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# CEDAW AND TRANSFORMATIVE JUDICIAL OBLIGATIONS: THE VULNERABLE MIGRANT DOMESTIC WORKER AND ROOT CAUSES OF ABUSE

Cheah W. L.\*

“For close to 10 months, the maid, Ms Piang Ngaih Don, was physically assaulted almost daily, deprived of food and rest, and made to shower and relieve herself with the toilet door open. In the last 12 days of her life, she was tied to the window grille at night while she slept on the floor. The Myanmar national weighed 24kg when she died on July 26, 2016, from the final assault, having lost 38 percent of her body weight since she started working for the family on May 28, 2015.”<sup>1</sup>

## I. INTRODUCTION

Like most migrant domestic workers (“MDWs”), Piang lived in a “hyper-precarious” world marked by depressed wages, coercive and insecure work conditions, and the risk of mental and physical harm.<sup>2</sup> MDWs, who

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1. Selina Lum, *Cop’s Wife Admits Starving, Torturing Maid to Death; Myanmar Victim Was Just 24kg in Her Final Days*, STRAITS TIMES (Feb. 23, 2021). For more accounts of migrant domestic worker (“MDW”) exploitation and abuse in Singapore based on casework, please see HUMANITARIAN ORG. FOR MIGRATION ECON. [HOME] & LIBERTY SHARED, BEHIND CLOSED DOORS: FORCED LABOUR IN THE DOMESTIC WORK SECTOR IN SINGAPORE 41–51 (2019) [hereinafter 2019 HOME & LIBERTY SHARED REPORT].

2. Scholars have argued that low-wage labor migrants are in not merely “precarious” but “hyper-precarious” situations due to a confluence of factors relating to the type of work they do as well as their social position (that is, their indebtedness, socio-economic status, gender, race, and nationality). As Professor Brenda Yeoh explains: “For low-wage migrants, therefore, precarious work and ontological precariousness are often mutually constitutive forces.” Kellyn Wee, Charmian Goh & Brenda Yeoh, *Chutes and Ladders: The Migration Industry, Conditionality, and the Production of Precarity Among Migrant Domestic Workers in Singapore*, 45 J. ETHNIC MIGRATION STUD. 2672, 2675 (2019).

are predominantly female, are protected under the widely ratified Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).<sup>3</sup> This article argues that CEDAW’s transformative provisions, which require states to address root causes of injustice and discrimination, can be made more effective not only through legislation and policy, as commonly argued, but through the judiciary. This article highlights the need to develop the content and implementation of transformative judicial obligations under CEDAW through a comparative study of judicial decisions on the abuse of female MDWs in three key MDW destinations that are party to CEDAW—Hong Kong, Singapore, and Malaysia. By engaging with scholarship on CEDAW’s positive obligations, transformative equality, and theories of adjudication, this article argues that criminal law courts should not only ensure the accountability and punishment of perpetrators of MDW abuse, but should also ascertain and critique the laws, policies, and practices enabling such abuse.

As counter-majoritarian actors within the constitutional landscape, courts are well-placed to protect and promote the rights of marginalized groups without political clout, such as MDWs who may not have the right to vote in destination countries. Courts usually exercise such protective powers through public law cases that address unconstitutional laws and policies but, as this article argues, criminal law cases also provide courts with transformative statement-making opportunities to identify and critique root causes of rights violations. When dealing with criminal cases of MDW abuse, courts in the MDW destination countries studied here have increasingly recognized MDWs’ vulnerabilities by discussing MDWs’ social isolation, financial precariousness, and dependence on employers for their basic needs.<sup>4</sup> However, these judicial discussions generally have not recognized the underlying causes of MDWs’ vulnerabilities. As a result, these judicial decisions treat MDWs’ vulnerabilities as predetermined and fixed even though they are constructed or exacerbated by existing laws, policies, and practices. By analyzing positive and negative examples of judicial decisions, this article demonstrates that criminal law courts *can* and *should* act as transformative agents by exercising their expressive or statement-making powers to address the causes of MDW vulnerabilities, such as the state’s immigration policies and regulatory failures. Importantly, CEDAW requires courts to determine the root causes of MDW abuse, identify the necessary steps forward, target responsible state actors, and counter deep-seated prejudices by representing

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3. Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUM. RTS. DEV. L.J. 1, 6, 20–21 (2005) ; Jennifer S. Hainsfurther, *A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers*, 24 AM. UNIV. INT’L. L. REV. 843, 846–48 (2009); see also INT’L LAB. ORG. [“ILO”], DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL STATISTICS AND THE EXTENT OF PROTECTION, at v (2013) [hereinafter DOMESTIC WORKERS ACROSS THE WORLD] (establishing that MDWs are predominantly women).

4. See *infra* Sections IV & V.

MDWs as dignified rights-bearing workers.<sup>5</sup> This article will analyze the methods courts may and have used to accomplish these objectives, and will illustrate how courts have substantial transformative potential.

According to the International Labor Organization (“ILO”), there are currently more than seventy-five million people employed as domestic workers around the world, and the majority are migrant women.<sup>6</sup> These MDWs—who are politically and socially marginalized due to their gender, nationality, and ethnicity—are a particularly vulnerable group, as evidenced by their discriminatory treatment, lack of legal protections, and rights violations in destination countries.<sup>7</sup> Indeed, reports of MDW exploitation in destination countries have increased in the wake of COVID-19-related lockdowns.<sup>8</sup> This article focuses on three key MDW destinations in the Asia-Pacific region: Hong Kong, Singapore, and Malaysia.<sup>9</sup> The Asia-Pacific region employs 38.3 million domestic workers (more than half of the domestic workers worldwide).<sup>10</sup> Over seventy-eight percent of domestic workers in this region are women.<sup>11</sup> Like most MDW destination countries, Hong Kong, Malaysia, and Singapore are not parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of

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5. Among the transformative obligations set out in CEDAW requiring state actors to address root causes of violations are articles 2(f) and 5 of CEDAW. For detailed discussion, see *infra* Section II.A; see also Convention on the Elimination of All Forms of Discrimination Against Women arts. 2(f), 5, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

6. *Who Are Domestic Workers?*, ILO, [https://www.ilo.org/global/docs/WCMS\\_209773/lang-en/index.htm](https://www.ilo.org/global/docs/WCMS_209773/lang-en/index.htm) (last visited Oct. 2, 2021) [hereinafter ILO, *Who Are Domestic Workers?*].

7. For an overview of the global situation, see DOMESTIC WORKERS ACROSS THE WORLD, *supra* note 3. Some important NGO reports documenting MDW abuse in the MDW destinations studied here include: 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1, at 41–51; JUST. CTR. HONG KONG, COMING CLEAN: THE PREVALENCE OF FORCED LABOUR AND HUMAN TRAFFICKING FOR THE PURPOSE OF FORCED LABOUR AMONGST MIGRANT DOMESTIC WORKERS IN HONG KONG (2016); HUM. RTS. WATCH, “THEY DECEIVED US AT EVERY STEP” – ABUSE OF CAMBODIAN DOMESTIC WORKERS MIGRATING TO MALAYSIA (2011) [hereinafter 2011 HRW].

8. As reported by Singapore-based NGO Humanitarian Organisation for Migration Economics (“HOME”), COVID-19 measures have impacted MDWs resulting in “overworking due to the household staying at home for longer hours, enhanced isolation and no rest days.” John Lui, *Maid Power: Helpers Now Harder to Come by*, STRAITS TIMES, (Dec. 26, 2020).

9. This article adopts the regional definition of the Asia and the Pacific of the ILO. See *ILO in Asia and the Pacific*, ILO, <https://www.ilo.org/asia/lang-en/index.htm> (last visited July 19, 2021).

10. *Informality and Exclusion from Labour Laws Remain Barriers to Decent Work for Asia Pacific Domestic Workers*, ILO, [https://www.ilo.org/asia/media-centre/news/WCMS\\_802026/lang-en/index.htm](https://www.ilo.org/asia/media-centre/news/WCMS_802026/lang-en/index.htm) (last visited July 19, 2021) [hereinafter ILO, *Informality and Exclusion*].

11. *Id.*

Their Families (“ICRMW”).<sup>12</sup> All three are, however, parties to CEDAW.<sup>13</sup> CEDAW takes three approaches to the securing of rights and equality for women: a formal approach (which requires states to meet the formal or de jure obligation of equal treatment),<sup>14</sup> a substantive approach (which requires equality of opportunity and results),<sup>15</sup> and a transformative approach (which requires state parties to combat the causes of discrimination and inequality).<sup>16</sup> The transformative approach to rights goes beyond remedying individual cases of rights violations by addressing their root causes and preventing future rights violations.<sup>17</sup> This article explores how criminal law courts can implement a transformative approach by exercising their expressive powers to identify and critique problematic laws, policies, and practices when dealing with individual cases of MDW abuse.

Like most MDW destinations, the laws and policies of Hong Kong, Malaysia, and Singapore are designed to ensure the impermanence of MDWs by denying them the possibility of freely changing employers or obtaining residency.<sup>18</sup> MDWs in these jurisdictions are required to reside within the households of their employers, making them particularly vulnerable to ex-

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12. *Status of Treaties: Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4) (last visited Oct. 3, 2021) (listing current signatories to the treaty); see also G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Dec. 18, 1990).

13. *See Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=\\_en#1](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en#1). (last visited Oct. 3, 2021) (listing current signatories to the treaty).

14. Simone Cusack & Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, 14 MELB. J. INT'L. L. 55, 63 (2013).

15. This means they need to consider contextual factors that may require women or some women to be provided with different treatment to ensure equality of opportunity and results. *Id.* at 64.

16. Professor Rikki Holtmaat’s analysis of article 5 draws attention to the “transformative equality” approach of CEDAW and its focus on “structural discrimination.” Rikki Holtmaat, *Article 5*, in *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY*, 141, 143 (Marsha A. Freeman, Christine Chinkin, & Beate Rudolf eds., 2012). Cusack and Pusey argue that the “principle of transformative equality underpins” several CEDAW provisions including articles 2(f) and 5. Cusack & Pusey, *supra* note 14, at 11.

17. Examples of CEDAW provisions implementing a transformative approach to equality include articles 2(f), 5, 10(c). See Cusack & Pusey, *supra* note 14, at 11.

18. As recognized by Paul in her comparative study that includes Hong Kong, Malaysia, and Singapore, some “important commonalities” contributing to MDW vulnerabilities include “the fact that these migrant workers/ temporary visas are tied to their continuing employment by a single employer.” ANJU MARY PAUL, *MULTINATIONAL MAIDS: STEPWISE MIGRATION IN A GLOBAL LABOR MARKET* 87–88 (2017).

ploitation and abuse within the privacy of their employers' homes.<sup>19</sup> MDWs also experience financial precarity due to the absence of minimum wage guarantees or their weak enforcement.<sup>20</sup> The governments of these MDW destinations are publicly committed to MDW protection, but researchers and activists continue to document a wide range of exploitative practices, abuse, and rights violations experienced by MDWs at the hands of their employers.<sup>21</sup> Although abusive MDW employers have been prosecuted in all three countries, public officials continue to overlook the laws, policies, and practices underlying MDW abuse. In addressing cases of MDW abuse, criminal law courts in these key MDW destinations have engaged in increasingly sensitive explorations of MDWs' vulnerabilities.<sup>22</sup> There has yet to be any detailed or comparative analysis of these judicial decisions.<sup>23</sup> In undertak-

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19. NGOs have highlighted that this live-in requirement make MDWs particularly vulnerable to abuse. In discussing the abuse and killing of Piang Ngaih Don, Transient Workers Count Too highlighted that the live-in requirement's impact on MDWs, resulting in MDWs being kept "under constant watch" and "easily be denied phones and days off." *Domestic Worker Dies from Abuse and Starvation, Commentary I*, TRANSIENT WORKERS COUNT TOO (Feb. 25, 2012), <https://twc2.org.sg/2021/02/25/domestic-worker-dies-from-abuse-and-starvation-commentary-1/> (last visited July 19, 2021). For more details and discussion of the live-in requirement see *infra* Section III.B.

20. MDWs in Malaysia and Singapore do not have minimum wages. Malaysia has concluded a bilateral agreement with the Philippines setting out a minimum wage of \$400 U.S. dollars, but it is not clear if this is enforced. While Hong Kong has a minimum wage, enforcement remains a problem. PAUL, *supra* note 18, at 96, 102, 107. For more details and discussion on MDW wages, see *infra* Section III.C.

21. See generally 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1; JUST. CTR. HONG KONG, *supra* note 7; 2011 HRW, *supra* note 7.

22. See discussion *infra* Sections III, IV. For a discussion of how the governments of these countries have affirmed their commitment to MDW rights before the CEDAW committee, see *infra* Section II.A.

23. There is a significant body of scholarship on MDW abuse and exploitation in the destinations studied here, though these do not focus on the content or reasoning of court decisions. For a comparative analysis, see PAUL, *supra* note 18. For recent studies on Hong Kong, see Jade Anderson & Annie Li, *Refugees or Victims of Human Trafficking? The Case of Migrant Domestic Workers in Hong Kong*, ANTI-TRAFFICKING REV., Oct. 2018, at 52; Yingtong Lai & Eric Fong, *Work-Related Aggression in Home-Based Working Environment: Experiences of Migrant Domestic Workers in Hong Kong*, 64 AM. BEHAV. SCIENTIST 722 (2020); Yuying Tong & Niantao Jiang, *Much Ado About Nothing? Do Foreign Domestic Workers in Hong Kong Benefit From Capital Accumulation?*, 64 AM. BEHAV. SCIENTIST 823 (2020); Roger Chung & Jonathan Mak, *Physical and Mental Health of Live-In Female Migrant Domestic Workers: A Randomly Sampled Survey in Hong Kong*, 64 AM. BEHAV. SCIENTIST 802 (2020). For recent studies in Singapore, see Eric Fong & Brenda S.A. Yeoh, *Migrant Domestic Workers: Disadvantaged Work, Social Support, and Collective Strategies in East Asia*, 64 AM. BEHAV. SCIENTIST 703 (2020); Wee et. al., *supra* note 2; Brenda S.A. Yeoh, Charmian Goh & Kellynn Wee, *Social Protection for Migrant Domestic Workers in Singapore: International Conventions, the Law, and Civil Society Action*, 64 AM. BEHAV. SCIENTIST 841 (2020); Rhacel Parreñas, Krittiya Kantachote & Rachel Silvey, *Soft Violence: Migrant Domestic Worker Precarity and the Management of Unfree Labor in Singapore*, J. ETHNIC. MIGRATION STUD. SPEC. ED., Apr. 2, 2020, at 1. For Malaysia, see Evelyn Devadason & Chan Wai Meng, *Policies and Laws Regulating Migrant Workers in Malaysia: A Critical Appraisal*, 44 J.

ing such a comparative analysis, this article argues that while judicial discussions of MDW vulnerabilities are positive developments, criminal law courts should not only determine accountability and recognize MDWs' vulnerabilities, but also identify and critique the root causes underlying MDW abuse. Though not without its challenges, such judicial contestation of the root causes of MDW abuse furthers the destination countries' CEDAW obligations to undertake transformative change.

