[29]
- are forbidden from withholding or confiscating, even temporarily, a migrant worker's passport or travel documents and are forbidden from using forged travel documents or misrepresenting a migrant worker's personal details[30]

Minimum standards of protection of migrant workers and application of labour laws in the country of immigration and of emigration

In order to ensure minimum standards for the protection of migrant workers regardless of immigration status, legislation in the *country of immigration* should:

- require that the basic human rights[31] of all migrant workers are respected, regardless of legal status in the country of immigration.[32]
- require that migrant workers, in cases in which laws and regulations regarding migration and entry into employment have not been respected, enjoy equality of treatment for themselves and their families in respect of rights arising out of past employment, as regards remuneration, social security, and other benefits;[33]
- allow migrant workers to present their case to a competent body in the event of a dispute over rights arising out of past employment;[34]
- ensure that in case of the expulsion of a worker holding illegal immigration status or her/his family, the cost is not borne by them;[35]
- ensure that migrant workers who entered the host country illegally, but whose immigration status has been regularized, benefit from all rights which are provided for migrant workers lawfully admitted;[36]
- ensure that, if a migrant for employment fails to secure, in the absence of her or his own fault, the employment for which he or she has been recruited or if this employment has been found to be

unsuitable, the migrant is given assistance in finding suitable employment, and, if she or he chooses to return, is paid all costs included in reaching the final destination;[37]
- provide for an expeditious determination of whether an illegal worker's status is to be regularized, and ensure that a worker whose status has been regularized benefits from all the rights provided to migrant workers lawfully admitted;[38]
- ensure that migrant workers are provided with sufficient information on the essential elements of laws and regulations and on provisions of collective agreements concerning the protection of workers and the prevention of accidents as well as on safety regulations and procedures particular to the nature of the work;[39]
- ensure that employers are forbidden from withholding or confiscating, even temporarily, a migrant worker's passport or travel documents and are forbidden from using forged travel documents or misrepresenting a migrant worker's personal details;[40]
- provide for psychological and medical assistance for victims of trafficking.[41]

To prevent migration from becoming abusive, *labour laws should apply without discrimination* to immigrants lawfully within a member state's territory and provide treatment no less favourable than that which it applies to its own nationals, particularly in matters of:[42]

- remuneration, providing for
- family allowances where these form part of remuneration;
- remuneration for all hours worked;
- payment of overtime wages;
- holidays with pay;
- fair remuneration for home work; (Home Work Convention, 1996 (No. 177)
- apprenticeship and training;
- equitable remuneration for women;
- equitable remuneration for the work of young persons;
- restriction on any advances to workers to a small proportion of their monthly remuneration, the excess of which should not be recoverable to avoid situations of debt bondage[43]
- minimum age for employment; (See Chapter VIII, The effective abolition of child labour: Legislation on minimum age for admission to work)
- membership in trade unions and enjoyment of the benefits of

collective bargaining;
- accommodation;
- employment services such as vocational guidance and placement services;
- social security benefits in case of injury in the course of employment, maternity, sickness, invalidity, retirement, death, unemployment, family responsibilities, and any other contingency which is covered by national social security laws and regulations;
- legal proceedings relating to the matters concerning migration and labour.

Legislation in the *country of emigration* could:
- ensure that recruiters send migrant workers to countries where their human rights are respected;
- require that its embassies and consulates in the country of immigration are aware of the condition of its migrant workers in the receiving country and are equipped to provide assistance to such workers.

Enforcement of legislation concerning trafficking and the exploitation of migrants

To enforce laws addressing trafficking and the exploitation of migrant workers:

(a) Legislation regarding trafficking and migration in abusive conditions should:
- establish administrative, civil, and penal sanctions (including imprisonment in their range) against organizers of labour trafficking and those who knowingly assist such movements, whether for profit or otherwise;[44]
- Administrative sanctions may include administrative fines, withdrawal or suspension of the license to act as an emigration agent, temporary or permanent closure of offices or enterprises of the offenders, temporary or permanent withdrawal of the authorization to carry on in international transport operations, blacklisting of traffickers and employers, etc.[45]
- provide that authors of labour trafficking can be prosecuted in the country in question whatever the country from which they operate;[46]

