

FEMALE MIGRATION AND LABOR IN THAILAND: WHEN LAW AND SOCIETY CONTINUE TO EXCLUDE YOU

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ABSTRACT

The vast majority of women from Burma who migrate to Thailand, regardless of their reasons for leaving home, immediately enter the labor market and take on the challenge of building livelihoods in the face of various forms of discrimination. Many women migrant workers work in labor-intensive industries alongside men, however sex workers in the entertainment industry and domestic workers in the home are overwhelmingly women. Thai society does not accept sex and domestic work as valuable paid labor, and the law does not afford these workers equal recognition under the law. Consequently, their fight for decent working conditions has been extraordinarily challenging.

The majority of Thai labor law excludes protection of domestic workers and sex workers. Domestic workers, in particular, do not benefit from key provisions of the Labour Protection Act, including limitations on working hours, minimum wage coverage, and overtime compensation. Because sex work is illegal under Thai law, it is not recognized under any labor laws. The lack of regulation and extreme power differential between sex workers and domestic workers and their employers lead to deplorable working conditions.

While the current state of international human rights law falls short of guaranteeing the rights of these workers, advocacy groups in Thailand have

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utilized international law to organize and to mobilize workers to change the discourse regarding these workers' rights. For instance, the campaign for the passage of the International Labor Organization's (ILO) Domestic Workers Convention in 2011 brought domestic workers out of the shadows onto the platforms of organized labor in Thailand and prompted the Thai Ministry of Labour to amend the laws applicable to domestic workers. Sex workers in Thailand have used their opposition to the international criminal legal framework on trafficking to lobby the international human rights community, including Amnesty International, to call for the decriminalization of sex work.

There are numerous unique challenges in organizing informal sector workers such as domestic workers and sex workers. Domestic workers work in isolation with very little time off for activities where they can learn their rights and then participate in campaigns. Sex workers are very transient and there is still social stigma and legal penalties for openly acknowledging their profession. MAP Foundation and EMPOWER Foundation are two non-governmental organizations in Thailand that use creative methods to reach, organize, and empower these workers. Increasing the visibility of these workers strengthens their power to influence societal perceptions of the value of their work and to prompt legal changes.

There are still enormous obstacles to overcome to guarantee the rights of domestic and sex workers both internationally and specifically for Burmese migrants in Thailand. Even as strides are made in achieving legal reform, challenges such as meaningful enforcement remain. Regardless, organizing efforts which utilize a legal-rights-based framework to educate migrant women have successfully increased their self-confidence—a major accomplishment in the struggle for gender equality.

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INTRODUCTION

Internal crises that cause women across the world to leave their home countries range from systematic rape, natural disaster, civil war, domestic violence, forced relocation to dire poverty. Only select groups of these migrants are afforded formal international legal recognition such as asylees, those threatened to be tortured, and victims of trafficking. While international human rights norms may require protection for these migrants from repatriation, the reality is that a majority of migrants flow through irregular channels and enter countries without access to the protections of any international or state legal system. Upon arrival, the first step to survival is to find work. Whatever crisis caused the migrant to leave her home country quickly transforms into a new challenge: building a livelihood to support herself and her family. As job opportunities are limited and earning money is crucial, women often have little choice in the kind of work they do in their new country. Often, they end up doing work that isolates them and keeps them vulnerable to abuse and exploitation. Without meaningful legal protections, they are left in a perpetual state of insecurity.

There are an estimated three to four million migrants living and working in Thailand. Around 80 to 85 percent of all migrants¹ are from Burma² and

¹ At peak times of registration in Thailand, registration statistics estimated around one million migrants, with generally 80 to 85 percent coming from Burma. Generally, estimates regarding the number of undocumented migrant worker are derived from employer's registration of needs, which have generally been two million migrants. See Rohan Radheya, *Burmese Migrant Workers in Thailand*, DIPLOMAT (Oct. 20, 2014), <http://thediplomat.com/2014/10/burmese-migrant-workers-in-thailand/> [https://perma.cc/QR5P-M878]. Burma estimates there are four million migrant workers in Thailand with only half legally registered to work. *Aung San Suu Kyi to Sign Pact to Allow Myanmar Workers Smoother Access to Jobs in Thailand*, RADIO FREE ASIA (June 22, 2016), <http://www.rfa.org/english/news/myanmar/aung-san-suu-kyi-to-sign-pact-to-allow-myanmar-workers-smoother-access-to-jobs-in-thailand-06222016164414.html> [https://perma.cc/2MSX-5W4V]. An International Labor Organization (ILO) briefing states there are 3.5 million migrants working in Thailand, with the majority from Burma. Thomas Maresca, *Thailand and Myanmar Boost Cross-Border Cooperation on Migrant Labour*, CHARTERED INSTITUTE PERSONNEL & DEVELOPMENT (July 27, 2016), <http://www.cipd.asia/people-management-magazine/hr-news-opinion/thailand-myanmar-migrants> [https://perma.cc/52X3-X3DM].

² The Union of Myanmar is the official country name recognized by the United Nations. I

50 percent are women.³ Burmese women migrant workers are generally between sixteen and forty years old and work in a range of labor-intensive industries, such as domestic work, factory work (garment and seafood processing), construction, agriculture, fish handling, sex work, entertainment work, and other small service industries.⁴ Their reasons for leaving Burma for Thailand include seeking a better life and escaping dire economic circumstances and human rights abuses in the country. Compared with Thailand, Burma generally has weaker education, poorer healthcare, and fewer employment opportunities.⁵ Nearly all these migrant women enter Thailand without documents and face stigmatization and discrimination.⁶

Two industries in Thailand that receive many of the women coming from Burma are domestic work and sex and entertainment work. Gendered notions of appropriate work for women makes these types of jobs in the informal sector readily available for newly arrived migrant women. Domestic work and sex work offer a quick solution to the problem of earning income, but at a price. They are “invisible” forms of work because they lack legal and societal recognition. Society views cleaning, caring, and sex as a duty or a natural role for women and not as valuable waged work. While employers

choose to use Burma throughout this report in support of the pro-democracy movement that prefers Burma as Myanmar is a name adopted by an unelected military junta.

³ REIKO HARIMA, *WAR ON WANT, RESTRICTED RIGHTS: MIGRANT WOMEN WORKERS IN THAILAND, CAMBODIA, AND MALAYSIA* 6 (2012), available at http://media.waronwant.org/sites/default/files/Restricted%20Rights.pdf?_ga=1.199471214.1159200972.1478021504.

⁴ I worked with MAP (Migrant Assistance Program) Foundation from 2008-11. During this time, I collected demographic information from 192 migrant women as well as interviewed migrant worker organizers at MAP Foundation, EMPOWER Foundation, Burmese Women’s Union, and Foundation for Education and Development.

⁵ For a detailed comparison of the two countries, see *Burma v. Thailand*, INDEXMUNDI, <http://www.indexmundi.com/factbook/compare/burma.thailand> (last visited Oct. 30, 2016) [<https://perma.cc/HBR3-MWDZ>]

⁶ Prior to the Nationality Verification Process, which began in 2003, nearly all migrant workers from Burma entered Thailand through irregular channels. Even after the Nationality Verification Process began, only a small number of workers have migrated formally. Nora McGann, *The Opening of Burmese Borders: Impacts on Migration*, MIGRATION POLICY INSTITUTE (Feb. 20, 2013), <http://www.migrationpolicy.org/article/opening-burmese-borders-impacts-migration> [<https://perma.cc/85P2-YA5L>]. Furthermore, sex workers and domestic workers are not recognized in Burma, and since 2014, Burma imposed a ban on women migrating to work as domestic workers. Katie Arnold, *From Village to Victim, Myanmar Women Fear Ban on Working as Foreign Maids Puts Them at Risk*, REUTERS (June 6, 2016 5:04 EDT), <http://www.reuters.com/article/us-myanmar-women-trafficking-idUSKCN0YS0TK> [<https://perma.cc/4A4X-ZYLP>].

claim that domestic workers are merely part of the family, others believe that sex workers should not be able to claim rights as employees because sex work is illegal. Individuals performing these jobs do not enjoy many legal protections and are susceptible to exploitation and abuse.