The first part of this article sets out CEDAW's transformative approach to rights and its implications for MDWs and state actors such as courts. It then juxtaposes this approach to the tendency of state officials in destination countries to condemn the abuse of vulnerable MDWs by errant employers without recognizing the impact of official laws and policies on MDWs' vulnerabilities. The second part of this article examines judicial discussions of MDWs' vulnerabilities in Hong Kong, Singapore, and Malaysia. Judges in these countries have primarily drawn attention to the isolation of MDWs in their employers' homes, the dependence of MDWs on their employers for their basic needs, and their lack of financial resources. While such judicial developments are important, the third part of this article argues that these courts need to go beyond discussing specific MDW's vulnerabilities and their individual criminal cases by identifying and critiquing the root causes of MDWs' vulnerabilities. It analyzes cases where courts have advanced or overlooked CEDAW's transformative objectives to argue that criminal law courts can and should advance CEDAW's goals by naming and contesting the laws, policies, and prejudices enabling MDW rights violations. Such a systemic or transformative approach to adjudication that pinpoints the root causes of MDW abuse can catalyze change at both the legal and policy levels, leading to a more rights-centered approach to MDWs that is consistent with CEDAW requirements.

## II. CEDAW AND MIGRANT DOMESTIC WORKERS: THE TRANSFORMATIVE POTENTIAL OF DOMESTIC COURTS

The ILO reports that the number of domestic workers worldwide grew from nineteen million in 1995 to fifty-two million in 2010.<sup>24</sup> Today, this work force stands at more than seventy-five million, with one in every five

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CONTEMP. ASIA 19 (2014); Juanita Elias, *Foreign Policy and the Domestic Worker: The Malaysia-Indonesia Domestic Worker Dispute*, 15 INT'L FEMINIST. J. POL. 391 (2013); Juanita Elias, *Governing Domestic Worker Migration in Southeast Asia: Public-Private Partnerships, Regulatory Grey Zones and the Household*, 48 J. CONTEMP. ASIA 278 (2018); Juanita Elias & Jonathon Louth, *Producing Migrant Domestic Work: Exploring the Everyday Political Economy of Malaysia's "Maid Shortage,"* 13 GLOBALIZATIONS 830 (2016).

24. *Executive Summary of Domestic Workers Across the World: Global and Regional Statistics and the Extent of Protection*, ILO (Jan. 9, 2013), [https://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms\\_173363.pdf](https://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_173363.pdf).

domestic workers being a migrant domestic worker.<sup>25</sup> In 2015, over seventy-three percent of migrant domestic workers were women.<sup>26</sup> Though the global demand for domestic work is clearly increasing, MDWs continue to suffer from depressed wages and serious discrimination in destination countries where they are particularly vulnerable to exploitation and abuse by their employers.<sup>27</sup> While it is more common for MDWs in Hong Kong, Singapore, and Malaysia to experience exploitative work conditions rather than serious physical abuse, exclusionary laws and implementation gaps have nonetheless given rise to some cases of particularly appalling MDW abuse. For example, in 2019, the Singapore District Court sentenced the employers of MDW Khanifah to eleven years and five months imprisonment in one of the “worst cases of maid abuse” in Singapore.<sup>28</sup> Over six months, Khanifah’s employers hit her with various objects, including a hammer and pestle, breaking her left finger.<sup>29</sup> That same year, across the border in Malaysia, the Malaysian Federal Court imposed the death penalty on the employers of Isti Komariyah for the latter’s murder.<sup>30</sup> The offenders had refused food and medical treatment to Komariyah, who starved to death and was found with bruises and scars all over her body.<sup>31</sup> A few years back, in a case that attracted global attention, the employer of former MDW Erwiana Sulistyarningsih was given six years imprisonment by the Hong Kong District Court for, among other allegations, punching and fracturing Sulistyarningsih’s teeth and pushing a vacuum-cleaner tube down her mouth.<sup>32</sup> The authorities in all three countries are quick to condemn the abuse of vulnerable MDWs but continue to focus on individual employers instead of comprehensively dealing with the root causes of such abuse. As a result, some MDW employers are in fact repeat offenders.<sup>33</sup> This section discusses the responsibilities that state actors have under CEDAW to not only refrain from, and remedy, rights violations, but also to transform the system enabling such rights violations. It then contrasts CEDAW’s transformative ap-

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25. ILO, *Who are Domestic Workers?*, *supra* note 6; *Migrant Domestic Workers*, ILO, <https://www.ilo.org/global/topics/labour-migration/policy-areas/migrant-domestic-workers/lang-en/index.htm> (last visited Oct. 3, 2021) [hereinafter ILO, *Migrant Domestic Workers*].

26. MARIA GALLOTI, DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL ESTIMATES 2 (2015).

27. For a comparative overview of law and policies of MDW destinations, see PAUL, *supra* note 18, at 85–126.

28. Charmaine Ng, *Woman Gets 11 years’ Jail in One of Singapore’s Worst Cases of Maid Abuse*, STRAITS TIMES, (Aug. 1, 2019).

29. *Id.*

30. *Malaysian Couple to Hang for Starving Maid*, NEWS.COM.AU (Mar. 7, 2014), <https://www.news.com.au/world/breaking-news/death-for-malay-couple-who-starved-maid/news-story/0b308242dbd22c421fb2aee5cd4cf817>.

31. *Id.*

32. HKSAR v. Law Wan Tung (Reasons for Verdict), [2015] DCCC 421/2014, H.K.D.C. 102 (D.C. Feb. 10, 2015) (H.K.).

33. Ng, *supra* note 28.



proach with the predominantly case-based penal approach employed in Hong Kong, Singapore, and Malaysia.

#### A. CEDAW and Female Migrant Domestic Workers: A Transformative Approach to Rights and Equality

International law specifically addresses the rights of MDWs through the ICRMW and the ILO Convention Concerning Decent Work for Domestic Workers (“No. 189”).<sup>34</sup> Unfortunately, these migrant-specific treaties are poorly ratified, especially by MDW destination countries.<sup>35</sup> Scholars have nevertheless highlighted that female migrant workers are protected by other human rights treaties, in particular CEDAW.<sup>36</sup> 189 states have ratified CEDAW.<sup>37</sup> Hong Kong, Malaysia, and Singapore are among the ratifiers.<sup>38</sup> The CEDAW Committee, an independent expert body established pursuant to the treaty, elaborated on the treaty’s application to female migrant workers in General Recommendation No. 26.<sup>39</sup> This Recommendation emphasizes that female migrant workers are entitled to protection of their universal human rights. Two types of CEDAW rights are especially implicated in the MDW abuse cases discussed in this article: first, rights relating to safety and

34. See ILO, *Convention Concerning Decent Work for Domestic Workers*, art. 15(A), ILO Doc. 189 (Jun. 16, 2011), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189](https://www.ilo.org/dyn/normlex/en/f?p=NORMLXPUB:12100:0::NO::P12100_ILO_CODE:C189).

35. There are currently fifty-six countries that are state parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *Ratification of 18 International Human Rights Treaties*, U.N. HUM. RTS. OFFICE HIGH COMM’R, <https://indicators.ohchr.org/> (last visited December 20, 2021). Hainsfurther notes: “Because of the low number of State Parties to the MWC, however, this convention has little impact in obliging States to provide a minimum core of rights for migrant workers within their boundaries.” Hainsfurther, *supra* note 3, at 846–47.

36. See Satterthwaite, *supra* note 3, at 20–21; Hainsfurther, *supra* note 3. Hainsfurther observes: “Given both the large number of states that have ratified CEDAW as well as the Convention’s Optional Protocol mechanism, CEDAW provides one of the most useful tools for holding States accountable for violations of the human rights of migrant workers within their territories.” *Id.* at 847–48.

37. For a record of CEDAW’s ratification status, see *Ratification of 18 International Human Rights Treaties*, U.N. HUM. RTS. OFFICE HIGH COMM’R, <https://indicators.ohchr.org/> (last visited Jan. 5, 2021).

38. Hong Kong, Singapore, and Malaysia have ratified CEDAW. CEDAW was extended to Hong Kong in 1996 by the British colonial authorities and applies to Hong Kong special administrative region as part of China post-1997. Amy Barrow & Anne Scully-Hill, *Failing to Implement CEDAW in Hong Kong: Why Isn’t Anyone Using the Domestic and Cohabitation Relationships Violence Ordinance?*, 30 INT. J.L. POL’Y & FAM. 50, 50 (2016). Singapore acceded to CEDAW in 1995. Li-ann Thio, *The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism and the Transformative Potential of CEDAW*, 1 SING. J. INT’L & COMPAR. L. 278, 299 (1997). Malaysia also acceded to CEDAW in 1995, Jaclyn Ling-Chien Neo, *Calibrating Interpretive Incorporation: Constitutional Interpretation and Pregnancy Discrimination under CEDAW*, 35 HUM. RTS. Q. 910, 919 (2013).

39. Comm. on Elimination of Discrimination Against Women, *General Recommendation No. 26 on Women Migrant Workers*, U.N. Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

welfare, including “the right to life,” “the right to personal liberty and security,” “the right not to be tortured,” and “the right to be free of degrading and inhumane treatment”; and second, rights associated with access to justice, such as “the right to equality before the law” and “the right to benefit from the due processes of the law.”<sup>40</sup>

As state parties to CEDAW, Hong Kong, Singapore, and Malaysia are obliged to respect, protect, and fulfill these rights for all individuals within their territories, regardless of nationality. These governments often describe the rights and protections afforded to MDWs at the domestic level in country reports submitted to the CEDAW Committee pursuant to article 18 of CEDAW (in which state parties are required to set out measures adopted to “give effect” to CEDAW).<sup>41</sup> In doing so, these governments implicitly recognize that they have responsibilities toward MDWs under CEDAW.<sup>42</sup> For example, in its fifth periodic country report, the Singapore government explained that laws and policies impacting MDWs were often reviewed to ensure that they remained “relevant,” highlighting the then recently implemented requirement that MDW employers either provide MDWs with a weekly rest day or additional compensation.<sup>43</sup> Similarly, in its combined third to fifth periodic country report, the Malaysian government referred to the extension of helpline services to MDWs and a 2006 memorandum of understanding with Indonesia which, *inter alia*, gave MDWs the rights to hold on to their own passports and to weekly rest.<sup>44</sup> The constitutions, laws, and jurisprudence of Hong Kong, Malaysia, and Singapore also recognize and guarantee these fundamental rights to varying degrees.<sup>45</sup>

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40. *Id.* ¶6.

41. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women art. 18 (Sept. 3, 1981) [hereinafter CEDAW 1981].

42. Comm. on the Elimination of Discrimination against Women, *Fifth Periodic Report of State Parties Due in 2015: Singapore*, U.N. Doc. CEDAW/C/SGP/5, at 5–6 (Nov. 6, 2015) [hereinafter Singapore CEDAW Report]; Comm. on the Elimination of Discrimination against Women, *Combined Third to Fifth Periodic Reports of State Parties Due in 2012: Malaysia*, U.N. Doc. CEDAW/C/MYS/3-5, at 24 (Oct. 17, 2016) [hereinafter Malaysia CEDAW Report]; Comm. on the Elimination of Discrimination against Women, *Combined Seventh and Eighth Periodic Reports of State Parties: Hong Kong, China*, U.N. Doc. CEDAW/C/CHN-HKG /7-8, at 33 (Jan. 17, 2013) [hereinafter Hong Kong CEDAW Report].

43. Singapore CEDAW Report, *supra* note 42, at 5. In July 2021, Singapore’s Ministry of Manpower announced additional measures to protect MDWs. By the end of 2022, employers will be required to provide MDWs with one compulsory rest day per month that cannot be compensated away. Isabelle Liew, *Enhanced Medical Checks, One Compulsory Day off Every Month for Maids in Singapore: MOM*, THE STRAITS TIMES (July 23, 2021).

44. Malaysia CEDAW Report, *supra* note 412, ¶¶ 109–10.

45. XIANGGANT JIBEN FA arts. 24–42 (H.K.); LAWS OF MALAYSIA FEDERAL CONSTITUTION arts. 5–13; CONSTITUTION OF THE REPUBLIC OF SINGAPORE arts. 9–16. Scholars recognize that despite Hong Kong’s delicate political relationship with Beijing, the Hong Kong judiciary has developed “an active rights jurisprudence” while taking care to avoid “direct confrontation with Beijing over critical issues.” Alec Stone Sweet & Jud Mathew, *Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea*,

As highlighted by human rights experts Simone Cusack and Lisa Pusey, CEDAW takes a transformative approach to rights, as reflected in its provisions that target the root causes of rights violations such as problematic “institutions, systems and structures” and underlying “harmful norms, prejudices, and stereotypes.”<sup>46</sup> For example, article 2(f) requires state parties to take “all appropriate measures” to address, “modify,” or “abolish” discriminatory “laws, regulations, customs, and practices,”<sup>47</sup> and article 5 calls on state parties to “modify the social and cultural patterns of conduct of men and women” with the aim of eliminating “prejudices and customary and all other practices” based on “the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>48</sup> The CEDAW Committee has underscored that inequality will only be effectively addressed if states take measures aimed at “a real transformation of opportunities, institutions and systems.”<sup>49</sup> Such a transformative approach to rights requires state parties not only to refrain from and remedy rights violations, but also to address the deeper causes of discrimination.<sup>50</sup> International human rights law recognizes that states have a “triad of obligations,” namely, duties to

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*Taiwan - Whiter Singapore?*, 29 SING. ACAD. L.J. 774, 790 (2017). While Malaysia’s judiciary has taken a position of “deference” in the past, scholars have recognized how the Malaysia Federal Court has adopted a “more intrusive approach to constitutional rights review.” *Id.* at 792–93. In contrast, some scholars have criticized the Singapore judiciary for being “a laggard state in Asia when it comes to rights protection.” *Id.* at 797. It is important, however, to note that in recent years and recent cases, the Singapore judiciary has “asserted a stronger role for themselves in the constitutional arena” and has “introduced substantive limits on permissible restriction of rights.” Swati Jhaveri, *Interrogating Dialogic Theories of Judicial Review*, 17 INT’L J. CONST. L. 811, 824 (2019).

46. Cusack & Pusey, *supra* note 14, at 11.

47. CEDAW, *supra* note 5, art 2(f).

48. *Id.* art. 5.

49. COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, GENERAL RECOMMENDATION NO. 25, ON ARTICLE 4, PARAGRAPH 1, OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, ON TEMPORARY SPECIAL MEASURES, ¶ 10 (2004), [https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf).

50. This transformative approach to rights is not exclusive to CEDAW and has also been much discussed by commentators working in the fields of transitional justice and community violence. Scholars of transitional societies have turned to transformative justice with the aim of “re-envisioning the goals of transitional justice mechanisms to account of long-term structural injustices.” Lauren Marie Balasco, *Locating Transformative Justice: Prism or Schism in Transitional Justice?*, 12 INT’L J. TRANSITIONAL JUST. 368, 368 (2018). Transformative approaches have also been used by social movements committed to addressing community violence by seeking “resolutions within more intimate systems of community or civil society.” Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC CULTURAL DIVERSITY. SOC. WORK 219, 226 (2018). While commentators in these different fields may disagree on certain points, they share a structural understanding of interpersonal violence and a commitment to broader societal change.

respect, protect, and fulfill human rights.<sup>51</sup> CEDAW's transformative approach maps onto the state's obligation to fulfill rights. The obligation to respect prohibits states from contravening or curtailing the enjoyment of rights, while the obligation to protect requires states to protect individuals from rights violations by others.<sup>52</sup> The obligation to fulfill requires states to take positive action to enable the enjoyment of human rights.<sup>53</sup> As rights violations are often facilitated by deeper root causes, the obligation to fulfill requires the state to adopt a transformative approach to understanding and achieving rights.