- ensure that trafficked persons have a legal right to seek reparations from traffickers as well as assistance in bringing such actions;[47]
- protect the privacy of victims of trafficking in the context of legal proceedings;[48]
- ensure that immigration laws permit victims of trafficking in persons to remain in its territory, at least while legal proceedings are pending;[49]
- provide for the consultation of employers and workers organizations in combating migration in abusive conditions;[50]
- establish mechanisms for systematic exchange of information on the subject of migration in abusive conditions at the national and international levels;[51]
- provide for the conclusion of agreements between sending and receiving countries on a standard contract containing basic provisions to govern the recruitment of migrants;[52] (See Migration for Employment Recommendation (Revised), 1949 No. 86, Annex: "Model Agreement on temporary and permanent migration for employment, including migration of refugees and displaced persons")
- adopt regulations to protect migrants at places of arrival and departure and while en route;[53]
- arrange for publicity warning the public of the dangers of traffic;[54]
- ensure the supervision of railway stations, airports, seaports and en route, and of other public places, in order to prevent international traffic in persons;[55]
- establish mechanisms through which the appropriate authorities be informed of the arrival of persons who appear, prima facie, to be the principals and accomplices in or victims of traffic.[56]

(b) Legislation regarding the application of national labour laws and minimum standards of protection should:
- promote educational programmes to secure the acceptance and observance of policies of equal opportunity and treatment and to ensure that lawfully admitted migrants are aware of their rights under national law;
- develop programmes to acquaint migrant workers with policies of equal opportunity and treatment, with their rights and with activities designed assist migrant workers in the exercise of their rights and for their protection;[57]
- establish mechanisms to examine complaints that minimum standards are not being observed and securing the correction, by

conciliation or other means;[58]
- provide that where employers or others fail to observe laws or regulations concerning the application of national labour laws and minimum standards of protection, administrative, civil and penal sanctions are be imposed;[59]
- provide that all measures are taken in collaboration with employers and workers organizations.

Domestic workers: prevention of abuse

While domestic work per se is not forced labour, domestic workers experience a high degree of vulnerability, since they tend to work in isolation and are frequently excluded from the coverage of labour legislation. Consequently, in certain conditions domestic work can degenerate into forced labour.[60]

Legislation on domestic workers

Legislation on domestic workers should:
- ensure the respect of freedom of association for domestic workers; (See Chapter II, Freedom of association)
- prohibit and take measures to eliminate child domestic work; (See Chapter VIII, The effective abolition of child labour: Special groups and hidden work situations)
- limit the hours of domestic workers, ensuring:
  - a forty hour work week[61] with adequate remuneration for overtime work[62];
  - the specification of a maximum hours of work permitted per day;[63]
  - a fixed uninterrupted rest period of eight hours per day[64]
  - limited hours spent "on call" and adequate remuneration for those hours[65];
- ensure that minimum wage laws and regulations apply to domestic workers and that domestic workers are included within the minimum wage fixing system, giving due regard to the general level of wages in the country, the cost of living, social security benefits, the relative living standards of other social groups and economic factors[66]
- ensure proper procedures for termination of employment, including:

  - ensuring that employers do not terminate domestic workers without cause relating to the capacity or conduct of the worker or based on the operational requirements of the employer;[67]
  - providing that the domestic worker whose employment is to be terminated is entitled to a reasonable period of notice or compensation in lieu thereof, unless he/she is guilty of misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period[68]
- ensure that domestic workers are entitled to a wide range of employment benefits such as maternity leave and annual holidays.

Enforcement of legislation on domestic work

Enforcement mechanisms for legislation regarding domestic work include those promulgated to address trafficking and exploitation of migrants (See Trafficking in persons and forced labour: prevention and elimination of trafficking and exploitation of migrants above), forced labour (See Enforcement provisions for legislation on forced labour below), and, in the case of child domestic workers, enforcement provisions dealing with the worst forms of child labour and those directed at the elimination of child labour in general (See Chapter VIII, The effective abolition of child labour: Implementation and enforcement).