Domestic workers frequently work in isolation in private homes where their employers hold enormous power over them and are able to restrict their movement and access to society. Furthermore, domestic workers are often on call twenty-four hours a day, seven days a week and receive very little pay. Sex and entertainment workers also work seven days a week without holiday and sick leave and face penalties for absences and breaches of unfair rules imposed by their employer. They are subject to discriminatory and often corrupt policing practices that strip them of their dignity and ability to make a living. Society largely denies the fact that these workers are in a true employment relationship, which means they do not benefit from labor rights that they should be entitled to under international human rights law.

Part I of this Article begins by outlining the current state of Thai laws and their applicability to women migrant workers and examining in further depth the challenges faced by Burmese migrant women working in Thailand. It also discusses the failure of the Thai legal system to provide adequate protections to women migrant workers. Part II of the Article looks at internationally recognized standards concerning legal protections for women migrant workers and discusses how the evolution of these international legal standards has both improved and harmed the rights of these workers. It then explains how these standards support organizing efforts of women migrant workers. Finally, Part III looks at the challenges in organizing and the efforts of migrant women from Burma in Thailand to organize and advocate for their rights. It then considers how these efforts have helped to empower the communities they serve and to increase their visibility.

I. AN INVISIBLE WORKFORCE: TREATMENT OF BURMESE DOMESTIC, SEX, AND ENTERTAINMENT WORKERS & DENIAL OF PROTECTIONS UNDER THAI LAW

Despite signs that the Thai government is gradually taking steps to recognize the rights of women migrant workers, the current realities faced by women migrant workers in Thailand show that there have been few improvements to their working conditions and treatment as a result of legal reform. The fact that poor working conditions and ill treatment are so widespread and essentially part of the job for migrant women in the domestic service and sex industries confirms that Thailand should more aggressively pursue reforms to strengthen legal protections afforded to this particularly

vulnerable group. This Part first identifies the basic contours of the Thai legal system relevant to the rights of domestic, sex, and entertainment workers. This Part then uses anecdotes and testimony from Burmese women who work in Thailand and statistical information⁷ to describe the working conditions and treatment of migrant women workers in the domestic services and sex and entertainment industries in order to illustrate why legal protection is necessary.

a. Denial of Protections Under Thai Law

Domestic workers and sex workers are excluded from the majority of protections under Thai labor law. Ministerial regulations expressly limit the protections available to domestic workers under these laws. Sex work, although not officially excluded from Thai labor laws, is deemed to be an industry to which labor laws do not apply.

Section 22 of the Labour Protection Act (B.E. 2541, A.D. 1998) (LPA) allows for the exclusion of agriculture, fishery work, home work, and other work from the full protection of the act.⁸ The ambiguity in this provision gives the Minister of Labour wide discretion to determine if and how Thai labor laws apply to workers in different industries. Under the first Ministerial Regulation of the LPA,⁹ “employers who employ employees to do housework which is not part of a business operation” (i.e., domestic workers) are excluded from essentially all protections except for those concerning payment of wages and entitlement to no less than six holidays per working year (with a year of uninterrupted service).¹⁰ On November 9, 2012, Thailand reduced these

⁷ MAP Foundation, an organization dedicated to educating and empowering migrants from Burma working in Thailand, organizes Burmese women migrant workers and identifies the major challenges and forms of discrimination they face at work to build campaigns to improve their rights. During 2009 to 2011, I worked with MAP Foundation to conduct three-day trainings on The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) with 192 migrant women from six locations, where women wrote about their experiences with discrimination in Thailand. The excerpts quoted in this article are drawn from these trainings.

⁸ “Agriculture, sea fishing, loading or unloading marine cargoes, homework, transport work and other work as provided in the Royal Decree may be prescribed in the Ministerial Regulations for the protection of labour differently from the protection under this Act.” Labour Protection Act, B.E. 2541(A.D. 1998) § 22 [hereinafter “LPA”], *available at* http://www.labour.go.th/en/attachments/article/18/Labour_Protection_Act_BE2541.pdf [<https://perma.cc/3AP8-6PWQ>].

⁹ The Ministerial Regulations of the LPA are issued by the Minister of Labour and are administrative rules governed by the statute and have the weight of law.

¹⁰ Ministerial Regulation No. 1 issued under LPA ¶ 2 (Aug. 19, 1998), *available at*

exclusions by issuing Ministerial Regulation No. 14 of the LPA, which entitles domestic workers to at least one day off each week,¹¹ paid sick leave¹² and either paid holidays or an overtime rate for work on holidays.¹³ Nevertheless, domestic workers still do not enjoy critical protections regarding limitations on working hours, overtime compensation, minimum wage coverage, and social security.¹⁴ In addition, domestic workers are not guaranteed maternity leave¹⁵ or protection from dismissal based on pregnancy.¹⁶

While domestic workers receive limited protections, sex work is not even recognized as “work” under Thai law. The act of solicitation of sex or working in a “brothel” is illegal under the Prevention and Suppression of Prostitution Act.¹⁷ As a criminal act, sex work receives no protections under the LPA. This is particularly problematic because many sex workers work in establishments designated as “Entertainment Places”¹⁸ and perform work that

http://www.labour.go.th/en/attachments/article/18/Labour_Protection_Act_BE2541.pdf.

¹¹ LPA § 28. *See also* INTERNATIONAL LABOUR OFFICE (ILO), ILO FACTSHEET - THAILAND: NEW MINISTERIAL REGULATION OFFERS BETTER PROTECTION OF DOMESTIC WORKER’S RIGHTS (Dec. 20, 2012), <http://wiego.org/sites/wiego.org/files/resources/files/T03.pdf>

¹² Employers are required to pay the full wage during up to 30 working days of sick leave per year. LPA §§ 32, 57.

¹³ LPA § 56. *See* ILO FACTSHEET, *supra* note 11.

¹⁴ Domestic workers remain outside the scope of the Social Security Act 1990 (B.E. 2533, A.D. 1990), *available at* <http://www.sso.go.th/sites/default/files/Social%20%20security%20act.pdf>.

¹⁵ Because domestic workers are outside the scope of the Social Security Act 1990, they are not entitled to maternity leave.

¹⁶ Ministerial Regulation No. 1 excludes domestic workers from protection under Section 43 of the LPA, which prohibits employers from terminating a female employee because of her pregnancy.

¹⁷ Section 4 of the Prevention and Suppression of Prostitution Act defines prostitution as “sexual intercourse, or any other act, or the commission of any other act in order to gratify the sexual desire of another person in a promiscuous manner in return for earning or any other benefit, irrespective of whether the person who accepts the act and the person who commits the act are of the same sex or not.” Section 4 also defines a “prostitution establishment” as a place established for prostitution, a place in which prostitution is allowed, and a place used for soliciting or procuring another person for prostitution. Section 5 fines a person who solicits prostitution not over 33 USD (1000 THB). Section 6 subjects a person who associates with another person in a prostitution establishment for the purpose of prostitution of oneself or another person to imprisonment of not over one month or a fine not more than 33 USD (1000 THB). *See* Prevention And Suppression Of Prostitution Act §§ 4, 5, 6, B.E. 2539 (1996) (Thai), *available at* <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/46403/65063/E96THA01.htm> [<http://perma.cc/AHK3-96R3>].

¹⁸ This term is defined in Section 3 of the Entertainment Places Act. Entertainment Places Act § 3, B.E. 2509 (1966) (Thai), *available at*

is not illegal, such as dancing, waitressing, and massage services. While the Entertainment Places Act regulates the operation of nightclubs, dance halls, karaoke bars, and massage parlours, the Act only requires these establishments to obtain operating licenses from local police.¹⁹ It does not offer any specific benefits or protections for workers in the industry who suffer from violations of labor laws such as the LPA or other occupational health and safety regulations. As such, sex workers are completely unprotected by the law even when they are working in licensed workplaces.

