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THE KAFALA SYSTEM:

DOES IT FULFILL INTERNATIONAL STANDARDS OF MIGRANT WORKERS.

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LIST OF ACRONYMS

MDW	Migrant Domestic Worker
GCC	Gulf Cooperation Council
ILC	International Labour Conference
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
PRA	Private Recruitment Agency
CLMC	Caritas Lebanon Migrant Center
CRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ESC	Economic, Social, and Cultural rights

GLOSSARY

Kafala System	A sponsorship system defining the relationship between the employer and the worker
Kafeel	The Sponsor, an individual or an agency/company, responsible for the worker
Makfoul	The Sponsored, the worker who is under the guardianship of the employer (the sponsor)
Tanazul	A notarized release waiver
The Committee	The Committee of Experts on the Application of Conventions and Recommendations

ANNEX I

English version of the Work Contract for Migrant Domestic Workers as per Unified Contract Decree No.19/1 dated 31/12/2009

CHAPTER 1: INTRODUCTION AND METHODOLOGY

1.1. Introduction

There are many factors that lead populations to migrate. One contemporary form of this phenomena is labour migration. In hopes to find a better life for them and their families, people leave their home country in pursuit of a decent career in a foreign state.

Foreign workers, documented or undocumented, with a regular or irregular status, are found to be vulnerable and subjected to exploitation and deprivation of their human rights. They are often found to be treated differently than nationals, marginalized and unprotected effectively by international law.

As vulnerable as they are, migrants enjoy fewer rights than nationals. Racism, discrimination, and exploitation are part of their daily lives. As labour markets extend, countries seek cheap labour hands which results in migrants taking the so-called "3-D jobs" (dangerous, dirty, and degrading)[1]. Domestic work fits this description.

The market of migrant domestic workers is hosted in many Arab countries. Their way into the labour market is paved by the *kafala* (sponsorship) system, a body of immigration rules and regulations that govern the relationship between the MDW and her employer. Lebanon is one of these countries that have adopted this policy, and one of the countries that host the largest number of MDWs. The 2022 world report issued by the Human rights watch highlighted the deterioration of the human rights situation in Lebanon. The report showed that more than 80% of those residing on Lebanese grounds do not enjoy nor have access to their basic rights and migrant workers are at increased risk of exploitation[2].

Over 250,000 MDWs live and work in Lebanon under the sponsorship system. Majority of them are women coming from Ethiopia, Sri Lanka, Nepal, the Philippines, and other African countries. 40% of employers do not pay the salary of the worker on time[3], 57.3% of MDWs don't have a day off[4], 13.9% of workers are locked indoors and deprived of their freedom, and 94.3% of employers confiscate the worker's identity papers[5]. These staggering numbers are the result of a lack of protection by the Lebanese Labour Code and many norms related to the practice of the *kafala* system.

Although many conventions have been adopted in order to protect migrant workers from exploitation, there seems to be a gap in legislation addressing immigration policies such as the *kafala*. These objectives fall under the scope of SDG 8, to promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all. In a Lebanese context, many shortcomings contribute

[1] Ryszard I Cholewinski, PFA de Guchteneire and Antoine Pécoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (UNESCO Pub; Cambridge University Press 2009) 4
[2] Human Rights Watch, 'World Report 2022: Events of 2021' (HRW, 2022) 415
[3] International Labour Office and others, 'A study of the Working and Living Conditions of MDWs in Lebanon "Intertwined: the workers' side' (ILO,2016) 25
[4] ibid 31
[5] ibid 37

to this reality and one can wonder if ratification of these instruments is enough to ensure the protection of these foreigners or efforts should start from within at first.

1.2. Research Question

Numerous authors have proclaimed that abolishing the sponsorship system is the only way of guaranteeing migrant domestic workers proper respect of their human rights. Those who proclaimed this hypothesis did not indulge their research to a concrete study on differentiated practices and legal frameworks that go hand-in-hand with the *kafala* system. Through this paper, I will primarily contest the theory of whether or not the *kafala* system breaches human rights instruments and international standards of migrant workers. To do so I have to deal with three main sub-research questions.

First thing I need to analyze is the act of confiscation of documents and to what extend it restricts the right to freedom of movement internally and externally.

On a second note, I will contest whether excluding migrant workers from labour law protection negatively affects their right to a fair remuneration and protection of wages.

Lastly, I will challenge the theory of whether tying the residency permit to an individual restricts the right to free choice of employment.

1.3. Literature Review

In the process of writing this dissertation, I noticed that many[6] have defined the *kafala* system and how it is perceived as an eco-social problem such as Ray Jureidini, Samantha Elia Abou Jaoudeh and the legal agenda, who focused on MDWs in Lebanon, the process of recruiting them, and the challenging lifestyle they are trapped in. Putting MDWs on the international map, the ILO has conducted statistics in order to show to what extend this system's practices and regulations have affected the living and working conditions of migrant domestic workers.

In conducting this research, several articles and reports were found addressing the vulnerability of migrant workers[7]. However, a major gap in doctrine is found in relation to the *kafala* system and human rights. For this reason, I relied on doctrine addressing international law vis-à-vis migrants. Discrimination appeared in many of these doctrines as the basis of differentiated treatment by States towards non-citizens. In this line, and in relation to the right to freedom of movement, I criticized the study of many such as the study conducted by Jose D.Inglés on discrimination as a right to everyone to leave a country. The criticism was used to build up on the literature gap that neglected the practice of the act of confiscation of travel documents allowed under the *kafala* as a limitation to the right to freely move.

[6] In a 2011 report drawn by Voice International (NGO), '" I came here for work" Calls for better protection of migrant domestic workers in Lebanon", the NGO spoke up in the voice of MDWs in Lebanon by explaining the *kafala* system and the detailed problems that these workers face since their recruitment.

[7] The IOM has addressed the notion of vulnerability of migrants in detailed manner. In its 2019 report on 'Migrants and their Vulnerability - to human trafficking, modern slavery and forced labour', it has conducted a study on different victim characteristics in order to determine which migrant are vulnerable to modern day slavery. It further suggested what is needed to be done to address this problem.

It is very common to find doctrine on decent work and precisely on labour rights[8]. The literature I based our analysis on is mainly related to labour rights in general by Rhona K.Smith, Cholewinski and others who again generally studied the right to fair remuneration and equal pay while contesting the notion of discrimination in the enjoyment of ESC rights. The gap in studies here is linked to the exclusion of certain workers by labour laws and how it affects their labour rights. For this purpose, I relied on jurisprudence enacted by the Lebanese judicial system to explain how labour cases of MDWs are handled vis-à-vis their labour rights.

When developing this research, I realized that among the many problems MDWs face, there is a forgotten issue of their inability to freely choose their job and the right to change it. On an international level, I developed Swepton's view on the right to free choice of employment and Shahid's criticism towards the restrictions stipulated by the CRMW. As this constitutes the basis of the analysis, no literature was found in relation to MDWs and their right to change jobs. For this reason, a comparison was made between the General Security's regulations stipulating the procedure of changing employers and the justified restrictions stipulated by international conventions.

Many international instruments were used for the purpose of this paper. However, the reason I chose the UDHR, ICCPR and ICESCR to explain and analyze part of the daily challenges of MDWs, is that economic, social and civil rights guarantee the way towards a decent living and thus independence and freedom. The progressive realism of these rights is often disrupted by policies and practices that foster discrimination and eventually lead to vulnerability of migrants and non-nationals in general. Moreover, it is important to note that Lebanon did not ratify any convention related to migration; however, it did ratify fundamental human rights conventions such as the ICCPR, ICESCR, CEDAW, and CERD. Nonetheless, it was important to reflect on migration instruments that encompass the rights to which migrants are entitled to in order to contest whether the *kafala* system is in accordance with international standards of migrant workers. The importance of these rights lies within the scope of the CRMW as the first international convention to stipulate provisions in relation to justice, labour, social and cultural rights, in addition to the ILO Convention on Domestic Workers as the first convention to prioritize domestic workers and the obligations of States towards them.

Furthermore, to establish the concrete comparative analysis of the *kafala* system and international law, reference was made to Lebanese legislation such as the Lebanese Labour Code, Penal Code, and the Law of obligations and Contracts.

Dependently, the researcher was able to find reports drawn by the ILO, and general comments drawn by the UN Committee on human rights and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families in relation to migrant's rights.

[8] See Jean Mayer, 'The Concept of the Right to Work in International Standards and the Legislation of ILO Member States' (1985) 124 Int'l Lab Rev 225

In conclusion, the researcher could not find a paper that addresses the relation between the *kafala* system and the international labour standards to contest the problematic of this study.

With the aim to provide a concrete insight on the *kafala* system, original articles, legislations, and jurisprudence have been translated from Arabic to English by the researcher of this paper. Moreover, for the purpose of this paper, and since the majority of migrant domestic workers are women, I will be addressing migrant workers and MDWs in female pronouns. Although employers can be both female and male, I will be using the masculine pronoun in addressing employers and the *kafeel*.

1.4. Scope and Limitation

This thesis will address at first the *kafala* system in the Arab region with specific reference to Lebanon and the Lebanese legal framework regulating the immigration, residency, and work of MDWs on the Lebanese territories. The topic is fairly big and requires in depth research, but for the purpose of this paper, I will be focusing on three main rights analyzed in the following chapters, often neglected, but constitute the base of migrant workers' exploitive situation. The conclusions and recommendations proposed by this paper would be a basis for further studies on this subject.

1.5. Methodology

As societies, we always look for ways to develop and embrace innovation, but we tend to forget how much the human aspect contributes to this development. With globalisation and technology, we no longer seek to progress in our homelands, and we embark on travels and experiences beyond these borders. For those who are not as lucky as those who were able to find stability and decent living, they embark on their own adventure to new countries for the purpose of employment.
Leaving your home to a strange land just for the purpose of getting a job and be able to support loved ones is not an easy task. Refugees, asylum seekers, and migrants, whoever they are and from whenever they come from, they all deserve respect of their human rights unconditionally.

Growing up in Lebanon, MDWs have always been part of the Lebanese society and they became part of it. In almost every household, there is a MDW, and as norms dictate, treating them differently than other workers was just ordinary since they were considered maids.
In recent years, many unfortunes hit Lebanon and these events brought to light what MDWs have been experiencing and living through. The media started to tell stories of slavery working conditions, abuse, and inhuman treatment that these workers were trapped in. News coverage of these women living on the streets near their ambassies waiting for repatriation has awakened the need to reform the *kafala* system under which the work of MDWs in regulated.

Migrant workers play a huge role in our economies and while they fulfill their duties, in return states are obliged to fulfill theirs towards them by protecting and respecting their human rights and offering them fair and just working conditions equal to citizens. This seems a bit far from reality as forced labour, trafficking, and abuse cases are still on the rise and international measures are not sufficient on their own to abolish them since conventions related to migration are poorly ratified. Even though some States need

labour hands, migration remains a fearful subject where discrimination has taken a permanent residency and migrant workers are not fully protected nationally by the host state since priority is given to citizens.

In a lack of international harmonization of obligations toward migrant workers, it is necessary to address national legislation and immigration policies and see whether or not they abide by international standards of migrant workers.
Because of its nature, the *kafala* system has shadowed the harsh situation of MDWs and at the same time it has proven to be a way of not just exploiting workers in the workplace, but also a way of controlling their liberty. Therefore, there is a need to transcend traditional analyzes of rights related to migrant workers and introduce the modern forms of deprivation of liberty.

For the above reasons, the research method of this paper is a comparative analysis between the *kafala* system and international standards of migrant workers in mainly three areas often neglected: the right to freedom of movement, decent work, and the right to free choice of employment.
Since the *kafala* system is a topic unknown to many (although it has existed for decades in many countries), I will dedicate the second chapter to give a brief historic overview of the *kafala* system and how Lebanon adopted it, and the third chapter to explain what is the *kafala* system, its legal framework, and the recruitment procedure.

Chapter four will be the essence of this dissertation. Three sub-chapters in it will deal with international standards of migrant workers in general with a follow-up analysis of the *kafala* system. Sub-chapter 4.1 on freedom of movement, 4.2 on the right to fair and just working conditions, and 4.3 on free choice of employment.

Lastly, chapter five will deal with an overall assessment of the thesis with a conclusion on the research question and proposed recommendations.

CHAPTER 2: A LEGAL ANALYSIS OF THE *KAFALA* SYSTEM IN LEBANON

2.1. Introduction

Although the *kafala* system has considerable effects on the life of many workers, it remains a subject fairly unknown to many. Therefore lies the importance of shedding light on this system from its conception till its recent functioning. In this matter, the following sub-chapters will be dedicated to informing the reader on what is the concept of *kafala*, and what are its elements. For this reason, I will begin by explaining how the *kafala* system came to existence and how it was adopted into the Lebanese legal instruments, followed by a study on its elements and legal framework. Of course, I couldn't talk about migrant domestic workers without mentioning how they are recruited and the nature of the work contract that they sign. For that, sub-chapters 2.4 and 2.5 will address this topic and the attempts of reforming the work contract. I will then conclude with a short remark on this chapter.

2.2. A brief historic overview of the *kafala* system

Few studies have addressed the historic background of this system. There are no evidence supporting this hypothesis, but some researchers think that the system arose from the ancient Bedouin custom to grant visitors protection. Others have established that the state's legal and bureaucratic procedures related to the migrant worker sponsorship system originated mainly during the period of British colonialism in the Gulf, especially in Bahrain and then Kuwait in the period from the twenties of the last century to the seventies. It formed the basis for the emergence of the labor market in the Gulf, which is radically dependent on foreign workers[9]. The Gulf countries were the first to apply this type of guarantee to the workforce, and specifically, to the immigrant worker whose ability to hold a job is conditioned by being guaranteed by a national (individual or company).