Addressing the root causes of rights violations is particularly important for highly marginalized groups like MDWs who experience discrimination on multiple grounds of gender, nationality, race, and class. Kimberlé Crenshaw, a feminist legal theorist who coined the term "intersectionality," argues that to be truly effective, interventions to protect the marginalized should account for the ways in which "systems of race, gender, and class domination converge" to produce injustices.<sup>54</sup> An intersectional approach is particularly important for combatting rights violations of MDWs, as they experience discrimination on "multiple grounds of identities."<sup>55</sup> For example, paid domestic work remains subject to highly gendered views. Domestic work is seen as "women's work" and something women do naturally as part of their "nurturing" nature; it remains undervalued and is perceived as low-skilled.<sup>56</sup> MDWs are also subject to intrusive gender-specific controls, such as pregnancy tests, in many MDW destinations, including the ones studied here.<sup>57</sup> Furthermore, the immigration and labor laws of many destination countries deny MDWs the opportunity to apply for permanent residence, the freedom to change employers, the labor guarantees afforded to

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51. Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 563, 567 (Dinah Shelton ed., 2013).

52. *Id.*

53. *Id.*

54. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour*, 43 STAN. L. REV. 1241, 1246 (1991).

55. *Id.* at 1245. Mary Romero and Nancy Pérez note that while early scholarship on care work focused on gender analysis, more intersectional approaches have been taken to explore the "implications for gender, race, class, and citizenship inequalities." Mary Romero & Nancy Pérez, *Conceptualizing the Foundation of Inequalities in Care Work*, 60 AM. BEHAV. SCIENTIST 172, 173 (2016).

56. Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 1 UTAH L. REV. 1, 2 (2001).

57. Kelly Fitzpatrick and Katrina Kelly observe how some "immigration regulations of receiving states are blatantly gender-biased," such as requiring the deportation of MDWs who are pregnant. Such punishment of pregnancy "reflects employers' interests in insuring that the household worker's own tasks of family maintenance do not interfere with the employer's exclusive right to her services." Kelly J. Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMPAR. L. REV., 47, 82-83 (1998).

other workers, and the ability to organize.<sup>58</sup> The wages, training, and recruitment received by MDWs may also depend on their nationality and race, as MDWs of different nationalities are subject to different prejudicial stereotypes. Even in Canada, which is widely viewed as a preferred destination by MDWs, a “hierarchy among countries” exists where employers view European or English nationals as more “professional” and “trained” in childcare compared to Filipino nationals.<sup>59</sup> Such bias and discrimination are enabled by existing laws and policies. For example, researcher and public interest lawyer Kristi L. Graunke highlights the persistent “on-the-job violence and harassment” historically and presently experienced by domestic workers in the United States as a result of, *inter alia*, exclusionary laws and immigration policies.<sup>60</sup> Indeed, as observed by Rashida Manjoo, in her former capacity as the UN Special Rapporteur on violence against women: “[n]o form of interpersonal violence against women is devoid of structural violence.”<sup>61</sup> Without dismantling and transforming the root causes of MDW abuse, it will be nearly impossible to prevent future MDW abuse.

B. *Domestic Courts as Transformative Agents Beyond the Individual Case: Statement-Making and Signaling for Change*

When discussing transformative change, CEDAW experts have largely focused on the legislature and the executive rather than the courts.<sup>62</sup> Nevertheless, courts are important sites of MDW protection due to their counter-majoritarian role. As non-nationals, MDWs usually do not have voting power, so legislators and policymakers are more likely to pay closer atten-

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58. As Constable observes, the “particular im/mobility” of MDWs “is shaped by inequalities of gender, class, ethnicity/race, occupation, and citizenship,” Nicole Constable, *Tales of Two Cities: Legislating Pregnancy and Marriage Among Foreign Domestic Workers in Singapore and Hong Kong*, 46 J. ETHNIC MIGRATION STUD., 3491, 3492 (2020).

59. Young, *supra* note 56 at 58–9. For other examples of work and wage discrimination experienced by based on race and nationality, see UNITED NATIONS POPULATION FUND [“UNFPA”], STATE OF WORLD POPULATION 2006, A PASSAGE TO HOPE WOMEN AND INTERNATIONAL MIGRATION 34–35 (2006).

60. Graunke highlights how abuse of MDWs is particularly difficult to address due to the isolation of MDWs and their dependence on employers resulting from exclusionary laws and policies. MDW abuse shares many features with “domestic violence between intimates.” Kristi L. Graunke, “*Just Like One of the Family*”: *Domestic Violence Paradigms and Combating On-The-Job Violence Against Household Workers in the United States*, 9 MICH. J. GEND. & L., 131, 204.

61. U.N. Hum. Rts. Council [“UNHRC”], *Rep. of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo*, ¶ 24, U.N. Doc. A/HRC/17/26 (May 2, 2011).

62. For example, in discussing article 5 in the context of “transformative equality” and “structural discrimination,” Holtmaat has focused on the need for states to scrutinize and change laws and policies. See Holtmaat, *supra* note 16. See generally Andrew Byrnes, *Article 2, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* (Marsha A. Freeman et. al. eds., 2012) (adopting a similar approach focusing on laws and policies with regard to article 2(f)).

tion to the interests of MDW employers, who are largely nationals. As a result, the rights of MDWs may be overlooked or taken less seriously at the legislative or executive level. Apart from ensuring individual accountability and providing remedies to victims, courts can contribute to transformative change by identifying, contesting, and calling for the elimination of the root causes of rights violations through their judicial decisions. Although courts have diverse functions and discretionary powers, this article focuses on judicial statement-making powers, which have attracted less discussion from the CEDAW Committee and commentators.<sup>63</sup> When discussing the role of courts in the context of article 2(c), the CEDAW Committee has called on states to ensure that “specific education and training programmes” about CEDAW’s “principles and provisions” are put in place for public officials, especially “the legal profession and the judiciary.”<sup>64</sup> More attention should be given to the content and explicit reasoning of judicial decisions. By requiring the wide dissemination of judicial decisions, the CEDAW Committee clearly expects judicial decisions to facilitate CEDAW compliance and promote change beyond individual cases.<sup>65</sup>

The idea of courts as actors with significant discretion and agency is not new. Scholars have long challenged the traditional idea of the judge as a “neutral, colourless, undistorting medium through which the law is transmitted to those bound by it.”<sup>66</sup> Brenda Marjorie Hale, the former President of the Supreme Court of the United Kingdom, observes that judicial decisions are shaped by “the judge’s own view of what is right and just” as well as “his or her personal philosophy to judging.”<sup>67</sup> In difficult or novel cases, judges have to choose between several possible outcomes, each of which may be equally supported by legal reasoning.<sup>68</sup> Judges also have significant discretion over how they present the facts and reasons for their decision.

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63. There is substantial literature on the expressive dimensions of the law. As Cass Sunstein explains, the expressive function of law relates to its function in “making statements” instead of its “controlling behavior directly,” Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1995). For a selection of key scholarship discussing the expressive function of law, including the criminal law, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329 (2008); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories Of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

64. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. CEDAW/C/GC/28, ¶ 38(d) (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 28].

65. *Id.* ¶ 38(c).

66. Tom Bingham, *The Judges: Active or Passive*, 139 PROC. BRIT. ACAD. 55, 56 (2006).

67. Brenda Marjorie Hale, *A Minority Opinion?*, 154 PROC. BRIT. ACAD. 319, 321 (2008).

68. *Id.* at 320.

Some CEDAW scholars have argued for courts to take on broader roles beyond the resolutions of individual cases. In their ground-breaking work on gender stereotypes, Rebecca Cook and Simone Cusack argue that CEDAW's provisions against gender stereotyping require courts not only to refrain from applying gender stereotypes, but also to name and identify operative gender stereotypes so as to contribute to their eradication.<sup>69</sup> As Cook and Cusack observe, law is an "effective tool for naming" as it can "publicly and authoritatively proclaim and transform an unacknowledged harmful experience into an experience, or wrong, that is recognized at law as one that is harmful and that requires legal redress."<sup>70</sup> It is noteworthy that CEDAW's transformative provisions, such as article 5, target not only gender stereotypes but a range of systemic factors, such as "laws," "regulations," "customs," "practices," and "social and cultural patterns of conduct."<sup>71</sup> Building on Cook and Cusack's work, courts dealing with rights violations should identify and contest not only stereotypes, but also the laws, regulations, customs, practices, and patterns underlying rights violations. Such judicial naming and contestation transforms the meanings attached to specific harms.

This expressivist function of judicial decisions, which focuses on the law's statement-making power rather than its sanctioning power, has been subject to much academic study and debate. Expressivists recognize that such statement-making may be designed to change norms or behavior due to the law's "moral weight" and its "signaling" of public attitudes.<sup>72</sup> Feminist scholars have also drawn attention to the expressive power of courts by emphasizing, for example, that judicial decisions should endeavor not only to reflect mainstream stories of traditional power dynamics but also to capture the narratives and experiences of marginalized groups.<sup>73</sup> Rosemary Hunter,

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69. REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 39 (2010).

70. *Id.*

71. CEDAW, *supra* note 5, art. 5.

72. Sunstein, *supra* note 63, at 2031, 2032. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000).

73. Feminist scholars have discussed the application of feminist principles to the practice of judging, including the writing of judicial decisions, arguing that this would produce judgments that are different in finding, content, and style. For example, Sharon Elizabeth Rush has argued that feminist judging will require not just familiarity with the law but "open compassion." Sharon Elizabeth Rush, *Feminist Judging: An Introductory Essay*, 2 WOMENS STUD. 609, 632 (1993). Claire L'Heureux-Dubé argues that applying feminist principles to judging will require judges to be sensitive to the life circumstances of marginalized groups unlike themselves. Of key importance is the inclusion of the experience of "outsiders." She is particularly critical of how the law privileges or celebrates the experience of "insiders." Claire L'Heureux-Dubé, *Outsiders on the Bench: The Continuing Struggle for Equality*, 16 WIS. WOMEN'S L.J. 15, 28 (2001). Specifically, there is a need to not only focus on the "outcome" of a case but also the "reasoning" of the court. Rosemary Hunter, *Feminist Approaches to Socio-Legal Studies*, in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS 269 (Naomi Creutzfeldt et. al. eds., 2019). In seeking to demonstrate how judgments could have

a socio-legal scholar of feminist judging, argues that judicial decisions should contextualize marginalized lives against “power structures, biases, inequalities and injustices” and aim at “making violence visible.”<sup>74</sup> As demonstrated below, while courts in Hong Kong, Singapore, and Malaysia increasingly include the stories of MDWs in judgments, they need to do much more to expose and challenge the root causes of rights violations. By challenging root causes, courts make visible structures of violence underlying individual cases of MDW abuse.

While criminal law courts can ascertain and critique root causes of violence in judicial decisions, their ability to directly modify or eliminate these causes is limited. Nevertheless, these courts can and should signal to the executive and legislature that action is required. In General Recommendation No. 28, the CEDAW Committee held that article 2(c) requires courts “to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of state parties under the Convention.”<sup>75</sup> If courts are unable to do so, they “should draw any inconsistency between national law” and “the State party’s obligations under the convention to the attention of the appropriate authorities.”<sup>76</sup> Although public law scholars have drawn attention to the “dialogue” between courts and other branches of the state in the context of judicial review, there continues to be academic debate about the scope and extent of such inter-branch exchange.<sup>77</sup> For the purposes of this article, it is primarily important to recognize that these judicial statements identify what should be done and by whom. Judicial statements about the responsibility of other state actors signal the appropriate way forward to the actors concerned, who may be incentivized to act or come under public scrutiny as a result of these judicial decisions. Such judicial statement-making is often associated with constitutional or administrative law cases, but criminal law cases also provide courts with valuable expressive and statement-making opportunities that can further transformative change. Indeed, in some criminal law cases, a more inclusive and structurally sensitive judicial approach could impact a court’s substantive findings by shedding light on the mental

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been drafted, feminist scholars have undertaken feminist judgment projects within which scholars re-write important judicial decisions in ways that reflect feminist principles of inclusion and justice. Some examples include, *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE*, (Rosemary Hunter et. al. eds., 2010); *FEMINIST JUDGMENTS IN INTERNATIONAL LAW*, (Loveday Hodson & Troy Lavers eds., 2019).

74. Hunter, *supra* note 73, at 264.

75. CEDAW General Recommendation No. 28, *supra* note 64, ¶ 33.

76. *Id.*

77. For an excellent analysis and critique of various debates, see Jhaveri, *supra* note 45, at 811–18. Jhaveri points to the “overelasticity” of dialogue theories and how this has resulted in the exclusion of “other characterization of the various patterns of exchange.” While I agree with Jhaveri’s insightful observations, this article focuses on the statement-making by courts rather than the response of other state actors. *Id.* at 818.



states of the accused or the extent of harm suffered by the victim.<sup>78</sup> While the primary objective of criminal law courts should remain the determination of guilt or innocence, judges can and should exercise their statement-making powers to identify and critique the root causes of rights violations and signal the need for action. By calling attention to the structural dimensions of MDW abuse, such judicial statements would highlight the need for follow-up systemic measures beyond criminal sanctions in the individual case.

### C. Hong Kong, Singapore, and Malaysia: Vulnerable MDWs and Errant Employers

Hong Kong, Singapore, and Malaysia were selected as this article's case studies for several reasons. First, these countries host a substantial number of MDWs in relation to their total population. According to the latest official data, there are 373,884 MDWs living in Hong Kong, which has a population of 7,394,700;<sup>79</sup> 252,600 MDWs living in Singapore, which has a population of 5.69 million;<sup>80</sup> and 130,450 MDWs in Malaysia, which has a population of about thirty-two million.<sup>81</sup> It should be noted that the actual number of MDWs in Malaysia is probably much higher due to the presence of undocumented workers.<sup>82</sup> Second, all three jurisdictions subscribe to the common law legal tradition where courts play an active role in legal interpretation and meaning-making.<sup>83</sup> This shared legal tradition facilitates a cross-country comparison of judicial statement-making. Third, while cases of MDW abuse in these jurisdictions are increasingly subject to public criti-

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78. Parti Liyani v. Public Prosecutor [2020] SGHC 187 (Sing.); *see also* discussion *infra* Section IV.A. below.

79. *Statistics on the Number of Foreign Domestic Helpers in Hong Kong (English)*, DATA.GOV.HK, <https://data.gov.hk/en-data/dataset/hk-imm-d-set4-statistics-fdh/resource/063e1929-107b-47ae-a6ac-b4b1ed460ac3> (last visited Jan. 5, 2021); *Population*, HKSAR CENSUS AND STATS. DEP'T, <https://www.censtatd.gov.hk/hkstat/sub/so20.jsp> (last visited Jan. 5, 2021). Note the figures for Hong Kong MDWs and total population are for different years.

80. *Foreign Workforce Numbers*, MINISTRY MANPOWER SING., <https://www.mom.gov.sg/documents-and-publications/foreign-workforce-numbers> (last visited Jan. 2, 2021); *Singapore Population*, DEP'T STATS. SING., <https://www.singstat.gov.sg/modules/infographics/population> (last visited Jan. 2, 2021).

81. Chester Tay, *Malaysia has 1.99 Million Foreign Workers Registered as at Aug 31*, THE EDGE, Oct. 8, 2019. ; *Current Population Estimates, Malaysia, 2020*, DEP'T STATS. MALAY., [https://www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=155&bul\\_id=OVByWjg5YkQ3MWFZRTN5bDJiaEVhZz09&menu\\_id=L0pheU43NWJwRWVSZkIWdzQ4TlhUUT09](https://www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=155&bul_id=OVByWjg5YkQ3MWFZRTN5bDJiaEVhZz09&menu_id=L0pheU43NWJwRWVSZkIWdzQ4TlhUUT09) (last visited Jan. 5, 2021).