Lastly, migrants—particularly undocumented migrants—are excluded from certain activities that would allow them to protect and advocate for their rights. For instance, provisions of the Labour Relations Act limit the involvement of non-nationals in unions.²⁰ Without the ability to unionize, migrant women who work as domestic workers and sex workers are unable to strengthen their political power, build solidarity with workers from other industries, and collectively bargain for better working conditions.²¹ Additionally, undocumented workers cannot contribute to social security under The Social Security Act and are therefore ineligible to enjoy its benefits, including protections for maternity leave.²²

This brief review of the current legal regime in Thailand demonstrates that its labor laws fail to recognize the rights of women migrant workers in multiple ways—not only with regard to the type of work being conducted, but also with the workers' immigration status. The intersection of the various forms of legal discrimination clearly indicate that women migrant workers are left largely unprotected by Thai labor laws. As a result, these women are subjected to poor working conditions and ill treatment that are detailed in the following Section.

b. Working Conditions and Treatment of Domestic Workers

Interviews with women migrant workers reveal that domestic workers are

http://www.krisdika.go.th/wps/wcm/connect/2ecdda004ba40a2d9e61bf8b0853d392/Entertainment_Place_Act.pdf?MOD=AJPERES&CACHEID=2ecdda004ba40a2d9e61bf8b0853d392 (unofficial translation) [<http://perma.cc/W969-TZBF>].

¹⁹ *Id.*

²⁰ See, e.g., Labour Relations Act §§ 88, 101(2), B.E. 2518 (1975) (Thai), available at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=14497 [<http://perma.cc/NA62-EVSC>].

²¹ See Eliza Marks & Anna Olsen, *The Role of Trade Unions in Reducing Migrant Workers' Vulnerability to Forced Labour and Human Trafficking in the Greater Mekong Subregion*, 5 ANTI-TRAFFICKING REV. 111 (2015).

²² Social Security Act 1990, *supra* note 14.

perhaps the most vulnerable among women migrant workers to human rights violations. There are several reasons for this increased vulnerability. First, since domestic employment takes place in the home, the work is often informal and largely unregulated. Second, in private homes, employers have great latitude to determine the working conditions for domestic workers and have a greater degree of control over the workers' freedom. As a result, domestic workers are susceptible to various forms of abuse by their employers.

I came out to Thailand with my husband and worked as a domestic worker in a household. I worked in the house without receiving any break while the gardener had the opportunity to take a rest from time-to-time. The employer said the housework was not so difficult or hard as to require rest. I was given 67 USD (2000 THB)[per month] for my salary while the gardener received 83 USD (2500 THB). One day the employer sexually harassed me, so I told my husband and left the job.²³

As mentioned in the previous Section, domestic work is excluded from minimum wage provisions set by the LPA.²⁴ Furthermore, gendered notions of these occupations as "women's work" also contribute to the undervaluation of this taxing work. A lack of minimum wage protections and gender stereotypes make labor in this sector cheap. Additionally, there is strong societal resistance to reforms which would drive up the cost of labor. Without minimum wage standards, however, employers are free to determine salary however they desire. In the example below, even though the salary originally agreed upon was small, the employer ultimately refused to pay the agreed amount and the interviewee only earned around \$1.25 per day for her work.

At the age of 16, I was sent to Bangkok with a broker to work as a domestic worker. I was promised to be paid 53 USD (1600 Baht) per month, but at the end of the first month I received only 20 USD (600 Baht). The employer told me that he would save 33 USD (1000 THB) every month for me and then give back the money when I was ready to go home. I had to work from 6:00 am until 9:00 pm and I worked there for 14 months. Even then, the owner didn't increase my salary nor give me my full salary, so I told him that my mother was sick so I could leave. He only gave me 267 USD (8000 THB) instead of the 400 USD (12000 THB) I was owed.²⁵

In addition to being underpaid, domestic workers also report working on average fourteen hours a day. Furthermore, domestic workers are commonly

²³ CEDAW training, Phang-Nga training, Story 8 (Nov. 9 to Nov. 11, 2009).

²⁴ *Supra* note 9.

²⁵ CEDAW training, Mae Hong Son training, Story 10 (May 11 to May 13, 2010).

on standby even during their non-working hours; thus, they never have privacy or time off. Consequently, the long hours of work coupled with the inability to take leave is severely detrimental to the physical, mental, and emotional well being of women migrant workers.

I migrated to Thailand, because in Burma I was experiencing financial problems and it was difficult to find work. I started work as a domestic worker as soon as I arrived in Chiang Mai. My employer did not allow me to sit during working hours and forced me to work all the time. The worst part is I had no time to go to the toilet and if I tried the employer shouted at me through the door. Although I worked 12 hours per day, she paid me very little and I had no holiday. Finally, I couldn't withstand the conditions any longer so I left.²⁶

As mentioned above, the Thai government in 2012 issued Ministerial Regulation No. 14, which required that employers give domestic workers at least one day off each week, paid sick leave, paid holidays, and paid overtime for work on holidays. While this was a huge win for domestic worker advocacy groups, there are still major concerns about the lack of meaningful enforcement mechanisms available to domestic workers. For instance, a major difficulty in enforcing this regulation is that domestic work is informal and private. Employers are able to exercise a great degree of control over domestic workers behind closed doors, restricting their movement, freedom, and access to the world outside the home. This is especially true in cases where the worker lives in the home where she works.

They promised to pay me 100 USD (3000 baht). I not only had to take care of the child, but also did all the house work, washing, cooking, cleaning -everything. And then I had to sleep with the child at night. I had to wake up at 4 am to work for the whole day and used to go to bed at 12:00 midnight. At night I had to wake up every two hours to take care of the child, change her diapers, and comfort her.²⁷

The informal, private nature of domestic work is not the only factor contributing to the difficulty of enforcing labor protections. The Thai government also has not played a sufficiently active role in enforcement. For instance, there are no labor inspectors responsible for implementing the Regulation. While the government has established the Department of Labour Protection and Social Welfare, Ministry of Labour (DLPSW) to handle complaints of labor law violations, there are good reasons for which migrant

²⁶ CEDAW training, Chiang Mai training, Story 19 (Mar. 29 to Mar. 31, 2010)

²⁷ CEDAW training, Sangkhlaburi training, Story 17 (June 21 to June 23, 2010)

workers may not be vocal about violations.²⁸ Many migrant domestic workers hesitate to file a complaint with the DLPSW because of their undocumented status and fear of deportation.

This failure to enforce the leave policy disproportionately impacts women because they are also responsible for the greater share of household and domestic responsibilities outside work. By denying women migrant workers leave, employers not only reduce worker productivity, but create a system in which fatigue, poor health, and injury are more likely to occur.

I finally told my boss one day that I would like getting some time off. They refused so I left. . .well it wasn't easy as just leaving and I actually had to sneak out at night when they were sleeping. They tried to prevent me from leaving by constantly watching me during the day, and the employer threatened that he could do anything he wanted to me should I try to leave and no one would even know. Because I was an undocumented migrant worker, I was reminded constantly that if I left, I would be arrested and deported because no one else would want to employ me, and then what would I do?²⁹

Not only are domestic workers who live with their employers more likely to be isolated and restricted in their movement, they are also more likely to suffer from violence and harassment by their employer or other visitors to the house. Seclusion in the home and control over movement enable employers to physically and emotionally abuse their workers without consequence. Domestic workers report the highest incidents of harassment and violence at the workplace among all migrant workers interviewed.³⁰ Other studies have also shown that “women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where they predominate.”³¹ In some instances, employers threaten workers with deportation if the workers do not meet their expectations, especially if the worker attempts to leave the job. In other cases, employers physically threaten the migrants or retaliate with violence because they know that they can do so with impunity, since undocumented workers will either be too scared to complain or the police will ignore their complaints.

²⁸ THE LABOUR PROTECTION ACT, B.E. 2541 § 124 (1998) (Thai).

²⁹ Burmese Women's Union, *Caught Between Two Hells*, WOMEN OF BURMA (2009), <http://www.womenofburma.org/Report/Caught%20between%20two%20hells.pdf> [<http://perma.cc/9NR9-VKTK>].

³⁰ This reflects analysis of information provided by women at CEDAW trainings during 2009-2011. See *supra* note 7.

