



Temporary Migrant Workers in Saudi Arabia: Kafala System and Protection of Migrant Workers

By

Osameh Hosen Gnaei

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ABSTRACT

The Kafala system in Saudi Arabia is a system of engagement of foreign migrant workforce, where migrant workers are bound to a sponsor, usually the employer, known as ‘kafil’. The Kafala system has become a backbone of Saudi economy, due to the large contribution from Kafala workforce. Despite this, the system has faced significant controversy in recent times, with many raising concerns on its impact to the rights of migrant workers.

While various elements of public and private regulation of the Kafala system have already been assessed as rights-restricting, this thesis looks at the effects of the Kafala system on migrant workers’ rights. Particularly, the rights concerning freedom of movement, freedom of association and, the principles of non-discrimination and (formal as well substantive) equality. This thesis adds to the existing discussion on the impact of the Kafala system on migrant workers, by questioning: “To what extent are the recent reforms to Saudi Arabia’s Kafala system legitimate, compatible with international instruments and compatible with Islamic law, for the purposes of protecting migrant workers?”

In answering this question, this thesis has critically evaluated aspects of governance and enforcement of migrant workers’ rights through the lens of three distinct, but intersecting, frameworks of law.

Firstly, the Kingdom’s obligations under international (treaty and customary) law were assessed, which led to mixed results. There is some indication that the Kingdom has begun to take steps to implement its obligations on specific issues such as labour protection. However, Saudi Arabia has been reluctant to bind itself formally to any international obligations that may dilute its sovereignty, including its authority to set and enforce its own domestic labour and associated immigration policies. Despite this, there is evidence that Saudi Arabia and its Gulf neighbours have become more responsive to global “rights” discourses as they seek further integration into the international economic order.

Secondly, the constitutionally mandated principles of Sharia were assessed, which showed that there are constitutional and religious-normative grounds for the further reform, or potential abolition, of the Kafala system. While there is significant internal debate among Islamic jurists

around the existence and basis of civil and political freedoms under Islamic law, this thesis has determined that Islamic values of equity justice are anathema to the most exploitative aspects of the Kafala system.

Thirdly, the relevant Saudi regulations and policies were examined, leading to a finding that the new reforms do appear to bring Saudi Arabia's domestic law into further alignment with international standards, including respect for freedom of movement. The Kingdom has taken significant steps to eliminate or relax the most rights-violating elements of the former Kafala system. Among the most recent reforms, is the dual system of labour rights protection among migrant workers and Saudi nationals. This is a structural function of the Kafala system, which has been reformed to introduce greater equity in terms of pay and other in-work protections. Many of the most problematic aspects of the Kafala process have been repealed, including the near absolute requirement of sponsor consent for the most basic freedoms, including the ability to change jobs and leave the country. Key challenges were identified, many intimately related to the relationship between law and political power under the Kingdom's constitutional framework.

Ultimately, this thesis shows that the Kafala system, in its current state, is showing a positive movement toward a greater alignment with international law, Sharia law and Saudi Arabia's labour law regulations. Though, there are many issues with the system concerning the rights of migrant workers. This thesis argues that deep reform of the Kafala system is still required to provide better conditions for migrant workers.

DECLARATION

I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any university and the research within will not be submitted for any other future degree or diploma without the permission of Flinders University; and to the best of my knowledge and belief, does not contain any material previously published or written by another person except where due reference is made in the text.

Signed: Osameh Gnaei

Date: 1st March 2024

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CHAPTER I: INTRODUCTION

The Kafala system in Saudi Arabia is a system in which foreign migrant workers can be engaged. The term ‘Kafala’ originates from the Arabic word for ‘sponsorship’, referring to a system where migrant workers are bound to *‘kafil’*, which is a sponsor, usually the employer.¹

The Kafala ‘sponsorship’ began in around 1952, emerging from strong economic prosperity of Saudi Arabia caused by the discovery of oil.² At the time, Saudi society was organized in a way that allowed wealth to be distributed in a way that favoured Saudi citizens. Prestigious public sector jobs were reserved for Saudi citizens, while less prestigious jobs in the public sector were reserved for migrant workers.³ The unfavourable position of the Kafala migrant workers throughout the entire existence of this system has led to significant controversy over time.

This controversy has developed from the human rights violations perspective, which is primarily due to the sponsorship system’s near total control over workers.⁴ Through time, the Kafala has become a backbone of Saudi economy, which is due to the large contribution from Kafala workforce. Despite this, the controversial nature of the system remains. The decision to outsource authority and control over the sponsorship of foreign workers is a defining feature of the Kafala system, which was not a historical accident caused by several correlating social factors. Outsourcing authority is a central pillar of the Kingdom’s constitutional and political settlement.⁵ Although some scholars criticize Kafala for suppressing character, worker rights have always been an intentional feature of Saudi Arabia’s foreign labour migration system.⁶

Given the controversial nature of the Kafala system the question must be asked: “To what extent are the recent reforms to Saudi Arabia’s Kafala system legitimate, compatible with

¹ مجمع اللغة ([Intermediary Dictionary Arabic Language] المعجم الوسيط , نخبة من اللغويين [An elite group of linguists] العربية بالقاهرة Arabic Language Academy In Cairo] , Vol 2 , ed 2, 1972).

² Human Rights Watch, *Saudi Arabia: Foreign Workers Abused* < <https://www.hrw.org/news/2004/07/15/saudi-arabia-foreign-workers-abused>>.

³ Hazem Beblawi and Giacomo Luciani, *The Rentier State* (Routledge, 2015) 62.

⁴ Joshua Teitelbaum, *Political Liberalization In The Persian Gulf* (Hurst, 2009) 61-66.

⁵ Françoise De Bel-Air, *The Socio-Political Background and Stakes of ‘Saudizing’ the Workforce in Saudi Arabia: the Nitaqat Policy* (Cadmus, 2015).

⁶ Fair Square, *Migrant Workers In Saudi Arabia* <<https://fairsq.org/wp-content/uploads/2020/11/FS-Policy-Brief-1-Saudi-Arabia-1020.pdf>>

international instruments and compatible with Islamic law, for the purposes of protecting migrant workers?”

The objective of this thesis is to critically evaluate the legal framework of the Kingdom of Saudi Arabia which governs the status and rights of temporary foreign migrant workers under the Kafala system. This will be done in order to determine the level of protection that is provided to migrant workers in light of the Saudi government’s recent proposals from March 2021 to relax and reform the Kafala (sponsorship) system. This thesis will then proceed to examine the structure and policies underpinning Saudi Arabia’s complex migration management system against the backdrop of the wider economic implications of migration movements, from the developing world to oil rich nations of the Gulf such as Saudi Arabia.⁷

At its core, the thesis focuses on the dysfunctions of the pre-reforms Kafala sponsorship system. It will do this by examining the limited labour rights and due process protections that are available to temporary migrants under this mechanism. Then, discussion will turn to the forces of legal reform that may be used to mitigate experiences of exploitation, abuse, and mistreatment for the extraordinary number of foreign workers that currently reside in Saudi Arabia. This will prepare the ground for an analysis of the recent decision to ease requirements relating to the Kafala system.

The aim of this thesis to consider the best avenues – constitutionally and at the level of international norm-making – for bringing about the meaningful advancement of Saudi Arabia’s legal framework of the rights of migrant workers. To outline this brief overview in a more detailed manner, this introductory Chapter will now address the following:

A Background

B Primary issues and Research Questions

C Research Methods

D Literature Review

E Structure

⁷ Marko Valenta and Jo Jakobsen, ‘Moving To The Gulf: An Empirical Analysis Of The Patterns And Drivers Of Migration To The GCC Countries, 1960–2013’ (2016) *57 Labor History* 627, 633

A Background

This section will examine the history of the Kafala system and draw on broader studies to explore the reasons why foreign workers rights in the Gulf Cooperation Countries (GCC), and in Saudi Arabia more specifically, have drawn long standing criticisms and scrutiny. It will provide data on workers in Saudi Arabia and examine the factors precipitating the demand for foreign workers, the social conditions that cause workers to migrate to economically developed nations in the GCC, and outline the key challenges faced by temporary foreign migrant workers.

1. Status and Position of Foreign Migrant Workers in Saudi Arabia

Foreign migrant labour has, over three decades of economic growth, played an indispensable role in in the Arab world. This has impacted the GCC nations of Saudi Arabia, Qatar, Kuwait, Bahrain, Oman and the UAE the most.

In an era of globalization, migrant workers will increasingly seek financial opportunities in oil rich nations such as Saudi Arabia.⁸ The sheer number of migrants – accounting for around 49 percent of the combined populations of the GCC nations – has shaped the social and economic fabric of these countries. More striking still, migrant workers are estimated to make up around 70 percent of the total labour force of the above GCC countries.⁹ The predominance of foreign labour in the GCC is typically attributed to the rapid economic development of these countries, in the aftermath of the 1973 oil boom.¹⁰ Large flows of foreign workers would subsequently migrate to the region in large numbers in search of job opportunities.¹¹ A large proportion of these migrant workers originate from economically underdeveloped nations in South Asia and South East Asia, including Pakistan, Bangladesh, Indonesia and the Philippines.¹² The Arab

⁸ Attiya Ahmad, *Migrant Domestic Workers in Kuwait: The Role of State Institutions* (Middle East Institute, 2010) 28-29; World Bank, *Migration And Remittances Factbook* <<http://issuu.com/world.bank.publications/docs/9780821382189>>.

⁹ Barbara Kobler and Pablo Lattes, *International Migration Report* (United Nations, 2017) 6, 14.

¹⁰ Mohamed Ramady, *The Saudi Arabian Economy Policies, Achievements and Challenges* (Springer, 2010) 360.

¹¹ George Cremer, 'Deployment of Indonesian Migrants in the Middle East: Present Situation and Prospects,' (1988) 24(3) *Bulletin of Indonesian Economic Studies* 14.

¹² Ahmad (n 8) 28-29.

world continues to attract large number of foreign nationals even today, with the movement of foreign workers from South East Asia to oil rich Arab countries estimated to account for the largest flow of foreign workers in the Global South.

Migrant workers have strong economic incentives for seeking employment opportunities abroad for the purposes of generating remittances that can be used to support their families and fuel the economies of low and middle-income economies.¹³ With low wages, and few educational and labour opportunities in their home countries, many choose to emigrate to wealthier countries.

Developed nations seek to drive the flow of migrant labour to their markets in a variety of ways and for a variety of reasons. Governments may look to relax their migration policies to, for example, redress a skill shortage, or to encourage the recruitment of low-skilled migrant workers for low-wage, dirty or dangerous occupations. Employers may also seek to recruit temporary migrant workers through informal employment procedures to pay lower wages or to minimise the regulatory costs of complying with domestic labour standards that would ordinarily protect national citizens or those with permanent residency or worker status.¹⁴

2. The Kafala System

The Kafala system has long come under scrutiny for depriving migrants of basic rights and protections. Saudi Arabia, one of the prime destinations for migrants, is a case in point. The country's overall population (Saudi and non-Saudi), according to the census from 2022, was estimated to be around 32 million.¹⁵ Of this overall number, the growth of the foreign population among its number has been remarkable. The number has ascended from nearly 1.5 million foreigners in 1980, to 3.8 million in 1990, 8.5 million in 2010, 10 million in 2016,¹⁶

¹³ Martin Baldwin-Edwards, *Labour Immigration and Labour Markets in the GCC Countries: National Patterns and Trends* (International Labour Organisation, 2011) 36.

¹⁴ Abdul Nabi Shaheen, *Demand for Domestic Help Grows in Saudi Arabia*, *Gulf News* <<http://gulfnews.com/news/gulf/saudi-arabia/demand-for-domestic-help-grows-in-saudi-arabia-1.847416>>.

¹⁵ Saudi Census, *Saudi Census* <<https://portal.saudicensus.sa/portal>>.

¹⁶ Philippe Fargues, 'International Migration and the Nation State in Arab Countries' (2015) 5 *Middle East Law and Governance* 5.

and around 41.6 percent in 2022.¹⁷ Representing a significant portion of the country's domestic labour force, foreign migrant workers are key drivers of the country's economic development. At the same time, Saudi Arabia ranks highly as remittance source country for migrants from Western Asia, Southeast Asia and Northwest Africa.¹⁸ Challenges remain, however. While migrants can enter Saudi Arabia's job market in search of economic opportunities, they must first navigate Saudi Arabia's complex migration management system. Saudi Arabia, like the other GCC countries, has created and successfully administered a system of state sponsored migration sponsorship known as Kafala.¹⁹

The Kafala system was set up in Saudi Arabia in 1962. The system is designed to allow governments to increase flow of temporary workers into the country during periods of economic prosperity while also providing them with an efficient means of deporting workers as market demand for foreign labour decreases.²⁰

With a migrant population of approximately 13 million according to the survey from 2022, Saudi Arabia's role in supporting the economic development of workers from poor countries often goes overlooked. Workers are estimated to be sending approximately \$36 billion back to their families in Asia and Africa.²¹ These remittances have helped to reduce global poverty, enabling families in the worker's origin countries to build business and obtain housing, schooling and medical care. Indeed, some commentators such as Weyl, have reported that migration patterns from the global South to the GCC countries 'has done much more to reduce global inequality than all welfare states and transfers in the more egalitarian OECD countries.'²²

¹⁷ Saudi Census (n 15).

¹⁸ Saudi Arabia is ranked as the second biggest remittance-sending country and was among the top five migrant destinations. Philippe Fargues and Francoise De Bel-Air. 'Migration to the Gulf States: The Political Economy of Exceptionalism', in Diego Acosta Arcaraso and Anja Wiesbrock *Global Migration Old Assumptions, New Dynamics* (2015, Praeger).

¹⁹ For a good overview of the issues Sulayman, Khalaf and Saad Alkobaisi. 'Migrants' Strategies of Coping and Patterns of Accommodation in the Oil-Rich Gulf Societies: Evidence from the UAE,'(1999) 26(2) *British Journal of Middle Eastern Studies* 28.

²⁰ Azfar Khan and Hélène Harroff-Tavel. 'Reforming the Kafala: Challenges and Opportunities in Moving Forward'(2011) 20 *Asian and Pacific Migration Journal* 313.

²¹ United Nations Development Program, Labour Migration, Remittances, and Human Development in Central Asia, UNDP Report (2015).

²² Glen Weyl, The Openness - Equality Trade - Off in Global Redistribution (2018) 128 *The Economic Journal* 1.

While the impact of remittances on global poverty indicators is phenomena that should be celebrated, aspects of Saudi Arabia's migration policy are open to challenge because of the experiences of mistreatment and exploitation workers have to suffer in the process of making a living. Foreign temporary migrant workers have limited rights protection under Saudi law when compared to domestic migrant workers. The root of the problem stems, by and large, from the structure of the Kafala system and the freedoms it erodes for workers currently or imminently subject to it.²³

The Kafala system operates at two levels: the administrative and private employer sponsorship. At the administrative level, the system is regulated by the Ministries of Labour, the body primarily responsible for establishing rules and procedures for migrant sponsorship and final oversight powers over individual applications.²⁴ The most significant feature of the Kafala system is that it is based on a model of employee sponsorship of foreign labour. Each migrant worker is required to work exclusively for their sponsor and can only work for them for the period specified in the employment contract.²⁵ This is controversial, because the employers of Kafala workers have a high level of influence on the possibility of the exercise of the employee's rights. This places migrant workers in a position of dependence on the employer's approval and consent. Approval is required for rights such as, the right to apply for a work visa; transfer to another company or even to leave the country.²⁶

It should be noted that Saudi government is not alone in seeking to stem or increase the flow of temporary migrant workers as required. Indeed, many OECD labour-receiving also tie visa status to employment sponsorship under various guest or temporary worker programs worldwide. Notwithstanding this, the Kafala system does present a particular challenge because of the 'sponsorship system's near total control over workers.'²⁷ At its crux, the Kafala system is viewed as problematic because it binds migrants to an unequal contractual relationship with

²³ Asma Azhari, 'The Kafala Sponsorship System in Saudi Arabia: A Critical Analysis from the Perspective of International Human Rights and Islamic Law' (2016) 10 *The SOAS Journal of Postgraduate Research* 61, 74-75; Andrzej Kapiszewski, "Arab Versus Asian Migrant Worker in the GCC Countries" in Prakash Jain and Ginu Zacharia Oommen (eds), *South Asian Migration To Gulf Countries* (Routledge, 2016), 46-69; Martin Ruhs and Philip Martin, "Numbers vs. Rights: Trade-Offs and Guest Worker Programs" (2008) 42 *International Migration Review* 249 .

²⁴ *Political Liberalization In The Persian Gulf* (Joshua Teitelbaum ed., 2009) pp. 60-62.

²⁵ Jureidini Ray, 'Ways Forward in Recruitment of Low-Skilled Migrant Workers in the Asia Arab States Corridor, (International Labour Organisation, 2016).

²⁶ Fair Square (n 6).

²⁷ Joshua Teitelbaum, *Political Liberalization In The Persian Gulf* (Oxford University Press, 2009) 61-66.

private employers for a specific period of time. This leaves only limited remedies in the event of contractual breaches or other discriminatory conduct.

In short, migrant workers cannot enter the country or terminate an employment contract without the consent of the sponsor/employer.²⁸ Faced with threats of deportation, and no rights to negotiate improved wages or working conditions, migrant workers are vulnerable to exploitation. This is exacerbated by the fact that migrant workers often arrive in the country heavily indebted after paying recruitment agencies to assist them in finding a sponsor.

3. The Policy Impetus for the Kafala System and Recent Development

As to its broader role in Saudi society, Kafala system reflects the dual policy aims animating Saudi Arabia's highly restrictive migration control policy. The first policy aim embodies a protectionist approach that is closely intertwined with Saudi Arabia's history as a rentier state and cultural system of patronage.²⁹ This model of governance reflects the tribal nature of early Saudi society, whereby nationality/citizenship were and continue to be carefully regulated so that any privileges were generally reserved for certain families with ethnic and dynastic ties to the country.³⁰ The second element of Saudi Arabia's international immigration policy speaks to the near complete absence of any political or public appetite for a more inclusive project of migrant integration and citizenship. This includes policies that would enable migrant workers to obtain permanent residence and thereby be eligible for gaining Saudi citizenship.

The overall effect of these policies is best illustrated by the bifurcated nature of the Saudi Arabia's labour market. Jobs tend to fall into one of two tiers. The first tier is high ranking, professional jobs are largely created in the public sector with positions open to Saudi nationals only. In contrast, the second tier consists of a largely under-regulated private sector which

²⁸ Philippe Fargues, "Immigration Without Inclusion: Non-Nationals In Nation-Building In The Gulf States" (2011) 20 *Asian and Pacific Migration Journal* 273 .

²⁹ World Bank Group, 'The Great Plunge in Oil Prices: Cause, Consequences, and Policy Responses, Development Economics' <http://www.worldbank.org/content/dam/Worldbank/Research/PRN01_Mar2015_Oil_Prices.pdf>.

³⁰ Iqal Hadari-Bedouin, 'Conflict and the Formation of the Saudi State' in Madawi Al-Rasheed and Robert Vitalis eds. *Counter-Narratives: History, Contemporary Society and Politics in Saudi Arabia and Yemen* (Palgrave Macmillan, 2003) 35-37.

relies heavily on the large-scale recruitment of foreign low skilled workers, entrepreneurs and in the case of large-scale development projects, Western consultants and experts.³¹ Such disparities in Saudi to non-Saudi ratio among workforce in different sectors still remains, despite Saudi Arabia's efforts to impose a policy of Saudization. Saudization would lead to foreign workers being replaced by Saudi workers and employers would be expected to a minimum baseline of nationals as part of the overall workforce.³²

From the standpoint of labour rights protections, any individual that chooses to emigrate to Gulf nations has historically faced significant barriers. These barriers include the migrants' ability to obtain the right to live and work in Saudi Arabia, and in respect of any eventual discrimination they may face in the workplace once they obtain legal status as temporary migrant workers. Male migrant workers who undertake employment abroad may bring their families with them. Historical data shows that the number of male workers and dependants granted permits started decreasing after trebling in fifteen years from 765,903 in 2000 to 2,212,635 in 2015. Over the 2000s, the share of dependents increased notably among permit holders.³³ Furthermore, women from these families may also be required to seek low-paid employment for financial reasons.

Gulf Cooperation Countries (GCC), including Saudi Arabia, have faced international criticism for their treatment of migrant domestic workers.³⁴ By mid-2016, low-educated foreign migrant workers made up 56 per cent of the non-nationals above 15 years of age.³⁵ Migrant women are especially vulnerable to practices of gender discrimination, violence and abuse.³⁶

The scarcity of rights protections available to migrant workers is even more troubling given the Gulf's focus on low-educated migrant foreign workers employed in the private sector. At the structural level, migrants may experience racial discrimination and barriers in Saudi

³¹ Hossein Esmaeili, 'On A Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System (2009) *Arizona Journal of International and Comparative Law* 1, 2.

³² Mohsin Khan, *Working Toward Vision 2030: Key Employment Considerations in Saudi Arabia* (Society for Human Resource Management, 2018).

³³ De Bel-Air (n 5).

³⁴ Human Rights Watch, 'Slow Reform: Protection of Migrant Domestic Workers In Asia and The Middle East,' 16 (2010).

³⁵ Gulf Migration, *Saudi Arabia Population* <<http://gulfmigration.org/saudi-arabia-population-aged-15-nationality-saudi-non-saudi-sex-educationlevel-august-2016/>>.

³⁶ George Cremer, 'Deployment of Indonesian Migrants in the Middle East: Present Situation and Prospects,' (1988) 24(3) *Bulletin of Indonesian Economic Studies* 14.

society, a further factor that impedes their occupational mobility.³⁷ Migrants from the developing world are typically consigned to the lower rungs of the occupational ladder, with figures suggesting that around 80 percent of all foreign labourers occupy low-skill, low wage positions.³⁸ Along with the absence of employment protection and stability, several other factors distinguish the Saudi Arabia's pre-reforms Kafala system from work placement schemes established under other legal systems. As this thesis will explore, these include the near complete exclusion of any legal right or process that would allow temporary workers to acquire citizenship.³⁹

This takes us to the central focus of this thesis and its main object of its analysis, both before and after the proposed reforms. Saudi Arabia is not the only country to have established a sponsorship system in the Gulf, and countries such as the United Arab Emirates and Kuwait have maintained, and reformed, aspects of their own national equivalents to a sponsorship model. These similar systems contain similar rights-restricting implications that are featured in Saudi Arabia's policy.⁴⁰ What distinguishes Saudi Arabia from these other countries, is that Saudi Arabia is widely regarded as imposing the most restrictive and hence impactful of the GCC's country's immigration system.

In the past, labour and human rights organizations have been scathing in their assessment of the Kingdom. These reports argue that the denial of basic freedoms under the Kafala, including the ability to exit the country or change employer without penalty or revocation of their legal status as temporary workers, is a form of trafficking that amounts to modern slavery.⁴¹ Saudi rulers have, on the surface, not been concerned by these allegations, reasserting their sovereign autonomy to elaborate their own immigration and labour policies in accordance with the law

³⁷ Md Mizanur Rahman, 'Migrant Indebtedness: Bangladeshis in The GCC Countries' (2013) 53 *International Migration* 205.

³⁸ De Bel-Air (n 5).

³⁹ Faiz Al-Mazrouie, Fakieh Says No Move to Abolish Sponsorship Law, Arab News (Jan. 19, 2011), <http://arabnews.com/saudiarabia/article238343.ece?comments=all>.

⁴⁰ De Bel-Air (n 5); Henelito Sevilla, 'Nationalization Scheme (Nitaqat) in Saudi Arabia and the Condition of Filipino Migrant Workers' (2014) 8 *Journal of Identity and Migration Studies* 7; Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and the Emirates: Trafficking Victims?' (2012) 50 *International Migration* 180.

⁴¹ Barbara Degorge, 'Modern Day Slavery in the United Arab Emirates' (2006) 11 *The European Legacy* 657; Sevil Sönmez, 'Human Rights and Health Disparities for Migrant Workers in the UAE' (2013) 13 *Health and Human Rights Journal* 17; Virginia Mantouvalou, 'Temporary Labour Migration and Modern Slavery' in Joanna Howe and Rosemary J Owens (eds), *Temporary Labour Migration in the Global Era* (Bloomsbury, 2016).

and culture of its nation.⁴² This defiant stance against presumed Western interference into the Arab world is reflected in the Saudi leadership's historically checkered participation in key labour and human rights conventions, some of which cover rights of applicability to foreign migrant workers. Despite the somewhat narrow-minded position taken by Saudi Arabia on issues of sovereignty,⁴³ the tide of political sentiment is shifting in Saudi Arabia. The Kingdom has taken its lead from other Gulf nations, notably the UAE, that have also introduced rights-respecting reforms to their sponsorship system.⁴⁴

In a seismic and very recent development, the Saudi Arabia's Ministry of Human Resources and Social Development, announced reforms to the Kafala system in November of 2020. These reforms allow foreign migrants to exit the country or change sponsors without the prior consent of their sponsoring employers.⁴⁵ Though seemingly a very modest set of reforms, this policy shift promises to allow 7 million low-income workers acquire certain freedoms that did not exist under the previous system, including the ability to change sponsors or leave the country without fear of imprisonment or confiscation of their travel documents.⁴⁶ Moreover, the Kingdom has set out a commitment to compel employers to improve wage and workplace conditions. These reforms took place in March 2021, but according to Human Rights Watch, the reforms did not sufficiently dismantle the kafala system because they did not include migrant workers not covered by the labour law. This includes domestic workers and farmers, who are among the least protected and most vulnerable to abuse.⁴⁷

⁴² For background see Linda Bosniak, Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention,' (1991) 25(4) *International Migration Review* 738.

⁴³ Such as rights protection and, crucially, citizenship privileges – which it jealously guards as the sole preserve of Saudi law, incorporating Sharia.

⁴⁴ وزارة الموارد البشرية والتنمية الاجتماعية تطلق مبادرة "تحسين العلاقة التعاقدية" لعاملي منشآت القطاع الخاص [The Ministry of Human Resources and Social Development launches the "Improving the Contractual Relationship" initiative for workers in private sector establishments],(2020) < <https://www.hrsd.gov.sa/media-center/news/770957>>

⁴⁵ Rebekah Smith, *Saudi Arabia Could Rewrite Its Record on Labor Mobility by Ending Kafala* Centre for Global Development <<https://www.cgdev.org/end-of-kafala-labor-mobility>>.

⁴⁶ Ibid.

⁴⁷ Human Rights Watch, *Saudi Arabia Labor Reforms Insufficient* <<https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>>.

B Primary Issues and Research Questions

This section outlines key limitations of the previous system, focusing on areas in which migrant rights and freedoms are significantly curtailed. This will then be used as the basis on which to examine the new proposed reforms.

While aspects of Saudi law, incorporating ILO standards, are devised to eliminate wage, age and gender discrimination in the workplace, these protections are reserved for Saudi nationals, not migrant workers. Under Saudi Arabia's nationality law and Kafala system, a migrant worker can only obtain a work permit if they are sponsored by a Saudi citizen or governmental agency. Every migrant worker is therefore required to submit to this process, regardless of their skill level or occupation.

Under the previous system, migrant workers had limited freedom to choose their place of work, the freedom to leave a position voluntarily or the right to form associations to improve their working conditions. A temporary migrant worker was consequently only permitted to work for their designated sponsor under the terms and conditions of their temporary contract. Due to this, they could not seek alternative work during this period without the prior consent of the original sponsor.⁴⁸ This rule denied migrant workers any prospect of acquiring equivalent protections or in-work rights as Saudi citizens over time.⁴⁹

If a foreign migrant worker was found to have breached the terms of their sponsorship agreement, authorities had the power to take possession of their passport or identification cards.⁵⁰ This has significant bearing on the rights of temporary migrant workers to exercise

⁴⁸ Azfar Khan and H el ene Harroff-Tavel. 'Reforming the kafala: Challenges and opportunities in moving forward, (2011) 20 *Asian and Pacific Migration Journal* 313.

⁴⁹ Through graduated levels of residency rights or naturalization depending on their record or duration of employment: ILO Policy 'Note Reform of The Kafala (Sponsorship) System Policy Brief No. 10' (July 3, 2019) and M Zahra, 'Gulf labour markets and migration', Explanatory Note No. 4/2013, Gulf Labour Markets and Migration (GLMM) Programme of the Migration Policy Center and Gulf Research Center: Geneva

⁵⁰ Radhik Kanchana, 'Is the Kafala Tradition to Blame for the Exploitative Work Conditions in the Arab-Gulf Countries?' *South Asian Migration in the Gulf* (Springer, 2018) 61-79.

freedom of movement. For instance, foreigners residing in Saudi Arabia were required to obtain an exit permit before being able to leave the country.⁵¹

The practical effect of these rules was to strengthen the bargaining position of the sponsoring employer, while significantly weakening the rights and freedoms of the employee/migrant worker. For example, the sponsoring employer reserved the right to terminate the contract unilaterally and could therefore abuse their dominant bargaining position by denying migrants proper working conditions or a fair wage on threat of dismissal.⁵² Adding to this impact, foreign temporary migrant workers are barred from joining a trade union or other means of exercising their collective bargaining rights. As a result, migrant workers would be reluctant to demand better working conditions, leave their place of work or raise a complaint of abuse or discrimination. This is due to fears that they would be forced to leave the country or denied this right.⁵³

Foreign migrant workers had no means of challenging a decision of an employer or an administrative authority that results in the termination of an employment and consequent expulsion from the country. In some cases, migrant workers from outside the GCC sought to bypass the Kafala system and associated immigration rules by first gaining entry to an approved country. Then, the migrant worker would illegally enter Saudi Arabia in search of irregular work in the informal economy.⁵⁴ Illegal workers⁵⁵ are especially vulnerable to work-related mistreatment, discrimination or even abuse.⁵⁶ As illegal migrants, they lack any formal status and access to state institutions, as well as the ability to seek diplomatic assistance from their home countries.⁵⁷

⁵¹ Andrew Gardner, *City of Strangers: Gulf Migration and the Indian Community in Bahrain*, (Cornell University Press, 2010).

⁵² Beza Nisrane, Ringo Ossewaarde, and Ariana Need. 'The Exploitation Narratives And Coping Strategies Of Ethiopian Women Return Migrants From The Arabian Gulf,' (2019) *Gender, Place & Culture* 1

⁵³ For instance, if their passport remains within the possession of the sponsor or administrative authorities: Beza L Nisrane and Ringo Ossewaarde, and Ariana Need. 'The exploitation narratives and coping strategies of Ethiopian women return migrants from the Arabian Gulf,' (2019). *Gender, Place & Culture* 1

⁵⁴ Sarah Zimmerman, 'Mending the protection and prosecution divide: looking at Saudi Arabia human trafficking flaws and possibilities,' (2016) 15 *Washington University Global Studies Law Review* 533

⁵⁵ Particularly those who work in the 'informal economy', such as employment of which is not officially recorded and reported to tax authorities.

⁵⁶ Philippe Fargues, and Nasra Shah. 'Skilful Survivals: Irregular Migration to the Gulf,' (Gulf Research Centre and Gulf Labour Markets and Migration Programme, 2017).

⁵⁷ Several instruments also protect against the exploitation of migrant workers and forced labor or slavery: ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) (adopted 24 June 1975, entry into force 9 December 1978), 1120 UNTS 323; ILO Forced Labour Convention, 1930 (No. 29) (adopted 28 June

Other elements of Saudi Arabia's domestic regulatory framework appeared, outwardly, to impose certain obligations on employers under the previous iteration of the Kafala system. Provisions of the Saudi labour law oblige the employer to reimburse migrants the costs of an exit visa and return ticket to the worker's home country. Once again, this type of work-related benefit relies heavily on the good faith actions of the employer. Crucially, at the end of a working arrangement, foreign workers become illegal residents. This has meant they are required to leave country immediately at their own expense - a cost that may be exorbitant for a low-skilled, low paid worker.⁵⁸

In combined effect, the previous sponsorship system created unfavourable labour market conditions for many migrant workers. Faced with the inequities of the migration policies of the Arab world and worldwide, legal activists and scholar would mobilise around a common ambition to formulate and effectuate robust international and domestic standards for the protection of migrant workers, including irregular and undocumented workers.⁵⁹

These collective efforts gave rise to various regional and international labour instruments and treaties. However, Saudi Arabia has not ratified many of these treaties, exposing a broader tension between the normative aspirations underlying international migration discourses and frameworks, and the political realities that impede their domestic enforcement.⁶⁰ Nonetheless, perhaps under the influence of the 'soft' power of international norm and decision-making processes, Saudi Arabia has introduced potentially transformative reforms to the Kafala system. In doing so, the Kingdom acknowledged the need to provide migrants with strengthened rights vis a vis their employers.⁶¹

1930, entry into force 1 May 1932), 39 UNTS 55; Abolition of Forced Labour Convention, 1957 (No. 105) (adopted 25 June 1957, entry into force 17 January 1959), 320 UNTS 291.

⁵⁸ Heather Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries,' (2012) 45(2) *Cornell International Law Journal* 461, 467; Anh Nga Longva, "Keeping Migrant Workers in Check: The Kafala System in the Gulf" (Middle East Research and Information Report 211, 1999); Amrita Pande, "The Paper that you Have in Your Hand is my Freedom: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon" (2013) 47 *International Migration Review* 414.

⁵⁹ Peter Taran, "The Need for a Rights-Based Approach to Migration in the Age of Globalization" in Cholewinski, Guchteneire and Pécoud (eds) *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009).

⁶⁰ *Ibid.*

⁶¹ Press Release, ILO, Will Arab States Ratify Historic International Labour Standards on Domestic Work? (June 17, 2011), < http://www.ilo.org/public/21eirut21/region/arpro/21eirut/downloads/info/stories/pr_170611.pdf>.

This brings forward the key focus of this thesis, the reforms to the Kafala system. Under the new reforms to Kafala system, certain foreign temporary workers will acquire the right to leave or re-enter the country without their employer's consent, thereby loosening the tie between the worker visa status and a given employer sponsorship. The relaxation of the previous rule requiring employer consent, however, only applies to a limited set of in-demand workers. Sectors covered by the reforms include construction, retail and IT.⁶² As well as relaxing exit and sponsorship transfer rules, the Saudi government has introduced new guidelines that requires any new employer to undertake the necessary steps to ensure compliance with its new visa regulations, wage protection program, as well as processes of self-monitoring workplace practices. The emphasis on self-monitoring raises questions of how robustly wage protection and other safe work practices will be enforced or monitored by state agencies. Moreover, while above amendments appear to, with crucial qualifications, improve the rights protection of foreign temporary migrant workers in some areas (such as freedom of movement) is worth noting that the new reforms do not address other areas in which foreign temporary migrant worker rights are lacking, including restrictions on family reunification or the denial of rights to freedom of assembly.

Foreign workers will only be able to take advantage of the more flexible relationship with their employer if they have worked with their employers for no less than one year since entering the country. This employment agreement also needs to have been notarised. It is difficult to see how this requirement would protect workers from an abusive or exploitative employment arrangement with an existing employer. On this point, one worker is reported to have said: 'That's barely a reform, as the main issue is that workers are trapped with their employer and can face abuse during their contractual period'.⁶³

The most obvious limitation of the amended policy is the precarious position it leaves informal or illegal workers. The current reforms do not cover some of the lowest paid workers, including up to 3.7 million domestic workers, drivers, farmers, gardeners and guards.⁶⁴ These workers and illegal workers are most likely to be subject to a system of forced labour, by fact of being 'confined to their employers' homes, their passports confiscated, forced to work excessive

⁶² Rebekah Smith, *Saudi Arabia Could Rewrite Its Record on Labor Mobility by Ending Kafala* Centre for Global Development <<https://www.cgdev.org/end-of-kafala-labor-mobility>>.

⁶³ Ibid.

⁶⁴ Md Mizanur Rahman, 'Migrant Indebtedness: Bangladeshis in The GCC Countries' (2013) 53 *International Migration* 205, 211.

hours without rest or days off, [or made] subject to very specific forms of abuse, such as physical and sexual abuse.’⁶⁵

Moreover, even regular workers with a notarized contract will first have to obtain the ministry’s approval before they can change jobs. The foreign worker will also have to remain in their current position until a ministry-approved notice period has lapsed, and little detail has been provided on the duration of the notice period, or any limits therein. Authorities may therefore deny the right of exit if the worker does not provide notice, has outstanding fines or debts or otherwise follow ‘specific measures’ – a vague term that while mentioned in the amending policy, is not yet defined.

In the absence a formal mechanism of challenging or appealing an administrative decision, it is difficult to see how migrant workers will be protected in practice. Currently, Saudi Arabia lacks a court with jurisdiction to hear immigration cases or process by which foreign workers can seek remedies for breaches of an employment contract before an impartial tribunal.⁶⁶ As to their right to a family life, foreign workers remain subject to certain immigration laws. Foreign workers are not permitted to marry Saudi nationals. Several other policies have been implemented to deter migrants from long-term settlement in the country, include obstacles to family reunion.⁶⁷

This thesis argues for further reform of the kafala system, for legal (normative) as well as market related (pragmatic) reasons. Saudi Arabia has followed in the footsteps of other Gulf countries, such as the UAE and Bahrain, in taking steps to relax rights-restricting conditions on foreign temporary migrant workers.⁶⁸ Like these jurisdictions, there are serious and probing questions to be asked as to the extent to which these reforms go far enough to bring Saudi Arabia into greater alignment with domestic constitutional norms of Sharia and international law.⁶⁹ As noted in the literature review, loosening the ties between employers and sponsors,

⁶⁵ Smith (n 46),

⁶⁶ Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries,’ (2012) 45(2) *Cornell International Law Journal* 461, 467

⁶⁷ Mohammad Auwal. ‘Ending the exploitation of migrant workers in the Gulf’, (2010) 34(2) *The Fletcher Forum of World Affairs* 89.

⁶⁸ Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries,’ (2012) 45(2) *Cornell International Law Journal* 461, 467.

⁶⁹ Each of these have a varying degree of binding effect and authoritativeness under Saudi domestic regulations.

and strengthening the freedoms of migrant workers will not only improve the Kingdom's reputation in the sphere of human rights, it may also lead to greater productivity in domestic labour markets.

Therefore, this thesis poses the following question: "To what extent are the recent reforms to Saudi Arabia's Kafala system legitimate and compatible with international instruments and Islamic law for the purposes of protecting migrant workers?" To help with this, there are a number of sub-questions that must be asked:

- 1- What is the Kafala system in Saudi Arabia and what are the key issues? This Sub question will be explored in Chapter II
- 2- To what extent was or still is the Kafala system before and after the reforms in conflict with Saudi Arabia's international obligations and emerging global labour standards and norms? This Sub question will be examined in chapter III.
- 3- Is the Kafala system in conflict with other sources of Saudi law, including domestic labour regulations and Sharia? This Sub question will be explored in chapter IV.
- 4- Does the Kafala system represent a meaningful step towards legitimising Saudi Arabia's migrant population by ensuring that employers and administrative authorities are rights respecting? This Sub question will be investigated in chapter V.
- 5- Can international and constitutional sources of rights protection be mobilised towards the future abolition of the Kafala system? This Sub question will be analysed in chapter VI.

C Research Methods

The thesis will seek to explore the above aims and answer the research question by developing research methods associated with each selected level of regulation: international human rights law; principle of Sharia and analysis of Saudi domestic labour legislation and associated instruments.

Accordingly, the study will apply a textual studies primary and secondary sources, such as laws and regulations, reports, journal articles, and case law. This methodology used in this study will therefore be literature based and doctrinal.⁷⁰ It will involve the interpretation of primary sources of Saudi constitutional law, labour laws, applicable case law, scholarly interpretations of Sharia and international source of labour law and commentary.

A conceptual analysis of international law theories of compliance, and some brief discussion of the normative foundations of Sharia will also be employed.⁷¹ This will be complemented by a brief reference to comparative jurisprudence.⁷²

Furthermore, this thesis will attempt to blend a legal positivistic method that examine what the law is in Saudi Arabia (what the regulations say, and legal officials do) as it applies to migrant workers subject to the Kafala system with a normative assessment of how Saudi law ought to be reformed, in light of principles of Sharia and international human rights law.⁷³ This will require an investigation of how Saudi Arabia courts and legislators interpret Sharia and

⁷⁰ Terry Hutchison and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', (2012) 17(1) *Deakin. Law review* 8.

⁷¹ Sebghatullah Qazi Zada, Mohd Ziaolhaq Qazi Zada, 'Codification of Islamic Law in the Muslim World: Trends and Practices' (2011) 6(12) *Journal of applied Environmental and Biological Sciences* 160.

⁷² Boris Kozolchyk, 'Trends in Comparative Legal Research: Apropos Dainow's The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions,' (1976) 24 *American Journal. Comparative Law* 100, 109. More generally, see Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 *Arab Law Quarterly* 272, 283-285; Herbert J Liebesny, 'Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions' (1972) 20(1) *The American Journal of Comparative Law* 38.

⁷³ For an interesting international perspective see, Benedict Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment,' (1998) 92 *American Journal of International Law* 7.

international human rights standards when applying and enforcing aspects of domestic migration law and policy, as governed under the applicable labour law provisions.⁷⁴

1. Scope

This thesis will focus on specific categories of labour rights that are assumed to have the most significant legal and practical import for migrant workers under the Saudi legal system. Therefore, the thesis will limit the scope of its analysis, given the broad range of migrant rights issues that are implicated under Saudi Arabia's administration of the Kafala system, and that have otherwise been explored in the extant literature on transnational migration and labour rights. The thesis therefore focuses on four main rights issues - freedom of movement; freedom of association; the right to a decent and safe working environment; and the principle of non-discrimination. This methodological approach is also informed by an awareness that not all rights are equal in the degree of recognition or weight they are or are not afforded under the applicable rules and provisions of Saudi domestic labour law, principles of Sharia or indeed contemporary judicial interpretations of international human rights law.⁷⁵ In the context of Saudi Arabia's domestic regulatory framework, such rights protections may vary depending on the classification of a migrant worker i.e. low-skilled or professional.⁷⁶ It is also important to note that Saudi Arabia's Kafala system, and the legislative-administrative-policy framework that underpins it, cannot be reformed by simply appealing to general (and thus not directly enforceable) principles of Sharia, in the same way that Saudi Arabia cannot be made to comply with treaty obligations it has not consented to, by act of ratifying the relevant human rights instrument.⁷⁷ The thesis will thus focus on identifying standards of Islamic and international human rights law that have sufficient support and legal basis in Saudi law and among other relevant (Islamic and international) juristic communities to bring about strengthened rights

⁷⁴ Manisuli Ssenyonjo 'Economic, Social and Cultural Rights: An Examination of State Obligations' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 36.

⁷⁵ Benedict Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment,' (1998) 92 *American Journal of International Law* 7.

⁷⁶ For a description of this approach, see Manisuli Ssenyonjo 'Economic, Social and Cultural Rights: An Examination of State Obligations' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 36.

⁷⁷ For a relevant approach, see Tad Stahnke and Robert Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief- A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries,' (2005) 36 *Georgia Journal of International Law* 947.

protection in the Kingdom's labour practice, specifically as it concerns migrant workers subject to the Kafala system.⁷⁸

2. Limitations

On the issue of methodological limitations, the Researcher faces challenges in acquiring resources, particularly as it concerns cases involving disputes between migrant workers and their sponsoring employers.⁷⁹ A key challenge is that Saudi Arabia has limited case law on migrant (or immigrant) rights and lacks a tribunal or court with a dedicated jurisdiction over these issues (since migrant workers have virtually no rights to challenge an employer's or administrative decision under the Kafala system, even with the reforms).⁸⁰ Thus, as noted in the previous section, it is not clear whether the migrant can avail of a legal remedy in cases of unfair dismissal or suspension of salary, particularly if the employer alleges that the migrant worker is in breach of their employment contract (and hence also in breach of their sponsorship conditions), or for any other practices that expose the worker to unsafe, discriminatory or abusive working conditions.⁸¹

As to the dysfunctions of the Saudi legal system more generally, there is no system of judicial precedent in Saudi Arabia, courts will apply Sharia in a non-systematic fashion and the administration of migrant worker sponsorship is based on a discretionary system of administrative decision-making that is neither controlled by limiting legislation or cabined by judicial review. This makes it difficult to assess aspects of rights jurisprudence in the field of Saudi migration law in a comprehensive way and as such the thesis will draw upon comparative jurisprudence by way of analogy. The larger obstacle faced in my study is the limited available case law and general absence of scholarship that integrates a country-level study of the Kafala system in Saudi Arabia, in conjunction with an analysis of applicable international human rights instrument and Islamic perspectives on labour law under a singular and synoptic frame. Instead, each issue or arena of law is typically explored separately, in isolation or with limited

⁷⁸ Krzysztof Drzewicki, 'The Right to Work and Rights in Work' in Eide et al (eds), *Economic, Social and Cultural Rights* (Kluwer, 2001) 223.

⁷⁹ Nathan J. Brown, 'Why won't Saudi Arabia write down its laws?' *Foreign Policy* (23 January 2012) <<http://foreignpolicy.com/2012/01/23/why-wont-saudi-arabia-write-down-its-laws/>>

⁸⁰ Abdullah Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (New York University School of Law, 2008).

⁸¹ National Society for Human Rights, *Conformity of the Saudi Rules and Regulations with the Convention on Basic Human Rights* (Saudi Arabia, National Society for Human Rights 2008) 196-198.

consideration of how these legal areas intersect or diverge on transnational questions of migrant rights. The Researcher aims to overcome these challenges by synthesizing these three strands of literature to examine the points of conflict or confluence between these legal systems in the hopes of addressing a gap in the literature and in Saudi law towards actionable reforms. The Researcher also plans to visit Saudi labour lawyers and consult with other legal officials with knowledge of current cases being heard before the Saudi labour courts, particularly as these relate to migrant worker-sponsor employment disputes.

D Literature Review

This section considers key themes identified in literature as a means of identifying areas of scholarly significance addressed in the thesis and important gaps in the literature.

1. *Protections for Workers under Sharia*

As a starting point, it necessary to note that the Saudi legal system is based on Islamic law, which is described as Sharia. Sharia refers to body of rules, precepts and standards that derive from primary sources of Islamic law, namely the *Quran and Sunnah* (the teachings and habits of the Prophet Mohammed).⁸² Sharia is literally translated to mean “the right way” and embodies a theological system of law derived from holy scripture and the narration of Prophetic sayings.⁸³ The Sunnah consists of a compendium of hadiths, the oral testimony of the Prophet’s companions and passed through the generations as authentic statements of Prophetic message. Islamic law though often used interchangeably with “sharia” tends to refer to the more general system of primary religious rules and laws traced to the *Quran and Sunnah* as well as a more complex system of Islamic hermeneutics, rules of inference and rules of rule interpretation and other interpretative and rule deduction methodologies.⁸⁴ Known as *fiqh*, a body of secondary rules, opinions and interpretations has been developed, often with some variation between the remaining four orthodox Sunni schools of Islamic jurisprudence discussed in chapter IV.⁸⁵ The critical point is that Sharia represents a totalizing moral scheme based on Quranic prescriptions and the Prophet’s revelation of the Quranic text.⁸⁶ Islamic law refers to primary sources of Sharia and to juristic opinions, rulings and methods of rule interpretation on any question of law, religious ritual or convention on which the *Quran and Sunnah* are silent or ambivalent. This is the field of Islamic knowledge described *as fiqh* and includes methods and accepted rules for ascertaining a juristic consensus on a particular interpretation of scriptural texts, social

⁸² M.H.Kamali, *Principles of Islamic Jurisprudence* (Islamic Legal Text society, 1989) 7-8

⁸³ Ibid.

⁸⁴ Mahdi Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research', (2003) 18(3/4) *Arab Law Quarterly* 215,218-219

⁸⁵ Wael B Hallaq, 'Ifta' And Ijtihad In Sunni Legal Theory: A Developmental Account' In Muhammad Khalid Masud and Brinkley Messick and David S Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fathers* Fatwas (HUP, 1996) 33, 36; Karim Daghbouche, Nadra Ahmad Shannan, 'The Algorithm of Islamic Jurisprudence (Fiqh) with Validation of an Entscheidungsproblem,' (2014) *Journal Academia* 1, 2-3.