Rights of Migrant Workers in Korea:
Focusing on Labor Rights Provided in Relevant ILO Conventions

Hwang, Pill-Kyu
/ Attorney at Law, Korean Public Interest Lawyers' Group GONG-GAM
Cha, Seong-Ahn
/ Researcher, Korean Judicial Research and Training Institute
Hong, Ye-Yeon
/ Researcher, Korean Judicial Research and Training Institute

1. Legal Status of Aliens in Korean Constitution

(1) Interpretation of the Korean Constitution

In the Korean Constitution, the subjects of Basic Rights are expressed as "All citizens".

However, the Constitutional Court stated:
"Aliens whose status is similar to that of citizen can be the subjects of Basic Rights.";
"Aliens can be the subjects of human dignity and worth and the right to pursue happiness since these are rights of human beings, and the right to be equal as a right of human beings can only be restricted by the nature of the rights such as the right to vote and reciprocity.";
"In principle aliens cannot or can within limits enjoy freedom of residence and movement, freedom to choose occupations, property right, right to vote, right to hold public office, right to claim just compensation from the State or public organization, right to receive aid from the State for the sufferings due to criminal acts of others, right to vote in a national referendum, social right, etc.."

To what extent aliens cannot enjoy these rights is not clear.

(2) Relevant Provisions of Korean Constitution

Constitution Article 6 provides:
"① Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.
② The status of aliens shall be guaranteed as prescribed by international law and treaties."

Therefore, treaties of which Korea is a State Party such as CCPR, CESCR, CERD, CAT, CEDAW, CRC have the same effect as the domestic laws of Korea.

(3) Conclusion

By the interpretation of Korean Constitution, aliens in principle are the subjects of Basic

Rights, and by the Constitution Article 6 international law and treaties that can be applied to aliens play a role of supplementing that interpretation.

It is desirable to expressly provide the subject of Basic Rights as "all persons" and to add "nationality" to the list of discrimination categories in the Constitution Article 11 dealing with the right to be equal. In addition, accepting a multicultural and multiethnic society as a reality, Korea reconsider in its Constitution expressions like "determined to consolidate national unity"(Preamble) and "endeavoring to develop national culture"(Article 69).

2. Labor Rights of Migrant Workers in Korea

(1) Individual Labor Rights

1) Equal Treatment

The ILO Convention No. 97 Article 6 1. (a) and the ILO Convention No. 143 Article 10 and Article 12 (e), (g) provide equal treatment concerning "immigrants lawfully within its territory" and "by methods appropriate to national conditions and practice".

The Labor Standards Act Article 5 provides:
"An employer shall not discriminate against workers by sex, or take discriminatory treatment in relation to the conditions of employment according to nationality, religion or social status."
The Act on Foreign Workers' Employment, Etc. Article 22 states:
"An employer shall not give unfair and discriminatory treatment to foreign workers on grounds of their status."

There are no penalties for the violations of the Act on Foreign Workers' Employment, Etc. Article 22 and the meaning of "unfair" is not clear. There should be substantial measures explicitly stated in the Act to fulfill the purpose of the Article 22.

"Industrial trainees" by definition, according to the Ministry of Labor, are not "workers". They are not entitled to some important provisions of the Labor Standards Act concerning working hours, various benefits and limitations to layoffs. However they hardly get any "training" and the Supreme Court declared "industrial trainees are workers according to the Labor Standards Act".

2) Changing Workplaces

There are no provisions concerning changeing workplaces in the ILO Convention No. 97 but the Recommendation No. 86 Article 16 2. and the Convention No. 143 Article 14 (a) guarantees the right to change workplaces after 2 or 5 years of employment.

The Employment Permit System prescribed in the Act on Foreign Workers' Employment, Etc. Article 22 has following problems concerning changing workplaces.

(1) There is a danger of forced labor because the law doesn't regulate the case of migrant workers refusing to renew the contract as a possible cause for changing the workplace.
(2) Possible causes for changing the workplace are very limited. An amendment is needed to regulate the case of prohibition of discrimination violation in the Act Article 22 as the causes for changing the workplace.
(3) Permit period for changing workplace is limited to 2 months, and there's no exceptional rule such as the case where the foreign worker doesn't have a cause of responsibility.
(4) The number of changing the workplace is as a principle limited to 3 times and one more change of workplace is allowed only when those three changes are cases without any cause of responsibility on worker's side. An amendment is required to allow the same number of additional changes as the cases where there's no cause of responsibility on worker's side.
(5) In case of being refused to change the workplace, the process of appeal is not defined.
(6) Right for requesting unemployment benefit is limited because of the limit on the permit period of changing workplace.