³¹ United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 26 on Women Migrant Workers*, ¶20, CEDAW/C/2009/WP (Dec. 5, 2008).

One young migrant domestic worker was employed by a Thai man who was paralyzed from the waist down. On the 20 June 2010, near the market, the employer beat the female domestic worker and then had his assistant beat up her husband, abduct him, take his phone and money, and leave him in an unknown location (and he cannot speak any Thai). Afterwards, the employer beat the domestic worker again and instructed his assistant to also beat her, spit on her face, urinate on her, and push her. During the working day, she was only allowed to crawl on her knees and was forced to do so until her knees were swollen. When the domestic worker tried to resign, the employer wouldn't allow her and beat her again. Sometimes the employer ordered her to massage him all night and didn't allow her to eat or go to the toilet. After the employer was paralyzed he couldn't have sex, so he asked his assistant to have sex with the domestic worker. His six previous Burmese domestic workers had run away. She was able to escape with the assistance of Burmese Association in Thailand (BAT) and Foundation for AIDS Rights (FAR), but lost 2 months' salary.³²

Even if domestic workers obtain legal status in Thailand, they may still be vulnerable to the overpowering control of some employers. Documented migrant workers report that employers confiscate their documents to restrict the ability of migrant women to change employers and/or to escape exploitative situations. An International Labor Organization (ILO) study revealed that employers engaged in widespread confiscation and holding of workers' ID cards, finding that this was true for almost 50 percent of domestic workers.³³ Migrant women interviewed by MAP Foundation also demonstrated that document confiscation by the employer is the norm for migrant workers with documents.³⁴

When I arrived in Thailand I couldn't apply for any jobs because I didn't have an ID card or work permit. I stayed with a rich Thai woman and worked for her. She didn't let me go out and threatened that if I went out I would be captured by the police. When all of my friends told me that they got their ID cards I pushed the owner of the house to follow up. She deducted 127 USD (3800 THB) from my salary. When I got the ID card she kept it and didn't

³² Case, Partner NGO: Burmese Association in Thailand, MAP Foundation Network Referral System

³³ ELAINE PEARSON, ET AL., *THE MEKONG CHALLENGE – UNDERPAID, OVERWORKED, AND OVERLOOKED: THE REALITIES OF YOUNG MIGRANT WORKERS IN THAILAND* 84, 90, 96, 101 (2006), available at http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_bk_pb_67_en.pdf.

³⁴ CEDAW trainings (2009-11); *see supra* note 7.

allow me to go out.³⁵

Confiscating documents would not enable employers to exercise control over Thai workers and limit their mobility. For migrant workers, however, this practice essentially traps them in their jobs. Without their documents, migrant women lose any proof of legal status and effectively become undocumented—they cannot travel; they are subject to arrest, detention, and deportation; and they cannot safely access or file labor complaints with DLPSW. Migrant workers report that some employers prefer to employ undocumented migrant women because they can take advantage of their fears of arrest to exploit and control the workers.

When I arrived in Mae Sot I worked in a house as a domestic worker. The employer told me he would pay 40 USD (1200 THB) per month. I had to work from 4 am until 10 pm every day. When the employer came home late at night, I had to wake up to open the door for the family and they even sometimes asked me to massage them. I didn't want to work with them anymore. When I told them that I wanted to quit the job they threatened me that they will inform the police to capture me. At that time my husband came to see me secretly. We had to find a way to leave the house. Finally, when the employer saw that I cried every day, he allowed me to go but did not give me any wages for my work. I was satisfied because I at least could leave the house without having been sexually exploited. I didn't receive any salary for the 4 months that I worked in that house.³⁶

While domestic work provides access to economic opportunities for many Burmese migrant women, the nature of the work and lack of regulation pose serious problems for those engaged in this type of work. Employers of migrant domestic workers are free to make decisions about salary, working hours, holidays, sick leave, working conditions, and treatment of workers behind closed doors. Most women report experiencing some form of abuse from their employers exercising this control—whether it be restrictions on their movement, seclusion in the home, or access to the outside world. In more extreme circumstances, employers physically abuse their workers. In addition to physical abuse, employers can psychologically abuse workers as well. For example, employers consistently threaten undocumented workers with detention and deportation. Also, as employers confiscate migrant worker's documents, they live with the constant fear of deportation.

Providing solutions to these problems is not an easy task. It requires substantial legal reforms that offer protections for women migrant workers,

³⁵ CEDAW training, Mae Hong Son training, Story 2 (May 11 to May 13, 2010).

³⁶ CEDAW training, Mae Sot training, Story 5 (Oct. 22 to Oct. 24, 2009)

most importantly by amending current labor laws to fully recognize domestic workers and sex workers as employees entitled to all protections under the LPA. Changing the law, however, is not a sufficient solution. The Thai government must also commit to ensuring that the legal protections are actively enforced.

c. Working Conditions and Treatment of Sex Workers

The image of women in sexual slavery in Thailand is pervasive in the media.³⁷ Contrary to the portrayals in the media, sex workers are less likely to be trapped in forced labor than domestic workers because they have greater freedom of movement and some power in determining their working conditions. Migrant women engaged in sex work can earn up to fifteen times as much as migrant women in other occupations, while also working fewer hours than domestic and factory workers.³⁸ Recent interviews with sex workers confirm that they have different concerns than those of domestic workers.³⁹ Their complaints generally concern the challenges of being outside the protections of labor laws as well as being regulated by criminal law—both disregard their rights as workers completely.

Sex workers identify wage deductions as one of the primary ways in which they are exploited in the workplace.⁴⁰ Most women in the Thai sex

³⁷ See, e.g., Nicholas Kristof, *If It Isn't Slavery, What Is?*, N.Y. TIMES (Jan. 3, 2009), http://www.nytimes.com/2009/01/04/opinion/04kristof.html?_r=0 [<http://perma.cc/E4K5-ARTP>]; Laurence Bradford, *Modern Day Slavery in Southeast Asia: Thailand and Cambodia*, INVESTVINE (July 23, 2013), <http://investvine.com/modern-day-slavery-in-southeast-asia-thailand-and-cambodia/> [<https://perma.cc/EC54-5979>]; Kirrily Schwarz, *Sex Tourism Crackdown Targets Brothels and Underage Prostitutes*, NEWS.COM.AU (Aug. 4, 2016, 8:27 AM), <http://www.news.com.au/travel/world-travel/asia/sex-tourism-crackdown-targets-brothels-and-underage-prostitutes/news-story/7b10359a7bc70e6ed6574186e214fd01> [<https://perma.cc/LM24-VZSD>]; Deena Guzder, *The Economics of Commercial Sexual Exploitation*, PULITZER CENTER ON CRISIS REPORTING (Aug. 25, 2009), <http://pulitzercenter.org/blog/untold-stories/economics-commercial-sexual-exploitation> [<https://perma.cc/CN6S-JXAX>].

³⁸ See RATS-W Team, *Hit & Run: The Impact of Anti-Trafficking Policy and Practice on Sex Workers' Human Rights in Thailand*, EMPOWER FOUNDATION (2012), http://www.empowerfoundation.org/sexy_file/Hit%20and%20Run%20%20RATSW%20Eng%20online.pdf.

³⁹ The information in this section is drawn from a report published by EMPOWER Foundation, an organization promoting the rights of sex workers with a membership of women, many of whom are migrants and are organizing for their rights to decent work. In 25 years, 50,000 sex workers have joined EMPOWER. See *id.*

⁴⁰ See EMPOWER FOUNDATION, MOVING TOWARD DECENT SEX WORK 71-8 (2016).

industry work in brothels or “entertainment places” such as karaoke bars, restaurants, massage parlors, and beer bars.⁴¹ As such, their work cannot exclusively be classified as sex work or entertainment work. While the Entertainment Places Act imposes licensing requirements on these establishments, it does not offer protections to entertainment workers. Because of the lack of regulation, owners and managers of these establishments are able to create harsh wage deduction rules and implement them strictly for any infraction. Common reasons for reducing wages include “lateness, weight gain, dress code infringements, and arguments with customers, etc.”⁴² Workers must also pay fines for absences and thus must decide whether to work seven days a week or lose pay for holiday or sick leave.⁴³ Employers often impose various quotas for alcohol sales and customers that, if not met, result in further wage deduction.⁴⁴ Because sex and entertainment workers are not considered protected employees under Thai law, employers are free to impose unfairly harsh policies on their workers, which would otherwise constitute unlawful deductions in violation of Section 76 of the LPA.⁴⁵

The second major concern of migrant women working in Thailand’s sex industry is the negative impact that anti-trafficking efforts has on their rights. Thailand is known internationally for its sex tourism, yet the country refuses to decriminalize sex work. Instead, it has attempted to implement anti-trafficking measures to address the issue. These measures were in part a response to the international movement to address human trafficking as a criminal issue, rather than a human rights issue, associated with the issuance of the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in 2000.⁴⁶ Women migrant sex workers

⁴¹ See EMPOWER FOUNDATION, *supra* note 38, at 17.