⁸⁶ Kevin Reinhart, 'Islamic Law as Ethics', (1983) 11(2) *Journal of Religious Ethics* 186 [describing the Shari'ah as an “independent scheme of moral categorization”].id 196

custom and reasoning by analogy, as well as general principles derived from the Quran, such a rule reinterpretation for reasons of public interest or necessity.⁸⁷

As Zulfiqar notes, the system of Islamic law, or Sharia, offers protections for all workers, both foreign migrant workers and nationals alike, and encompasses general principles on fair treatment and pay. Ahmed goes further to contend that principles of labour law are deeply rooted in the Islamic tradition from the moment of scriptural revelation and the birth of the religion.⁸⁸ In the Qur'an, for example, it is stated that: "He it is who has made the earth tame to you; so walk in the path thereof and eat of His Provision. And to Him will be the Resurrection."⁸⁹ This verse has been interpreted to mean that not only does every human have the right to work without any conditions or qualification, but that every individual must be afforded to this right in order to maintain basic sustenance and a minimum quality of life.⁹⁰ Chaudry excavates Islamic legal sources and traditions and finds that labour and work within Islamic society is connected with honour and respect, and that work contributes to the functioning of society.⁹¹ In this regard, the Prophet Muhammad is reported to have said 'there is no better food than what has been earned by the use of both hands.'⁹² Modern day readings of the Prophet's teachings – a primary source of Islamic law – are emphasised by scholars who regard the right of work as a religious and spiritual requirement. Going beyond the spiritual dimensions, others have defined the right of all individuals to work as a public good and as duty incumbent on all Muslims to 'produce more than they consume' within society.⁹³ Taking this logic to its perceived conclusion, Zulfiqar posits:

"...there is significant religious support for securing the rights of those who work. For instance, a Prophetic tradition reports that an individual who takes away rights of a worker should be considered an oppressor."⁹⁴

⁸⁷ Ayman Shabana, (ed) *Custom in Islamic Law and Legal Theory: The Development of the Concepts of Urf and Adah in the Islamic Legal Tradition*, (Macmillan, 2010) 162

⁸⁸ Iftikhar Ahmad, 'Religion and Labor: perspective in Islam' (2011) 14(4) *Journal of Labor and Society* 591.

⁸⁹ *Qur'an*, Surat Al-Mulk, verse 15.

⁹⁰ Hani Abdulghani, 'Examining Obstacles to Saudi Women's Right to Work in the Kingdom of Saudi Arabia' (DPhil Thesis, Brunel University London 2016) 67.

⁹¹ Muhammed Sharif Chaudry, 'Fundamentals of Islamic Economic System'

<http://www.muslimtents.com/shaufi/b16/b16_8.htm>; Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003).

⁹² Muhammad Muhsin Khan (trs), *The Translation of the Meaning of Sahih Al-Bukhari* (Darussalam, 1997).

⁹³ *Ibid.*

⁹⁴ Adnan Zulfiqar, 'Religious Sanctification of Labor Law: Islamic Labor Principles And Model Provisions' (2007) 9 *University of Pennsylvania Journal of Labour and Employment Law* 433.

Moreover, Baderin notes the right to earn a living wage, and the right to work under certain conditions has a sound basis in Islamic law and traditions.⁹⁵ An ILO study notes that such rights are therefore generally enforced and culturally recognised within many Islamic societies and that the legal codes of countries such as Iran, Jordan, Syria and Malaysia now make provision for worker's rights.⁹⁶ Although Quranic verses and the Prophet Mohammed's teachings (Sunnah) appear to recognise the right of all individuals to seek work of fair income – with no distinction as to their nationality or origins- these principles do not expressly identify what rights certain categories of worker may be entitled to under the Saudi sponsorship system.⁹⁷ Some commentators such as Azhair have considered how Sharia can be applied in support of more specific categories of civil, political, social and economic rights. In this vein, they have examined the interface between international human rights law and Islamic law, noting that both regimes can be used to strengthen labour rights for migrant and non-migrant employees in Saudi.⁹⁸ The scope of his study considers the clauses concerning labour under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

2. The relation between International Labour Norms and their Domestic Implementation

While the thesis will engage in an analysis of reforms that have not been comprehensively dealt with in existing literature, due to their recent adoption, some studies have nonetheless generated important conceptual insights into the relation between international labour norms and their domestic implementation. Thus, Gross and Compa reflect on the conceptual and normative interdependencies that exist between domestic labour rights and human rights and depicting

⁹⁵ Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003).

⁹⁶ ILO National Laws on Labor, Social Security and Related Human Rights 'Islamic Republic of Iran' <<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/21843/64830/E90IRN01.htm>>; ILO National Laws on Labor, Social Security and Related Human Rights 'Jordan' <<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/45676/65048/E96JOR01.htm>> WIPO 'Syrian Arab Republic Labor Law No 17/2010' <http://www.wipo.int/wipolex/en/text.jsp?file_id=246698>; ILO National Laws on Labor, Social Security and Related Human Rights 'Malaysia Employment Act 1955' <<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/48055/66265/E55mys01.htm>>

⁹⁷ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (YUP 1992) 43.

⁹⁸ Azhari, 'The Kafala Sponsorship System in Saudi Arabia: A Critical Analysis from the Perspective of International Human Rights and Islamic Law' (2016-2017) 10 *The SOAS Journal of Postgraduate Research* 61, 74-75.

these dual rights-based frameworks as mutually enabling, rather than mutually exclusive, spheres of regulation.⁹⁹ Taking inspiration from this theoretical framework and applying to practical realities of the Saudi sponsorship system, this study will consider the various human rights treaties and conventions with applicability to migrant's rights. This will prepare the ground for a discussion of how such treaties have been received by Saudi Arabia in the past and present, including those treaties that have been ratified, endorsed and implemented as part of Saudi Arabia's domestic legal order. As alluded to above, in many cases Saudi Arabia has chosen not to ratify key international human rights conventions containing important labour rights protections. The thesis will therefore consider the 'bindingness' and political support for labour-related clauses in international instruments in a bid to examine how such standards may be used to further reform - whether formally through treaty processes or via 'soft' forms of international pressures - the Kafala system and associated labour practice as in Saudi Arabia¹⁰⁰

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Various studies provide useful comparative insights, for example Ewing's analysis of UK labour legislation.¹⁰¹ Though focused on the specific issue of the extent and manner by which the UK has implemented its obligations under the European Convention on Human Rights, the study is useful because it sheds lights on the narrow way in which certain labour rights have been interpreted, even in jurisdictions with a strong tradition of human rights protection, such as national legal systems that are required to submit to the European Convention of Human Rights, in accordance with the final interpretative authority and jurisdiction of the European Court of Human Rights in Strasbourg. Nonetheless, the thesis will contend that the jurisprudential nexus between labour and human rights that is developing under European legal systems bears limited relevance in respect of how international human rights norms on labour law might be integrated into the domestic law of Saudi Arabia. In this sense, this thesis is guided by the inevitable reality of legal-regulatory pluralism and how such conditions make the task of developing a common transnational framework on migrant workers protections difficult, if not perpetually elusive.¹⁰² As noted above, European conceptions and standards of labour rights as human rights cannot be uncritically transposed to the Arab and Muslim world.

⁹⁹ James A Gross and Lance Compa, 'Introduction' in James A Gross and Lance Compa (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (ILR Press 2009) 1-12.

¹⁰⁰ Ibid.

¹⁰¹ K D Ewing, 'The Human Rights Act and Labour Law' (1998) 27(4) *Industrial Law Journal* 275, 275-292.

¹⁰² Otto Michiel, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (LUP, 2016).

In this regard, Hammami's work on the Arab Charter of Human Rights (1994) is one of the few scholarly works to comprehensively examine the provisions of a treaty that reflects the efforts to develop human rights instruments that have been framed and elaborated by the Arab world itself.¹⁰³ In this scholarly work, it is noted that many of the Arab Charter's provisions appear to guarantee many of the same rights as universally accepted human rights standards embodied by instruments such as the UNDHR but qualifies these to ensure respect for the legal, religious and cultural traditions that prevail within this region. On the issue of labour rights, Hammami draws attention to the fact that while the 1994 charter prohibits forced labour it does not declare the right to be free from slavery.¹⁰⁴ This is consistent with some contested rulings and interpretations of Sharia, as will be explored in further chapters.¹⁰⁵ Others challenge these narrow conceptions of Sharia, noting that Islamic law provides a rich jurisprudence on worker's rights and freedoms from which courts in Saudi Arabia and other Muslim nations can draw inferences in interpreting labour rights.¹⁰⁶ In this regard, noting the resistance of Arab nations to 'tie their hands' by accepting binding treaty obligations, and the resulting weaknesses of the Arab Charter's enforcement mechanism, Professor Mohamed Y. Mattar offers a robust defence of long standing proposals to establish the first Arab Court of Human Rights. Such a court, he notes, could be established under explicit provisions of the Arab Charter, thus fostering a stronger tradition of Sharia-compliant rights protection, treaty - implementation and enforcement within these influential Muslim nations.¹⁰⁷

3. Original Contribution

After performing the literature review, it has come to light that the novelty of this thesis lies in the recentness of the Saudi reforms to the Kafala system. While there have been some studies on the rights of foreign migrant workers under the Kafala system, these have not addressed

¹⁰³ Fida Hammami, 'The Arab Charter On Human Rights: The Task Still Unfinished,' Dissertation, Irish Centre of Human Rights, (University of Galway, 2013)

¹⁰⁴ Ibid, 47.

¹⁰⁵ Ann Mayer, *Islam and Human Rights: Tradition and Politics* (WP, 2012); Bassam Tibi, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations' (1994) 16 *Human Rights Quarterly* 277.

¹⁰⁶ It will be argued that rights cannot be interpreted in a void and courts are required to draw upon the jurisprudence of their jurisdiction as well as traditions in other jurisdictions. See Stephanie Palmer, 'Human Rights: Implications for Labour Law' (2000) 59(1) *The Cambridge Law Journal* 168, 168. Thus, courts in Saudi Arabia may interpret in light of the Sharia.

¹⁰⁷ Mohamed Mattar, 'Article 43 of the Arab Charter on Human Rights' (2013) 26 *Harvard Human Rights Journal*, 145.

these in a comprehensive manner, nor have these dealt with the possible merits and limitations of the new reforms.

This thesis starts from the vantage point that the new reforms are potentially transformative for certain categories of foreign migrant workers. However, this thesis attempts to unpack those elements of the reform that are truly empowering for Saudi Arabia's foreign workers from those that are more cosmetic in nature. The 'real time' nature of these reforms also means that this study will also be able to track and evaluate attempts to implement these reforms in practice, since the phasing out of the old system has yet to be rolled out. Such an approach can be used to emphasise the practical as well as normative significance of these reforms, creating opportunities to examine how Saudi employers and broader society will react to this policy shift, and whether it will result in a stronger culture of labour rights protection (safety, higher wages, the elimination of direct or structural discrimination etc.). This thesis is of great importance today due to the violation in the Kingdom of Saudi Arabia and the increased public scrutiny that will be placed on Saudi Arabia to implement meaningful reforms.¹⁰⁸

¹⁰⁸ Human Rights Watch, 'Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia' (2004), available at <<https://www.hrw.org/reports/2004/saudi0704/>>.

E Structure

In terms of structure, this thesis will examine three levels or sites of legal reform and governance, which include domestic laws, international law, and Sharia law.

The first concerns the domestic laws and framework in place in Saudi Arabia in relation to migrant workers, including but not limited to, the Kingdom's immigration and citizenship laws, and labour laws. This provides the necessary starting point for understanding the precarious status that temporary foreign migrants have found themselves in under the previous system and what has changed under the proposed reforms. In terms of scope, the thesis will examine Saudi Arabia's domestic provisions, or lack thereof, affecting, inter alia, (1) discrimination, (2) the freedom of movement, (3) freedom of association, and (4) the right to work in a safe and healthy environment. Many of these rights are well-established in other legal systems and have acquired form and binding content under various international human rights and labour related treaty regimes.

This takes to the second arena of law examined in the study: the applicability of international instruments and norms as a means of critically evaluating or reforming, through the domestic implementation of treaty obligations, Saudi Arabia's domestic migration related laws and policies. Implicit in this line of enquiry are the inevitable limitations of the consent-based model of international law, and, correlatively, Saudi Arabia's unwillingness to ratify core treaties that could, if implemented, strengthen the civil, political, social and economic rights of the swelling number of foreign nationals that make up its labour force. This casts doubt on how effective international law is likely to be in addressing previous or existing gaps in Saudi law. Nonetheless, this thesis argues that Saudi Arabia's recent decision to phase out, or at the very least minimise the most draconian and inequitable aspects of the former Kafala system may have been influenced by international condemnation of its migration policy, and the growing demand for minimal global standards for the protection of migrant workers.¹⁰⁹

¹⁰⁹ Peter Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization', in Cholewinski, de Guchteneire and Pécoud, (eds), *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, 2009) 150.

A third level of legal analysis moves beyond specific provisions of Saudi migration and labour law to assess the constitutional framework from within which these laws and norms are formulated.¹¹⁰ Saudi Arabia's legal system is constitutionally grounded in principles of Islamic law or Sharia. Consequently, Saudi Arabia's legislative and executive body draw their authority and legitimacy from the supervening principles of Sharia. Saudi Arabia's enforcement of uncodified though pre-emptory norms of religious law may seem to be only tangentially related to a study of migrant worker protections under Saudi domestic law and its obligations under general principles of international labour law, encompassing certain human rights (e.g. right to an appeal, right to collective bargaining, right to family life etc).¹¹¹ However, as this thesis aims to show, Sharia law sets out some general conditions regarding the fair treatment of workers and associated social and economic rights, influencing the country's decision to ratify certain international agreements, such as the ILO's non-Discrimination Convention.¹¹² In this way, the thesis will explore the extent to which Saudi Arabia's migration management system is compatible with the obligations, and aspirations, of international law and Sharia respectively, before and after the reforms. This thesis will finally, and crucially, reflect on discriminatory aspects of the Kafala system that remain in place. In the final analysis, the thesis will adopt a critical mode of analysis and set out the dual-edged market-related and normative (ethical) reasons why Saudi Arabia should abolish the Kafala system in its entirety. In terms of future reform, the aim of thesis will be to show how sources of domestic constitutional and international law can spark a stronger commitment to inclusive, fair, and non-discriminatory migrant rights and related labour standards. Pertinently, it will be argued that the soft power of international labour organizations and pressure groups may have played an important role in bringing about the recent reforms. However, it will be suggested that the failure to repeal discriminatory provisions undermines the progress made by Saudi Arabia to bring its laws and policies into greater alignment with current international labour rights discourses and the higher norms of Islamic law.

¹¹⁰ Abdulaziz Al-Fahad, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30(2) *Yale Journal of International Law* 375, 376, 384-385.

¹¹¹ Zulfiqar, 'Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions' (2007) 9 *University of Pennsylvania Journal of Labour and Employment Law* 433.

¹¹² International Labour Organization, 'Observation (CEACR)' adopted 2016 (106th ILC session, 2017) Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Saudi Arabia.

CHAPTER II: KAFALA SYSTEM IN SAUDI ARABIA AND ITS CONTEXT

A The Legal Basis of The Kafala System and the Limited Rights of Workers

This Chapter will provide context to the Kafala System by introducing the legal basis for the system, the limited rights of workers, demand for reform, and the final reform that has resulted.

The Kafala system of labour migration provides the institutional cover for Saudi Arabia's continuous failure to enact and enforce minimal rights for migrant workers.¹¹³ It does this first, by setting up a sponsorship system that imposes restrictive contractual requirements upon foreign employees before they become eligible for a work visa. Secondly, by deregulating the conditions under which employment bargains are struck, performed, and terminated.¹¹⁴ In 2006, a senior labour official was reported to have said:

“The private sector decides the nationality of workers, not the ministry of labour... We don't even know how many Arabs and Asians are here. We have our Labour Code and that's all we need.”¹¹⁵

The Kafala system was devised so that Saudi businesses could exercise almost total control over the legal status and in-work conditions of their foreign workforce.¹¹⁶ Over time, Saudi businesses grew reliant on this more controllable and cheaper foreign workforce. South Asian migrant workers were often required to pay high fees to recruitment agencies before finding a route to the visa application process, overseen at the governmental level.¹¹⁷ Once in the country, migrant workers were often indentured before they had even begun employment as a consequence of being forced to settle debts with their labour, often by working long hours and

¹¹³ Hanan Malaeb, 'The 'Kafala' System and Human Rights: Time for a Decision' (2015) 29(4) *Arab Law Quarterly* 307-342, 308.

¹¹⁴ Human Rights Watch, *Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East* (Report, April 2010) ('*Slow Reform*') <<https://www.hrw.org/report/2010/04/27/slow-reform/protection-migrant-domestic-workersasia-and-middle-east>>.

¹¹⁵ Fair Square (n 6).

¹¹⁶ Mohamed Ramady, 'Gulf Unemployment and Government Policies: Prospects for the Saudi Labour Quota or Nitaqat System' (2013) 5(4) *International Journal of Economics and Business Research* 476, 477.

¹¹⁷ Human Rights Watch *Exported and Exposed: Abuses against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates* (Report, 2007) ('*HRW Report*') <www.hrw.org/sites/default/files/reports/srilanka1107webwcover.pdf>.

in poor conditions.¹¹⁸ Since their right of residence in the country was dependent on the sponsoring employer's approval, migrant workers would be deterred from asking for increased wages or stronger workplace protections. The scope of control exercised over migrant workers spurred further demand for cheap labour and migrant workers could not even change jobs without their sponsoring employer's permission. Due to this it is arguable that the Kafala sponsorship system has functioned as the formal apparatus used to normalise, entrench and obscure widespread exploitation of foreign workers in the private sector. One scholar observed:

The [Kafala employment system causes serious harm for those at the very bottom of the payment chain.....In fact, this policy is the institutional embodiment of the subordination of non-nationals and their segregation. In practice, the kafala system ties workers to their sponsors (kafeel) and thus opens the door for exploitative relationships.¹¹⁹

The uncertain legal status of foreign temporary migrant workers was further reinforced by the obscure legal basis of the Kafala system. A clear irregularity of the Kafala system is that there is no single 'Kafala law'. The immigration and contractual aspects of employee sponsorship are treated as bifurcated and mutually exclusive spheres, with each regulated under the applicable rules of the 1952 Residency law,¹²⁰ and the new 2005 Labour Code, respectively.¹²¹ The enforcement of labour codes more generally derived from a patchwork of laws, policies and customs. In practice, this has meant that the most exploitative aspects of the Kafala system, including the employer/sponsor's role in approving work permits, have an unclear and discretionary basis in law.¹²² As subsequent chapters will outline, employment practices and grievances are resolved by appealing to customary, rather than codified, law. In theory, this should mean that Islamic common-lawlike principles would have application to ordinary

¹¹⁸ On the rights and exploitation of migrant workers, see Rita Afsar, *Unravelling the Vicious Cycle of Labor Recruitment: Migration from Bangladesh to Gulf Countries* (International Labour Office, 2009); Migrant rights, *Migrant workers under the 'Kafala' system in the GCC* <<http://www.migrantrights.org/2010/11/23/migrant-workers-underthe-%E2%80%9Ckafala%E2%80%9D-system-in-the-gcc/>>.

¹¹⁹ Júlia Palik, *The Challenges of Dual-Societies* (Migration Gulf Research Centre, 2018) 117.

¹²⁰ In a policy brief produced by Fair Square, it is noted that "Article 40 of the Labour Law holds the employer responsible for paying for worker exit visas but does not explicitly specify that they have a right to approve or deny this visa. The 1952 Residency Law makes no explicit mention of sponsors' or residents' role in approving or denying exit visas. Nevertheless, it is clear that in practice employers enjoy this right Fair Square (n 6)10.

¹²¹ Maysa Zahra, *The Legal Framework of the Sponsorship Systems of the Gulf Cooperation Council Countries: A Comparative Examination* (Explanatory Note No. 10, 2015); Gulf Labour Markets, *Migration and Population (GLMM) programme of the Migration Policy Center (MPC) and the Gulf Research Center* <<http://gulfmigration.eu>>.

¹²² Hanan Malaeb, 'The "Kafala" System and Human Rights: Time for a Decision' (2015) 29(4) *Arab Law Quarterly* 307-342, 309; Heather Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries' (2012) 45(2) *Cornell International Law Journal* 461, 461.

employment contracts. However, as further chapters will explore, many principles of Sharia have not been fully realized or given full effect in the sphere of Saudi labour law. Instead, there is an accretion of legislation that deals with foreign worker rights in a fragmented, and often inequitable, manner.

At the level of justice, the Kafala system constitutes a dual labour market, and defines the laws applicable to each. The result is a two-tiered system: a highly centralized and anti-competitive public sector, and a decentralized and under-regulated private sector. It is little wonder then the Kafala system of contracting the foreign migrant workforce has created the very conditions under which migrant workers have suffered rampant forms of abuse, exploitation, and insecurity.¹²³ Since the Nitaquat system was first implemented, mass deportation and expulsion of undocumented workers, absent any right of challenge or appeal, have become commonplace. These deportation campaigns are most aggressively implemented when the tide of anti-immigrant sentiment is high, often during periods of economic decline and uncertainty.¹²⁴ It comes as little surprise that migrant workers were the first casualties of the oil slump in 2014 and accompanying efforts to restructure the labour market. In the same year, 2.5 million undocumented migrant workers were deported.¹²⁵

The story of how Saudi Arabia has implemented its migration policies is not particularly unique. Undocumented workers often face the threat of forced deportation in the ‘civilized’ legal systems of Europe and America. The difficulty Saudi Arabia faces is how it is to reduce its dependencies on foreign workers when they make up the majority of the workforce in sectors such as construction. 35000 migrant workers are currently employed in the construction of the Red Sea luxury tourism project, for example, despite efforts to recruit local workers.¹²⁶

¹²³ Human Rights Watch, *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia*, (Report, 2004) (*‘Bad Dreams’*) <<https://www.hrw.org/report/2004/07/13/bad-dreams/exploitation-and-abuse-migrant-workers-saudi-arabia>>; Human Rights Watch, *As If I Am Not Human: Abuses against Asian Domestic Workers in Saudi Arabia* (Report, 2008) (*‘As If I Am Not Human’*) <https://www.hrw.org/sites/default/files/reports/saudi-arabia0708_1.pdf>; or Human Rights Watch, *Detained, Beaten, Deported: Saudi Abuses against Migrants during Mass Expulsions* (Report, 2015) (*‘Detained, Beaten, Deported’*) <<https://www.hrw.org/report/2015/05/10/detained-beaten-deported/saudi-abuses-against-migrants-during-mass-expulsions>>

¹²⁴ Assault on Foreign Worker Sparks Debate in Saudi Arabia’, *Al Araby* (18 December 2016) <<https://english.alaraby.co.uk/opinion/assault-foreign-worker-sparks-debate-saudi-arabia>>

¹²⁵, Mohammed Al-Sulami, ‘90-day amnesty granted to residency, labor violators in Saudi Arabia’, *Arab News* (20 March 2017) <<https://www.arabnews.com/node/1070766/saudi-arabia>>.

¹²⁶ Global Construction Review, *‘Saudi Arabia picks teams to build village for 10,000 workers on Red Sea tourism mega-scheme’*, <<https://www.globalconstructionreview.com/news/saudi-arabia-picks-teams-build-village-10000-worke/>>

Given the additional regulatory and wage costs of hiring Saudi workers such as social insurance, occupational hazard and unemployment insurance¹²⁷, business elites continue to enjoy strong incentives to select migrant candidates for low-wage positions, driving a regulatory race to the bottom. One commentator notes that Saudi employers prefer hiring migrant workers because “it is more difficult to fire Saudi workers than foreign workers.”¹²⁸ It is not difficult to see how labour market dynamics such create a regulatory “trap” so to speak. On the one hand, Saudi employers have come to resist any legislative efforts to control immigration policy that might reduce the availability of cheap labour. On the other hand, Saudi authorities have been impeded in their efforts to tackle the unemployment crisis precisely because of a cultural expectation – one that has historically been cultivated by Saudi ruling authorities – that “a standard of living higher than that of non-nationals is an inalienable right, irrespective of any personal contribution to the wealth and well-being of society as a whole.”¹²⁹

Finally, the essential flaw or injustice of Saudi Arabia’s labour migration policy is the segmentation of national and foreign workers. This is because foreign workers are made subject to a discriminatory application of rules under a parallel (Kafala) legal framework. Ruling authorities have long recognised that Saudi citizens have only been prepared to accept the substantial presence of migrant workers in the country if their own economic security was guaranteed.¹³⁰ Moreover, by ‘buying’ social legitimacy through economic incentives, the ruling regime could also count on civil apathy in the face of unfair migrant labour practices, ruling out any societal demand for strengthened or equivalent rights for foreign workers.¹³¹ Private employers have actively resisted efforts to establish comparable or minimal rights for migrant workers under the Kafala system, which are still vulnerable to a wide range of abuses, from passport confiscation to delayed wages and forced labour¹³².

¹²⁷ Payslip, *Saudi Arabia Global Payroll Tax Information Guide* <<https://payslip.com/resources/blog/saudi-arabia-global-payroll-tax-information-guide>>.

¹²⁸ Mohamed Ramady, Gulf unemployment and government policies: prospects for the Saudi labour quota or Nitaqat System, (2013) 5(4) *International Journal of Economics and Business Research* 476-498, 477

¹²⁹ Ibid.

¹³⁰ De Bel-Air (n 5).

¹³¹ Hazem Beblawi and Giacomo Luciani (eds), *The Rentier State: Nation, State and Integration in the Arab World* (London, 1987) 2.

¹³² Human Rights Watch, *Saudi Arabia Labor Reforms Insufficient* <<https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>>.

B The Demand for Reform

This section will examine the demand for Kafala reform arising from the human rights arena, economically powerful nations and civil society actors.

The key limitation of Saudi Arabia's Kafala reform proposal is that many classes of vulnerable workers continue to inhabit unregulated workplaces. These workers live without even minimal protections against abuses, such as access to remedies, freedom of movement and the right to change jobs. Nonetheless, it is arguable that Saudi Arabia may eventually succumb to international pressures. This may occur because the even modest reforms have the potential to create new social expectations around the need and desirability of labour related rights.¹³³ Job mobility and strengthened in-work protections may therefore be on the table, even for low-skill migrants. In recognition of the fact that workplace abuse is rampant in Saudi Arabia, and cannot be brought to heel without across-the-board rights protections, the Saudi government faces sustained pressure by human rights bodies to further level up its immigration and labour laws, bringing demands for the Kingdom's fuller participation in, and ratification of, regional and international human rights treaty frameworks.¹³⁴

It is noteworthy that Saudi Arabia held a seat in the Human Rights Council over the periods of 2013 to 2019. This symbolic gesture was not necessarily followed by a discernible shift in the country's human right record. Saudi Arabia has not ratified the International Covenant on Civil and Political Rights ('ICCPR') and thus has failed to recognize any international obligations to respect political rights including freedom of movement and rights of collective action. Later chapters will note that even where it has acceded to human rights treaties, Saudi Arabia has only done so by entering expansive reservations to core treaty provisions, based on contested and contestable interpretations of Sharia.¹³⁵ Though its engagement with human rights issue has been uneven, Saudi rulers have recently aimed to enhance the country's

¹³³ Rebekah Smith, 'Saudi Arabia Could Rewrite Its Record on Labor Mobility by Ending Kafala Centre for Global Development', <<https://www.cgdev.org/end-of-kafala-labor-mobility>>

¹³⁴ Samid Darawsheh, 'Human Rights in the Constitutions of the Gulf Cooperation Council Countries (GCC): Texts and Realities' (2020) 11 *Beijing Law Review* 519, 519.

¹³⁵ On competing interpretations of Islamic human rights controversies such as women rights see Charles. Kurzman, 'Introduction: Liberal Islam and its Islamic Context' in Kurzman (ed), *Liberal Islam, A Sourcebook* (OUP, 1998); Ziba Mir-Hosseini, Mulki Al-Sharmani, and Jana Rumminger, *Men in Charge? Rethinking Authority in the Muslim Legal Tradition* (Oneworld, 2015).

economic credibility by engaging more actively in and with global economic institutions.¹³⁶ Its membership in global economic institutions such as the International Centre for Settlement of Investment Disputes ('ICSID') and the World Trade Organisation ('WTO') has exerted direct and indirect pressures on ruling authorities to integrate wider human rights concerns. This includes labour standards, into the domestic legal order. These efforts are further bolstered by the lobbying efforts of influential human rights bodies and Non-governmental Organisations ('NGOs') who will often produce shadow reports highlighting abuses of migrant worker's rights.¹³⁷ The soft power of human rights organizations lies in their ability to bringing awareness of human rights violations to the attention of bilateral or multilateral partners, or by compelling international treaty bodies and Committee to issue condemnation of such practices on the world stage.¹³⁸ It is notable that Saudi Arabia has partnered with the International Labour Organisation ('ILO') on Vision 2030 and played host to the International Trade Union Confederation ('ITUC') Secretary General.¹³⁹ Saudi Arabia's formal adoption of certain ILO treaties may well indicate a sincere desire on the part of the Kingdom to give greater recognition and domestic force to international labour norms and frameworks. However, Saudi Arabia's strategic decision to cast itself as a key supporter of the UN,¹⁴⁰ and sporadic engagement with labour related human rights issue, may also disguise the opportunism behind such initiatives. The rhetoric of human rights has long been leveraged by states for political reasons, providing them with a patina of legitimacy that shields them from more sustained and probing forms of scrutiny and opposition.¹⁴¹ Whatever the underlying motivations of the ruling regime, the Saudi government has not been able to escape condemnation for systemic abuses of human rights. The Kafala system in Saudi Arabia has come under scrutiny as one of many elements of

¹³⁶ Steffen Hertog, 'Two-level negotiations in a fragmented system: Saudi Arabia's WTO accession' (2008) 15(4) *Review of international political economy* 650-679, 650.

¹³⁷ Kenneth Abbott, 'Orchestration: Global Governance through Intermediaries' <<https://ssrn.com/abstract=2125452>>; Paul Poast and Johannes Urpelainen, '*How International Organizations Support Democratization: Preventing Authoritarian Reversals or Promoting Consolidation?*' (Pearson Institute, 2015) 7.

¹³⁸ For a related discussion, see Yonatan Lupu, 'Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements' (2013) 67(3) *International Organization* 469-503, 469; Yonatan Lupu, 'The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects,' (2013) 57(4) *American Journal of Political Science* 912-925, 912. For a critical perspective see Daniel Hill, 'Estimating the Effects of Human Rights Treaties on State Behavior' (2010) 72(4) *Journal of Politics* 1161-1174, 1161.

¹³⁹ Rashid Hassan, 'International trade union visits Riyadh labor court to discuss work environment', *Arab News* (11 July 2019) <<https://www.arabnews.com/node/1523881/saudi-arabia>>

¹⁴⁰ 'General Assembly Elects 14 Member States to Human Rights Council, Appoints New Under-Secretary-General for Internal Oversight Services', *United Nations* (17 October 2019) <<https://www.un.org/press/en/2019/ga12204.doc.htm>>.

¹⁴¹ Eva Bellin, 'Reconsidering the Robustness of Authoritarianism in the Middle East. Lessons from the Arab Spring' (2012) 44(2) *Comparative Politics* 127, 149.

domestic policy in desperate need of strengthened human rights guarantees. Acutely aware of the damaging effects of negative headlines on the country's tourism and investment agenda, and mindful of not attracting the same global outrage that would follow Qatar's migrant workers World Cup fiasco. Saudi leadership has realized that political costs of failing to respond to concerns about migrant worker rights may outweigh the domestic fallout from a pro-migrant and migration policy. While these will doubtless be factors that the Saudi regime will be forced to weigh and balance in the scheme of its labour market needs and Saudization agenda, there is little proof to suggest labour protections figure prominently in the country's development projects.¹⁴² It has been reported, for instance, that the thousands of workers farmed to work on the construction of the Neom tech city¹⁴³ continue to live and work in harsh conditions and forced to shared cramped accommodation.

Outside collective institutions, economically powerful nations may also wield their "soft" diplomatic power to incentivize domestic human rights protections through the offer of tangible benefits as trade or investment.¹⁴⁴ If Saudi Arabia is to achieve the economic modernization aims in the Vision 2030, it will need to secure the support of partner governments in Europe and North America. These partnerships may also force the hand of Saudi leaders to engage constructively in international treaty frameworks concerning migrant worker rights. Regional partners may use institutional channels to exert diplomatic pressure on allies and partners to implement reform at the domestic level. In this regard, the GCC has taken the bold leap of establishing a sub-regional human rights framework known as the GCC Declaration on Human Rights, thereby opening a space for multilateral initiatives on shared human rights concerns.¹⁴⁵ Strikingly, the Declaration's Articles replicate the hierarchy of rights set forth in Universal Declaration of Human Rights ('UDHR'), including inter alia the freedom of movement (Article 10) and freedom of association (Article 31). Among its most important achievements, the GCC Declaration is the first regional instrument since the adoption of the Arab Charter and Cairo

¹⁴² Mustafa el-Mumin, 'Gulf Declaration of Human Rights (GDHR) Protection against Slavery: A Double-edged Sword' (2020) 34(3) *Arab Law Quarterly* 241-266, 241.

¹⁴³ مدينة نيوم التكنولوجية [NEOM Technology City], < https://www.neom.com/en-us/about/business?gclid=EAIaIQobChMirJLX4b_BgwMVkKRmAh1YDwKxEAAAYASAAEgJ8hPD_BwE >

¹⁴⁴ Rafi Hossin, 'The Role Of Human Rights As A Soft Power In America's Foreign Policy' (2016) 8(32) *Political Science And International Relations Journal* 177, 213

¹⁴⁵ Basak Çali and Nazila Ghanea, 'The Domestic Effects of International Human Rights Treaty Ratification in the Member States of the Cooperation council for the Arab States of the Gulf (GCC) II' (2014) <<https://qatar.sfs.georgetown.edu/research/faculty-research/domestic-effects-international-human-rights-treaty-ratification-member>>; Abdulaziz Al-Horr, 'Rethinking soft power in the post-blockade times: The case of Qatar' (2019) 28(2) *Digest of Middle East Studies* 329, 350.

Declaration on Islamic Human Rights, to afford some type of recognition to the right to political participation (Article 30).¹⁴⁶

In the regional context, GCC member states are highly interconnected by shared economic and security interests. Instruments such as the GCC Declaration on Human Rights that are adopted by consensus by GCC Member States may therefore play a critical role in fostering legal and social acculturation or ‘shared normativity’ around regional customary human rights norms. Regulatory competition between regional partners in the GCC may also generate regional customary norms around migrant rights. Qatar, as the GCC outlier, has been engaged in a campaign to rebrand its image as the GCC leader on human rights issues.¹⁴⁷ In this regard, the Qatari leadership has looked to form alliances with the non-Arab world on human rights initiatives, including by announcing its commitment to ending poor working conditions for migrant workers, following condemnation by the EU and international organizations.¹⁴⁸ Building on this idea, the race for international investment may drive a regulatory race to the top between regional partners. If this line of argument is shown to have explanatory value, legislative reform in one GCC nation may have a spillover effect on other Gulf partners, creating pressures on states to level up their own labour standards and policies. This may even explain why nearly every GCC Member has amended its labour laws in the last five years, and reformed aspects of their own labour sponsorship systems.¹⁴⁹ There is however a discernible gap between the GCC’s rhetorical commitments to strengthened human rights protections and the employment systems of Gulf nations ‘on the ground’.¹⁵⁰ Moreover, while Qatar has been responsive to pressure exerted by powerful regional blocs such as the EU, the default position of GCC states has been to determine their policy priorities from a national rather than international perspective.

¹⁴⁶ Khalifa AlFadhel, ‘The GCC Human Rights Declaration: An Instrumentation of Cultural Relativism’ (2017) 31(1) *Arab Law Quarterly* 92, 93.

¹⁴⁷ Mehran Kamrava, ‘Mediation and Qatari Foreign Policy’ (2011) 65 *Middle East Journal Orbis* 539, 542

¹⁴⁸ *Ibid.*

¹⁴⁹ Human Rights Watch, *Saudi Arabia: Steps toward Migrant Workers’ Rights* (Web Page, 15 November 2015) <<https://www.hrw.org/news/2015/11/15/saudi-arabia-steps-towardmigrant-workers-rights>>; Peter Kovessy, ‘Qatar Officials Propose Changes to Kafala System’, *Doha News*, (May 14, 2014); Human Rights Watch, *UAE A Move to Protect Migrant Workers* (1 November 2015) <<https://www.hrw.org/news/2015/11/01/uae-move-protect-migrant-workers>>

¹⁵⁰ Mustafa el-Mumin, ‘The GCC Human Rights Declaration: An Instrument of Rhetoric?’ (2020) 34(1) *Arab Law Quarterly* 86-95, 86; Mani Mostofi, *For a Better Life: Migrant Worker Abuse in Bahrain and the Government Reform Agenda* (Report, 4 October 2012) <<https://www.hrw.org/sites/default/files/reports/bahrain1012ForUpload.pdf>>.

Demands for legal reform will also frequently emerge as a consequence of “bottom up” pressure by domestic civil society actors.¹⁵¹ By the same token, an absence of strong civil society pressure to amend or abolish rights-violating policies or other abusive practices may weaken or further entrench a state’s non-compliance with regionally or internationally agreed upon standards.¹⁵² Existing scholarship indicates that states are most likely to ratify human rights treaties when a combination of forces exists, including the leadership’s commitment to human rights participation, a robust civil society, and a system of checks and balances, above all the existence of independent courts with strong powers to review governmental acts and enforce rights.¹⁵³ Where these elements are not present or weak, Burton & Kiyoteru Tsutsui posit that the mere decision to implement a regional soft law instrument such as the GCC Declaration of Human Rights is unlikely to have a coercive or even persuasive effect on domestic law or policy.¹⁵⁴ These problems are compounded when domestic groups or populations have little to gain from legislative reform. This takes us to the vested interest of Saudi employers in ensuring that the Kafala system is not dissolved. Further reinforcing the challenges of domestic opposition to Kafala reform, it is noted that:

Actors directly involved in the vast industry built around labour recruitment and management have vested interests in obstructing reform. The Kafala’s many inefficiencies generate opportunities for rent-seeking and exploitation during the recruitment and visa processes. Even if reform were beneficial at an aggregate level, these groups would clearly lose out, at least in the short run. The potential losses have galvanized such entrenched interests and, in combination with the larger uncertainty among the population, have made reform difficult.

¹⁵¹ James Vreeland, ‘Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture’ (2008) 62(1) *International Organizations* 65-101, 70

¹⁵² Daniel Brumberg, *Liberalization Versus Democracy: Understanding Arab Political Reform* (Carnegie Endowment for International Peace, 2003) 22. The Kuwait court has displayed some willingness to give force to human rights obligations deriving from the UN treaties the government has ratified, specifically on issues such as women’s rights. This can be contrasted with the Saudi Arabia and Oman, where no constitutional court exists. Thus, while judicial independence is formally guaranteed by the Saudi Basic Law, this is not evident in practice. See Samid Darawsheh, ‘Human Rights in the Constitutions of the Gulf Cooperation Council Countries (GCC): Texts and Realities’ (2020) 11 *Beijing Law Review* 519.

¹⁵³ Thomas Risse-Kappen, Stephen Ropp, Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013); and Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

¹⁵⁴ Emilie Hafner-Burton and Kiyoteru Tsutsui, ‘Human Rights in a Globalising World: The Paradox of Empty Promises’ (2005) 110 *American Journal of Law and Society* 1373, 1384–86.

These potential losses are real and should not be gainsaid. After all, uncertainty alone cannot explain the overwhelming opposition to reform found throughout the Gulf.¹⁵⁵

As previous sections have argued, Saudi workers have been alienated from participating in the private sector workforce because of cultural prejudices that are closely linked to the social contract that exists between state and society. Yet, these cultural prejudices have only been able to endure because they reflect economic realities. Private sector employment is seen as precisely so undesirable because of “the poor work environment and low wages that the system has established.”¹⁵⁶ Once again it is possible to start from the premise that the Saudi government is currently engaged in a potentially transformative project of remaking its social contract. In this new conceptualization of the state-society relation, Saudi citizens will emerge not as passive recipients of state handouts but as active participants in a new economic order.¹⁵⁷ While falling short of a democratic society, this re-imagining holds out the promise to a new political settlement in which social cohesion and solidarity is based on more than familial and religious ties, but as one rooted in a shared stake in a common economic future and the wellbeing of society.¹⁵⁸ Zaid M. Belbagi astutely observes:

In the coming decade, social trends focused on demographic, economic and political issues have the potential to be destabilizing without adequate government efforts to seek a more engaging social contract. Falling energy prices affect the severity of these trends and the speed at which they may have an adverse impact on the viability of the GCC states in their current form. Given the challenges of youth and the need to create meaningful employment, the focus of governments must be the economic well-being of nationals.¹⁵⁹

How then, does the Kingdom’s labour migration agenda figure in this equation? On the one hand, the Saudi leadership has strong economic imperatives to begin the long process of steering Saudi employers – via regulatory measures- away from cheap sources of foreign labour

¹⁵⁵ Abdoulaye Diop, Trevor Johnston, and Kien Trung Le, *Challenges in Reforming the Kafala* (Gulf Research Center Cambridge, 2018) 44-45

¹⁵⁶ Maaal, ‘Sources confirm: imminent decision to permanently abolish kafala system in Saudi’, *Al Maaal Economic newspaper* <<https://www.maaal.com/archives/20200203/135233>>.

¹⁵⁷ J.E. Peterson, *The GCC States: Participation, Opposition, and the Fraying of the Social Contract* (Kuwait Programme on Development, Governance and Globalization in the Gulf States, LSE: 2013) 4

¹⁵⁸ Gregory Gause III and Jill Crystal, ‘The Arab Gulf: Will Autocracy Define the Social Contract in 2015?’ In Judith S. Yaphe (ed), *The Middle East in 2015: The Impact of Regional Trends on U.S. Strategic Planning* (Institute for National Strategic Studies, 2002) 165; Martin Hvidt, *Economic Diversification in GCC Countries: Past Record and Future Trends* (Kuwait Programme on Development, Governance and Globalization in the Gulf States, LSE, 2013) 5.

¹⁵⁹ Zaid Belbagi, ‘Renegotiating the Social Contract in the GCC: Lessons from the Rousseau Playbook’ (2015) *Gulf Affairs* 2, 4.

and towards greater investment and training of the local workforce.¹⁶⁰ This could be achieved by raising labour standards, thus increasing the compliance costs of employing foreign labour.¹⁶¹ On deeper inspection, however, all evidence suggests that the Saudi leadership's position on migrant remains ambivalent at best. It has been noted that the Kingdom's labour migration agenda appears to be driven by the need to preserve the regime's survival through populist policies that attain the consent and approval of the local population.¹⁶²

In the above regard, foreign migrant workers were the targets of media fear mongering at the height of the Covid Pandemic in 2020.¹⁶³ Blamed for spreading infection in migrant accommodation settlements, the Saudi government once again carried out mass deportations of migrants without regard to their legal and residency status, in response to rising public panic.¹⁶⁴ Among their numbers, children and pregnant women were dispatched to deportation centres, where many languished for long periods without any right of appeal, in conditions described by some reports as "hellish". The heightened media focus on deportation campaigns also reenergized debates around labour nationalization, prompting international commentators to call for a recalibration of the foreign to Saudi nationals labour ratio in emerging economic sectors.¹⁶⁵ What remains less clear is if the Saudi leadership can restructure its labour market to tap into the unrealized potential of its youth population, while remaining competitive in a global economy. Furthermore, it is uncertain whether the Kingdom will be able to successfully execute its own infrastructure development plans, ambitious as they are, if migrants continue to leave in high numbers. Often left stranded for months without pay, migrant workers may cut their losses and exit the Kingdom in search more stable employment.¹⁶⁶ Such an eventuality

¹⁶⁰ Ibrahim Saif, *The Oil Boom in the GCC Countries, 2002-2008: Old Challenges, Changing Dynamics* (Carnegie Endowment for International Peace, 2009) 16-17.

¹⁶¹ 'New Domestic Labor Law to Help Improve rights of Weaker Party', *Arab Times* (27 April 2017) <<https://www.arabtimesonline.com/news/new-domestic-labor-law-help-improve-rights-weaker-party/>>; A. Hannan, '1,441 Firms Shut for Not Complying with Salary Protection Program', *Arab News* (26 October 2015) <<http://www.arabnews.com/saudi-arabia/news/825921>>. See also Tarik Yousef, 'Unlocking Labor Markets in the Gulf Cooperation Council' In, Zaid Belbagi, *Renegotiating the Social Contract in the GCC: Lessons from the Rousseau Playbook* (Gulf Affairs, 2015) 163

¹⁶² *Middle East Eye* 'Migrant Worker Bear the Brunt of Saudi's Archaic Kafala System', <<http://www.middleeasteye.net/columns/migrant-workers-bear-brunt-saudis-archaic-kafala-system-817327584>>.

¹⁶³ Migrant-Rights, *Stranded outside Saudi, migrant residents in limbo; confusion over their return* (Web Page, 21 September 2020) <<https://www.migrant-rights.org/2020/09/stranded-outside-saudi-migrant-residents-in-limbo-confusion-over-their-return/>>.

¹⁶⁴ Amnesty International, *Ethiopian migrants describe "hell" of detention* (Web Page, 2 October 2020) <<https://www.amnesty.org/en/latest/news/2020/10/ethiopian-migrants-hellish-detention-in-saudi-arabia>>

¹⁶⁵ Bayly Winder, *Challenges and Opportunities for the Saudi Economy* <<https://carnegie-mec.org/sada/82104>>.

¹⁶⁶ Rejimon Kuttappan, 'Indian migrant workers in Gulf countries are returning home without months of salary owed to them', *The Hindu* (19 September 2020) <<https://www.thehindu.com/society/indian-migrant-workers-in-gulf-countries-are-returning-home-without-months-of-salary-owed-to-them/article32639165.ec>>

does not only jeopardize projects in which the Kingdoms has already poured substantial public investment, it will also have deflationary effect on local economies propped up by the flow of expatriate workers into the country.¹⁶⁷ An exodus of high skilled workers will have knock on effects for the most vulnerable low-income workers, with one scholar noting that: “scarcity of jobs in the Gulf is likely to make competition for these positions fiercer and increase costs and abusive practice in the recruitment process.”¹⁶⁸

¹⁶⁷ International Labour Organization, *COVID-19: Labour Market Impact and Policy Response in the Arab States* (Briefing Note, May 2020) <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/briefingnote/wcms_744832.pdf>

¹⁶⁸ Upasana Khadka, ‘Brokers going for broke’, *Nepali Times* (20 July 2020) <<https://www.nepalitimes.com/opinion/brokers-going-for-broke/>>.

C The Kafala Reforms

This section will examine the steps taken by Saudi Arabia to strengthen its regulation over the labour market over the past decade. This includes the establishment of a labour court system¹⁶⁹ (albeit with limited jurisdiction over foreign worker rights) and a domestic worker law that may have significant implications for the large number of (predominantly female) foreign workers recruited and deployed in this sector. More importantly, it will examine efforts to reform and improve the image of the country's sponsorship system.

In 2000, and in response to sustained international criticism of the country's sponsorship system, the Saudi government made the political decision to remove all references to the term "Kafala" from its domestic laws.¹⁷⁰ This rhetorical strategy was later followed by other Gulf states with similar systems.¹⁷¹ Shifting the legal language from sponsorship to employment contracts, Saudi lawmaker would now attempt to recast the Kafala system not as a legalized form of bonded labour, or one-sided bargain between Saudi businesses and their rightless migrant employees, but as contractual relationship founded in established principles of party autonomy, equality and mutuality.¹⁷² Despite the shift in terminology, employers continued to exercise the same powers over their employees.¹⁷³ As such, the removal of the Kafala failed to effectuate any substantive change in the legal status or rights afforded to migrant workers. As an exercise of reputation management, moreover, the change in terminology did little to alter the way that UN Committee, the US State department and contemporary commentators viewed and analysed the "de facto sponsorship system".¹⁷⁴ The plight of migrant workers in

¹⁶⁹ الوسيط في شرح التنظيم القضائي الجديد في المملكة العربية السعودية [Ahmed Saleh Makhlof] , احمد صالح مخلوف [The Intermediary in explaining the new judicial organization in the Kingdom of Saudi Arabia] (مطبوعات معهد الإدارة) Publications of the Institute of Public Administration in Riyadh] , 2013) 85.

¹⁷⁰ Council's decision No. 166 of 12 July 2000 on Regulations concerning the relationship between employers and foreign workers (Saudi Arabia)

<https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=59275&p_country=SAU>

¹⁷¹ Amnesty International, *New Name, Old System? Qatar's new employment law and abuse of migrant workers* (December 2016) ('*Amnesty International Report*') <<https://www.amnesty.org/download/Documents/MDE2252422016ENGLISH.PDF>>

¹⁷² International Trade Union Confederation, *Facilitating Exploitation: A review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries* (Final Report, 2017) ('Migrant domestic workers in gulf') <https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf>

¹⁷³ United Nations, *Committee on the Elimination of Racial Discrimination, Concluding observations on the combined fourth to ninth periodic reports of Saudi Arabia* <<https://undocs.org/en/CERD/C/SAU/CO/4-9>>; and US State Department, *2018 Trafficking in Persons Report: Saudi Arabia* (Report, June 2018) ('*2018 Trafficking in Persons Report*') <<https://www.state.gov/reports/2018-trafficking-in-persons-report/saudi-arabia/>>

¹⁷⁴ Antonio Donini, 'Social Suffering and Structural Violence: Nepali Workers in Qatar' In *The ILO @ 100* (Brill, 2019) 55; United Nations, *Committee on the Elimination of Racial Discrimination, Concluding*

the Gulf failed to occupy a prominent place in the international human rights agenda, at least until 2010 onwards. In more recent years, there has been intensified scrutiny of systemic human rights abuses in the Kingdom.¹⁷⁵ Even so, the welfare of foreign temporary migrant workers in Saudi Arabia has failed to attract the kind of sustained attention and criticism by NGOs and media visited upon on other Gulf nations. High profile events such as the fate of migrant workers contracted to build Qatar's world cup stadium have garnered more media attention, moving Saudi Arabia's Kafala sponsorship system out of the international spotlight.¹⁷⁶ Indeed, symbolic gestures and piecemeal reforms, including Qatar's partnership program with the ILO, have, arguably, engendered a degree of false optimism and complacency on the part of the international community. Like Qatar and Bahrain, Saudi Arabia has attempted its own reforms to the sponsorship system, potentially in a bid to outcompete its regional rivals and allies, in the international legitimacy stakes.¹⁷⁷

A case in point, the 2020 reforms announced by the Saudi government are but the latest of a series of long running pledges made by the Saudi government to end or substantially reform its sponsorship system. There is a danger that sporadic reforms are too warmly welcomed as a substantial change in legal practice, thereby freeing international actors from engaging in sustained review of how such reforms are implemented on the ground. Just as commentator's welcome recent announcements of sweeping reforms to the Kafala system in 2020,¹⁷⁸ high hopes of the international community were similarly pinned on statements made by the Labour ministry in 2012. At this time, it was declared that the sponsorship system was, finally, on "its way out".¹⁷⁹ Under the proposed 2012 reforms, the government's management of foreign

observations on the combined fourth to ninth periodic reports of Saudi Arabia (Web Page, 8 June 2018) <<https://undocs.org/en/CERD/C/SAU/CO/4-9>>; US State Department, *2018 Trafficking in Persons Report: Saudi Arabia* (Report, June 2018) ('*2018 Trafficking in Persons Report*') <<https://www.state.gov/reports/2018-trafficking-in-persons-report/saudi-arabia/>>.