3) Undocumented Migrant Workers

The ILO Convention Article 1 and Article 9 1. mention the protection of undocumented migrant workers.

The Labor Standards Act Article 14 provides:
"The term "worker" in this Act means a person engaged in whatever occupation offering work to a business or workplace for the purpose of earning wages."

The Supreme Court also stated that the provisions of the Immigration Act regulating illegal stay of aliens do not prohibit those from receiving the legal effects as worker.

(2) Collective Labor Rights

The ILO Convention No. 97 Article 6 1., the Convention No. 143 Article 10 1. and the Recommendation No. 151 Article 2 and Article 8 3. guarantee collective labor rights.

The Constitutional Court declared that collective labor rights are 'civil rights playing a role of social protection' or 'civil rights with the nature of social rights' and therefore migrant workers, by the interpretation of the Constitution, have collective labor rights. Moreover the Trade Union and Labor Relations Adjustment Act Article 9 provided that a member of a trade union shall not be discriminated against race, religion, sex, political party or social status.

The Trade Union and Labor Relations Adjustment Act Article 2 4. prescribes:
"the term "trade union" means an organization or associated organization of workers which is formed in voluntary and collective manner upon the workers initiative for the purpose of maintaining and improving working conditions, or improving the economic

and social status of workers."

The Ministry of Labor emphasizes that trade unions are "for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers" in the future so that undocumented migrant workers cannot be the subjects of collective labor rights. The Ministry even stressed that this is the right interpretation of the ILO Conventions. A court case concerning migrant workers' labor union mostly consisting of undocumented migrant workers is still in process in the Administrative Court.

IFBWW Policy and Activities Regarding Migrant and Cross-Border Work

Jin-Sook Lee
/ IFBWW, Asia-Pacific Region

Introduction

There is a variety of definition when one discusses migrant workers. This presentation will focus on migrant workers who are leaving their home temporarily for employment purposes in the construction industry and it does not describe the situation of other types of migrants intending to immigrate to other countries either for residence or toward gaining citizenship in the receiving country.

Today, we are living in an era of globalization. We are no longer dealing with one single national company; instead, we are dealing with big corporations that know no national boundaries, as they easily move from one country to another in order to maximize their profits at the expense of workers. Some corporations' profits are greater than one individual country's Gross Domestic Product. In fact, Wal-Mart, one of the most anti-union companies in the world is the largest employer in the world. Governments no longer have independence in developing economic, social, political, and even foreign policy as much of this is dependent upon the policies and activities of corporations. Basically, the big Fortune 500 companies now seem to rule the world.

As a result of globalization and neoliberal policies, the basic rights of workers have dramatically decreased in countries across the globe. Responding to global competitions, companies are using structural adjustment policies, sub contracting, employing irregular (non-permanent, part-time, contract, temporary, etc.) and migrant workers, and moving to other countries, where the work force is "cheaper and more docile."

More and more government are modifying labor laws, introducing new forms of legislations, and establishing export processing zones that limits the fundamental rights of workers, introduces "flexible forms of work" as opposed to full-time permanent work, and undermines the social security system which acts as a crucial "safety net" for workers.

In the construction industry, flexible labor practices have resulted in an increase in workers being employed through sub-contractors and intermediaries on temporary or casual terms. Sub contracting and temporary work has resulted in an increase in the number of small and medium sized companies that rarely respect workers' rights. Thus, workers have low quality jobs in terms of income, job stability, work hours, health and safety, social security, and other benefits. The majority of the work is part-time or seasonal.

This fragmentation of the industry also has a negative impact on trade union

membership and collective bargaining, as the traditional form of industrial relations that is based on an employer-worker relationship is increasingly disappearing. There are now a growing number of workers who are outside the scope of protection normally associated with the traditional employment relationship.

Flow of Migration

Additionally, employers are hiring migrant workers, some through government sponsored "internships" or training programs, and others through private recruiting agencies. Migrant workers face double forms of discrimination---racial discrimination and legal discrimination, particularly if they are irregular. The construction industry has a long tradition of employing migrant workers from lower-wage economies and this phenomenon is not only increasing but also taking different forms.