Britain exercised a legal authority over all foreigners residing in the Gulf (except for Saudi Arabia). Consequently, a package of laws and procedures were adopted in order to control and pave the way for extensive inflow of expatriate workers. This established the essence of the current sponsorship system.

It all started in Bahrain, in 1919, when the *kafala* system entered into force. Courts were divided into Courts with jurisdiction over legal issues of foreigners, as well as the "hybrid court" which is dedicated to cases involving foreigners and local residents. After the emergence of oil industry in Bahrain, new labor relations crystallized in the region and doors were opened to the influx of foreign workers to the Gulf. The sponsorship system had to be amended; consequently, procedures for financial guarantees by the sponsor, work permits, exit visas and no-objection certificated were adopted as an essential part of the immigration policy of the Peninsula.

[9] عمر الشهابي، ' تاريخ نشوء نظام الكفالة للعاملين الوافدين في دول الخليج العربية' (مركز الخليج لسياسات التنمية، 2018)
Omar Al Shahabi, 'The history of the establishment of the sponsorship system for expatriate workers in the Arab Gulf states' (Golf Center for Development Policies, 2018)
<https://gulfpolicies.org/gcc/index.php?option=com_content&view=article&id=2320&catid=9&Itemid=1142&lang=ar> accessed 6 March 2022

One of the major developments during this period was the increased use of foreign domestic workers since locals in Bahrain were considered to be not well qualified for this service. Domestic workers started flowing in from India, Malaysia, and Singapore, and thus the sponsorship system was imposed on them.

In Lebanon

Lebanon is currently a destination for workers coming from Asia and Syria. As it is based on a fragile political situation, the legal framework of migration is basically not legislative and concretely regulated on an ad hoc administrative manner. Internationally speaking, Lebanon refrains from committing itself to conventions related to migration[10].

In Lebanon, there is no specific law that protects the interests of migrants in general. The Labor Code does include non-nationals however it excludes domestic workers from its provisions.

There are two ways for expatriates to enter the Lebanese labour market. Under Presidential Decree 17561/64, non-Lebanese must obtain a work permit and a prior approval from the Ministry of Labour and Social Affairs that enable them to seek work. However, it is time consuming and fairly expensive. As a result, employers take the easier route of recruitment by sponsoring a migrant worker until the employment contract is terminated[11]. The sponsorship concept in Lebanon is used as a way to regulate the situation of low-skilled workers coming from Africa and Asia, excluding Syrian workers that enjoy more mobility. To better understand how Lebanon adopted the *Kafala* system, I should dive into the history of domestic work since this framework is mainly regulating aliens that seek work in this field.

One of the few researchers that addressed the roots of domestic work in Lebanon was Samantha Elia Abou Jaoudeh. The trajectory towards grasping when this type of work became regulated by the sponsorship system is only traced back to after the independence of the Lebanese Republic without evaluating whether or not any traces of *Kafala* existed during the French colonialization period. In the 1920s, and till the fifties, domestic workers were predominantly Lebanese workers with poor economic backgrounds[12]. As Abou Jaoudeh described it, "hiring domestic work was not a means of contributing to the labour market, as it was only contributing to the social status of female employees who wanted to hire help in order to show managerial skills"[13]. During and after the civil war, starting 1975, as Lebanese emigrated, there was a shortage in domestic work in Lebanese households. These families started hiring female workers from Asia and Africa. In 1978, the first recruitment agency began operating and recruiting migrant workers from Sri Lanka[14].

[10] Anna Di Bartolomeo, Tamirace Fakhoury, and Delphine Perrin, 'CARIM Migration Profile-Lebanon: The Demographic-Economic Framework of Migration, the Legal Framework of Migration, The Socio-Political Framework of Migration' (European University Institute, CARIM – Consortium for Applied Research on International Migration, 2010) 1-3
[11] Dr. Paul Tabar, 'Lebanon: A Country of Emigration and Immigration' (LAU,2010) 13
[12] Samantha Elia Abou Jaoudeh, 'Migrant Domestic Workers in Lebanon: In between the Kafala system and Abuse' (Masterarbeit im Masterstudiengang Politikwissenschaft: Demokratisches Regieren und Zivilgesellschaft, Universität Osnabrück| 2017) 30
[13] ibid
[14] ibid 36

With the lack of adequate sources depicting the exact year when the sponsorship system was first adopted in Lebanon, it would be logical to tie it to the theory that Lebanon borrowed the system from the Gulf countries where it first originated and started applying it in various customary and administrative practices after the beginning of the civil war and the opening of the first recruitment agency in 1978.

Similarly to the Gulf, a migrant worker must find a sponsor before coming to Lebanon that would legally invite her and sponsor her. The sponsor must be the employer at the same time, and the worker must live with him given that any freelance job conducted by her would be illegal.

2.3. The concept of *Kafala* and it's legal framework

The word *Kafala* means sponsorship in Arabic, it originates from Sharia law (Islamic Law). The word Kaffala in Islamic law refers to guardianship, a formal agreement to provide temporary support for an orphaned child until adolescence[15]. In civil law, sponsorship is a legal concept though which one of the parties (the guarantor) provides a legal guarantee on behalf of the other party (the guaranteed) and undertakes to bear the legal responsibilities in the event where the latter is unable to do so. This usually applies to loans and debts.

The *kafala* system is the legal basis of the work relationship between the migrant worker and the employer also known as the sponsor. It is a restrictive immigration regime mixed with customary practices which ties the residency of the worker to their employer. The *kafala* system has been implemented in many countries through a set of bureaucratic and legal procedures that regulate the relationship between the sponsor, the expatriate, and the state. Although there are some differences in procedures across countries and times, the most important of these bureaucratic-legal procedures are based on the following[16]:

- Entry/Residence Visa - A state-issued visa that an expatriate needs to be able to legally work in the country. It needs a citizen sponsor (or a company owned by a citizen) to sponsor the expatriate in order to issue it.
- Exit visas
- No Objection Certificate (which will be called in the next chapters a *tanazul* waiver)- A certificate is required before the expatriate leaves the country or changes the sponsor in the country, as the certificate shows that the current sponsor has no objection to the worker leaving the country or transferring his sponsorship to another sponsor.

[15] Isabel Henzler Carrascal, The Lebanon papers, 'The Kaffala System in Lebanon-An unequal power balance' (4, 2021), Fridrich Naumann Stiftung <freiheit.orh/Lebanon-and-syria>

[16] عمر الشهابي، ' تاريخ نشوء نظام الكفالة للعاملين الوافدين في دول الخليج العربية' (مركز الخليج لسياسات التنمية، 2018)
Omar Al Shahabi, 'The history of the establishment of the sponsorship system for expatriate workers in the Arab Gulf states' (Golf Center for Development Policies, 2018)
<https://gulfpolicies.org/gcc/index.php?option=com_content&view=article&id=2320&catid=9&Itemid=1142&lang=ar> accessed 6 March 2022

- Financial Deposit - Some countries require the sponsor to deposit a certain amount of money as security for any costs related to the departure or repatriation of the expatriate worker from the country.

Unlike the GCC countries, Lebanon does not have a sponsorship law that can be found in one legal document, the legal provisions of the *kafala* system are thus incorporated in national laws, and some administrative regulations and customary practices.

The Lebanese Labour Code of 1949 excludes domestic and agriculture workers from its articles[17]. Therefore, they do not enjoy any protection granted by Labour law including minimum wage, compensation in case of contract termination, and the right for leisure and vacation days[18].

In Lebanon, The Penal Code applies to all individuals residing on the Lebanese territory while the General Contractual Obligation law, that addresses any gap found in private laws, regulates civil responsibilities and the principle of guarantee (sponsorship view from a civil law perspective). In addition, the 1962 Foreigners' Law requires every foreigner to hold a legal valid visa as a right of residency, a right which foreign workers might lose by violating this law as a result of being tied to the *kafeel* as we will see later on.

Migration and the sponsorship process consist of a set of guidelines implemented and monitored by the General Directorate for General Security, a department working under the authority of the Ministry of Interior affairs. Visas, residency permits and the registration of the migrant as the responsibility of the *Kafeel*, all of these decisions are implemented by the General Security. Abou Jaoudeh implied that "migrant workers' immigration status within Lebanon is treated as a security matter rather than a labor one"[19].

2.4. The Recruitment Process

The recruitment process is the playing field of private agencies, which handle most of the hiring process; however, they are not properly supervised and monitored by the State[20]. Let's suppose that a foreigner is seeking a job as a domestic worker in Lebanon, she would have to follow the guidelines established by the General Security. They entail the following procedure:

An agency in her home country provides the service of linking her to a Lebanese private agency in order to obtain a job offer. The prospective employer has the choice of choosing the employee based on skills, age, race, and other factors through these recruitment agencies. After being selected, she will sign a work contract in her home country and the process of obtaining a visa begins.

[17] Lebanese Labour Code, art 7

[18] Samantha Elia Abou Jaoudeh, 'Migrant Domestic Workers in Lebanon: In between the Kafala system and Abuse' (Masterarbeit im Masterstudiengang Politikwissenschaft: Demokratisches Regieren und Zivilgesellschaft, Universität Osnabrück| 2017) 39

[19] ibid

[20] Nadim Houry, Without Protection: How the Lebanese Justice System Fails Migrant Domestic Workers (Human Rights Watch 2010) 15

The agency will sort out needed documents and request a preliminary approval of a work permit from the Ministry of Labour. After that, the sponsor has to prove that he has enough financial means in order to guarantee the expat and to request a visa for the worker from the General Security department[21]. He will also need to sign a waiver stating that he takes full responsibility of the foreigner. The entry and working visa are only valid for three months renewable upon the request of the *Kafeel*[22]. All of these steps show the full dependency of the worker on her sponsor.

All of the relevant expenses are the burden of the guarantor, including travel expenses and accommodation. In case of domestic workers, they will reside with their employer who should provide them with at least a private room. Agencies can also charge MDWs for extra fees, either in the destination country or their homeland.

After the arrival of the migrant worker, her passport is confiscated by the private agency or the *kafeel* as a "guarantee for the investment the sponsor has spent in order to employ her". This is only a mere customary practice not regulated by the General Security regulations or stipulated in the employment contract.

Zahra Babar (2013) described it as the "privatization of migration governance" since the state delegates the responsibility of migrant workers to individuals and private agencies, creating a migration policy that would cause vulnerability of these expats[23].

Labour mobility is restrained by the "sponsorship transfer" requirement. For a migrant worker to change jobs and employers she must first find a new *kafeel*. Leaving the job or changing employers can only be done if the current *Kafeel* signs a *tanazul* – a notarized release waiver- approving his will for his domestic worker to be employed somewhere else. In order to process a request of a guarantee transfer, the new *Kafeel* must sign a pledge before a public notary, in which he declares taking full responsibility of the foreigner, and presents it along with the release waiver before the General security[24]. A request of transfer of sponsorship should be submitted at least 15 days before the residency permit of the worker expires. After submission, the domestic worker has to continue working for the primary *Kafeel* until the transfer is approved. Meaning that even in abusive and exploitive circumstances, the employee cannot unilaterally leave the job. During their time in Lebanon, migrant workers are only allowed to change their sponsor twice.

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[21] المديرية العامة للأمن العام اللبناني، ' طلب سمة عامل في الخدمة المنزلية '
The General Directorate of the Lebanese General Security, 'Application for the visa of a domestic worker'<https://www.general-security.gov.lb/ar/posts/171> accessed 12 March 2022

[22] المديرية العامة للأمن العام اللبناني، ' المستندات المطلوبة للحصول على عامل في الخدمة المنزلية'، para 5
The General Directorate of the Lebanese General Security, 'The requested documents related to domestic workers', para 5 <https://www.general-security.gov.lb/ar/posts/23> accessed 12 March 2022

[23] Samantha Elia Abou Jaoudeh, 'Migrant Domestic Workers in Lebanon: In between the Kafala system and Abuse' (Masterarbeit im Masterstudiengang Politikwissenschaft: Demokratisches Regieren und Zivilgesellschaft, Universität Osnabrück| 2017) 39

[24] المديرية العامة للأمن العام اللبناني، ' طلبات نقل الكفالة'
The General Directorate of the Lebanese General Security, 'Application for the transfer of guarantee'< https://www.general-security.gov.lb/ar/posts/170> accessed 20 February 2022

2.5. The Employment Contract as an ambiguous instrument

Once selected, and before travelling, the migrant domestic worker signs an employment contract in her country of origin. However, this contract does not have any legal effect in Lebanon. Upon their arrival to Lebanon, MDWs have to sign a new contract drafted solely in Arabic before a public notary[25].

Nonetheless, this contract has more stringent conditions and offers the worker less wages. Injustice can be spotted from the very beginning of the employment procedure as MDWs come from different linguistic backgrounds so few, if not none, understand the Arabic language. Consequently, they are not assisted by a translator nor provided with a translated copy of the signed document. They do not know their rights nor their obligations. A 2016 conducted by the ILO showed that 73.8% of workers do not receive a copy of the contract[26].

This raised many speculations upon which a standard compulsory contract was adopted by the minister of Labour in 2009 outlining terms and conditions of employment of MDWs. However, it has failed to impose provisions that protect MDWs from forced labour and exploitation. This contract remains heavily criticized as it is strongly biased to the benefit of the employer and violations of the obligations laid down in it remain unanswered[27].