¹⁷⁵ Sifa Mtango, 'A State of Oppression – Women's Rights in Saudi Arabia' (2004) 5(4) *Asia Pacific Journal on Human Rights and the Law* 49; Amnesty International, 'Saudi Arabia: Access for independent monitors urgently needed amid more reports of torture of activists' (25 January 2019) <<https://www.amnesty.org/en/latest/news/2019/01/saudi-arabia-access-for-independent-monitors-urgently->>; Bernard Haykel, *Saudi Arabia and Qatar in a Time of Revolution* (CSIS, Middle East Program, Gulf Analysis Paper, 2013) 7

¹⁷⁶ Abdoulaye Diop, Trevor Johnston, and Kien Trung Le 'Reform of the Kafala System: A Survey Experiment from Qatar' (2015) 5(2) *Journal of Arabian Studies: Arabia, the Gulf & the Red Sea* 116-137, 117.

¹⁷⁷ Raed Alhargan, 'The Impact of the UN Human Rights System and Human Rights INGOs on the Saudi Government with Special Reference to the Spiral Model' (2012) 16 *International Journal of Human Rights* 598-623, 598.

¹⁷⁸ Maaal, 'Sources confirm: imminent decision to permanently abolish kafala system in Saudi', *Al Maaal Economic newspaper* (Riyadh, 3 February 2020) <<https://www.maaal.com/archives/20200203/135233>>

¹⁷⁹ *Al-Bab*, 'Labouring in Vain: the Gulf 's Unpaid Workers', <<http://al-bab.com/blog/2016/09/labouring-vain-gulfs-unpaidworkers>>.

migration would be replaced instead by a privatized system handled by large recruitment companies. On its own terms, it was not clear how wholesale transfer of migration management from the state to private sector would solve the human rights concerns of migrant workers, if not also accompanied by strengthened labour rights protections. Saudi Arabia amended its labor law in 2005 to introduce minimal protections for national workers, introducing new protections concerning maximum working hours, restrictions on salary deductions, paid holidays and by establishing mechanisms for resolving employment disputes.¹⁸⁰ However, migrant workers entering the Kingdom to perform a specific task for a period not exceeding two months, were expressly excluded by Article 7 of the labor law from these provisions. This denied them equivalent protections guaranteed to other workers.

Some reforms toward improved working conditions for migrant worker were advanced in the intervening years before proposals to systematically overhaul the Kafala system would again be mooted in 2020. Notable developments included the enactment of a domestic workers regulation in 2013.¹⁸¹ This legislation was the first regulatory instrument of its kind to acknowledge the vulnerable status of domestic workers under the Kafala system, namely their inability to liberate themselves from abusive employers without their prior consent. Though far from a panacea, the domestic workers regulation does set out a legal framework for establishing minimal protections for domestic workers, though these fall short of international standards formulated in the ILO Domestic Workers Convention.¹⁸² As part of an effort to improve transparency and the visibility of domestic workers, the Saudi government established a digital forum for the recruitment and registration of domestic workers, an innovation that the ILO praised as a “promising development”.¹⁸³ During this period, the Saudi government also entered into a series of bilateral treaties with countries from which the majority of domestic workers originated, including the Philippines, Indonesia, Sri Lanka, and India.

¹⁸⁰ Royal Decree No. M/51 2005 (Saudi Arabia).

¹⁸¹ Decision No. 310 of 1434 on Domestic Workers 2013 (Saudi Arabia).

¹⁸² International Labour Organization, *Domestic Workers Convention* <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189>.

¹⁸³ International Labour Organization, *Labour mobility between Asia and the Arab States: Sharing of experiences and progress under the Bali Declaration with specific focus on women migrant workers Bangkok* <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_754661.pdf>.

In a seismic development, the long-awaited labour courts system was established in 2018, over a decade after a statutory basis for their creation was passed in 2007.¹⁸⁴ Prior to this, labour disputes fell under the jurisdiction of the labour ministry and were adjudicated by administrative tribunal.¹⁸⁵ The creation of a labour court had the welcome effect of placing labour disputes outside the political arena, providing Saudi judicial authorities with the necessary flexibility to articulate a body of labour principles and jurisprudence. Supplementing these developments, further amendments were made to the labour law to allow authorities to impose harsher penalties on employers found to have contravened the provisions of the Code.¹⁸⁶

The above labour reforms have aimed to improve workplace conditions and enforcement practices in a bid to draw Saudi nationals into the workforce. Any such efforts to improve the labour market for the high number of foreign workers currently living in Saudi Arabia has been far slower.¹⁸⁷ Key aspects of Saudi labour legislation will be addressed in further detail in later chapters. Scholars have observed that the sheer scope of the Saudi Vision 2030 has further contributed to a lack of certainty around market outcomes, with “conflicting projects and programs across most government sectors [illustrating] the ill-thought nature of policymaking in the kingdom”.¹⁸⁸

The abolishment of the sponsorship system was once put back on the agenda in February 2020, with a local newspaper reporting that the sponsorship would now finally be phased out and replaced with an alternative system. These noises prompted a wave of confusion as the Saudi government later denied the veracity of this claim. Nonetheless, it is suggested that the newspaper had received high level backing to print the story, perhaps in an effort to take the public temperature on the desirability of such reforms.¹⁸⁹ In subsequent months, the Saudi

¹⁸⁴ Muhammad Al-Sulami, ‘7 new labor courts and 96 chambers set up across KSA’, *Arab News* (15 May 2018) <<https://www.arabnews.com/node/1302871/saudi-arabia>>

¹⁸⁵ Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press, 1997) 155.

¹⁸⁶ Migrant-Rights.org, ‘Saudi Arabia introduces new amendments to Labour Law regulations’, (29 August 2019) <<https://www.migrant-rights.org/2019/08/saudi-arabia-introduces-new-amendments-to-labour-law-regulations/>>

¹⁸⁷ *Al-Bab* ‘Labouring in Vain: the Gulf’s Unpaid Workers’, <<http://al-bab.com/blog/2016/09/labouring-vain-gulfs-unpaidworkers>>

¹⁸⁸ Hadi Fathallah, ‘Challenges of Public Policymaking in Saudi Arabia’, *Carnegie Endowment* (22 May 2019) <<https://carnegieendowment.org/sada/79188>>

¹⁸⁹ Lauren Holtmeier, ‘Saudi Arabia set to abolish sponsorship system soon: Report’, *Al Arabiya* (6 February 2020) <<https://english.alarabiya.net/en/News/gulf/2020/02/06/Saudi-Arabia-set-to-abolish-sponsorship-system->

government was once again forced to choose between its conflicting policy aims: the regime's commitment to scaling down the public sector to allow for the fuller absorption of Saudi nationals in the private arena, on one side, and commercial demand for cheap labour in the context of the Kingdom's grand economic development projects, on the other.¹⁹⁰

As part of the Kingdom's bid to attract foreign investment and expertise into the country, a new scheme was introduced in 2019 to simplify the country's laborious residency rules and procedures to allow skilled migrants to fast track their applications or extend their visa more efficiently.¹⁹¹ This new scheme resembles green card systems aimed at attracting wealthy and high-skilled expats, and offers two types of residencies: permanent and a one year but renewable. The rationale behind the scheme is to allow foreign expats free movement, ability to own properties and to do business in the kingdom.

Seeking to render the labour market more competitive, Saudi ministries have taken a more activist role in labour export agreements by establishing bilateral treaty arrangements with migrant worker-origin states.¹⁹² Finally, the Saudi government opted to reform the Kafala system, but chose to address these reforms to in-demand high skilled migrant workers.

Under the new reforms, certain classes of workers gain stronger workers protections and rights to free movement. At their core, the reforms appear to mark an end to employer control over residency, transfer of work visa and exit. This development should thus be viewed as an important step by the Saudi government to wrest control from employers towards exercising stronger forms of oversight over migration. Yet, as noted in the introduction, these reforms fail to significantly improve the rights and welfare of Saudi Arabia's blue-collar workers. It is difficult, therefore, to see the value in right based reforms that exclude the oppressed and

soon-Report>; and 'Abolition of sponsorship system is imminent: Report', *Saudi Gazette* (4 February 2020) <<https://saudigazette.com.sa/article/588280>>

¹⁹⁰ Ahmed Feteiha and Vivan Nereim, 'Saudi Arabia's Safety-Net Spending Wipes Out New Tax Gains', *Bloomberg* (9 May 2018) <<https://www.bloomberg.com/news/articles/2018-05-09/saudi-arabia-s-safety-net-spending-wipes-out-new-tax-gains>>.

¹⁹¹ Simon Dawson, 'Saudi Arabia launches special residency scheme for expats', *CNBC* (23 June 2019) <<https://www.cnbc.com/2019/06/23/saudi-arabia-launches-special-residencyscheme-for-expats.html>>

¹⁹² Human Rights Watch, *Detained, Beaten, Deported: Saudi Abuses against Migrants during Mass Expulsions* (Report, 2015) ('*Detained, Beaten, Deported*') <<https://www.hrw.org/report/2015/05/10/detained-beaten-deported/saudi-abuses-against-migrants-during-mass-expulsions>>.

substantial majority of foreign citizens that comprise Saudi Arabia's work force. The invisibility and legal exclusion of the Gulf's low-paid workers is neatly captured as follows:

The debate and analysis of the kafala often focuses exclusively on blue-collar or low-skill migrant labour. While many of the most egregious abuses within the system often fall disproportionately on this vulnerable population, the kafala's scope is much more expansive. More than just labourers, domestic servants, and retail workers, the kafala also regulates the entry/exit and treatment of white-collar, high-skill expatriate labour.¹⁹³

A more general limitation of the Saudi sponsorship system is that it offers few avenues for legalizing irregular workers, creating a rigid set of rules and procedures that preserve incentives for employers and workers to flout the rules.¹⁹⁴ At the same the rigidity of immigration and residence renewal rules are not matched by the Kingdom's effective enforcement of labour protections and employee grievance mechanisms.¹⁹⁵ Given that few legal benefits are attached to legal work, migrant workers – high skilled or low-wage- may choose to work outside of the regulated labour market in search of flexible work and better wages.

The crux of the above analysis is that the Kafala reforms should be viewed in the context of a broad political project on the part of the Saudi government to restructure the labour market away from low-wage migrant workers to higher-skilled expatriate workers. In another sense, the new reforms to the Kafala are arguably little more than a continuation of Saudi Arabia's dual labour market system. One scholar notes that Saudi Arabia's labour migration policies, those seemingly embodied a policy shift from protectionism to economic liberalization, is the institutional embodiment of "nationalism expressed in the ethnopolitics of chauvinism towards non-national residents".¹⁹⁶ There is some evidence of change though. A new stratification of the workforce is being order, one in which the old dichotomies of domestic/foreign worker are

¹⁹³ A Abdoulaye Diop, Trevor Johnston, and Kien Trung Le, *Challenges in Reforming the Kafala* (Gulf Research Center Cambridge, 2018) 36.

¹⁹⁴ Hélène Thiollet, *Immigrants, Markets, Brokers, and States: The Politics of Illiberal Migration Governance in the Arab Gulf* (2019) <<https://hal.archives-ouvertes.fr/hal02362910v2/document>>

¹⁹⁵ *Al-Bab*, 'Labouring in Vain: the Gulf's Unpaid Workers', <<http://al-bab.com/blog/2016/09/labouring-vain-gulfs-unpaidworkers>>.

¹⁹⁶ Neil Patrick, *Nationalism in the Gulf States, Kuwait Program on Development, Governance and Globalisation in the Gulf States* (Report No. 5, October 2009) ('*Nationalism in the Gulf States, Kuwait Program on Development*'). See also 'Reduce Number of Expatriate Workers in the GCC, Says UAE Minister', *The National* (22 April 2014) <<https://www.thenational.ae/uae/government/reduce-number-of-expatriateworkers-in-gcc-says-uae-minister-1.310175>> ; Al Araby, *Sack all Foreigners by 2020, Says Saudi Government* (Web Page, 10 May 2017) <<https://www.alaraby.co.uk/english/news/2017/5/10/sack-all-foreigners-by-2020-says-saudi-government>>.

now being reconstituted along class lines, resulting in new inequalities and divisions between wealthy ex-patriate workers from the West and low-skill workers from the Global South.¹⁹⁷

The failures and limitations of the Saudi Kafala system will now be explored in connection with the Kingdom's commitments and obligations under global labour and other international human rights standards.

¹⁹⁷ For racially motivated differences in public attitudes to White, middle class, professionals and low-skill workers from Asia and Africa see David Chaudoir, 'Westerners in the United Arab Emirates: A View from Abu Dhabi' In *Migration and the Gulf. The Middle East Institute* (Washington, D.C., 2010)

CHAPTER III: EXPLORING THE INTERNATIONAL LEGAL FRAMEWORK COVERING MIGRANT RIGHTS AND ITS DOMESTIC ENFORCEMENT IN SAUDI ARABIA

A Introduction

This chapter considers the rights of migrant workers in the sphere of international human rights, in order to answer sub questions number two: “To what extent was or still is the Kafala system before and after the reforms in conflict with Saudi Arabia’s international obligations and emerging global labour standards and norms?”.

The Kafala sponsorship has historically deprived migrant workers of their ability to achieve dignity, equality, and security in their chosen employment.¹⁹⁸ In light of the above claims, this chapter begins by sketching a conceptual framework of why states do, or do not ratify human rights treaties and instruments. This conceptual frame offers a way of unpacking and rationalizing Saudi Arabia’s engagement with human rights discourses, thus sharpening the reader’s understanding of the extent to which normative related concerns, including human rights protection, figured in its decision to reform its Kafala system. This discussion will also consider the extent to which other factors, including strategic self-interest and economic gains, may provide a better rationalization of this decision.

This chapter offers a systematic and largely descriptive analysis of the most important international treaties with applicability to the rights of migrant workers,¹⁹⁹ before narrowing its discussion on global labour standards, many of which are pursued through supranational processes of international treaty making. This will lay the ground for an analysis of how the Gulf countries have traditionally viewed human rights norms and treaty frameworks, including by developing their own regionally and culturally appropriate human rights framework and labour standards as a counterpoint to the perceived “hegemony” of Euro-centric human rights

¹⁹⁸ Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries’ (2012) 45(2) *Cornell International Law Journal* 461.

¹⁹⁹ For an overview of the issues, see Khalaf Sulayman and Saad Alkobaisi. ‘Migrants’ Strategies of Coping and Patterns of Accommodation in the Oil-Rich Gulf Societies: Evidence from the UAE’ (1999) 26(2) *British Journal of Middle Eastern Studies* 28.

standards. After assessing the Gulf's slowness to implement rights protections equivalent to those established under the core UN human rights treaties, the chapter will proceed to review Saudi Arabia's domestic implementation of global human rights and labour related standards, and its failures in this regard. The conclusion will therefore reflect on the gap between Saudi Arabia's commitments to human rights rhetoric and the domestic enforcement of such rights under the newly reformed Kafala framework.

B The International Framework for the Protection of Migrant Workers

Responding to an increase in the mistreatment, abuse and discrimination of migrant workers, human rights organisations have spearheaded the movement to strengthen labour protections for workers. This encourages states to engage in deliberative processes that shape the way that global labour norms and practice evolve.

As will be outlined below attempts to establish a robust legal framework for the protection of migrant workers, including irregular and undocumented workers are most frequently negotiated at the bilateral and multilateral levels, often in ways that reveal the complex relation between human rights and economic development goals. As a result, it is necessary to examine the treatment of migration as a ‘fundamentally human phenomenon’²⁰⁰, to prepare the ground for a critically focused analysis on whether an international migration governance regime that remains centrally focused on human rights is ultimately effective, given the ongoing objections to strengthened rights for migrant workers on political and development grounds.

The next section will outline the core treaties that aim to protect the rights of workers, focusing ultimately on those specifically dedicated to the rights of migrant workers.²⁰¹

States ratify international or regional human rights treaties for a variety of reasons and rationales. State ratification of a human rights treaty may be driven by ethical rather than political concerns, such as commitment to the actual substance of a treaty as end of itself.²⁰² Conversely, as noted above, states may participate in international human rights treaty framework for self-interested or political reasons, such as a desire to enhance their standing in the international community of states. Or, this can be done to acquire some of other economic or political benefit from membership in collective treaty making arrangement as a condition of bilateral investment or membership in, or the legitimation of, agenda-setting multilateral

²⁰⁰ Ibid.

²⁰¹ Committee on the Elimination of Discrimination Against Women, Concluding Comments on Saudi Arabia, 40th Sess, Jan. 14-Feb. 1, 2008, U.N. Doc. CEDAW/C/ SAU/CO/2 (Apr. 8, 2008).

²⁰² Basak Çali and Benjamin Jones, ‘Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council’ (2016) 38 *Human Rights Quarterly* 21, 24.

economic institutions such as the IMF, WTO or World Bank.²⁰³ In these instance, a state's accession or ratification of a human rights treaties may proceed with a principled commitment to achieving the aims of the treaty.²⁰⁴ In most cases, the reasons behind a state's ratification, or non-ratification of a human rights treaty may be less than clear cut. States' engagement within international human rights frameworks are motivated, often, by reasons of national self-interest and by the collectivist aspiration to unite around issues of a more humanitarian or ethical nature.²⁰⁵ Other factors also shape a state's commitment to, and compliance, with human rights obligations that are elaborated and agreed at the international or regional level. A good example of this is the scope of the human rights treaty itself. Like all treaties, human rights instruments will often include general principles with provisions of a mandatory and thus more detailed nature.²⁰⁶ State authorities may agree with the general aims or "spirit" of a treaty but object to a specific treaty provision, or otherwise seek to narrow its scope by offering their own national interpretation of its application. State delegations may also object to a treaty compliance mechanism, contending that issues of enforcement should be left to national authorities and decided at the level of domestic law and policy.²⁰⁷

The crucial point about the above analysis is that States will participate in international human rights frameworks for different reasons, with varying levels of commitment to the treaty terms. The complexities of State engagement with human rights issues at levels above the state is itself a reflection of the vagaries of treaty bargaining processes which are often the outcome of political compromises between state actors, international bureaucracies and civil societies actors – each expressing their aims, expectations and preferences.²⁰⁸ Despite these complexities, scholars such as Çalı, Ghanea and Jones, among others, have offered a taxonomy

²⁰³ Beth Simmons, 'International Law and State Behavior: Commitment and Compliance in International Monetary Affairs' (2000) (94) *American Political Science Review* 819.

²⁰⁴ James Vreeland, 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture' (2008) 62 *International Organizations* 65.

²⁰⁵ Ryan Goodman & Derek Jinks, 'International Law and State Socialization: Conceptual, Empirical and Normative Challenges' (2005) 54 *Duke Law Journal* 983; James R. Vreeland, 'Political Institutions and Human Rights: Why Dictatorship enter into the United Nations Convention Against Torture' (2008) 62(1) *International Organization* 65, 101.

²⁰⁶ Basak Çalı and Benjamin Jones, 'Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council' (2016) 38 *Human Rights Quarterly* 21, 24.

²⁰⁷ Rebecca Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International Law* 643, and Uta Oberdörster, 'Why Ratify? Lessons from Treaty Ratification Campaigns' (2008) 61 *Vanderbilt Law Review* 681

²⁰⁸ Basak Çalı and Benjamin Jones, 'Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council' (2016) 38 *Human Rights Quarterly* 21, 24.

of the reasons why states endorse and assimilate human rights norms and standards into their domestic legal systems.²⁰⁹

This section will now outline the UN Core Human Rights Treaties, The International Covenant on Protection of the Rights of All Migrant Workers and Members of Their Families, International Labor Organization Conventions, and other treaties concerning the rights of migrant workers.

1 UN Core Human Rights Treaties

While this thesis will focus on in-work rights, and not on the more general right to work which remains the preserve of national labour law and policy, it is useful to outline international treaties that regulate issues affecting the rights, interests, and welfare of migrant workers.

The general right to work for domestic workers and regular workers is enshrined in the International Convention on Economic, Social and Cultural Rights (ICESCR).²¹⁰ Article 6 of the ICESCR acknowledges:

The right of everyone to opportunity to gain her living by work which she freely chooses or accepts.²¹¹

This definition underscores the rights of the individual to exercise a voice over the choice of profession and the terms of their employment. Subject to Article 4 of the ICESCR, ratifying states are obligated to ‘take appropriate to safeguard this right’, namely by introducing employment legislation that imposes duties on employers to create ‘just and favorable conditions of work, to safe working conditions’.²¹² Specifically, Member states should take all measures to eradicate discrimination in the access to, and maintenance of employment, in accordance with grounds enumerated in Article 2 of the ICESCR, including discrimination

²⁰⁹ Ibid.

²¹⁰ Ben Saul, David Kinley and Jacqueline Mowley, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 272; International Convention on Economic, Social and Cultural Rights, 16 December 1966, GA Res 2200A (XXI) (entered into force 3 January 1976).

²¹¹ International Convention on Economic, Social and Cultural Rights, 16 December 1966, GA Res 2200A (XXI) (entered into force 3 January 1976) art 6.

²¹² Ibid, art 7.

based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²¹³

In addition, State Parties are to assure that workers maintain the right to participate in collective bargaining processes as well as the right to obtain legal remedies in the event of unfair dismissal.²¹⁴ This assures the right of the worker not to be deprived of work unfairly and underscores the importance of work for social and economic inclusion. Crucially, however, the ICESCR qualifies the scope of the right, stipulating that the right does not guarantee full or absolute enjoyment of the right to work, noting that employment policy remains with the political control and sovereign authority of nation states.²¹⁵ The Covenant also identifies the rights of states to control the entry and flow of workers from foreign nations, emphasizing that restrictions on the rights of non-citizens ‘would not constitute unlawful discrimination under article 2 of ICESCR.’²¹⁶

Another relevant instrument for the purposes of this discussion is the Convention on the Elimination of Discrimination Against Women (CEDAW).²¹⁷ Article 14 of CEDAW states that Parties should undertake all appropriate measures to eliminate discrimination against women in the field of employment by granting equal rights to work as an alienable right; equal employment opportunities; the freedom to choose their professional and employment; equality in remuneration, health and safety, social security and the prevention of discrimination on grounds of marriage or maternity.²¹⁸ Furthermore, all State Parties are required to recognize and protect the rights of children, including by taking measures to prevent economic exploitation that may be hazardous to the child’s health, education or social development.²¹⁹ States are obliged to regulate and set a minimum age before a child can enter employment and

²¹³ Ibid.

²¹⁴ Ibid, art 8.

²¹⁵ Kristina Touzenis and Alice Sironi, *Current challenges in the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Directorate-General For External Policies Of The Union, <[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET\(2013\)433715_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET(2013)433715_EN.pdf)>

²¹⁶ International Convention on Economic, Social and Cultural Rights, 16 December 1966, GA Res 2200A (XXI) (entered into force 3 January 1976) art 2. See also See, Mutatis Mutandis, General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 5 November 2008, UN Doc. CCPR/C/GC/33, para. 15

²¹⁷ Convention on the Elimination of Discrimination Against Women, 18 December 1976, UNGA (entered into force 3 September 1981).

²¹⁸ Ibid, art 14.

²¹⁹ Convention on the Rights of the Child, 20 November 1989, GA Res 44.25 (entered into force 2 September 1990) art 32.

impose restrictions and penalties for violations of minimum working hours and safe conditions of employment.

Finally, Article 27 of the Convention on the Rights of Persons with Disabilities affirms the right of persons with disabilities ‘to work on an equal basis with others’ including by ensuring that they are ‘not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.’²²⁰

2. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*

Turning now to international legal instruments specifically designed for the protection of the rights of migrant workers, three Conventions are particularly noteworthy. Firstly, is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMW).²²¹

The ICPRMW represented a landmark in the global governance of international labour migrants. The Convention is also extremely comprehensive in that it consists of ninety-three articles.²²² Essentially, the Convention in effect reaffirms the standards provided for by the International Bill of Human Rights including, the right to life,²²³ the right to be free from torture²²⁴ and the right to freedom of thought.

This section will now cover the rights covered by the ICRMW, including Civil, Political, and in-Work rights.

a) Rights Covered by the ICRMW

²²⁰ Convention on the Rights of Persons with Disabilities, 12 December 2006, GA RES A/RES/61/106 (Entry into force 3 May 2008) art 27.

²²¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003).

²²² Compared to the twenty-three articles of ILO Convention and the twenty-four articles of ILO Convention 143.

²²³ International Covenant on Civil and Political Rights, 16 December 1966, GA Res 2200A (XXI) (Entry into force 23 March 1976) art 6.

²²⁴ Ibid, art 7.

The ICPRMW codifies many rights protections already identified in previous human rights treaties, particularly in relation to vulnerable groups and minorities, such as women, children and disabled persons. Such protections are enshrined under the relevant provisions of CEDAW,²²⁵ CRC,²²⁶ and CRPD.²²⁷ Its key innovation is to frame the protection of fundamental rights of individuals and groups through the specific language of migrant rights. The Convention goes further by elaborating on existing rights that are more likely to impact the lives of migrant workers and their families. One illustration of the Conventions ‘migrant Focus’ concerns the broad definition of migrant worker to include any persons engaged in an “remunerated activity.”²²⁸ This definition is specifically designed to cover not only those workers that are living and working in the destination state but also those that are currently resident in the country of origin or in the process of undertaking a monetary activity in a country where they are not citizens. This definition also has coverage over any persons that are no longer engaged in employment but are still residing as non-nationals in the host country or are preparing to return to their country of origin.²²⁹ In Part IV, the ICPRMW also elaborates special protections for specific categories of migrant workers such as “seasonal workers”, “project-tied workers” and “members of the family” who also enjoy rights under the Convention. Moreover, the ICRMW covers certain categories of migrant workers such as “frontier workers” and “self-employed persons”, that have previously been excluded under the migrant-specific ILO conventions.²³⁰ In a further step, the Convention recognizes and affirms protections owed to “members of the family” who also enjoy rights under the Convention.²³¹ According to Article 8 of the ICPRMW, all migrant workers and their families have the freedom to leave any state, as well as the right to return and remain in their country of origin.²³² These clauses, taken together, are the first to comprehensively recognize the rights of temporary migrant

²²⁵ Convention on the Elimination of Discrimination Against Women, 18 December 1976, UNGA (entered into force 3 September 1981) art 14.

²²⁶ Convention on the Rights of the Child, 20 November 1989, GA Res 44.25 (entered into force 2 September 1990) art 32.

²²⁷ Convention on the Rights of Persons with Disabilities, 12 December 2006, GA RES A/RES/61/106 (Entry into force 3 May 2008) art 27.

²²⁸ Kristina Touzenis and Alice Sironi, *Current challenges in the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Directorate-General for External Policies Of The Union, 2013) 7

²²⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 2(1).

²³⁰ Ibid.

²³¹ Article 4 defines “members of the family” as ‘persons married to migrant workers or having with them a relationship that produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.’ Ibid, art 4.

²³² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 8.

workers and their families. Notably, the Convention strives to promote effective protection, for example, by including various clauses ensuring migrants' access to legal remedies, so bridging the gap between legal protection and de facto enjoyment of rights.²³³

b) Civil and Political Rights Under the ICPRMW

The ICPRMW is, however, not a universal remedy. At the time of signature, ratification, or accession, states have the option of inserting reservations to incompatible clauses.²³⁴ It is also worth noting that rights protections available to temporary workers under ICPRMW are narrower in scope than workers in regular work situations. Article 39 specifically recognizes the rights of migrant workers and their families to freely relocate and select their state of residence.²³⁵ This is consistent with the right of freedom of movement enshrined in the International Covenant on Civil and Political Rights (ICCPR).²³⁶ The general wording of this provision, however, does not offer specific protections for migrant workers that are effectively compelled to remain because of economic pressures, for example.

Article 16(4) prohibits the arbitrary arrest or detainment of migrant workers while Article 17 safeguards rights and guarantees relating to restrictions of liberty in accordance with the law.²³⁷ This includes administrative detention of migrants without due process. Subject to these provision, migrant workers and members of their families detained or arrested shall be notified of any charges against and provided with reasons at the time of arrest, where possible in a language they understand. The migrant worker or their family members shall be afforded the right to challenge the legality of arrest and detention before a competent court. The wording of Articles 16 and 17 mirror the general obligations already provided for instruments such as the ICCPR in so far as governments are able to restrict the application of such rights as it

²³³ R Böhning, 'The ILO and the New UN Convention on Migrant Workers: The Past and Future' (1991) 25(4) *International Migration Review* 698

²³⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art 88. The Convention only expressly restricts the rights of States to make reservations to the Convention with regard to the exclusion of any category of migrants.

²³⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003). art 39.

²³⁶ International Covenant on Civil and Political Rights, 16 December 1966, GA Res 2200A (XXI) (Entry into force 23 March 1976).

²³⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 16, 17.

appropriate and proportionate under the relevant domestic law, for instance to safeguard national security, public order, public health, morals, or the rights and liberties of others.

A more specific right enshrined under Article 16(2) of the ICPRMW requires that State protect migrant workers and their families from public officials or private individuals using violence, physical harm, threats, and intimidation. This provision can be construed broadly as general requirement to protect migrant workers against and their families from abuse or xenophobic acts. Another specific right articulated for the first time in the ICRMW concerns the right of migrant workers and their families to seek assistance and protection from consular or diplomatic authorities, including in the event of arrest and detention. Subject to these provisions, should an affected person request consular assistance, they are afforded the right to communicate with the relevant authorities without delay.²³⁸ In this regard, the ICRMW also codifies several rights relating to expulsion already enshrined in existing international instruments. General provisions regarding the rights to consular assistance are elaborated in Article 36 of the Vienna Convention on Consular Relations,²³⁹ Article 13 of the ICCPR²⁴⁰ and Article 32 of the Convention and Protocol relating to the Status of Refugees²⁴¹ The ICRMW goes further to explicitly mandate procedural guarantees for migrant workers and members of their family subject to deportation or expulsion processes, including the right to individual assessment of the case by a competent authority and the right to have the decision communicated to them in their native tongue.²⁴²

Article 56 contains regulations that apply only to migrant workers and members of their families who are employed on a regular basis. And therefore, excludes migrant workers that reside or work in the host country irregularly or illegally.²⁴³ Subject to this provision, any decision to expel a regular migrant worker should not be reached at for the specific purpose of

²³⁸ The Convention also protects the right is the right to life as well as the right to be free from torture, degrading and inhumane treatment provided by Articles 9 and 10 ICRMW as well by Articles 6 and 7 ICCPR. See *Ibid*, art 9, 10; International Covenant on Civil and Political Rights, 16 December 1966, GA Res 2200A (XXI) (Entry into force 23 March 1976).

²³⁹ Vienna Convention on Consular Relations, 8 June 1967, 596 UNTS 261 (Entry into force 19 March 1967) art 36.

²⁴⁰ International Covenant on Civil and Political Rights, 16 December 1966, GA Res 2200A (XXI) (Entry into force 23 March 1976) art 13.

²⁴¹ Convention and Protocol relating to the Status of Refugees, 38 July 1951, GA Res 429(V) (entry into force 22 April 1954) art 32.

²⁴² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 22.

²⁴³ *Ibid*, art 56.

depriving the worker or their family of rights properly afforded in accordance with law and employment arrangement. Moreover, Article 56(3) provides, in hortatory rather than binding language, that States should take any humanitarian or other relevant considerations into account, including the length of time that the migrant worker has lived or worked in the country, before reaching a decision.²⁴⁴ Migrant workers and their families are also entitled to be made aware of the conditions applicable to their admission into the country; period of stay and of any requirements they must satisfy in the State of employment or of any change in those requirements.²⁴⁵ The wording of this provision as it applies to regular migrant workers restates protections already enshrined in Article 2 of the ILO Convention.²⁴⁶ It is also worth briefly noting that Article 44 of the ICRMW also obliges State Parties to take any such reasonable measures to ensure that families are reunified in the event of a separation.²⁴⁷ However, the Convention uses highly qualified language in this provision, and States' are only obliged to consider reunification measures as 'they deem appropriate' and 'within their competency.'²⁴⁸

c) *In Work Rights Under ICRMW*

In respect of certain in-work entitlements and guarantees, the ICRMW reaffirms several social-economic and cultural rights already recognized as fundamental rights in other core treaties.²⁴⁹ Nonetheless, it is worth emphasizing that the scope of such rights is more narrowly defined for migrant workers than for domestic workers, particularly for irregular workers, including temporary migrant workers. Article 28 of the Convention affirms that migrant workers and their families are entitled to receive emergency health on an equal footing with nationals.²⁵⁰ This definition is more restrictive than the scope of the right to health established under Article

²⁴⁴ Ibid, art 56(3); Kristina Touzenis and Alice Sironi, *Current challenges in the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Directorate-General for External Policies Of The Union, 2013) 9

²⁴⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 33.

²⁴⁶ International Labor Organisation Convention 97, art 2.

²⁴⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 44.

²⁴⁸ Ibid.

²⁴⁹ The ICRMW specifies that all workers have access to social security 'in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties'. Ibid, art 27.

²⁵⁰ Ibid, art 28.

12 of the ICESCR.²⁵¹ In a general comment, the ICESR Committee, the Convention's governing body, affirms that:

States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.²⁵²

The scope of this right is circumscribed under the applicable Articles 43 and 45 of the ICRMW, whereby regular migrant workers and members of their families achieve equality with domestic nationals regarding health rights.²⁵³ This is only achievable if they meet country requirements for eligibility, which is based on the relevant income or insurance contributions schemes.

Article 30 of the ICPRMW also recognises a limited right to education. Subject to this provision, the children of migrant workers have the right to access free primary and secondary education in equality with nationals, irrespective of their regular or irregular status.²⁵⁴ Migrant workers in a regular situation, which would seemingly exclude temporary workers, have stronger right to access educational institutions in equality with nationals.²⁵⁵ This provision is not generally applicable to special classes of irregular or temporary workers.²⁵⁶ It is also worth noting that the ICRMW contains provisions protecting the link between migrants and their respective States of origin, including by ensuring respect for the cultural identity of migrant workers.²⁵⁷

The Convention also makes certain provisions for the protection of in-work labour rights for migrant workers. In this regard, it builds on existing standards established under the ICESCR and the ILO conventions, as well as setting out a few unique provisions. The principle of equality at work and social security rights, and the rights to join trade unions from the ILO

²⁵¹ Ibid, arts 43, 45.

²⁵² General Comment No. 14, The right to the highest attainable standard of health, 11 August 2000, UN doc. E/C.12/2000/4 (2000), para. 34, 27; CMW, General Comment No. 1, para 57

²⁵³ International Convention on Economic, Social and Cultural Rights, art 12.

²⁵⁴ Migrant workers and members of their families enjoy, under Article 27, the same treatment granted to nationals, however only in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 27.

²⁵⁵ Ibid, art 44.

²⁵⁶ CMW, General Comment No. 1, para 57

²⁵⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (Entry into force 1 July 2003) art 31.

Conventions,²⁵⁸ that are restated in more limited form in Article 25 of the ICPRMW.²⁵⁹ Regular migrant workers obtain additional rights under Article 54 including protection against unfair dismissal, access to unemployment benefits, and the right to seek alternative employment in the of termination. Under Article 26 of the ICPRMW, only regular migrant workers and their families in regular work situation are entitled to form a trade union.²⁶⁰

In a crucial step, Article 32 of the ICPRMW deals with remittances for migrant workers and their families.²⁶¹ In this regard, Article 32 affirms the right of all migrant workers to transfer their earnings and savings using facilities that are in accordance with the applicable laws of the State of Employment. Once again, regular migrant workers are afforded strengthened rights, with Article 47 expressly recognising their right to transfer their earnings and savings to their State of origin or any other State.²⁶²

3. International Labor Organization Conventions

The rise of globalization has given rise to a multitude of collective agreements and decrees that provide for a range of legal processes and norms concerned with the governance of worker's rights.²⁶³ Detached from state law-making and enforcement processes, these new transnational forms of governance represent an attempt to standardize minimal work practices and norms across various national contexts and supply chains. Some of these norm-making processes emerge from private or hybrid public-private institutions.²⁶⁴ For the most part, the spread and promulgation of global labour standards has been largely driven by supranational institutions such as the International Labour Organisation, paving the way for a multitude of international instruments.

²⁵⁸ International Labor Organisation Conventions 97 and 143.

²⁵⁹ By means of recognition of equal treatment for all irregular migrant workers and members of their families in respect of working hours, overtime, health and safety and other basic guarantees. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art 25.

²⁶⁰ Freedom of Association is a fundamental principle at work under Article 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)

²⁶¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art 32.

²⁶² Ibid, art 47. See also Article 9 LO Migration for Employment Convention (No. 97)

²⁶³ Laurence Helfer, 'Monitoring compliance with Unratified Treaties: the ILO experience' (2008) *Law & Contemp. Problems*.

²⁶⁴ Jan Orbie and Olufemi Barbarinde, 'The Social Dimension of Globalisation and European Union Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility' 30 (2008) *Journal of European Intergration* 459 [arguing that the EU has "shifted from a rather narrow approach of promoting core labour standards through trade policies to a broader and more ambitious social agenda"]

Adopted unanimously in 1920 by International Labour Organization (ILO) governing body, the ILO's international labour standards continues to act as the standard bearer of labour rights that embody the ILO's commitments to social justice and decent work for all.²⁶⁵ Although the ILO Constitution does not articulate a right to work, its preamble states that 'unjust or inhumane labour conditions produce unrest and imperil peace.'²⁶⁶

The ILO's standard-setting activity remains dynamic and has evolved over time to reflect changes in work practices and patterns of global migration in the decades since the ILO first came into existence. The ILO framework consequently consists of a patch work of various declarations, standards and principles and conventions of varying levels of binding effect and state recognition and membership. These include the Equal Remuneration Convention²⁶⁷, the Discrimination (Employment and Occupation) Convention,²⁶⁸ the Workers with Family Responsibilities Convention²⁶⁹ and the Maternity Protection Convention (No. 183)²⁷⁰. The Discrimination (Employment and Occupation) Convention No. 111's defines 'discrimination' as:

[a]ny distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.²⁷¹

Furthermore, The ILO Conventions 97 and 143 protect the principle of equality at work and social security rights in relation to hours of work, weekly rest, overtime, minimum age of workers, paid holidays, health and safety, termination and unfair dismissal and freedom of association. The ILO Convention on the Freedom of Association and Protection of the Right to Organise, for example, protects the rights to join trade unions and stipulates that "[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject

²⁶⁵ Doris Weichselbaumer and Rudolf Winter-Ebmer, 'The Effects of Competition and Equal Treatment Laws on Gender Wage Differentials' (2007) 22 *Economic Policy* 235, 245.

²⁶⁶ International Labour Organisation Constitution, Preamble.

²⁶⁷ The Equal Remuneration Convention (100), 29 Jun 1951 34th ILC Sess (Entry into force 23 May 1953).

²⁶⁸ Convention concerning Discrimination in Respect of Employment and Occupation, 25 Jun 1958, 42nd ILC Sess (Entry into force 15 Jun 1960).

²⁶⁹ Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 23 Jun 1981, 67th ILC Sess (Entry into force: 11 Aug 1983)

²⁷⁰ Convention concerning the revision of the Maternity Protection Convention, 15 Jun 2000, 88th ILC ses 1952 (Entry into force: 07 Feb 2002).

²⁷¹ Convention concerning Discrimination in Respect of Employment and Occupation, 1957, ILO 111 (Entry into force June 1960).

only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.’

The fragmented nature of the ILO framework stems from the protracted disagreements that routinely take place between developed and developing nations have tended to thwart progress in this area.²⁷² In terms of domestic labour rights, developing countries have typically resisted adoption of, or accession to, any supranational instruments that impose obligations on them to improve working standards, particularly if lax domestic standards provide them with a competitive advantage over other legal systems. At the same time, lower and middle-income countries have tended to be more vociferous supporters of strengthened migrant workers (as predominantly migrant-sending countries), while more economically developed (migrant receiving countries) have resisted efforts in this arena.

The most prominent attempt to achieve a core set of standards reflecting a negotiated settlement between the interests of developing and developed countries in recent years remains the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1985.²⁷³ This instrument sets out core rights concerning minimum pay, working hours, overtime, unfair dismissal and other standards on health and safety. Though the Declaration is promotional rather than binding in nature, these standards have been routinely incorporated in corporate codes of conduct and in regional and bilateral investment treaties.²⁷⁴ The scope and applicability of these standards, however, remains consigned to domestic workers and excludes coverage over migrant workers. In response, there have been attempts to tackle general questions of global migration through traditional international public law treaties, including efforts to adopt an umbrella treaty concerning the rights of migrant workers.

²⁷² James Atleson et al, *International Labor Law: Cases and Materials On Workers' Rights In The Global Economy* (University of Maryland, 2008).

²⁷³ Matthew Finkin and Guy Mundlak, *Comparative Labour Law* (Edward Elgar, 2015) 88.

²⁷⁴ *Ibid.*

4. Other Treaties Addressing the Rights of Migrant Workers

Turning now to international legal instruments specifically designed for the protection of the rights of migrant workers, two conventions are particularly noteworthy. These are the ILO's Migration for Employment Convention²⁷⁵ and Migrant Workers (Supplementary Provisions) Convention.²⁷⁶

The Migration for Employment Convention was the first instrument of its kind to establish the principle of non-discrimination against migrant workers. Previous efforts to articulate rights for migrant workers were largely unsuccessful, resulting in a plethora of conventions that were latterly withdrawn or otherwise failed to attract adequate levels of member-state ratification. This includes the ILO Migration for Employment Convention,²⁷⁷ ILO Inspection of Emigrants Convention,²⁷⁸ and the ILO Migration for Employment Convention.²⁷⁹ The adoption of the Migration for Employment Convention appeared to be a victory in the recognition of Migrant Workers right. However, the scope of this instrument was highly circumscribed, limited only to the recognition of regularized (legal and documented) migrant worker to obtain 'membership of trade unions and enjoyment of the benefits of collective bargaining.'²⁸⁰ Amongst its limitations, the 1949 Convention remained silent on the status of informal or irregular workers, nor did it address issues of discrimination, exploitation, or the abuse of informal workers in unregulated workspaces.²⁸¹

In subsequent decades, a handful of international conventions were adopted for the purposes of regulating and protecting the rights of migrant employees by international consensus and agreements. Many of these failed to attract widespread membership and it was not until a period of economic recession in 1970s that the international community acknowledged the importance of an instrument specifically designed to protect the rights of all migrant workers, including irregular migrant workers, who are subjected to exploitation and discrimination.²⁸² This

²⁷⁵ The Migration for Employment Convention (Revised), 1949 (No. 97).

²⁷⁶ Migrant Workers (Supplementary Provisions) Convention (1975), 1975, 1120 U.N.T.S. 323

²⁷⁷ ILO Migration for Employment Convention, 1939 (No. 66) (withdrawn).

²⁷⁸ ILO Inspection of Emigrants Convention, 1926 (No. 21) (shelved).

²⁷⁹ ILO Migration for Employment Convention (revised), 1949 (No. 97).

²⁸⁰ See also General Assembly, Resolution 3449(XXX), *Measures to ensure the human rights and dignity of all migrant workers*, UN Doc. A/RES/32/120, 9 December 1975, para. 2

²⁸¹ ILO Migration for Employment Convention (revised), 1949 (No. 97).

²⁸² For background see Linda Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention* (1991) 25(4) *International Migration Review* 738.

coincided with the creation of ILO working group chaired by Mexico and Morocco and the adoption of ILO Migrant Workers (Supplementary Provisions) Convention.²⁸³ For the first time, this convention included express provisions requiring States Parties to take steps to prevent irregular migration and penalise employers engaged in exploitative practices involving migrant workers.²⁸⁴ Article 2 of this Convention explicitly addressed the rise in people trafficking and the rise of informal, unregulated labour markets, stating that:

Each Member shall adopt all necessary and appropriate measures, both within its jurisdiction and in collaboration with other Members:

- (a) to suppress clandestine movements of migrants for employment and illegal employment of migrant workers
- (b) against the organisers of illicit or clandestine movements of migrants for employment, departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal condition.²⁸⁵

While the adoption of the 1975 Convention resulted in decades of campaigning for the enhanced protection of irregular workers, the Convention was criticised for offering weak protections for irregular workers, and generally lacked widespread support. Over 15 years later, renewed demands for strengthened rights for migrant workers culminating in the adoption of the ICPRMW, as discussed in the previous section.

²⁸³ ILO Migrant Workers (Supplementary Provisions) Convention N°143(4) of 1975.

²⁸⁴ Gabriella Diaz and Gretchen Kuhner, 'Mexico's role in promoting an implementing the ICRMW' In Cholewinski, Guchteneire and Pécoud, (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, 2009)

²⁸⁵ ILO Migrant Workers (Supplementary Provisions) Convention N°143(4) of 1975 art 2.

C Regional Human Rights Frameworks

Moving beyond the international human rights framework, is the regional rights framework. The level of commitment to human rights recognition and enforcement in the Gulf generally offers a mixed picture. In the face of rapid economic and social change, GCC states have compelling reasons to cede some sovereign authority by agreeing to be bound by international human rights standards.

It is certainly true that Gulf states appeared more willing to engage with international human rights organizations from the 1990s onwards. Qatar's ratified the highest number of UN human rights treaties after the ruler Hamad bin Khalifa Al Thani was deposed in 1995. Bahrain ratified the and established a National Action Charter on human rights issues in 1999.²⁸⁶ Saudi Arabia also ratified the most treaties shortly after the second Gulf war. These developments notwithstanding, GCC states do not appear to regard many of the core international human rights treaties as having binding or even persuasive authority.²⁸⁷ This raises the dilemma of which site and level of governance should human rights reforms be articulated and advanced: domestic, international, or regional. It has already been noted that Gulf Arab states appear to have implicitly rejected the false universality of international human rights instruments, or at least have resisted attempts to impose rights-based reform from "above".²⁸⁸ This in turn has introduced thorny conceptual challenges around the most appropriate and legitimate forum in which conflicts around the nature and scope of human rights should be resolved. International human rights discourses have attracted criticism of moral supremacism or essentialism.²⁸⁹ It is also the case that the international treaty processes cannot always reflect or accommodate the extreme diversity of legal systems, or the varying degree of institutional capacity to monitor

²⁸⁶ Basak Çali and Benjamin Jones, 'Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council' (2016) 38 *Human Rights Quarterly* 21, 24, 38.

²⁸⁷ Ibid, 38-39

²⁸⁸ Nehal Bhuta, 'Rethinking the Universality of Human Rights: A comparative historical proposal for the idea of "common ground" with other moral traditions' in Anver M Emon and Mark S Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (OUP, 2012)

²⁸⁹ Nik Saleh, 'A Conceptual Analysis of 'Rights' in the International and Islamic Human Rights Instruments' (2012) 2(4) *American International Journal of Contemporary Research* 155, 158-158; Heiner Bielefeldt, "'Western" versus "Islamic" Human Rights Conceptions: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28 *Political Theory* 90, 100.

human rights abuse, not least when powerful Western states play a dominant role in drafting processes.²⁹⁰

In conditions of cultural and regulatory pluralism, it is arguable that regional or community orientated organizations are more suited to the task of framing human rights concerns to better reflect the ideologies, interests, and capacities of their members than universalizing pretensions of international human rights treaties.²⁹¹ In this regard, scholars such as Dinah Shelton and Paolo Carozza, among others, have suggested that regional and sub-regional human rights frameworks may be able to attract higher levels of legitimacy among their participants and thus achieve higher levels of human rights compliance.²⁹²

The numerous attempts to develop and institutionalize an Islamic human rights framework, deemed to reflect and accommodate the voices and needs of the Muslim world more legitimately.