82. PAUL, *supra* note 18, at 109.

83. While recognizing that categorization may lead to some simplification, comparative law scholars have described judicial opinions in the common law tradition as more rhetorical and persuasive in nature. In contrast, in the civil law tradition, judges are viewed as experts in "a type of rational argument" and "in the science of law." Daniel Bonilla Maldonado, *Judges. Judicial Opinions, and Culture from a Comparative Perspective.*, 52 VERFASSUNG RECHT ÜBERSEE 289, 292 (2019).

cism, legal and policy change has been slow. Over the years, Singapore and Malaysia have taken steps to improve MDW protections, but these efforts still fall behind those in other advanced economies.<sup>84</sup> Hong Kong is described as offering a “strong set” of protections relative to other Asian countries, but enforcement remains an issue.<sup>85</sup> Enhanced judicial scrutiny of the systemic causes of MDW abuse could serve as the impetus needed for legislative or executive change.

All three MDW jurisdictions are parties to CEDAW and have the right to equality enshrined in their constitutions.<sup>86</sup> For domestic implementation purposes, it would be preferable for parliaments in these dualist jurisdictions to pass legislation clearly committing state actors to CEDAW’s transformative approach to rights.<sup>87</sup> However, it should be noted that the judicial statement-making powers discussed in this article are inherent to courts in these jurisdictions and do not require the implementation of domestic legislation. As a result, courts in these jurisdictions have the opportunity to engage in statement-making exercises exposing deeper sources of MDW abuse to motivate action by other branches of government. As demonstrated by the positive examples discussed below, several judges have already deployed their statement-making powers in a transformative manner when dealing with MDW abuse. Unfortunately, most public officials in these jurisdictions do not take a transformative approach to MDW rights violations. There is little discussion by public officials of the laws and policies enabling MDW abuse. For example, in response to the horrific starving, torture, and killing of Indonesian MDW Adelina Sau, Malaysia’s then-Minister for Women, Family, and Community Development called for action against the

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84. For a succinct overview of MDW protections in Singapore and Malaysia, including recent developments, see PAUL, *supra* note 18, at 102–09.

85. PAUL, *supra* note 18, at 96. Paul observes that abuse and exploitation is particularly an issue for Indonesian MDWs in Hong Kong due to their lack of awareness of their rights. *Id.*

86. CEDAW was extended to Hong Kong in 1996 by the British colonial authorities and continues to apply to Hong Kong special administrative region as part of China post-1997. Singapore and Malaysia both acceded to CEDAW in 1995. Article 25 of Hong Kong’s Basic Law states that all Hong Kong residents are equal before the law. XIANGGANT JIBEN FA XIANGGANG JIBEN FA art. 25 (H.K.). Article 12 of the Singapore Constitution and Article 8 of the Malaysia Constitution states that all persons are equal before the law and entitled to equal protection of the law. CONSTITUTION OF THE REPUBLIC OF SINGAPORE art. 12; LAWS OF MALAYSIA FEDERAL CONSTITUTION art. 8.

87. For countries subscribing to dualist regimes, unlike those subscribing to monist regimes, international law is not considered automatically incorporated into domestic law. Rather, international law only becomes part of domestic law when transformed or enacted through legislative acts. The judiciary in Hong Kong, Singapore, and Malaysia have held that customary international law may be received into the domestic legal system through common law, but this would be subject to any statutory enactment to the contrary, though the extent to which this takes place differs according to each jurisdiction. See Michael Ramsden, *Dualism in the Basic Law: The First 20 Years*, 49 H.K.L.J. 239 (2019); Siyuan Chen, *The Relationship Between International Law and Domestic Law: Yong Vui Kong v PP [2010] 3 SLR 489*, 23 SING. ACAD. L.J. 350; Abdul Ghafur Hamid, *Judicial Application of International Law in Malaysia: An Analysis*, 1 ASIA-PAC. Y.B. INT’L HUMANITARIAN L. 196 (2005).

victim's employers rather than a broader consideration of the labor laws contributing to such abuse.<sup>88</sup> Similarly, the Singapore Ministry of Manpower ("MOM") repeatedly insists that the country has "numerous measures in place to ensure the welfare and protection of migrant domestic workers," even as MDWs in the city-state argue that what they "really want is better protection by the law."<sup>89</sup> Finally, while MDWs in Hong Kong benefit from the best legal protections of these three jurisdictions, activists have criticized the authorities for not undertaking "serious policy reform."<sup>90</sup> By highlighting legal and policy failures when addressing individual cases of MDW abuse, judicial decisions could lead to legislative and policy change.

Governments of these MDW destinations have primarily responded to MDW abuse through criminal prosecutions and measures, like enhancing the sentences to be meted out for crimes committed against MDWs. For example, the Singapore authorities have amended their criminal laws to enhance the maximum penalties applicable to certain offences when committed against MDWs.<sup>91</sup> In arguing for these amendments, the former Singapore Minister for Home Affairs observed that the "great majority of employers treat their maids well," but "a small minority behave as if their maids are slaves."<sup>92</sup> This treats MDW abuse as an aberration undertaken by a minority of employers and overlooks or ignores the laws and policies ena-

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88. *Malaysia Can Do More to Protect Foreign Maids*, MALAY. DIG., (Feb. 19, 2018), <http://apmigration.ilo.org/news/malaysia-can-do-more-to-protect-foreign-maids>.

89. *Singapore's Foreign Maids Exploited By Agents, Employer*, BUS. TIMES, (May 27, 2015), <https://www.businesstimes.com.sg/life-culture/singapores-foreign-maids-exploited-by-agents-employer>.

90. *Hong Kong to Strengthen Maid Agency Regulation*, YAHOO! NEWS (Mar. 1, 2014), <https://sg.news.yahoo.com/hong-kong-strengthen-maid-agency-regulation-194008280.html>.

91. Courts were authorized to impose penalties on MDW abuse cases that were up to 1.5 times the normal maximum in cases of hurt or grievous hurt, wrongful confinement, assault or use of criminal force with intent to outrage modesty, and insult of modesty. During 1998 parliamentary debates, it was stated that "[s]imple hurt and outraging of modest are the two most common forms of maid abuse," comprising ninety-two percent of cases from 1994–1998. 68 Sing. Parliamentary Debates (Apr. 20, 1998), col. 1925 (statement of Wong Kan Seng, Minister for Home Affs.). Over the past few months, several non-criminal law and administrative, measures have been, or are to be, implemented by the Singapore authorities to better ensure MDW welfare. See Gabrielle Anders, *Maid Agencies Must Conduct Post-Placement Checks Within 3 Months as Part of new Licence Conditions*, CNA NEWS (Oct. 28, 2021) (Employment agencies will "soon be required" to undertake "at least one post-placement check" on MDWs within three months of their placement by call or in person); Affiah Darke, *Employers not Allowed at Maid Medical Exams as Part of New Measures to Help Detect Abuse: MOM*, CNA NEWS (Aug. 5, 2021) (Employers are no longer "allowed to be present during their maid's six-monthly medical examination as part of new measures introduced to help detect abuse"); Lakeisha Leo, *Employers Must Provide Maids with Rest Day That Cannot be Compensated away: MOM*, CNA NEWS (July 22, 2021) (At the end of 2022 employers will be required to provide MDWs with a compulsory rest day a month that cannot be compensated away); Ang Hwee Min, *Maids to Get Home Visits from MOM Officers to Check on Their Living Conditions*, CNA NEWS (Apr. 26, 2021).

92. *Id.*

bling such abuse. During Singapore's parliamentary debates on criminal measures targeting MDW abuse, legislators discussed the isolation of MDWs in private homes, their irregular work hours, and other MDW vulnerabilities.<sup>93</sup> A few parliamentarians sought, but failed, to bring attention to the root causes of these MDW vulnerabilities, such as the absence of proper standardized contracts and an effective complaints mechanism.<sup>94</sup> These penal efforts have had limited impact on MDW protection and the prevention of MDW abuse. In 2010, the Singapore Court of Appeal in *ADF v. Public Prosecutor* noted that, despite enhanced criminal penalties, the number of MDW abuse cases had "not meaningfully decreased."<sup>95</sup> The Court also noted that these cases are difficult to detect.<sup>96</sup> The systemic nature of the problem and the severe nature of some cases of MDW abuse has led to diplomatic disputes and the temporary cessation of MDW movement between countries. For example, in 2009 and 2011, Indonesia and Cambodia instructed employment agencies operating within their territories to stop sending Indonesian and Cambodian MDWs to Malaysia.<sup>97</sup>

As demonstrated in cases discussed in Sections III and IV below, the authorities in Hong Kong, Singapore, and Malaysia have not hesitated to prosecute employers engaging in MDW abuse.<sup>98</sup> While these criminal prosecutions represent a small fraction of the actual number of MDWs abused, these cases provide courts with opportunities not only to ensure individual accountability, but also to contribute to long-term change. Though judges are not empowered to hand down structural remedies when adjudicating

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93. Domestic workers are treated as vulnerable persons under Singapore's recent penal amendments and in amendments being discussed in Hong Kong. See, e.g., Penal Code, ch. 224, § 304(B) (2008) (Sing.); THE LAW REFORM COMMISSION OF HONG KONG, CONSULTATION PAPER: CAUSING OR ALLOWING THE DEATH OR SERIOUS HARM OF A CHILD OR VULNERABLE ADULT ¶ 2.145 (2019).

94. During 1998 parliamentary debates in Singapore, apart from flagging MDW vulnerabilities, such as their isolation and irregular work hours, Singapore's Minister for Home Affairs at the time argued that cases of MDW abuse undermined "Singapore's aspiration to be a gracious and civil society" and damaged Singapore's "international reputation and bilateral relations." Sing. Parliamentary Debates, *supra* note 91, col. 1924. In responding to suggestions for standardized contracts, the Minister for Home Affairs at the time rejected this possibility, stating that "[m]aids work under different circumstances for different reasons, for different employers and so on, and therefore it is quite difficult to have a standard contract specifying the exact terms for each of the maids and employers." *Id.*

95. *ADF v. Public Prosecutor*, 1 Sing. L. Reps 874, ¶ 61 (C.A. July 8, 2009) (Sing.).

96. *Id.*

97. Kocha Olarn, *Cambodia Defies Ban and Sends Maids to Malaysia, Lawmaker Says*, CNN (Nov. 5, 2011), <https://edition.cnn.com/2011/11/05/world/asia/cambodia-domestic-workers/index.html>. Despite this ban, there were reports of domestic workers being sent to Malaysia. MDW migration resumed after both countries concluded Memorandum of Understandings with Malaysia with the aim of enhancing protection of MDWs. For a foreign policy analysis of these bans, see Juanita Elias, *Foreign Policy and the Domestic Worker: The Malaysia-Indonesia Domestic Worker Dispute*, *supra* note 23.

98. See discussion *infra* Sections III & IV.

criminal cases (unlike public law cases), they can nevertheless identify and critique root causes of MDW rights violations when contextualizing facts and identifying responsibility. Judicial-driven change and rights protection is often associated with public law cases, such as those dealing with applications for the judicial review of legislative and executive acts.<sup>99</sup> However, courts in Hong Kong, Singapore, and Malaysia operate in socio-political contexts characterized by varying degrees of authoritarian rule, in which public law cases involving the direct judicial challenge of laws and policies face various obstacles.<sup>100</sup>

In Hong Kong, individuals and interest groups seeking recognition or enforcement of their rights through public law litigation have had some success before the courts.<sup>101</sup> However, in Singapore and Malaysia, restrictive legal doctrines, judicial restraint, and the reluctance of the public to sue state actors have prevented these countries from developing a strong tradition of public law litigation.<sup>102</sup> Both jurisdictions have nevertheless witnessed some active developments in public law litigation.<sup>103</sup> Apart from public law cases,

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99. In their account on the development and rise in judicial review as a rights protective and accountability mechanism worldwide, Doreen Lustig and J.H.H. Weiler observe that “judicial review, of a constitutional nature, has become the norm rather than the exception in the contemporary world.” Doreen Lustig & J.H.H. Weiler, *Judicial Review in the Contemporary World - Retrospective and Prospective*, 16 INT’L J. CONST. L. 370 (2018).

100. There is substantial scholarship on authoritarian rule in Singapore, Hong Kong, and Malaysia. Recent works include Benny Tai, Scott Veitch, Fu Hualing & Richard Cullen, *Pursuing Democracy in an Authoritarian State: Protest and the Rule of Law in Hong Kong*, 29 SOC. LEG. STUD. 107 (2019); THE LIMITS OF AUTHORITARIAN GOVERNANCE IN SINGAPORE’S DEVELOPMENTAL STATE (Lily Zubaidah Rahim & Michael D. Barr eds., 2019); Azmi Sharom, *Did the General Elections of 2018 Signal the End of Authoritarianism in Malaysia?*, in THE SPECTRA OF AUTHORITARIANISM IN SOUTHEAST ASIA 165 (Azmi Sharom & Magdalen Spooner eds., 2019). In the case of Malaysia’s historic 2018 elections, a coalition of opposition parties ousted the then incumbent party and started implementing a range of democratic reforms, which were then halted or reversed when the coalition lost their majority in parliament due to the withdrawal of support from several parliamentarians. Yen Nee Lee, *Malaysia’s New Prime Minister Has Been Sworn in – But Some Say the Political Crisis is “Far From Over,”* CNBC (Mar. 2, 2020), <https://www.cnbc.com/2020/03/02/malaysia-political-crisis-muhyiddin-yassin-appointed-as-prime-minister.html>.

101. Pui Yin Lo, *Hong Kong: Common Law Courts in China*, in ASIAN COURTS IN CONTEXT 203 (2015).

102. Roger Tan Kor Mee, *The Role of Public Interest Litigation in Promoting Good Governance in Malaysia and Singapore*, XXXIII J. MALAY. BAR 58–176, 78–79, 87, 101–18 (2004). This is particularly so when compared to more activist judiciaries in Asia, such as the Indian judiciary which has been described as being “at the forefront of rights-protection and rights activism.” Jayanth K. Krishnan, *Legitimacy of Courts and the Dilemma of Their Proliferation: The Significance of Judicial Power in India*, in ASIAN COURTS IN CONTEXT 270 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015). It should be noted, however, that there has been an increase in the number of judicial review cases brought before Singapore and Malaysia courts in recent years.

103. For example, the criminalization of male homosexual sex in Singapore law has been repeatedly challenged by plaintiffs, though these efforts have been thus far unsuccessful. Rei Kurohi, *High Court Dismisses Challenges Against Law That Criminalises Sex Between*

criminal law cases are another avenue by which courts can contribute to broader change through judicial condemnation of rights violations and critique of root causes. As demonstrated below, many criminal law decisions in these jurisdictions have sought to highlight MDWs' vulnerabilities in a sensitive and inclusive manner, but these efforts need to go further to promote transformational change.