Decree No.19/1 dated 31/12/2009 stipulated the adoption of this unified "work contract for migrant domestic workers"[28]. For reasons explained in the next paragraphs, this contract remains till today the legal agreement used to regulate the relationship between the employer and the worker. Both of the parties are misinformed about the provisions of the contract, being that some don't even read it. Duration of the employment contract is one year renewable[29], alas 43.8% of employers thinks it's for three years, and 8.4% have no knowledge about it. The contract has failed to address modern issues related to the *kafala* concept; a major gap is the lack of any provision related to the custom of confiscation of passports of the MDW. The contract neither allows nor prohibits this practice. In fact, 94% of employers confiscate the worker's passport[30].

Legally speaking a MDW is entitled to terminate the contract with the first party (the employer) taking full responsibility in three cases; namely in the case of non-payment of salary for three consecutive months, in case of abuse, and lastly in a situation where the worker is employed under a capacity which is not agreed on and without her consent[31].

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[25] Ibid 17
[26] International Labour Office and others, 'A study of the Working and Living Conditions of MDWs in Lebanon "Intertwined: the workers' side' (ILO,2016) 22
[27] Ibid
[28] See Annex I
[29] See Annex I, art 4
[30] Zeina Mehzer, Gabriella Nassif, and Claire Wilson, 'Migrant Workers' Rights are Women's Rights. Women Migrant Domestic Workers in Lebanon: A gender perspective' (ILO, 2021) 5
[31] Work contract for migrant domestic workers, art 17

However, as mentioned before, for an expat worker to leave her work or to change employers, she needs the primary sponsor to apply for a sponsorship transfer. Although she can rightfully terminate the contract, she has to continue her working duties for the primary *kafeel* until the decision of transfer is taken. In case of abuse and assault or any other reason for quitting, the system is allowing further exploitation to take place.

In a scenario where the MDWs are faced with this dilemma, and after quitting, they leave the house of the sponsor without his consent. Here the *kafala* system provides the sponsor with a complaint mechanism. The employer files an "absconding complaint" before the competent public prosecutor, in light of which investigations are conducted by the police in order to issue an "absconding report" against the foreigner. This report raises the responsibility of the employer[32], and thus the migrant worker loses her residency permit. In case where a new sponsor is willing to take full responsibility of the domestic worker and to renew her residency, then only will the complaint be withdrawn.

2.5.1. Attempts of reforms

In 2011, the previous Minister of Labour Boutros Hareb submitted to the Council of Minister a Bill regulating the working conditions of domestic workers (drafted in conformity with Domestic Workers Convention of 2011, No. 189)[33]. The Bill stipulated safeguards to protect the rights of workers in Lebanon, including social security coverage, payment of wages, work hours and days off. However, it has not been adopted by the Parliament till today.

On 8 September 2020, Caretaker Minister of Labour Lamia Yammine issued the revised Standard unified Contract. A contract based on an action plan to abolish the *Kafala* system in coordination with the ILO. It is a major step towards the protection of the rights of domestic workers in Lebanon, guaranteeing them their basic rights as workers including payment of wages, prohibition of confiscation of papers and a key provision that allows the worker to terminate the contact unilaterally in case of violation of the obligations laid down in the contract[34]. A key instrument with safeguards necessary to end forced labour against MDWs.

The unified contract did not see the light. On the 14th of October, the *State Shura Council* – Lebanese administrative Court- rendered a decision on the suspension of the implementation of the Standard unified contract. This decision came after the Syndicate of the owners of recruitment agencies filed a complaint before the Court under the legal argument that the two decisions adopted by the Minister of Labour to adopt the new contract, inflict great damages to the agencies' benefits[35]. This contract was

[32] المديرية العامة للأمن العام اللبناني، شكوى ترك مكان العمل للعمال الأجانب'
The General Directorate of the Lebanese General Security, 'Complaint about leaving the workplace for foreign workers <https://www.general-security.gov.lb/ar/posts/324> accessed 15 March 2022

[33] نص مشروع تعديل قانون العمل المقترح من الوزير بطرس حرب سنة 2011 (المركز اللبناني للتدريب النقابي، 2011)
Draft labor law amendment proposed by Minister Boutros Harb (Lebanese Center for Trade Union Training, 2011) <http://www.ltutc.com/ArticleDetails.aspx?art_ID=53> accessed 19 February 2022

[34] ILO, 'Lebanon takes crucial first step towards dismantling Kafala in Lebanon' (Press release, 10 September 2020) <https://www.ilo.org/beirut/media-centre/news/WCMS_755008/lang--en/index.htm> accessed 16 February 2022.

[35] ريتا الجمال، ' لبنان: القضاء يظلم عاملات المنازل مجدداً' (العربي الجديد، 28 أكتوبر 2020)

supposed to be the first legal document that MDWs can rely on in Lebanon. Unfortunately, they are again left with no hope of reform and protection.

Amendments and reforms of the *Kafala* system could have been achieved through this contract. The complexity of legislation and regulating foreign labour made this the only gateway for rectification. New Minister of Labour, Mustafa Bayram is currently working on a new standard contract. However, the first draft showed that this contract will be a major step back from the previous contract issued by the previous minister Yammine. The new document is biased in favor of recruitment agencies, domestic workers have no right to terminate the contract unilaterally without paying a financial compensation to the *Kafeel,* the freedom of the worker can now legally be constrained in the first three months of employment, basic working and leisure rights have been removed and finally this contract is not mandatory and will only be signed upon the will of the worker[36].

A Bill regulating work conditions of domestic workers has been already drafted in accordance with the 2011 Domestic Workers Convention (No.189) providing a number of safeguards such as regulating leisure periods, payment of wages and social security coverage. Nonetheless, the Bill has been submitted to the Council of Ministers to be discussed but till the date of writing of this paper, the Bill has not been adopted yet[37].

2.6. Final Remarks

In concluding this chapter, one can notice major steps in attempting to regulate domestic work in Lebanon from drafting a new unified contract to drafting a Bill in which provisions are sought to be in accordance with Convention No.189. Nonetheless, all efforts come down to political barriers that stop these initiatives from being adopted and enforced. I can also put emphasis on the lack of knowledge regarding the contractual obligations of both parties which in the case of employers is only a matter of prioritizing traditions over the contract, and therefore allowing for exploitive practices to be part of these traditions. In the end, it all comes down to how the national and international justice systems respond to these challenges.

Rita Al Jamal, 'Lebanon: the judiciary oppresses domestic workers again' (Al Arabi Al Jadeed, 28 October 2020) <https://www.alaraby.co.uk/society/%D9%84%D8%A8%D9%86%D8%A7%D9%86-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A1-%D9%8A%D8%B8%D9%84%D9%85-%D8%B9%D8%A7%D9%85%D9%84%D8%A7%D8%AA-%D8%A7%D9%84%D9%85%D9%86%D8%A7%D8%B2%D9%84-%D9%85%D8%AC%D8%AF%D8%AF%D8%A7%D9%8B> accessed 16 February 2022

[36] The Legal Agenda, 'To the Minister of Labor… We Urge you to End this Mistake' (07/02/2022) https://english.legal-agenda.com/to-the-minister-of-labor-we-urge-you-to-end-this-mistake/ accessed 28 February 2022

[37] International Labour Conference, Application of International Labour Standards 2022: Report of the Committee of Experts on the Application of Conventions and Recommendations (ILO, 110th session, 2022) 364

CHAPTER 3: INTERNATIONAL STANDARDS OF MIGRANT WORKERS

One might think that international standards of migrant workers are just related to employment; the purpose of this research is to highlight the fact that these standards expend to other human rights too. In addressing the issue of exploitation, being free from it is not a controversial notion but this chapter focuses on right-holders whose situation generates much controversy: MDWs. For the purposes of this paper, a domestic worker is defined as a person engaged in domestic work within an employment relationship, and who performs work in or for a household[38].

Touzenis K. and Cholewinski R. did not go wrong when they identified an interrelation between human rights and migration[39]. Regulating migration is not only focused on the economic aspect of it and one can see that the preservation and protection of human rights of migrants has been the subject of many legal instruments. Most importantly, All of the UN conventions are derived from the UDHR which declares that "*All human beings are born free and equal in dignity and rights*" and "*all persons, without any distinction of any kind and regardless of their status, are entitled to all of the rights listed in this Declaration*". This Declaration give human rights a universal trait[40]; nonetheless, there might be some exceptions where some rights apply only to nationals of a state party, however, this does not exclude migrant workers from the protection of the state[41].

The UDHR has become customary international law and has already placed all forms of rights stipulated in the ICCPR and ICESCR into its articles. One of these rights is the right to work, protection from unemployment and the right to fair and just conditions of work. As Etienne Piguet observed "the transformation from rural to urban society required an additional and more complex system of protection"[42]. Protection evolved to encompassing not only the right to work but also to equal pay, leisure, social security and in general to just employment conditions.

Historically speaking, economic, social and cultural (ESC) rights have been placed in the UDHR as equally important rights; however, in contrast to fundamental rights such as the right to life, ESC rights have been seen as an aspiration to reach rather than rights to fully realize[43]. In the words of the Office of the High Commissioner for Human Rights in 2008, there is a "relative neglect of these rights on the human rights agenda"[44]. Adding to these words, we expect migrants to deliver on their duties without sufficiently providing them with their ESC rights. This is partially why States and Governments neglect extending these rights to migrants. The research will not only focus on these conventions as a primary source but also on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their

[38] Convention Concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 5 September 2013) C189 (Domestic Workers Convention) art 1

[39] Kristina Touzenis and Ryszard Cholewinski, 'The Human Rights of Migrants - Editorial Introduction' (2009), vol.11, no.1, (IJMS: International Journal on Multicultural Societies) p.3 <www.unesco.org/shs/ijms/vol11/issue1/intro> accessed 5 April 2022

[40] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1 - 2

[41] Ryszard I Cholewinski, PFA de Guchteneire and Antoine Pécoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (UNESCO Pub; Cambridge University Press 2009) 124

[42] Kristina Touzenis and Ryszard Cholewinski, 'The Human Rights of Migrants - Editorial Introduction' (2009), vol.11, no.1, (IJMS: International Journal on Multicultural Societies) p.10 <www.unesco.org/shs/ijms/vol11/issue1/intro> accessed 5 April 2022

[43] ibid 21

[44] ibid 22

Families. Although this Convention is weak in ratification, but it recognizes the rights of foreign workers in the fields of labour, education, health, and justice.

This weak ratification only mirrors the poor level of protection granted to migrant workers. Negligence is often accompanied by *de facto* and *de jure* discrimination translated in national legislation such as the exclusion of MDWs from the Lebanese labour law provisions, and other factors that have escalated this unwillingness to slavery-like working conditions. Human rights instruments do not put a lot of limitations and derogations upon which states parties can justify their negligence towards migrants. Certain limitations provided for example in Article 4 of ICESCR are those related to the general welfare of people. The Limburg Principles – which provide interpretation of the ICESCR – observe that this article was meant to protect individuals and not to be used as a limitation ground[45]. In reality, it does limit the ESC rights of non-nationals. Nowadays, treaty monitoring bodies have been paying more attention to migrants as a vulnerable group and I see that general comments not only give guidance to states but they also adopt a practice to recommend state parties to ratify the ICRWM[46]. Moreover, courts started to apply the principle of non-discrimination between nationals and aliens in a way that reaffirms the fact that the migration status of a person cannot in itself hinder human rights. One of these judgments is rendered by the Inter-American Court of Human Rights in 2003 where the Court stated that

> *"The migratory status of persons can never constitute a justification in depriving them of the enjoyment and exercise of their human rights, including those related to work.[47]"*

Explicitly, the ILO mentions migrant workers as a group with "special social needs", requiring "special attention" in relation to the protection of their fundamental labour rights. Furthermore, it gave great attention to MDWs in adopting the Domestic Workers Convention C-189 and its Recommendation R201. All of these international standards are now part of the UN sustainable development goals adopted in 2015 (2030 agenda for sustainable development). Among those goals, creation of jobs and rights at work became an integral part of SDG 8 which calls for the "promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work". As these are the key areas of the ILO's engagements, the organization adopted the decent work agenda which calls for the creation of quality jobs, and a decent work environment promoting equality, dignity, fair remuneration and safe working conditions.

Significant attention has been given to migrant workers and their working conditions, but few have addressed those who are working under the *kafala* system and the new forms of exploitation that it has created. MDWs are a special case that needs urgent undivided attention, it is not just another case of a migrant being denied his wages, but it extends to working under regulations that give the employer total domination over his employee leaving this latter deprived of his basic fundamental rights. MDWs in

[45] ibid 25
[46] ibid 26
[47] ibid 8

Lebanon are deemed to be in a 'slavery-like working situation' as a result of restrictive immigration policies, and live-in circumstances that render them trapped in 'out of sight' labour situations.

A new dimension to the traditional topic of international migrant standards will be explained in the first sub- chapter on the right to freedom of movement and its relation to the act of confiscation of documents attributed to the sponsorship system. The Second sub-chapter will discuss the notion of decent work focusing on the right to fair remuneration and the Lebanese judicial system's response to unpaid wages. The last sub-chapter deepens the argument of exploitation in new forms made possible by the *kafala* system notably the right of free choice of employment.