⁴² *Id.*

⁴³ See *supra* note 37.

⁴⁴ See *id.*

⁴⁵ Section 76 of the LPA prohibits employer deductions except in five specified circumstances, namely income tax, contribution to labour union, savings co-operatives, and a security deposit against gross negligence or accumulated fund. Except for income tax, all these deductions must not be in aggregate exceed 20% of the wages. See LPA § 76.

⁴⁶ The Protocol defines trafficking as “the exploitation of the prostitution of others or other forms of sexual exploitation.” G.A. Res. 55/25, art. 3 (Nov. 15, 2000). Even though trafficking affects migrants across all industries, “prostitution” is emphasized separately. Critics argue that the definition of trafficking was deliberately left vague in order to maintain a framework that permits states to choose to either legalize or criminalize sex work. See, e.g., Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT’L L.J. 473 (2003). Those who support the Protocol view

complain that enforcement of these measures leads to worse conditions rather than greater protection against workplace exploitation. Some even feel that there are more sex workers in Thailand “who are being abused by anti-trafficking practices than there are women being exploited by traffickers.”⁴⁷

In response to international pressure regarding anti-trafficking efforts, Thailand passed the Prevention and Suppression of Human Trafficking Act (Anti-Trafficking Act).⁴⁸ The Anti-Trafficking Act defines trafficking as “other forms of sexual exploitation,” which is undefined in the Act.⁴⁹ This lack of specificity in the law encourages selective enforcement by government agencies which sometimes use the law to target workers in other entertainment places that are not performing sex work.⁵⁰ This vagueness also leads to extortion by police who demand bribe payments from sex workers directly or from their employers who eventually deduct the bribes from the migrant workers’ wages.⁵¹ Instead of seeking to expose trafficking, law enforcement has significant power to use warrantless enforcement efforts to penalize and harass sex workers.

Enforcement of anti-trafficking rules not only affects workers’ pay, it also subjects them to violence and danger. The Anti-Trafficking Act allows police

sex work as sexual exploitation and are proponents of abolishing sex work altogether. Recently there has been considerable criticism of this approach to addressing human trafficking. First, critics argue that framing the issue as a criminal, rather than human rights matter has a negative impact on the majority of human-trafficking victims and ignores the rights of sex workers. Furthermore, this approach favors a small minority of women that are affected by trafficking and ignores the vast majority of migrant women, such as those from Burma to Thailand. Critics also complain that the UN Human-Rights Instruments’ silence as to the rights of sex workers keeps sex workers invisible and denies them decent working conditions. Instead of perpetuating the stigma attached to sex work, opponents of the Protocol believe that the UN should focus on improving the working conditions of sex workers and support their right to work.

⁴⁷ See EMPOWER FOUNDATION, *supra* note 38 at vi.

⁴⁸ Anti-Trafficking in Persons Act, B.E. 2551 (2008) (Thail.) [hereinafter “Anti-Trafficking Act”], *available at* http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=81747&p_country=THA&p_count=441.

⁴⁹ “‘Exploitation’ means seeking benefits from prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.” PREVENTION AND SUSPENSION OF HUMAN TRAFFIC ACT, B.E. 2551 § 4 (Thail.).

⁵⁰ See EMPOWER FOUNDATION, *supra* note 38, at ix.

⁵¹ See *id.* at 18

to conduct raids.⁵² Law enforcement raids of entertainment places and brothels often happen without a warrant and take place late at night, in direct violation of the Alien Employment Act (which provides that raids should occur during the daytime to avoid danger, violence, and injury).⁵³ The typical raid aims to collect fines for prostitution and immigration violations. Undocumented migrant sex workers caught in a raid face additional risks—they are usually placed in detention to await deportation.⁵⁴ These workers lose opportunities to make money to support themselves and their families. Anti-trafficking efforts are sometimes characterized as “rescue” operations, but these “rescues” can put migrant women sex workers in even worse circumstances. For instance, workers may be compelled to testify against traffickers and may be held in detention or women’s shelters for weeks, months, or even up to a year while awaiting a court hearing.⁵⁵ These rescues deprive workers of their ability to make money which consequently threaten their security and autonomy.

Migrant sex workers are often unaware of their rights, which complicates the problems associated with anti-trafficking enforcement. When police engage in a trafficking investigation, migrant sex workers frequently do not understand the purpose of the interview and their rights are not explained to them.⁵⁶ Because they are not permitted to contact family members or seek legal assistance, they remain uninformed throughout the process.⁵⁷ After being interviewed, workers are then transferred to shelters where they are often forced to take classes in sewing and handicrafts. These products are eventually sold, but workers receive no compensation.⁵⁸ Women may not leave the shelter, whereas male victims of trafficking are permitted to seek

⁵² See Anti-Trafficking Act, *supra* note 48 at § 27.4 (Police may enter dwellings or premises in order to seize evidence of trafficking in persons).

⁵³ See Working of Alien Act, B.E. 2551 § 48 (Thail.), available at http://www.mol.go.th/sites/default/files/downloads/pdf/WORKING_OF_ALIEN_ACT_2551_DOE.pdf (unofficial translation).

⁵⁴ See EMPOWER FOUNDATION, *supra* note 38, at 31.

⁵⁵ *Id.* at 61 (“It is not possible to determine the actual number of women or minors currently being held in shelters in Thailand. Data from shelters is either incomplete or unavailable for public access despite several formal requests from our research team. NGO estimate that victims of trafficking generally stay in shelters for a period of 6-9 months awaiting court cases and receiving support services. That may be true as an average range but our research found that periods of detention of 18 months to 2 years were also not uncommon.”).

⁵⁶ See EMPOWER FOUNDATION, *supra* note 38, at 89.

⁵⁷ See *id.*

⁵⁸ See *id.* at 64.

work outside the shelter during the day and earn daily minimum wage.⁵⁹

The decriminalization of the sex industry and legal recognition of sex workers as employees are essential to improving the working conditions for migrant women working in this industry. Doing so will reduce workplace exploitation and ensure that women workers' rights are not undermined by the enforcement of anti-trafficking laws.

II. GLOBAL STANDARDS: POSSIBILITIES FOR ORGANIZING MOVEMENTS

Overall, current international human rights law falls short in providing comprehensive protection for women migrant workers. There are certain instruments, however, that create opportunities for organizing efforts on the ground that can aid the fight for the inclusion of domestic workers and sex workers in Thai law and society.

a. International Human Rights Instruments for Migrants, Workers & Women

Currently, the human rights instrument that most directly addresses migrant rights is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Although the instrument entered into force in 2003, it still has yet to be ratified by many countries. Within Southeast Asia, only the Philippines and Indonesia have fully ratified the Convention, while Timor-Leste has acceded⁶⁰ and Cambodia is a signatory.⁶¹ All of these countries are typically characterized as “source” countries for migrants—that is, countries from which people are emigrating.⁶² Thailand as well as other “receiving” countries like Malaysia and Singapore have not ratified the Convention. In fact, no “receiving” country around the globe has ratified the Convention. The lack of international recognition and ratification from “receiving” countries undermine the influential power of the Convention.

By contrast, most countries have supported international efforts to address the discrimination of women. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) enjoys wide

⁵⁹ *See id.*

⁶⁰ Accession has the same legal effect as ratification.