For example in the 1970s and the 1980s, many South Korean construction workers went to the Middle East, Germany, and Mexico. Today, migrant workers from China, Russia, Philippines, and other Southeast Asian countries are coming to South Korea to work in the construction industry. Prior to the handover of Hong Kong to Mainland China, many migrant workers came to Hong Kong but today; Hong Kong construction workers are going to Macao or even Mainland China to work.

Migrant workers face severe problems. They are often paid lower wages than native workers performing similar jobs and they have poor working conditions. Irregular migrant workers have little or no access to social security benefits and live with constant fear of discovery and possible deportation from the immigration officers. They have no political or trade union rights and are very often prevented from joining trade unions.

Workers and trade unions in receiving countries often perceive problems related to migrant workers. They may see migrant workers as potential strikebreakers or as taking jobs that would otherwise be available for native workers. They may also consider migrants as workers unwilling to join trade unions, as having a negative impact on collective bargaining and as a source of social disruption.

Migrant workers have rights just as any other worker. They should not be treated as commodities; instead, we need to work with and organize migrant workers to improve their wages and working conditions, which is also a way to reduce the disparity between local and migrant workers. IFBWW recognizes that labor migration will not disappear and in fact with globalization we recognize that labor migration will be an increasing phenomenon in all sectors. Thus, it will continue to impact on trade union membership and working conditions in our sectors

The number of regular (documented) and irregular (undocumented) migrant workers will increase as countries increase the export of workers as a source of income. Because of this, it is important to increase global union cooperation with the aim of better assisting migrant and cross border workers in IFBWW sectors and prevent and undercutting of nationally achieved standards.

IFBWW Policy on Migration---Rights Based

IFBWW believes that any policy concerning migrant workers should be rights based. In her presentation at the ILO Labor Conference last June, Anita Normark, General Secretary of IFBWW stated, that the IFBWW believes that our objective should be to ensure that the benefits of migration are more equitably distributed between destination and source countries and also between migrants and nationals. To achieve this we require a rights' based approach to migration under which all workers, whether migrants or nationals, should benefit from equal treatment and opportunities and the protection of labor law.

It also means that special attention must be devoted to the sectors where migrant workers are particularly disadvantaged. These are the sectors that employ low skilled migrants in poorly paid jobs and where working conditions are often bad and dangerous. Trade unions should therefore promote a framework of labor laws and regulations that ensure that migrant workers benefit from equal treatment and opportunities in respect of wages, working conditions, and benefits of collective agreements, membership of trade unions, and social security and tax contributions. In short, we should promote policies on migration that are respectful of worker and human rights.

Irregular Migration

Another area that IFBWW believes needs to be addressed is irregular migration. In the building industry there is a large and increasing proportion of irregular migrant workers who are often employed in place of native construction workers because the are willing to accept low wages and poor working conditions. One should also be aware that irregular migration is never the preferred choice of workers.

Closed-door policies, tight border controls, and repatriation have failed to reduce irregular migration. In fact these policies have often made the problem worse by reinforcing the network of traffickers. Addressing the problem of irregular workers, and the abuses linked to it, requires the design of a comprehensive and innovative approach to migration. Again this policy should be rights' based and not strictly security based, as it is perceived in many countries such as the United States, Canada, Great Britain, and Japan.

It should be noted that in the United States, after 9-11, immigration policy no longer fell under the jurisdiction of Department of Justice, but now it is under Department of Homeland Security, a new department established after 9-11 to ensure domestic security. In addition, migration policy falls under the Department of State, thus confirming the stance that migrant labor is a security issue rather than a labor issue.

"Posted Workers"

The IFBWW also considers that it is important to address the case of employees working in another country for a limited period of time at the request of their employer.

This is very common in the construction industry and in practice, these workers, who we call "posted workers" often do not enjoy the same benefits and rights that apply to native workers doing similar worker. We are concerned about these workers because "posted workers" are outside of the scope of ILO Convention 143 (Migrant Workers Supplementary Provisions Convention, 1975) on migrant workers, and thus, they do not benefit from equal treatment and opportunity as compared to native workers.