3.1. Right of Freedom of movement and liberty

3.1.1. Introduction

As McAdam argued, in the UDHR, the right of freedom of movement has been reflected upon as a civic liberty right and few have analyzed it as "an economic right and an aspect of personal economic freedom and development"[48]. Many other rights interrelate with this one such as the right of liberty and security and as fundamental as it seems, it is not absolute. Effectively, it is lawfully restricted by national policies and laws in order to protect public interest and national security. However, there is a point where I need to assess if a legislation or a policy is indirectly or deliberately restraining this right. In Lebanon, MDWs are deprived of their liberty, restrained in the household of the sponsor, and denied visitations to their home country. Some of these women have not been able to see their families for years. One could say that we underestimate how dependent they are on their sponsors since all of these rights need his permission.

In this sub-chapter, the main focus is to bring the attention to the right of movement to a whole new perspective which has not been discussed before vis-à-vis MDWs. This right is not only related to their right of freedom, but also to their contractual relationship with their sponsor. The *kafala* system brought to light the practice of confiscation of papers as a root cause of deprivation of liberty; nevertheless, literature has not addressed this issue before. For this reason, the following sub-paragraphs will consist firstly of a general explanation of the legal framework of this right. Secondly, i will analyze how travel documents are not only a precondition to travel, but also an instrument of repression in the lives of MDWs to conclude whether withholding these papers is justified under the ICCPR and the CRMW. Most importantly, the last sub-paragraph will explain in depth the repercussions of restricting the right to leave by the *kafala* system.

[48] Jane McAdam, 'An intellectual history of freedom of movement in international law: the right to leave as a personal liberty' [2011] Melbourne Journal of International Law 4
<https://law.unimelb.edu.au/__data/assets/pdf_file/0011/1686926/McAdam.pdf> accessed 8 May 2022

3.1.2. Scope of the right of movement

This right consists of external and internal freedom of movement. It encompasses three rights, namely the right to freely move within a country and to choose a place of residency, the right to leave any country, and the right to return to one's country[49].

Originally, the right came from natural law and ancient philosophy as an integral part of personal liberty and was enshrined later on in the 1789 Declaration of the Rights of Man and Citizen and in the 1791 French Constitution as "'*the freedom of everyone to go, to stay, or to leave, without being halted or arrested in accordance with procedures established by the Constitution*[50]". After the WWII, it was necessary to include the right of freedom of movement in an international context. Jagerskiold explains that giving individuals this right lies with the ability to achieve a better standard of living, to obtain a job elsewhere and in contrast we must provide them with protection against persecution and deprivation of rights by the host state[51]. For these reasons, it was considered a fundamental human right that became included in many instruments such as the UDHR, ICCPR, CERD, and CEDAW.

Even though it is a fundamental right, one cannot consider it absolute, and States can impose lawful restrictions in the enjoyment of this right specially when it comes to migration as it falls in their national competence. States are entitled to regulate the right of freedom of movement within the constraint of the law and it encompasses all of the territory of the State concerned[52]. Everyone is entitled to enjoy the right of movement as long as they are not to be found illegally moving or residing in a country. Thus, it shall be applied without any discrimination between nationals and aliens in regard to freedom of movement and residence within the borders of each State[53]. In principle, nationals are always lawfully present within the territory of their country, whilst the status of an alien is to be determined by domestic law[54].

3.1.3. The unexplored challenges of the right to freedom of movement

The general concept of this right was primarily laid down in absolute terms by article 12 (3) of the UDHR, but most importantly it reaffirms it as a right applicable to all persons. Various instruments, such as the CERD, recognized the obligation of States to adopt measures in order to ensure that the right of freedom of movement is guaranteed to each individual, thus prohibiting any form of discrimination[55].

[49] ibid 4
[50] ibid 12
[51] ibid 21
[52] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12 (1)
[53] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 13
[54] UN Human Rights Committee, 'General Comment No.27 (67) * 'in 'Freedom of Movement (article 12)' (1999) CCPR/C/21/Rev.1/Add.9
[55] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) (CERD) art 5

Needless to say, citizens are free to move and enter their country. Aliens on the other hand need to have a regularized status in order to do so, and it might as well be legitimately restricted. Consequently, the UN Human Rights Committee in its General Comment No.27 considered that any alien who enters the border of a country irregularly, but have their status legalized, shall be free to move within the territory of the State. That is because entry conditions are a matter of domestic consideration, and a State may impose plausible restrictions to whom it wants to admit in its territory. Debates rose to assess what is considered as a permissible limitation to the right of movement, the UDHR was then followed by the ICCPR which gave this right a broader conventional basis and listed the permissible restrictions. Thus, States should indicate the justification behind adopting differentiated measures between citizens and foreigners in accordance with the restrictions enumerated in article 12 (3) of the ICCPR:

> *"The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant."*

Basically, what I am saying is that once allowed entrance, the foreigner is entitled to rights set out in the ICCPR including the right of freedom of movement[56]. Hence, he is allowed to remain there within the context of his residency permit and to leave without any constraints.

Regarding migrants, one can witness in some cases that they cannot leave the host state because of private interference and deprivation of their travel document. The CRMW stipulated in its article 8(1) that migrant workers and members of their families have the right of leaving any State including their State of origin with restrictions justified under the similar grounds enumerated in Article 12 (3) of the ICCPR.

I. The special case of MDWs and their right to freedom of movement

All of these travels, either within one nation or transnationally, are made possible by the possession of travel documents. As Inglés stated, "travel documents are a mean of identifying the traveler and to guarantee him a safe journey" [57]. Naturally, a passport is an indispensable precondition to enjoy the right of external free movement. He added that the modern passport has become "an instrument of repression and control in certain States". I can give this statement different meaning and perhaps what Inglés is intending to explain is that some countries use the passport as an instrument to deny access to their territories to some individuals. The issue can be read from another angle in the special case of MDWs, and the link between repression and the act of confiscation of their travel documents.

In order to explain this, there is a need to understand that deprivation of movement is more prevalent against women. Considering the traditions and norms of certain societies, women are not allowed to leave the house or reside on their own without the consent of the manly figure responsible for them. Notably I

[56] UN Human Rights Committee, 'General Comment No. 15' in 'The Position of Aliens Under the Covenant' (1986)
[57] José D. Inglés 'Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country' (UN, 1963) 12

see this distinction between men and women in the GCC Countries and the Middle East in general. Adequately, States' obligations extend to protecting the right of freedom of movement from private and public interference. Meaning that a woman's right to freely move and choose her residence shall not be tied to another individual's decision; such restrictions are incompatible with the ICCPR and do not constitute grounds of justification as mentioned in Art 12(3) of the Covenant[58]. In the same context, article 15 (4) of CEDAW reaffirms the States' duty in according, to both men and women equally, the same rights when enacting a law relating to the movement of persons and the freedom to choose their domicile[59].

International bodies have been made aware of the situation of domestic workers and the practice of confiscating of their papers. The CRMW is the first international instrument to consider the confiscation of papers of a migrant and/or his family members to be an unlawful act. It limited the legality of the retention of papers to only public officials that are authorized to do so. Therefore, any confiscation of documents, performed by private agencies and sponsor, is a violation of article 21:

> *"It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family."*

The ILO Domestic Workers Convention of 2011 (No.189) in its article 9 (c) specifically mentioned that domestic workers are entitled to keep in their possession their travel and identity documents. However, a peculiar practice of the Kafala system in Lebanon and Saudi Arabia is the confiscation of the MDWs' papers by private entities. The *Kafeel* withholds the passport of the MDW and her residency visa. It is very rare to find a migrant worker under the Kafala system who still possesses her passport. A study showed that 94 per cent of employers in Lebanon confiscate the worker's passport[60].

Iglés considers that denying someone's travel documents can be acceptable if this act is pursuant to the law[61]. I see that on a human rights international level, and as mentioned above, it is unacceptable. On a national level, the Lebanese law does not regulate the issue of confiscation of travel documents, but it does consider the act of deprivation of liberty to be a criminal act. Logically, without any travel papers, MDWs are unable to move within the country and consequently unable to travel outside of it. If caught on the streets without any identification, the police would arrest them for breaching local laws and could

[58] UN Human Rights Committee, 'General Comment No.27 (67) * 'in 'Freedom of Movement (article 12)' (1999) CCPR/C/21/Rev.1/Add.9

[59] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 15 (4)

[60] Zeina Mehzer, Gabriella Nassif, and Claire Wilson, 'Migrant Workers' Rights are Women's Rights. Women Migrant Domestic Workers in Lebanon: A gender perspective' (ILO, 2021) 5

[61] José D. Inglés 'Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country' (UN, 1963) 13 <https://digitallibrary.un.org/record/701141?ln=en>

as a result of that be arrested. This is a clear unjustified restriction to their right of freedom internally and externally.

To deepen my analysis, Jureidini well explained that the problem here is not just limited to their inability of travel and returning home, but it also encompasses other practices[62]. Some employers confine their domestic workers indoors and are thus not allowed to move freely without express permission given by the *Kafeel* even during their days off. Statistics show that 1 out of 5 Lebanese employers lock their workers inside[63]. Thus lies the relation between the restriction of movement and deprivation of liberty and as Jureidini puts it "It is a form of imprisonment that has become part of the normative expectations of the employment relationship"[64]. Eventually, this had to be added in Convention C-189 stating that domestic workers are not obliged to remain inside the house where they work during their time of leisure[65]. Meaning that they are free to leave the house and commute outside of work hours thus protection their right of freedom of movement in relation to the nature of their job.

Ironically, the right of free movement has been enshrined in the preamble of the Lebanese Constitution, para b:

> "*The land of Lebanon is one land for all the Lebanese. Every Lebanese has the right to reside on any part of it and to enjoy this right it under the rule of law, there is no segregation of the people on the basis of any affiliation, and there is no fragmentation, no division, and no settlement."*

Nonetheless, there is a lack of protection of this right to migrants whose employment is regulated by the *kafala* system. As I mentioned before, there is no explicit wording of the right of freedom of movement given to migrants by the Lebanese Law. Furthermore, the employment contract does not provide whether or not the act of passport retention is allowed or prohibited, neither do the guidelines of the General Security. It's a mere norm that sponsors exercise as a guarantee for the financial investment they have put in order to hire a domestic worker. Recruitment agencies misinform sponsors about the legality of this act, and usually encourage it since some employers do not have a clear knowledge on what the law promulgates[66]. However, legislation in Lebanon does consider that this act amounts to forced confinement as one can categorize it here as a violation of the right of freedom of movement.

Article 569 of the Lebanese Penal Code sanctions any act that amount to deprivation of liberty and forced confinement:

> *"Whoever deprives another person of his personal freedom by kidnapping or by any other means shall be punished by life imprisonment with hard labor in each of the following cases:*

[62] International Labour Office and others, 'Gender and Migration in Arab States: The Case of Domestic Workers' (ILO,2004) 71
[63] International Labour Office and others, 'Intertwined: A study of employers of migrant domestic workers in Lebanon' (ILO,2016) 33
[64] International Labour Office and others, 'Gender and Migration in Arab States: The Case of Domestic Workers' (ILO,2004) 71
[65] Convention Concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 5 September 2013) C189 (Domestic Workers Convention) art 9 (b)
[66] International Labour Office and others, 'Intertwined: A study of employers of migrant domestic workers in Lebanon' (ILO,2016) 36

1. If the period of deprivation of liberty exceeds one month.
2. If someone who is deprived of his freedom is inflicted with physical or mental torture […]
The penalty is increased in accordance with Article 257 if the offense results in the death of a person as a result of terror or any other cause related to the accident."

Lebanese Courts were reluctant to consider the act of confiscation of papers as an act amounting to restriction of movement and deprivation of liberty. There are no precedents where courts have considered that confiscation of passports is of a criminal offence that amounts to forced confinement. It is considered natural and common for the employer to withhold the papers of the workers under the Kafala system[67]. In a case brought by migrant workers from Madagascar against their recruitment agency before the Investigative Judge in Beirut, the Judge held that:

"*It is natural for the employer to confiscate the maid's passport and keep it with him in case she tries to escape from his house to work in another without compensating him*.[68]"

II. Invisible barriers to the right to leave a country

All of these factors reaffirm what Iglés has observed on considering travel documents as a means of repression. By taking away these documents, we are depriving migrants from going back home. The right of migrant workers to leave any country is recognized by the CRMW and can only be restricted in accordance with the justification grounds set out by it. The benefit of this right is that it is not dependent on the legal status of the migrant or the legal residency in itself. General Comment No.27 of the Human Rights Committee noticed that "*The law itself has to establish the conditions under which the rights may be limited. […] Restrictions which are not provided for in the law or are not in conformity with the requirements of Article 12 of the ICCPR, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.[69]"* The Committee goes further, and indicates that these restrictions must be necessary and proportionate to the permissible purpose they need to achieve.

There is however a concern on barriers imposed by State's practice regarding this right since exceptions are not precisely defined. When discussing the right to leave and its discriminatory dimensions, Iglés noted that "*foreigners are hardly ever refused permission the leave the country of their sojourn*" and that "*certain countries, even though they recognize the right of everyone to leave any country, subject the exercise of that right to that the criterion of travel should not be against the interest of the State, and permit wide administrative discretion in the determination as to whether a particular journey is, or is not, against the State's interest*"[70].