⁶¹ A signatory may not violate the object and purpose of the treaty whereas a ratifying state is legally bound by the treaty.

⁶² *See* Stephen Castles & Mark J. Miller, *Migration in the Asian-Pacific Region*, MIGRATION POLICY INSTITUTE (July 10, 2009), <http://www.migrationpolicy.org/article/migration-asia-pacific-region> [<https://perma.cc/7GSF-S5PD>].

ratification in Southeast Asia.⁶³ Thailand has been a party to CEDAW since 1985 and has actively participated in its reporting process. Of the seven human rights treaties it has ratified,⁶⁴ Thailand has only submitted periodic progress reports to the Committee for the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW Committee) and the Human Rights Committee. Encouragingly, Thailand has abandoned six of its seven reservations to CEDAW⁶⁵ in recent years and has instituted a number of positive changes that support the advancement of women, including amending its rape law in 2007 and passing the Domestic Violence Victim Protection Act.⁶⁶

In 2008, the CEDAW Committee issued General Recommendation No. 26 on Migrant Women, clarifying the specific obligations under CEDAW of countries of origin, transit countries, and countries of destination for women migrant workers. For example, in Paragraph 14, the CEDAW Committee notes that, “[W]omen migrant workers often experience intersecting forms of discrimination, suffering not only sex- and gender-based discrimination, but also xenophobia and racism. Discrimination based on race, ethnicity, cultural particularities, nationality, language, religion, or other status may be expressed in sex- and gender-specific ways.”⁶⁷ The Recommendation illustrates that the CEDAW Committee is increasingly paying more attention to intersectionality,⁶⁸ the particular forms of discrimination endured by

⁶³ All 10 ASEAN Countries have ratified CEDAW. Brunei Darussalam (May 24, 2006), Burma (July 22, 1997), Cambodia (Oct. 15, 1992), Indonesia (Sept. 13, 1984), Lao PDR (Aug. 14, 1981), Malaysia (July 5, 1995), Philippines (Aug. 5, 1981), Singapore (Oct. 5, 1995), Thailand (Aug. 9, 1985), Vietnam (Feb. 17, 1982). CEDAW, *State Parties*, UN WOMEN (2010), available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

⁶⁴ Thailand has ratified the ICCPR, ICESCR, ICERD, CAT, CRC, CEDAW and CPRD.

⁶⁵ The government has withdrawn reservations to article 11, paragraph 1(b), article 15, paragraph 3 (Jan. 25, 1991), and article 9, paragraph 2 (Oct. 26, 1992), which were made upon accession. Thailand also withdrew reservations to article 7 and article 10 (Aug. 1, 1996). It withdrew reservation to 16 (July 18, 2012). The only remaining reservation is Article 29, paragraph 1. CEDAW, *Declarations, Reservations and Objections to CEDAW*, UN WOMEN, available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N57>.

⁶⁶ Act Amending the Criminal Code (No.19), B.E. 2550, A.D. 2007, § 3 (Thail.) and Domestic Violence Victim Protection Act, B.E. 2550, A.D. 2007 (Thail.).

⁶⁷ CEDAW, *supra* note 31, at para. 15.

⁶⁸ See CEDAW, General Recommendation No. 28 on Core Obligations of States Parties Under Article 2 of CEDAW, art. 2, ¶ 18, CEDAW/C/2010/47/GC.2 (Oct. 19, 2010). Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity.

migrant women, and the obligations of states to address these issues.⁶⁹ For instance, the CEDAW Committee states that occupations populated by women migrant workers, namely domestic and entertainment work, should be protected by labor laws including wage and hour regulations, health and safety codes, and holiday and vacation leave regulations.⁷⁰ It also addresses issues of employer control, isolation, and seclusion in the home.⁷¹ By focusing on these issues, the CEDAW Committee aims to provide a comprehensive framework that tackles problems faced by migrant women from both a policy and enforcement standpoint. Although Thailand recently submitted its Sixth and Seventh Periodic Progress Reports to CEDAW, it has not acknowledged the CEDAW Committee's Recommendation and continues to deny undocumented migrant women in the country working in the domestic service and sex/entertainment industries their rights.⁷²

In addition to international instruments to protect migrants and women, there have also been efforts to enforce the rights of workers in particular industries. On June 16, 2011, the ILO—comprised of governments, trade unions, and employer associations—voted overwhelmingly to adopt the ILO Convention Concerning Decent Work for Domestic Workers (No. 189) (ILO Domestic Worker Convention). It sets forth the first global standard for domestic workers.⁷³ Under Article 10 of ILO Convention 189, governments should work to ensure that there is “equal treatment between domestic workers

Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. *See also*, CEDAW, General Recommendation No. 25, art. 4, para. 1 (2004). They also need to adopt and pursue policies and programs designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with Article 4, Paragraph 1 of the Convention and General Recommendation No. 25.

⁶⁹ CEDAW, *supra* note 31.

⁷⁰ *Id.* at para. 26(b).

⁷¹ “States Parties should also take steps to end the forced seclusion or locking in the homes of women migrant workers, especially those working in domestic service.” *Id.* at para. 26(d).

⁷² CEDAW, *Consideration of Reports Submitted by States Parties Under Art. 18 of the Convention – Sixth and Seventh Periodic Reports of States Parties Due in 2010: Thailand*, CEDAW/C/THA/6-7 (May 29, 2015).

⁷³ The ILO defines domestic worker as any person engaged in domestic work within an employment relationship who does not work occasionally or sporadically but on an occupational basis. ILO, C189- Domestic Workers Convention, 2011 (No. 189) art. 1 (entered into force Sept. 5, 2013), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189#A1.

and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations.”⁷⁴ In adopting this treaty, the ILO seeks to expressly address the exclusion of domestic workers from the national labor laws around the world and promote the value in changing the longstanding perception that domestic work is not real work. The ILO Domestic Worker Convention emphasizes the economic and social value of domestic workers and seeks to advance gender equality.⁷⁵ It entered into force on September 5, 2013, and currently has been ratified by twenty-two countries. There is still international momentum pushing for legal reform in line with the Convention. Although it has yet to ratify the Convention, Thailand has taken some initiative in responding to the adoption of the Convention and implementing its principles. For instance, in October 2012, Thailand issued a ministerial regulation directed at domestic workers, ensuring at least one day off each week, paid sick leave of up to thirty days, and paid holidays or overtime rate for work on holidays.⁷⁶

While international instruments theoretically offer protections for the rights of women migrant workers, the absence of widespread ratification and a lack of commitment to enforcement hinders the ability of these instruments to have any substantial impact on the legal protections that countries provide this group. In order for these standards to be effective, countries like Thailand need to affirm their commitment to these objectives, not only by ratifying international agreements, but also by taking direct action to integrate these principles into their legal systems. While Thailand has taken some steps towards recognizing the rights of women, migrants, and workers, it is still far from developing laws in accordance with international standards that offer adequate legal protections.

b. Regional Efforts to Promote Migrant Worker Rights

Apart from global movements to establish human rights standards, there have also been regional efforts in Southeast Asia to acknowledge the importance of promoting and enforcing the protection of human rights. As part of these efforts, the regional body for Southeast Asia, the Association of Southeast Asian Nations (ASEAN),⁷⁷ ratified its charter in 2007 and

⁷⁴ *Id.* at art. 10.

⁷⁵ *See id.*

⁷⁶ *See supra* note 10.

⁷⁷ ASEAN is comprised of ten member states: Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Viet Nam, Lao PDR, Myanmar, and Cambodia.

established a legal and institutional framework for the organization. The Charter specifically declares that one purpose of ASEAN is to be the promotion and protection of human rights and fundamental freedoms.⁷⁸ Many view this as a positive development for human rights⁷⁹ because smaller regional bodies are thought to possess greater contextual understanding and ability to handle issues specific to the area than the United Nations system.