### III. ASSESSING JUDICIAL EFFORTS: MORE INCLUSIVE UNDERSTANDINGS OF MDW VULNERABILITIES

When dealing with cases of MDW abuse, judges in Hong Kong, Malaysia, and Singapore have increasingly addressed MDW vulnerabilities in an empathetic and nuanced manner. Such judicial discussions of MDW vulnerabilities are important. By including the marginalized experiences of MDWs "in the text of the law," these judicial discussions contribute to better understandings of MDW lives and realities.<sup>104</sup> Nevertheless, most of these judicial decisions stop at the acknowledgment and description of MDWs' vulnerabilities. This section illustrates how courts are currently describing MDW vulnerabilities while avoiding discussion of their root causes. Judges should do more to recognize that MDWs' vulnerabilities are not predetermined, but are instead the result of existing laws, policies, and practices. By doing so, courts would underscore the need to look beyond individual errant employers if MDW protection is to be secured effectively. If courts do not go beyond the individual case and address the factors causing MDWs' vulnerabilities, MDWs will continue to be at risk of physical and mental harm, as well as other abusive practices. Highlighting the laws, policies, and practices that contribute to MDW abuse would be in line with CEDAW's transformative commitment, which requires the deeper causes of discrimination to be "brought to the surface."<sup>105</sup> This section critically examines judicial deliberations on MDW dependence, isolation, and impecuniousness with the aim of highlighting the root causes missing from these judicial narratives of MDW vulnerabilities.

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*Men*, STRAITS TIMES (Mar. 31, 2020), <https://www.straitstimes.com/singapore/high-court-rejects-all-three-challenges-against-section-377a>. Regarding public interest litigation undertaken pursuant to public law in Malaysia, researchers observe that "some judges in Malaysia" have "started utilizing a liberal and flexible approach" that facilitates such litigation. Gan Chee Keong, Ahmad Azam Mohd Shariff, Ramalinggam Rajamanickam & Nazura Abdul Manap, *An Overview on the Public Interest Litigation in Malaysia: Development and Dilemma Under Provision of Remedies for Enforcement of Fundamental Rights*, MEDITERRANEAN J. SOC. SCIS. 116 (2016).

104. Hunter, *supra* note 73, at 265.

105. Holtmaat, *supra* note 16, at 163.

A. *The Dependent MDW and the Goodwill of Employers: The Tied Visa System and Responsibilities of Employers*

A MDW's legal status in these jurisdictions depends on her continued employment with the same employer, as MDWs are only entitled to short-term visas that tie them to a particular employer.<sup>106</sup> While MDWs in Hong Kong may apply to the immigration authorities to change employers at the end of their contracts, the formal position of the government is that any request for change during the contractual period "will not as a rule be approved."<sup>107</sup> Similarly, MDWs in Malaysia cannot change employers unless they obtain permission from the immigration authorities first.<sup>108</sup> Singapore, on the other hand, only permits MDWs to transfer employers with their current employer's consent.<sup>109</sup> The immigration authorities have the discretion to allow persecuted MDWs to transfer employers, but it is not clear how this discretion is exercised.<sup>110</sup>

This inability to change employers freely is crucial to MDWs' vulnerability. MDWs are reluctant to leave employers, even those who are abusive or exploitative, as this will lead to visa cancellations and they will legally be required to return to their home countries.<sup>111</sup> Because many MDWs take on significant debt to secure their work placement, which is itself problematic, they are reliant on continued employment to meet debt repayment requirements. Judges in these jurisdictions have recognized the dependence of MDWs on the goodwill of their employers. For example, in *Janardana Jayasankarr v. Public Prosecutor*, a case in which the accused was convicted of voluntarily causing harm to his MDW, the Singapore High Court emphasized that MDWs normally "do not have a voice" and are largely "de-

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106. The temporary and employer-specific nature of these visas has been described by Paul as a "core level of vulnerability" shared in these MDW destinations. PAUL, *supra* note 18, at 88.

107. *Foreign Domestic Helpers*, IMMIGR. DEP'T H.K. SPECIAL ADMIN. REGION, [https://www.immd.gov.hk/eng/services/visas/foreign\\_domestic\\_helpers.html#c](https://www.immd.gov.hk/eng/services/visas/foreign_domestic_helpers.html#c) (last visited Jan. 2, 2021).

108. *Foreign Domestic Helper (FDH)*, IMMIGR.N DEP'T MALAY <https://www.imi.gov.my/portal2017/index.php/en/foreign-domestic-helper-fdh.html> (last visited Jan. 2, 2021) ("4(m): The employer must obtain approval from the Immigration Department if the FDH wishes to terminate her services, if the employer wishes to terminate the services of the FDH, or to get the Check-out memo from the Department of Deportation if the pass has expired.")

109. 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1, at 27.

110. With respect to Singapore, HOME has noted that it is not clear what the Ministry of Manpower ("MOM") will treat as a "valid claim" based on whether MDWs will be permitted to change employers rather than being repatriated or told to return to their previous employers. *Id.* at 33.

111. Many MDWs have taken on debts to secure their jobs and are supporting their families back home. Singapore-based NGO HOME notes that this employer-sponsored visa system is "a fundamental stumbling block to the realization of migrant workers' rights." *Id.* at 26.

pendent on the good faith of their employers.”<sup>112</sup> Nevertheless, the Court did not recognize how this dependence of MDWs on the goodwill of their employers is in fact created by laws and policies, such as the work visa system that ties employees to employers.

Since policies effectively prevent MDWs from leaving their employers, MDWs in these jurisdictions must rely on the goodwill and discretion of their employers for fair and decent treatment because the responsibilities of employers are not clearly set out in law. MDWs in these destinations are even excluded from certain labor laws and protections. In Singapore, migrant workers engaged in work considered unskilled, including MDWs, are not covered under the Employment Act,<sup>113</sup> which applies to all other employees and which sets out clear working conditions, such as maximum working hours and leave requirements.<sup>114</sup> MDWs working in Singapore are covered instead by the Employment of Foreign Manpower Act (“EFMA”),<sup>115</sup> which uses open-ended terms to define employers’ responsibilities. For example, Singapore’s EFMA regulations state that the employer is responsible for “the upkeep and maintenance” of MDWs, including the “provision of adequate food,” without a definition of “adequate.”<sup>116</sup> A similar situation exists in Malaysia where MDWs are excluded from key provisions of Malaysia’s Employment Act, which address, among others, leave days, work hours, overtime pay, termination conditions, and maternity leave.<sup>117</sup> The relationship between MDWs and employers in Malaysia is largely governed through contractual terms that are vague and often lopsided in favor of the employer.<sup>118</sup> On paper, MDWs in Hong Kong have more rights because they are covered under key employment laws, but the uneven policing

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112. *Janardana Jayasankarr v. Public Prosecutor*, 4 Sing. L. Repts. 1288, ¶ 4. (H.C. Aug. 4, 2016) (Sing.).

113. *See* Employment Act 2009, c. 91 (Sing.).

114. This is Singapore’s key labor law and specifies clear requirements on working hours, public holiday pay, annual leave and paid sick leave. The Singapore government justifies the exclusion of MDWs from the Employment Act on the basis that domestic work is “quite different” from “normal work,” though many scholars, like Findlay and Lim, highlight that the regulation of household domestic work should not “be more difficult than in any other closed environment.” MARK FINDLAY & SI WEI LIM, *REGULATORY WORLDS: CULTURAL AND SOCIAL PERSPECTIVES WHEN NORTH MEETS SOUTH* 141–42 (2014).

115. *See* Employment of Foreign Manpower Act 2009, c. 91A (Sing.).

116. Employment of Foreign Manpower (Work Passes) Regulations 2012, pt. I, § 1(a) (Act. No. S 569) (Sing.). While the Singapore MOM has issued an advisory on the typical daily food intake, NGOs continue to report cases where MDWs were not provided sufficient food or food of adequate nutrition. Further, some MDWs report that their employers do not respect their religious dietary restrictions. 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1, at 38.

117. *See* Employment Act 1955, § 57 (Act No. 265) (Malay.).

118. *See* Ainaa Aiman & Shathana Kasinathan, *Govt Considering Standalone Act for Domestic Workers*, FREE MALAY. TODAY (Aug. 5, 2019), <https://www.freemalaysiatoday.com/category/nation/2019/08/05/govt-considering-standalone-act-for-domestic-workers/>.



and enforcement of these rights remains a problem.<sup>119</sup> Given this legal context, the policing of individual employers in all three countries through workplace checks is impractical and ineffective. In *Farida Begam d/o Mohd Artham v. Public Prosecutor*, the Singapore High Court increased the accused's sentence to nine months for causing harm to her MDW and recognized that it would be an "administrative nightmare" if authorities had to "check" on each MDW's "living conditions" and on "household members."<sup>120</sup> It is precisely because such detailed checks are not possible that employers should have their responsibilities clearly delineated in the law. With clear laws, MDWs would be more aware of the treatment they are entitled to and arguably in a better position to enforce their rights.

These vague legal definitions of employer responsibilities mean MDWs are dependent on the goodwill of employers for their basic needs, a situation which can result in severe deprivations and abuses. In the 2017 Singapore case of *Public Prosecutor v. Lim Choon Hong*, the accused had "systematically deprived" Thelma Oyasan Gawidan of sufficient food for over fifteen months, subjecting her to a "bizarre feeding regime" of "a fixed number of slices of bread and packets of instant noodles at two specified times of the day."<sup>121</sup> The victim also had to ask the accused for permission before drinking water.<sup>122</sup> As a result, Gawidan lost forty percent of her body weight and became "grossly undernourished."<sup>123</sup> Gawidan also stopped menstruating and experienced hair loss.<sup>124</sup> Her employers ignored her pleas and prevented her from seeking help by insisting that any messages sent by her to her agency went through them.<sup>125</sup> The accused were each imprisoned for ten months for failing to provide adequate food to Gawidan on charges under the EFMA.<sup>126</sup> Similarly, in the Malaysian case of *Public Prosecutor v. Soh Chew Tong & Chin Hui Ling*, the Cambodian MDW Mey Sichan had not only been physically abused, but had also been systemically denied food

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119. PAUL, *supra* note 18, at 100.

120. *Farida Begam d/o Mohd Artham v. Public Prosecutor*, 4 Sing. L. Repts. 610, ¶ 28 (H.C. Nov. 8, 2001) (Sing.).

121. *Public Prosecutor v. Lim Choon Hong*, 5 Sing. L. Repts. 989, ¶18 (H.C. Sept. 15, 2017) (Sing.) Adjustments were made to the food ration of the victimized MDW by the employer if more was given earlier *Id.* ¶ 18. For an analysis of this case, see Benjamin Joshua Ong, *Offences Against Foreign Domestic Workers in Singapore: Vindicating the Victim's Right to Dignity*, OXFORD HUM. RTS. HUB BLOG (Nov. 17, 2017), <http://ohrh.law.ox.ac.uk/offences-against-foreign-domestic-workers-in-singapore-vindicating-the-victims-right-to-dignity>.

122. *Jail and Fine For Couple Who Starved Maid, Causing Her to Lose 20kg*, STRAITS TIMES (Mar. 27, 2017), <https://www.straitstimes.com/singapore/courts-crime/jail-and-fine-for-couple-who-starved-maid-causing-her-to-lose-20kg>.

123. *Lim Choon Hong*, 5 Sing. L. Repts. ¶18.

124. STRAITS TIMES, *supra* note 122.

125. *Lim Choon Hong*, 5 Sing. L. Repts. ¶19.

126. *Id.* ¶ 29.

and water.<sup>127</sup> Mey had eventually starved to death, and the accused were charged for her murder.<sup>128</sup> The court highlighted that Mey had been starved “for about a few months.”<sup>129</sup> Her weight had dropped from forty-four kilograms to 26.1 kilograms. Mey was so hungry that she had “scavenged” for “left over [*sic*] food in the rubbish bin.”<sup>130</sup> On appeal, the Court of Appeal sentenced the accused to death for murder.<sup>131</sup> State actors may call for MDWs to be recognized as “human beings with aspirations, interests, intellect and more,” but for MDWs to be truly treated with dignity and have their rights respected, the laws and policies enabling their abasement and exploitation have to change.<sup>132</sup> While the judges in these cases condemned the callous behavior of MDW employers, they did not discuss the need for clearer definitions and enforcement of employers’ obligations toward MDWs.

### B. *The Isolated MDW: Living in and The Tyranny of Home*

Another MDW vulnerability emphasized by courts in these three jurisdictions is the isolation experienced by MDWs residing in employers’ homes. This isolation is directly connected to the laws and policies of each country concerning the MDWs residence. MDWs reside in the homes of their employers but the laws and policies of these jurisdictions do not specifically require employers to respect MDWs’ freedom of movement and privacy. Employers often impose long work hours on MDWs, and MDWs often work up to sixteen or eighteen hours per day.<sup>133</sup> Employers are also not required to provide MDWs with their own room. MDWs are usually required to share rooms with the children or elderly parents of their employers.<sup>134</sup> It is also not uncommon for employers to instruct MDWs to sleep in store rooms, kitchens, and living rooms even though this results in them getting insufficient rest due to noise.<sup>135</sup> The Singapore NGO HOME has rec-

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127. Public Prosecutor v. Soh Chew Tong & Chin Hui Ling, [2013] 1 LEGAL NETWORK SERIES 1189, at 35 (H.C.) (Malay.).

128. *Id.*

129. *Id.* at 8.

130. *Id.* at 27.

131. Public Prosecutor v. Soh Chew Tong and another and another appeal, 5 C.L.J. 725, ¶90 (C.A. Feb. 17, 2016) (Malay.) at 90. The lower court had sentenced the accused to twenty-four years’ imprisonment each.

132. In Soh Meiyun v. Public Prosecutor, 3 Sing. L. Repts. 299, ¶ 44 (H.C. Apr. 29, 2014) (Sing.), the Singapore High Court emphasized that MDWs are “a class of highly vulnerable victims” whose employers may “reduce them to their function of providing domestic help” though MDWs are “human beings with aspirations, interests, intellect and more.” The Court was critical of such employers who treated MDWs as “second-class persons.” *Id.* ¶44.

133. 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1, at 36.

134. *Id.* at 97.

135. *No Privacy, No Space: Domestic Workers Endure Poor Living Conditions*, HOME, <https://www.home.org.sg/our-updates/2017/11/30/no-privacy-no-space-domestic-workers-endure-poor-living-conditions> (last visited July 20, 2021).

orded at least one case where the MDW was forced to sleep on the balcony with only a “shower curtain for shelter.”<sup>136</sup>

The laws and policies of Malaysia and Singapore not only fail to guarantee adequate living conditions, but they contribute to a lack of privacy and restrictions on movement of MDWs as well. In both countries, employers are required to provide the government with substantial security bonds that may be lost if permit conditions are contravened.<sup>137</sup> This has led to employers’ constant monitoring of MDWs’ daily activities and choices, with some employers checking the phone of their MDWs, hiring private investigators to follow MDWs on their days off, and organizing surprise visits at home.<sup>138</sup> It is accepted practice for employers to install surveillance cameras to monitor the work and movement of MDWs, even where the MDW sleeps.<sup>139</sup> Many employers impose unreasonable restrictions on MDWs’ phone usage, while some employers prohibit MDWs from speaking to others outside the home.<sup>140</sup> In the Malaysian case of *Public Prosecutor v. Soh Chew Tong & Chin Hui Ling*, where the MDW Mey Sichan was starved to death, the employment contract in that case specifically advised the employer not to allow the MDW to “mix with stranger.”<sup>141</sup> These conditions have enabled some unscrupulous employers to imprison MDWs in homes to prevent them from seeking help. In November 2020, Sulis Sutyowati’s employer was sentenced to over ten months imprisonment in Singapore for repeatedly abusing Sutyowati and locking her in the flat. Sutyowati escaped by bravely climbing over the balcony and down fifteen floors in the early hours of the morning.<sup>142</sup> All these restrictions on MDWs’ time, movement, and communications limit their ability to form social support networks and seek help in destination countries.<sup>143</sup>

136. *Id.*

137. *Security Bond Requirements for Foreign Domestic Worker*, MINISTRY MANPOWER SING., <https://www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-domestic-worker/eligibility-and-requirements/security-bond> (last visited July 20, 2021). Malaysia’s bond requirements vary according to the nationality of the MDW. See *Foreign Domestic Helper (FDH)*, IMMIGR. DEP’T MALAY., <https://www.imi.gov.my/portal2017/index.php/en/foreign-domestic-helper-fdh.html> (last visited Jan. 2, 2021).