Seeking to formulate Sharia compliant human rights framework, the Arab League sponsored the adoption of what later be known as the Universal Islamic Declaration of Human Rights (UIDHR).²⁹³ Drafted in consultation with state representatives from leading Islamic nations and members of Islamic Councils, the Declaration was finally adopted in 1980.²⁹⁴ The text of the instrument affirms the Islamic world's commitment to 'conferring honour and dignity on mankind and eliminating exploitation, oppression, and injustice.'²⁹⁵ Though loosely based on the hierarchy of rights enshrined in the UDHR, including the right to work, the text of the Declaration explicitly affirms that all rights expressed in the charter derive from Quranic scripture and Prophetic traditions, in accordance with classic schools of Islamic jurisprudence.²⁹⁶ However, this instrument was subject to criticism for failing to provide

²⁹⁰ Shaina Western 'Bargaining Power at the Negotiation Table and Beyond' (2020) 25(2) *International Negotiation* 169-200.

²⁹¹ Abdullahi An-Naim, 'Human Rights in the Arab World: A Regional Perspective' (2001) 23 *Human Rights Quarterly* 701.

²⁹² Dina Shelton & Paula Carozza, *Regional Protection of Human Rights* (Oxford University Press, 2013) 90.

²⁹³ Universal Islamic Declaration of Human Rights. See draft of .text at University of Minnesota Human Rights Library (umn.edu) <http://hrlibrary.umn.edu/instate/islamic_declaration_HR.html>

²⁹⁴ Dina Shelton & Paula Carozza, *Regional Protection of Human Rights* (Oxford University Press, 2013) 90..

²⁹⁵ See draft of .text at University of Minnesota Human Rights Library (umn.edu)

<http://hrlibrary.umn.edu/instate/islamic_declaration_HR.html>. For a discussion see Nik Saleh, 'A Conceptual Analysis of 'Rights' In the International and Islamic Human Rights Instruments' (2012) 22(4) *American International Journal of Contemporary Research* 155, 158-158

²⁹⁶ Nik Saleh, 'A Conceptual Analysis of 'Rights' In the International and Islamic Human Rights Instruments' (2012) 22(4) *American International Journal of Contemporary Research* 155, 158-158

equivalent protections to the UDHR, particularly in respect of freedom of movement (justified on the basis of Sharia related restrictions on the free movement of women), prohibition of slavery and political rights such as freedom of expression and assembly.²⁹⁷ These derogations were formally justified as being consistent with the Islamic legal tradition which has traditional emphasized social, economic and cultural rights in lieu of first generation civil and political rights. It is equally arguable, however, that scant recognition afforded to political freedoms and freedom from slavery a pretext on which the ‘robustness of authoritarianism’ could be preserved. In this way, religious justification for human rights derogations can be wielded as pretext on which to defend, as well as critique, systematic human rights abuses in the Arab world.²⁹⁸

A decade later, the Organisation of Islamic Cooperation (OIC) built on the achievements of the UIDHR with the adoption of the Cairo Declaration on Human Rights in Islam (CDHRI) in 1990. This Declaration went further than its predecessor to elaborate a hierarchy of rights that closely resembled those set forth in UDHR, in language and emphasis.²⁹⁹ In contrast with the UIDHR, for instance, the Cairo Declaration recognized, albeit to a limited extent, the rights of religious minorities. Going further, the Declaration adopted a more flexible approach to religious restrictions on freedom of speech, limiting to speech acts that were expressly forbidden or insulting to Islam,³⁰⁰ thus relaxing the UIDHR’s exemptions to free speech rights on grounds of defamation or national security. While couched in more liberal and flexible language, the International Commission of Jurists determined that the Declaration fell short of minimum standards of customary international law.³⁰¹ Moreover, the OIC presented the Declaration to the UN in 1993, requesting that it open the treaty for general membership. This proposal was, however, rejected by UN due, once again, to insufficient protections and equivocations of the Declaration on core rights, among them freedom of movement, slavery and political rights including freedom of assembly.

²⁹⁷ Ann Mayer, *Islam and Human Rights: Tradition and Politics* (Westview Press, 2012) 22.

²⁹⁸ Eva Bellin, ‘Reconsidering the Robustness of Authoritarianism in the Middle East: Lessons from the Arab Spring’ (2012) 44(2) *Comparative Politics* 127, 128.

²⁹⁹ Ibid.

³⁰⁰ Cairo Declaration on Human Rights in Islam, 5 August 1990, U.N. GAOR, 4th Sess UN. Doc A/CONF.157/PC/62/Add.18 (Entered into force 1993) art 22.

³⁰¹ Douglas Remy, *The Trouble with the Cairo Declaration*

<<https://thebentangle.wordpress.com/2011/08/28/the-trouble-with-the-cairo-declaration/>> .

The UN's refusal to recognize the Declaration would represent a significant departure point from many Muslim nations. Brem noted that Muslim majority countries would react defiantly to what would come to be perceived as the UN's cultural imperialism and rejection of Islamic values. In the following decade, the number of reservations and interpretative declarations submitted by Arab nations to core UN treaties would increase in frequency.³⁰² The Arab League would promptly adopt CDHRI, though challenges would arise around the conflicting national interpretations of its Sharia clauses, due in large part to differences in the schools of thought followed by different countries applying Sharia, and variation in the mandatory scope and application of Islamic law under national constitutional frameworks.³⁰³ These interpretative conflicts, notwithstanding, the Cairo declaration did consolidate the demand for a regionally and culturally appropriate human rights frameworks.

The Arab Charter of Human Rights was opened for signature in 2004 following decades of negotiation among the Arab League's 53 Member States.³⁰⁴ Whereas other continental organisations such as the African Union, Organization of American States and European Convention of Human Rights had long established their own failing to meet the unanimity voting threshold. The final text was consequently of various political compromises and concessions among divided nations states, itself a reflection of the Arab League's strong norms of non-interference and sovereignty. These compromises also meant the substantive provisions of the Charter established weaker protections than those articulated under the more developed Continental Inter-American and the European human rights regimes.³⁰⁵ Despite the compromised nature of the final treaty text, the Charter was not widely ratified, even after it was revised and brought into force four years later, in 2008.³⁰⁶ Among its deficiencies, the Charter framework lacked robust enforcement and monitoring mechanisms, and arguably was rendered a dead letter, failing to exert any meaningful check or constraint on the human rights practices of Arab League Members, many of whom remained ideologically divided and

³⁰² Ibid, 268.

³⁰³ Ann Mayer, *Islam and Human Rights: Tradition and Politics* (Westview Press, 2012) 23.

³⁰⁴ Dalia Vitkauskaite-Meurice, 'The Arab Charter on Human Rights: The Naissance of new regional Human Rights Systems or a Challenge to the Universality of Human Rights?' (2010) 119(1) *Jurisprudencija* 166.

³⁰⁵ Abdullahi An-Naim, 'Human Rights in the Arab World: A Regional Perspective' (2001) 23 *Human Rights Quarterly* 701, 714

³⁰⁶ Vera van Hüllen, 'Leave us Alone: The Arab League and Human Rights' In *Governance Transfer by Regional Organizations: Patching Together a Global Script* (Macmillan, 2015) 140. See also Mervat Rishmawi and Sohair Riad, *Civil Society Interaction with the League of Arab States: Key insights, principles, good practices and emerging lessons* (Cairo Institute for Human Rights Studies, 2013) 172-174.

deadlocked on key issues.³⁰⁷ As a result, Islamic and regional human rights instruments have not seriously addressed the persistent gap between the rhetoric of human rights protection and the enforcement of human rights guarantees at the level of domestic law and policy-making. In this regard, the human rights legislation of Arab-GCC countries compare poorly with the human rights practices of States subject to other regional regimes, such as the European Convention on Human Right or the American Convention on Human Rights.³⁰⁸ These disparities can be explained in party by the soft and non-binding status of the regional instruments established in the region, itself a reflection of the enfeebled quality of supranational and regional-level mechanisms of supervision and review of states practices, under the above discussed Arab Charter and Islamic human rights frameworks.³⁰⁹

³⁰⁷ Hossein Esmacili, Marboe Irmgard, Rehman Javaid, *The Rule of Law, Freedom of Expression and Islamic Law* (Bloomsbury Publishing, 2017) 377-384.

³⁰⁸ Samid Darawsheh, Human Rights in the Constitutions of the Gulf Cooperation Council Countries (GCCC): Texts and Realities 11 *Beijing Law Review* (2020) 519, 532.

³⁰⁹ Vera van Hüllen, 'Leave us Alone: The Arab League and Human Rights' In *Governance Transfer by Regional Organizations: Patching Together a Global Script* (Macmillan, 2015) 138.

D GCC Developments in Labour Standards

There is a mixed picture of human rights protection in Saudi Arabia. Actors at the bilateral, regional, international level, combined with civil society actors have shaped and influence the state policy in complex ways. This has both advanced, and undermined, human rights related concerns.

Viewed through this lens, the decision to reform the Kafala system offers a prime example. Regionally, the competition among GCC states to improve their international legitimacy has prompted all states to present themselves as more respecting of foreign workers rights. All GCC states have announced plans to phase out the most problematic aspects of the sponsorship schemes, including by eliminating restrictions on freedom of movement such as the worker's ability to leave the country without threat of financial or penal penalty.

A further illustration of how regional dynamics may have a levelling effect on human rights practices can be found in joint attempts to combat human trafficking and slave labour in GCC countries. The GCC's General Secretariat of the GCC has cooperated with international agencies to address the growing challenge of forced or exploitative labour in the Gulf.³¹⁰ Moreover, the GCC Human Rights Office has attempted to establish regionally harmonized de minimis labour protections for unskilled or domestic workers in the GCC, culminating in the effort to draft a GCC wide model employment contract.³¹¹ Under this model contract, employers are prevented from imposing unfair contract terms on vulnerable workers and are instead contractually obliged to establish minimal in work rights for protected categories of workers. In a paradigm of multi-level governance, Qatar has chaired the Committee for Regulating Domestic Labour Contracts for the GCC whereby all Gulf states are encouraged to cooperate in the pursuit of a unified Gulf strategy for addressing the experiences of discrimination and abuse endured by domestic workers throughout the GCC.³¹² Qatar has distinguished itself from other GCC countries by enacting more robust labour rights legislation

³¹⁰ GCC, *The Permanent Mission of the Cooperation Council to the United Nations Participates in the Conference on Combating Human Trafficking in Vienna* <<https://www.gcc-sg.org/Pages/PageNotFound.aspx?requestUrl=https://www.gcc-sg.org/ar-sa/MediaCenter/NewsCooperation/News/Pages/News2017-10-23-1.aspx>> [Arabic Version]

³¹¹ 'Gulf ministers admit unified contract for domestic workers in November' *Mubasher.info* (19 May 2014) [in Arabic] <<http://goo.gl/XqJyId>>

³¹² AlwasatNews, 'A unified model for the contract of domestic workers in the countries of the Cooperation Council' (2017) <<http://www.alwasatnews.com/news/831159.html>> [Arabic version]

in a move to establish higher in-work rights protections for domestic and low-skill workers.³¹³ Keen to ensure that the regional rival, Qatar, does not surpass in the international reputation stakes, Saudi Arabia has made assurances that it will review its employment policies as discussed in the next chapter. In another example of how regulatory competition may have a levelling up effect on human rights practices, Bahrain has been praised for recent measures taken to pursue and prosecute individuals involved in trafficking activities in its territories.³¹⁴

While the above examples indicate higher levels of engagement with human rights issues, including in the under-regulated sphere of migrant worker rights, the point remains that all GCC states often fail to establish protections equivalent to those demanded by the minimal protections established by human rights treaties, including the ICCPR and ICESCR.³¹⁵ As noted only Kuwait, Bahrain and most recently Qatar have ratified the International Covenant on Civil and Political Rights whereas Kuwait is the only country that has ratified the International Covenant on Economic, Social and Cultural Rights.³¹⁶ Moreover, all GCC governments have refrained from ratifying the ILO Convention on Decent Work for Domestic Workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).³¹⁷ In the final analysis, these failures are an indictment of the GCC, as a regional coordinator of human rights policy. While it has succeeded in uniting GCC states around what might emerge to be the basis of regional customary human rights standards, now expressed in the GCC Human Rights Declaration, this political achievement is blunted by the weakness of its monitoring and compliance mechanisms. The GCC human rights office lacks the authority and competence to assess the extent to which GCC Members oversee domestic employment contracts, for example. Thus, the question of how states choose to opt into, and thus enforce, the unified employment contract scheme to counteract exploitation of domestic workers is left to the discretion of member states.

³¹³ Ministry of Administrative Development, Labour & Social Affairs, *Labour Law Reforms* <<https://www.adlsa.gov.qa/en/Labour>>.

³¹⁴ US Department of State, *Trafficking in Persons Report* (2020) 55.

³¹⁵ Criticisms of GCC labour practices are widespread, See United Nations Committee on the Elimination of Discrimination against Women, 'List of issues and questions in relation to the initial report of Qatar; Replies of Qatar' CEDAW/C/QAT/Q/1/Add.1, December 3, 2013; "Proposed Domestic Workers Contract Falls Short: Gulf Countries Should Improve Laws, Ratify Treaty," Human Rights Watch news release, November 17, 2013, <<http://www.hrw.org/news/2013/11/16/proposed-domestic-workers-contract-fallshort>>; Human Rights Watch, *Walls at Every Turn: Abuse of Migrant Domestic Workers through Kuwait's Sponsorship System*, October 2010, <<http://www.hrw.org/reports/2010/10/06/walls-every-turn>>.

³¹⁶ United Nations Development Programme, *Arab Human Development Report 2009: Challenges to Human Security in Arab Countries* (New York: United Nations Publications, 2009) 258

³¹⁷ 'Middle East Failing to Protect Domestic Workers', *Human Rights Watch news release* (28 October 2013) <<http://www.hrw.org/news/2013/10/28/middle-east-failing-protect-domestic-workers>>

³¹⁸As such it is difficult to envision how such scheme will achieve harmonized labour standards, as evidenced by state practices in the GCC region to date.

Even in the most advanced labour law regime of Qatar, migrant workers are denied basic statutory protections or the right to pursue an industrial action against wrongful dismissal or unfair working conditions. These legislative gaps are replicated elsewhere in the Gulf. In the absence of strong compliance mechanism, domestic and regionally, there is little judicial oversight of workers who continue to impose inequitable terms in a labour contract.³¹⁹ In Saudi Arabia and in Qatar, despite reforms to the sponsorship, some of the most vulnerable workers remained tied to a specific employer, who exercise the unilateral power to renew or cancel a worker's residency permit.³²⁰ This practice is clearly in conflict to the standards and aims of the GCC Unified Contract for Domestic Employment. Thus, while the institutions of the GCC may encourages processes of dialogue and joint decision-making at the intergovernmental level, it is difficult to escape the conclusion that such institutions lack any meaningful ability to hold states accountable for employment practices which flout or fall below the minimum of regionally agreed standards or resolutions.³²¹

This should not be taken to suggest that GCC states operate in an international vacuum, or that they are can silently dismiss domestic or transnational demands for strengthened citizenships right. In this regard participation in international human rights treaties can serves as important symbolic measures, setting expectations that Gulf states fall short of international norms, and creating impetus for them to undertake incremental reform by setting up new social

³¹⁸ For an analogy see JL Kunz, 'The United Nations Declaration of Human Rights' (1949) 43(2) *American Journal of International Law* 316, 320 ['[That human rights are enumerated in a constitution is not proof that they exist. [...] There is often a remarkable discrepancy between constitution and practice.]

³¹⁹ Condemnation of GCC labour practices are numerous, See United Nations Committee on the Elimination of Discrimination against Women, "List of issues and questions in relation to the initial report of Qatar; Replies of Qatar," CEDAW/C/QAT/Q/1/Add.1, December 3, 2013; "Proposed Domestic Workers Contract Falls Short: Gulf Countries Should Improve Laws, Ratify Treaty," Human Rights Watch news release, November 17, 2013, <<http://www.hrw.org/news/2013/11/16/proposed-domestic-workers-contract-fallsshort>>; Human Rights Watch, Walls at Every Turn: Abuse of Migrant Domestic Workers through Kuwait's Sponsorship System, October 2010, <<http://www.hrw.org/reports/2010/10/06/walls-every-turn->>; Human Rights Watch, As If I am not Human: Abuses against Asian Domestic Workers in Saudi Arabia, July 2008 <<http://www.hrw.org/reports/2008/07/07/if-i-am-nothuman>>

³²⁰ Human Rights Watch, 'Qatar: Little Progress on Protecting Migrant Workers' <<https://www.hrw.org/news/2020/08/24/qatar-little-progress-protecting-migrant-workers>>; 'World Report 2021: Rights Trends in Qatar' (13 January 2021) <<https://www.hrw.org/world-report/2021/country-chapters/qatar>>; Amnesty International, 'Qatar Reforms Strike at Heart of Abusive Kafala System' <<https://www.amnesty.org/en/latest/news/2020/08/qatar-announcement-kafala-reforms/>>

³²¹ Hiba Khodr, 'A Preliminary Comparative Study of Policy Making in Two GCC Countries' (2014) *Politics & Policy* 272.

expectations about how they ought to behave. Foreign migrant workers may be able to rely on these expectations, and request that domestic institutions align their policies with international commitments to improve labour practices.³²² The challenge faced by migrant workers in the domestic environments of Gulf countries, however, is that labour reform measures are domestically unpopular. It has already been noted that the Saudi Arabia is contending with rising levels of unemployment and austerity. Faced with the threats of social unrest and a regional democratic creep, the Saudi leadership has recognized that it will need to balance the need for international legitimation (a condition of future investment and involvement in multilateral forums) with a domestic policy strategy that is palatable to its citizenry.

³²² See arguments developed in Mustafa el-Mumin, 'Gulf Declaration of Human Rights (GDHR) Protection against Slavery: A Double-edged Sword' (2020) 34 *Arab Law Quarterly* 241.

E Social Reform

Under the new leadership of the Crown Prince MBS, Saudi Arabia has implemented social reforms. These reforms are designed to appeal to its large youth population and international audiences, including by strengthening women rights and relaxing the gender restrictions maintained under the traditional law system of male guardianship.³²³

The Saudi government has also strived to win the approval of international business actors and companies by reforming its Kafala system.³²⁴ In doing so the Kingdom has favoured a strategic approach of targeting the most widely criticized or “internationalized” aspects of its domestic human rights practices. This includes women rights and the rights of blue collar Western migrant workers. In its domestic practices, however, the Saudi leadership continues to scapegoat foreign workers to increase support among the middle classes and has done by employing a narrative of economic and Islamic nationalism. This has been done as a way of rallying opposition to any criticism of governmental policies, measured against international human rights standards.³²⁵

The social pact between Saudi authorities and society is more stable than one might anticipate. By variously claiming to support Islamic rights, the Saudi regime has been able to fend off challenges from religious groups or factions.³²⁶ Saudi Arabia claims to observe the ideology and rulings of the Hanbali school, a jurisprudential school that requires strict adherence to teachings and customs of the Prophet Muhammad.³²⁷ The role of religion within the Saudi legal framework has also complicated the relationship between the Kingdom’s radical social and economic modernization and its wavering acceptance and enforcement of human rights.

³²³ Courtney Freer, *Concerts, Cinemas and Comics in the Kingdom: Revising the Social Contract after Saudi Vision 2030* (London School of Economics: Middle East Centre, 26 May 2017).

³²⁴ Rebeka Smith, *Saudi Arabia Could Rewrite Its Record on Labor Mobility by Ending Kafala Centre for Global Development* (CGDEV, March 2020) <<https://www.cgdev.org/end-of-kafala-labor-mobility>>. See generally H. Malaeb, ‘The “Kafala” System and Human Rights: Time for a Decision’ (2015) 29(4) *Arab Law Quarterly* 307; Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries’ (2012) 45(2) *Cornell International Law Journal* 461.

³²⁵ Amnesty International, ‘Saudi Arabia: Access for independent monitors urgently needed amid more reports of torture of activists’ (25 January 2019) <<https://www.amnesty.org/en/latest/news/2019/01/saudi-arabia-access-for-independent-monitors-urgently-needed-amid-more-reports-of-torture-of-activists/>>

³²⁶ Russell Lucas, ‘Monarchical Authoritarianism: Survival and Political Liberalization in a Middle Eastern Regime Type’ (2004) 36(1) *IJMES* 103, 105.

³²⁷ Leo Zelig, *Fundamentalisms: Threats and Ideologies in the Modern World* (Oxford, 2015) 243.

Moreover, as the role of civil society is in Saudi Arabia, the ruling authorities have often designed policies that intended to appeal to wealthy merchant classes.³²⁸ This also explains why the Saudi government has little incentive to support the domestic ratification or implementation of a treaty framework aimed at strengthening the bargaining position and rights of migrant workers at the regional or international level. Indeed, business classes continue to impede any domestic move towards developing stronger social and economic rights for migrant workers.³²⁹

This is not to suggest that Saudi Arabia can escape pressure to comply with customary human rights standards, or that civil society groups and NGOs cannot impose pressure on the Kingdom to further reform its human rights standards in line with international norms.³³⁰ In the above light, the next section considers the specific attitudes of Saudi Arabia to international treaties dealing with worker rights, and in particular migrant worker rights.

³²⁸ Daniel Brumberg, *Liberalization Versus Democracy: Understanding Arab Political Reform* (Carnegie Endowment for International Peace, 2003) 22.

³²⁹ On the rights and exploitation of migrant workers, see Rita Afsar, *Unravelling the Vicious Cycle of Labor Recruitment: Migration from Bangladesh to Gulf Countries* (International Labour Office, 2009)

³³⁰ Thomas Risse and Kathryn Sikkink 'The Socialization of International Human Rights Norms into Domestic Practice' In *Domestic Politics and Norm Diffusion in International Relations* (Routledge, 1999) 117.

F Ratification and Implementation of International Human Rights Conventions Concerning Labour Rights

1. Overview of the Ratification Framework

Saudi Arabia has elected not to ratify the ICRMW. Furthermore, of the nations with the highest levels of migrant employment in 2020,³³¹ only Saudi Arabia and UAE have refused to ratify the International Civil and Political Rights Covenant. The Saudi government has also refused to ratify the ICESCR, on the grounds that the rights enumerated under the Convention are already protected under Saudi law and Sharia, and that it has already ratified similar conventions covering the same rights.³³²

Against this backdrop, regarding the rights of persons with disabilities, Saudi Arabia has ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol under Royal Decree No. M/28 in 2008.³³³ Activities related to the protection of that category of persons are further supported by ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled under Royal Decree No. M/109 in 2013.³³⁴ This can also be seen through the subsequent approval of the Unified Guiding Law (Regulation) for Empowering Persons with Disabilities in the Cooperation Council for the Arab States of the Gulf under Cabinet Resolution No. 212 in 2020.³³⁵

Similar activities are taken by the Saudi Government concerning the rights of children, and the first step was the ratification of the Convention on the Rights of the Child by Royal Decree (No. M/7) in 1995.³³⁶ This was continued by ratification of the Covenant on the Rights of the

³³¹ Including United States, Germany, Saudi Arabia, UAE Russia, United Kingdom, France, Canada, Australia, and Spain/ See IOM, *World Migration Report 2020*, <https://publications.iom.int/system/files/pdf/wmr_2020.pdf>.

³³² National Society for Human Rights, *Conformity of the Saudi Rules and Regulations with the Convention on Basic Human Rights* (Saudi Arabia, National Society for Human Rights 2008) 196-198.

³³³ Authority of People With Disability, *Overview of the Rights of Persons with Disabilities in the Kingdom of Saudi Arabia* <<https://apd.gov.sa/web/content/15711?unique=0d23ee619dbb470672c2272b00c697106093f858#:~:text=The%20Kingdom%20of%20Saudi%20Arabia%20is%20one%20of%20the%20countries,%2C%20dignified%2C%20and%20equal%20life>>.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Saudi Arabian Government, *Child Rights*

<<https://www.my.gov.sa/wps/portal/snp/careaboutyou/childrights/?lang=en>>.

Child in Islam by Royal Decree No. (M / 54) in 2006³³⁷, ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, child Prostitution and Child Pornography by Royal Decree No. (M/38) in 2010³³⁸, and finally the ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict by Royal Decree No. (M/39) in 2010.³³⁹

However, the actual implementation of the international treaties into Saudi Arabia's legal system is not fully completed by ratification of those treaties. Namely, Saudi Arabia does not have a fully developed or codified system of law, and many aspects of private law are governed by general principles of Sharia, which will be discussed in depth later. The Basic Law of Saudi Arabia, other than Quran, is the highest-level source of law that sets out the fundamental rights of citizens and regulates and defines the powers of the organs of government.³⁴⁰ This may raise questions regarding the status of international treaties in the Saudi legal system. Saudi Arabia is one of the countries that have adopted the dualist method of domesticating international law to its domestic legislation,³⁴¹ which means that the norms of international treaties must be incorporated or 'transposed' into national law before they have any legal effect. The Basic Law is therefore a legal source above the international treaties, and the adoption of international treaties into the Saudi legal system must be done in accordance and as provided under the Basic Law. Having that in mind, it may be highlighted that the international treaties in Saudi Arabia are the executive competence of His Royal Majesty's Government³⁴² due to the fact that the Article 70 of the Basic Law of Governance³⁴³ and Article 20 of the Council of Ministers Law provide that:

laws were enacted and amended, and treaties, international agreements and concessions were approved and implemented, by Royal Decrees after having been considered by the Consultative Council and the Council of Ministers. ³⁴⁴

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ Al-Fahad, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30(2) *Yale Journal of International Law* 375, 376, 384-385

³⁴¹ K.L.Bathia, *Textbook on Legal Language and Legal Writing*, (Universal Law Publishing, 2010) 252.

³⁴² This is known as the Consultative Council and the Council of Ministers.

³⁴³ Basic Law of Governance (Saudi Arabia) art 70.

³⁴⁴ Council of Ministers Law (Saudi Arabia) art 20. World Trade Organization, Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to The World Trade Organization, WT/ACC/SAU/61, 1 November, 2005, (05-5141), Protocols of accession for new members since 1995, including commitments in

Furthermore, this means that the Royal Decrees are the legal instrument by which international agreements and treaties are incorporated into Saudi law.³⁴⁵

The final implementation of an international treaty into national law is subject to interpretation and must first pass the filter of governmental point of view over the norm that is to be transposed. As the Sharia is the primary and ultimate legal norm, it is not likely that any norm that is in contradiction to the current interpretation of Sharia principles by Saudi decision-makers, is to pass the implementation without some level of resistance. Should there be a conflict between international and internal norms, such conflicts are resolved in accordance with the following rules of: (i) an international agreement could not override a rule of Shari‘ah; (ii) given an apparent inconsistency between an international agreement and domestic law, the text of each would be interpreted so as to avoid any conflict; and (iii) where the text did not resolve the conflict, recourse could be had to the intent and purpose of the agreement and the law.³⁴⁶

The conclusion is that before implementation, any international law must pass the Basic Law test. Although, the Basic Law of Saudi Arabia is functionally equivalent to a constitutional document. Notably, the Basic Law of Governance does recognize the right to work as well as the right to education for all minors as a fundamental protection of Saudi and Sharia law.³⁴⁷ In addition to the Basic Law of Governance, the Saudi Labour Code also contains several provisions that are relevant to the right to work in Saudi Arabia. Indeed, the Labour Code has granted the right to work for all citizens, both men and women. This right has been introduced in Article 3 of the Labour Code, which states that: ‘Work is the right of every citizen. No one else may exercise such right unless the conditions provided for in this Law are fulfilled. All citizens are equal in the right to work’.³⁴⁸

goods and services (24 August 2012), http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#sau (accessed 18/01/13)

³⁴⁵ Royal Decree No. A/90 of 27.8.1412H (1 March 1992).

³⁴⁶ Hatim Al-Bisher, Selina Stead, Tim Gray, ‘Saudi Maritime Policy integrated Governance’, Routledge, 2012) 33.

³⁴⁷ *The Basic System of Governance, Royal Order No. A/90 (27/8/1412H, Mar. 1, 1992)*

³⁴⁸ Saudi Arabia Ministry of Labor. *The Labor Code Article 3*, available at http://www.saudiarabien.diplo.de/contentblob/2761466/Daten/850057/Arbeitsrecht_SDA.pdf .

2. Issues with Ratification

These rights are, however, not clearly defined, nor is the scope of these rights clearly elaborated. The Basic Law, like the Labour Code, does not explicitly address or recognize the rights of foreign citizens, including temporary or irregular migrant workers.

From the outset, it is also necessary to acknowledge that when implementing the Labour Code, Article 4 provides that both the employer and the employee shall adhere to the provisions of Sharia.³⁴⁹ As later chapters will cover in depth, the system of Islamic law, or Sharia, does offer protections for workers, and encompasses general principles on fair treatment and pay, but these principles do not form part of Saudi Arabia's written law or legislation. Instead, such standards - based on Quranic text, the Prophets teachings, and other juristic sources of rule-adjudication - are open to varying interpretations by religious scholars and authorities.³⁵⁰ Individuals cannot always rely on the sound and consistent judicial enforcement of these standards by Saudi courts or administrative authorities, particularly when in conflict with express provisions of Saudi labour law or policy.³⁵¹

Some commentators have suggested that Saudi would be unable to ratify the ICCPR and the ICESCR Conventions without also entering a general reservation as a result of aspects of Saudi law being incompatible with international human rights.³⁵² Examples of incompatibility between the ICESCR and Saudi law include limitations on human rights by subjecting such rights to Sharia interpretation, and a disparity in the notion of equality and non-discrimination between genders and between domestic Saudi workers and temporary migrant workers under the Kafala system.³⁵³ Some have argued that international treaties such as the ICESCR may have attained the status of customary international law and are therefore binding in Saudi Arabia. In *Abdullahi v Pfizer*, for example, the US Second Circuit determined that the International Covenant on Civil and Political Rights provided sufficient evidence of customary

³⁴⁹ Ibid, art 4.

³⁵⁰ Zulfiqar, 'Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions' (2007) 9 *University of Pennsylvania Journal of Labour and Employment Law* 433.

³⁵¹ The Prime Minister and King retain final authority to overturn the decisions of the highest courts of the land under Article 50 of the Basic Law.

³⁵² Fred Halliday, 'Relativism and Universalism in Human Rights: The Case of the Islamic Middle East' (1995) 43 *Political Studies* 152,154-156.

³⁵³ Quran 4:11.

international law, even though it was not self-executing and did not create binding international obligations.³⁵⁴

It is also doubtful that labour norms concerning the rights of migrant workers have attained the status of customary law, though it is worth noting an advisory opinion of the American Court of Human Rights which offered a positive ruling on these issues.³⁵⁵ The Court ruled that the principle of non-discrimination had attained the status of a jus cogen (pre-emptory) norm and that this international principle, properly applied, should therefore extend equally to any discrimination of undocumented (irregular) workers in terms of their terms and conditions of work.³⁵⁶ Consequently, the Court opined that national authorities (and hence employers subject to their jurisdiction) could not invoke national immigration policies to deny fundamental workplace protections and rights to irregular migrant workers. This case will be explored in more detail in this thesis, suffice to say that a court situated in Saudi Arabia may approach any potential conflict between national policy and global labour norms quite differently.³⁵⁷

It is notable that Saudi Arabia has often delivered swift justice to migrant workers accused of a crime or expelled them from the country without due process.³⁵⁸ Furthermore, some labour-sending countries have been willing to provide consular assistance to migrant workers with legal challenges, or to impose restrictions on countries that mistreat their citizens, for fear of the economic or political repercussions. After all many low-income countries depend on the remittances generated from migrant labour in the Middle East. Sri Lanka, for example, has been reluctant to impose diplomatic pressure to protect the rights of its citizens ‘for fear that employers in the Middle East will turn to labour from other countries.’³⁵⁹ Even when the Saudi

³⁵⁴ Abdullahi v Pfizer (USA) 562 F.3d 163. (2d Cir. 2009).

³⁵⁵ *Inter-American Court Of Human Rights Advisory Opinion On The Juridical Condition And Rights Of Undocumented Migrant* (requested by the United Mexican states), OC-18/03 of September 17, 2003

³⁵⁶ Ibid, the Court stated: [T]he international community is unanimous in considering that the prohibition of racial discrimination and of practices directly associated with it is an obligation erga omnes. The jus cogens nature of the principle of non-discrimination implies that, owing to their peremptory nature, all States must observe these fundamental rules, whether or not they have ratified the conventions establishing them, because it is an obligatory principle of international common law. “Even though the international community has not yet reached consensus on prohibiting discrimination based on motives other than racial discrimination, this does not 24 lessen its fundamental importance in all international laws. Ibid, 24.

³⁵⁷ Faiz Al-Mazrouie, *Fakieh Says No Move to Abolish Sponsorship Law*, Arab News (19 Jan 2011) <http://arabnews.com/saudiarabia/article238343.ece?comments=all>.

³⁵⁸ Kathy Quiano, *After Beheading, Indonesia Stops Sending Workers to Saudi Arabia*, CNN (22 June 2011) <http://articles.cnn.com/2011-06-22/world/indonesia.migrant.workers_1_migrant-worker-saudi-arabia-indonesian-ministry?_s=PM:WORLD>.

³⁵⁹ Michele Gamburd, ‘Lentils There, Lentils Here!’ Sri Lankan Domestic Labour in the *Middle East*, In *Asian Women As Transnational Domestic Workers* (Shirlena Huang et al. eds., 2005) 92, 103.

government has acceded to core treaties, it has often entered sweeping reservations to treaty provisions on national security, sovereignty and religious grounds as will now be illustrated.³⁶⁰

3. Implementation of the Convention on Elimination of All Forms of Discrimination Against Women

In a welcome step, Saudi Arabia joined the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 2000.³⁶¹ As a party to CEDAW, Saudi Arabia is required to comply with provisions including Article 11. Article 11(1) of CEDAW provides that State Parties are obliged:

Eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.³⁶²

Pursuant to this provision, governmental authorities are obliged to take adequate steps to ensure that women have equal employment opportunities; the right to choose their profession and employment freely; the right to promotion; training; job security and benefits; equal pay for equal work; equal access to unemployment; retirement; and a right to a safe working environment.³⁶³

Article 2 of CEDAW obliges State Parties “to ensure” compliance by their governments’ organs with the treaty and “to take all appropriate measures” to secure “the elimination of discrimination in all its forms” and “to modify or abolish existing laws, regulations, customs and practices.”³⁶⁴ The requirement imposes a ‘positive’ duties to national governments to actively work to eliminate discriminatory laws and practices in their jurisdiction.³⁶⁵

Saudi Arabia entered a general reservation in its ratification of CEDAW, stating that where there was a contradiction between the Convention and Islamic law, it would not be obligated

³⁶⁰ Anjali Bonner, ‘Muslim States’ Reservations to CEDAW and Possibilities for the Reconciliation of Shari’a Law with International Women’s Rights Norms’ (2009) 3 *Hong Kong Journal of Legal Studies* 27, 33-4.

³⁶¹ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46.

³⁶² Ibid, article 11.

³⁶³ Marsha Freeman, Christine Chinkin and Beate Rudolf, *the UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012) 286-288.

³⁶⁴ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, art 11.

³⁶⁵ Committee on the Elimination of Discrimination Against Women, Concluding Comments on Saudi Arabia, 40th Sess., Jan. 14– Feb. 1, 2008, U.N. Doc. CEDAW/C/ SAU/CO/2 (8 Apr 2008)
<http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SAU.CO.2_en.pdf>

to adhere to the Convention. The broad scope of this reservation is difficult to reconcile with fundamental aim and purpose of the CEDAW convention (and the Vienna Convention on the Interpretation of Treaties, to be discussed)³⁶⁶, which seeks to eliminate gender discrimination and promote equality by imposing obligations on State Parties to reform their laws and social practises in order to achieve this.³⁶⁷ Indeed, the CEDAW Committee has claimed that such a reservation ‘is contrary to the object and purpose of the Convention’ and thereby recommends the Saudi government:

Consider the withdrawal of its general reservation to the Convention, specifically in terms of the reality that the delegation is certain that there will be no contradiction in element among the Convention and Sharia.

The CEDAW Committee went on to observe that Saudi Arabia has yet to fulfil its Article 2 obligations since references to Sharia are both vague and applied too broadly to justify instances of gender discrimination.³⁶⁸ For instance, Article 11 (1) (c) provides that women should exercise the freedom to determine their employment. Though it would appear that Saudi law is currently in breach of certain provisions, there has been an acknowledgment of this by the state.³⁶⁹ Commenting on its obligations to CEDAW, the Saudi government has stated that:

It has agreed that stereotypes, particularly those relating to the status of women, portrayed a negative image of Islamic societies; however, attitudes did not change overnight...the Government has taken a number of measures.³⁷⁰

The gradual relaxation of the guardianship rule in 2017, which required women to seek a male’ guardian’s approval before travelling, obtaining identification documentations, seeking employment or healthcare, has been widely celebrated as evidence of Saudi Arabia’s social

³⁶⁶ The 1969 Vienna Convention on the Law of Treaties (VCLT) defines a reservation as: a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. Article 2(d) The 1969 Vienna Convention on the Law of Treaties Vienna Convention on the Law of Treaties, adopted May 23, 1969, entered into force on January 27, 1980, United Nations, *Treaty Series*, vol 1155, 33

³⁶⁷ Sifa Mtango, ‘A State of Oppression – Women’s Rights in Saudi Arabia’ (2004) 5 *Asia Pacific Journal on Human Rights* 61.

³⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, para 12.

³⁶⁹ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, art 11(1)(c).

³⁷⁰ CEDAW/C/SR.815, 15 February 2008, 7-8

and economic modernization.³⁷¹ Despite reforms made by the Saudi government, religious and cultural factors continue to affect women's rights to work in Saudi Arabia.³⁷²

A report on Saudi Arabia's compliance with CEDAW notes that the Saudi Arabia leadership has passed several laws that purport to protect vulnerable workers, including the 9 million foreign nationals in Saudi Arabia, including 1.2 million domestic employees of which almost all are women.³⁷³ These laws include legislation aimed at preventing trafficking (in 2009), some limited rights to vote in local elections (in September 2011), protections for domestic workers and the criminalization domestic violence (2013 and March 2017)' the decision to grant women personal identification cards in some circumstances (2015), and the abolition of a rule prohibiting women from driving. However, the Report goes on to note that:

Female domestic workers suffer from the loopholes in these laws. Because they typically work within personal homes, isolated from society, they are at heightened risk of abuse, including withheld salaries, confiscated passports and cell phones, work hours more than 15-hours-per-day, physical abuse, and sexual abuse, including harassment and rape. Some female domestic workers leave their jobs because of the abuse and poor working conditions they face. However, because many women have had their passports confiscated, they cannot leave the country and are sometimes lured into prostitution. Traffickers will employ numerous tactics to force these women into submission....[and] verbally harass, and physically beat the woman until she breaks down, submits, and agrees to meet with clients.³⁷⁴

CEDAW, in its general recommendation No 19, has also pointed to the fact that gender specific violence, including sexual harassment in the workplace can have a substantial impairing effect on equality in employment. It recognizes that:

³⁷¹ Middle East Media Research Institute 'The Saudi Royal Decree Easing Guardianship Requirements For Women, And Responses To It In Saudi Arabia' <<https://www.memri.org/reports/saudi-royal-decree-easing-guardianship-requirements-women-and-responses-it-saudi-arabia>>

³⁷² Anne Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience', in J Peters and A Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives*, (Routledge 1995) 176-177.

³⁷³ Report on Saudi Arabia's Review under CEDAW, Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46..

³⁷⁴ Ibid.

such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the women have reasonable grounds to believe her objection would disadvantage her in terms of employment... or create a hostile working environment.³⁷⁵

4. Domestic Implementation of ILO Treaties

In terms of broad policy reforms, Saudi Arabia has taken some steps to improve worker rights domestically, for instance by ratifying the ILO's Equal Remuneration Convention and the Discrimination (Employment and Occupation) Convention.³⁷⁶ Saudi Arabia is required, as a member state of this body, to execute all international provisions expressed by the ILO through the adoption of its recommendations and agreements.³⁷⁷ Article 2 of the Equal Remuneration Convention stipulates that all Parties establish appropriate means for 'determining rates of remuneration...[to] ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.' This principle may be applied by means of "national legislation", "legally established or recognised machinery for wage determination", "collective agreements between employers and workers or by some "combination of these various means."³⁷⁸ The Equal Remuneration Convention does not explicitly address the rights of migrant workers but does include broad references to any work involving remuneration, defined as the 'ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.'³⁷⁹

Strikingly, the ILO Committee have acknowledged that the Saudi Arabian government have taken steps in protecting workers against discrimination involving one of the protected grounds as per its obligations under the ratified ILO' Discrimination (Employment and Occupation) Convention.³⁸⁰ Furthermore July 2016, the Saudi leadership authorized the establishment of working group for the purposes of developing a national equality policy in conformity with

³⁷⁵ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (no. 46) at 193, U.N. Doc. A/34/46, General Comment 19.

³⁷⁶ See Saudi Arabia profile page on International Labour Organization <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103208>

³⁷⁷ Roger Blanpain and other, *The Global Workplace: International and Comparative Employment Law Cases and Materials* (Cambridge University Press, 2007) 19.

³⁷⁸ Equal Remuneration Convention, art 2b

³⁷⁹ Equal Remuneration Convention, Preamble.

³⁸⁰ See Saudi Arabia profile page on International Labour Organization <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103208> . See also Saudi Arabia 106th ILC session (2016).

Article 2 of the of ILO Discrimination (Employment and Occupation) Convention.³⁸¹ However, the ILO Committee has expressed ongoing concerns that Saudi Arabia's law did not yet contain provisions that explicitly enables temporary migrant workers to change employers or leave the country without the employer's consent.³⁸² Crucially, foreign workers in Saudi Arabia have an expressly transitory status. From an international human rights perspective, Saudi Arabia's failure to ratify the ICCPR and the ICESCR renders temporary migrant workers vulnerable to any breaches of the ICCPR's provisions on freedom of movement and liberty from arbitrary detention. Taking the lead in ratifying these treaties would help to improve Saudi Arabia's image both in respect of its national citizens and any rights applicable to migrant workers.³⁸³

5. Future Recommendations for Ratification of ILO Treaties

It has been noted that domestic workers and other low skilled workers are excluded from the scope of the newly adopted Kafala reforms. These gaps could be addressed by Saudi Arabia's ratification and domestic implementation of minimal standards on the treatment of domestic workers. The adoption of a treaty dedicated to the rights of domestic workers has long been the object of a political impasse, despite the ILO first adopting a convention on domestic workers in 1965. This treaty expressed the urgent need to provide domestic workers with 'basic elements of protection which would assure to them a minimum standard of living, compatible with the self-respect and human dignity which are essential to social justice.'³⁸⁴ However, this treaty, once again, was not widely ratified. The issue of regulating domestic worker reemerged on the agenda of the 2010 International Labor Conference. Following demands by global unions and domestic workers' organizations for the adoption of an international instrument for protecting vulnerable domestic workers, the ILO's Domestic Worker's Convention came into force as of 2011.³⁸⁵ The significance of this treaty is that it attempts to set global standards for domestic workers who may be denied equivalent protections to permanent workers, including freedom of association, the right of collective bargaining, prohibitions on child or forced labour, and the duty to eliminate any forms of occupational discrimination based on gender,

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ National Society for Human Rights, *Conformity of the Saudi Rules and Regulations with the Convention on Basic Human Rights* (Saudi Arabia, National Society for Human Rights 2008) 196-198.

³⁸⁴ ILO, Record Of Proceedings, ILC, 49th Session, Appendix Xii: Resolutions Adopted By The Conference 693- 94 (1965); See Also Carol Lubin & Anne Winslow, *Social Justice For Women* (1990) 108

³⁸⁵ Asha D'souza, *Moving Towards Decent Work For Domestic Workers: An Overview Of The ILO's Work* (ILO, 2010) 45.

ethnicity, nationality etc.³⁸⁶ The treaty calls on national governments to take all necessary and appropriate measures to protect domestic workers from any forms of harassment, violence or prejudicial treatment, as well to ensure they obtain fair terms of employment and acceptable living conditions. Supplementing these provisions, ratifying countries are also encouraged to achieve equal treatment of domestic workers in respect of minimum wage (if received by other workers), hours of employment, time-off of a period of no less than 24 consecutive hours, overtime compensation and annual paid leave.

In June, a United Arab Emirates delegate to the ILO stated that all GCC countries would continue to implement measures aimed at protecting domestic workers, although many have yet to ratify the 2011 Convention. Kuwait has, for example, enacted new rules requiring authorities to conduct routine labour inspection in private households and has approved a standardised labour contract for domestic workers containing minimal labour protections and fair work terms.³⁸⁷ Saudi Arabia has yet to introduce equivalent reforms and has not yet ratified the Domestic Workers Convention of 2011. It is also worth noting that even if Saudi Arabia did take steps to ratify the Convention, or indeed the ICRMW, this would not be evidence of meaningful reform. As the UAE Delegate pointedly observed ‘the real challenge is how to make these [global labour] principles a reality.’³⁸⁸

Although the Saudi government have acknowledged that some areas of law lack the relevant protections to enable them to comply with their international obligations, in other areas the government appears unwilling to accept that certain categories of workers, namely temporary migrant workers, especially women, are not adequately protected under Saudi law. The government has repeatedly stated that domestic laws conform to international human rights and implying that there is no need for Saudi Arabia to ratify core human rights and labour treaties because the rights afforded by these treaties are already protected under domestic law. However, this position would appear to be somewhat of an obfuscation, as it would appear

³⁸⁶ While Saudi Arabia has yet to ratify the 2011 Domestic Workers Convention (mainly affecting women) , it did ratify the Forced Labour Convention, 1930 (No. 29) in 1978

³⁸⁷ Press Release, ILO, Will Arab States Ratify Historic International Labour Standards on Domestic Work? (June 17, 2011) <http://www.ilo.org/public/english/region/arpro/beirut/downloads/info/stories/pr_170611.pdf>

³⁸⁸ International Trade Union Confederation, Spotlight Interview with Salman Jaffar Al Mahfoodh <<http://www.ituc-csi.org/spotlight-interviewwith-salman.html>>. Cited in Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries,’ (2012) 45(2) *Cornell International Law Journal* 461, 466.

clear that if Saudi Arabia were in conformity with the ICESCR, the Domestic Worker's Convention or the ICRMW, they would have ratified these treaties.

F Conclusion

This Chapter's analysis has demonstrated the relatively thick layer of treaty regulation that exists for the protection of migrant workers, both in respect of general human rights treaties and issue-specific migrant worker conventions.

This analysis has also shown that in many core treaties addressing the rights of migrant workers have failed to attract cross-cultural support. The final section has identified that despite the existence of a multi-layered and multi-level system of governance, regulation of migrant workers does exist. There is in fact, very little to analyse when examining Saudi Arabia's domestic recognition and enforcement of such frameworks.

In short, the participation of Saudi government in treaty frameworks, regional and international, is highly partial and limited. Only a handful of treaties addressing the rights of workers have been ratified by the Saudi government, and most do not directly address the rights of migrant workers. This points to an inherent challenge of assessing Saudi Arabia's engagement with wider discourses and emerging frameworks on migrant worker rights against the inescapable facts of sovereignty and regulatory fragmentation.

The sovereign autonomy of states to determine their own laws and policies over issues subject to their jurisdictional and territorial control is the backbone of classic theories of international law.³⁸⁹ Recognition of a nation state's ability to control migration and set policies that reflect its economic, social, and cultural requirements is, arguably, both legitimate and necessary. However, this legitimate diversity also impedes the development of regional or international consensus around common rights for migrant workers. This regulatory pluralism is clearly evidenced by the extreme variation of immigration standards and policies, including migrant restrictions, across different national and intergovernmental contexts. In the case of Saudi Arabia, the failure to ratify or enter sweeping reservations to core treaties remains a significant obstacle to the develop of common evaluative standards by which to critique the treatment of migrant workers, or the operation of the newly reformed Kafala system. This is especially the

³⁸⁹ Martti Koskenniemi, 'Introduction' in Koskenniemi (ed.) *Sources of International Law* (Routledge, 2000).

case for migrant workers who are excluded from the protections offered to high skilled foreign workers.

It is necessary to reflect on the uneasy tension that exists between the ethical demand for migrant worker protections and the economic development goals.³⁹⁰ The UNDP's report on human rights and human development reflects the need to strike a balance between economic development aims and migrant worker protections.³⁹¹ It is clearly the case that the imposition of any standards that national government consider too demanding will prevent further progress in the acceptance and evolution of global labour norms. Any reputational damage that may result from a failure to observe labour standards may also have the effect of discouraging higher-income countries from admitting migrant workers under the applicable naturalization and work permit schemes. This will also impact the economic opportunities and income potential of migrants and their families.³⁹² Evidence suggests that low-income, poorly educated migrant workers may have few options to pursue employment abroad, even in countries with severely attenuated labour right protections. These issues raise complex and sensitive questions around the ability of governments to set labour policies most suitable to their needs, and the degree of choice and agency available to migrant workers who chose to work in countries with a poor record of protecting rights.³⁹³

In the face of Saudi Arabia's continued non-participation, the focus must turn to Saudi rulers. Saudi rulers can be encouraged to bring their domestic practices into line with regional and international customary standards via indirect processes of dialogue and diplomacy. Furthermore, this can also be achieved through comprehensive treaty-based reform. A major study on the ineffectiveness of the ICRMW has called for a fresh approach that 'incorporates the concerns of the developed destination countries.'³⁹⁴ This would mean foregoing a

³⁹⁰ These development goals that have apparently informed Saudi Arabia's decision to improve its sponsorship system in the hopes of attracting and retaining high quality foreign workers.