[67] Nadim Houry, Without Protection: How the Lebanese Justice System Fails Migrant Domestic Workers (Human Rights Watch 2010) 41
[68] [2001] Decision of the Investigative Judge in Beirut No. 11/1167
[69] UN Human Rights Committee, 'General Comment No.27 (67) * 'in 'Freedom of Movement (article 12)' (1999) 3 CCPR/C/21/Rev.1/Add.9
[70] José D. Inglés 'Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country' (UN, 1963) 19 <https://digitallibrary.un.org/record/701141?ln=en>

What Iglés wants to conclude is that these criteria and administrative discretion may be the basis of arbitrary judgments of restrictions. In the field of the sponsorship system, this is true since exiting the country is also not possible without any interference of the *kafeel*, and any exit permit to leave the country must be issued only after obtaining the consent of the sponsor, such as the case of MDWs residing in Qatar and the UAE[71]. In Lebanon, a MDW is theoretically allowed to leave the country whenever she wants. Nonetheless, given the practice of confiscation of passports she is not able to travel unless the sponsor gives her his consent and consequently gives her back her passport. Even though this is not a rule imposed by the General Security, MDWs are forced to forbid their freedom to their sponsor and many guidelines ensure to advice the worker to obtain this unformal approval to be able to leave[72].

I have noticed that the bigger root cause of deprivation of liberty and withholding papers is tying the residency of the MDW to her *kafeel*. It is not quite problematic until one can see that it's resulting to an unequal power between the employer and the migrant worker and the amount of control he has on his worker. With no ground of protection, the migrant is dependent on her employer to enjoy her right to freedom of movement. Thus, lies the failure of the Government to protect MDWs' rights from private interference. The ILO observed that the number of years spent in the country of destination influence the likelihood of granting MDWs more freedom of movement[73]. This observation is to be criticized since the right of movement should not be dependent on the time a person spent in a country, and neither does this statement give any consideration to the other negative impacts and violations that result from this type of deprivation.

One of these impacts is that the worker flees the house of her sponsor or simply leaved without his consent. When a MDWs leaves the house of the *kafeel* without his consent, and for any reason, the sponsor will file an "absconding complaint" before the competent public prosecutor upon which a report will be issued to withdraw the residence permit of the foreigner. Competent authorities have therefore the obligation to detain the worker and consequently deport her, as stipulated in article 36 of the 1962 Lebanese Foreigners' Law:

> *"Aliens without a valid residence permit shall be under penalty of fines and imprisonment"*

Of course, the right of freedom of movement has limitations and expelling a foreigner according to domestic law is not a violation of it as the ICCPR stated in article 13:

> *"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons*

[71] Heather E. Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries' (Cornell International Law Journal,2012) vol.45, 471
[72] ILO Regional Office for Arab States, Lebanon, and Ministry of Labour, 'Information Guide for Migrant Domestic Workers in Lebanon' (ILO, 2012) 12
[73] Marie-José Tayah, 'Decent Work for Migrant Domestic Workers: Moving the Agenda Forward' (ILO, 2016) 68

against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Another impact I can add is related to the work contract. In taking a closer look at the work contract for migrant domestic workers, I notice that a mere failing to comply with a contractual obligation condemns the migrant worker to compulsory leave Lebanon. Thus, she loses the work permit, the residence permit and eventually will be expelled as stipulated by the Foreigners' Law. However, the right to freedom of movement shall not be dependent on these factors, for this purpose the CRMW addresses this gap by adding a provision explicitly addressing the gap; article 20 (2) provides that:

"2. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit."

Nonetheless, Article 16 of the contract[74] gives the right of the employer to terminate the present contract in case the MDW commits a mistake, neglect, assault, or threat, or causes any damage to the interest of the sponsor or any member of his family. This is a vague provision, leaving space for multiple interpretations as the term "any damage to the interest of the First Party" can include any act that might inflict damage to the sponsor. In conclusion, the *kafala* system allows the foreigner to be expelled on grounds of unfulfillment of a contractual obligation. The contract clearly shows the disproportionate dominance of the employer of his worker's rights, given that the contract only obliges the sponsor to send his worker back to her home country if the contract is terminated upon certain violations made by the employer and/or any of his family members. Then, and only then, he is obliged to allow the MDW to return home and therefore he is obliged to give back her papers. Under the ICCPR, this is not a lawful restriction of the right of freedom of movement. Here lies the gap in the enumerated restrictions of the right subject of this sub-chapter as it leaves indefinite discretion to the State and individual's practice and consist of the basis of discrimination as Iglés observed.

3.1.4. Conclusion

I cannot speak about freedom of movement without the concept of liberty and discrimination when addressing migrant workers as subjects to these rights. International instruments addressed the topic of freedom of movement and laid down the principle of non-discrimination in the enjoyment of this right. On the other hand, the ICCPR and the CRMW established the legitime restrictions that States may adopt. However, they are not sufficiently defined and leave the floor for discriminatory deprivation of this right. There is a significant gap in international and national legislation and doctrine in relation to the act of confiscation of travel documents and its implications on the right of movement. One single document has both the power of giving you liberty and the power to confine you from it. Withholding it thus is a clear unjustified violation of the right of freedom of movement within a country and the right to leave it.

[74] See Annex I

The *kafala* system and its practices, limited to this sub-chapter, are a framework that uncover many hidden barriers that a migrant worker can face. There is so much depth to this right that many have failed to identify, and even though we must not constraint this right to any factor including a legal residency, I see that it is inevitable in the sponsorship system. Eventually, one act of deprivation opens the door for other violations such as deportation for breaching a work contract.

3.2. Right to work and enjoyment of just and favourable conditions of work

3.2.1. Introduction

Labour rights and the right of decent work have been recognized in many human rights instruments, applying to all workers despite their nationality. The protection against abusive labour practices extend to migrant workers. Domestic workers on the other hand have been left out of many national labour laws as they are not considered to be "workers" per say as they fall under the stigma of "house helpers"[75]. Effectively, this means that they are not protected by labour law and their working conditions might not fall under the international concept of just and favourable employment situation. Even though the right to just and fair working conditions is divided into numerous rights, I will only be addressing the rights related to fair remuneration and unpaid wages. I will assess how the international community incorporated migrants in decent work agendas and the measures it has taken to combat discrimination in the enjoyment of ESC rights.

In another instance, I noticed that there is lack of research on the legal root causes that are inflicting inequality in remuneration for MDWs internationally and nationally in Lebanon. The following study is entitled solely for the main legal cause which is the exclusion from labour protection, and it highlights the problematic of definition of domestic work and its relation to minimal wages. Jurisprudence of the Lebanese Courts will give concrete examples to the judicial response in this aspect. Therefore, I will first explain the scope of decent work and then narrow it down to analyze the rights of equal pay and minimal wages regarding MDWs. Lastly, I will demonstrate the response of the Lebanese judicial system in case of violations of these rights.

3.2.2. Scope of decent work

Labour rights are a complex set of social-economic rights, and when addressing the topic of decent work, we are actually addressing a variety of different rights. Some scholars such as Mathew Craven divide the right to work to encompass the right to employment, security in employment, and being free from forced labour[76]. However, it is actually much broader and extends to the right of non-discrimination, work-related rights (just conditions of work, working hours, holidays and leisure, equal pay and fair remuneration, etc.) and work-derivative rights[77].

[75] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'General comment no. 1' in 'migrant domestic workers' (2011), CMW/C/GC/1

[76] Rhona K. Smith, International Human Rights Law (Ninth edition, Oxford University Press 2020) 298

[77] Kristina Touzenis and Ryszard Cholewinski, 'The Human Rights of Migrants - Editorial Introduction' (2009), vol.11, no.1, (IJMS: International Journal on Multicultural Societies) 10 <www.unesco.org/shs/ijms/vol11/issue1/intro> accessed 5 April 2022

Putting the work-related rights in an international context was mainly the result of efforts done by the ILO. Ever since its creation, the ILO considered in its constitution that improvement of labour conditions is a way to achieve universal and lasting peace to all members. In 1944 the Philadelphia Declaration adopted at the 26th session of the general conference of the ILO reaffirms the aims and purposes of this organization and it states:

> *"All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity"*

Even though the ILO and the UN international instruments include "everyone" in their engagements, the protection of migrants and their rights was not recognized as a global development goal until the Rio+20 Conference. International recognition of migrants' contribution to development grew and the outcome of this recognition was partially seen in the General Assembly's adoption of the Declaration of the High-level Dialogue on International Migration and Development in 2013. This document called for the respect of International Labour standards, work-rights of migrant workers, and protection of women domestic workers. Indeed, these events paved the way for the 2030 Agenda for sustainable development which include labour rights for all in SDG8[78].

Yet again I have to remind that discrimination plays an important role in the enjoyment of these work rights and throughout this research I find that prejudice against migrant workers is found in almost every aspect. Under the kafala system or not, any alien lawfully residing in the territory of the host state, shall enjoy fair and safe working conditions such as rest and time off. Employers should pay their wages on times and remuneration shall not be less than equal to work of similar value executed by a national[79]. Discrimination is not a modern issue and has existed for long enough to recognize it as a general prohibition in any human rights instrument. When addressing labour issues, the ILO addressed this topic in the 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-up; it sets an obligation over member states to respect, promote, and realize the elimination of discrimination in respect of employment and occupation.

The Committee on the Elimination of Racial Discrimination, in its general recommendation XXX on discrimination against non-citizens[80], reminded state parties to the CERD to "eliminate and prohibit racial discrimination in the enjoyment of civil, political, economic, social and cultural rights". In my perspective, the wording of this document is crucial to put non-citizens as subjects to these rights since the scope of the fight against discrimination was further deepened to include MDWs and migrant workers in general. The general recommendation served the purpose of recognizing the serious problems faced by MDWs and the modern work-related conditions that they are facing including retention of paper and illegal confinement. This is exactly what distinguishes it since few have talked about how retention of papers

[78] ILO, 'Promoting Decent Work for Migrant Workers' (ILO,2015) 3

[79] Declaration on the Human Rights of Individuals who are not nationals of the country in which they live, art 8 (1) (a) (c).

[80] UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 30' in 'Discrimination against non-citizens' (2004), A/59/18

and illegal confinement -socio-economic problems- are part of unfulfilled obligations of states towards employment rights of migrant workers.

This have been reaffirmed in the Domestic Workers Convention (No.189)[81] as a reminder that domestic worker should be protected and granted the same rights at work as those provided to other categories of workers. This Convention added an obligation on ratified States to ensure that domestic workers enjoy, equally to all workers generally, fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy[82].

3.2.3. Legal framework of decent work

Alongside the elimination of forced labour (which will be discussed in the following sub-chapter), labour rights as enumerated by the UDHR[83] entail a different set of rights. For the purposes of this research, I will only focus on the right to a fair remuneration in relation to the nature of domestic work in an international and national context. Much more can be said about employment rights, but the problematic remuneration right vis-à-vis MDWs is one of the core issues with the *kafala* system and it is interesting to capture how the Lebanese jurisprudence has judged on labour cases while domestic work is still excluded from the Labour Law.

I. Equal pay for equal work and fair remuneration

Quoting Rhona K.M. Smith, the right of work is the chain linking an adequate standard of living to equal payment[84]. I can draw from this sentence that these rights are co-dependent and interlinked, and assessing fair remuneration is done in relation to the cost of living in the State of employment. Therefore, one cannot give it an inter-state or transnational criteria. Craven adds that fair remuneration is linked to many elements such as level of skills, nature of the job, responsibilities, risks, and the value output to the local economy.[85] In a nutshell, this all brings me to conclude that we cannot have an international harmonization of what amount of money would constitute a fair remuneration for the same job, but States can achieve fairness through implementing a minimum wage sufficient to ensure a decent living.

On the other hand, the right to equal pay started from a gender-based perspective -as embodied in the ILO constitution- in order to ensure that men and women gain the same pay for a job of the same value. In the framework of human rights, the UDHR supplemented by the ICESCR further developed this right. Pursuant to Article 7 (a), gender-pay based discrimination is prohibited, thus men and women shall be paid the same. Nonetheless, one must not limit these rights to a gender-based definition as unfairness in remuneration transcends gender. Indeed, as labour migration became prominent, people globally started to notice that migrants are paid less than citizens for the execution of the same work. Human rights

[81] Convention Concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 5 September 2013) C189 (Domestic Workers Convention) art 3 (2)
[82] ibid art 6
[83] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 23
[84] Rhona K. Smith, International Human Rights Law (Ninth edition, Oxford University Press 2020) 306
[85] ibid

instruments such as the CERD and others such as the ILO's convention on discrimination in employment and occupation (No.111) stipulate that everyone has the right to fair remuneration that is equal to the value of the work conducted without distinction of any kind. Discrimination based on nationality is therefore prohibited, meaning that aliens and citizens should earn the same amount of money for the same performed task. Similarly, the CRMW made sure to include migrant workers in this discussion and it articulates in article 25 (1) that migrant workers shall enjoy treatment not less favourable regarding remuneration than that which that applies to nationals of the state where they work.

The issue remains that one needs a comparator in order to assess equal pay, and as Smith argued that "it's not possible to effect a direct comparison between two workers, one male and one female, in the same workplace, carrying out the same work[86]". This is debatable since carrying out the same position, the same workload would entail that both workers are remunerated equally, otherwise it would be discriminatory and the same applies if a citizen and a foreigner are executing the same work. For numerous reasons related to their vulnerable situation, migrants often find themselves in an unfavorable position to negotiate compensation of their work, specially MDWs. In a global labour market, one of the least paid occupations is domestic work. An ILO policy brief showed that these workers are typically paid less than half of the average wages. For example, in countries that have adopted the sponsorship system, MDWs in Bahrain gain slightly more than 20% of the average wage while in Qatar they are paid more or less 30%[87].