138. Constable, *supra* note 58, at 3497.

139. 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1, at 40.

140. In the maid abuse case of *Public Prosecutor v. Chan Huey Fern*, No. 180/2013/01, [2013] SGDC 346 (D.C. Oct. 14, 2013) (Sing.), the victim was prohibited from speaking to another MDW in the same employ.

141. *Public Prosecutor v. Soh Chew Tong & Chin Hui Ling*, [2013] 1 Legal Network Series 1189, at 11 (H.C.) (Malay.).

142. Shaffiq Alkhatib, *Over 10 Months’ Jail for Woman Whose Maid Climbed Down 15 Storeys to Escape Abuse*, STRAITS TIMES (Nov. 18, 2020), <https://www.straitstimes.com/singapore/courts-crime/over-10-months-jail-for-woman-whose-maid-climbed-down-15-storeys-to-escape>.

143. In another 2016 case, the employers of Jonna Memeje Muegue repeatedly assaulted her and prevented her from seeking help by locking her in their condominium. Muegue escaped by climbing out of the sixth-floor window, but broke her legs in the process. Elena

The isolation and surveillance experienced by MDWs in the homes of their employers undermines their ability to seek help. For example, in *Tay Wee Kiat and another v. Public Prosecutor and another appeal*, where the accused had physically abused their MDW over two years, the Singapore High Court highlighted “the vulnerable status of domestic maids,” given that MDWs are “in an inherently unequal position of subordination in relation to their employers,” and that abuse “will usually take place in the privacy of the employer’s home and without the presence of any independent witnesses.”<sup>144</sup> Indeed, MDW abuse may only come to light due to the intervention of good Samaritans. In the Singapore case of *ADF v. Public Prosecutor*, a police report was made by a neighbor,<sup>145</sup> while in the case of *Janardana Jayasankarr v. Public Prosecutor*, the abuse was reported by a “concerned stranger” who had noticed the many injuries inflicted on Miezal Cagas Limbaga by her employer when Limbaga dropped off the children under her care at school.<sup>146</sup> Many other cases go unreported. Indeed, the Singapore High Court has recognized that neighbors who are best-placed to intervene may be reluctant to do so, as they could think it is none of their business or that the employer was merely “teaching the maid a lesson.”<sup>147</sup> In the Hong Kong case of *HKSAR v. Law Wan Tung*, the abused and starved MDW Erwiana Sulistyaningsih knocked on a neighbor’s door to beg for food, but was turned away by the neighbor who thought it was a “prank.”<sup>148</sup>

Due to their isolated circumstances, MDWs may also be unfamiliar with avenues of help and the receiving country’s legal system. Justice Rajah, in *ADF v. Public Prosecutor*, noted that many MDWs are “not well educated” and cannot communicate in English or “effectively” with the wider public.<sup>149</sup> Further, “[l]ess educated” MDWs may not be aware they can seek help from the authorities.<sup>150</sup> Employers may exploit such inequalities and take advantage of MDWs’ unfamiliarity with the host country to prevent MDWs from complaining about their employment conditions. In the *ADF* case, Justice Rajah found that the employer had “made use of his status as a police officer” to prevent the victim from complaining.<sup>151</sup> When a worried

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Chong, *Boss Jailed for Maid Abuse*, STRAITS TIMES (May 6, 2016), <https://www.straitstimes.com/singapore/boss-jailed-for-maid-abuse>.

144. *Tay Wee Kiat and another v. Public Prosecutor and another appeal*, 4 Sing. L. Repts. 1315, ¶ 68 (H.C. Nov. 23, 2017, March 2, 2018) (Sing.).

145. *ADF v. Public Prosecutor*, 1 Sing. L. Repts. 874 (C.A. July 8, 2009) (Sing.).

146. *Janardana Jayasankarr v. Public Prosecutor*, 4 Sing. L. Repts. 1288, ¶ 9 (H.C. Aug 4, 2016) (Sing.); see also K.C. Vijayan & Audrey Tan, *Maid Abusers in “Simple Hurt” Cases May Face Longer Jail Terms*, STRAITS TIMES (Aug. 18, 2016), <https://www.straitstimes.com/singapore/courts-crime/maid-abusers-in-simple-hurt-cases-may-face-longer-jail-terms>.

147. *Soh Meiyun v. Public Prosecutor*, [2014] 3 Sing. L. Repts. 299, ¶ 44 (Sing.).

148. *Law Wan Tung (Reasons for Verdict)*, H.K.D.C. 102, ¶ 35.

149. *ADF*, 1 Sing. L. Repts. ¶ 61.

150. *Id.*

151. *Id.* ¶ 103.

neighbor had first tried to persuade the victim to make a report, the latter had declined to do so explaining that her employer worked for the police and “would put her in jail” if she complained about his abusive behavior.<sup>152</sup> This was similarly the case in *HKSAR v. Law Wan Tung*, where the accused was charged with numerous charges including assault and criminal intimidation of her MDWs. In this case, the convicted employer convinced Erwiana Sulistyaningsih that her husband was rich, had important connections in Indonesia, and could arrange to have Erwiana’s family in Indonesia killed if she complained to anyone about the abuse she experienced.<sup>153</sup> The court noted that while this threat may seem “farfetched” to many, it understandably appeared “genuine” to Erwiana given her circumstances.<sup>154</sup> MDWs are not responsible for their own unequal life circumstances, which in fact highlight the need for systemic intervention and the limitations of a case-by-case approach. While the judicial decisions discussed here drew attention to the MDWs’ isolation and unequal life circumstances, they did not discuss how the live-in requirement and legal vagueness around employer responsibilities exacerbates MDW vulnerability and puts them at risk of abuse.

### C. *The Impecunious MDW: Financial Exploitation and Depressed Wages*

Judges in Hong Kong, Singapore, and Malaysia have recognized that the difficult financial circumstances of MDWs enhance their dependence on employers, though there has been little discussion about the root causes of such financial precariousness. Thus, abused MDWs are placed in a dilemma. If MDWs report the abuse and their employers are then investigated and prosecuted, the MDWs will also lose their source of income. Due to their depressed wages and indebtedness, MDWs do not have the savings or financial stability to deal with the consequences of MDW abuse or to hold them through periods of unemployment. In Singapore, the judiciary has repeatedly described MDWs as “impecunious” when deciding, as authorized to do so under the Singapore Criminal Procedure Code, on whether the convicted accused should pay victim compensation to abused MDWs.<sup>155</sup> This line of judicial reasoning recognizes that it is particularly difficult for MDWs to deal with the financial fallout of abuse and that compensation from the accused can play a role in ameliorating such hardship. In *Public Prosecutor v. AOB*, the Singapore High Court noted that compensation orders are “particularly suitable and appropriate” for “victims who may have

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152. *Id.* ¶102.

153. *Law Wan Tung (Reasons for Verdict)*, H.K.D.C. 102, ¶62.

154. *Id.* ¶109.

155. Criminal Procedure Code 2012, c. 68, § 359 (Sing.) states that the court “shall [...] consider whether or not to make an order for the payment” against a convicted person “by way of compensation to the person injured.” This provision was amended in 2010 to make it mandatory for courts to consider whether compensation is “appropriate” and to make a compensation order if so. *Id.*

no financial means or have other difficulties in commencing civil proceedings for damages against the offender.”<sup>156</sup> However, as demonstrated by the Singapore case of *Tay Wee Kiat (Compensation Order)*, a victimized MDW may not always receive the compensation ordered by the court, as offenders may refuse to pay and choose to serve default imprisonment instead, while the court may decide not to exercise its enforcement powers against the convicted.<sup>157</sup>

Awarding victim compensation in the context of criminal law to abused MDWs in Singapore is particularly important because MDWs seldom have the financial resources to meet the legal costs associated with pursuing civil compensation claims against their employers. Due to their depressed wages, the bringing of civil proceedings by MDWs against their former employers is highly challenging unless MDWs have access to legal aid. Under Singapore’s Legal Aid and Advice Act, MDWs do not have access to legal aid for civil proceedings because of their non-citizen and non-resident status.<sup>158</sup> That said, NGOs and the Singapore Law Society have helped MDWs accused of crimes obtain the services of pro bono legal counsel.<sup>159</sup> MDWs in Singapore who are victims of crimes and unable to claim compensation from offenders may also apply for compensation from the Victim Assistance Scheme run by Singapore’s Community Justice Centre, but the maximum amount claimable under this scheme is capped at \$1,000 Singapore dollars.<sup>160</sup> This amount is usually insufficient to reflect the loss experienced by abused MDWs. For example, the accused in *Tay Wee Kiat (Compensation Order)* were ordered by the Singapore High Court to pay the injured MDW \$5,900 and \$1,900 Singapore dollars, respectively, for physical injuries, resulting pain and suffering, and loss of employment caused to their former MDW.<sup>161</sup>

Unlike in Singapore, in Hong Kong and Malaysia MDWs have access to government-funded legal aid, which enables MDWs to bring civil pro-

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156. Public Prosecutor v. AOB, 2 Sing. L. Repts. 793, ¶23 (H.C. Dec. 31, 2010) (Sing.).

157. *Tay Wee Kiat and another v. Public Prosecutor and another appeal (Compensation Order)*, 5 Sing. L. Repts. 438 (H.C. May 8, 2018) (Sing.). For a critique of this case and the court’s approach, see Benjamin Joshua Ong, *Compensation for Abused Foreign Domestic Workers: A Problem of Enforcement*, 1 SING. ACAD. L.J. 1 (2020).

158. Legal Aid and Advice Act 2014, c. 160, pt. II, § 5(1) (Sing.).

159. For example, in Singapore, local organization HOME has been assisting accused migrant workers obtain pro bono legal representation. It did so in the recent high-profile Parti Liyani case discussed *infra* Section IV.A; see also Cara Wong, *Improve Access to Justice for Those of Lesser Means After Ex-maid Parti Liyani’s Case: Experts*, STRAITS TIMES (Sept. 21, 2020), <https://www.straitstimes.com/singapore/improve-access-to-justice-for-those-of-lesser-means-experts>.

160. Benjamin Joshua Ong, *supra* note 157, at 39.

161. *Tay Wee Kiat (Compensation Order)*, 5 Sing. L. Repts. 438, ¶22.

ceedings against their employers.<sup>162</sup> Some MDWs in these jurisdictions have been successful in civil claims against their former employers. Such civil proceedings are not necessarily dependent on criminal convictions, though the state may choose to also pursue criminal prosecutions against the accused.<sup>163</sup> These proceedings differ from the victim compensation scheme under the Singapore Criminal Procedure Code (described above), which requires the conviction of the accused before a court can decide on victim compensation. For example, in *Tutik Lestari Ningsih v. Law Wan Tung*, the Hong Kong court awarded the MDW damages for false imprisonment, *inter alia*, even though this was not a charge in the earlier criminal case against Lestari's employer.<sup>164</sup> In *Shalini Shanmugam v. Marni Anyim*, the Malaysian court affirmed the lower court's decision and award of compensation without relying on the earlier criminal conviction of the accused on the basis that the claimant had proven her case on the balance of probabilities.<sup>165</sup> The significance of this case means that MDWs in Malaysia are able to successfully claim compensation via such civil proceedings regardless of the outcome of criminal proceedings, if any, against their employers.

More importantly, while most courts have recognized MDW's financial precariousness and the need to compensate abused MDWs for their suffering and loss of income, such compensation does not address the underlying root causes of MDW financial precariousness which include, *inter alia*, the failure of MDW destinations to regulate MDW wages effectively.<sup>166</sup> In Singapore, which does not have a national minimum wage, MDW wages depend on MDW nationality, educational background, and work experience.<sup>167</sup> The wages of MDWs in Singapore fall far below the average wages of local cleaners and caregivers.<sup>168</sup> Although Hong Kong implements a minimum

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162. Jennifer Whelan, Rohaida Nordin, Ma Kalthum Ishak, Nursyuhada Matwi, Siti Nurimani Zahari, Nicole Mekler & Amritha Thiyagarajan, *Abused and Alone: Legal Redress for Migrant Domestic Workers in Malaysia*, 1 *INDON. L. REV.* 1, 12–13 (2016).

163. See generally *Tutik Lestari Ningsih v. Law Wan Tung*, [2018] H.K.D.C. 734; *Shalini P Shanmugam v. Marni Anyim* [2007] 4 M.L.J. 80 (HC) (Malay.).

164. *Tutik Lestari Ningsih v. Law Wan Tung*, [2018] DCCJ 2197/2015, H.K.D.C. 734, ¶1 (D.C. June 25, 2018) (H.K.).

165. *Shalini P Shanmugam & Anor v. Marni bte Anyim* [2007] 4 MALAY. L.J. 80, 80.

166. Singapore does not stipulate a minimum wage in general for all workers. Joanne Poh, *Singapore's Minimum Wage vs Progressive Wage Model: What's the Debate About?*, *MONEYSMART* (Nov. 13, 2020), <https://blog.moneysmart.sg/career/singapore-minimum-wage-pwm/>.

167. In recent years, Singapore employers have favored hiring Indonesian MDWs who command lower salaries and are viewed as more "submissive and docile" when compared to Filipino MDWs. PAUL, *supra* note 18, at 103.

168. Some embassies in Singapore issue recommended wages, but these are not legally enforceable. The Philippine embassy recommends \$570 Singapore dollars (\$400 U.S. dollars) a month. The Indonesian embassy recommends \$550 Singapore dollars (\$411 U.S. dollars). The Sri Lankan embassy recommends \$500 Singapore dollars (\$374 U.S. dollars). 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1, at 30. In reality, a live-out babysitter commands upwards of an average rate of \$18 Singapore dollars per hour. For example, based

wage for MDWs, after taking into account working hours, this wage is still lower than that afforded to those in other professions.<sup>169</sup> In Malaysia, domestic workers are not covered under Malaysia's Minimum Wages Order 2012.<sup>170</sup> The Malaysian government has concluded a bilateral Memorandum of Understanding ("MOU") with the Philippines that requires a minimum salary for MDWs, but it is not certain whether this is enforced on the ground.<sup>171</sup> As highlighted by commentators, most of the bilateral MOUs concluded by the Malaysian government with MDW home countries are non-binding and do not mandate a decent minimum wage.<sup>172</sup> Further, MDWs are often required to pay substantial agency fees for job placements, which may come out of their salaries for the first few months.<sup>173</sup> In Singapore, while the Employment Agencies Rules limit "fees that a licensee may charge or receive from an applicant for employment" (for example, agency fees), employment agencies have identified and exploited loopholes, such as by including "personal loans" and "service fees" in the overall "placement fee."<sup>174</sup> Even in Hong Kong, where MDWs are entitled to a minimum wage, cases show that employers use deceptive practices to deprive MDWs of their rightful pay. For example, in *HKSAR v. Lam Leonor Chan*, the convicted employer had instructed her MDW to write out a receipt indicating

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on figures advertised by a popular babysitting agency in Singapore, local babysitters command an hourly wage of about \$18 Singapore dollars onwards. *Babysitter (At Client's House)*, A-TEAM AMAHS & CLEANERS, <http://www.a-team.com.sg/babysitter.html> (last visited Oct. 18, 2021). *Live in Caregiver*, SALARYEXPERT <https://www.salaryexpert.com/salary/job/live-in-caregiver/singapore> (last visited Oct. 18, 2021) (showing that the average monthly salary for a live in caregiver is about \$2361 Singapore dollars); *Cleaner*, SALARYEXPERT <http://www.salaryexplorer.com/salary-survey.php?loc=196&loctype=1&job=156&jobtype=3> (last visited Oct. 18, 2021) (showing that the cleaners in Singapore typically earn around \$2,340 Singapore dollars a month).