³⁹¹ Human Development Report 2000 (UNDP, 2000) 22
<http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf>

³⁹² Martin Ruhs, 'Protecting Migrant Workers: The Case for a Core Rights Approach' In McAuliffe, M. and M. Klein Solomon (Conveners) *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (IOM: Geneva, 2017) 3-4

³⁹³ *ibid*

³⁹⁴ Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud, *UNESCO Report: Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, 2009).

fragmented or broad-ranging Convention such as the ICRMW, in favour of a pared-down approach that focuses on core rights, as a means of incremental reform.

The ILO Fundamental Principles and Rights at Work adopted in 1985, with coverage over migrant workers, might be a more realistic starting point for the protection of fundamental civil, political and labour rights. These standards have the benefit of addressing key issues of concerns to the most vulnerable migrant workers in the Gulf region, including those that escape the protections introduced under the new reforms. These core rights would include, the right to free movement,³⁹⁵ the right to equal access to legal protections on an equal footing to domestic nationals, and minimal guarantees of fair working conditions.³⁹⁶ These core rights should ideally also enshrine the right to participate in collective bargaining processes. Such reforms might be more constructively pursued through the development of a socially and culturally specific discourse on the existence of political rights under Islamic human rights conceptions. Beyond this, it arguable that such core rights should also include strengthened social welfare entitlements and labour rights as enshrined in the ICESCR, such as social housing or low-income support.

While these rights should remain an aspirational commitment for future reform, governments retain the freedom to restrict welfare benefits even for their own citizens, with even tighter restrictions imposed under current national labour immigration program worldwide. A list of core rights may offer a prudent and plausible means of achieving protections for migrant workers legally employed under temporary labour immigration schemes. These rights are the most relevant to low skill migrant workers in Saudi Arabia.³⁹⁷ As a result, it is now necessary therefore to explore the practical realities of Saudi Arabia's migration system, to determine whether a core-rights approach that focuses on achieving a legitimate balance between economic pragmatism and protection of fundamental rights can be effectively implemented under the Sharia influenced system of Saudi law.

³⁹⁵ Providing the right to leave the country including the right to retain identity documents or to have these arbitrarily withdrawn.

³⁹⁶ Martin Ruhs, 'Protecting Migrant Workers: The Case for a Core Rights Approach' In McAuliffe, M. and M. Klein Solomon, *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (IOM: Geneva, 2017) 4-5.

³⁹⁷ Saudi Arabia to abolish sponsorship system for migrant workers, Middle East Monitor (7 February 2020) <<https://www.middleeastmonitor.com/20200207-saudi-arabia-to-abolish-sponsorship-system-for-migrant-workers/>>.

CHAPTER IV: THE ISLAMIC PERSPECTIVE ON THE KAFALA SYSTEM AND MIGRANT WORKER RIGHTS

A Introduction

In order to answer the research sub-question, “Is the Kafala system in conflict with other sources of Saudi law, including domestic labour regulations and Sharia?”, this chapter analyses basic principles of Kafala system under Islamic law and according to Saudi Arabi legal system.

Firstly, this chapter will provide a background, through a brief overview of the Saudi legal system, as well as traditional and modern interpretation of Islamic law. Then, the natural and principle of kafala under Islamic and Saudi Arabian law will be examined. This constitutional overview will provide the necessary context for understanding the historic influence of a particular school of Islamic thought, known as the Hanbali school. The potential implications for how certain rights have been interpreted, enforced, and applied will be assessed from this perspective. This will prepare the ground for a discussion on how principles of Islamic law may be interpreted or enforced in connection with the rights of temporary foreign migrant workers under Saudi Arabia’s Kafala migrant worker sponsorship system, before and after the reforms.

It will be argued that principles of Sharia do not exist in an interpretative vacuum. Intense jurisprudential debate surrounds legal questions around the form and purposes of Islamic rights conceptions, particularly when such matters are not explicitly addressed by primary sources of Sharia. Since principles and precepts of Sharia are nowhere codified, whether at the state or international level, it often resembles a discretionary, rather than rule-based system of law. This leaves much scope to regulatory and political authorities to decide how such principles will be applied in the positivized sphere of Saudi law. These implementation and interpretative challenges aside, the Sharia can provide legitimacy and authority to ongoing efforts to further improve the Kafala system in support of the least protected foreign migrant workers.

This chapter will examine traditional conceptions of Kafala in Islamic custom and associated frameworks of contract and labour regulation in order how these adapted and applied in the

modern contexts of Saudi Arabia's labour migration framework. At the normative level of analysis, this chapter will contend that the constitutional primacy of Sharia under the Saudi legal system³⁹⁸ may provide the inspiration and source for strengthened protections for foreign migrant workers under the Kafala system, where regulatory and legislative provisions are lacking. This is particularly relevant to those categories of workers that fall outside of the scope of the new reforms, for instance domestic and other low-skill, low-income workers. In a broader sense, this chapter seeks to interrogate the gap between the highest ideals of Islam and the realization of these ideals in the practical contexts of modern Muslim nation states. Therefore, it is necessary to examine the dynamic relation between the law and norms in the evolution of the Kafala system in Saudi Arabia and its implications for the future reform of the Kingdom's labour migration law and policy.

³⁹⁸ And any principles of Sharia that protect the rights of workers.

B The Saudi Legal System

This section considers the more novel aspects of the Saudi Arabia's constitutional order. In its institutional aspects, the Saudi legal system shares commonalities with many other legal systems, including the constitutional frameworks of Western legal systems. Saudi Arabia does not have a formal (written) constitution, in part due to opposition to the codification of Sharia.³⁹⁹ However, the rulers of the Kingdom passed three regulations in 1993 that set out key rules concerning the constitution, review and distribution of powers between Saudi Arabia's three organs of government: the executive, legislative chamber and judiciary.⁴⁰⁰ Thus, key historic and institutional aspects of the constitutional framework of the Kingdom are codified in the Basic System of Governance,⁴⁰¹ the Consultative Council (*Shura Council*) Law,⁴⁰² and Regional Law.⁴⁰³ In combined form, these laws are referred to as the Basic Law of Saudi Arabia.

The Basic Law enshrines elements of customary and religious law that have survived periods of legal transformation since the modern state of Saudi Arabia first came into existence in 1932. It also incorporates elements of modern constitutional law, including by establishing a doctrine of the separation of powers between the three organs of government; enumerating the basic rights of all citizens, including the right to work; and codifying elements of judicial procedure that previously lacked a statutory basis.⁴⁰⁴ In this regard, the Basic Law functions as a founding constitutional document.⁴⁰⁵ One further legal instrument of a constitutional nature is the Council of Minister's Law. This instrument sets forth the powers and functions of the government's executive branch. The Ministerial Council is comprised of the ministers of various governmental departments, the head of which sits the sovereign monarch or King of

³⁹⁹ The Basic law of Governance, Royal Order No. A/90 (1992) (Saudi Arabia).

⁴⁰⁰ النظام الدستوري للمملكة العربية السعودية, محمد حسن القحطاني [Muhammad Hassan Al-Qahtani], *النظام الدستوري للمملكة العربية السعودية* [The constitutional system of the Kingdom of Saudi Arabia] (جامعة الملك عبدالعزيز [King Abdulaziz University], ed 8, 2022).136.

⁴⁰¹ Ibid.

⁴⁰² The Shura Council Law, Royal Order No. A/91 1992 (Saudi Arabia), O.G. Umm al-Qura No. 3397 1992 (Saudi Arabia).

⁴⁰³ The Regional Law, Royal Order No. A/91 1992 (Saudi Arabia), O.G. Umm al-Qura No. 3397 1992 (Saudi Arabia).

⁴⁰⁴ Ibid.

⁴⁰⁵ Kevin Whiteley, Brad Keeton, and Matthew Nagel, *Kingdom of Saudi Arabia* (Al Mamlakah Al Arabiyah As Suudiyah) (ICM Publication, 2006) <<http://law.wustl.edu/GSLR/CitationManual/countries/saudiarabia.pdf>>.

Saudi Arabia.⁴⁰⁶ Legislation implemented through Ministerial resolutions, in addition to secondary sources of law,⁴⁰⁷ are classed as enforceable law under the Saudi legal order.⁴⁰⁸

This outline of the constitutional elements of the Saudi legal system does not yet deal with the role of Sharia in the hierarchy of Saudi laws, whether legislative, regulatory or derived from judicial decision-making. In historical context, the current architecture of the Saudi legal system can be traced back to the reforms implemented by the founding father of the modern state of Saudi Arabia, King Abdul-Aziz Ibn Abdulrahman Al Saud.⁴⁰⁹ As the architect of Saudi Arabia's contemporary legal institutions, the King drew from customary law, Sharia and the civil codes and procedures of 'foreign' legal systems, primarily from the Ottoman era and French model of civil law.⁴¹⁰ By the time of the King's death in 1953, the Saudi legal system conferred broad powers to the executive organs of government.⁴¹¹ Even today, most regulatory acts as adopted by sovereign acts of the monarch and subsequently issued through Royal Decrees. At the same time, amidst centuries of religious strife and tribal conflict, King Abdul-Aziz Ibn Abdulrahman Al Saud strived to lay down the foundations of a legal system based on shared social and religious ties, and rooted in a 'method of ruling in the name of Islam and modernization'.⁴¹² As a result, structures of governance decision-making were influenced by Islamic norms of conciliation, power-sharing and deliberation between civil authority and ordinary members of the public.⁴¹³ This gave rise to a governance mechanism whereby all laws adopted by ministerial decree are scrutinized and reviewed by a legislative chamber composed of ordinary members of society, known as the Shura Council.

⁴⁰⁶ Council of Ministers Law, Royal Order No. A/13 1993 (Saudi Arabia) art. 29

⁴⁰⁷ Such as administrative circulars.

⁴⁰⁸ Ibid.

⁴⁰⁹ Muddassir Quamar, 'Islamic Modernism and Saudi Arabia: Confluence or Conflict' (2015) 2(1) *Contemporary Review of the Middle East* 71, 71-73; Esmacili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26(1) *Arizona Journal of International and Comparative Law* 1, 27-30. See also, George Sfeir, 'The Saudi Approach to Law Reform' (1988) 36(4) *The American Journal of Comparative Law* 729, 729-759.

⁴¹⁰ Herbert Liebesny, 'Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions' (1972) 20(1) *American Journal of Comparative Law* 38, 46.

⁴¹¹ The Islamic foundation of the Saudi legal system was declared as early as 1950. See *Royal Decree No. 1320 1950* (Saudi Arabia). Article 1 of the Decree stipulates that "the Board of Grievances" shall apply the "rules of the Islamic Shari'ah in accordance with the Qur'an, the Sunnah and laws not conflicting with the present Law, and their proceedings shall comply with the provisions thereof."

⁴¹² Muddassir Quamar, 'Islamic Modernism and Saudi Arabia: Confluence or Conflict' (2015) 2(1) *Contemporary Review of the Middle East* 71, 71-73.

⁴¹³ Frank Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (Harvard University Press, 1994) 169-222.

This attempt to reconcile modern legal procedures with religious tradition gave rise to Saudi Arabia's dualistic legal system. Under this dualist model, institutional aspects of the Saudi legal system share structural similarities with the European continental model of civil law, while all aspects of rule creation, interpretation and adjudication are subject to the substantive and ethical controls of Islamic law. Thus, one of the earliest regulations to be passed obliged all judicial authorities to:

[a]pply to cases before them provisions of Sharia laws, in accordance with the Qur'an and Sunnah of the Prophet (peace be upon him), and laws promulgated by the State that do not conflict with the Qur'an and Sunnah, and their proceedings shall comply with the provisions of this Law.⁴¹⁴

Returning to the current makeup of its legal system, and in contrast with other Muslim majority countries that incorporate elements of Sharia into their legal system, Saudi Arabia is somewhat distinctive because norms of Sharia are conceived not as one of many sources of authoritative primary law (such as statutory law), but as the only and ultimate source of all law and authority.

⁴¹⁵ Accordingly, Article 7 of the Basic System of Governance mandates that the:

[g]overnment in Saudi Arabia derives power from the Holy Qur'an and the Prophet's tradition'. Principles of Sharia are, in principle, codified and given concrete effect through regulations (i.e man-made law) passed by executive decree or legislative act.⁴¹⁶

Under this framework, sources of Saudi law take two forms: *fiqh* and *siyasa*.⁴¹⁷ As will be discussed in the next section, *fiqh* derives from the primary sources of Sharia: the *Quran and Sunnah* (the legal traditions of the Prophet).⁴¹⁸ The body of laws known as *siyasa*, by way of comparison, refers to man-made (and thus temporal) laws and policies adopted by a civil authority. In this case, this refers to the Saudi government, in the ordinary course of

⁴¹⁴ Law of Procedure before Shari'ah Courts, Royal Decree No. (M/21) 2000 (Saudi Arabia) article 1 <<http://www.wipo.int/edocs/lexdocs/laws/en/sa/sa029en.pdf>>.

⁴¹⁵ Herbert Liebesny, 'Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions' (1972) 20(1) *American Journal of Comparative Law* 38, 46, 52; Al-Fahad, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30(2) *Yale Journal of International Law* 375, 384-385.

⁴¹⁶ Basic System of Governance (Saudi Arabia) art 7.

⁴¹⁷ See also Asifa Quraishi-Landes, 'The Shari'ah Problem with Shari'ah Legislation' (2014) 41 *Ohio North University Law Review* 545, 546.

⁴¹⁸ سعيد حوى [Saeed Hawwa], العقائد الإسلامية - الأساس في السنة وفقهها [The Foundation of the Sunnah and its Jurisprudence - Islamic Beliefs] دار السلام للطباعة والنشر والترجمة [Dar Al Salam for printing, publishing, distribution and translation], ed2,1992).187.

governing.⁴¹⁹ It follows that *siyasa* brings within its scope any regulatory acts or civil law codes that are not explicitly proscribed or regulated by the primary sources of Sharia, discussed below.

In the domain of *siyasa*, the Council of Ministers have passed 200 regulations and codes including in the arena of labour law.⁴²⁰ Many of these codes were influenced by the colonial history of neighbouring nations, such as Egypt, Lebanon and in particular, the legacy of French system of administrative law on its former colonies.⁴²¹ The Ottoman empire and its system of Sharia inspired civil law has also shaped the legal systems of the Arabian world. Many aspects of this are rooted in the Hanafi school of jurisprudence. These European and Ottoman models have had a distinct influence on the development of Saudi Arabia's modern legal institutions. Although, the role of Sharia remains paramount, with civil authorities obliged to adhere to mandatory provisions of Sharia across all aspects of public and private law and life.⁴²²

These two realms of law making, man-made and divine, are not treated as distinct under the Saudi constitutional order, in so far as civil authorities are constrained by an Islamic conception of rule-based governance. Juristic opinion holds, in this regard, that certain acts, individual or civil, fall into one of the following categories: mandatory, recommended, permissible, morally repugnant or prohibited activities.⁴²³ Vogel examines the dualistic nature of the Saudi legal system:

[I]n most Islamic states other than Saudi Arabia, the legal system is bifurcated: one part is based on man-made, positive (wadi) law; the other part on Islamic law. The first part usually exists in the form of comprehensive codes similar to those of the European civil law systems, and the second in the form of Islamic law, usually codified as well. The positive legal system provides the basic or residual law, while the Islamic law is exceptional, supplementary and relatively narrow in scope. There is a similar bifurcation in the institutions that apply the law, for example, between positive

⁴¹⁹ Ibn Qayyim Al-Jawziyya and Muhammad Ibn Abi Bakar, *Al-Turuq Al-Hukmiyyah Fi As-Siyaasah Al-Shar'iyah* (International Law Books, 2000) 237.

⁴²⁰ Ibid.

⁴²¹ Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 *Arab Law Quarterly* 271, 277-288.

⁴²² Ibid.

⁴²³ Joseph Brand, 'Aspects of Saudi Arabian Law and Practice' (1986) 9 *Boston College International and Comparative Law Review* 1, 20.

law tribunals and religious law courts. Saudi Arabia also has a dual legal system, but the relative roles of the two sides are reversed. The Islamic component of the legal system is fundamental and dominant. The positive law, on the other hand, is subordinate, constitutionally and in scope.⁴²⁴

It follows that while the civil authorities have the competence to propose and enact laws and policies, the content of such laws must conform and give effect to the requirements of Sharia.⁴²⁵ By extension, Royal Decrees, which are the highest form man-made legislation, are presumed to derive from, or be subordinate to, accepted rules of Islamic law and opinion.⁴²⁶ It is therefore necessary to establish what Sharia consists of, and how such norms are enforced, and crucially interpreted, in the local and culturally specific context of local legal systems, focusing on Saudi Arabia.

⁴²⁴ Frank Vogel, 'Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction' in Gary Sick and Lawrence Potter (eds), *The Persian Gulf at the Millennium; Essays in Politics, Economy, Security, and Religion* (Saint Martin's Press, 1997) 275. For an economic take on the duality of the Saudi legal system, see Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19(1) *Arab Law Quarterly* 91, 112.

⁴²⁵ Bryant Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1979) 18 *Columbia Journal of Transnational Law* 438, 442.

⁴²⁶ *Ibid.*

C Islamic Law and its Interpretation

Saudi law consists of a blend of statutory law, civil law codes transplanted from foreign legal systems, traditional law based on custom,⁴²⁷ and norms of Sharia.⁴²⁸ In the overall hierarchy of legal sources, however, rulings and norms of Sharia - many of which remain uncodified having no basis in statutory law – constitute the primary source of all law and constitutional authority. The most authoritative source of Sharia derives from the explicit text of Quran.

After scriptural revelation, the Sunni branch of Islamic theology regards the life and teachings of the Prophet Mohammed as the next most authoritative source of Islamic law. This body of teaching is collectively referred to the *Sunnah*.⁴²⁹ The Saudi tradition of Hanbali jurisprudence gives weight and authority to the *Quran* and to the *Sunnah*. This is significant because there are significant disagreements between the Hanbali and other mainstream schools of Sunni jurisprudence on fundamental questions of rule-interpretation and reform of established Islamic custom and tradition. To expand on these issues further, it is necessary to briefly touch to the distinction set up between divine law and its human interpretation.

As noted above, the accumulated body of Islamic rules, principles, customs, and ritualistic practices derived from the primary sources of Sharia are collectively described as *Fiqh*.⁴³⁰ As Kamali notes the *Quran and Sunnah* constitute the ‘source and subject matter’ of *Fiqh*,⁴³¹ and has coverage over religious, personal life, as well issues of a more explicitly legal nature, such as penal law or contract regulation and rules on fair trade.⁴³² However, the *Quran and Sunnah* do not provide exhaustive guidance on matters of contemporary law. In response to this challenge, the earliest (classical) Islamic jurists elaborated a complex set of secondary rules (rules for interpreting rules) to resolve jurisprudential questions not explicitly addressed in the

⁴²⁷ Traditional customary practices vary significantly from one Islamic country to another. See Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press, 1989) 17.

⁴²⁸ Herbert Liebesny, ‘Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions’ (1972) 20(1) *American Journal of Comparative Law* 38, 52.

⁴²⁹ Imam Muslim and Abdul Hamid Siddiqi, *Sahih Muslim: Being Traditions of the Sayings and Doings of the Prophet Muhammad as Narrated by his Companions and Compiled under the Title Al-Jami'-Us-Sahih: With Explanatory Notes and Brief Biographical Sketches of Major Narrators* (Ashraf Islamic Publishers, 1990) 5.

⁴³⁰ Abdullah An Naim, ‘Sharia and Positive Legislation: Is An Islamic State Possible Or Viable’ (2008) *Yearbook of Islamic and Middle Eastern Law* 5.

⁴³¹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Legal Text society, 2003) 5-8, 12-14.

⁴³² *Ibid*, 230-242.

primary sources. This gave rise to a second branch of Islamic knowledge known as *Usul al-fiqh*. This domain of Islamic legal knowledge brings within its scope an impressive sweep of secondary methods of rule-interpretation, deduction and inference.⁴³³ It should be emphasized that these two branches of Islamic knowledge represent two distinct realms.⁴³⁴ Kamali clarifies the importance of the distinction.

Fiqh..... is the law itself whereas *usul al-fiqh* is the methodology of the law. The relationship between the two disciplines resembles that of the rules of grammar to a language, or of logic (*mantiq*) to philosophy. *Usul al-fiqh* in this sense provides standard criteria for the correct deduction of the rules of *fiqh* from the sources of *Shari'ah*. An adequate knowledge of *fiqh* necessitates close familiarity with its sources.⁴³⁵

Fiqh, as the body of Islamic law refined over centuries of jurisprudential enquiry, is not reducible to how these norms are implemented in modern Islamic states. As Reinhart has suggested, Sharia represents a universal and a-temporal moral scheme for all times and places, thereby collapsing the classical distinctions set up between public and private life, between the local and global, or cultural and political.⁴³⁶ Put differently, Islamic has its own independent validity criteria as a system of divine law which is separate and distinct from how juristic authorities interpret these criteria.⁴³⁷ This is because there may be significant interpretative disputes over contemporary legal issues on which the *Quran and Sunnah* are silent or ambiguous.

Usul al-fiqh derives from human enquiry and methods of interpretation. These interpretative methods did not come into existence until the 8th Century, after the Prophet's death. In the first Islamic century (622 CE – 719 CE),⁴³⁸ there was limited cause to formulate secondary rules and methods of interpretation. This is due to the fact that all disputes concerning the meaning of Quranic texts could be resolved or corroborated by the Prophet himself, as the last messenger

⁴³³ Ibid,12-14; Mahdi Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research' (2003) 18(3/4) *Arab Law Quarterly* 215, 230.

⁴³⁴ Ibid.

⁴³⁵ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Legal Text society, 2003) 12; Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research' (2003) 18(3/4) *Arab Law Quarterly* 215, 230. 230-242.

⁴³⁶ Kevin Reinhart, 'Islamic Law as Ethics' (1983) 11(2) *Journal of Religious Ethics* 186, 196

⁴³⁷ Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Rowman and Littlefield, 2014) 298-299.

⁴³⁸ Ibid.

of Allah.⁴³⁹ After the Prophet's passing, still in the First Islamic Century, the Prophet's companions could be relied upon to confirm and pass down knowledge of the Prophet's rulings and opinions, thus forming the basis of the *Sunnah*.⁴⁴⁰ By the 8th Century, of 2nd Islamic Century, the Prophet's companions had also perished, and jurists could no longer rely on the oral testimony of those with direct knowledge of the Prophet's rulings and opinions on matters not explicitly addressed, or left unclear, by Quranic texts. To resolve these issues, the most revered jurists of the age began to formulate ever more experimental secondary methods of rule interpretation.⁴⁴¹

In this formative period of classical Islamic jurisprudence, religious opinion was diverse and pluralistic, and many schools of thought competed for interpretative authority. However, three centres of intellectual enquiry began to emerge as prevalent in *Hijaz* (Arabia) Iraq and Syria.⁴⁴² The jurists of these centres wielded significant influences over local customs and shaped the governance practices of ruling authorities in these regions. Over time, jurists from within these intellectual centres began to diverge on the legitimate uses of Islamic methods of rule interpretation. The substance of the dispute centered on the extent to which legal norms and administrative rule-making derived from the Quran could be deviated from, or reassessed, to meet local needs or welfare demands.⁴⁴³ The *Hijaz* regions of Mecca and Medina favoured a strict interpretation of Quranic revelation and faithful adherence to practices followed by the Prophet, opining that local custom and other non-textual sources could only be used to supplement *fiqh* in limited situations.⁴⁴⁴ The consensus that formed around the rulers and jurists of Mecca and Medina would later become the chief influence behind the Hanbali school – the de facto official *fiqh* of modern day Saudi Arabia. The rulers and jurists in Iraq and Syria began, by contrast, to advocate for a more contextual and flexible method of rule interpretation

⁴³⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Legal Text society, 2003) 14.

⁴⁴⁰ For a discussion of this see Mahdi Zahraa, 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research' (2003) 18(3/4) *Arab Law Quarterly* 215, 230. 243.

⁴⁴¹ Showkat Hussain, 'Coherence and Relativity of the Islamic Legal Theory: A Study of Methodology in Socio-legal Context' (2017) 8(1) *Journal Of Humanities And Social Science* 59, 68.

⁴⁴² Ibid.

Wael Hallaq, 'On the Origin of the Controversy about the Existence of Mujtahid and the Gate of Ijtihad' (1986) 63(24) *Journal of Studies Islamica* 129, 191.

⁴⁴⁴ Ibid.

to fill in interpretative gaps in the fiqh.⁴⁴⁵ These jurists would emerge as the intellectual forbearers of the Hanafi, Shafi and Maliki schools, discussed below.⁴⁴⁶

The scholar al Shafi, the classical jurists of the 2nd Islamic century and eponym of the Shafi school, is widely regarded as the father of Islamic jurisprudence and *usul al-fiqh*.⁴⁴⁷ Al Shafi began the work of developing general principles and methods of rule interpretation, and systematizing the oral testimonies of the Prophet's teachings (the Hadith).⁴⁴⁸ In this formative period, jurists from other traditions began to develop ever more complex argumentative schemes and methods in a bid to elaborate a more complete body of Islamic law and jurisprudence. Many of these schools also began to rely heavily on the Sunnah to support and supplement Quranic text.⁴⁴⁹ While many schools first flourished, given rise to vibrant intellectual debate, by the 12th Centuries only four schools of Sunni jurisprudence remained: the; Shafi, Hanafi, Maliki and Hanbali schools (madhabs).

The four authoritative schools converged in their formulation of a hierarchy of recognised sources from which general principles and substantive norms of Islamic law could be derived or deduced. In descending order these were the Qur'an, Sunnah, analogy (*qiyas*), and consensus (*ijma*). Thus, classical scholars of the 8th Centuries would also formulate a set of proofs for, amongst other things, settling interpretative disputes around the primacy of conflicting verses of the Quran; rules for determining which verses should be interpreted literally and those to that should be construed in historical context, as well as a rich scheme on juristic authority for assessing which jurists could determine points of law (fatwas) or those only qualified to render summary judgments in individual cases.⁴⁵⁰

All schools acknowledged that the Quran remained supreme in the hierarchy of sources, but leading figures of the four schools diverged on the question of whether methods of independent reasoning (*ithjihad*) could be employed when issuing rulings without an explicit basis in

⁴⁴⁵ Ya'kov Meron, 'The Development of Legal Thought in Hanafi Texts' (1969) 30 *Studia Islamica* 73.

⁴⁴⁶ Showkat Hussain, 'Coherence and Relativity of the Islamic Legal Theory: A Study of Methodology in Socio-legal Context' (2017) 8(1) *Journal Of Humanities And Social Science* 59, 68.

⁴⁴⁷ Wael Hallaq, 'Was al-Shafi'i the Master Architect of Islamic Jurisprudence' (1993) 4 *International Journal of Middle East Studies* 587.

⁴⁴⁸ Ibid, 14; G. H. A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadith* (Cambridge: Cambridge University Press, 1983) 77–95.

⁴⁴⁹ Wael Hallaq, *Authority, Continuity and Change in the History of Islamic Law* (Cambridge University Press, 4th ed, 2004) preface, 34.

⁴⁵⁰ Ibid.

religious text or tradition. The influential jurist Ibn Rashad, affiliated with the more purposively orientated Maliki school claimed that rules based on juristic consensus may in circumstances prevail over ambiguous verses of the Quran or weak and contested hadiths. By contrast, the founder of the Hanbali school, Ibn Hanbal, diverged from the Hanafi school in significant ways. Ibn Hanbal refuted the use of independent juristic reasoning as an impermissible innovation (*bid'a*) that strayed too far from the strict theological enquiry into what constitutes *fiqh*, based on Quranic exegesis and narration of the Prophet's teachings. As a result, the four orthodox schools began to diverge on the limits and authoritativeness of the above proofs (principle of continuity verse methods of rule re-interpretation).⁴⁵¹ At its essence, the jurisprudential conflict came down to whether civil or religious authorities could or should depart from religious text and tradition, whether to fulfil the higher ethical purpose of Sharia, or to accommodate processes of social and political change.⁴⁵²

This takes us to a central theme of this chapter's preceding analysis of contemporary adaptations of Islamic traditions, including traditional contract forms in the context of Saudi Arabia's *Kafala* system. In one sense, the implementation of Sharia within the modern-day legal frameworks of sovereign nations such as Saudi Arabia is based on the principle of 'continuity'. This is because all regulatory and juristic authorities cannot disregard the explicit proscriptions of the Qur'an and Sunnah.⁴⁵³ At the same time, Saudi Arabia is no different from any other legal system that aims to modernize its laws through secular (civil) processes of legislative reform and rule re-interpretation. Throughout its history, the Islamic legal tradition has always been flexible enough to adapt to these 'processes of continuity and change.'⁴⁵⁴ The dilemma has always centered around the question of where to draw line between tradition and reform, posing the question of what innovations can be justified by Islam and which derive from local custom and culture. It is not an accident that the four schools would emerge dominant of certain countries or local legal systems in which they first originated. Nor is it an accident that the opinions of these school would reflexively reflect, and shape, the local customs of the regions in which they held most authority.⁴⁵⁵ Thus, the Hanafi School has continued to exert influence on regions over which the Ottoman empire ruled, while the

⁴⁵¹ Ibid; 230-242.

⁴⁵² Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Rowman and Littlefield, 2014) 88-89.

⁴⁵³ Kevin Reinhart, 'Islamic Law as Ethics' (1983) 11(2) *Journal of Religious Ethics* 186, 193.

⁴⁵⁴ Wael Hallaq, *Authority, Continuity and Change in the History of Islamic Law* (Cambridge University Press, 4th ed, 2004) preface, 34.

⁴⁵⁵ Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1979) 71-72.

Hanbali School remains the official school in Saudi Arabia and Qatar, albeit aspects of its jurisprudence are also prominent in Palestine, Syria, and Iraq.⁴⁵⁶

Finally, it is noted that doctrinal innovation in Islamic jurisprudence began to wane by the 10th Century, with practice of rule-interpretation applied more narrowly to new legal problems.⁴⁵⁷ Hallaq argues that the cautious approach to rule-interpretation reflected a general consensus among the Muslim community that the opinions of classical scholars had attained the status of a ‘universal’ form of Islamic custom.⁴⁵⁸ Others take a more critical view, arguing that fidelity to classical fiqh has led to the “fossilization” of Islamic legal thought, resulting in the stagnation of social and economic progress in modern Muslim societies.⁴⁵⁹ As part of this debate, legislators in modern Muslim states have wielded secondary rules of Islamic law to allow for a broad, and some might suggest overly expansive, re-interpretation of Islamic customs and practices to further their public policy aims. Public authorities have often done so by invoking the principle of public interest (*maslahah*) as a way of justifying the reformulation and re-imagining of Islamic customs for reasons of state security, order, or the public welfare.⁴⁶⁰

The above outline takes us neatly to the focal point of this chapter and its study of the relationship between traditional contract forms and the modern use and application of the Kafala form under Saudi Arabia’s migrant sponsorship system. The next section will therefore consider the origins of Kafala contract form within a wider discussion of the intersecting relationship between classical principles of Islamic contract law and the Islamic conception of industrial relations. This will prepare the ground for discussion of the possible failings of the Kafala system, assessed considering the ethical and regulatory dimensions of Sharia.

⁴⁵⁶ Yusuf Al-Qaradawi et al, *Introduction to the Study of Islamic Shari’ah: Al-Shari’ah Al-Islamiyyah* (Maktabat Wahbah, 1991) 106.

⁴⁵⁷ Wael Hallaq, ‘Ifth’ And Ijtihad In Sunni Legal Theory: A Developmental Account’ In Muhammad Khalid Masud, Brinkley Messick and David Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fathers Fatwas* (HUP, 1996) 33-43.

⁴⁵⁸ Wael Hallaq, *Authority, Continuity and Change in the History of Islamic Law* (Cambridge University Press, 4th ed, 2004) preface, 34. Hallaq notes :[Although the notion of necessity has been used to justify a number of departures from the stringent demands of the law, it is, like custom, restricted to those areas upon which the explicit texts of revelation are silent.]. Ibid, 227.

⁴⁵⁹ Muhammad Khalid Masud, *Iqbal's Reconstruction of Ijtihad* (Islamic Research Institute, 1995) 7.

⁴⁶⁰ Felicitis Opwis ‘Maṣlaḥa in Contemporary Islamic Legal Theory’ (2005) 12(2) *Islamic Law and Society* 182, 184.

D The Basis of Kafala in Islamic Law and Custom

There is a legal and, arguably ethical, imperative to evaluate the relationship between the Islamic conception of Kafala and the contemporary interpretation and administration of this concept in modern day Saudi Arabia.⁴⁶¹ As detailed in the previous sections, Islamic jurists recognized the authority and power of a ruler within the civil realm of law-making (*siyāsa shar'īyya*) to impose or modify rules in order to meet social or economic needs, or to serve the public interest (*maslaha*).⁴⁶² Modern nation states with Islamic legal systems exercise this discretionary power even today, among them Saudi Arabia. However, Islamic principles, including the principle of continuity, demand that civil authorities enact rules that adhere to, and do not violate, the higher justice principles of Sharia.⁴⁶³ These justice principles implicate questions around the validity of unfair bargains in contracts and the ruler's obligations to foreign citizens subject to its rule.⁴⁶⁴

To begin with, it is necessary to define Kafala as a special type of contract, and the rules that govern the form, conditions, and purposes of that contract.⁴⁶⁵ Drawing on Islamic methods of linguistic interpretation, or hermeneutics, it is certainly true that the word Kafala itself has a historic root in the Arabic language.⁴⁶⁶ Over time, the word Kafala came to acquire more precise meaning and was associated with the legal concept of guarantor, trustee, guardian, sponsor or bailor, or any legal arrangement involving of the “cojoining of responsibility to another.”⁴⁶⁷ Turning to its specific usage in religious teachings, the concept of Kafala came to embody a diverse range of non-profit based contract forms, itself a testament to the fluidity of its use and application in Islamic custom. In the area of family life and political decision, the

⁴⁶¹ Ray Jureidini and Said Fares Hassan, ‘The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform’ in *Migration and Islamic Ethics* (Brill, 2019) 92.

⁴⁶² Ibn Qayyim Al-Jawziyya and Muhammad Ibn Abi Bakar, *Al-Turuq Al-Hukmiyyah Fi As-Siyaasah Al-Shar'īyyah* (International Law Books, 2000) 237; and Felicitis Opwis, ‘Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Legal Theory’ in Abbas Amanat and Frank Griffel (eds), *Shari'a Islamic Law in the Contemporary Context* (Stanford University Press, 2007) 62-82.

⁴⁶³ Saba Habachy, ‘Property, Right and Contract in Muslim Law’ (1962) 62 *Columbia Law Review* 450, 458.

⁴⁶⁴ محمد بن أحمد القرطبي [Muhammad bin Ahmed Al-Qurtubi], المقدمات الممهدة [The introductions are paved] (دار الغرب الإسلامي، بيروت - لبنان [Dar Al -Gharb Islamic, Beirut - Lebanon] , Vol 2 , ed1,1988) 373.

⁴⁶⁵ نظام العمل السعودي الجديد في ميزان التحليل الفقهي , منير الدكمي [The New Saudi Labor System In The Balance Of Jurisprudential Analysis] (دار حافظ للنشر والتوزيع [Dar Hafez for Publishing and Distribution in Jeddah] , ed2,2011) 166.

⁴⁶⁶ Ray Jureidini and Said Fares Hassan, ‘The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform’ in *Migration and Islamic Ethics* (Brill, 2019) 92, 93.

⁴⁶⁷ Ibid; Bālī, Wahīd ibn ‘Abd al-Salām, *Qawānīn al-Sharī'a al-Islāmiyya al-latī Taḥkum bihā al-Dawla al-Uthmāniyya* (Dār al-Taqwā, 2013).

concept Kafala is closely connected within Islamic values of solidarity, consultation, and trust in strengthening the social bonds between the local community and ruling authorities. In the arena of family law, the concept has been used to regulate legal forms of guardianship between adults and orphaned minors. In this form of Kafala, a person with financial means and capacity (*kafil*) voluntarily agrees to assume responsibility for a child's welfare until they reach adulthood.⁴⁶⁸ As to its socio-political dimensions, a magistrate or representative who provided advice, council, or assistance to individuals in their dealings with local authorities was characterised as a *Kafil*. The diverse meanings and legal formulations of Kafala reinforces the capaciousness of this concept, which brings with its scope a breadth of social, financial, and political arrangements.⁴⁶⁹

Leaving aside its broader usages, Kafala is most commonly associated with the act of providing legal guarantees in the context of, for example, credit agreements.⁴⁷⁰ For instance as surety for repayment of debts (*kafala bi-al-mal*) or as satisfaction against a future promise to deliver goods.⁴⁷¹ In this sense, the Kafala contract is most widely used in business contracts as a risk-mitigating instrument and thus similar to Western concept of enforceable collateral.⁴⁷² The doctrine of Kafala may also refer to any guarantees made by a third party representative before a public authority. For example, this would include a bail bond, where the Kafil accepts an obligation to pay bail, and provides assurances that the defendant will attend court hearings as required.⁴⁷³ Thus, in its ordinary contractual usage, Kafala simply refers to any arrangement when a third party cojoins responsibilities a contracting party, and consequently accepts any liability for a breach of such obligations.⁴⁷⁴

As to the nature of the contract itself, Islamic jurists broadly converge on the idea that the defining feature of all Kafala contracts, whatever their form, is that they are non-profit earning in nature. Kafala arrangements, in Islamic parlance, are classified as tabarru contracts. A tabarru contract refers to a benevolent undertaking or act of goodwill by a third party. This

⁴⁶⁸ Franz Elizabeth, *Exporting Subservience: Sri Lankan Women's Migration for Domestic Work in Jordan* (Department of Anthropology, London School of Economics, 2011) 98.

⁴⁶⁹ Ibid.

⁴⁷⁰ Monzer Kahfa and Abdul-Jalil Ibrahim, 'Return On The Letter Of Guarantee: Issues And New Proposals In Structuring The Product' (2017) 25(3) *International Journal of Economics, Management and Accounting* 549.

⁴⁷¹ Hammad, Nazih, 'Extent of Permissibility of Payment for Guarantee (Kifalah) in Islamic Fiqh' (1997) 9(1) *Journal of King Abdulaziz University: Islamic Economics* 95.

⁴⁷² Monzer Kahf, *Islamic Finance Contracts* (Lexington, 2015) 433.

⁴⁷³ Muḥammad Amīn Ibn 'Abdīn, *Rad al-Muḥtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* (Dār 'Ālam al-Kutub, 200) chapter 7.

⁴⁷⁴ Nicholas Foster, 'The Islamic Law of Guarantees' (2001) 16(2) *Arab Law Quarterly* 133, 141.

condition also requires that any arrangement structured by a Kafala contract ‘should not be used as an earning vehicle’.⁴⁷⁵ This is consistent with principles of Islamic contract law that state that a person can only legitimately earn from a transaction if certain formal and substantive requirements of Sharia are first satisfied.⁴⁷⁶

Now that the basic forms of the Kafala, and the moral purposes to which such arrangements have been used in Islamic custom have been outlined, it is necessary to turn to more specific question of how the traditional usages of this concept have been adapted and reimagined in the modern context of Saudi Arabia’s sponsorship system.

Scholars have noted that the concept of guarantorship remains present in the new Kafala form of migrant sponsorship, although in a different mode.⁴⁷⁷ The question for this chapter is whether these differences in the mode, and indeed purposes, of Kafala contract forms applied under the Saudi Arabia sponsorship system are justified from a Sharia perspective. To put the question differently, is the modern application of Kafala a continuation of Islamic custom in a new form? Or is the exploitation of workers, an accusation of which the GCC model of migrant sponsorship has long been accused, is itself evidence of a widening gap between tradition and modern legal practices in Saudi Arabia? If this is the case, the administration of Kafala may be viewed as impermissible deviation from classical *fiqh*, and instead rationalized as politically motivated in nature.⁴⁷⁸ In order to unpack these issues with a view to assessing the doctrinal continuity between Islamic tradition and the modern administration of Saudi Arabia’s sponsorship system, it is necessary first to examine Islamic rules on the formation and validity of a contract. This is because the sponsorship system is essentially contractual in nature and thus, ultimately, governed under the law of obligations - albeit the sponsorship system in embedded in an overarching governance structure. The Kafala system, in other words, takes the form of ‘labour contracts for service’ regime that is constituted and administered under a

⁴⁷⁵ Monzer Kahf and Abdul-Jalil Ibrahim, ‘Return On The Letter Of Guarantee: Issues And New Proposals In Structuring The Product’ (2017) 25(3) *International Journal of Economics, Management and Accounting* 549, 557.

⁴⁷⁶ Nicholas Foster, ‘The Islamic Law of Guarantees’ (2001) 16(2) *Arab Law Quarterly* 133, 141.

⁴⁷⁷ Ray Jureidini and Said Fares Hassan, ‘The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform’ in *Migration and Islamic Ethics* (Brill, 2019) 105.

⁴⁷⁸ Nicholas Foster, ‘The Islamic Law of Guarantees’ (2001) 16(2) *Arab Law Quarterly* 133, 143; and Ayaz Asadov, *Fatwa Making in the Context of Abnormal Justice: The Case of Migrant Workers in Saudi Arabia* (Social Justice and Poverty in Muslim World, International Ilem Summer School, Konya, Turkey, 2015) 43–54.

system of regulatory decision-making (for example, the approval of sponsorship applications).⁴⁷⁹

1. Principles of Islamic Contract Law

The rules governing contracts, or *ijara*, in religious texts are important to fully probe the degree of continuity and change that exists between the classical formulation and application of *kafala* in Islamic law and jurisprudence, and its current iteration in the context of Saudi Arabia migration laws and policy.⁴⁸⁰ This section will consider Islamic principles governing the formation, performance and termination of contracts, as well as the conditions of contract validity. This is relevant, because although *Kafala* contracts represent a special class of ‘goodwill’ contracts, they are still bound by general principles of Islamic contract law.

Over centuries of jurisprudential debate, the classical jurists of the four Sunni schools have elaborated several general standards and principles concerning the permissible form and subject matter of a contract. As to its form, the Islamic definition of a valid contract is broader than its common law equivalent.⁴⁸¹ Coulson notes that ‘a contract in Islamic law is in no sense the precise equivalent of the technical term contract in Western jurisprudence, which involves, certainly at the common law, the two basic essentials of agreement and consideration.’⁴⁸² Nonetheless, classical *fiqh* does impose certain formal requirements on contracting parties, such as “precision, clarity, eligibility and approval” that are not dissimilar to contract principles in most advanced modern contract regimes.⁴⁸³ The absence of any of these elements in a contract may be sufficient to render the whole contract null and void under precepts of Sharia. Moreover, only a contract entered into by mutual agreement and intent will be

⁴⁷⁹ [دار ومكتبة الشركة الجزائرية] [Athar Ibn Badis] [أثارُ ابنُ بادييسَ] , [Abdul Hamid Al-Sanhaji] [عبد الحميد الصنهاجي] Algerian Company House and Library] , Vol 4, ed1,1968) 68.

⁴⁸⁰ [Islamic Jurisprudence] [فقه الإسلام] "شرح بلوغ المرام في جمع ادلة الاحكام" , [Abdul Qadir Shaybah Al-Hamad] [عبدالقادر شيبه الحمد] مطابع الرشيد , ["Explanation of Attainment of the Purpose from Collecting Evidence of Rulings"] [المدونة العربية السعودية - المملكة العربية السعودية] [Al-Rasheed Press, Medina - Kingdom of Saudi Arabia] , Vol 6 , ed1,1982) 42.

⁴⁸¹ Abdul Jalil and Muhammad Rahman, ‘Islamic Law of Contract is Getting Momentum’ (2010) 1(2) *International Journal of Business and Social Science* 175, 180; Siti Salwani Razali, *Islamic Law of Contract* (Cengage, 2010) 1-2; Hideyuki Shimizu, ‘Philosophy of the Islamic Law of Contract: A Comparative Study of Contractual Justice’ (1989) 15 *IMES Working Paper* 1, 8.

⁴⁸² Noel James Coulson, *Commercial Law in Gulf States: The Islamic Legal Tradition* (Graham and Trotman, 1984) 18.

⁴⁸³ Abdul Rahman Hasbullah, ‘Offer and Acceptance in Islamic Law of Contract’ (2000) 8(2) *Journal of Shariah* 15, 23; Nabil Saleh, ‘Definition and Formation of Contract under Islamic and Arab Law’ (1990) 5(2) *Arab Law Quarterly* 101, 102-103.

considered enforceable.⁴⁸⁴ This is also consistent with the Islamic condition that a contract be free of an unacceptable degree of uncertainty and unfairness at the negotiation and formation stages of the contractual process. Scholars have also affirmed that, as with common law systems, both parties must offer consideration of an acceptable value, though certain exceptions exist including in the case of promissory or unilateral undertakings, covering Kafala arrangements.⁴⁸⁵

There are fundamental differences between Islamic contract law and common law regimes. One distinction is the relative flexibility with which parties can enter into and terminate contracts. Sharia imposes few formal requirements that parties must fulfil before contract comes into force, and the contract is deemed to have been concluded after an offer has been accepted.⁴⁸⁶ As to the substance of a contract, precepts of Sharia forbid the presence of any elements of 'impurity' in the material terms of a contractual agreement. Generally speaking, no contract will be valid if pertains to the performance of any activity deemed to be *haraam* (an act forbidden under the Sharia). Thus, a contract will, in principle, be invalid if it involves elements of interest taking (*riba*). *Thanwi* explains that *riba* is prohibited in Islam because it enables the interest-taker to obtain a material advantage without a corresponding duty to provide consideration in a contract of exchange.⁴⁸⁷ Other elements proscribed by Sharia is any form of gambling or speculation (*gharar*); uncertainty (*maysir*) as to nature of the transaction, the parties involved, or price, or, indeed, any practices of deception, exploitation or illegality by one or all of the contracting parties.⁴⁸⁸ As to the last point, any agreement that incorporates *facid* or *fayed* (unequal or unfair contractual) clauses can also make a contract void ab initio.⁴⁸⁹ These requirements of Sharia have applicability to all stage of the contract, covering the

⁴⁸⁴ Hideyuki Shimizu, 'Philosophy of the Islamic Law of Contract: A Comparative Study of Contractual Justice' (1989) 15 *IMES Working Paper* 1, 9. See also, Jason CT Chuah, 'Islamic Principles Governing International Trade Financing Instruments: A Study of the Morabaha in English Law' (2006-2007) 27(1) *Northwestern Journal of International Law and Business* 137, 166.

⁴⁸⁵ Abdul Jalil and Muhammad Rahman, 'Islamic Law of Contract is Getting Momentum' (2010) 1(2) *International Journal of Business and Social Science* 175, 182-183.

⁴⁸⁶ Aron Zysow, 'The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law' (1985-1986) 34 *Cleveland State Law Review* 69, 72.

⁴⁸⁷ Muhammed Ala Thanwi, *Kashshaf Istilahat alfunum* (Vol 3, Sharikat al-Khayyat le al-kutub, 1998) 592.

⁴⁸⁸ Irit Bligh-Abramski, 'The Judiciary (Qadis) As A Governmental-Administrative Tool In Early Islam' (1992) 35 *Journal of Economic History of the Orient* 65, 57.

⁴⁸⁹ Faisal Kutty, 'The Shari'a Law Factor in international Commercial Arbitration' (2006) 28 *International and Comparative Law Review* 565, 566.

formation, performance, modification, rescission, early termination of an individual or collective agreement, or future arbitration of a contractual dispute.⁴⁹⁰

2. The Moral Dimensions of Contract Law: between Form and Substance

For the purposes of this discussion, it is necessary to point out that sources of the *fiqh* can be construed to place, both, an onus on fairness and equity in contract negotiations, and on the sanctity of contractual obligations.⁴⁹¹ This exposes a tension between Islam's dual commitments to neutrality in the adjudication of contractual outcomes, on the one side, and to requirements of equity and equilibrium between parties in bargaining relationships, on the other.⁴⁹² The apparent ambivalence one finds in Islamic texts can be used to support divergent views on the rights of workers and the legitimate role of legal authorities in regulating the labour market. It is only by situating these interpretative controversies in the longstanding tension between 'continuity and change' in the evolution of Islamic law and thought that one can assess how principles of Sharia may influence the continuation or reform of Saudi Arabia's kafala system.⁴⁹³ To explore these issues, it is necessary to begin by examining the Sharia perspectives on the ethical and economic dimensions of Islamic forms of regulation.

One of the fundamental tenets of Sharia is that all contracts constitute a sacred pact between the consenting parties. Several verses of the *Quran and Sunnah* assert that the contracting parties have a duty to fulfil their contractual obligations in good faith.⁴⁹⁴ Key verses state: 'O ye who believe fulfil the contractual obligations',⁴⁹⁵ '[a]nd fulfil your covenant with me and as I fulfil my covenant with you'.⁴⁹⁶

⁴⁹⁰ Al-Tammawi Soliman, *General Basis of the Administrative Contracts: A Comparative Study* (Dar Al-Fiker Al-Arabi, 5th ed, 1991) 53.