Following this disproportionality in remuneration, Touzenis K. and Cholewinski R. came to the conclusion that protection from discrimination is of a specific relevance to migrants[88]. In certain aspects of vulnerability, I would agree with this statement even though non-discrimination is universal and applied to everyone under the jurisdiction of the state. When it comes to MDWs there hasn't been any further analysis on how discrimination evolved and took new shapes other than national-citizen distinction.

Alas, in Lebanon I see that the issue of discrimination in wages of MDWs is two-folds: Foreign-Citizen discrimination, and racial discrimination. As domestic work is considered to be a low-skilled job, many Lebanese women refrain from agreeing to work as a domestic worker. The high social standards of the Lebanese society are the first reason why these women do not engage in such occupations. The few that consent to these jobs, are those who demand triple the wages of a migrant worker. It is for this reason that the UN Convention on the rights of migrant workers adopted a provision guaranteeing migrant workers, who obtained authorization to engage in a certain occupation, to enjoy equal treatment that nationals are entitled to in the exercise of the same paid activity[89]. This vacancy became racialized, and employers started paying different wages depending on the nationality of the migrant worker. For instance, Filipino women are considered to be better skilled and more educated and consequently are on

[86] ibid 309

[87] Martin Oelz, 'Domestic work Policy Brief 1' (International Labour Office,2011) p.1 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_155654.pdf>

[88] Kristina Touzenis and Ryszard Cholewinski, 'The Human Rights of Migrants - Editorial Introduction' (2009), vol.11, no.1, (IJMS: International Journal on Multicultural Societies) 6 <www.unesco.org/shs/ijms/vol11/issue1/intro> accessed 5 April 2022

[89] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) UNGA A/RES/45/158 (CRMW) art 55

top of the chain, getting paid the highest wages amongst foreign domestic workers. Other employees who hold other nationalities earn less, with Sri Lankans in a second place and Ethiopians in a third rank[90].

This is in violation of Article 5 of the ICERD that stipulates that states parties' obligation to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of equal pay for equal work, and just and favourable remuneration. Article 2 of ICESCR should always be read in conjunction with article 5 (2) as it places an obligation on the State party to take effective steps in "to the maximum of its available resources" to realize the rights recognized in the covenant. The notion of maximum of its available resources is a hard notion to establish as it varies from one nation to another. Yes, non-discrimination is to be guaranteed towards everyone who should enjoy their rights under this covenant, but Article 2 also gives a margin of appreciation to developing countries with due regard to human rights and to what extend they have an obligation to guarantee them towards non-nationals. It seems at that the time of drafting this covenant it was a good idea to encourage developing states to ratify it as its purpose was to end colonial domination, however easing their duties towards non-nationals has nowadays numerous repercussions that affected aliens negatively and gave reasons for these countries to insufficiently extend their effective protection towards migrants. Reaching back to the minimum core obligation in paragraph 2, I believe that even developing countries should demonstrate that sufficient effort was taken in order to protect migrants against discrimination and to provide them – equally to nationals- the right to enjoy all of their economic, social and cultural rights including their right to equal pay and fair remuneration.

II. Minimal wages

As explained above, the right of equal pay for equal work is hardly established in Lebanon leaving MDWs subject to the will of the employer. This lies in the fact that employers prefer to hire migrants rather than citizens since they would accept remuneration below the standard. In other words, they take advantage of the vulnerability of the migrants and their need for a job to pay less. In a human rights approach this does not comply with a fair remuneration that is enough to ensure a decent living. The least that a person should paid shall not be less that the national minimal wages defined by the national authorities in the state of employment.

Coverage by national minimal wages is a means of protecting all workers against these unjustified inequalities. ILO Convention on domestic workers obliges ratifying states to ensure that they enjoy minimal wage. Here I go back again to the issue of exclusion from labour protection, as minimal wage is a right for those that are including in national labour laws; domestic workers are excluded from it in some countries.

The Lebanese Labour Code devoted the principle of minimal wage in article 44:

[90] Samantha Elia Abou Jaoudeh, 'Migrant Domestic Workers in Lebanon: In between the Kafala system and Abuse' (Masterarbeit im Masterstudiengang Politikwissenschaft: Demokratisches Regieren und Zivilgesellschaft, Universität Osnabrück| 2017) 42

"The minimum wage must be sufficient to meet the essential needs of the wage earner and the needs of his family, provided that the type of work should be taken into consideration, and it should not be less than the official minimum."

The problematic is that paragraph 1 of article 7 of this law excludes "Servants in the homes of individuals" from its provision and thus employers are not obliged to abide by a minimal pay. Even after amending the law by adopting Degree 3791/2016 Amending Decree No. 7426 dated 25/1/2012 related to "fixing the official minimum wage for employees and workers subject to the Labour Law, the cost-of-living rate and how to implement it"; it still excluded domestic workers from its protection since it only applies to persons subject to the Labour Law.

In its international obligations, this exclusion is in accordance with the ILO Minimum Wage Fixing Convention (No.131) of 1970 which Lebanon has ratified unlike the domestic worker convention. Each member that has ratified the minimal wage convention undertakes to establish, under its full discretion, a system of minimum wages which covers all wage earners. Determining the group of workers that are eligible for this system is left to the competent national authority, but it must justify why it chooses to exclude certain occupations from it. Subsequently, the member state should periodically report to the ILO on the position of its laws and practices in respect to the uncovered groups[91]. In accordance with these provisions, Degree 3791/2016 defines the minimal wage and those that can benefit from it and those who are uncovered. There is much to be said critically about this Convention since it leaves certain groups of workers unprotected, but this convention should be read in conjunction with article 2 of the Protection of Wages Convention of 1949 (No. 95).

Indeed, In the last ILC report of 2022 drawn by the Committee of Experts on the Application of Conventions and Recommendations, the committee notes the importance of extending the protection of the Lebanese Labour Code to list of workers that have been excluded from it under Article 7. It recalls that these occupations including domestic work fall under the scope of article 2 of the Protection of Wages Convention of 1949 (No. 95) that sets forth that the Convention applies to all persons to whom wages are payable, such as domestic workers. If the extension of labour law protection to them is not perceivable, then other measures should be taken.

The committee seems to have neglected paragraph 2 of article 2 of the Protection of Wages Convention of 1949 (No. 95) that clearly mentioned that national competent authorities may exclude some categories of people "*whose circumstances and conditions of employment are such that the application to them of all or any of the said provisions would be inappropriate and who are not employed in manual labour or are employed in domestic service*" from the application of its provisions. However, this does not relief the national authorities from adopting effective measure to ensure fair remuneration to all workers.

In the light of this issue, Qatar's legislation seems to be on the reform side of its labour law. Although it did not ratify the Domestic Workers Convention (No.189), It has adopted the new Law No. (17) of 2020

[91] Convention Concerning Minimum Wage Fixing with Special Reference to Developing Countries (adopted 22 June 1970, entered into force 29 April 1972) C131 (Minimum Wage Fixing Convention) art 1

setting the minimum wage for workers and domestic workers which came into force on 20 March 2021. Wage protection of domestic workers, foreign or citizen, is now integrated into the minimum wage law. This law is to be considered a good practice in a country which adopted the *kafala* system since it finally gives domestic workers the definition of an employee. The first provision of this new law defines the term employee as:

> *"The employee: the natural person who performs domestic work, under the management and supervision of the employer, in return for a wage, such as the driver, the nanny, the cook, the gardener and the like of them."*

It further gives the worker additional protection, in case of a live-in domestic worker or if the employer provides accommodation in addition to food, the employer shall not deduct those expenses from the minimum wage.

Giving Qatar as an example is a way to show that the main reason for excluding domestic workers from the minimal wage protection, fair remuneration, equal pay and in general from the Labour Law, is all due to the problematic definition of what is domestic work.

Not giving domestic workers the title of an employee is not just found in one country. I believe that legislators and policy makers do not see the negative implications of such exclusion; the issue does not stop at wages, but it transcends to rights of compensation in case of work injuries and even death in the process of fulfilling their duties. My reasoning is not only related to the fact that they are working under an employment contract like any other employee, as people of law we have to always remember that morality, humanity, and dignity come hand in hand with law. These women are often head of families, whose members are financially dependent on them, and excluding them from labour protection is thus discriminatory and it renders their situation invisible. This argument has been raised before the Constitutional Court of South Africa[92], in a case raised by a daughter of a deceased domestic worker against the minister of labour. The domestic worker died after drowning in her employer's pool while working, and her daughter was denied compensation for the death of her mother since domestic workers are excluded from the social security system -Compensation for Occupational Injuries and Diseases Act (COIDA)- and are not considered as employees. The judgement ordered the invalidity of this exclusion and it held that

> *"*[119] *The limitations on the fundamental rights outlined above are neither reasonable nor justifiable"* and *"*[117] *Unquestionably, the right to equal protection of the law, the right not to be discriminated against unfairly and the right to dignity are of singular importance in our constitutionalism. Equally, the right of access to social security is important. It seeks to uplift the vulnerable and marginalized from destitute conditions and for that reason, it is also closely linked to the value of and right to dignity."*

[92] Mahlangu and Another v Minister of Labour and Others (CCT306/19) [2020] ZACC 24

I chose this decision as it is a cornerstone in the history of MDWs' rights, and it further affirm that not extending labour protection to this category of workers is deliberately unjustifiable and have discriminatory impacts that are prohibited under international law. However, one must see the two sides of a coin. Some view this exclusion justifiable because of the personal employment relationship between the domestic worker and the employer. I find this too extreme of a justification and perhaps the reasoning behind this is that there are different definitions to what is domestic work and whether it should be regulated under the scope of labour law. The live-in-situation and sponsorship systems make it hard for legislators to fully include domestic workers in the labour law provisions; a new approach of partial inclusion in this code can be accomplished and some countries have adopted this approach after the entry into force of the ILO domestic workers Convention. Portugal for example subjects domestic work to a specific regime governed by Decree Law No. 235/92 of 24 October 1992, but it also subjects their work contract to the general rules of the Labour Code. This comes hand in hand with the Committee's observation (The Committee of Experts on the Application of Conventions and Recommendations) stating that as long as the wording of the labour code does not exclude domestic work from its general provisions then regulating this work relationship under specific law, regimes, or provisions is advisable as long as these provisions specifically define their scope of application[93].

3.2.4. Unpaid wages and the Lebanese judicial response

In respect to remuneration and other working conditions, there shall be no derogation from the principle of equality of treatment between nationals and foreigners[94]. According to Protection of Wages Convention (No. 95), every person who earns payable wages, should be paid on a regular basis prescribed by appropriate arrangements, national laws, and regulations, or fixed by collective agreement or arbitration award[95]. Domestic workers shall be paid at a regular basis at least once a month according to Convention No.189. According to the supplementary recommendations of this Convention (No.121), each payment should be recorded in an account given to the worker, including any deduction and the justification behind it. Moreover, any outstanding payment should be paid upon termination of employment[96].

The work contract for MDWs regulating the employment relationship of the *kafeel* and the worker imposes that the employer is obliged to pay the employee her full salary, accompanied by a written receipt signed by both parties, by the end of each working month without unjustified delay[97]. In case the employer does not withhold his commitment for three consecutive months, the employee shall be entitled to terminate the contract with the employer taking full responsibility.

[93] International Labour Conference, *Securing decent work for nursing personnel and domestic workers, key actors in the care economy* (ILO, 110th session, 2022) 240
[94] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art 25 (2)
[95] C095 - Protection of Wages Convention, 1949 (No. 95), art 12 (1)
[96] R201 - Domestic Workers Recommendation, 2011 (No. 201), para 15
[97] Work Contract for Migrant Domestic Workers, art 6 (See Annex I)

Most complaints of MDWs are related to non-payment of wages and when employers are asked about their justified reason, it is usually related to their fear of losing the financial investment that they had paid to hire the migrant worker. When interviewed, one employer replied that[98]:

> *"If we give them their salaries on time, they will flee to seek other opportunities"*

Since they are excluded from the Labour Code, the jurisdiction of the Labour Arbitration Council in conflicts that emanate from this work relationship is debatable. Article 79 (3) of the Labour Code did stipulate that this Court has jurisdiction:

> *"Over disputes arising from dismissal from service and leaving work, imposing fines and, in general, in all disputes arising between employers and employees from the application of the provisions of this law."*

In a case where a domestic worker filed a case against her employer demanding the payment of her wages with the amount of /11,364/ Lebanese Pounds, the court considered that, according to article 7 of the Labour Law (which excludes MDWs from its provisions), the Labour Arbitration Council does not have competence over this dispute.

> **Sahakian v. Malousian and others, Labour Arbitration Council, Award No.349 dated 18/03/1966**
>
> The extend of the Labour Arbitration Council's jurisdiction to consider claims of domestic servants demanding payment of their wages.
>
> The Award:
>
> *"Where it is recognized between the two parties that the plaintiff was working for the defendants as a maid in their home and that the wages demanded are the allowances of her salaries and what is subtracted from her as a result of her said work.*
> *And since it is decided under Article 7 of the Labor Law that servants in the homes of individuals are excluded from the provisions of this law.*
> *Whereas the plaintiff and the defendants agreed on the aforementioned qualification. And since in the light of the foregoing, the case referred to the Council is outside its jurisdiction, which requires its dismissal."*

This decision reaffirms the argument stated in the sub-paragraph on minimal wages concerning the issue of defining domestic work. The Court here explicitly considers this occupation to not work related but rather considers these persons as maids and home servants. Nonetheless, the practice of Courts relating to work-related rights and obligations isn't uniform. Some Courts considered the work relationship between the two parties to fall under the scope of the law of obligations and contracts since this general law is applicable in case a legal void was found in certain cases. Jurisprudence did not entirely deny the

[98] Nadim Houry, Without Protection: How the Lebanese Justice System Fails Migrant Domestic Workers (Human Rights Watch 2010) 21

rights of MDWs, such as the following case of the right to compensation for the termination of the contract where the Court acknowledges that termination of this work contract is subject to the common law.