169. The Minimum Allowable Wage for MDWs in Hong Kong is \$4,630 Hong Kong dollars per month, *Minimum Allowable Wage and Food Allowance for Foreign Domestic Helpers*, HONG KONG GOV'T <https://www.info.gov.hk/gia/general/202109/30/P2021093000329.htm> (last visited Dec. 1, 2021). The Statutory Minimum Wage for other workers is \$37.5 Hong Kong dollars per hour, *Statutory Minimum Wage*, HONG KONG GOV'T LAB. DEP'T., <https://www.labour.gov.hk/eng/news/mwo.htm> (last visited Dec. 1, 2021).

170. Minimum Wages Order 2020, P.U.(A) 5, Fed. Gov't Gazette (Malay.).

171. PAUL, *supra* note 18, at 107.

172. In her study of Malaysia's use of MOUs, Elias observes that though these MOUs are "frequently presented as mechanisms that serve to protect the rights and interests of domestic workers, this is often not the case and the agreements focus mainly on the technicalities and costs of the recruitment process." Juanita Elias, *Governing Domestic Worker Migration in Southeast Asia: Public-Private Partnerships, Regulatory Grey Zones and the Household*, *supra* note 23, at 285.; *see also* Malahayati Malahayati, *Legal Protection on Indonesian Domestic Workers in Malaysia: From Actors' View*, 43 J.L. POL'Y & GLOBIZATION 78 (2015).

173. PAUL, *supra* note 18, at 101, 106–07.

174. Employment Agencies Rules 2011, c. 92, § 12 (Sing.). MOM does not consider such "personal loans" and "service fees" as fees limited under the Employment Agencies Rules. Most foreign domestic workers pay fees of around \$1200–4000 Singapore dollars. 2019 HOME & LIBERTY SHARED REPORT, *supra* note 1, at 30.



she had received her full wages, even though a substantial amount was deducted for agency fees.<sup>175</sup> In addition, employers often adopt wage payment practices that exacerbate MDWs' financial insecurity and dependence on their employers. For example, in *ADF v. Public Prosecutor*, the Singapore Court of Appeal highlighted a wage payment arrangement by which the MDW would only be paid when she returned home.<sup>176</sup> This meant the victim was "wholly dependent" on the accused and his wife for her daily needs, including meals, while she worked for them.<sup>177</sup> As illustrated through these cases, the financial precariousness of MDWs is not a pre-existing fact. Apart from recognizing the financial impecuniousness of MDWs, courts should highlight and critique laws, policies, and wage arrangement practices that lead to and maintain MDW depressed wages and indebtedness.

#### IV. BEYOND MDW VULNERABILITIES: INTERROGATING ROOT CAUSES AND SOME TRANSFORMATIVE JUDICIAL EXAMPLES

The case law discussed above demonstrates a tendency among courts, like most state actors, to focus on MDWs' vulnerabilities without discussing their root causes. This judicial proclivity falls short of the obligation state actors have under CEDAW to contribute to the transformation of the root causes of gender-related injustice and inequality.<sup>178</sup> Apart from elaborating on MDWs' isolation, dependence, and impecuniousness, courts can and should go further to identify and contest the root causes of MDW vulnerabilities. In setting out the facts of the case, courts should contextualize individual instances of MDW abuse against the broader factors enabling such abuse, and in doing so, challenge the predominant "errant employer" explanation for MDW abuses. Courts should also identify the responsible state actors and contest prejudices and stereotypes in their judicial decisions. Feminist scholars of adjudication have underscored the ability of judicial decisions to disrupt and challenge abusive patterns and their root causes by putting forward alternative understandings of injustice.<sup>179</sup> By exercising their expressive or statement-making powers in this manner, criminal law courts can spotlight systemic issues and catalyze further action by other public actors even when these courts are unable to directly require structural change. This section analyzes criminal cases involving MDWs where courts not only assessed individual culpability and punishment, but also identified broader discriminatory patterns, named state actors responsible, and countered prejudices and stereotypes. These cases demonstrate that domestic criminal law courts can function as transformative agents for marginalized

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175. HKSAR v. Lam Leonor Chan, HCMA125/2009, ¶ 3 (C.F.I. Aug 18, 2009) (H.K.).

176. *ADF v. Public Prosecutor*, 1 SING. L. REPS. 874, ¶ 6 (C.A. July 8, 2009) (Sing.).

177. *Id.* ¶ 7.

178. See discussion *supra* Section II.A on CEDAW's transformative obligations, which include articles 2(f) and 5.

179. Hunter, *supra* note 73, at 265–66.

groups and that more should be done to develop and strengthen such positive judicial obligations under CEDAW.

A. *Contextualizing the Individual Case: Root Causes Enabling the Offense*

Criminal law courts can reframe understandings of MDW abuse by contextualizing an individual case against the broader structural factors enabling such abuse. Indeed, a criminal law court's appreciation of this broader context may be crucial for its understanding of human behavior, human motives, and assessment of criminal responsibility. For example, in September 2020, the Singapore High Court issued its explosive decision acquitting MDW Parti Liyani, who had been accused of theft by her wealthy employers.<sup>180</sup> Parti argued that these accusations by her employer were false and retaliatory. Her employer's wife had asked Parti to clean the office and home of her employer's adult son, which amounted to illegal deployment. In its decision, the Singapore High Court observed that Parti had eventually refused to carry out the additional cleaning work and had "expressed unhappiness" over being asked to do so.<sup>181</sup> Importantly, the High Court noted that Parti must have faced a "dilemma" when she was instructed to undertake such additional cleaning.<sup>182</sup> The High Court recognized that she could have made a complaint to the Singapore authorities, but this would have led to her losing her job, presumably because her employer would have summarily terminated her.<sup>183</sup> Despite this "dilemma," Parti had "given hints" to her employer that she should not be asked to do such additional work.<sup>184</sup> The High Court thus acknowledged the structural conditions shaping Parti's response to her employers' illegal instructions. However, the Court did not go on to recognize that the structural conditions were the result of the tied work visa system implemented in Singapore, which gives employers the power to unilaterally cancel the work visas of MDWs.<sup>185</sup> If the Court had deepened its analysis to consider the tied work visa system, it could have demonstrated how this visa policy could give rise to concrete cases of abuse, as in Parti Liyani's case.

When assessing the veracity of witness testimony in the Parti Liyani case, the Singapore High Court also considered common practices of employer retaliation against MDWs, specifically the making of unsubstantiated

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180. Parti Liyani v. Public Prosecutor, No. 9068, SGHC 187, ¶¶ 4–5 (H.C. Sept. 4, 2020) (Sing.). Note that in this case, the accused was the MDW who was accused of theft. Though it was not a case of MDW abuse, the Singapore High Court took into account structural factors and the reality of MDW lives, resulting in an acquittal.

181. *Id.* ¶47.

182. *Id.*

183. *Id.* ¶¶40–43.

184. *Id.* ¶47.

185. *See* Employment of Foreign Manpower Act 2009, c. 91A, § 4(7) (Sing.).

allegations by employers via police reports and other official feedback mechanisms. The closing submissions of the defense, which were reproduced by the High Court in its decision, explained that Parti's employers had likely filed the initial police report against her as a "pre-emptive move."<sup>186</sup> Her employers used their police report as "a defensive manoeuvre" which would "ensure that Parti would have difficulties returning and finding employment in Singapore."<sup>187</sup> The possible rationale behind the defensive maneuver was that if Parti was unable to obtain employment, she would not be able to return to Singapore to lodge a complaint about her employers with the authorities.<sup>188</sup> The defense explained that such unsubstantiated accusations against MDWs are "a known defensive measure used by employers."<sup>189</sup> The High Court decided that there was "reason to believe" that Parti's employers were aware of her "unhappiness" over her working conditions and that they "took the pre-emptive first step to terminate her employment suddenly."<sup>190</sup> This was done "in the hope that Parti would not use the time to make a complaint to MOM."<sup>191</sup> The High Court found that, but for Parti's "express threat," her employers may not have made the police report.<sup>192</sup> Based on its review of the totality of evidence, the High Court held that the prosecution had failed to show beyond a reasonable doubt that there was no improper motive on the part of Parti's employer in making the police report against her.<sup>193</sup> The Court's situating of this individual case against broader abusive practices facilitated its arrival at findings that significantly differed from that of the lower court, which had found Parti guilty of theft on the basis of her employer's account of facts without considering broader contextual factors that would have cast doubt on this account.<sup>194</sup>

Having courts name and critique systemic factors underlying an individual case of MDW abuse complicates the "errant employer" rationale put forward by governments. In *HKSAR v. Chan Kwok Keung*, the MDW was sexually abused by her employer who was sentenced to three years and three months of imprisonment.<sup>195</sup> Apart from confirming the employer's conviction by the lower court, the Hong Kong Court of Appeal stated that it

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186. *Parti Liyani*, SGHC 187, ¶43.

187. *Id.*

188. The defence highlighted that such a MOM complaint regarding the Liew family's exploitative treatment of their MDW would have been "scandalous and extremely embarrassing for Mr Liew and his family" given his prominent position in Singapore's business community. *Id.*

189. *Id.*

190. *Id.* ¶48.

191. *Id.*

192. *Id.*

193. *Id.* ¶52.

194. *Id.* ¶ 25.

195. *Hong Kong v. Chan Kwok Keung*, CACC 383/2006 ¶¶ 1-4 (C.A. Aug. 17, 2007) (H.K.).

felt “compelled to draw attention” to the fact that the complainant had been required to pay \$3,000 Hong Kong dollars out of \$3,250 Hong Kong dollars of her monthly salary to the Indonesian agency that had secured her the job.<sup>196</sup> The Court drew attention to the fact that, based on “anecdotal evidence,” such burdensome agency fee arrangements were “common” practice.<sup>197</sup> It went on to recognize that though this was a “criminal matter” and that it was not for the court “to promote particular causes of any kind,” its discussion of broader injustices had “validity in relation to the offences committed.”<sup>198</sup> Specifically, the Court explained that the indebtedness of MDWs may encourage MDW employers “tempted to offend” and who “may offend more readily” because “it is known that the likelihood of complaint is lessened materially by the consequences to the employee.”<sup>199</sup> In other words, the court recognized that prevailing agency fee deduction practices enabled employers to abuse their MDWs, as the employers knew that their MDWs would not complain about their abuse to avoid losing their jobs.<sup>200</sup> The court situated the case against broader unjust practices of indebtedness and explained why this practice facilitated individual cases of MDW abuse by unscrupulous employers. Such judicial decisions highlight that the offense is not an isolated occurrence and that there is a need for legal and policy changes to address their root causes and prevent other offenses.

### B. Judicial Signaling and the Targeting of Responsible State Actors

Apart from naming and critiquing the root causes enabling individual offenses, some judges have called for action on the part of state actors. When giving the reasons for sentencing in *HKSAR v. Law Wan Tung*, the Hong Kong District Court identified and critiqued several factors enabling the repeated cases of MDW abuse.<sup>201</sup> The employer faced charges of physically abusing three MDWs, among other charges, and was convicted of charges relating to two MDWs, including Erwiana Sulistyaningsih, whose horrific injuries attracted much domestic and international media attention.<sup>202</sup> In her sentencing decision, Justice Woodcock described the offender’s treatment of her MDWs as “contemptible.”<sup>203</sup> She did not stop there, but

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196. *HKSAR v. Chan Kwok Keung*, H.K.C.A. 367, ¶ 31 (C.A. July 5, 2007) (H.K.).

197. *Id.*

198. *Id.*

199. *Id.* ¶ 32.

200. *Id.*

201. *HKSAR v. Law Wan Tung* (Reasons for Sentence), [2015] DCCC 421/2014 & 651/2014, H.K.D.C. 209, ¶ 3, (D.C. Feb. 27, 2015), (H.K.).

202. Associated Press in Hong Kong, *Employer in Hong Kong Maid Abuse Case is Sentenced to Six Years’ Jail*, THE GUARDIAN, Feb. 27, 2015, <https://www.theguardian.com/world/2015/feb/27/hong-kong-court-sentences-woman-to-6-years-in-prison-for-abusing-indonesian-maid-0>.

203. *Law Wan Tung* (Reasons for Sentence), H.K.D.C. 209, ¶ 3., ¶ 13.

went on to highlight that this case was not isolated or exceptional. The court noted that it was “regrettable” that “such conduct, attitude, physical and mental abuse” was “not rare” and in fact “often dealt with in the criminal courts.”<sup>204</sup> Critically, the court identified the live-in requirement as one of the root causes of MDW abuse, noting that “such conduct could be prevented if domestic helpers were not forced to live in their employer’s homes” and that “this rigidity fuels such cases where domestic helpers are unfortunate enough to be employed by a bully.”<sup>205</sup> Indeed, the court noted that giving MDWs a choice regarding living arrangements “may lead to a decline” in MDW abuse.<sup>206</sup> The judicial review application against this live-in requirement has been recently dismissed by the Hong Kong Court of Appeal.<sup>207</sup>

The *HKSAR v. Law Wan Tung* court also observed that the facts of this case showed that many MDWs are charged significant fees by agencies in their home countries.<sup>208</sup> To pay back these fees, MDWs have their wages deducted for several months. The court noted the “organised and sophisticated” manner by which the MDW’s debt in that case was “transferred” to a finance company in Hong Kong to facilitate the debt’s collection and repayment.<sup>209</sup> Importantly, the court stated that this illegal arrangement required, “[w]ithout a doubt,” the cooperation and complicity of Hong Kong agencies and MDW employers.<sup>210</sup> While the court found that Sulistyaningsih “knew” that this agency fee would be deducted from her wages and that her employer would pay it for her, she in reality “did not decide upon or agree to this arrangement.”<sup>211</sup> It “was decided for her,” and “she had no say in it.”<sup>212</sup> In this holding, the court recognized the power disparities between MDWs, on the one hand, and employment agencies and employers on the other. Just because Sulistyaningsih knew about these contractual terms does not mean that there was true consent or that she had exercised her agency in deciding to agree to them. The court noted that such wage deduction practices result in MDWs being “trapped” and unable to leave their employers, as their agencies could be unwilling to help them if they had unpaid debts.<sup>213</sup> Crucially, the court emphasized the need for the authorities in Hong Kong and Indonesia to “address this practice and investigate it vigorously.”<sup>214</sup>

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204. *Id.* ¶ 15.

205. *Id.*

206. *Id.*

207. *Lubiano Nancy Almorin v. Director of Immigration*, H.K.C.A. 782, ¶1 (C.A. Sept. 21, 2020) (H.K.).