⁴⁹¹ Noor Mohammed, 'Principles of Islamic Contract Law' (1988) 6(1) *Journal of Law and Religion* 115, 115-116; Mahmoud Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law, A Comparative Analysis' (2014) 28(3) *Arab Law Quarterly* 205, 206.

⁴⁹² Muhammed Baker and Rashid Mansoor, 'Form and Substance in Islamic Finance: from the Perspective of Islamic law of Contract' (2020) 9(2) *Hazara Islamicus* 73, 89.

⁴⁹³ For an account of this debate Wael B Hallaq Authority, *Continuity and Change in the History of Islamic Law* (Cambridge University Press, 4th ed, 2004) preface, 127-128.

⁴⁹⁴ Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles' (2011) 13 *Pace International Law Review* 30, 30.

⁴⁹⁵ Qur'an 5:1.

⁴⁹⁶ Qur'an 2:40.

The duty to honour one's obligations under contract is therefore elevated from legal requirement to religious requirement.⁴⁹⁷ It has been noted that a contract must be free from an impermissible degree of uncertainty. As a result, an ordinary contract for the exchange of services, including an employer-employee contract, must clearly set out the work or service to be performed, for what duration and in what location, and in exchange for consideration (such as remuneration or other in-kind benefits).⁴⁹⁸ However, outside of the validity-related conditions defined above, the contract regime in Islamic legal system is viewed as taking a permissive stance on the terms of the contractual bargain struck between parties, including the conditions of an employment contract. The renowned Hanbali scholar Ibn Taymiyya, an influential figure in the evolution of religious opinion and fatwas in Saudi Arabia, has stated to this effect:

...all contracts entered into, or conditions attached thereto, are permissible unless specifically prohibited by either the Qur'an or the Sunnah.⁴⁹⁹

As a result, and partly because of the influence of civil law systems on much of the Arab Muslim world, changes to contract terms are frequently upheld under the Islamic doctrine of changed circumstances and other equity-related defences.⁵⁰⁰ According to Shimizu, the ease with which parties may enter and exit contractual arrangements is evidence of Islam's innate capacity for change and innovation. He notes that:

Islam has a basic idea that private ownership should be effectively used and that exchange is a sort of productive activity. ...[T]he easy formation or cancellation of a contract is also a contribution to efficiency, since there is then a natural increase in the number of those people who are willing to enter into contracts if restrictions on them are decreased. The law encourages to enter into a contract by omitting formalities in the formation of a contract, or freeing contractors from the binding-force as they want.⁵⁰¹

While the Islamic model of contract law and justice may seem to take a more flexible position on the formal conditions of contract than its common law equivalents, it would be a mistake to

⁴⁹⁷ A Alkhenain, 'Contracts Involving Uncertainty' (2002) 13 *Ministry of Justice Journal, Saudi Arabia* 170, 170.

⁴⁹⁸ Abdul Jalil and Muhammad Rahman, 'Islamic Law of Contract is Getting Momentum' (2010) 1(2) *International Journal of Business and Social Science* 175, 182-183.

⁴⁹⁹ Hideyuki Shimizu, *Philosophy of the Islamic Law of Contract* (Institute of Middle Eastern Studies, 2012) 14.

⁵⁰⁰ Ibid, 14. However, this applies only to simple contracts. With special contracts, there are often special rules governing termination. See Lyn Welchman, 'A Husband's Authority: Emerging Formulations in Muslim Family Laws' in Mashood A Baderin (ed), *Issues in Islamic Law* (Vol 2, Routledge, 2014) 142-143.

⁵⁰¹ Hideyuki Shimizu, *Philosophy of the Islamic Law of Contract* (Institute of Middle Eastern Studies, 2012) 17.

conclude that this flexibility is instrumental in nature, and such only concerned with market inefficiency and the stability of contracts.⁵⁰² Instead, the Islamic contract regime, extending to employment contracts discussed below, are anchored a broader framework of social and justice. The central moral principle of Islam is arguably expressed in the principle of Tawhid which elaborates a unified view of the equality and oneness of all God's creations.⁵⁰³ The Quran exhorts:

Men, we have created you from a male and a female and divided you into nations and tribes that you might get to know one another. The noblest of you in Allah's sight is *atqakum* (the one who fears Him most), Allah is wise and all-knowing.⁵⁰⁴

To the extent that Islamic philosophy is concerned with the role of the divine in human affairs, it is a tradition that is more firmly embedded in the ethics, than the Western rationalist tradition.⁵⁰⁵ While this claim has been disputed, with some attempting to embed Islamic legal knowledge in the Aristotelian tradition of rational knowledge,⁵⁰⁶ there is at least in principle an argument to be made that ethical considerations tend to be prioritized over competing economic or political considerations in the Islamic worldview. It is this ethical dimension of the Islamic law of obligations that provides the rationale for rules preventing interest taking or speculation. Each is considered unethical because of the moral hazard they pose; by incentivizing individuals to profit from another's losses or to deceive weaker parties for their own personal gain.⁵⁰⁷ For some scholars, therefore, a contract cannot be binding on the weaker party until the "real equilibrium (among the interests of contractors, the wellbeing of the community and the Will of the Divine) is ascertained."⁵⁰⁸ Thus, fairness and mutuality in contractual undertakings are assumed to not only benefit of the party in a weaker bargaining position. This strengthens the social fabric of Muslim societies, but also help to stabilize the

⁵⁰² Nabil Saleh, 'The Role of Intention (Niyya) Under Saudi Arabian Hanbali Law' (2009) 23 *Arab Law Quarterly* 347, 349-350.

⁵⁰³ Isma'il Raji Al Faruqi, *Al-Tawhid: Its Implications for Thought And Life* (IIIT, 1992) 175.

⁵⁰⁴ Qur'an 49:13.

⁵⁰⁵ Kevin Reinhart, 'Islamic Law as Ethics' (1983) 11(2) *Journal of Religious Ethics* 186, 196. See generally, Sebastian Conrad, 'Enlightenment in Global History: A Historiographical Critique' (2014) 117(4) *The American Historical Review* 999, 1027.

⁵⁰⁶ For a critique see Wael Hallaq, 'The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law' (1985-1986) 34 *Cleveland Law Review* 79. On this point Hallaq says: [T]he Islamic lawyer resists logic because he views it as an offshoot of Greek philosophy. For him the unqualified acceptance of logic entails the acceptance of metaphysical conclusions which run against the fundamentals of his belief as Muslim. Ibid, 80.

⁵⁰⁷ Noel James Coulson, *Commercial Law in Gulf States: The Islamic Legal Tradition* (Graham and Trotman, 1984) 44.

⁵⁰⁸ Ibid, 99.

expectations of both parties through the existence of validity conditions that eliminate uncertainty around the nature of the exchange bargain.⁵⁰⁹

For some, the appeal of Islam lies in its repudiation of liberalism's private-public distinction and instead holds out the possibility of a more substantive conception of legal justice.⁵¹⁰ In the Islamic worldview, contracts cannot be directly analogized to private undertakings between individuals. This is because Islamic conceptions of property are founded upon the moral principle that all worldly goods are owned by Allah.⁵¹¹ Due to this, any contract for the exchange of goods or supply of services is based not on the idea of private ownership and acquisition but on the Islamic concept of trusteeship. This principle holds that men do not acquire absolute rights over property under contract, but instead acquire something akin to usufruct rights when acting as trustees over God's creations. Precepts of Sharia also tend to place more emphasis on the intent and motive of the parties.⁵¹² This includes the contracting party's intent to deceive or unfairly enrich themselves will affect the validity of the contract. Thus, individual conscience plays a more significant role in the scope of Islamic notions of contractual justice that is ordinarily the case in common and civil law systems of the West. Shimizu notes:

The attitude of [Muslim] jurists endeavors to understand the total context or the real situation by examining the real intention of the individual. That is to say, it seeks for substance, and is not overly concerned with formalism...⁵¹³

The logical implication of this moral framework is that no bright line exists between a person's religious and social obligations in the Islamic tradition and no dividing line can be established between a person's private actions and their duty to their fellow humans in the public sphere. As will be returned to later in this chapter, the concept of the private contract finds its natural 'public law' counterpart in the Islamic paradigm of human rights. Here, individual rights – and associated notions of self-interest, individual freedom, and self-autonomy- are balanced and

⁵⁰⁹ Abdur Rahim, *The Principle of Muhammadan Jurisprudence* (Hyperion Press, 1981) 283.

⁵¹⁰ Jason Morgan-Foster, 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2014) 8(1) *Yale Human Rights and Development Journal* 67.

⁵¹¹ Saba Habachy, 'Property, Right, and Contract in Muslim Law' (1962) *Columbia Law Review* 450, 450.

⁵¹² Nabil Saleh, 'The Role of Intention (Niyya) Under Saudi Arabian Hanbali Law' (2009) 23 *Arab Law Quarterly* 347.

⁵¹³ Hideyuki Shimizu, *Philosophy of the Islamic Law of Contract* (Institute of Middle Eastern Studies, 2012) 16.

sometimes subjugated to a moral conception of the common good.⁵¹⁴ In this regard, the Sharia shares a common goal with international rights law— the prevention of individual harm and the common welfare for all human beings.⁵¹⁵ As Mashood Baderin argues, ‘[p]rotecting the welfare of individuals does ultimately ensure communal...welfare and vice versa’.⁵¹⁶ In short, to follow a pious life, all Muslims, whether governmental authority or private employer, must enter into and foster relationships that instantiate Quranic principles of collective good, unity and social welfare.

It is generally a matter of consensus that *sisyasa*, the local laws of an Islamic legal system, are amenable to revision over time if rules are no longer judged equitable, or if their abrogation serves the public interest or good (public *maslaha*).⁵¹⁷ At the same time, the validity of local laws must accord with the Qur’an ‘as a guide to human beings [as] Criterion of judgment between right and wrong.’⁵¹⁸ This criterion may not always lend themselves to the articulation of binding legal standards. While the values of truth, solidarity, altruism and so forth are deeply embedded in the Islamic tradition, these values do not easily translate into determinate legal principles that can be defined and enforced in the practical sphere of contract adjudication. These values may fall out of the reach of formal law, marked by the neutral application of general rules and principles.⁵¹⁹ Any attempt to resolve more prosaic questions of contract law in accordance with general principles of *Fiqh* will require courts and arbitrators to make discretionary, and thus subjective, judgments regarding the intent of the parties and morality of their actions.⁵²⁰

Given this, the question posed by the chapter is whether Kafala contracts administered under Saudi sponsorship system can be justified as being in conformity with principles of Islamic contract law, in form as well as substance. Moreover, from a Sharia perspective, do civil authorities have a duty to police against inequitable bargaining relationships in an employment

⁵¹⁴ Vatican Colloquium on Economic, Social and Cultural Rights in Islam (Beyrouth, Dar Al-Kitab Allubnani)

⁵¹⁵ Ibid; Mashood A Baderin, *International Human Rights and Islamic Law* (OUP, 2003) 40.

⁵¹⁶ Ibid.

⁵¹⁷ The possibility of abrogation is deduced from the following verse of the Qur'an: “God Repeals What He Wills, Or Confirms.” Qur'an 13:39.

⁵¹⁸ *Qur'an* 3:4.

⁵¹⁹ Sebghatullah Qazi Zada, Mohd Ziaolhaq Qazi Zada, ‘Codification of Islamic Law in the Muslim World: Trends and Practices’ (2011) 6(12) *Journal of applied Environmental and Biological Sciences* 159, 160-171.

⁵²⁰ For a related discussion on the relationship between law and culture see Hossein Esmaeili, ‘The Nature of Law in the Saudi Arabian Legal System’ (2015) 26(1) *Arizona Journal of International & Comparative Law* 1, 22 <<http://arizonajournal.org/wp-content/uploads/2015/10/Esmaeili.pdf>>.

contract, particularly when the employee does not benefit from the same protections as nationals?⁵²¹ The intersection between these principles come into sharp relief when dealing with the multi-layered nature of Saudi Arabia's sponsorship system. The next section therefore considers the relationship between Islamic principles of contract and labour regulation.

3. The Intersection between Islamic Labour and Contract Law Principles

For some, the Tawhidic principle of solidarity, dignity and unity among men, described in the previous section, is no less applicable to the informal settings of the workplace as it is does to the globalizing worlds of business and commerce.⁵²² In this regard, scholars have noted that:

The Islamic Sunnah [traditions of the Prophet (PBUH)] sanctions that the employer, employee/owner and servant should transact business among themselves with kindness, courtesy, amity and mutual co-operation. Each party should wish for others what he wishes for himself.⁵²³

It has been noted that the Sharia provides ample protection for workers and does so based on Islamic conception of "the rule of law".⁵²⁴ These protections are rooted in the social history of the religion, and role Islam played in fostering commerce among its followers by establishing rules for the trade of services and human capital both within the Muslim world and with the non-Islamic world. The right to work, as well as the employee's rights in the workplace, are viewed as having a firm basis in Islamic tradition. Once again, however, the right to work is regarded not only as an instrument for the maximization of wealth and productivity, but as an ethical imperative, since no person may live without sustenance.⁵²⁵ Quranic revelation urges all humans with the requisite mental or physical capacity to achieve spiritual fulfillment through work. Thus, all employees are encouraged to perform their obligations to the employer dutifully and earn their living through lawful employment for the benefit of all humanity.⁵²⁶ According to the Qur'an:

⁵²¹ Ray Jureidin, Islamic ethics and migrant labor in Qatar (ed), *Labor in an Islamic Setting: Theory and Practice* (Routledge, London, 2017) 84.

⁵²² Azizah Al-Hibri 'Islam, Law And Custom: Redefining Muslim Women 'S Rights' (1997) 12 *American University International Law Review* 1, 19.

⁵²³ Abdullah Mohammed Seidu, 'Islamic Concept Of Employer-Employee Relationships: An Instrument For Managing Human Resources And Certain Operational Risk Exposures' (2006) 3(2) *Legon Journal of Sociology* 45, 51.

⁵²⁴ Javid Sayed, 'An Islamic perspective of industrial relations: the case of Pakistan' (2008) 5(4) *Journal of Management, Spirituality and Religion* 417-440.

⁵²⁵ Ziauddin Ahmad, *Islam, Poverty And Income Distribution* (1991) 17-18.

⁵²⁶ Ibid.

Work (righteousness): soon Allah will observe your work, and His Messenger and the believers....'.⁵²⁷The Prophet Muhammad reaffirmed this message, equating the pursuit of work to a religious obligation and is narrated to have said: Allah loves those believers who labor to earn a living through lawful means.⁵²⁸

At the same time, the Prophet called on both parties to an employment bargain to forge mutually beneficial and harmonious relations, based on equal dignity and respect, stating that '[the] worker, if employed, and takes what is right and gives what is right, is like a mujahid [struggler in the cause of Allah] till he returns home'.⁵²⁹

Several Islamic scholars have in fatwas and other religious opinion, elaborated a number of Sharia derived labour standards.⁵³⁰ In doing so, jurists have utilised and applied Islamic methods of rule interpretation to deduce a few general principles that can be used to evaluate the legality and fairness of employer-employee relations.⁵³¹

One foundational principle of the Islamic model of employment law is that workers should be paid reasonable monetary compensation for their efforts, or an amount that is appropriate to the time-value of the work performed.⁵³² This standard of reasonable income has been construed as being no less than a living wage. In other words, this is the basic minimum that the worker would require for basic necessities such as accommodation, food and family expenses. In this regard, scholars turn again to the Prophet's instruction to the merchants of his age: Suffer no loss to yourselves and make others not suffer.⁵³³

A second principle derived from Islamic *fiqh* obliges employers to pay any income due to employees as soon as work has been completed. Authority for this principle is found in the Prophet's exhortation that employer should: "Give the laborer his wages before his sweat dries."⁵³⁴ Consistent with the Quranic message of the sanctity of all contracts, any breach of

⁵²⁷ *Qur'an* 9: 105.

⁵²⁸ Al-Tabarani, Sulaiman bin Ahmad, Al-Mujam al-Kabeer, *Mosul: Maktabat al-'Ulum wa al-Hikam* (193).

⁵²⁹ Cited in Javid Sayed, 'An Islamic perspective of industrial relations: the case of Pakistan' (2008) 5(4) *Journal of Management, Spirituality and Religion* 417, 421.

⁵³⁰ Adnan Zulfiqar, 'Religious Sanctification Of Labor Law: Islamic Labor Principles And Model Provisions' (2007) 9(2) *University of Pennsylvania Journal Of Labor And Employment Law* 421, 433-434.

⁵³¹ *Ibid.*

⁵³² M. Umer Chapra, *Islam And The Economic Challenge* (International Institute of Islamic Thought, 1992) 253.

⁵³³ Ali ibn Abu Bakr al-Haythami, *Majma' az-Zawaid of Imam al-Haythami* (1334) 56-110.

⁵³⁴ Iqra Islamic Publications, *Rights and Obligations of Workers and Employers* <http://www.iqra.net/Hadith/work_rights.php>. See also Zulfiqar, 'Religious Sanctification Of Labor Law: Islamic Labor Principles And Model Provisions' (2007) 9(2) *University of Pennsylvania Journal Of Labor And Employment Law* 421, 436.

the material terms of an employment agreement is considered a grievous sin.⁵³⁵ The Prophet is alleged to have cautioned:

There are three people whom I shall be their opponent on the day of judgment:... [one of them is] A man who hires a laborer, makes use of his service then does not give him his wages.⁵³⁶

Extrapolating from the Sunnah, jurists have argued that the Sharia protects the right of employee to make a claim against employers for non-payment.⁵³⁷ On this basis, it is arguable that employees, of all categories and nationality, have the right to seek redress and compensation for any unpaid income due to them.⁵³⁸

A third principle is that workers should be treated with dignity and not suffer excessive hardship. The Prophets sayings have been construed to impose a duty on employer to treat their workers humanely and fairly:

You should treat your servants well and should be considerate to them. You should not hurt them; for you should realize that they too have sensitive hearts like you. If hurt, their hearts get sore and grieved, and if you treat them well, their faces glow with pleasure. Why, therefore, should you not be decent and kind to them.⁵³⁹

Zulfiqar notes that while ‘Islam recognizes that social divisions are going to exist in any community, these divisions should not be used to exploit other groups employers should not inflict excessive demands on their workers, in respect of their working hours and workload.⁵⁴⁰ Instead, employers are urged, in the spirit of Sharia to, treat their employees as members of a family, with which they “share the burden” of labour, while benefiting from the fruits of their collective labour (based on Islamic notions of profit and loss sharing).’⁵⁴¹

⁵³⁵ Ibn Rushd, *The Distinguished Jurist's Primer I & II* (Imran Ahsan Khan Nyazee trans., 1994) 265.

⁵³⁶ Imam Bukhari, *Sahih Bukhari Book 34, No. 430* (Vol. 3).

⁵³⁷ Khalil-Ur-Rahman, *The Concept of Labor In Islam* (1995).

⁵³⁸ Majed Alzahrani, ‘The System of Kafala and the Rights of Migrant Workers in GCC Countries- With Specific Reference to Saudi Arabia’ (2014) 16(2) *European Journal of Law Reform* 61, 68.

⁵³⁹ علي بن عبد الملك الهندي [Ali bin Abdul Malik Al-Hindi], كنز العمال [Kanz Al-Ummal] دار الفكر [Dar Al-Fikr] , 1972) 55-54.

⁵⁴⁰ Zulfiqar, ‘Religious Sanctification Of Labor Law: Islamic Labor Principles And Model Provisions’ (2007) 9(2) *University of Pennsylvania Journal Of Labor And Employment Law* 421, 436.

⁵⁴¹ Khalil-Ur-Rahman, *The Concept Of Labor In Islam* (Xlibris, 2010) 76.

A further foundational principle of Islamic models of labour law is that the employment relationship should be based on the precondition of mutual trust, and the worker should not enter into a contract unless he is willing to perform his duties honestly and diligently.⁵⁴² By the same token, any breach by the employer of his contractual commitments is, in accordance with classic fiqh, a form of oppression that violates God's Law. The Quran instructs: "O faithful fulfil your contracts, and be true to your commitments, for you shall have to account for them."⁵⁴³

Read in the above light, it can be persuasively argued that the Quran posits a view of justice based on solidarity among humans in service to their creator. The Quran moreover identifies compassion and kindness to other as a religious obligation and expression of piety, stating that "God loveth those who are kind."⁵⁴⁴ In his study of Islamic conceptions of worker rights, AlFaruqi draws on the principles of egalitarianism inscribed in religious texts to formulate a substantive conception of work-place justice.⁵⁴⁵ In this reading, the Sharia goes beyond the aspirations of Western legal tradition of formal equality. The law is fundamentally concerned with abstract principles such as equal treatment before the law and neutral enforcement of equal rights without judicial bias. This is used to pass judgment on the fairness of, for example, contractual outcomes.⁵⁴⁶ Drawing inspiration from the Tahwidic principle ideals of the unity of all people, under the oneness of their creator, it is argued that Sharia repudiates discrimination of any kind, whether on grounds of nationality and race. Furthermore, authorities are expected to reach decisions through consultation and consensus (shura) of all in society, without distinction based on race, rank or authority.⁵⁴⁷ Yet, this does not yet resolve a more contentious question in Islamic discourse: to what extent are civil authorities obligated to intervene in contracts to restore the equilibrium (of rights and power) between employer and employee, when the terms of contract are tipped in favour of the employer. The next section will attempt to examine from the two perspectives that may be equally justified from an Islamic point of view.

⁵⁴² Ismail Al-Faruqi and Gamal Al-Banna, *Towards Islamic Labour and Unionism* (International Islamic Confederation of Labour, 1985) 12-14.

⁵⁴³ Qur'an 20: 114.

⁵⁴⁴ Quran 5:13.

⁵⁴⁵ Isma'il Raji Al-Faruqi, *Al-Tawhid: Its Implications For Thought And Life* (2nd ed, 1992) 175.

⁵⁴⁶ For a discussion of legal formalism see Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89(8) *Harvard Law Review* 1685, 1691.

⁵⁴⁷ Al-Faruqi and Al-Banna, *Towards Islamic Labour and Unionism* (International Islamic Confederation of Labour, 1985) 68; Nazamul Hoque, 'Industrial Relations –An Islamic Approach' (2011) 8 *IUC Studies* 39, 55.

4. The Politics of Labour Regulation: An Impasse in Fiqh?

This recent analysis links neatly to the wider jurisprudential debates that have emerged between classical and reformist perspectives within the Islamic world.⁵⁴⁸ As noted earlier, the interpretative limits of Islamic teachings solidified, to a certain extent, after the 13th Century. At this time, it was supposed that the leading scholars of the age had settled the most important points of Islamic law.⁵⁴⁹ While the history of Islamic thought may have lost some of its early dynamism, Islamic teachings have always contained tools for reform and revision. Scholars who favour change over continuity champion Sharia's intrinsic capacity for change in the face of social need and injustice. This was achieved by emphasizing the political and economic principles that are latent in Fiqh, such as the prohibition usury (riba) that prevents persons from gaining from the financial exploitation of another.⁵⁵⁰ This provided the requirement that wealth owners pay a charitable tax known as zakat, to be distributed among the poorest in society.⁵⁵¹

From within the debate on continuity versus change, one set of scholars will seek out religious texts that support a conception of Islamic justice that weighs heavily in favor of worker's rights. In this reading of Islamic texts, the Sharia abhors any system of governance based on workplace hierarchies, or the stratification of worker protections based on artificial categories such as occupation or citizenship.⁵⁵² Scholars from this perspective tend to graft a model of redistributive justice on their understanding of Islamic conceptions of contract. This is used to argue in defence of structural forms of social and economic equality in labour relations.⁵⁵³ Here, the Islamic model of contractual justice is not reducible to abstract legal principles, but conceived as a dynamic tool of social reform that can be wielded to address real world problems of economic and social nature.⁵⁵⁴ Others take an opposing position on how flexibility can be accommodated by Islamic norms of contract law.

⁵⁴⁸ Ayoub Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) 21 *Arab Law Quarterly* 197.

⁵⁴⁹ Muhammad Khalid Masud, *Iqbal's Reconstruction of Ijtihad* (Islamic Research Institute, 1995) 7; and Lawrence Rosen, *The Anthropology Of Justice: Law As Culture In Islamic Society* (CUP, 1989) 11.

⁵⁵⁰ M. Umer Chapra, *Islam And The Economic Challenge* (The International Institute of Islamic Thought, 1992) 253.

⁵⁵¹ Ibn Taymiyyah, *Kitāb Al-Imān* (Salman Hassan Al-Ani and Shadia Ahmad Tel trans., 1999).

⁵⁵² Javid Sayed, 'An Islamic perspective of industrial relations: the case of Pakistan' (2008) 5(4) *Journal of Management, Spirituality and Religion* 417, 422.

⁵⁵³ Hamid Hosseini, 'Notions of Private Property in Islamic Economics in Contemporary Iran: A Review of Literature' (1988) 15(9) *International Journal of Social Economics* 51.

⁵⁵⁴ Mohammad Hashim Kamali, 'Istihsān and the Renewal of Islamic Law' (2004) 43(4) *Islamic Studies* 561, 562-563.

Contrary to the claim that the Sharia is doctrinally flexible on contractual enforcement Schacht posits: “Islamic law does not recognise the liberty of contract, but it provides an appreciable measure of freedom within certain fixed types. Liberty of contract would be incompatible with the ethical control of legal transactions.”⁵⁵⁵ It is therefore equally possible to argue that Islam is neutral on redistributive justice, and affords no special rights to the weaker party in bargaining processes, typically the employer.⁵⁵⁶ After all, if Islam privileges the sanctity of contract above all other competing considerations – as an immutable and thence unchanging norm of Sharia - it follows that a contractual bargain will be respected and enforced, providing that certain formal requirements are met, and the substance of the contract does not expressly violate accepted precepts of Sharia.⁵⁵⁷ The Qur'an affirms this perspective, stating: ‘And their business is (conducted) through consultation among themselves’.⁵⁵⁸ This verse appears to vindicate autonomy of private parties to negotiate the terms of their own collective and individual agreements, including the wage-work bargain in employment contracts. Read in this light, there may be far less to distinguish Islamic and Western contract regimes, the latter steeped in the tradition of legal formalism, than would appear on first sight.

It would, of course, be a mistake to conclude that Sharia, and the *fiqh* that derives from it, is indifferent to questions of justice. Sharia sets out moral principles for regulating the form of an employment contract (which must be written) and establishes guidelines on wages and labour conditions proves otherwise. Despite this, religious text can be construed as favouring legal equality over social justice, since both employer and employee outwardly appear to have equal status before the law.⁵⁵⁹ In this conception, the Islamic perspective affords no privileges to workers and both sides of the employment bargain are “equally obligated to fulfill what their employers and society have hired them to do.”⁵⁶⁰ The wider implication is that Islam is more compatible with free market model than some would imagine, and that other welfare related principles found in the Islamic tradition. This is relevant, whether it be zakat to the principle

⁵⁵⁵ Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1965) 144.

⁵⁵⁶ For a pro-welfare perspective see Monzer Kahf, ‘The Islamic State and the Welfare State: Similarities and Differences’ in *Readings In Public Finance In Islam* (1995) 57, 66. For a critical perspective see John Cummings et al, ‘Islam and modern economic change’ In J. Esposito, ed., *Islam and Development: Religion and SocioPolitical Change* (Syracuse University Press, 1980).

⁵⁵⁷ Faisal Al-Fadhel, ‘Respect for Party Autonomy under Current Saudi Arbitration Law’ (2009) 20(2) *Arab Law Quarterly* 31, 31-57.

⁵⁵⁸ Quran 42: 38.

⁵⁵⁹ Javid Sayed, ‘An Islamic perspective of industrial relations: the case of Pakistan’ (2008) 5(4) *Journal of Management, Spirituality and Religion*, 417, 422-423.

⁵⁶⁰ Al-Faruqi, & Al-Banna, *Towards Islamic Labour and Unionism* (International Islamic Confederation of Labour, 1985) 16.

of profit and loss-sharing in financial contracts, can comfortably co-exist with a relatively unregulated sphere of private employee relations.⁵⁶¹ If this reasoning proves valid, then ruling authorities need not intervene in unfair employment contracts or otherwise implement regulatory measures for achieving equal treatment of foreign and domestic workers under the relevant provisions of their labour laws.

What can be learned from these dual perspectives is that Islamic texts can be harnessed in support of diametrically opposed ideologies, both as a resource for legitimising the status quo, and as a tool for subverting or challenging unfair and inequitable practices in the private worlds of business and the workplace.⁵⁶² How this conflict between egalitarianism and legal neutrality is resolved within the Islamic framework will depend on the jurist or ruling authority own biases. This includes the local customs and culture from within which Islamic principles are interpreted and applied. Moreover, this conflict is unlikely to be settled conclusively while precepts of Sharia remain uncodified.⁵⁶³ One problem with this, is that those who advocate for neutrality and therefore support a permissive attitude to employment contract terms may lend legitimacy unfair labour practice under the pretext of doctrinal 'continuity' with classical fiqh.⁵⁶⁴ Even if Sharia demands neutrality on questions of contract regulation and adjudication, ruling authorities are still required to ensure that contrasting forms do not entirely deviate from their original purpose and application. In this regard, some have suggested that there is a spurious connection drawn between the current uses of the Kafala contract and its Islamic origins.⁵⁶⁵ Based on this, the next section will now consider the administration of the Kafala contract form under the local laws of the Saudi Arabia legal system.

⁵⁶¹ Nabil Saleh, 'Freedom of Contract: What Does it Mean in the Context of Arab Laws?' (2001) 16 *Arab Law Quarterly* 346, 346-47; and Javid Sayed, 'An Islamic perspective of industrial relations: the case of Pakistan' (2008) 5(4) *Journal of Management, Spirituality and Religion*, 417, 422-423.

⁵⁶² Nazih Ayubi, *Political Islam, Religion and Politics in the Arab World* (Routledge, 1995) 61.

⁵⁶³ Najmaldeen Zanki, 'Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars' (2014) 9(1) *International Journal of Humanities and Social Science* 134.

⁵⁶⁴ For a broader discussion see Lawrence Rosen, *The Anthropology Of Justice: Law As Culture In Islamic Society* (CUP, 1989) 17.

⁵⁶⁵ Omar AlShehabi, 'Policing Labour in Empire: the modern origins of the Kafala sponsorship system in the Gulf Arab States' (2019) 48(2) *British Journal of Middle East Studies* 291. See also, Elizabeth Franz, 'Exporting Subsistence: Sri Lankan Women's Migration for Domestic Work in Jordan' (London School of Economics, 2011) 97.

E Saudi Arabia's Kafala System: A Break from Islamic Tradition?

Turning now to the temporary foreign migrant worker, the Kafala system administered in Saudi Arabia and in the GCC more generally, operates in two stages.⁵⁶⁶

The first stage of the sponsorship is highly centralized and administered by regulatory authorities under the Saudi Labour Code. This is the public law dimension of the Kafala system, whereby sponsorship laws are set and enforced by ministries that oversee the issuance and approval of work and residency permits – notably without formal oversight by the courts or other review bodies.

The second dimension of the Kafala system is, by way of contrast, highly decentralized because it involves the self-regulation of employment relations by firms at the level of contract law. This effectively means that the management and enforcement of sponsorship is outsourced to the private sphere, rendering “citizens [and not public authorities] directly responsible for the residency violations of non-citizens.”⁵⁶⁷ In turn, this leads to a curious situation where the actual administration of the sponsorship process is placed outside the scope of legitimate review by the courts and other institutions, at the regulatory phase of sponsorship approval. After sponsorship agreements have been formally approved, market actors who employ foreign workers are free to determine their own workplace policies and practice, deracinated from governmental oversight.⁵⁶⁸ This is because statutory protections for workers do not generally extend to foreign temporary migrant workers.

1. The Saudi Labour Code and Requirements of Sharia

⁵⁶⁶ Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries’ (2012) 45(2) *Cornell International Law Journal* 461.

⁵⁶⁷ Noora Lori, ‘Temporary Workers or Permanent Migrants? The Kafala System and Contestations over Residency in the Arab Gulf States’ (2012) *Center for Migrations and Citizenship* 12.

⁵⁶⁸ Human Rights Watch, *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia* (E Report Series, July 2004) 2, 12.

Saudi Arabia's Labour code enshrines the rights of domestic workers.⁵⁶⁹ Relevant provisions of the Labour Code and their application to migrant workers will be addressed in a further chapter. Article 3 of the Labour Code states that:

[w]ork is the right of every citizen. No one else may exercise such right unless the conditions provided for in this Law are fulfilled. All citizens are equal in the right to work.⁵⁷⁰

Article 11 (1) (c) provides that all workers have freedom to choose their own profession and employment. These provisions should be read in light of Article 4 which provides that the employer and the worker shall comply with mandatory norms of Sharia.⁵⁷¹ Articles 151 to 156 of the Labour Code regulates worker protections and entitlements, holidays and paid leave.⁵⁷² These provisions however, do not apply to foreign migrant workers.⁵⁷³ Although, the Labour Code does set out statutory conditions governing the employment relationship between foreign workers and Saudi employers.⁵⁷⁴ This includes rules concerning formal conditions of contracts for hire of foreign workers employed under the Kafala system. Pursuant to Saudi Arabia's Labour Code, a sponsorship contract must specify the name of the employee, the duration and nature of employment, and the terms of salary.⁵⁷⁵ These provisions of the Labour Code are, accordingly, consistent with Sharia, and with the Sharia supremacy clause enshrined in Article 4 of the Code. The justification for this requirement is against traced to Quranic text, where it is stated that:

When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing... whether it be small or big; it is juster in the sight of God, more suitable as evidence, and more convenient to prevent doubts among yourselves.⁵⁷⁶

While the Labour Code may meet certain formal necessities, the matter of whether the Kafala system is, in its entirety, consistent with Islamic custom remains far more contestable. The Saudi sponsorship model inverts Islamic tradition by concentrating power in the hands of the

⁵⁶⁹ Labor Law (approved by *Royal Decree No. M/21 1969* (Saudi Arabia).

⁵⁷⁰ Saudi Arabia Ministry of Labor, *The Labor Code Article 3*, <http://www.saudiarabien.diplo.de/contentblob/2761466/Daten/850057/Arbeitsrecht_SDA.pdf>.

⁵⁷¹ *Ibid.* *Labour Law* (Saudi Arabia) Art. 4.

⁵⁷² *Ibid.*, Part IX.

⁵⁷³ *Ibid.*, art 7.

⁵⁷⁴ *Ibid.*, Part III.

⁵⁷⁵ *Ibid.*, art 33; *Amended Law* (Saudi Arabia) art 60.

⁵⁷⁶ Quran 2: 282.

sponsor/*Kafil*, including by enabling them to profit from the sponsorship arrangement.⁵⁷⁷ This is in contradiction with the classic form of *Kafala*, which is a contract based on trust and charity. In the classic form of *Kafala*, the *Kafil* is effectively the weaker party. This is because the *Kafil* does not directly benefit from the transaction even though he assumed liabilities as a guarantor. Turning to the Saudi legal system, historically the sponsor (the would-be *Kafil*) could freely restrict the liberties of the sponsored worker.⁵⁷⁸ Foreign temporary migrant workers required the prior consent of an employer before they could leave their job or obtain an exit visa. These restrictions, along with others, were widely criticized as a breach of the free movement of workers.⁵⁷⁹ In the past year, the Saudi government has introduced reforms that abrogate the requirement of prior consent for certain workers.⁵⁸⁰ The limitation of these reforms is that these exclude many categories of worker, specifically the most vulnerable and low paid workers (such as domestic workers and labourers). There have also been attempts to introduce stricter standards on unfair labour practices, discrimination, and wage exploitation, but such proposals have yet to be formally enacted and therefore fall short of binding requirements on employers.⁵⁸¹ The recent reforms will be discussed in a further chapter. Instead, the remaining sections of the chapter will assess whether the historic and current administration of Saudi Arabia's *Kafala* system adhere to basic principles of Sharia. This entails an analysis of the duties owed by the state to foreign workers under the Sharia governed framework of the Saudi legal system, as well as those obligations owed by the sponsor-cum employer to their employees.

2. Assessing the Gaps in the Kafala System from a Sharia Perspective

In this section, it is necessary to begin by exploring the obligations of the Saudi government to take steps to ensure that foreign migrant workers can obtain any rights due to them, and to eliminate any unfair, discriminatory, or inhumane labour practices. From the outset, it is

⁵⁷⁷ Ray Jureidini and Said Fares Hassan, 'The Islamic Principle of *Kafala* as Applied to Migrant Workers: Traditional Continuity and Reform' in *Migration and Islamic Ethics* (Brill, 2019) 95-99.

⁵⁷⁸ Ibid, see also Nicholas Foster, 'The Islamic Law of Guarantees' (2001) 16(2) *Arab Law Quarterly* 133, 141-142.

⁵⁷⁹ ILO Policy, *Note Reform of The Kafala (Sponsorship)* (System Policy Brief No. 10, July 2019); M Zahra, *Gulf labour markets and migration* (Explanatory Note No. 4, 2013), Gulf Labour Markets and Migration (GLMM) Programme of the Migration Policy Center and Gulf Research Center: Geneva.

⁵⁸⁰ Rebekah Smith, *Saudi Arabia Could Rewrite Its Record on Labor Mobility by Ending Kafala Centre for Global Development* (March, 2020) <<https://www.cgdev.org/end-of-kafala-labor-mobility>>.

⁵⁸¹ Ibid.

arguable that the very act of “outsourcing” legal responsibility for migrant workers to civil society is anathema to Islamic teachings. A few scholars argue that the Sharia abiding state must intervene in the workplace if an employer is engaged in unjust labour practices, or if the worker lacks the physical or financial capacity to defend themselves against threats.⁵⁸² From this view, it is for the state to assess the needs and capacity of the worker by safeguarding their rights and exercising their civic authority to implement and enforce laws that protect such rights. It has also been established that Saudi Arabia is a signatory to ILO treaties,⁵⁸³ but is not a signatory to ICCPR or ICSECR.⁵⁸⁴ Article 9 of the ICCPR obliges Contracting States to eliminate any laws or measures that illegitimately deprive individuals of their freedoms, though exceptions may be made for any deprivations of liberty justified on public interest grounds, including immigration control.⁵⁸⁵ To what extent, then, can principles and precepts of Sharia be relied upon as tool of reform, thus filling legislative gaps in Saudi law, or *sisyasa*?⁵⁸⁶

While the relationship between Islamic rights conceptions and current international human rights discourses on the protection of migrant workers will be explored in a later chapter, it should nonetheless be reiterated that each of these paradigms emerged from distinct traditions.⁵⁸⁷ As Baderin notes, the Sharia is founded on the notion of universal divine law and no separation exists, as it does in the Western liberal positivist tradition, between law and morality, or between the individual, society and state.⁵⁸⁸ This is not to suggest, however, that the two traditions are incompatible, and on questions of migrant rights there may be more that unites these two frameworks than is generally understood. There is another component to the Islamic legal tradition that has already been alluded to above. As noted, the interpretation of Sharia, or *Fiqh*, is by its nature pluralistic, because of the open-textured nature of the primary

⁵⁸² International Center for Law and Religion Studies, *The Cairo Declaration on Human Rights in Islam* <<http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm>>. See also Abu Ya'la al-Qadi Ibn al-Farra, *Al-ahkam al-sultaniyya* (Mustafa alBabi al-Halabi, 1966); and Ahmed Zaki Yamani, ‘Social Justice in Islam’ (2002) 41(1) *Islamic Studies* <<http://www.jstor.org/stable/20837162>>.

⁵⁸³ It is a signatory to *Equal Remuneration Convention (No 100)* 1951 and the *Discrimination (Employment and Occupation) Convention (No 111)* 1958.

⁵⁸⁴ Azhari, ‘The Kafala Sponsorship System in Saudi Arabia: A Critical Analysis from the Perspective of International Human Rights and Islamic Law’ (2016-2017) 10 *The SOAS Journal of Postgraduate Research* 61, 74-75.

⁵⁸⁵ Baderin, ‘The Role of Islam in Human Rights and Development’ in Javaid Rehman and Susan Carolyn Breau (eds) *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff, 2007) 352.

⁵⁸⁶ For a related discussion See also Asifa Quraishi-Landes, ‘The Shari’ah Problem with Shari’ah Legislation’ (2014) 41 *Ohio North University Law Review* 545.

⁵⁸⁷ Ann Mayer, ‘Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?’ (1994) 15 *Michigan Journal of International Law* 307.

⁵⁸⁸ Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003) 40-42.

sources of Sharia and because of enduring debate around the weight and authority carried by different methods of rule-deduction and interpretation.⁵⁸⁹ For this reason, scholars have long resisted codification of Sharia, since all schools, and the jurists affiliated with each, are in some sense vying for interpretative authority. Moreover, the notion that precepts of Sharia must always be treated as fixed and changing is itself antithetical to the dynamic nature of Islamic jurisprudence. The question of where to draw the line between doctrinal continuity and reform has always contested. It should not be argued that, despite the divergent nature on the legal traditions on which they are founded, Sharia cannot also provide equivalent migrant worker protections to those guaranteed by positive law instruments in the sphere of international human rights law.

3. The Sharia Perspective on the Right to Free Movement

The discussion on Islamic conceptions of contract, including employment, has attempted to show that the Islamic conception of the employee and employer relation is based on reciprocity and mutual trust. The Kafala migration apparatus in Saudi Arabia appears to fall short of this ideal, attracting accusations that the private employers have in various ways exploited the sponsorship system.⁵⁹⁰ One right denied to foreign migrant workers under the historic administration of the Kafala system is the right of free movement. Since the *Kafil* holds the balance of power, previously all workers, and now only workers not exempted by the new reforms, face disproportionate restrictions on their freedoms. They cannot change jobs without the sponsor consent and may be forced to remain in inequitable employment contracts faced with threats of deportation, or the confiscation of their passports.⁵⁹¹ This abuse of power has led the most strident critics of the Kafala system to compare it with a form of modern-day

⁵⁸⁹ Reza Aslan, *No God But God: The Origins, Evolution, And Future Of Islam* (Random House, 2011) 70.

⁵⁹⁰ Barbara Degorge, 'Modern Day Slavery in the United Arab Emirates' (2006) 11 *The European Legacy* 657; Sevil Sönmez et al, 'Human Rights and Health Disparities for Migrant Workers in the UAE' (2013) 13 *Health and Human Rights Journal* 17; Virginia Mantouvalou, 'Temporary Labour Migration and Modern Slavery' in Joanna Howe and Rosemary J Owens (eds), *Temporary Labour Migration in the Global Era* (Bloomsbury, 2016).

⁵⁹¹ Barbara Degorge, 'Modern Day Slavery in the United Arab Emirates' (2006) 11 *The European Legacy* 657; Anic Pande, 'The Paper that You Have in Your Hand is My Freedom: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon' (2013) 47(2) *International Migration Review* 414-441.

slavery in violation of Article 8 of the ICCPR customary norm on the prohibition of slavery and/or forced labour.

The Islamic concept of labour must be viewed in its rightful historical context. Islam's emergence in the 7th Century coincided with the explosion of mercantilism.⁵⁹² In this regard, slavery was widely practiced in pre-Islamic Arabia. With the advent of Islam, the Quran now endowed slaves with newly acquired rights, including the right to be treated with decency.⁵⁹³ The Quran states: “[F]ree those captives . . . who wish to buy their freedom”⁵⁹⁴ Many verses of the Quran have been interpreted as calling for the gradual abolition of slavery, and this is instantiated by reports that the Prophet himself freed many slaves.⁵⁹⁵ Moreover, while the Sharia does not explicitly proscribe slavery, Islamic principles of justice explicitly condemn cruelty and mistreatment of others, based on the principle of the equality and equal dignity of all humans.⁵⁹⁶ As noted in previous sections, the Quran exhorts employers to pay incomes that are equivalent to value of the work performed.⁵⁹⁷ It is also arguable that Sharia not only recognizes, but guarantees the liberties of all, regardless of race, creed or nationality.⁵⁹⁸ Ruling authorities that derive their authority from Sharia, including the Saudi ruling regime, are arguably duty-bound to protect the security and liberty for all people, except with valid justification.⁵⁹⁹ On this point, it is difficult to see any credible public policy justification for denying the most vulnerable workers. This includes those excluded under the new reforms, of equivalent protections to those granted to Saudi nationals and, now, professional classes of foreign migrant workers.⁶⁰⁰ Verses of the Quran can be construed as commanding ruling authorities to use their powers to restrict movement justly and proportionately:

⁵⁹² Jairus Banaj, ‘Islam, the Mediterranean and the Rise of Capitalism’ (2007) 15 *Historical Materialism* 47, 47-74.

⁵⁹³ Ibn Rushd, *The Distinguished Jurist's Primer* (Imran Ahsan Khan Nyazee, 1994) 264-307.

⁵⁹⁴ Qur’ān 24:33.

⁵⁹⁵ Shehzad Saleem, *The Condemnation of Slavery in Islam* (RENAISSANCE, Mar 1995) <<http://www.renaissance.com.pk/mared95.html>>.

⁵⁹⁶ Zulfiqar, ‘Religious Sanctification Of Labor Law: Islamic Labor Principles And Model Provisions’ (2007) 9(2) *University of Pennsylvania Journal Of Labor And Employment Law* 431.

⁵⁹⁷ Nazamul Hoque, ‘Industrial Relations –An Islamic Approach’ (2011) 8 *IUC Studies* 39.

⁵⁹⁸ Bassam Tibi, ‘Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations’ (1994) 16 *Human Rights Quarterly* 277.

⁵⁹⁹ Azhari, ‘The Kafala Sponsorship System in Saudi Arabia: A Critical Analysis from the Perspective of International Human Rights and Islamic Law’ (2016-2017) 10 *The SOAS Journal of Postgraduate Research* 61, 70.

⁶⁰⁰ For a theological perspective see Ahmad Ibn Naqib Al-Misri, *Reliance Of The Traveler* (Nuh Ha Mim Keller trans., 1994) 638.

It is He (God) Who Has made the earth tractable for you (mankind), so traverse through its tracts and enjoy of the sustenance which He (God) furnishes; but unto Him is the Resurrection.⁶⁰¹

Any threats to migrant workers, including the threat that migrant workers will be sent home, or deprived of their passports would, arguably, constitute a transgression of the above Quranic verse. Even the international human rights permit aims to enact public policy exceptions to general rights, such as the right of free movement. There may be good public order reasons for why Saudi Arabia would seek to impose limits on labour migration, and on the rights and liberties of migrant workers.⁶⁰² However, these limits should be proportionate and, moreover, consistent with Sharia, as the constitutional foundation of the Saudi legal system. Thus, as one scholar argues, 'while is a state's duty and concern to regulate its political territory, it is also a state's responsibility to protect the migrant workers' rights once they reside in the country lawfully.'⁶⁰³

4. An Islamic Defence of the Migrant Workers Rights in Work

Turning now to rights in work, several scholars have argued that Sharia provides robust protections to workers. This includes the right to fair wage, access to justice when denied wages, decent working conditions, and equal treatment.⁶⁰⁴ Some have even claimed that, in contrast with the Western preoccupation with civil and political rights, 'third generation solidarity rights [including rights in work] are more developed in Islamic law than in

⁶⁰¹ Quran 15: 67.

⁶⁰² Ismail Poonawala, 'Muhammad 'Izzat Darwaza's Principles Of Modern Exegesis: A Contribution Toward *Qur'anic Hermeneutics*' In G R Hawting and Abdul-Kader Shareef (eds), *Approaches To The Qur'an* (Routledge, 1993) 225, 230.

⁶⁰³ Azhari, 'The Kafala Sponsorship System in Saudi Arabia: A Critical Analysis from the Perspective of International Human Rights and Islamic Law' (2016-2017) 10 *The SOAS Journal of Postgraduate Research* 61, 70.

⁶⁰⁴ E.g. Latife Reda, 'Principles of the Basic Entitlement Package for Migrant Workers in Arab Countries' (2016) 30(3) *Arab Law Quarterly* 199; Asma Azhari, 'The Kafala Sponsorship System in Saudi Arabia: A Critical Analysis from the Perspective of International Human Rights and Islamic Law' (2016-2017) 10 *The SOAS Journal of Postgraduate Research* 61; Monzer Kahf, *The Islamic State and the Welfare State: Similarities and Differences* (Readings In Public Finance In Islam, 1995) 57.

international law'.⁶⁰⁵ More generally, it is arguable that all workers, regardless of nationality, are entitled to a decent life. The Quran states in this regard:

Let them adore the Lord of his house Who provides them with food against hunger, and with security against fear (of danger).⁶⁰⁶

On face value, this may be taken to impose duty on state authorities to ensure that employers meet minimal labour standards on fair wages, working hours, safe and decent working conditions and a right of redress for contractual breaches.⁶⁰⁷ However, on the more pragmatic issue of rights enforcement, it may be difficult to extract binding rights and standards from Quranic verse of a general nature such as the one above. Even a right to a decent life could be established; this could be formulated broadly or narrowly. Would such a right automatically privilege the weaker party in so called submissive contracts and thus impose a duty on regulatory authorities to enforce a minimum wage or regulations on fair working conditions for all temporary migrant workers, (including maximum working hours and holiday pay)?⁶⁰⁸ In the absence of determinate criteria derived from fiqh, it falls to rulers and other juristic authorities to decide what types of rights and entitlements are warranted by Sharia, based on a plain reading of religious texts.