Civil Appeal Court, Beirut, Case No. 757 dated 15/06/1954

"The wage earner who works as a domestic servant is entitled to compensation for the termination of the contract issued by the employer, unless it was caused by a breach of the contract or a mistake committed by the wage-earner, because domestic servants may invoke their violations with the employer according to the provisions of the common law. The wage earner who works as a domestic servant is entitled to compensation for the termination of the contract issued by the employer, unless it was caused by a breach of the contract or a mistake committed by the wage-earner, because domestic servants may invoke their violations conducted by the employer according to the provisions of the common law."

Amendment took place in 1980, and article 1 of Decree no.3572/1980 added to the Labour Arbitration Council's jurisdiction competence over individual labor disputes arising from labor relations within the meaning of Article 624 (1) of the Law of Obligations and Contracts. This provision perfectly fits the definition of domestic work as it stipulates the following:

"*A work or service lease is a contract whereby one of the contracting parties undertakes to put his work at the service and under the direction of the other in return for a remuneration which the latter undertakes to pay to him."*

One should not confuse this amendment to be an extension of the labour protection, but it is however a measure of legal protection to MDWs to have the Labour Arbitration Council hear the work-related cases of these workers.

Although, the Labour Arbitration Council considers cases emanating from any violation of the obligations set out in the work contract of the domestic worker, it does not mean that this work relationship is fully protected by the Labour Law's provision as a result of the exclusion. Unpaid wages can be demanded and granted to the worker by a court's decision, nevertheless, the domestic worker cannot benefit from other workers' privileges such as Compensation for arbitrary dismissal, prior notice, and annual vacations. In the case of Khoury v. Daoud before the Labour Arbitration Council of Beirut (dated 26/11/2002), the Council justified not ruling on these rights under the reasoning that the domestic worker is not subject to the Labour Law, it held that:

"A domestic driver is listed under the category of servants in the homes of individuals and is not subject to the Labour Law, and the Labour Arbitration Council remains valid to consider the case, even if the plaintiff not subject to the Labor Law as long as the dispute is an individual dispute arising from a work contract.

The plaintiff does not benefit from compensation for the arbitrary dismissal, prior notice compensation, and annual vacations for not being subject to the Labor Law.

And if the plaintiff is from the category of servants in the homes of individuals, he is linked to a work contract with the employer and must be registered in the social security."

3.2.5. Conclusion

The moral of this sub-chapter is the fact that there is still a lot of reforms that should be done on an international and national level. Including migrant workers in wages protection schemes, in particular MDWs, is a measure that not all states are happy to take. Although conventions are clear on the notion of non-discrimination regarding these rights, there is still an issue of admitting that domestic work is a work relationship between a homeowner and the worker and thus should be adequately included in labour protection. The exclusion of both labour laws and official minimal wages exacerbates the exploitation of these workers. Ratification of the CRMW and the ILO Convention on domestic work would solve these matters since a concrete definition is stipulated in the ILO Convention and CRMW obliges ratifying states to ensure fair remuneration to migrant workers.

3.3. Free choice of employment

3.3.1. Introduction

Labour mobility is a protection net against unemployment, but when discussing labour mobility in immigration one has to question to what extend can policies established by governments and states limit the right of a migrant worker to freely chose and change jobs. Although the right to be discussed in this sub-chapter is recognized in many international conventions and it covers all individuals, there are national restrictions to the enjoyment of this right imposed on MDWs that are not regulated by these conventions. In order to unveil these restrictions, the sub-paragraphs will first address the right to free choice of work in an international context with the focus on CRMW since it frames this right towards migrant workers. Secondly, I will explain how the sponsorship system has created a new dimension to the right to free choice by linking the enjoyment of this right to the sponsor.

3.3.2. Derogations and limitations of the right of free choice of employment

Free choice of employment is one of the core labour rights established by Article 23 of the UDHR. As all labour rights, it shall be ensured to everyone without any interference from authorities and private individuals. This right became part of the work-related rights that everyone is entitled to enjoy, and it clearly made it into the international labour standards in Article 6 (1) of the ICESCR, stipulating that everyone should have the opportunity to make a living through a work which he freely choses.

Swepston views this right from two dimensions: being free from compulsory labour freedom of choice of work[99]. In his argument, the right to freely chose an occupation has its roots in previous cases where governments assigned work to individuals under which they would be penalized if they do not perform

[99] Lee Swepston, The Development in International Law of Articles 23 and 24 of the Universal Declaration of Human Rights: The Labor Rights Articles (Brill Nijhoff 2014) 40

it[100]. The connection between these two dimensions is the principle of workfare raised by the ILO in relation to the social security conventions:

"Negation of compulsory work by the concepts of suitable and freely chosen employment[101]"

Swepton's view holds an important criterion as restricting or denying the right of freedom of choice of work intensifies the chances of the person in question to be trapped in situations of forced labour. On the other hand, one cannot choose a job unless there are employment opportunities available to him. Similarly, state Parties of the ICESCR recognize this right to all individuals including aliens, and they shall take appropriate steps in order to realize this right including the adoption of appropriate policies to achieve productive employment that safeguards fundamental economic and political freedoms of the individuals[102].

For migrants, refugees, and non-citizens in general, accessing employment in sectors of which they desire is a hard task to accomplish since the host state places many limitations either related to work permits or residency status. The general principle is that gender and racial discrimination in this area is in principle prohibited and States should undertake to effectively guarantee to everyone[103] equality notably in the enjoyment of their right to work and free choice of occupations[104].

For a migrant worker, his work options can be dependent on his legal status in the host state, and to whether or not his residency is linked to the occupation upon which he received his work permit, all in accordance with national legislation and policies. Additionally, some States adopt the principle of "mutual recognition of occupational qualifications" by which they can limit access to certain occupations unless there is mutual recognition of occupational qualifications outside its territories and between each other. Meaning that for migrants coming from countries that do not adopt this principle vis-à-vis the host state there's a limitation to their choice of work.

Other forms of restrictions can be found in the CRMW and ILO Conventions. Article 8 of the ILO Convention on Migration for Employment (No.143) gives member states the ability to restrict the right to free choice for not more than two years, but it also entails that if a migrant loses his job, he shall lose his residence permit. The CRMW has been criticized by many for diluting the right to free choice of work. Ayesha Shahid observed that the CRMW is weak and that it "*it fails to address the gender specific problems faced by female migrant workers, and it limits itself to a relatively vague and undifferentiated treatment of foreign domestic workers[105]."*

[100] ibid 66
[101] ibid 69
[102] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1966) 993 UNTS 3 (ICESCR) art 6
[103] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 15 (4) - art 11 (1) (c)
[104] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) (CERD) art 5 (6) (i)
[105] Ayesha Shahid, 'Valuing women's labour: Law, empowerment and human rights of migrant filipino domestic workers in Pakistan' (Brunel University London, 2014) 4

Following Shahid's criticism, the CRMW dedicates article 52 to address the right of every migrant worker to freely choose his remunerated activity. Nonetheless, it has widened the scope of conditions and limitations. It is clear that the intention was to cover all regimes under which labour migration is regulated, but these conditions make the enjoyment of this right complex. At first instance, it gives the member states the right to restrict it whenever there is a necessity regarding state's interest. Many more restrictions are added for those whose work permits are limited in time, such as conditioning the right of free choice to a continual legal residency for the purpose of employment for a period that does not exceed two years, and limiting access to certain occupations in case there is a policy prioritizing nationals unless the migrant has legal residency for the purpose of employment for a period that does not exceed five years[106].

The speculation remains that CRMW does not protect all groups of migrant workers such as those working under the *kafala* system. In some national rules regulating labour migration, unemployment and irregular status cannot exist without each other. An irregular status can be explained as an alien losing the legal authorization to reside in a country, or he entered the territory of a state without following entry requirements. It is quite logical to consider irregular migrants as a burden on the host state, who will eventually adopt measures of expulsion and deportation that might be hindering human rights of the aliens.

Let's follow the procedure of how a migrant worker receives an authorization to reside in Lebanon. The main objective for them is to accept a job offer with a Lebanese sponsor/agency who will proceed to apply for a work permit and then a visa for the prospective employee. The residency permit is linked to the occupation and therefore to the *kafeel*, and as we have seen before, if this foreigner wants to change jobs or leave, she needs to follow certain procedures before the General Security that are all dependent on the *kafeel*. Otherwise, the foreigner will be considered as an absconder, forced into irregularity after his residency permit is withdrawn upon an absconding complaint filed against her by the employer. All of this leads to the same conclusion, she will be arrested and then expelled.

Article 51 of the CRMW did cover such a situation by addressing the topic of linking irregularity to deprivation of freedom of labour mobility. To put it simply, except for when a migrant worker's residency is dependent upon her paid activity, in addition to the fact that she is not permitted to freely choose her occupation, then national authorities are not allowed to consider him in an irregular situation or deprive her of her residency in case of termination of her work contract (given that it happens prior to the expiration of his work permit). For those whom authorization of residency is dependent on their employment situation, they have the right to seek alternative employment and participate in retraining programs as long as they do not exceed the limits of what is specified in the work permit. This renders the criticism of indifference towards MDWs debatable.

[106] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) UNGA A/RES/45/158 (CRMW), art 52

3.3.3. A brief comparison with the *kafala* system in Lebanon

I need to approach this subject from two different points of view: Are MDWs free to accept job offers they are interested in before coming to Lebanon? and do they enjoy freedom of changing their current job?

As explained in the sub-chapter on the *recruitment process***,** the prospective migrant worker needs to guarantee a job offer in Lebanon to be able to obtain a visa for employment.

For the first part of the approach, if a foreign woman seeks work as a domestic worker in Lebanon, she will be in contact with a private agency in her home country that will set a connection between her and a Lebanese agency that will offer her a job. Therefore, the answer is yes, there is a free choice of employment in this matter since the act of reaching an agency that will provide her with a job offer as a domestic worker is enough to establish that she practiced her right of choice of work. However, one could argue that even though MDWs chose their type of renumerated activity, their ability to choose employers is questionable since employers select the worker amongst many profiles gathered by the agency. Notably, the only limitation imposed by the Lebanese national authorities is the condition to obtain a work permit in order to practice the chosen activity. This does not constitute a restriction to the right of free choice as established by international law.

In a second matter, migrant workers' ability to freely change jobs is restricted and conditioned by many elements. First and foremost, the residency authorization for the MDW to reside and work in Lebanon can only be issued after receiving a work permit from the Ministry of Labour. The residency permit itself cannot exist without the *kafeel*, who's the person responsible for the migrant worker. No sponsor, No legal residency. Changing jobs is therefore conditioned by finding another sponsor and applying for a "sponsorship transfer" before the General Security after the prior sponsor signs a notarized release waiver. However, the worker must remain at the service of the initial sponsor until the application has been approved. This request should be submitted at least 15 days before the residency permit of the worker expires. It should be noted that according to the General Security's regulations, the MDW can only change sponsors twice during their time in Lebanon. Meaning that they either are obliged to remain with the previous sponsor, or they have to leave Lebanon. In case of termination of the work contract, as stipulated in its articles 16 and 17, the worker shall be obliged to leave Lebanon. Again, the MDW shall be allowed to stay if she finds a new sponsor.

It seems like an unbreakable chain where the free choice of work is linked to a single person, namely the sponsor. However, these limitations seem to be in accordance with article 51 of the UN Convention on the rights of migrant workers as MDWs fall under the exception of those whom residency is dependent upon their paid activity. Nonetheless, this instrument is likely to have ruled out the situation of MDW who are considered as irregular and lose their residency permit in case they leave the house of the sponsor for reasons related to forced labour and maltreatment, also known as termination of the contract on the fault of the employer. There is definitely a gap in addressing national immigration policies that give full power to an individual over the livelihood of a migrant worker where the residency is not only tied to the occupation but also to the employer.

3.3.4. Conclusion

In conclusion, Lebanon is not a signatory of the CRMW or the ILO conventions on domestic work and migration for employment, but it is still obliged to respect human rights conventions and customary international law in providing core protection to MDWs. Nevertheless, a major gap is noticeable in international law addressing the right of freely changing jobs as part of the right to free choice of employment. The CRMW did encompass provisions that may be suitable to cover different immigration policies; however, it did not sufficiently protect the rights of those working under the sponsorship system. Namely, conditioning their free choice of work to the approval of a single individual and only allowing them to do so twice during their residency. These are new restrictions uncovered by human rights and labour rights instruments.

CHAPTER 4: ASSESSMENT AND SUGGESTED REFORMS

Issues and gaps of already existing legal frameworks and immigration policies seem to resurface every time a new crisis strikes. As the Committee of Experts on the Application of Convention and Recommendations expressed in its 2022 General Report, the Covid-19 pandemic "exposed the blind spots of pre-existing legal and policy frameworks exacerbating inequality and poverty and stalling, or even reversing, the progress made towards sustainable development and towards realizing the SDG 8 vision of full, productive and freely chosen employment and decent work for all"[107]. The pandemic exposed the harsh reality of how migrant workers are treated, laying down how precarious migration policies have deeply rooted inequality and patterned exploitation of migrants in our modern societies.