In the same year that it ratified the Charter, ASEAN specifically addressed the rights of migrant workers in the region in the Declaration on the Protection and Promotion of the Rights of Migrant Workers, a short non-binding agreement that details obligations of sending countries, receiving countries, and ASEAN generally. For instance, Paragraph 8 states that receiving countries should “[p]romote fair and appropriate employment protection, payment of wages and adequate access to decent working and living conditions for migrant workers.”⁸⁰ At the same time, the ASEAN Committee on Migrant Workers (ACMW) was formed to help develop an ASEAN Instrument to implement the Declaration by further defining and clarifying the rights of migrant workers as well as the precise duties and responsibilities of the sending and receiving states.

Civil society⁸¹ chose to develop its own proposal to submit to the

⁷⁸ Charter of the Association of Southeast Nations art. 1, ¶ 7 (Nov. 20, 2007) [hereinafter ASEAN Charter].

⁷⁹ Three regional bodies have established human rights courts that have the power to issue binding decisions on the human rights violations of its member countries. The newest is the African Court on Human and People’s Rights which rules on the compliance of the 25 member states of the African Union’s with the African Charter of Human Rights. Commentators believe that the African Court will be better posed to deal with human rights issues in a cultural context such as female genital mutilation. The Inter-American Court has taken steps to deal with rights violations such as violence against women and forced disappearances in Latin America far before the international community had examined the issues.

⁸⁰ ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers ¶ 8 (2007).

⁸¹ Civil society refers to non-governmental officials, such as directly affected persons, community based organizations, and non-governmental organizations. Civil society groups involved in this process include: Indonesia’s NGO Coalition for International Human Rights Advocacy (HRWG) and Indonesian Workers’ Union Association (ASPEK); Thai Migrant Working Group; Center for Migrant Advocacy (Philippines); Vietnam Lawyers’ Association; Tenaganita and ALIRAN (Malaysia); CARAM Cambodia; Lao Youth Union and Lao Federation of Trade Unions; and Think Centre/Singapore Working Group on ASEAN. Task Force on ASEAN Migrant Workers, Civil Society Proposal: ASEAN Framework Instrument on the Protection and Promotion of the Rights of Migrant Workers 11 (2009), http://workersconnection.org/resources/Resources_72/book_tf-amw_feb2010.pdf [<https://perma.cc/3XNS-GVS3>].

Committee after a two-year participatory and consultative process with migrant groups in every country of the region. The proposal was called the ASEAN Civil Society Proposal for the ASEAN Framework Instrument on the Promotion and Protection of the Rights of Migrant Workers. In May 2009, the proposal was presented to the ACMW members and ASEAN Secretariat. According to the mandate of the ACMW, the Instrument should be a legally binding agreement among all ASEAN states in accordance with ASEAN Charter Article 5.2, but its implementation has been stalled by the Committee's drafting process since December 2009, when the proposal to include undocumented migrants under the protection mechanisms was opposed.⁸² Without a legally-binding document that includes undocumented workers, ASEAN lacks the enforcement power and provides limited guidance for the proper protections of women migrant workers.

These regional efforts appear to be a step in the right direction, particularly as they have prompted civil society organizations to speak up and advocate on behalf of those whose rights are impacted by the proposed instrument. However, without the ability to reach a consensus as to implementation, the ASEAN efforts to offer protections to women migrant workers do not look promising.

c. Global Efforts to Address Trafficking

While international and regional standards for the rights of migrant workers at least theoretically could provide a suitable framework for protection if they were properly implemented, the international approach to eliminating human trafficking can be problematic in ensuring these rights.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in 2000 (UN Protocol on Trafficking) defines trafficking as "the exploitation of the prostitution of others or other forms of sexual exploitation."⁸³ Despite the fact that trafficking affects migrants in all industries, "prostitution" is emphasized separately in the Protocol. Supporters of the Protocol view sex work as sexual exploitation and are proponents of

⁸² "Malaysia strongly opposed the inclusion of undocumented foreign workers and families of migrant workers within the scope of the proposed regional instrument on labour migration. Thailand, on the other hand, wanted a clear distinction between documented and undocumented workers, and insisted that rights accorded migrant workers should not exceed those granted to the locals." Tess Bacalla, *ASEAN Locks Horns on Migrant Workers Rights*, REPORTING ASEAN, <http://www.aseannews.net/asean-locks-horns-on-migrant-workers-rights/> (last visited Oct. 7, 2016) [<https://perma.cc/XDM2-7VK2>].

⁸³ G.A. Res. 55/25, *supra* note 46, art. 3.

criminalizing and abolishing sex work altogether.⁸⁴ Critics argue that the definition of trafficking was deliberately left vague in order to maintain a framework that permits states to choose to either legalize or criminalize sex work, which they argue will have little effect on tackling human trafficking.⁸⁵

Recently, there has been considerable criticism of the approach that advocates for the criminalization and abolishment of sex work to address human trafficking. First, critics argue that framing the issue as a criminal matter, rather than as a human rights matter, negatively impacts the majority of human-trafficking victims and ignores the rights of sex workers.⁸⁶ The complaints of sex workers in Thailand discussed in Part II seem to corroborate this point—workers are concerned about the corruption, exploitation, and abuse fostered by the anti-trafficking framework in Thailand. Given these concerns, critics support decriminalizing sex work as a better alternative to improving the working conditions of sex workers. This approach is supported by human rights groups such as Amnesty International.⁸⁷ Furthermore, the approach of the Protocol concerns a small minority of women that are affected by trafficking and ignores the vast majority of migrants who choose to perform sex work. “According to Richard Howard of the Bangkok office of the International Labour Organisation, less than ten percent of sex workers in Thailand are ‘trafficked’”⁸⁸ Instead of perpetuating the stigma attached to sex work by allowing its criminalization, some believe that the UN should focus on improving the working conditions of sex workers and support their right to work.⁸⁹ The major concerns of sex workers in Thailand—which are

⁸⁴ *Id.*

⁸⁵ See Abramson, *supra* note 46.

⁸⁶ See, e.g., Hilary Hanson, *Here’s What Amnesty International’s Sex Work Proposal Really Means*, HUFFINGTON POST (Aug. 4, 2015), http://www.huffingtonpost.com/entry/amnesty-international-sex-work-prostitution_us_55bfb184e4b06363d5a2e89b [https://perma.cc/85FR-YQJP]; Lisa Ko, *Targeting Sex Buyers, Not Sex Sellers: Arresting Demand for Prostitution*, PBS (Jan. 23, 2015), <http://www.pbs.org/independentlens/blog/targeting-sex-buyers-not-sex-sellers-arresting-demand-for-prostitution/> [https://perma.cc/KA6D-3A99].

⁸⁷ See *Global Movement Votes to Adopt Policy to Protect Human Rights of Sex Workers*, AMNESTY INT’L (Aug. 11, 2015, 5:00PM), <https://www.amnesty.org/en/latest/news/2015/08/global-movement-votes-to-adopt-policy-to-protect-human-rights-of-sex-workers/> [https://perma.cc/ERD5-CHTN].

⁸⁸ Jean Friedman-Rudovsky, *Meet the Thai Sex Workers Fighting for Their Right to Earn a Living*, VICE (Mar. 28, 2016), http://www.vice.com/en_au/read/blow-jobs-are-real-jobs-v23n1 [http://perma.cc/KC87-Z8C9].

⁸⁹ See Mike Ludwig, *Monica Jones to the UN: US Must Decriminalize Sex Work*, TRUTHOUT (Mar. 20, 2015), <http://www.truth-out.org/news/item/29766-monica-jones-to-the-un-us-deprives-sex-workers-of-human-rights-must-decriminalize-sex-work> [http://perma.cc/2YCA-

related to wage deductions, unfair treatment by their employers, and exploitation furthered by the anti-trafficking regime—demonstrate that the primary approach should be to create a legal framework that will provide workers with the protections they deserve in the workplace.

The successes and failures of international and regional efforts to address migrant worker rights illustrate that mere consensus on defining those rights is insufficient to provide adequate protections to this group. There also needs to be cooperation and commitment among the source and receiving countries, both internationally and regionally, to effectively create an international legal framework that would provide such protections. At present, it does not seem likely that this change will happen soon. Nonetheless, the international approach to anti-trafficking suggests that the international community needs to reconsider how it frames the issue in order to better reflect the concerns of those who it is trying to help. Further criminalization of sex work brings about more harm than it is helping the current situation.