In this regard, there have been important positive law attempts to codify rights from within from an Islamic framework. One example is the Cairo Declaration on Human Rights in Islam (CDHRI) – a non-binding instrument adopted by the Organisation of Islamic Cooperation (OIC) and presented to the United Nations in 1993.⁶⁰⁹ The CDHRI was rejected by the UN, largely because of provisions relating to freedom of thought and conscience. Nonetheless, the instrument remains an important landmark in the effort to articulate human rights from within a Sharia-compliant paradigm. A number of countries with Muslim majority populations or

⁶⁰⁵ Jason Morgan-Foster, 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2014) 8(1) *Yale Human Rights and Development Journal* 67, 73.

⁶⁰⁶ Quran 106: 4.

⁶⁰⁷ See Alil-Ur-Rahman, *The Concept Of Labor In Islam* (1995); Hakim Mohammed Said ed., *The Employer And The Employee—Islamic Concept* (1972) 14, 76; Adnan Zulfiqar, 'Religious Sanctification Of Labor Law: Islamic Labor Principles And Model Provisions' (2007) 9(2) *University of Pennsylvania Journal Of Labor And Employment Law* 421, 441-443.

⁶⁰⁸ See the Model of *Islamic Labour Law* proposed by Zulfiqar; ; Adnan Zulfiqar, 'Religious Sanctification Of Labor Law: Islamic Labor Principles And Model Provisions' (2007) 9(2) *University of Pennsylvania Journal Of Labor And Employment Law* 421, 441-443.

⁶⁰⁹ *The Organisation of Islamic Cooperation* (OIC)

constitutionally enshrined systems of Sharia are signatory to it, thereby helping to bridge the gap between the local interpretations of Sharia and divergences across the Islamic schools of thoughts.⁶¹⁰ The CDHRI enumerates rights that are broadly in alignment with the Universal Declaration on Human Rights. This is achieved by affirming the human dignity of all people, prohibiting discrimination on the basis of gender, religion, race, age, political affiliation or social status,⁶¹¹ and the right of equality before the law and right to a fair trial.⁶¹² With regard to second generation rights, the Convention enshrines the right to work, social security, an adequate standard of living and the right equal pay for equal work without discrimination.⁶¹³ Article 13 of the CDHRI state as follows:

Work is a right guaranteed by the State and Society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled - without any discrimination between males and females - to fair wages for his work without delay, as well as to the holidays, allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

The difficulty faced by those who seek reform of Saudi Arabia's migration system and associated labour policies, is that the Kingdom was one of the few Arab nations that did not sign up to the Cairo Convention. This highlights the challenge of achieving consensus around the scope and application of human rights. Saudi Arabia has opted out of a regional framework that was specifically designed to alleviate the concerns of Arab Muslim nations who have not acceded to international human rights instruments on purportedly religious and cultural grounds.⁶¹⁴ It can be assumed that the Kingdom's decision not to give its support to the Declaration was driven not by concerns around Sharia compliance, but by political considerations concerning its sovereignty and state security. The consequence is that market institutions operate in the long shadow of state regulation, even with the existence of the labour

⁶¹⁰ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (WP, 2012).

⁶¹¹ *Cairo Declaration on Human Rights in Islam*, (5 August 1990) art 1(a).

⁶¹² *Ibid*, art 19.

⁶¹³ *Ibid*, art 13.

⁶¹⁴ For a parallel analysis see Ann Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, 1995) 176, 177; Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia* (Harvard University Press, 2008).

code. Despite recent attempts to develop non-binding recommendations on guidelines on fair wages or safe working conditions (which will be discussed in a further chapter), market institutions float free of robust enforced compliance and monitoring mechanism. In the absence of employment tribunals, or a mechanism for challenge a decision involving a migrant worker's residency status, temporary workers have little opportunity to challenge unfair labour conditions, or to dispute a unilateral termination of a sponsorship, resulting in deportation.⁶¹⁵ One way that the rights of foreign migrant workers might be strengthened is by ensuring that those who are denied equivalent legal protections to other categories of workers are given 'voice' through trade unions and other political representatives.

5. An Islamic Defence of the Right to Freedom of Association

Islam does not have a strong tradition of recognising the right of freedom of association. This is evidenced by the fact that no reference to this right was included in the final draft of the Cairo Declaration. In an attempt to re-interpret Islamic rules to support the right of collective bargaining, scholars have interpreted religious text liberally and expansively to hold that the state has a responsibility to provide workers with a right to self-organize and form collective bargaining groups in order to equalise their power against larger employers.⁶¹⁶ Al-Banna elaborated a general right in its favour by relying on general principles derived from the Sunnah, including of narration of the Prophet's tidings: "One who mistreats those under him will not enter paradise."⁶¹⁷ The right to bring an action an abusive employer may be framed more broadly to include the ability of a worker to bring a complaint against the state itself, should public authorities fail to provide individuals with access to justice or due process guarantees. Justification for legal remedies where the state fails to protect worker rights has been traced, inter alia, to the Quranic instruction that: [if complainants] "do help and defend themselves after a wrong (done) to them, against such there is no cause of blame."⁶¹⁸ Once again, it is uncertain as to whether a legally precise and enforceable right or rights could be

⁶¹⁵ Attiya Ahmad, 'Migrant Domestic Workers in Kuwait: The Role of State Institutions' in *The Middle East Institute, Viewpoints: Migration and The Gulf* (MEI, 2010) 28-29.

⁶¹⁶ Jahwid Sayed, 'A Context-Specific Perspective of Equal Employment Opportunity In Islamic Societies' 2008 25(1) *Asia Pacific Journal of Management* 135.

⁶¹⁷ Gamal Al-Banna, *Islam and the Trade Union Movement* (Cairo, 1980) 81.

⁶¹⁸ Quran 42: 41.

derived or elaborated from Quranic verses and Prophetic traditions of a more general and hortatory nature.

The above interpretative conflicts implicate divergent opinions on the role of the state in protecting the political rights of workers. In support of the right of all workers to enter into collective bargaining processes, Al-Faruqi and Al-Banna argued: “All the world knows that workers are still exploited, that the conditions of work are inhumane, that trade unions were established to prevent these gross outrages and enable workers to live a decent life.”⁶¹⁹ Other jurists, who favour contractual ‘neutrality’ over special rights for workers, have broadly rejected attempts to align Islamic justice models with ‘man-made’ (Marxist) theories as an illegitimate innovation from classical fiqh, and its separation from secular models.⁶²⁰ Nonetheless, there may be a pragmatic argument to be made in support of a general to freedom of association. The articulation of this right could, arguably, strike the hallowed middle ground between the Sharia's dual impulses: social justice and legal (contractual) neutrality.⁶²¹ One proposal would be provide migrant workers with a formal bring complaints before appointed third party guardian who more effectively represent their claims and concerns.⁶²² Noting that employers cannot be neutral when in a dispute with their employees, jurists have advocated that State authorities have a responsibility to establish special tribunals or a *muhtasib* (similar to a trustee or ombudsman) with powers to investigate and sanction employers who exploit or discriminate against their employees.⁶²³ Under this model, all employees would have the right to lodge a complaint before a third-party representative. Furthermore, all employees would finally have a tribunal, to be used when denied freedoms to freely choose their work or forced to work in a dangerous or intimidating work environment. By the same token, the existence of such a mechanism would also protect the interests of an employer. For instance, by releasing them of any contractual obligation to pay unearned wages or retain an employee that does not perform their duties satisfactorily.

⁶¹⁹ Ismail Al-Faruqi and Gamal Al-Banna, *Towards Islamic Labour and Unionism* (The international Islamic Confederation of Labour, 1985) 67.

⁶²⁰ Javid Sayed, ‘An Islamic perspective of industrial relations: the case of Pakistan’ (2008) 5(4) *Journal of Management, Spirituality and Religion* 417, 422-423. For a more general discussion on the resistance to secularization, see Abdullahi Ahmed An-Na'im, ‘Globalization and Jurisprudence: An Islamic Law Perspective’ (2005) 54 *Emory Law Journal* 25, 48-49; and Peter Samuelson, ‘Pluralism Betrayed: The Battle between Secularism and Islam in Algeria's Quest for Democracy’ (1995) 20 *Yale Journal of International Law* 309.

⁶²¹ Javid Sayed, ‘An Islamic perspective of industrial relations: the case of Pakistan (2008) 5(4) *Journal of Management, Spirituality and Religion* 417, 422-423.

⁶²² Al-Banna, *Islam and the Trade Union Movement* (Cairo, 1980) 77-78.

⁶²³ Imam Abu Ya'la, *Alahkam al-sultaniyya (The Rules of Government)* (1966).

While the Islamic perspective on the legitimate place of ruling authorities to intervene in private contracts may be less than clear cut, except where labour practices clearly violate Saudi law and precepts of Sharia, the creation of political rights for migrant workers may go a long way towards redressing asymmetries in bargaining power. In the final analysis, the wider issue at stake is whether, and the extent to which, Saudi authorities have a religious-cum-constitutional obligation to police unfair contract terms.⁶²⁴

6. An Islamic Perspective on Discrimination as Unequal Employment Bargains

The debate around which labour rights can be extrapolated from Islamic text highlights the challenges of reaching a consensus around the correct interpretation and application of Sharia in the localized settings of national legal systems. As noted, there are two possible Islamic jurisprudential perspectives on labour rights. The first prioritizes the Islamic preference for party autonomy, expressed in the principle of freedom to contract, and the other seeking to establish far-reaching worker protections through a liberal re-reading of Islamic justice principles. With regard to the second, the Hanbali school has generally advocated continuity with Islamic traditions, Given the influence of Ibn Taymiyya on Saudi law, parties are generally afforded freedom and autonomy to enter into business contracts of their choosing, and enforce these agreement in Saudi Arabia, providing that that the terms of the agreement are not “contrary to the legal nature and purpose of the contract.”⁶²⁵ To what extent then finally, does the very form of the Kafala system remain consistent with the original purpose of the contract form? At the same time, it is possible to argue that the 'neutrality' position simply legitimizes a political decision to restrict rights for low-income migrants.

⁶²⁴ For a general discussion on how Islamic states have approaches Sharia supremacy clauses see Herbert J Liebesny, ‘Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions’ (1972) 20(1) *The American Journal of Comparative Law* 38, 46-52; Dawood Ahmed & Tom Ginsbury, ‘Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions’ (2013) 54 *Virginia Journal of International Law* 615.

⁶²⁵ Ibid. *Hanbali fiqh* posits that for a contract to be valid it must only include clauses that are necessary to fulfil the object of the contract and that it does not contain haram conditions such as payment of interest. Hanafi scholars by contrast distinguish between valid, invalid (*fasid*) and void (*batil*) contracts. Thus, an invalid contract is any contract considered prejudicial to one party or which enables one party to gain an advantage without fair consideration. Bada' i'al Sana'i', vol. 2, 54-55, al Hidayah and its commentary Fath al Qadir, vol. 2, 10. Scholars such as Alqudah, suggest that the Hanafi categorization has a weak basis in *Shari'ah* or in Islamic custom. See Mutasim Ahmad Alqudah, ‘The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council’ (2017) 1 *Journal of Legal, Ethical and Regulatory Issues* 1, 12.

The recent rulings of Saudi religious authorities point to a possible tension between political institutions and the guardians of Islamic jurisprudence. Jurists have assessed the relationship between the classical Islamic contract form and the evolution of *kafala* in the context of labour contracts formed under the Saudi sponsorship system.⁶²⁶ Once again, it is important to note that a Kafala contract formed between sponsor/employer and foreign employee is structurally similar to the Islamic private employee contract or *ajir khas*.⁶²⁷ However, the application of these contracts illustrates a ever widening gulf behind the original purposes of the Kafala contract. This is based on principle of trust, cojoined responsibility and altruism, along with the experiences of exploitation employees of the Kafala system have faced on a daily basis.

In every legal incarnation of the Kafala concept in Islamic custom, whether in the realm of public trusteeship, family law or business contracts, the *Kafil* is not expected to obtain a direct financial gain from the transaction. In contemporary practices in the Gulf, reports indicate that recruitment agencies and other employers have exploited the Kafala system by selling visas to foreign workers in a practice known as “visa trading”.⁶²⁸ Recruitment agencies, and even employers, will create false job posts in order to obtain governmental approval for sponsorship. In exchange, the foreign worker will be asked to pay a fee, often without guarantees that they will be gainfully employed upon their entry into the country. In other cases, the foreign employee may be indebted even before they enter the country, by virtue of an agreement with the employer or sponsor requiring them to pay part of their salaries to the relevant third party in perpetuity.⁶²⁹ These practices are not permitted under the Saudi and other Kafala sponsorship systems, and any parties found guilty of exploiting workers, or of providing false or deceptive information to governmental authorities may be prosecuted, fined or shut down.⁶³⁰ Regardless, these practices are still reportedly widespread.⁶³¹

Interestingly, the highest religious authority in Saudi Arabia, the Saudi General Council on *Iftā*’ and Research issued a ruling on the legality of agency contracts of the above nature, and their dissimilarities to traditional Kafala contract forms. In relation to visa trading, the

⁶²⁶ Ray Jureidini and Said Fares Hassan, ‘The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform’ in *Migration and Islamic Ethics* (Brill, 2019).

⁶²⁷ al-Nahhām, Ṣāliḥ. *Anwā’ al-ijāra* (Majallat al-Wa’i al-Islāmi, 2011) 550.

⁶²⁸ Gulf Times, *Three arrested for running fake companies, visa trade* (20 March 2018).

⁶²⁹ Ray Jureidini and Said Fares Hassan, ‘The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform’ in *Migration and Islamic Ethics* (Brill, 2019) 91, 101.

⁶³⁰ Mary Sophia, *Saudi Arabia Clamps Down On Visa Trading* (Gulf Business, 18 February 2015).

⁶³¹ Mohammed Dito, ‘Kafala: Foundations of Migrant Exclusion in GCC Labour Markets’ In *Transit States: Labour Migration and Citizenship in the Gulf* (Pluto Press, 2014).

Council opined that a contractual clause requiring migrant workers to pay recruitment or sponsorship fees was contrary to the public policy, which is to protect the public interest and security of Saudi citizens.⁶³² More importantly, the Council affirmed that fee clauses breached the conditions of a Kafala contract, because the Kafil cannot unlawfully profit from the worker. The Council reasoned that the sponsorship arrangement could not be analogized to an ordinary private employment contract, since no mutual exchange of services for consideration was involved. Instead, the function of the agent or sponsor, when not directly employing the worker, was to facilitate the process of obtaining a governmental permit, after which the migrant worker would go on to work for another employer.⁶³³ The Council restated that that any agreement, that does not involve a direct contractual relationship between an employer and employee, can only be lawful if it takes the form of a charitable undertaking. (in other words, a *tabarrau* contract). Moreover, contracts of this nature were also found to contravene fundamentals of Islamic contract law, because they contained elements of *riba* (interest taking) and *gharar* (contractual uncertainty).

The Council also noted, more generally, that informal contracts may be haram (unlawful) *prima facie* because they lacked precision regarding material conditions, such as the salary amount, any additional costs borne by the worker. In another ruling, the Fatwa Committee also affirmed that an employer who is no longer able to employ the worker should not earn money for extending a sponsorship visa. This is even if the employer's motive is based on compassion for his workers, who may be forced to return to home upon termination of the employment contract. As a result, no transaction involving payment to the Kafil will be recognized as legitimate adaptation of the classical form of Kafala and any money earned treated as equivalent to a form of interest taking. The only exception to the rule prohibiting profiteering is the reimbursement of any legitimate costs incurred by the sponsor while arranging travel, visa fees or accommodation.⁶³⁴ However, any claims to recover fees and costs of arranging a visa are not available to sponsors under Saudi law. This may create perverse incentives for employers to seek illegitimate means of recovering their costs.⁶³⁵

⁶³² Ray Jureidini and Said Fares Hassan, 'The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform' in *Migration and Islamic Ethics* (Brill, 2019) 92, 101.

⁶³³ Ibid Islam Web, *fatwa no. 101777* <fatwa.islamweb.net>.

⁶³⁴ Ibid

⁶³⁵ *Labour Law* (Saudi Arabia) art 40.

F The Origins of Kafala System in Saudi Arabia: Law or Culture

The rulings of Islamic authorities in Saudi Arabia exacerbate claims that many aspects of the Saudi Arabia's sponsorship model bears very little resemblance to the Islamic conception of Kafala, in form and in substance.⁶³⁶ Going further, some have argued that the modern Kafala system has endured, despite international condemnation, in part because of the 'vener of legitimacy' it gains from its linguistic association with Islamic concepts.⁶³⁷ Yet, if Saudi Arabia's legal system draws its authority and legitimacy from the higher norms of Sharia, the *Quran and Sunnah*, the abuse of Kafala contracts must in some broader sense be 'unconstitutional'.⁶³⁸ On the other hand, Islamic laws and the jurisprudence that underpins, has evolved over centuries. Jurists have long accepted that rulers may have some discretion to adapt Islamic legal doctrines, and this would reasonably extend to legitimate migration controls.⁶³⁹

More generally, the model of governance that has come to embody political decision making in Saudi Arabia has always involved a trade-off between freedoms and social entitlements.⁶⁴⁰ Saudi citizens are not guaranteed various political rights, including the right to join a trade union. Citizens are compensated for this absence by stronger social entitlements that are also more firmly rooted in the Islamic emphasis on second generation rights.⁶⁴¹ While such rights may constitute a legitimate trade-off for Saudi nationals, foreign migrants are denied these benefits without any of the civil and political rights that would allow them to mobilise in collective structures or seek legal remedies for abuses of power. It has been noted that in Gulf countries:

⁶³⁶ Herbert Liebesny, 'Comparative Legal History: Its Role In The Analysis Of Islamic And Modern Near Eastern Legal Institutions' (1972) 20(1) *The American Journal Of Comparative Law* 38, 46.

⁶³⁷ Ray Jureidini and Said Fares Hassan, 'The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform' in *Migration and Islamic Ethics* (Brill, 2019) 92.

⁶³⁸ Al-Fahad, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30 *Yale Journal Of International Law* 347, 378-379.

⁶³⁹ Frank Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (University Microfilms, 1996) 141-142.

⁶⁴⁰ Jane Kinninmont, *Vision 2030 and Saudi Arabia's Social Contract: Austerity and Transformation* (Research Paper, Chatham House, July 2017) 3, 11 <<https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-07-20-vision-2030-saudi-kinninmont.pdf>>.

⁶⁴¹ Jason Morgan-Foster, 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2014) 8(1) *Yale Human Rights and Development Journal* 67.

A crucial element in the state's stability has been the link between the kafala system and the wider social contract between states and citizens. Although citizens face restrictions on their human rights, the state offers them a wide range of social benefits, such as generous housing benefits, access to free education and medical services, preferential treatment in the workforce, generally higher salaries, and more. By contrast, with few exceptions, virtually all foreign workers must have an employer sponsor who is a citizen or resident . . . In most circumstances, the sponsor must be the majority owner of the enterprise. This creates a significant power imbalance between the sponsor who is also legally the worker's employer and the migrant worker.⁶⁴²

If the requirement of Sharia-compliance comes down to the balance of rights under the Kafala system, rather than specific cases of Sharia related contractual breaches (such as visa trading), it could be argued that the Kafala system is not unconstitutional per se. Legal neutrality is not a morally indefensible position to take from Islamic perspective. If contracts must be honoured under Sharia, it might be legitimately argued that Saudi Arabia has no duty to intervene in the workplace to restore an equilibrium between employer and employee. After all, the terms of a sponsorship agreement are no different from any other employment contract in which the hiring firm holds the balance of power. Why, in a strictly legal if not ethical sense, should sponsorship contracts, left largely unregulated after they have been approved at the governmental level, be any different from other contracts simply because these are formed between Saudi personalities and foreign migrant workers? As a counterpoint to this argument, and if legal neutrality is the goal, this reasoning does not explain the differential treatment of certain categories of workers. For example, this includes those who are exempt from certain requirements, such as prior employee consent for an exit visa, and those who are not (low-skill and low-paid workers).

The above point links more to generally to the conflation of religious custom and culture in the Saudi context. In parallel debates surrounding discrimination against women in the workplace, scholars have consistently argued that regulations that legitimize unequal treatment between workers are more often rooted in cultural practices than religion.⁶⁴³ Regarding discrimination in the workplace Abalkhail suggests that rather than being justified on Islamic grounds, state and judicial decisions are based on "individual interpretations of labour law that reflect cultural

⁶⁴² *Mustafa Qadri, The UAE's Kafala System: Harmless or Human Trafficking?* (The Carnegie Endowment for International Peace, 2020) <<https://carnegieendowment.org/2020/07/07/uae-s-kafala-system-harmless-or-human-trafficking-pub-82188>> .

⁶⁴³ Azzam Tamimi, 'The Origins of Arab Secularism' in *Islam and Secularism in the Middle East* (New York University Press, 2000) 13, 28.

norms”.⁶⁴⁴ AlShehabi reaches a similar conclusion, noting that the modern Kafala system has little basis in Islam and originates instead from the transplantation of foreign legal customs into the GCC nations.⁶⁴⁵ In his analysis, AlShehabi traces the historical origins of the Kafala system to British rule in former Arab colonies in the 1920s. Saudi Arabia was never subject to colonial rule, but its legal system is influenced by systems that were. If this analysis is sound, the rationale behind the foreign imposed system had little connection to the Islamic traditions of these nations and was introduced instead as a mechanism of importing cheap labour. The sponsorship system was desirable from the perspective of British rulers because the regulatory costs of controlling migration was passed to employers in the sphere of civil society. When former colonies gained independence and statehood, the newly anointed Muslim rulers simply carried on these practices for the same reasons of economic and political expediency. This allowed them to bring in large numbers of foreign companies and individual without any corresponding obligation to enact protective legislation.⁶⁴⁶

Despite its contested basis in Islamic custom, Islamic principles of contract and labour practices may provide a source of inspiration and reform of the Kafala system. This requires political authorities to justify innovations in state regulatory practice by taking account of considerations of equality, due process, and the balancing of rights. Baderin argues:

[D]ue to its very significant role in Muslim States, Islam can and should, where employed appropriately, provide the glue that can make human rights stick and a channel to promote development in Muslim states.⁶⁴⁷

At the level of individual cases, the Hanbali jurist, for example, is obligated to weigh individual rights with the welfare of the community. The religious opinions of senior clerics may then filter through to legislative change, bringing about a greater degree of alignment between Saudi Arabia’s legal system and wider norms and discourses on labour and human rights.

⁶⁴⁴ Ronald Burke and Astrid Richardsen, *Women in Management Worldwide: Signs of Progress* (Taylor & Francis, 2016) 332.

⁶⁴⁵ Omar Hesham AlShehabi, ‘Policing Labour in Empire: the modern origins of the Kafala sponsorship system in the Gulf Arab States’ (2019) 48(2) *British Journal of Middle East Studies* 291, 310.

⁶⁴⁶ Ibid. For a broader analysis see Aziz Al-Azmeh, *Islamic Law (RLE Politics of Islam): Social and Historical Contexts* (Routledge, 2013) 78.

⁶⁴⁷ Baderin, ‘The Role of Islam in Human Rights and Development’ in Javaid Rehman and Susan Carolyn Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers, 2007) 352.

G Conclusion

This chapter began with an assessment of the role and place of Sharia in Saudi Arabia's constitutional order, noting that, in theory, mandatory norms (*fiqh*) take precedence over Saudi law and legislation. This chapter then proceeded to examine the evolution of Islamic law and custom. It was noted that plurality of religion opinion is both the driver of innovation in Islamic legal thought and the source of irresolvable doctrinal controversies. This constitutional and theological analysis provided the backdrop to the chapter's analysis of the disparities between the classical form of the Kafala contract and its modern application in the contexts of Saudi labour migration system. Drawing on Islamic principles of Islamic contract law and debates concerning the role of state regulation in the sphere of employment relations, it was argued that while the Islamic jurisprudential tradition has always contained within the tools for rule adaptation, such adaptations must not be fundamentally at odds with the intended purposes of such legal forms. Analysis found that certain practices such as the taking of sponsorship or visa fees, have been judged, in accordance with religious fatwas and rulings, to be Hanbali fiqh. Islamic principles of justice may therefore be harnessed as a legal resource for challenging inequitable labour practices that are anathema to Islamic contract norms, or Islamic conceptions of labour rights, where Saudi legislation is silent on such matters.

In its broader analysis, this chapter suggests that if a failure to reach political consensus over fundamental human rights has thwarted attempts to develop a common framework on migrant workers at the level of international human rights, these challenges are equivalent and evident from within Islamic legal debates.⁶⁴⁸ Saudi Arabia has exercised its sovereign discretion to deny or limit rights for migrants, but has done by creating a questionable linguistic association between its migration policy and traditional concepts of Islamic law. Nonetheless, if Islam is to play a legitimizing role in justifying migrant right policy, it may also provide the impetus for its reform. In the Islamic tradition, workers are guaranteed basic labour protections and any deviation from such guarantees must be based on objective legal standards, and reasonably justified by the law.

⁶⁴⁸ Peter Samuelson, 'Pluralism Betrayed: The Battle between Secularism and Islam in Algeria's Quest for Democracy' (1995) 20 *Yale Journal of International Law* 309, 358.

In some sense, the problem with the Kafala system is not that foreign migrant workers are denied their rights, except by legislative omission. The problem is that their rights are not contemplated in legislative instruments in the first place (for the most part). If Sharia is to fill the legislative vacuum, it does not help that Islamic right conceptions are deeply contested and not precisely defined. In the absence of clear and general standards, it will always be up to civil authorities to decide if Sharia will be interpreted and enforced. On occasion, this may lead to a conflict between religious authorities who seek to revive classical traditions and regulators who seek to adopt (or abandon) tradition where economic and political realities demand it.

The next chapter will therefore examine the specific provisions of Saudi labour law, the policy rationales that underlie them, and how such labour laws can be applied or adapted to provide stronger protections for workers included and excluded from the most recent reforms.

CHAPTER V: THE STATUS AND PROTECTION OF MIGRANT WORKER RIGHTS UNDER THE KINGDOM'S STATUTORY LABOUR REGULATION AND ENFORCEMENT REGIME: A TOOL FOR REFORMING THE KAFALA SYSTEM?

A Introduction

This Chapter analyses the Kingdom's Statutory Labour Regulation and Enforcement Regime to answer the research sub question: "Does the Kafala system represent a meaningful step towards legitimising Saudi Arabia's migrant population by ensuring that employers and administrative authorities are rights respecting?"

Building on the analysis of previous chapters, this chapter focuses on the Kingdom's labour law regulation as the framework that underpins, and delineates, the scope and operation of the Kafala system of migrant worker sponsorship, before and after the 2020 reforms.⁶⁴⁹ From these premises, the chapter goes on to examine the rights, entitlements and protections available to both local and foreign temporary migrant workers under Saudi Arabia's Labour and implementing regulations to prepare the grounds for a critical assessment of the limits and potentialities of the Kingdom's statutory framework. The question for this chapter is therefore to what extent can be argued that the new Kafala system, and its reforms have been buttressed, or undermined, by Saudi Arabia's evolving labour laws and dispute settlement regime?

The Saudi leadership has introduced significant reforms to the old Kafala system of employer sponsorship system. This has been achieved by easing restrictions on migrant workers and expanding the permitted circumstances under which employees may end their contract.⁶⁵⁰ The political significance of these regulatory reforms should not be underestimated, and in many ways the new reforms do herald a new era of migrant rights protections in Saudi Arabia.⁶⁵¹

⁶⁴⁹ Ministry of Human Resources and Social Development, *Resolution No. 51848 of 1442 (2020)*. See also Ministry of Human Resources and Social Development, *Labor Reform Initiative (LRI) Services Guidebook, 2020* <<https://hrsd.gov.sa/sites/default/files/1112020.pdf>>.

⁶⁵⁰ Alzahrani, "The System of Kafala and the Rights of Migrant Workers in GCC Countries- With Specific Reference to Saudi Arabia" (2014) 16(2) *European Journal of Law Reform*.

⁶⁵¹ Heather Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries' (2012) 45(2) *Cornell International Law Journal* 461.

These developments are not isolated but should instead be viewed in the context of a decades long project of progressive labour law and social rights reform. This chapter will demonstrate that the Kingdom's framework on labour and social rights regulation has been strengthened and supplemented by various national labour initiatives aimed at safeguarding the financial and compensatory rights of both foreign and Saudi workers. Therefore, it is arguable that the Kafala reform does not represent a departure point in the Kingdom's migrant workers policies, but the continuation of the statutory recognition and adjudication of social and labour equality rights.⁶⁵²

Yet, the evolving "story" of the Kingdom's labour law reforms, of which the Kafala regime is a central pillar, can be viewed more critically as a regime that has been as complicit in entrenching (migrant) worker inequality as it has been in combating it. Many elements of labour law statutory regime are deficient in establishing labour rights protections, that are indiscriminately enforced by labour authorities, and consistently interpreted by Saudi Arabia's labour law adjudicative bodies.⁶⁵³ The new reforms aim to repeal the most abusive elements of the Kafala system, namely the power exercised by employer's basic freedoms. However, this chapter contends that the Kingdom's labour laws, even in their amended form, have too often provide the legal framework and legitimating basis upon migrant have historically been denied basic or equivalent labour protections (to Saudi nationals), while simultaneously shielding private sector employers from legal liability.

Structurally, the chapter will proceed by examining general provisions of the labour law, before moving on to examine the specific rules that govern the rights and obligations of foreign migrant workers. This will prepare the ground for an examination of recent amendments to the Labour Law, many ostensibly strengthening the rights and protections of migrant workers, particularly in respect of worker's wage rights and access to justice.⁶⁵⁴ As part of its sequential analysis, the chapter moves through successive rounds of legislative reform and amendment to uncover the extent to which such reforms have been driven by economic concerns, and where they have been responsive to broader rights, rule of law and justice considerations. This

⁶⁵² Azfar Khan et al, "Reforming the Kafala: Challenges and Opportunities in Moving Forward", (2011) 20 (3) Asian & Pacific Migration Journal 293.

⁶⁵³ *Saudi Labour Law*, Royal decree no. M/51 (Saudi Arabia); Martin Baldwin-Edwards, "Labor Immigration and Labor Markets in the GCC Countries: National Patterns and Trends", <http://eprints.lse.ac.uk/55239/1/Baldwin-Edwards_2011.pdf>.

⁶⁵⁴ National Society for Human Rights, *Second Report on the Status of Human Rights in the Kingdom of Saudi Arabia. 2010* <<http://nshr.org.sa/tabid/88/Default.aspx>>.

analysis will illustrate specific provisions of the labour law framework expressly provide for the unequal and potentially discriminatory treatment of migrant workers via a vis their Saudi counterparts. Moreover, structural aspects of the Saudi labour market often means that neutral provisions of the Saudi labour law are often applied with discriminatory effects for migrant workers.⁶⁵⁵ These challenges are shown to have been further exacerbated by the low levels of state regulation, investigation, and enforcement of penalties against abusive employers, which is partly a consequence of a general shift to formal state regulation of employer practice to privatised model of corporate self-regulation.

Conceptually, this analysis will look to expose a fundamental tension between formal aspects of labour regulation and substantive “equality” provisions of the Kingdom’s (Sharia governed) constitutional law, and between Saudi Arabia’s ratification of international labour conventions and the uneven judicial enforcement of labour protections at national level. Focusing on the jurisprudence of Saudi Arabia’s specialised labour courts and tribunals, this chapter reflects on the role the courts have in furthering labour rights protection. This will prepare the ground for the future analysis of the recent jurisprudence of the Kingdom’s labour courts and tribunals. This future analysis will focus on the extent to which the Kingdom’s adjudicative authorities have weighed and balances statutory rules with general legal principles to achieve a more equitable trade-off between enhanced rights protection and employer freedoms. This chapter will conclude by highlighting the remaining gaps and limitations of the Kingdom’s labour regime considering the most recent reforms to the Kafala system, preparing for the next chapter’s discussion.

⁶⁵⁵ Teresa Twomey and Drew Harris, ‘Revealing The Role of Privilege in Free Markets,’ 22(1) *International Business Journal* 90, 100.

B The Regulatory Design and Orientation of the Kingdom's Evolving Labour Law Framework

It has been well established, by now, that Saudi Arabia is an oil rich economy with “exceptionally high international migration of persons originating from a wide range of countries”.⁶⁵⁶ It has also been noted that most foreign migrants are employed in the private sector. Against the backdrop of rising youth unemployment and wider economic uncertainty, Saudi Arabia’s leadership has taken measures to rebalance the labour market, most notably through the introduction of the Saudization (labour indigenisation) program.⁶⁵⁷ This program provides statutory incentives for privately owned businesses to reduce their dependence of foreign workers and penalizes them where they fail to employ, and retain, a statutory quota of local workers.⁶⁵⁸ However, these structural measures have only been partially successful.

Despite efforts to rebalance the labour market, the Kingdom’s General Authority for Statistics has reported that migrant labour workers continue to comprise over 80 percent of the Kingdom’s private sector labour force.⁶⁵⁹ Yet, the Saudi leadership’s commitment to Saudization has wavered undecidedly between regulations that squeeze the supply of cheap migrant labour and policies, and those designed to open Saudi Arabia’s markets to global talent and investment.⁶⁶⁰ These twin pillars of the Kingdom’s modernisation agenda, the renationalisation of the Saudi workforce, and liberalisation of domestic markets, have been identified as national priorities in the Saudi 2030 Vision. This is despite the obvious tensions that exist between these competing goals.⁶⁶¹ Looking to reconcile these policy goals, the Saudi governments has spearheaded several initiatives aimed at enhancing the national framework

⁶⁵⁶ Nasra Shah, ‘Recent Labor Immigration Policies om The Oil-Rich Gulf: How Effective Are They Likely To Be,’ (International Labour Office, 2008) 1, 2.

⁶⁵⁷ Michael Lopesciolo, Daniela Muhaj, and Carolina Pan ‘The Quest for Increased Saudization: Labor Market Outcomes and the Shadow Price of Workforce Nationalization Policies’ (Centre for Harvard Development, 2021).

⁶⁵⁸ Madawi Al-Rasheed, *A History of Saudi Arabia* (Cambridge University Press, 2002) 213.

⁶⁵⁹ Olivier Durand-Lasserve , ‘Nationalization Of The Private Sector Labor Force, Quotas, Matching And Public Jobs, An Illustration With Saudi Arabia. (2022) (86) *The Quarterly Review of Economics and Finance* 98, 99.

⁶⁶⁰ Jane Kinninmont, ‘Vision 2030 and Saudi Arabia’s Social Contract: Austerity and Transformation’ (*Research Paper, Chatham House, July 2017*) 3, 11; Zvi Bar’el, ‘*Even the Saudi Public Discourse on Reforms is Conducted in Secrecy.*’ (Haaretz, 2004).

⁶⁶¹ Robert Looney, ‘Saudization and Sound Economic Reforms: Are the Two Compatible?’ (2004) 3 (2) *Strategic Insights*; Mohsin Khan, ‘Working Toward Vision 2030: Key Employment Considerations in Saudi Arabia’ (Society for Human Resource Management, 20 April 2018).

on labour market regulations towards enhanced rights protection and certainty for workers and employers in their employment relationships.⁶⁶²

The National Transformation Program (NTP), is a body created with the objective of facilitating public-private partnerships towards greater mobility in the Kingdom's labour market. The NPT has been the architect of a number of reforms to the governance of employment practices.⁶⁶³ In the first of many significant reforms, the NPT outlines an operational plan to completely overhaul the traditional "top down" approach to labour market regulation.⁶⁶⁴ This operational plan would later result in the establishment of national employment database with an accurate record of worker salaries, social insurance benefits and payment procedures from each company registered to the scheme.⁶⁶⁵ At the heart of this operational plan was the proposal that the private sector be given a leading role in promoting socially responsible corporate policies. This includes fair labour standards, in the shadow of ministerial oversight. Which, in this instance, is the Ministry of Labour and the General Organisation for Social Insurance.⁶⁶⁶

The implementation of labour law related reforms has accelerated over the past two years as the Kingdom looks to recover from Covid 19 related disruptions to domestic labour market. In 2020, the Ministry of Human Resource and Social Development (MHRSD) passed a resolution in which several measures for establishing "a safe and attractive working environment" for all workers was identified as a key target of national regulatory reform.⁶⁶⁷ These measures build on the early recommendations in 2018.⁶⁶⁸ In 2020, the NPT issued another policy instrument,

⁶⁶² Meshal Alharbi, 'Protecting Employees' Wages in Accordance with Saudi Labour Law: Should We Do More?' (2021) 12(2) Beijing Law Review 320.

⁶⁶³ The Saudi Council of Economic and Development Affairs, *The Operational Plan for the National Transformation Program 2018/2020*.

<https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20Arabic%20Public%20Document%202810_0.pdf>.

⁶⁶⁴ The US-Saudi Arabian Business Council, *Working in Saudi Arabia: A Labor Market Update*. Labor Market <<http://www.ussaudi.org/wp-content/uploads/2018/02/Labor-Industry-Brief-2017.pdf>>.

⁶⁶⁵ Meshal Alharbi, 'Protecting Employees' Wages in Accordance with Saudi Labour Law: Should We Do More?' (2021) 12(2) Beijing Law Review 320.

⁶⁶⁶ The Saudi Council of Economic and Development Affairs, *The Operational Plan for the National Transformation Program 2018/2020*.

<https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20Arabic%20Public%20Document%202810_0.pdf>.

⁶⁶⁷ The Ministry of Human Resources and Social Development. *Strategic Objectives for National Transformation Program* <<https://mlsd.gov.sa/en/page/strategic-objectives>>

⁶⁶⁸ The Saudi Council of Economic and Development Affairs, *The Operational Plan for the National Transformation Program (2018/2020)*

<https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20Arabic%20Public%20Document%202810_0.pdf>.

where it announced the Kingdom's commitment to improving job security and rights protections for all workers in the private sector.⁶⁶⁹ By way of these policy announcements, the NPT and MHRSD were preparing the ground for a major shift in government policy.⁶⁷⁰ It is not uncommon for GCC governments to take the market's temperature on legislative proposals before they are formally enacted as new law.⁶⁷¹ In this case though, the NPT, as a commerce orientated partnership between public and private authorities, had the task of gauging the local business community's responses to socially responsive labour market reforms. This culminated finally in the dismantling of key elements of the Kafala systems in 2021. This was due to the fact that Saudi companies had the most to lose, if the government was to increase support for a pro-worker legislative (and policy) agenda.⁶⁷²

In their combined scope and orientation, these policies highlight something significant about the Kingdom's evolving approach and attitude to regulation. Historically, Saudi Arabia has intervened in labour markets to protect national industries or curtail foreign influence in strategically important sectors or enterprises.⁶⁷³ Often Saudi Arabia has, as a rentier state, made significant legislative concessions to local and business interests.⁶⁷⁴ It is in this context that we might also gain clearer insight into why Saudi Arabia's governing authorities have been slow to introduce stricter legislative controls on employment practices. This was achieved through the elaboration of clear legal standards and rights protections that are effectively policed and enforced against abusive employers.⁶⁷⁵

Met with growing demands for reform of the country's Kafala system and policies on migrant worker rights, the Kingdom opted for a compromise solution. Powers and functions that were traditionally reserved to state authorities and ministries were now being transferred to the

⁶⁶⁹ The Ministry of Human Resources and Social Development. *Wages Protection System* <<https://mlsd.gov.sa/ar/initiatives>>.

⁶⁷⁰ Ingo Forstenlechner and Emilie Rutledge, The GCC's 'Demographic Imbalance': Perceptions, Realities and Policy Options, (2011) 18 *Middle East Policy* 25, 30.

⁶⁷¹ Raga'ei el Mallakh, *Saudi Arabia: Rush to Development: Profile of an Energy Economy and Investment* (Routledge, 2015) 45,189; Madawi Al-Rasheed, *Kingdom without borders: Saudi political, religious and media expansion* (Hurst and Co, 2008).

⁶⁷² Mohammed Almutairy, *A Private Company to Manage the Wages of the Employees in the Private Sector at the End of 2020* (Al Eqtisadiyah, 2019).

⁶⁷³ Jane Kinninmont, 'Vision 2030 and Saudi Arabia's Social Contract: Austerity and Transformation' (*Chatham House*, 2017) 4.

⁶⁷⁴ Robert Looney, 'Development Strategies for Saudi Arabia: Escaping the Rentier State Syndrome' (2004) 3(3) *Strategic Insights* 10.

⁶⁷⁵ Nasra Shah, 'Recent Labor Immigration Policies om The Oil-Rich Gulf: How Effective Are They Likely To Be' (International Labour Office, 2008).

private sector.⁶⁷⁶ The prevailing assumption here is that state policies do not always translate to increased private sector compliance (with labour standards). Furthermore, softer mechanisms of corporate self-regulation, for example self-instituted reporting and disciplinary procedures can more effectively “level up” corporate governance and company labour standards.⁶⁷⁷ In this “break” from old to new governance, national labour authorities play a more limited (coordinating) regulation in regulating employment bargains and the rights of employers and employees “in the shadow of state regulation”. In many ways, the debate around the relative virtues, and limits, of “old” and new models of governance continues to shape the form (and content) of migrant rights regulation in Saudi Arabia even today.⁶⁷⁸

The Kafala system is a case study in hybrid form of public-private labour regulation.⁶⁷⁹ Administrative rules concerning entry and exit into country, the issuance of work and residency permits and compliance with immigration rules fall within the scope of public regulation.⁶⁸⁰ Once a sponsor had agreed to vouch for a migrant employee, filed for the relevant permits and both parties had signed an employment agreement, the role of (state) law recedes progressively into the background. This gives way to a more privatised model of labour law and governance (i.e private employment agreements, codes and practices performed and enforced in the, by now, relatively weak shadow of state regulation).⁶⁸¹ In many respects, Saudi Arabia’s labour policy makers are only catching up to developments that have long been underway in the law of labour market regulation in the Western world. This has caused associated debates around the public and private distinction as a doctrinal category of labour law (is the employment

⁶⁷⁶ The new *Private Sector Participation Law* was approved under Council of Ministers Resolution 436, dated 03/08/1441 AH (corresponding to 17/03/2021 AD).

⁶⁷⁷ Justine Nolan, ‘Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights’ (2014) 30 (78) *Utrecht Journal of International and European Law* 7.

⁶⁷⁸ While the first speaks to the more familiar model of law issued through binding legislation that is enforced through national courts, the latter describe informal, open and participatory modes of private (self-regulating) governance which may nonetheless allow for varying degrees of state (legislative and judicial) oversight and review. See for a discussion on the weak or strong shadow of state regulation, Lyle Scruggs, ‘Is There Really a Link Between Neo-corporatism and Environmental Performance?’ (2001) 31 *British Journal of Political Science* 686; Tess Hardy and Sayomi Ariyawansa, ‘Literature Review on the Governance of Work’ (International Labour Organization, 2019).

⁶⁷⁹ For a critical analysis of the same basic contention, see Anita Hammer and Ayman Adham, ‘Mobility Power, State and the ‘Sponsored Labour Regime’ (2022) *Journal of Work, Employment and Society*.

⁶⁸⁰ Martin Baldwin-Edwards, ‘Labour Immigration and Labour Markets In The GCC Countries: National Patterns And Trends’ (LSE, 2011) 36. See also the *1954 Law of the Saudi Arabian Nationality*, Royal Decree 8/20/5604 (Umm Al-Qura, No. 1539, 16/3/1374H) (Saudi Arabia).

⁶⁸¹ ILO, “Contract Labour – Fifth item on the agenda,” Report V (1) to the International Labour Conference 86th Session 1998, Geneva. For a theoretical analysis of the roots of this shift in models of labour regulation see Nóra Jakab, ‘The Importance of Individual Self-Governance in Labour Law’ (2018) 52(3) *Zbornik radova Pravnog fakulteta Novi Sad* 699; Karl Klare, ‘The Public/Private Distinction In Labor Law’ (1982) 130 *University Of Pennsylvania Law Review* 1358.

contract a purely private relationship or its regulation inextricably bound up with the public interest?).⁶⁸² The private law dimensions of Saudi Arabia's migrant worker labour regulation and immigration has, however, been present from the very inception of the modern Kafala system. After employment agreements were found to abide with immigration rules and permit requirements, the terms and management of employment contracts was left to the parties themselves (the sponsoring employer and migrant employee). The difficulty was that, under the Kafala system, the employer held the monopoly of power.⁶⁸³ As a State representative of Filipino migrant workers noted in respect of the Kingdom's approach to employment regulation:

Standard employment contracts are legally difficult to enforce because no permanent law exists. Therefore, employers and, to an extent, domestic workers can violate this labor contract without equal protection.⁶⁸⁴

In reality, there were and are laws in place to deal with the fundamental rights of migrant workers, most covered under the provisions of the Labour Law, The main difficulty with the Kafala system is that public and private aspects of the Kingdom's Kafala and labour law framework were mutually reinforcing to the great cost of migrant workers. One of the central controversies is how employers have been able to restrict the fundamental freedoms of their workers, in ways deemed to violate human rights standards.⁶⁸⁵ The important point addressed by this chapter is not that there were abuses which is undoubtedly the case. Rather, that any restrictions imposed on migrant workers were not simply overlooked or tolerated by Saudi's labour authorities, but when in certain fundamental ways themselves mandated by law. For its critics, the Kafala system, and the labour laws that structured it, amounted to little more than the state sanctioned and enforced subjugation of vulnerable migrant workers.⁶⁸⁶ One scholar has fully captured how public and private elements of migrant labour regulation and immigration control come to reinforce inequalities in law and in bargaining power:

⁶⁸² B Hadfy, *Alwajeez in Explanation of Labour Law: An Individual Labour Relationship*. (Joussour, 2015).

⁶⁸³ Froilan Malit et al, 'Asymmetric Information under the Kafala Sponsorship System: Impacts on Foreign Domestic Workers' (IZA, 2016).

⁶⁸⁴ Ibid, 8.

⁶⁸⁵ Bina Fernandez. 'Racialised Institutional Humiliation through the Kafal' (2021) 47 (19) *Journal of Ethnic and Migration Studies* 5.

⁶⁸⁶ Ibid.

The state shapes the labour market through the *kafala* system, a long-standing and structured state policy that controls the mobility of migrants in and out of the country [and] gives employers control over workers who are constrained by being unable to change their employers. This control is accentuated through precarious living conditionsand a strong state exercises control over the mobility and bargaining power of a vast migrant workforce... [The] near absence of industrial relations through the kafala system ... helps create a centralised decision-making approach where the decisions of owners and managers are rendered unquestionable. Labour management in Saudi as well as of multinational firms tends to be that of a 'hire and fire culture' that prefers 'employees who fear authority and work with minimum demands' In the absence of trade unions..... migrant labour appears to have almost no bargaining power with their employers.⁶⁸⁷

Yet, it is arguable that this assessment of the Kingdom's Kafala system and underpinning labour law framework is also insufficiently nuanced and excessively bleak. Over the last decades, there have been advances in rights protection for all workers employed in Saudi Arabia, some even relatively progressive by the standards of comparative labour law regimes.⁶⁸⁸ At the same time, there is no denying that migrant workers do not always benefit from the same protections as Saudi workers, or that even when equivalent protections do exist, these are effectively implemented or enforced to ensure employer compliance with enacted laws and standards.

The question for this chapter is whether, following successive rounds of legislative reform, the Kingdom's current regime on labour regulation has struck a more equitable balance between employer's (market) freedoms and labour rights protections. Situated within this study's analysis of the Saudi Kafala system and recent reforms to this system, a related line of enquiry exists between the regime governing the rights and treatment of migrant workers and the Kingdom's general labour laws.

⁶⁸⁷ Anita Hammer and Ayman Adham, 'Mobility Power, State and the 'Sponsored Labour Regime' (2022) *Journal of Work, Employment and Society* 3.

⁶⁸⁸ Nisha Varia, 'Sweeping Changes?' A Review of Recent Reforms on Protections for Migrant Domestic Workers in Asia and the Middle East (2011) 23 *Canadian Journal of Woman and Law* 265, 268; James Atleson et al., *International Labor Law: Cases And Materials On Workers' Rights In The Global Economy* (West Academic Publishing, 2008) 59.

The next section will outline the constitutive laws and framework of Saudi Arabia's labour regulation regime. This will pave the way for an analysis of the extent to which labour laws have been applied to safeguard or even advance the rights of migrant workers, and the ways it can be seen to have further reinforced and legitimised exclusionary, unfair, and unequal treatment of foreign workers.

C The Legal Framework on Labour Regulation

The Saudi Basic Law of Governance is the Kingdom's functional equivalent to a constitutional document. The Basic Law constitutes, delineates and regulates the powers of all organs of government.⁶⁸⁹ Though, Saudi Arabia has a bicameral legislature, the power to legislative agenda, pass resolutions and enact laws resides, ultimately lies with the executive.