The international community plays a harsh and complex role in the field of migration. Since migration is both a domestic and international concern, there is hardly ever a balance between international migration law and domestic legislation. As we have seen, migrant rights are scattered all over multiple conventions and instruments which creates a certain amount of confusion to scholars, lawyer, and activists. The issue remains that even though we now have the ICRMW, there is still a lack of international response and very low ratification rate. Migration remains a feared topic and states prefer to regulate it internally rather than locking themselves to international obligations. We cannot seem to find common ground on migration, asylum and refugees as these individuals are seen as a burden on States rather than an asset to their economic and cultural diversity. Diversity has proven again and again to be challenging and unaccepted by many, all of these challenges have paved the way towards trafficking, exploitation and smuggling of those who are desperately seeking a decent living abroad.

Writing this dissertation proved that in every rule governing the rights of migrants, the benchmark is non-discrimination. Which is evident since all rights and freedoms enshrined in the UDHR derive from "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"[108]. Sadly, the principle of non-discrimination remains merely ink on pages. While focusing on three

[107] International Labour Conference, Application of International Labour Standards 2022: Report of the Committee of Experts on the Application of Conventions and Recommendations (ILO, 110th session, 2022) 47
[108] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) preamble

fundamental standards of migrant workers, I can conclude that international law neglected many human rights violations towards MDWs and the *kafala* system. I can see that in four conclusions.

First, sponsors are allowed to confiscate the MDWs' papers and therefore depriving them of their right to move within a country and to leave it. The ICCPR adopted justification grounds that allow states to restrict this right, but it is not strictly defined and leave too much discretion to national authorities. Even though the ILO Convention C-189 and the ICRMW stipulated that MDWs are entitled to keep them in their possession, Lebanon only ratified the ICCPR here and thus is not bound by these rules. Meaning that neither the law nor the work contract protects MDWs from this practice.

Secondly, giving MDWs the title of workers by Convention C-189 was not enough to ensure that domestic workers are entitled to labour law protection since many did not ratify it. As a result of this, MDWs are denied labour protection under the *kafala* system and thus employers are not obliged to abide by the official minimal wage or even to equally pay them for their job. The ILO protection of wages conventions neglected these workers and allowed member states to exclude them from it. Obliging states to adopt substitute protective measures to ensure fair remuneration to all workers did not work. No measures were adopted, and consequently MDWs were denied their labour rights before Courts.

Thirdly, the right to change jobs should be recognized as the right to free choice of employment. Although tying the residency permit of a MDWs is in itself not problematic, its implications raise many concerns. Namely, it created a new form of restriction of the right to free choice by conditioning the choice of changing jobs to the will of the sponsor and only twice during the residency of the worker. None of the conventions related to migrant workers addressed this issue and there is a need of an explicit provision that allows MDWs to be free to change jobs unilaterally without any prior permission specially in case of abuse, and exploitation.

That being said, the international community should put more effort into protection migrant workers in low skilled jobs. Confiscation of papers should be explicitly condemned, free choice of changing jobs should be on the agenda of providing decent work for migrants, and states should be allowed to impede the right to freedom of movement only on the basis of strictly defined restrictions that don't constitute a basis of arbitrary discrimination. Making the right to keep travel document in one's own possession as a fundamental right stipulated in not only migration conventions but also in human rights instruments. All of these standards should be promulgated into one concrete convention since having scattered provisions does not accomplish noticeable improvement. Most importantly, excluding some occupations from labour law protection and wage protection cannot just be solved by demanding states to adopt other measures. Protective measures should be concretely stipulated in migration conventions as an obligation on member states.

In the midst of this, one can realize that the basis of MDWs' deprivation of certain fundamental rights lies in the disproportionate power of the *kafeel* over their work and also on their personal live. The reasoning behind this is the fact that MDWs are live-ins workers and spend their entire time under the supervision of their employer. The CRMW, Convention C-189 and relevant conventions in general, have neglected the situation of these workers since evidently their stories are invisible behind locked doors. Labour inspection

measures and trained to inspectors should be strengthened to encompass these occupations in order to uncover the accurate number of MDWs faced with exploitation.

On a national level, the *kafala* system in Lebanon does hinder the enjoyment of labour and human rights of migrant workers; however, it is not the only hinderance since traditions and practices play a huge role in contributing to the exploitation of MDWs. Numerous literatures and researchers are demanding the abolishment of this system as if removing the concept of sponsorship would solely put an end to violations of migrant workers' rights. The matter in question goes far deeper than it appears to, and reforms should not only be limited to immigration policies.

Scattered rules, guidelines and regulations that govern the recruitment process under the *kafala* system is complicating things and allowing for lack of supervision of the whole procedure. Many actors are involved in bringing the prospective foreigner to work in Lebanon. While the General Security manages and oversees entry and exit matters, all the rest is left to the PRA and the employer. The Government and more precisely the Ministry of Labour and Social Affairs should be more involved.

It is evident that there must be a legislative act that encompasses the legal framework of the *kafala* system. By following the provisions of Domestic Workers Convention No.189, MDWs shall be considered as workers in this Bill. Finding a sponsor as a requirement to legally work and reside in Lebanon shall be kept, as it is a national matter of the Lebanese Government to regulate inflows, and in itself it does not breach any rights. As a worker, the Bill shall stipulate in its provisions all components of decent work including minimal wages, fair remuneration, freedom of movement, etc. Therefore, it is unacceptable to have an article in the work contract giving the employer the authority of limiting phone calls and correspondences or the worker[109]. It is crucial to provide an article that condemns the practice of confiscation of papers, done either by the PRA or the employer, by criminalizing the act and clearly considering it as an act amounting to deprivation of liberty, forced confinement, and restriction of movement under article 569 of the Lebanese Penal Code. After defining them as workers, the Labour Code should extend its protection to low-skilled workers such as domestic workers in order to provide them with the same judicial protection enjoyed by employees in other sectors. This would be the ground of ensuring that the *kafala* system is promulgated with relevance to the international standards of migrant workers. Satisfactory results would be assured. Furthermore, I mentioned that MDWs sign two work contracts, and the first of those in not valid in Lebanon, this affects the validity of the consent of the MDW who initially signed a contract in her home country and then signed another one in Lebanon with different and more stringent conditions. Even though the terms of the Labour Code establish that the contract with the most protective conditions for the employee is the one that shall be applied, it will thus be possible for MDWs after amending the Labour Law. The Labour Arbitration Council would be able to render a decision of compensation for the arbitrary dismissal, prior notice compensation, and annual vacations. Furthermore, domestic worker would benefit from minimum wage as set out in the latest Decree.

The new Bill can regulate the free choice of employment this by the following proposal; instead of subjecting the right of free choice of employment to a sponsorship transfer application that can only be

[109] Annex I, art 14

applied twice, a rule can be adopted to allow MDWs who completed their first term of the work contract to freely change employers without putting any limitations on how many times they can practice this right as long as their work permit is still valid. If the national authorities wish to restrain this right legally for a reason of public interest, the rule can add a prior approval from the minister of labour as a requirement.

Lacunas in the recruitment process entail the lack of institutional system of monitoring private recruitment agencies, as PRA are not controlled nor regulated by the Ministry of Labour and the blacklist of agencies is not frequently updated. Effective labour inspection is hard to achieve with only 20 labour inspectors entrusted to on-site inspections of all PRA operating on the Lebanese territories. It is much more complex for MDWs since they live in the household of the employer, and there are many rules protecting the sanctity of the house from interventions. The only possible way for this kind of investigation to take place, is in the case of a crime where the police can acquire a warrant to enter the house. However, it can be made as an obligation on the employer, where at the moment he applies for a work permit for the worker he agrees to allow labour inspectors periodically inspect the living and working situation of the worker.

A lot of work needs to be done in order to achieve the goal of ensuring the respect of international standards of migrant workers. The international community is heading towards this goal, and it has already put these standards in legally binding conventions such as the ILO Convention No.189 and the UN Convention on the rights of migrant workers. The response of the member states towards these efforts are however concerning, since both conventions have a low ratification rate and countries are reluctant to abide by international rules that would affect their sovereignty over immigration policies. Attention is often given to matters that are of a bigger importance to States, differing the attention from the reality of how migrants are living on their territories. Awareness should be spread on this subject, taking as example the good practices of countries that have ratified these conventions. Periodical reports and direct requests will not create immediate response of member states, this is why stronger accountability measures should be adopted at international level. As peer pressure and public reports do publicly shame a certain practice but it does not fix it nor abolish it, and recent events have proven that present monitoring and follow-up mechanism have failed to protect migrants from human rights violations.

ANNEX I

The Republic of Lebanon
Ministry of Labour

WORK CONTRACT FOR MIGRANT DOMESTIC WORKERS

Signed between:

The First Party: (Employer): Full Name: ..... Nationality: .....

Born in: ..... Having his/her place of residence at: .....

Family Status: ..... Location of Register: .....

ID, Individual Registration Certificate: .....

Address: ..... Telephone: .....

And

The Second Party: (Employee): Full Name: ..... Nationality: .....

Passport no.: ..... Date of issue: ..... Date of expiration: .....

Born in: ..... Family Status: .....

Having his/her place of residence at address: .....

Whereas the First Party wishes to employ a person who enjoys competence, experience and skill to work for him/her in the capacity of a domestic worker.

Whereas the Second Party enjoys the aforementioned characteristics.

Therefore, both Parties mutually agreed on the following:

1) The introduction to this Contract shall be an integral part thereof.
2) The First Party agreed that the Second Party works for him/her as a worker in his/her house. The Second Party consented to the aforesaid capacity in accordance with the terms and conditions stated under the present Contract.
3) The First Party shall undertake not to employ the Second Party in any other work or place that is different from the place of residence of the First Party.
4) The duration of this Contract shall be defined by one (1) year renewable.
5) This Contract shall enter into force as of the date on which it is concluded by both Parties before the Notary Public, including the probationary period of three months.

*As per Unified Contract Decree No. 19/1 dated 31/12/2009.

6) The First Party shall pledge to pay to the Second Party by the end of each working month his/her full monthly salary, which is agreed upon in the amount of ....., without unjustified delay. The salary shall be disbursed in cash directly to the Second Party, in pursuance of a written receipt to be signed by both Parties or in pursuance of a bank transfer with a written receipt to be signed by both Parties as well.

7) The Second Party shall pledge to perform his/her work in a serious and sincere manner and to comply with the instructions of the First Party, taking into consideration the work rules, customs and ethics and the privacy of the house.

8) The First Party shall pledge to meet the requirements and conditions of decent work and fulfil the Second Party's needs, including food, clothing and accommodations with which his/her dignity and right to privacy are respected.

9) The First Party shall pledge to guarantee medical care for the Second Party and to obtain an insurance policy from an insurance company recognised in Lebanon in accordance with the conditions prescribed by the Ministry of Labour.

10) The First Party shall pledge to obtain a work permit and authorisation of residence for the Second Party in due form at his/her own and full expense. He/she shall also pledge to renew them as long as the Second Party works for him/her.

11) The First Party shall fix the working hours for the Second Party at an average of ten (10) non-consecutive hours a day at most, including at least eight (8) continuous hours of rest at night.

12) The First Party shall pledge to grant the Second Party a period of weekly rest of not less than twenty four (24) continuous hours, the conditions of the use of which shall be defined by agreement between both Parties. The Second Party shall also be entitled to benefit from an annual leave of a period of (6) six days. Both Parties shall define its timing and the conditions of its use.

13) The First Party shall secure at his/her expense a ticket for the departure of the Second Party and his/her return to his/her country, except in the cases agreed upon in Article (16) of this contract.

14) The First Party shall undertake to allow the Second Party to receive telephone calls and correspondence intended to the latter as well as to permit the Second Party to communicate with his/her parents once per month on the expense of the First Party, and otherwise the Second Party shall bear the cost.

15) If the Second Party has a sickness other than that derived from his/her services and work-related injuries, she or he has the right to a sick leave based on a medical report for half a month with pay and half a month with half pay.

16) The First Party shall be entitled to terminate the present Contract in the following cases:

   A. In case the Second Party commits a deliberate mistake, neglect, assault or threat, or causes any damage to the interests of the First Party or a member of his/her family.

   B. In case the Second Party has committed an act that is punishable by the Lebanese laws in force in accordance with a court judgement.

   C. In these cases, the Second Party shall be obliged to leave Lebanon and to pay the price of the return ticket home from her/his own money.

17) The Second Party shall be entitled to terminate the Contract with the First Party taking full responsibility in the following cases:

   A. In case the First Party does not honour the payment of the salary of the Second Party for a period of (3) three consecutive months.

B. In case the First Party or a family member of his/hers or any resident in his/her house beats, assaults, sexually abuses or harasses the Second Party, after such has been established through medical reports given by a forensic physician and investigation records provided by the Judicial Police or the Ministry of Labour.

C. In case the First Party employs the Second Party under a capacity other than that under which he/she had recruited him/her without his/her consent.

In these cases, the First Party shall be obliged to return the Second Party to his/her country and to pay the price of the travel ticket.

18) In the event of a dispute between the Parties of this Contract, it may be lodged to the Ministry of Labour to settle it amicably.

19) Upon failure of an amicable settlement of the dispute, the aggrieved Party shall be entitled to seek redress at the competent Lebanese Courts.

20) This Contract has been drawn up before the Notary Public in Arabic and signed by both Parties.

First Party **Second Party**

For the Notary Public's Use

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