208. *Law Wan Tung (Reasons for Sentence)*, H.K.D.C. 209, ¶ 16.

209. *Id.*

210. *Id.* ¶ 17.

211. *Id.*

212. *Id.*

213. *Id.* ¶ 18.

214. *Id.*

The expressive power of courts is even more important when their decisions are limited by unjust statutes. Courts may find themselves bound by clear limitations in the law, which are nevertheless exploited by MDW employers. For example, the Malaysian High Court in Sabah and Sarawak at Kuching, in the case of *Public Prosecutor v. Low Ah Chai*, dealt with complaints from two abused Indonesian and Cambodian female domestic workers, Cinta and Mok Chan Sour, who alleged, among other things, that the accused had not paid them or given them any days of rest.<sup>215</sup> The accused was charged with trafficking under Malaysia's Anti-Trafficking in Persons and Anti-Smuggling Migrants Act of 2007, an offense which includes "forced labour or services."<sup>216</sup> The High Court confirmed the lower court's acquittal of the accused, as there was no evidence of coercion or force, and because it seemed the women were "doing work out of their own free will" even though they were not paid.<sup>217</sup> The Court noted that a different piece of legislation governed non-payment of salary, specifically, section 109(1) of the Labour Ordinance.<sup>218</sup> In other words, the Court found that it would have been more appropriate for the MDWs to bring an action under the Labour Ordinance rather than the law on trafficking. However, the Court also took the opportunity to point out gaps in legal protection. For example, it noted that the Labour Ordinance's provision regarding rest days did not apply to domestic workers. The Court observed that it was "regrettable" that domestic workers were "marginalised by the law" in this manner and that these workers "deserve a day of rest."<sup>219</sup> The judge called on the "legislature" to "address this clear and blatant injustice to domestic servants rather than leaving them at the mercy of unscrupulous employers who are wont to take advantage of this intentional omission in the law."<sup>220</sup> Such judicial decisions can set the stage for law and policy improvements by identifying legal or enforcement problems beyond the individual case and the state actor responsible for further action.

Activists can also use these judicial statements to argue for change. For example, in response to the Singapore High Court's Parti Liyani decision, which highlighted the common practice of illegally deploying MDWs among employers, the Singapore government commenced a review of its punishment scheme for the illegal deployment of MDWs.<sup>221</sup> Although nec-

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215. *Public Prosecutor v Low Ah Chai* [2015] 1 Legal Network Series 196 (H.C. Sabah & Sarawak) (Malay.).

216. Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, pt. I, § 2 (Act No. 670) (Malay.).

217. *Low Ah Chai*, 1 Legal Network Series, at 5.

218. See Sarawak Labour Ordinance, 1952, (Act. No. A1237) c. 76, § 109(1) (Malay.).

219. *Low Ah Chai*, 1 Legal Network Series, at 5.

220. *Id.* at 5–6.

221. See Wong Pei Ting, *Illegal Deployment of Maids: MOM Reviewing Whether Employers Let off with Warning Should Be Fined in Future*, TODAY (Oct. 15, 2021),

essary legal and policy change may not be implemented immediately, the expressive authority of judicial statements can play an important role in facilitating such change.

C. *Contesting Prejudice and Recognizing the Humanity, Rights, and Labor of MDWs*

As explained below, some courts have challenged mainstream prejudices and stereotypes of MDWs by not only condemning the abuse of MDWs but also stressing the need to respect their dignity and rights. This is required by CEDAW's stereotype-related obligations.<sup>222</sup> This is particularly important given widely held and deeply ingrained prejudices against MDWs in MDW destination countries, some of which are reinforced in law and policy. Reflecting popular biases of MDWs as immoral and potential "husband snatchers," Singapore's work visa conditions prohibit MDWs from being involved in "any illegal, immoral or undesirable activities, including breaking up families in Singapore."<sup>223</sup> All MDWs in Singapore and Malaysia are prohibited from getting pregnant while working in these destinations, and though MDWs in Hong Kong are entitled to maternity leave, employment agencies often require MDWs to sign contracts promising not to get pregnant.<sup>224</sup>

Such otherization of MDWs as "lesser" beings underlies some employers' dehumanizing treatment of MDWs, as recognized by judges who have condemned the derogatory attitudes held by employers toward MDWs. In its sentencing decision in the case of *HKSAR v. Law Wan Tung*, the Hong Kong District Court astutely observed that the offender's contemptible abuse of her MDWs stemmed from her lack of "compassion" and her belief that they were "people she considered beneath her."<sup>225</sup> In this case, in addition to physical abuse, the Indonesian MDW Erwiana Sulistyarningsih was only permitted to use the bathroom twice a day, was required to clean the bathroom after using it, and was to "urinate in a bucket or a plastic bag" if she needed to urinate again.<sup>226</sup> Judges in other MDW abuse cases have criticized the fact that employers treat MDWs as "a chattel devoid of human emotion"<sup>227</sup> and have called out employer perceptions of their "abased social

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<https://www.todayonline.com/singapore/illegal-deployment-maids-mom-reviewing-whether-cases-let-warning-should-be-subject-fines> (last visited July 20, 2021).

222. See Convention of the Elimination of All Forms of Discrimination Against Women art. 5(A), Dec. 18, 1979, 1249 U.N.T.S. 13.

223. Employment of Foreign Manpower (Work Passes) Regulations 2012, ch. 91A, § 8 (Act No. S 569) (Sing.). Constable notes that Singapore's approach is "reinforced by Confucian familial and paternalistic notions of hierarchy." Constable, *supra* note 58, at 3493.

224. Nicole Constable, *Migrant Workers, Legal Tactics, and Fragile Family Formation in Hong Kong*, 3 OÑATI SOCIO-LEG. SER. 1004, 1011 (2013).

225. *Law Wan Tung (Reasons for Sentence)*, H.K.D.C. 209, ¶ 13.

226. *Law Wan Tung (Reasons for Verdict)*, H.K.D.C. 102, ¶ 12.

227. *ADF v. Public Prosecutor*, 1 SING. L. REPS. 874, ¶159 (C.A. July 8, 2009) (Sing.).

status.”<sup>228</sup> These judicial statements seek to counter the dehumanizing manner by which MDWs are viewed and treated by employers.

In all three jurisdictions, courts have stressed the humanity and equality of MDWs. In *Soh Meiyun v. Public Prosecutor*, the Singapore High Court emphasized that MDWs are “human beings with aspirations, interests, intellect and more.”<sup>229</sup> In *Fong Kong Meng v. Public Prosecutor*, the Malaysian High Court condemned “the cruel treatment by one human being to another.”<sup>230</sup> In *Farida Begam v. Public Prosecutor*, the Singapore High Court underscored that MDWs should not be treated as “any less of a human being” or “any less protected by the law.”<sup>231</sup>

Nevertheless, judicial decisions, especially in Singapore and Malaysia, could do more to represent MDWs as rights-bearing workers. Judges in these jurisdictions have called for MDWs to be treated with “fairness,” “respect,” and “dignity.”<sup>232</sup> These judicial decisions can go further to protect and empower MDWs by explaining that such fair, respectful, and dignified treatment is owed to MDWs as a matter of right rather than charity or morality. Recognizing MDWs as rights-bearing agents is particularly salient given the severe power imbalance between MDWs and their employers. Further, some judges have employed utilitarian arguments in their decisions. For example, while the Singapore High Court in *Farida Begam v. Public Prosecutor* noted that her social status as an MDW did not make Khusniati Habib “any less of a human being,” it went on to warn MDW employers in Singapore not to take “affordable” foreign domestic work “for granted” as “the luxury of having foreign help depends greatly on good relations with neighboring states.”<sup>233</sup>

This judicial reasoning echoes explanations given by Singapore ministerial holders in support of the need to prevent MDW abuse. When the Penal Code was amended in 1998 to increase sentences for certain offences committed against MDWs,<sup>234</sup> the then Singapore Minister for Home Affairs Wong Kan Seng explained that MDW abuse “runs counter to Singapore’s aspirations to become a gracious and civil society” and that such abuse can “damage [Singapore’s] international reputation and bilateral relations”<sup>235</sup> To avoid the impression that the humane treatment of MDWs is dependent on the economic or social interests of the host country, such utilitarian reasons

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228. *Farida Begam d/o Mohd Artham v Public Prosecutor*, 4 Sing. L. Repts. 610, ¶ 27 (H.C. Nov. 8, 2001) (Sing.).

229. *Soh Meiyun v. Public Prosecutor*, 3 Sing. L. Repts. 299, ¶ 44 (H.C. Apr. 29, 2014) (Sing.).

230. *Fong Kong Meng v. Public Prosecutor* [2019] 12 MALAY. L.J. 110, 124.

231. *Farida Begam*, 4 Sing. L. Repts. ¶ 27.

232. *ADF*, 1 Sing. L. Repts. ¶ 159. *See Fong Kong Meng*, 12 Malay. L.J. 110, 124

233. *Farida Begam*, 4 Sing. L. Repts. ¶¶ 27–28.

234. *See Penal Code 2008*, c. 224, §304(B) (Sing.).

235. Sing. Parliamentary Debates, *supra* note 91, col. 1925 (statement by Wong Kan Seng, Minister for Home Affs.) (Sing.).



against MDW ill-treatment should at least be represented as secondary to the need to respect MDWs' rights. The rights of MDWs should be respected regardless of the social and economic benefits that doing so brings to the host country.

In addition to depicting MDWs as rights-bearing individuals, courts should also affirm the important economic and social contributions of paid domestic work by referring to them as "workers" rather than as "maids" or "helpers." Judges in these MDW destinations consistently refer to MDWs as maids or domestic helpers in their decisions.<sup>236</sup> The terms maids and helpers reinforce existing social perceptions of domestic work as less valuable and unskilled. Such cultural devaluation of paid domestic work also partially explains the depressed wages of MDWs and justifies the idea that such workers are dispensable. These social prejudices in fact sustain and legitimize laws and policies ensuring the temporariness and financial precariousness of MDWs in MDW destination countries. Migrant worker activists have criticized the "perennial" use of the word "helpers" in official discourse and documents.<sup>237</sup> Some underscore the fact that MDWs themselves prefer to be referred to as "domestic worker[s]" rather than "domestic helper[s]."<sup>238</sup> Similarly, it is noteworthy that the ILO uses the term "domestic worker" to refer to this group of employees in all the organization's official documents.<sup>239</sup> State actors, including courts, should refer to MDWs as "domestic workers" rather than "maids" and "helpers" in recognition of their significant economic and social contributions as employees.

## V. CONCLUSION

Most MDW destination countries, including those studied here, take a case-based approach to MDW abuse that attributes such abuse to errant employers while overlooking the laws, policies, and biases enabling such abuse – in effect, leaving the root causes of rights violations intact. CEDAW's transformative approach to rights requires state parties to do more. Specifically, states should not only remedy rights violations, but should also address their root causes to prevent future violations. While the recognition and discussion of MDWs' vulnerabilities are necessary, there is also a need to identify and change the laws, policies, and practices making MDWs vul-

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236. See, e.g., *Law Wan Tung (Reasons for Verdict)*, H.K.D.C. 102; *ADF*, 1 Sing. L. Reps. 874; *Public Prosecutor v. Soh Chew Tong & Chin Hui Ling*, [2013] 1 Legal Network Series 1189 (H.C.) (Malay.).

237. Linda Lumayag, *They are Domestic Workers – Not Maids or Helpers*, ALIRAN, (June 29, 2017), <https://aliran.com/thinking-allowed-online/2017-ta-online/domestic-workers-not-maids-helpers>.

238. JUST. CTR. HONG KONG, *supra* note 7, at 21. In a 2015 survey of eighty-five domestic workers, seventy-two percent expressed preference for "domestic worker" over "domestic helper."

239. See ILO, *Who Are Domestic Workers?*, *supra* note 6.

nerable and facilitating their abuse. CEDAW imposes such transformative obligations on state parties, and further research is required to detail the content of these obligations for specific state actors such as courts. As this article demonstrates, courts in Hong Kong, Singapore, and Malaysia have not hesitated to condemn MDW abuse and are increasingly recognizing MDW vulnerabilities in their judgments. Judges are drawing attention to the isolation, dependence, and financial impecuniousness of MDWs. Nevertheless, most judicial decisions continue to overlook or ignore the fact that these MDW vulnerabilities are created or exacerbated by existing laws, policies, and practices. Apart from ensuring individual accountability in cases of MDW abuse, courts should exercise their expressive powers in judicial discussions to highlight the root causes of MDW rights violations, signal the follow-up action necessary, and represent MDWs as rights-bearing agents.

While this article argues that courts can and should contribute to transformative change as required by CEDAW, it recognizes that contextual factors will shape the extent to which courts are able and willing to contest MDW-related laws and policies passed by the legislature and executive. Due to socio-political factors, such as a strong executive and restrained judicial culture, the level and nature of public law litigation in these MDW destinations is relatively subdued compared to other jurisdictions with more proactive and activist judiciaries. Nevertheless, courts have the capacity to contribute to transformative change in non-public law cases. While public law cases directly targeting unconstitutional or illegal laws and policies remain important, criminal law cases also provide courts with statement-making opportunities by which the root causes of rights violations may be identified and critiqued. Indeed, this article's findings about the transformative potential of courts and the importance of their expressive or statement-making powers applies not only to MDW-related cases, but to other types of cases as well. Courts can exercise their statement-making or expressive powers in ways that acknowledge and respect the separation of roles between the judiciary, government, and parliament. Their expressive judicial powers may pose less of a challenge to the separation of powers than their powers of judicial review. In jurisdictions without a strong tradition of public law adjudication or an activist judiciary, the development and exercise of such expressive judicial powers may be a less controversial way by which courts can contribute to longer-term rights promotion. Indeed, the positive case examples discussed in this article highlight the transformative potential of criminal law courts regarding MDW rights and protection.

Taking a transformative approach that targets the root causes of rights violations is particularly important for the protection of MDWs who experience multiple and intersecting forms of discrimination. While this article has focused on female MDWs because the vast majority of MDWs are female, there is no reason why the substantive arguments supporting a transformative approach to rights should not apply to male MDWs as well. As non-citizens and non-residents, MDWs often do not have a strong voice in the parliament or the government. The judiciary therefore can serve as an

important bulwark of justice for marginalized groups like MDWs by not only addressing individual cases of injustice, but also identifying the root causes of rights violations and the need for follow-up action. Nevertheless, there is no guarantee that these judicial statements will have the impact desired. For example, the Singapore High Court in the Parti Liyani case broke new ground by recognizing the exploitative practices of MDW employers. However, this aspect of the court's decision has been less discussed compared to the decision's discussion of police and prosecutorial lapses that affect the public and are not specific to MDWs.<sup>240</sup> As this case demonstrates, issues specific to marginalized groups like MDWs may not be effectively addressed even when flagged by courts in their judicial decisions. The state, employers, and households all reap substantial economic benefits and convenience from low-wage domestic work, while deep-rooted social prejudices and stereotypes make it easy to ignore the abusive practices toward MDWs and root causes of MDW vulnerabilities. A multi-pronged strategy involving diverse state actors as well as the broader public is required for lasting change. Courts must be part of this holistic approach of transforming MDW vulnerabilities and the long-term securing of MDW rights.

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240. Harpreet Singh Nehal, *Parti Liyani Case Raises Some Critical Questions That Review Must Address*, STRAITS TIMES, (Sept. 28, 2020) <https://www.straitstimes.com/opinion/parti-liyani-case-raises-some-critical-questions-that-review-must-address-0>.