This issue should be considered in the broader context of the WTO negotiations on the General Agreement on Trade in Services or GATS. Under GATS Mode 4 which deals with the temporary movement of natural persons, employers would have the right to post their workers abroad on a temporary basis. GATS Mode 4 has so far accounted for 1% of world services and has mostly involved skilled workers. But the current negotiations on GATS Mode 4 are likely to result in increased temporary migration of workers as some countries are trying to expand the category of persons performing services to unskilled workers, and clearly we believe this will include workers in both the construction industry and wood working industry.

The problem with GATS Mode 4 is that it does not protect the rights of employees sent abroad who in practice, may not enjoy the same benefits and rights than native workers performing similar work and can thus, be used by employers to undermine national salaries and benefits. To address the above situation the IFBWW has been campaigning to ensure that working conditions of the receiving country where the worker is employed should prevail, provided they are better than those in the sending country.

At the recent ILO Tripartite Meeting of Experts on Labor Migration that was held in Geneva, to draft a non-binding multi-lateral framework on migration. IFBWW submitted amendments addressing preservation of existing national labor legislation and prevailing national collective agreements in order to address our concerns of the upcoming WTO negotiations

BYGGNADS (Swedish Building Workers Union) Case Study

Recently, IFBWW has been involved in a campaign with our Swedish affiliate, Byggnads (Swedish Building Workers Union), who has been engaged in a struggle with a Latvian construction company, L&P Baltic Bygg AB.

In Sweden, the fundamental principle of industrial relationship is the collective agreement between the employer and the union. The Swedish model of collective agreements has evolved through time a series of dialogues, which the Swedes are very prod of and believes is effective. The social partners conclude national agreements, which act as a stabilizer for both employers and workers.

In June 2004, L&P Baltic Bygg AB, which is registered in Sweden and its mother company Laval Un Parneri Limited which acts as a subcontractor to L&P Baltic Bygg as it provides workers to the latter refused to sign a collective agreement with Byggnads. Instead of signing a collective agreement with Byggnads the company concluded an agreement with the Latvian Building Workers' Union and claimed that

therefore no collective agreement with the Swedish union was necessary. However, the real reason for the company's refusal to sign an agreement with Byggnads was that the company did not want to provide the same wage rate and working conditions to Latvian workers "posted" in Sweden to that of Swedish construction workers.

According to Byggnads, the Latvian company's action was in violation of the European Union's Posting Directive, which basically stipulates that the labour laws and labour market regulations of the receiving country will be applicable. Thus, in this particular case, the collective agreement that the Latvian company signed with the Latvian union was invalid and they would have to sign an agreement with Byggnads. The company steadfastly refused, stating that the agreement it signed with the Latvian union should prevail. The company had the support of the Latvian government, the Latvian Construction Employers, and the Swedish Conservative Parties who particularly wanted to undermine the strength of the labour movement. (The union density for in the construction industry is over 80%).

On November, 2004, as a last resort, Byggnads launched a blockade against the company. According to the Swedish constitution, trade unions can conduct industrial actions against companies that refuse to conclude a collective agreement. Unfortunately, rather than resolve the conflict with Byggnads, the company declared bankruptcy and later filed a suit with both the Swedish Industrial court and Supreme Court stating that it violated the European Union's regulations on freedom of movement of labor and services. In both cases, the Latvian company lost. However, they have decided to take the case to the European Court of Justice.

The industrial dispute between the Latvian construction company and Byggnads goes to the very heart of the inherent contradiction within the European union, where on the one hand, it seeks free movement of labour and capital, and on the other hand, it wants to precariously preserve a European "social model," with the promise of a guaranteed base of workers' rights within the EU.

This case also highlights the ramifications that the proposed Service Directive will have within the European Union. The Services Directive, which was to liberalize the markets for all services such as advertising, trade, construction, telecommunication, and financial services, would recognize the labour laws of the sending country or country of origin. Thus, for Byggnads one of the major concerns is the Services Directive, as it would undeniably impact its collective bargaining agreements that it has traditionally signed with employers in Sweden.

In 2003, the IFBWW published, "Exploitation of construction, forestry, and wood workers in connection with migrant and cross border work." The strategies and actions that were outlined in the document was the result of a survey among IFBWW affiliates on the policies they have adopted to address migrant worker issues. They are as follows:

1. Increase trade union awareness on migrant workers and continue to campaign against racism and xenophobia.