While its success in encouraging governments to carry out legal reform is unclear, international instruments can have influential power over social movements on the ground. Certain international human rights standards, such as the ILO Domestic Worker Convention, lay a baseline for legal reform and have prompted a movement for change in Thailand.⁹⁰ The organizing efforts demanding the rights in the ILO Convention seek to alter society's perspective that domestic workers are not employees. In contrast, while the incorporation of the UN Protocol on Trafficking into Thai domestic law has been harmful, it also galvanized a movement of sex workers against anti-trafficking efforts. This movement has drawn attention and helped to create a platform for the decriminalization of sex work and the promotion of decent working conditions. Part III details the challenges in organizing these workers but also lays out the successes of domestic worker and sex worker activist groups.

III. ORGANIZING EFFORTS: SELF-EMPOWERMENT AMONG BURMESE MIGRANT WOMEN

While Thailand still has a long way to go to ensure women migrant

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⁹⁰ ILO, *ILO Discussion Paper on Women Migrant Workers in Domestic Care Work*, ILO.ORG 12 (Sept. 8, 2015), http://www.gfmd.org/files/documents/gfmd_turkey2014-2015_ILO_GFMD_discussion_paper_Sept_2015.pdf [https://perma.cc/DD2Y-FBPR]; ILO, *Migration and development*, ILO.ORG, <http://www.ilo.org/global/topics/labour-migration/policy-areas/migration-and-development/lang—en/index.htm> [http://perma.cc/2MND-AVKQ].

workers have basic legal protections, there have been, as mentioned, several signs that the government is gradually moving in the right direction. This can, in part, be viewed as a product of the remarkable success of women migrant workers in organizing themselves and empowering their communities.

There are great difficulties in organizing domestic workers given their working conditions—isolation, long hours, and restricted communication. They are not educated about their rights and often do not know other workers because they are not in a single workplace, which makes it difficult to organize meetings and activities to share experiences. Despite these difficulties, several organizations in Thailand have developed innovative approaches to reach out to migrant women working in Thailand. For instance, MAP Foundation broadcasts daily radio programs in migrant languages to educate domestic workers of their rights.⁹¹ Workers can listen to these programs on their phones. The Foundation also organizes women’s exchanges where women are invited to meet, eat, learn about new topics, and share their experiences.⁹² This grassroots approach is bringing domestic workers out of the shadows and building solidarity among migrant women. It empowers the workers themselves and allows them to discuss their problems and possible solutions. As domestic workers have come together to build strength and campaign, the ILO’s attention to the rights of domestic workers gave them traction to pressure the Thai government to make changes. In August and September 2009, consultation meetings titled “Decent Work for Domestic Workers” were held between the ILO and Thai entities, namely Ministry of Labour, employers, domestic workers, and civil society organizations.⁹³ The meetings resulted in the formation of the “Working Team for Decent Work for Domestic Workers.”⁹⁴ The working team consisted of Thai trade unions and a number of Thai non-governmental organizations who work directly with migrant communities.⁹⁵ This partnership was extraordinarily important, as union support was essential to the passage of the ILO Domestic Worker Convention. After listening to domestic workers discuss their rights, the unions decided to adopt the workers’ struggle despite the fact that domestic

⁹¹ MAP RADIO, <http://www.mapradio.org> [<http://perma.cc/4AU4-8TKD>].

⁹² *Rights for All (RFA)*, MAP FOUNDATION (Jan. 14, 2014), <http://www.mapfoundationcm.org/eng/programmes/rights-for-all-rfa.html#WwomenExchange> [perma.cc/EZ6Z-8USU].

⁹³ *Thailand: Network of Domestic Workers in Thailand*, INT’L DOMESTIC WORKERS FED. (Feb. 8, 2015), <http://www.idwfed.org/en/affiliates/asia-pacific/network-of-domestic-workers-in-thailand> [perma.cc/J52T-JNQR].

⁹⁴ *Id.*

⁹⁵ *Id.*

workers are ineligible for membership. In November 2009, the ILO and HomeNet Thailand⁹⁶ organized a training on domestic workers' rights.⁹⁷ The success of the adoption of the ILO Convention and subsequent passage of Ministerial Regulation No. 14 of the Labour Protection Act gave power to this marginalized group. While enforcement of legal protections is still an uphill battle, increased visibility of domestic workers has begun to challenge the assumption that domestic work is not work.

Organizing sex workers is challenging because of the stigma associated with sex work, the transient nature of the job, and the potential for law enforcement raids in the workplace. Even so, sex workers have also made efforts to organize and promote their rights. EMPOWER Foundation is an organization run by sex workers that advocates for the improvement of justice, work, and life for sex workers.⁹⁸ One of its main efforts is challenging the anti-trafficking regulations, which undermine the autonomy and ability of sex workers to provide for themselves and their families.⁹⁹ EMPOWER has issued several reports with recommendations to the Thai Government from sex workers themselves based on personal experience and interviews with other workers.¹⁰⁰ Given the debates over legalization, sex work continues to be a controversial movement for labor rights, so visibility and pride are important tools in demonstrating the falsehoods that all sex work is trafficking.

Another EMPOWER initiative is the establishment of a model bar, Can Do Bar in Chiang Mai Thailand, that is owned and run by sex workers. It provides an example of appropriate working conditions for entertainment places in Thailand. Using the rules in the LPA as guidance, EMPOWER imposes rules to protect the workers' basic working rights including limits of an eight-hour-working day, employee consent to overtime hours, payment of overtime wages, one day a week off, ten paid holidays, thirteen public holidays per year, and paid sick leave.¹⁰¹ EMPOWER hopes that the bar can serve as a model for proper labor practices in the sex work industry in

⁹⁶ *HomeNet Thailand*, WOMEN IN INFORMAL EMP'T: GLOBALIZING AND ORG., <http://wiego.org/wiego/homenet-thailand> (last visited Nov. 3, 2016) [perma.cc/XK46-RMD8].

⁹⁷ *Supra* note 86.

⁹⁸ *See* EMPOWER FOUNDATION, http://www.empowerfoundation.org/index_en.html (last visited Nov. 3, 2016) [perma.cc/8T26-UY97].

⁹⁹ *See* EMPOWER FOUNDATION, *supra* note 38.

¹⁰⁰ *See id.*; EMPOWER FOUNDATION, *supra* note 40.

¹⁰¹ *Can Do!*, EMPOWER FOUNDATION, http://www.empowerfoundation.org/barcando_en.html (last visited Nov. 3, 2016) [http://perma.cc/7U3B-B5SZ].

Thailand. However, the Can Do Bar has not yet been replicated and just breaks even financially.

International law influenced changes in Thai domestic law in a variety of ways. On the one hand, the frameworks for CEDAW and ILO Convention on Domestic Workers have helped buttress organizational efforts advocating for the rights of women migrant domestic workers. On the other hand, opposition to the international Anti-Trafficking framework has contributed to the mobilization of sex workers. MAP Foundation and EMPOWER's creative approaches to gathering support, increasing visibility, and reaching out to the communities they serve have positioned them as a strong political and social force.

CONCLUSION

After migrating from Burma to Thailand, women must find work in order to survive and support their families; yet performing "invisible work," such as sex and domestic work, denies women the legitimacy of their livelihood. Exclusions from the law enable employer abuse and exploitation, but the lack of recognition also undermines the dignity and pride a person derives from working and earning a living. Without the organizing efforts of groups on the ground, women working in isolation in these industries can easily give into false feelings of worthlessness or low self-esteem. While the struggle to build a movement for not only legal change but enforcement of new legal norms is enormously challenging, participation can bring a rise in women's empowerment.

Using international law as a basis for organizing brings Burmese migrant domestic workers and sex workers in solidarity with movements around the world. Workers can engage in a forceful international discourse requiring full labor protections for domestic workers and decriminalization of sex work as another means to influence changes nationally in Thailand. While Thai law and society continues to exclude migrant domestic workers and sex workers, the workers are making themselves increasingly visible and demanding equal rights.