Under this system, the King, as sovereign, has veto power over all acts of laws, primary and secondary (administrative). The Basic Law can also be likened to a bill of rights, insofar as the fundamental rights of all citizens, as well as the duties of government, are enshrined in this law⁶⁹⁰ The Basic Law also stipulates that sources of Sharia law – the *Quran* and *Sunnah* – are the foundation of the Kingdom's legal system.⁶⁹¹ Article 8 of the Basic Law states that “governance in the Kingdom of Saudi Arabia shall be based on justice, *shura* (consultation) and equality in accordance with the Islamic Shariah.”⁶⁹²

The Sharia is preeminent as the highest law of the Saudi legal system. In a more general sense, religion, and religious (traditional) law and custom is regarded as the social fabric that binds Saudi society, been captured by numerous scholars.⁶⁹³ Rajkhan, for instance, notes that “the religious institution plays a crucial role in the kingdom's governance and has widespread influence over numerous prospects of the citizen's everyday lives”⁶⁹⁴. Given the central role of Islam in all aspects of life, Islamic rules and principles also shape and influence the interpretation and enforcement of rights and obligations recognised by international, as well as national law. This includes human rights. Due to this, several provisions of the Basic Law address the rights of workers. In a strongly worded provision, Article 3 of the Labour Code exhorts that “work is the right of every citizen.”⁶⁹⁵ Nonetheless, this provision goes on to

⁶⁸⁹ *Basic Law of Governance*, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992), For an overview of the Saudi legal system and the institutionalized separation of powers and other constitutional elements, see Esmaili, ‘On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System’ (2009) 26(1) *Arizona Journal of International and Comparative Law* 1, 27-30.

⁶⁹⁰ *The Basic Law of Governance* no (a/90) March 1992.

⁶⁹¹ *Ibid*, Art 1, Chapter 1.

⁶⁹² *Ibid*, Art 8.

⁶⁹³ Muddassir Quamar, ‘Islamic Modernism and Saudi Arabia: Confluence or Conflict?’ (2015) 2(1) *Contemporary Review of the Middle East* 71, 71-73; George Sfeir, ‘The Saudi Approach to Law Reform’ (1988) 36(4) *The American Journal of Comparative Law* 729, 729-759.

⁶⁹⁴ Safaa Fouad Rajkhan, ‘Women in Saudi Arabia Status, Rights, and Limitations’ (University of Washington Bothell, 2014).

⁶⁹⁵ Labour Code (Saudi Arabia) art 3.

qualify the right to work as one that is exclusively granted to citizens, whereby “no one else may exercise such right unless the conditions provided for in this Law are fulfilled.”⁶⁹⁶ Other provisions of the Basic Law stipulate the State’s obligations to redistribute national wealth, including through secure work and social welfare provisions. Article 17 builds on the same principle to identify labour, and labour market regulation, as a vital function of governance and pillar of the country’s social and economic structure.⁶⁹⁷ Other provisions of the Basic Law elaborate specific social rights aimed at widening access and opportunity to the job market including the right to receive education and vocational training.⁶⁹⁸ These social and labour rights are to be statutorily recognised and treated as legally enforceable, without distinction on grounds of gender, ethnicity, religion, or race (although no mention is made of distinction based on nationality).

In their combined effect, the Basic Law goes further than labour and social regulation frameworks of many other developed European nations to establish an explicit relation between the stability of labour markets, underpinned by legally enforceable rights, and the general welfare of Saudi citizens. No apparent conflict exists between the legal standards guaranteed under the Kingdom’s Basic Law and those elaborated under various international human rights treaties for instance in respect of labour equality and non-discrimination.⁶⁹⁹ In practice, human rights and civil society organisation have highlighted various forms of indirect and discrimination in the workplace and in wider societies.⁷⁰⁰ Research indicates low levels of occupational mobility among segments and demographics of Saudi societies.⁷⁰¹ Religious minorities lack access to public sector jobs that are largely reserved for Sunni majorities, in ways that that social hierarchies and powers structures that have shaped aspects of the Kingdom’s labour market and Saudization policies Saudi Arabia’s labour indigenisation

⁶⁹⁶ Saudi Arabia Ministry of Labor. *The Labor Code Art 3*

<http://www.saudiarabien.diplo.de/contentblob/2761466/Daten/850057/Arbeitsrecht_SDA.pdf>.

⁶⁹⁷ *Basic Law of Governance*, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992) (Saudi Arabia) art 17.

⁶⁹⁸ The Basic Law enshrines the right to education (Article 30), welfare rights (Article 27) and health care (Article 31) as rights belonging to all Saudi citizens. *Ibid*, arts 30, 27, 31.

⁶⁹⁹ Paul Robinson et al, ‘Codifying Shari’a: International Norms, Legality and the Freedom to Invent New Forms’(2007) 2 (1) *Journal of Comparative Law*.

⁷⁰⁰ See comments of ILO, Discussion on Saudi Arabia’s Ratification of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (2013) Publication: 102nd ILC session (2013).

(Saudization) policies.⁷⁰² International focus has also been drawn to the structural barriers faced by Saudi women upon entering the job market.⁷⁰³

Though beyond the scope of this thesis, one obvious barrier to gender equality in the workplace concerned the routine administration of a system of male guardianship.⁷⁰⁴ Under the applicable administrative regime, employers were not permitted to employ Saudi women without first obtaining the prior consent of a designated male guardian (i.e. their husband and father).⁷⁰⁵ A similar customary practice of gender segregation in the workforce also prevailed, and both monitored and enforced by the Kingdom's religious police, although these rules have been recently reformed.⁷⁰⁶ These examples expose a gap between constitutionally mandated labour (equality) rights and the social contexts in which these rights are implemented and enforced. The male guardianship proved particularly challenging from a "legality" related perspective since these rules - being neither traced to an enumerated law or judicial reviewable standards - were applied and imposed by administrative agencies on an essentially discretionary basis.⁷⁰⁷

Tellingly, the Basic Law is entirely silent on the rights of foreign citizens with a substantial connection to the Saudi Arabia. These silences are not particularly exceptional as far as national constitutional instruments go, being that these are typically concerned with the rights of nationals, including those naturalised under the applicable immigration regimes.⁷⁰⁸ However, the explicit choice to exclude Saudi workers from the labour protections enumerated in article 2 of the Basic Law is still nonetheless noteworthy given the sheer extent, and thus exceptionality, of the Kingdom's historic dependence on foreign labour. Other articles of the Basic Law can be construed more liberally as establishing minimum protections for all

⁷⁰² Ayman Adham and Anita Hammer, 'Understanding Arab capitalisms: patrimonialism, HRM and work in Saudi Arabia' (2021) 32(21) *International Journal of Human Resource Management* 4578.

⁷⁰³ Committee on the Elimination of Discrimination Against Women, Concluding Comments on Saudi Arabia, 40th Sess. 14 February 2008, U.N. Doc. CEDAW/C/ SAU/CO/2 (United Nations, 2008).

⁷⁰⁴ Nikki Keddie and Beth Baron, *Women in Middle Eastern history: Shifting boundaries in sex and gender* (YUP, 2008) 106; Human Rights Watch, *Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia* (Human Rights Watch, 2008).

⁷⁰⁵ Human Rights Watch, *Boxed In: Women and Saudi Arabia's Male Guardianship System* <<https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system>>.

⁷⁰⁶ B Shanee, *The Saudi Royal Decree Easing Guardianship Requirements For Women, And Responses To It In Saudi Arabia* (The Middle East Media Research Institute, 2017) Al Jazeera, *Saudi Arabia strips religious police of arresting power* <<http://www.aljazeera.com/news/2016/04/saudi-arabia-strips-religious-police-arresting-power-160413141418824.html>>

⁷⁰⁷ Human Rights Watch, *Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia* (Saudi Arabia, 2008) 1, 7

⁷⁰⁸ Thomas Schindlmayr, 'Sovereignty, Legal Regimes, and International Migration' (2003) 41(2) *International Migration* 109, 111.

workers. Article 28 of the Law states, for instance, that the “State shall provide job opportunities to all able-bodied people and shall enact laws to protect both the employee and the employer”.⁷⁰⁹ In contrast to Article 2 (which limits the right to work to nationals),⁷¹⁰ this provision does not expressly exclude non-nationals from coverage.

A generous interpretation of the Article’s wording might imply that this imposes on constitutional requirement on the Saudi government to provide protections to all employees, regardless of their nationality or residence status.⁷¹¹ Although, it would be a mistake to place too much onus on the articles of the Basic Law, which while guaranteeing fundamental rights, are nonetheless framed broadly as general principles and not as directly enforceable rules. This is not to suggest that the Basic Law does not hold legal weight or authority as an instrument of law. In theory, the courts of Saudi Arabia could strike down legislation or decide controversial questions of social policy based on their interpretation of fundamental rights enumerated in the Law.⁷¹² The more important question for the purposes of this chapter is whether Saudi Arabia’s courts have been prepared to interpret other provisions of Saudi labour law. This includes intervening in private bargains between employers and employees, to assure conformity with fundamental rights and higher principles of Sharia.⁷¹³ This leads us now to consider how, and the extent to which, labour provisions of the Basic law have been further elaborated and made effective under the Kingdom’s labour laws.

1. The Labour Law

A patchwork of laws, regulations and secondary rulemaking has been established to regulate various aspects of the labour market. The central piece of employment legislation in the Kingdom of Saudi Arabia is the Labour Law. This law was first enacted in 1969.⁷¹⁴ This Act was later repealed with the adoption of new labour law 2005, and further amended in 2015 and

⁷⁰⁹ Basic Law (Saudi Arabia) art 28.

⁷¹⁰ Ibid, art 2.

⁷¹¹ Moosa Ghazi, ‘Constitutional Human Rights: Saudi Perspective’ (2010) 4(3) *Journal of Middle Eastern and Islamic Studies*.

⁷¹² Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights,’ (2008) 19(4) *European Journal of International Law* 655, 664; Dawood Ahmed and Tom Ginsbury, ‘Constitutional Islamization and Human Rights: The Surprising Origin And Spread Of Islamic Supremacy In Constitutions’ (2014) 3 *University Of Chicago Law School Chicago Unbound, Public Law And Legal Theory Working Papers* 6.

⁷¹³ Clark Lombardi, ‘Constitutional Provisions Making Sharia “A” Or “The” Chief Source Of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?’, (2013) 28 *American University Of International Law Review*.733, 743–46.

⁷¹⁴ *Labour Law* (Royal Decree No. M/51) (Saudi Arabia) 9-92.

2019.⁷¹⁵ In many respects, the “story” of the Kingdom’s labour regime is one of the Kingdom’s persistent willingness to provide any statutory recognition to migrant worker rights. Adopted in an era in which the number of foreign workers living and employed in the country was moderately low, the 1969 Labour Code dedicated few provisions to any rights, protections, or entitlements due to non-Saudi workers.⁷¹⁶ In subsequent decades, little progress was made on the question of migrant rights even as the demographics of the labour force altered dramatically. The result was few statutory protections for migrant workers sponsored under the Kafala system. The most significant shift the Kingdom’s migrant labour policy till arrived with the introduction of the Saudization (Nitaqat) policy.⁷¹⁷ It was in 2005, and in legislative reforms thereafter, that the Saudi labour ministries gave the green light to a significant overhaul of the country’s now outmoded labour legislation.⁷¹⁸ The drafting and deliberation of the country’s new labour reforms was in no small measure influenced by Saudi Arabia’s longstanding bid to join the WTO.⁷¹⁹ Under pressure by the international trade organisation to liberalise its economy as a condition of future membership, the Saudi government began formulating a legislative agenda that would allow for greater accommodation between the Kingdom’s nationalist labour polices, on the one hand, and increased market access to foreign entrants, on the other.⁷²⁰ In pursuit of this aim, the drafting process was opened to local and foreign public and private sector consultation. During the consultation process, 80 amendments were proposed, some attracting intense scrutiny and contestation by the local

⁷¹⁵ The Labour Law as approved by Royal Decree M/51 of 1426 (amended by statute in 2005). See Shearman & Sterling, *Understanding Employment Law in the Kingdom of Saudi Arabia* <<http://www.shearman.com/~media/Files/NewsInsights/Publications/2016/11/Understanding-Employment-Law-in-the-Kingdom-of-Saudi-Arabia-IA-11142016.pdf>>.

⁷¹⁶ Frederick W. Taylor, JR, “Changing Circumstances: Saudi Labor Law and Recent Developments,” (1978) 12(3) *The International Lawyer* 661, 661-662

⁷¹⁷ Though the Saudisation program was first introduced into Saudi policy in the 1990s it was only formally adopted in 2011. For background, see R Sehgal, *Nitaqat law* <<http://www.eurasiareview.com>>.

⁷¹⁸ Issued by Royal Decree No. M/51 dated 23/08/1426 H (27 September 2005) and with the Approval of the Council of Ministers Resolution No. 219 dated 22/08/1426 H (26 September 2005). For background see MN Aldumky, *The New Saudi Labour Law in the Balance of the Doctrinal Analysis: A Detailed Description for the Rules of the Saudi Labour Law* (Dar Hafiz, 2023).

⁷¹⁹ World Trade Organisation, ‘Request to transform the Working Party on the Accession of Saudi Arabia to the General Agreement on Tariffs and Trade 1947 into a WTO accession Working Party’ UN Doc WT/ACC/SAU/1 (WTO, 2005).

⁷²⁰ Adrien Faudot, ‘Saudi Arabia and the rentier regime trap: a critical assessment of the plan Vision 2030,’ (2019) 62 *Resources Policy* 94.

business community.⁷²¹ Some 38 amendments were finally approved and adopted into the 2005 law and brought into force in 2006.⁷²²

Whatever its limitations, the revised labour law (or Code) did represent a breakthrough in the effort to clarify, codify and revive the Kingdom's labour legislation framework. Many of the amendments took the form of statutory guidelines, some setting out targets for increased cooperation between the public and private sector in areas such as education, skills and vocational training are set forth in 2005 amended Law.⁷²³ Other chapters of the legislation are directly enforceable as legal rules, thus eliminating some of the limitations of the previous legal framework, namely the inconsistent application of labour laws and weak enforcement of statutory requirements and settlement of disputes.

2. The Definition and Rules Applicable to Employment Agreements

In its substantive aspects, the labour law delineates a more precise, though by no means exhaustive, set of rules and requirements for employers, for instance in respect of fixed term contracts. Pursuant to Article 4 of the labour law Code, all agreements struck between employer and the worker are required to "adhere to the provisions of *Shari'ah*."⁷²⁴ The amended 2005 Law would for the first time provide clarity on the formal requirements that all employment contracts must satisfy before these are considered valid and enforceable, in accordance with general principles of contract law.⁷²⁵ Under the amended rules, only written contracts with specified terms will have the force of law. Construed in accordance with Islamic principles, any elements of illegality, such as usury or excessive uncertainty in material clauses of the employment contract may be voided or the contract nullified in its entirety.⁷²⁶ Pursuant to Article 52 of the Labour Law, all employee contracts are required to specify the "name of the employer, venue, the name of the worker, nationality, identification, wage agreed upon, type

⁷²¹ Rebecca Ford and Sara Khoja, *Saudi Arabia: Approved Amendments To KSA Labour Law* <<https://www.mondaq.com/saudi-arabia/whistleblowing/393074/approved-amendments-to-ksa-labour-law>>; K Musa, *The New on the Explanation of the Labour Law and the Law on Social Insurance in Saudi Arabia in Accordance with the Latest Amendment Issued by Royal Decrees No. M/46 (02 August 2006)* (University Book House, 2018).

⁷²² Aahil Shaik, *New 38 Amendments in Labour Law* <<https://www.saudi-expatriates.com/2015/11/saudi-arabia-labor-law-2015-38.html>>.

⁷²³ *Labour Law* (Saudi Arabia), Royal Decree No. M/51 dated 23 / 8 / 1426 (corresponding to 2005) Council of Ministers Resolution No. 219 dated 22 / 8 / 1426 (corresponding to 2005). See in particular, *Chapter I, Part II, Art 21 et seq*,

⁷²⁴ *Ibid*; *Labour Law*, art 4.

⁷²⁵ *Ibid*, arts 50-60.

⁷²⁶ Mohammed Alothaimen, *Alsharh Almumtea Ala Zaad Almustaqnea*. (Dar Ibn Aljawzi, 2005).

and location of work, date of employment, duration of the contract if fixed”. In principle, these rules prevent employers from hiring employees without contractual guarantees regarding the commencement of employment, employee responsibilities and wage payment procedures.⁷²⁷ Stronger rules concerning the auditing and inspection of Saudi companies were also established, as well as stronger penalties for violations of the law. Furthermore, under the amended Law, appointed Saudi labour inspectors are empowered to carry out routine or unannounced workplaces inspections to ensure that private sector establishments have complied with the provisions of the Labour Law.⁷²⁸

The 2005 Saudi labour law amendments also strengthened the scope of legal protections and social benefits due to Saudi workers. In a notable gesture of the Saudi government’s commitments to improving worker rights, the law establishes stronger wage payment protections.⁷²⁹ Other provisions of the law protect Saudi workers by obliging private employers to assume liability for any injury or accident that occurs at work. Going further still, private employers are obligated to take any steps as necessary to ensure the wellbeing and safety of their employees, including by providing “preventive and therapeutic health care” as assessed in accordance with the Kingdom’s social and health insurance protocols.⁷³⁰ These and other provisions of the amended labour law point to the impressive scope of the protections available to Saudi workers, sometimes by imposing far-reaching obligations on employers to prevent harm in the workplace.⁷³¹ Other provisions of the amended 2005 Law speak more directly to the Kingdom’s evolving commercial law regime. Sweeping structural changes have been introduced to the Kingdom’s capital market, investment and corporate takeover laws as part of a national strategy to attract external sources of finance and entice business to engage in commercial undertakings with Saudi partners.⁷³² Legislative reforms of this nature have generated intense concerns around their possible impacts on local economies, employees and stakeholders.⁷³³ To address these concerns, the new labour law establishes protections for employees of any company targeted for takeover or acquired via merger. In cases where the

⁷²⁷ *Labour Law* (2005) (Saudi Arabia) art 55.

⁷²⁸ *Ibid*, art 37

⁷²⁹ *Ibid*, art 22, 243.

⁷³⁰ *Ibid*, art 144.

⁷³¹ M Aldumky, *The New Saudi Labour Law in the Balance of the Doctrinal Analysis: A Detailed Description for the Rules of the Saudi Labour Law* (Dar Hafiz, 2006).

⁷³² Ayman Adham and Anita Hammer, *Embedding Saudi capitalism at the workplace* (Red Globe Press, 2020) 175–195.

⁷³³ For a parallel discussion see Meshal Alharbi, ‘Assessment of Applying Saudi Labour Law to Digital Platform Workers: Taking Uber as an Example’ (2022) 4 *Academic Journal of Interdisciplinary Studies* 273.

original business ceases to exist, the labour law establishes a compensation scheme for former employees.⁷³⁴ This provision allows for any rights or entitlements due to employees under a pre-existing employment agreement to be transferred to an acquiring company (and new employer).⁷³⁵

3. Non-Discrimination Provisions

Certain provisions of the amended labour law address, either explicitly or implicitly, the equal treatment and protection of Saudi workers under law. This prohibits any legal or other form of workplace discrimination of disadvantaged groups. A whole section of the amended legislation is dedicated to the rights of workers with disabilities. Any private business with more than 25 workers is required to “employ a number of disabled that represents at least 4% of the total number of his workers.” A further section is dedicated to the rights of minors.⁷³⁶ Under the applicable provisions, employers are prohibited from employing anyone under the age of 15. Certain restrictions are also imposed on employers regarding the kinds of work, or occupations, that persons under 18 may be hired for, in addition to statutory limits on maximum working hours.

Notably, a further chapter of the labour law is exclusively concerned with the rights of female workers. As part of a wider package of social security guarantees and entitlements, including end of service remuneration, sick pay and paid holiday leave, the new Law introduced special protective measures for women, including paid maternity⁷³⁷ and protection from dismissal for pregnancy related illnesses.⁷³⁸ Further enabling legislation would, for the first time, enable private enterprises to establishing position female employees without satisfying the Kingdom’s restrictive license requirements.⁷³⁹ In principle, these reforms bring Saudi Arabia’s domestic labour regime into greater compliance with the Kingdom’s international obligations under the ratified ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and Equal

⁷³⁴ Article 18 of the Saudi Labour Law establishes the mandatory principle that when ownership of an establishment is transferred or its legal form is changed by “merger, partition or otherwise”, the successor and the predecessor will be liable jointly and severally for meeting employees’ financial rights that existed before the legal transformation. *Labour Law* (2005) (Saudi Arabia) art 18.

⁷³⁵ Ibid. See also The Superior Commission for the Settlement of Labour Disputes affirmed this rule in judgment No. 1389/1/432 issued on 3 October 2011.

⁷³⁶ *Labour Law* (2005) (Saudi Arabia) art 28.

⁷³⁷ Ibid, art 153, 154.

⁷³⁸ Ibid, art 155, 156.

⁷³⁹ *New Measures for Female Workers* (2005) (Saudi Arabia) passed by Royal Decree No. 187 of 2005. See also Amani Hamdan, ‘Women and Education in Saudi Arabia: Challenges and Achievements’, (2005) 6(1) *International Education Journal* 44.

Remuneration Convention, 1951 (No. 100). Pursuant to Article 2 of the Discrimination Convention, the Saudi government is obliged to repeal or revise any laws or policies based on a “distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin” as well as to eliminate any measures that result in the “nullifying or impairing equality of opportunity or treatment in employment or occupation”.

Though beyond the scope of this thesis, it is worth noting that the Labour Law’s new gender equality provisions have come under criticism for reinforcing, rather than dismantling, entrenched cultures stereotypes regard the place and role of women in society.⁷⁴⁰ Women are, for instance, encouraged to seek work in the so called “caring” sectors. In this regard, Article 149 provides that: “Women shall work in all fields suitable to their nature.⁷⁴¹ It is prohibited to employ women in hazardous jobs or industries: women’s employment shall be prohibited or restricted under certain terms”⁷⁴² These aspects of the Saudi labour law framework appear to conflict with the Kingdom’s obligations under the ILO Discrimination Convention and CEDAW.⁷⁴³ For the purposes of this discussion, the discriminatory application or effects of the amended labour law bear particular significance in respects of the rights and status of domestic workers. Female workers make up the majority of domestic workers and are highly vulnerable to abuse, as supported by countless human rights reports and surveys of the migrant worker experience in Saudi Arabia.⁷⁴⁴ Yet, as discussed below, domestic workers, like many other low-wage workers are excluded from statutory coverage under the amended Labour law.

4. The Rights of Migrant (Non-Saudi) Workers under the Labour Law

⁷⁴⁰ Anne Mayer, ‘Cultural Particularism as a Bar to Women’s Rights: Reflections on the Middle Eastern Experience’, Peters and Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspectives*, (Routledge, 1995) 9.

⁷⁴¹ Elizabeth Broomhall, Women Split on Gulf Maternity Leave Policies, *Arabian Business* (Nov. 22, 2011), <http://www.arabianbusiness.com/women-split-on-gulf-maternnity-leavepolicies-431273.html>.

⁷⁴² *Labour Law* (2005) (Saudi Arabia) art 149. Article 150 provides that: “Women may not work during a period of night the duration of which is not less than eleven consecutive hours, except in cases determined pursuant to a decision by the Minister.” Ibid, art 150.

⁷⁴³ Elin Andersson and Linn Togelius, *Women oppressed in the name of culture and religion: Saudi Arabia and the Convention on the Elimination of All Forms of Discrimination Against Women* (Malmö University School of Global and Political Studies, 2010) 3; Kelly Le Benger, *Behind the veil: The state of women in Saudi Arabia* (Institute of Gulf Affairs, 2008) 13.

⁷⁴⁴ Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries’ (2012) 45(2) *Cornell International Law Journal* .461, 469-479.

While certain minorities within Saudi society continue to face discrimination, in law and in practice,⁷⁴⁵ the 2005 amended Law did nonetheless promote legal certainty through a number of law reforms that would include inter alia a newly improved dispute resolution procedure and the encouragement of early settlements between employer and employee, a wage protection scheme, and substantive rules on dismissals. The rights of Saudi workers were also substantially enhanced, relative to the vaguer provisions of the 1969 Law. Nonetheless, the absence of institutionalised legal mechanisms for preventing and eliminating the abuse of migrant workers exposed gaps in the amended employment legislation. In this legislative vacuum, migrant workers risked continual assaults on their fundamental and human rights without a clear path to accessing justice or statutory guarantees of a legal remedy.⁷⁴⁶ Indeed, though the 2005 reforms were crafted in consultation with local business communities, little input or discussion was elicited on how enhanced labour protections might also be extended to the vast number of foreign workers employed by Saudi businesses.⁷⁴⁷

Part 3 of the labour law (concerning the employment of non-Saudi workers) incorporates the rules applicable to employment agreements between a Saudi private establishment and a sponsored worker (and eligible for work under the applicable immigration controls of the Kafala system).⁷⁴⁸ The relevant provisions are almost entirely focused on the obligations that both employer and employee must fulfil as a condition of the employee's right to reside and work in the Kingdom. As with contracts formed between Saudi employers and employees, all employment agreements made between a Saudi private business and non-national must comply with certain formalities to be valid (they must be written in the Arab language and be drafted precisely).⁷⁴⁹ But foreign workers are, under the rules of the Kafala system, also expected to satisfy additional administrative hurdles and legal requirements before a private employment agreement will be considered lawful under the relevant public and regulatory sponsorship regime. Article 39 of the labour law states that a non-Saudi labourer will only be

⁷⁴⁵ The Saudi Shia community in the Eastern Province faces high levels of exclusion and discrimination. See Toby Craig Jones, *Desert Kingdom* (2010, Harvard University Press).

⁷⁴⁶ Robert MacKenzie and Chris Forde, 'Tof Rhetoric Of The 'Good Worker' Versus The Realities Of Employers' Use And The Experiences Of Migrant Workers' (2009) 23(1) *Work, Employment and Society* 142.

⁷⁴⁷ ILO, Individual Case (CAS) – Discussion on Saudi Arabia's Ratification of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (2013) Publication: 102nd ILC session (2013).

⁷⁴⁸ Labour Law (2005) (Saudi Arabia) art 32.

⁷⁴⁹ Pursuant to Islamic rules, only employment for the exchange of salaries paid in cash (rather than in kind, such as in shares, debentures etc) meet the requirements of valid employment contract. Article 50 of the Saudi Labour Law, which defines the work contract as "a contract concluded between an employer and a worker, whereby the latter undertakes to work under the management or supervision of the former for a wage". Labour Law (2005) (Saudi Arabia) art 50.

eligible to work in the Kingdom, and under guarantees of their sponsoring employer, if they have “followed the stipulated legal rules and procedures”.⁷⁵⁰ These stipulated rules are that an “employer may not permit a sponsored employee to carry out employment for another (non-sponsoring) employer.” Furthermore, Article 31 of the labour law consolidates the idea of the Kafala contract as an essentially private agreement, deracinated from state control, by stating that any persons “recruited from abroad on behalf of the employers shall be deemed workers of the employer and bound to him by direct contractual relation.”⁷⁵¹

Some of the protections granted to Saudi workers employed under a fixed contract also appear to have equal application foreign, temporary migrant workers processed under the Kafala system (in short, the legal regime applicable to all non-Saudi workers). Like Saudi nationals, foreign workers are, on paper, not required to work more than eight hours per day, or 48 hours per week (or 6 hours, or 36 hours respectively for Muslim workers during the holy month of Ramadan).⁷⁵² Certain exceptions apply, and minimum working hours may be increased to 9 working hours for certain categories of workers by ministerial approval. All workers are entitled to a rest period of 9 consecutive hours, though no provision mandates specific rest periods during the working day.⁷⁵³ All employers are also required to provide their workers with two full days of rest per week, one with full pay.⁷⁵⁴ In cases where job conditions necessitate “continuous work”, for instance for technical or operational purposes, rest periods may be consolidated after a work period of no more than 8 weeks with the agreement of the employer and employee and subject to the Ministry’s approval.⁷⁵⁵ Foreign workers are also granted a statutory right to annual leave for a total period of 21 days a year, for the first five years, and 30 days thereafter.⁷⁵⁶ All workers are entitled to an end of service gratuity of an amount equivalent to half a month’s wage for the first five years. Workers are also provided with equivalent protection to Saudi nationals in respect of statutory sick pay (which is also adjusted according to the number years that the worker has been employed).⁷⁵⁷ Special protections with general applicability have also been established for the purposes of protecting the wellbeing of workers, including a rule preventing workers from working outdoors during

⁷⁵⁰ Labour Law (2005) (Saudi Arabia) art 39.

⁷⁵¹ Ibid, art 31.

⁷⁵² Ibid, art 98.

⁷⁵³ Ibid, art 09.

⁷⁵⁴ Ibid, art 101, 102.

⁷⁵⁵ Ibid, art 103.

⁷⁵⁶ Ibid, art 109.

⁷⁵⁷ Ibid, art 117.

certain hours in the summer season (though the labour law lists certain exceptions for workers in the oil and gas sector). A right to claim overtime is also protected by the Saudi labour law. All workers regulated under the amended labour law are entitled to overtime at the statutory rate of 150 per cent of their basic hourly wage.⁷⁵⁸

A strict interpretation of the above provisions would suggest that the Saudi labour law is, for the most part, anchored in principles of fairness, equality and equivalent (non-discriminatory) treatment of workers, without distinction on grounds of nationality, except when justified on public policy grounds.⁷⁵⁹ On face value, the labour law does not distinguish between the claims of a foreign or national worker for alleged violations of statutory provisions. However, many aspects of the Kingdom's labour regime "but exclude domestic workers and institutionalize bias against women (and migrant workers generally)."⁷⁶⁰

5. The Unequal Protection of Migrant Workers in Law

Key differences in the treatment of domestic and certain categories of foreign workers begin to reveal themselves on closer review of the Kingdom's employment legislation. The first, is that certain categories of workers, including some of the most vulnerable among migrant workers, are excluded from coverage under the letter of the Labour Law.⁷⁶¹ As noted above, the rights of non-nationals are addressed in a single chapter. This strongly indicates that any statutory protections due to Saudi workers will not apply to non-nationals except where expressly indicated under applicable provisions of the relevant legislation.⁷⁶² In this connection, the labour law explicitly excludes domestic workers from equal protections provided to other workers (foreign and local).⁷⁶³ Therefore, excluded workers generally suffer from far weaker protections.

⁷⁵⁸ Ibid, art 107.

⁷⁵⁹ See representations of the Saudi government to the ILO Individual Case (CAS) Discussion ON Saudi Arabia's Ratification to the Forced Labour Convention, 1930 (No. 29) and Protocol of 2014 to the Forced Labour Convention, 1930 - Saudi Arabia (Ratification: 2021), 103rd ILC session (2014) .

⁷⁶⁰ Human Rights Watch, *Saudi Arabia: Steps Towards Migrant Workers Rights* <<https://www.hrw.org/news/2015/11/15/saudi-arabia-steps-toward-migrant-workers-rights>>.

⁷⁶¹ ILO Individual Case (CAS) Discussion ON Saudi Arabia's Ratification to the Forced Labour Convention, 1930 (No. 29); Protocol of 2014 to the Forced Labour Convention, 1930 (Saudi Arabia) (Ratification: 2021) , 103rd ILC session (2014).

⁷⁶² Ansary, *A Brief Overview of the Saudi Arabian Legal System*, <http://www.nyulawglobal.org/globalex/saudi_arabia.htm>.

⁷⁶³ Malte Luebker et al, *ILO Domestic Work Policy Brief No. 5: Coverage Of Domestic Workers By Key Working Conditions Laws* <http://www.ilo.org/wcmsp5/groups/public/--ed-protect/--protrav/--travail/documents/publication/wcms_157509.pdf>.

As evidence of the domestic worker's subjugation to rules that nakedly favour the rights of employers, several statutory protections and benefits are waived or relaxed in relation to these types of employment agreements. Under the applicable provisions of Saudi law, domestic workers may be required to work for a period of up to 15 hours of days (in place of the general 8-hour rule), without a statutorily mandated rest period.⁷⁶⁴ Whereas all other workers enjoy two days off per week, employers only obliged to grant domestic workers one rest day per week. Other discrepancies can be found in statutory rights to annual leave. Domestic workers are only entitled to 30 days of annual leave every two years (a significant shortfall in the minimum of 21 days annually stipulated under the general provisions of the Labour Law) and no right to overtime is explicitly safeguarded under any provision of Saudi law.⁷⁶⁵ Any benefits guaranteed by law to domestic workers in the form, of for instance, end of service remuneration are also diminished under the applicable Saudi laws. Domestic workers are only entitled to half a month's wage after four years of service (instead of annual increases corresponding to the duration of employment).⁷⁶⁶ The case of domestic workers offers a clear example of unequal or dissimilar treatment of workers that is not just simply tolerated or silently overlooked, but rather one which is explicitly mandated by law. Beyond the express provisions of the Labour law, there are other, rules, which though neutral on face value, have been applied in such a manner as to disguise their discriminatory effects.

Saudi Arabia has yet to establish an official minimum wage for private sector workers.⁷⁶⁷ This legislative omission also extends to the absence of any minimum wage protections for domestic workers. On the other hand, Public sector workers (a sector that is exclusively open to Saudi nationals) are entitled a minimum of 3000 riyals a month, without distinction on grounds of gender.⁷⁶⁸ The neutral application of this requirement, to all public sector workers at least, marks a further attempt by Saudi authorities to bring their own employment laws and practices

⁷⁶⁴ Saudi Arabia Government, *Ministerial Order amending the Labour Law Implementing Regulations* <<https://mlsd.gov.sa/sites/default/files/178743.pdf>>; Saudi Arabian Council of Ministers Decision No. 166 of 12/7/1421 AH Regulating Relations between Migrant Workers and Their Employers, Supreme Economic Council.

⁷⁶⁵ Ibid

⁷⁶⁶ Ibid. see also ILO Explanatory Note, *Regulatory Framework Governing Migrant Workers In Saudi Arabia Updated* <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms_728262.pdf>.

⁷⁶⁷ There have been proposals to establish a minimum wage for domestic workers, but these do not appear to have been implemented yet.

⁷⁶⁸ The Economist, 'Government set to raise minimum wage for Saudi employees' <<http://country.eiu.com>> . See also International Monetary Fund, 'Saudi Arabia: Selected Issues: The Economic Impact of Policies to Boost the Employment of Saudi Nationals' 264 IMF Staff Country Reports (IMF Working Papers, 2018).

with international standards and obligations. For instance, under the Equal Remuneration Convention, 1951 (No. 100), Saudi authorities are obliged to take all steps necessary to ensure “equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.”⁷⁶⁹ The existing frameworks fails to adjust for the gender pay gap that results from women being encouraged, and in some cases required to take up work, in the lower paying “care” sectors.⁷⁷⁰ Furthermore, the legislation does not account for social or institutional barriers that prevent religious minorities and other disadvantaged groups from accessing high paying public sector jobs. As a result, this meets the ILO definition of discrimination of national rules or measures that nullify and impair “equality of opportunity or treatment in employment or occupation”.⁷⁷¹

The absence of a minimum wage rule for the private sector is also neutral and non-discriminatory on face value. This is because no law explicitly provides for, or permits, wage inequality between Saudi and non-Saudi workers. Going beneath what appears to be a formally neutral policy to minimum wage, it becomes clear that many aspects of Saudi Arabia’s labour policy have been structured to provide Saudi nationals with an advantage. One example of the discriminatory application of wage protections can be seen in the Kingdom’s centrepiece Saudization and employment nationalisation (Niquaat) programme. Under this statutorily enforced labour nationalisation scheme, all private employers are required to recruit and retain a minimum number of Saudi workers. Employers that exceed statutory thresholds are eligible for certain tax and other financial benefits. Conversely, private sector establishments that do not meet national quota thresholds will be penalised with an administrative fine. A de facto minimum wage for Saudi national law is, in this way, indirectly enforced by law under the scheme, since only those workers that receive a wage of no less than 4,000 riyals (approx.\$1,060) a month will qualify as a “Saudi worker” for Saudization purposes. No equivalent provision exists for foreign workers.⁷⁷² This constitutes a disguised discriminatory application of rules relating to minimum wage. It should also be noted that the Council of Ministers reserves the right to establish a minimum wage in general or for certain sectors, upon

⁷⁶⁹ *Equal Remuneration Convention*, 1951 (No. 100). Art 1 (b)

⁷⁷⁰ Committee on the Elimination of Discrimination Against Women, Concluding Comments on Saudi Arabia, 40th Sess., Jan. 14-Feb. 1, 2008, U.N. Doc. CEDAW/C/ SAU/CO/2 (Apr. 8, 2008).

⁷⁷¹ *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), Art 1(b) (ratified by Saudi Arabia in 1978).

⁷⁷² ILO Explanatory Note, *Regulatory Framework Governing Migrant Workers In Saudi Arabia* <<https://www.ilo.org>>.

recommendation of the Minister of Labour/ Saudi authorities. Revealing, this ministry has not yet exercised this power.⁷⁷³

The absence of a statutory minimum wage is less likely to affect the rights and interests of in-demand “white collars” workers in the professional sectors.⁷⁷⁴ Saudi employers looking to attract talent from abroad have strong market incentives to offer competitive salaries and benefits to these categories of workers. The same does not hold for sectors for which there is an over-supply of potential candidates, including domestic workers in Saudi Arabia who have among the lowest pay in the whole of the GCC region.⁷⁷⁵ Given that there is no regulatory floor for the payment of basic wages, employers are free to exploit their dominant bargaining power against these vulnerable workers. This is of course, only in the event that there arent any controlling role or intervention by national authorities in Saudi Arabia, or indeed their home countries.⁷⁷⁶ As one scholar notes, the Kafala system has entrenched a system of sourcing cheap labour from the developing world ‘precisely because the countries are less likely to impose tougher hiring conditions on Saudi Arabia's recruitment efforts, such as signing a standard contract providing for a minimum wage, mandated time off and other protections.’⁷⁷⁷

Any legal protections that do exists for migrant workers are only as effective as the means of enforcing them. In this regard, a more general indictment of the Kingdom’s labour reforms is “gap” between the statutory recognition of labour rights under the Kingdom’s national employment legislation and the weak implementation and enforcement of migrant worker protections in practice. This “gap” is many ways symptomatic of the excessive power granted to employers to restrict the basic freedoms of sponsored workers, both in respect of the public and regulatory dimensions of Kafala sponsorship rules, and at the level of employment contract

⁷⁷³ Implementing Regulations, which came into effect in April 2016 (Ministerial Decree No. 1982)

⁷⁷⁴ Anita Hammer and Ayman Adham, ‘Mobility Power, State and the ‘Sponsored Labour Regime’ in Saudi Capitalism’ (2022) *Journal of Work, Employment and Society*.

⁷⁷⁵ Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries’ (2012) 45(2) *Cornell International Law Journal* 461, 474. The only concession granted to domestic workers, for instance, is the right to free housing accommodation, a cost that is born by their employer. See Human Rights Watch, *Saudi Arabia: Shura Council Passes Domestic Worker Protections* <<http://www.hrw.org/news/2009/07/10/saudi-arabia-shura-council-passes-domestic-worker-protections>>.

⁷⁷⁶ Anita Hammer and Ayman Adham, ‘Mobility Power, State and the ‘Sponsored Labour Regime’ in Saudi Capitalism’ (2022) *Journal of Work, Employment and Society*.

⁷⁷⁷ Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries’ (2012) 45(2) *Cornell International Law Journal* 461, 464; Joanna Howe et al, ‘Slicing and Dicing Work in the Australian Horticulture Industry’ (2020) *Federal Law Review* 247.

regulation under the applicable provisions of Kingdom’s employment legislation. As discussed in previous chapters, human rights bodies have reported that Saudi “employers regularly and illegally confiscate passports” and “withhold wages” as “security” against poor employee performance or early termination of a work agreement by a disgruntled employee.⁷⁷⁸ These types of abusive practices have been illegal since 2000, with the adoption of a Council of Ministers Decision.⁷⁷⁹

The 2000 “Regulating Relations between Migrant Workers and Their Employers” Resolution formally prohibits employers from withholding or confiscating the passport of any migrant workers employed by them. Any employers found in violation of these rules may be required to pay a fine of up to 5,000 riyals (US\$1,300). Under the same ministerial resolution of 2000, employers must bear the costs of any recruitment or other fees charged to migrant workers, with the notable exception of the special (and vulnerable) category of domestic workers, a sector overwhelming composed of women from the developing world.⁷⁸⁰ Charging domestic workers recruitment, residence permit or work permit fees is not explicitly prohibited by Saudi law, although employers are prohibited from deducting such fees from a domestic worker’s net wages.⁷⁸¹ However, the mechanisms used to monitor or investigate delinquent employers are far from ideal,⁷⁸² even if labour protections has been extended to foreign workers, some even generous by comparison to the fundamental *social rights* regulating industrial relations under other national labour frameworks (in respect of sickness pay etc).

These enforcement failures and other limitations of the Kingdom’s regulatory regime on migrant workers will now be mapped and critically assessed in the following sections.

⁷⁷⁸ Americans for Democracy Against Bahrain, *Submission to the Committee on the Elimination of Racial Discrimination: Concerning Abuses Perpetrated by Saudi Arabia against Migrant Laborers* (Americans for Democracy Against Bahrain, 2019). See also Migrant Rights, *Understanding Kafala: An Archaic Law at Cross Purposes with Modern Development* <<https://www.migrant-rights.org/2015/03/understanding-kafala-an-archaic-law-at-cross-purposes-with-modern-development/>>.

⁷⁷⁹ *Council of Ministers Decision No. 166/1421* (Saudi Arabia).

⁷⁸⁰ Sanja Kelly and Julia Breslin, *Women's Rights In The Middle East And North Africa: Progress Amid Resistance* (Freedom House, 2010) 74.

⁷⁸¹ *Ministerial Decision No. 310 of 1434 H, 2013* (Saudi Arabia).

⁷⁸² On the twilight of the welfare state and trend towards deregulation of the employment relation as the primary means in which the state can supervise the allocation of rights and obligation between both parties, see R Kuttner, “Labor market regulation and the global economic crisis”, in V W Stone and Harry Arthurs, *Rethinking workplace regulation: Beyond the standard contract of employment* (Cambridge University Press, 2013).

D Labour Law Reforms and the Labour Law Enforcement Gap

Saudi leadership has long refuted claims that the Kafala system subjugates migrant workers, by restricting their freedom of movement and dignity, in both direct and indirect ways. When employers are not subject to strong oversight, employers are empowered to take actions that are otherwise unlawful, but which expose the migrant worker (and not the employer) to severe legal and financial ramifications. For example, any change to the migrant's visa status risks a penalty of deportation, denial of medical treatment or imprisonment.⁷⁸³ In a 2016 report to the UN Committee to Elimination of Racial Discrimination, the Saudi government issued the following defence of the equivalent protections granted to migrant workers under its national employment laws and statutory framework.

[A]ny waiver or compromise in respect of a worker's rights arising pursuant to the [Labour] Act during the lifetime of the contract of employment shall be null and void unless more favourable to the worker. The Act gives a worker the right to leave his employment without informing the employer, while retaining his statutory rights in full even if the employer does not agree. This applies in the following cases: if the employer, a member of his family or the line manager commits a violent assault against or behaves indecently toward the worker or a member of his family; if the employer or line manager bullies the worker or treats him in a cruel or humiliating way; or if the employer or his representative, by his actions, drives the worker to leave, particularly if such actions constitute bullying or treatment that breaches the terms of the contract.⁷⁸⁴

On one side, there is considerable evidence to contradict the Saudi government's rebuttal to allegation concerning the inherently discriminatory aspects of the Kafala system. On the other,

⁷⁸³ Human Rights Watch, 'Bad Dreams': Exploitation and Abuse of Migrant Workers in Saudi Arabia' <<https://www.hrw.org/report/2004/07/13/bad-dreams/exploitation-and-abuse-migrant-workers-saudi-arabia>>.

⁷⁸⁴ Saudi Arabia, Consideration of reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: 4th to 9th periodic reports of States parties due in 2006: Saudi Arabia" (United Nations Digital Library, 2016), 21. See also Labour Law (2005) (Saudi Arabia) art. 20 which states: "An employer or a worker may not perform any act that may abuse the provisions of this Law or the decisions or regulations issued for its implementation. Neither of them may undertake any act that infringes upon the freedom of the other or the freedom of other workers or employers to realize any interest or impose a point of view that conflicts with the freedom of work or the jurisdiction of the competent authority in charge of settlement of disputes."

are the ineffectual enforcement of the Kingdom's employment laws. The US State Department has produced several country reports detailing the many areas in which Saudi Arabia lags behind other jurisdictions in respect of the effective enforcement of legal protections of migrant workers.⁷⁸⁵ In many of these reports, it found that police and enforcement authorities were slow, or unwilling to investigate, allegations of forced labour and trafficking, or systemic financial exploitation of migrant workers.⁷⁸⁶ It has also been reported that limited resources have been put in place for the investigation and eventual prosecution of employers found to have physically and sexually abused their employers.⁷⁸⁷

Partly in response to international criticism of the chasm between the rhetoric of rights protection and the enforcement gap, the Saudi leadership ratcheted up its law reform efforts. These efforts begin with several minor (or cosmetic) amendments to its labour law over the years of 2015 and 2019.⁷⁸⁸ Among the reforms made, the wording of Article 2 was amended for the purpose of clarifying its equal application to men and women. This largely symbolic gesture marks a further attempt by the Saudi leadership to persuade the international community of its serious commitment to gender rights reform. Gender equality in the workplace has also been strengthened following amendments to Articles 155 and 156. Under the amended provisions, female employee cannot be dismissed, or their employment terminated, if they apply for sick leave during pregnancy or statutory maternity leave, providing a health certificate has been obtained by an accredited doctor. The most significant change from the standpoint of migrant rights protections is a slight increase in the financial penalties that can be imposed on employers for violations of labour laws. Employers found to have breached the applicable rules prohibiting passport confiscation or withholding of wages are not liable to pay steeper fines.⁷⁸⁹ Viewed in the context of wider legal reforms, introduction of stricter penalties for abusive employers appears to build on the legislative conclusions of the

⁷⁸⁵ United States Department of State, 'Saudi Arabia 2016 Human Rights Report' (United States Department of State, 2019).

⁷⁸⁶ Mizanur Rahman, *Does labour migration bring about economic advantage? A case of Bangladesh migrants in Saudi Arabia*. (Institute of South Asian Studies, 2011); Office of the United Nations High Commissioner for Human Rights, 'Special Rapporteur on the human rights of migrants; and the Special Rapporteur on Trafficking In Persons, Especially Women And Children' (OHCHR, 2021).

⁷⁸⁷ Mary Briggs, 'Women Migrant Domestic Workers in the Arab States (International Labour Organization January 2014).

⁷⁸⁸ *Royal Decree No. M/46 of 05/05/1436H (2015)(Saudi Arabia), Ministerial Resolution No. 51848/1442 (Saudi Arabia).*

⁷⁸⁹ Increased in the 2019 ministerial order amending the Labour Law Implementing Regulations.

Anti-Harassment Law, an instrument that passed only a year prior. The key features of this law and implementing legislation, and its consequences for migrant workers, will now be outlined.

1. The Anti-Harassment Law

Enacted in 2018, the Anti-Harassment Law constitutes the first piece of legislation passed by Saudi lawmakers to regulate and proscribe spectrum of anti-social behaviours, in and out of the workplace.⁷⁹⁰

Guided by the aim of protecting individual freedoms, privacy and dignity, the law sets out rules and procedures for combatting “behavioural” abuses between private individuals, entities and corporations.⁷⁹¹ The meaning of “abuse” is defined expansively to include physical, sexual, emotional, verbal or cyber abuse, intimidation and harassment. Equally broad in its scope, the law sets out procedures and practices that should be followed to prevent such abuses in (and out of the) workplace.⁷⁹² A further resolution was passed, this time setting out specific measures and procedures aimed at protecting employees from workplace harassment and abuse.⁷⁹³ Under the new rules, employers are now obligated to establish procedures that include three features. Firstly, a transparent process for filing confidential complaints against colleagues or company managers. Secondly, the institutionalisation of disciplinary committees with powers to investigate complaints and sanction abusive conduct. Thirdly, the implementation of company harassment prevention and awareness policies and a system for referring serious cases of abuse to national law enforcement authorities once internal procedures have been exhausted, or in cases of criminal conduct.⁷⁹⁴ Employers who fail to comply with these measures may be sanctioned by national authorities. For example, failure to implement the mandated disciplinary committee procedure is punishable by an administrative fine of up to SAR 15,000. Failure to refer an accused person for investigation, or impose

⁷⁹⁰ Ministerial Resolution No 488 (2018)(Saudi Arabia).

⁷⁹¹ Ibid, art 2

⁷⁹² Ibid, art 5.

⁷⁹³ Ibid, *Anti Harassment Law* (Saudi Arabia) Art 5. See also Implementing Ministerial Resolution No. 20912 (on Employer Anti-Harassment Investigation and Disciplinary Procedure)(Saudi Arabia).

⁷⁹⁴ *Anti Harassment Law* (Saudi Arabia).

appropriate disciplinary sanctions is punishable by a fine of up to SAR 25,000 for reported violation.⁷⁹⁵

If the reports of numerous human rights bodies are to be taken seriously, one of the most glaring deficiencies of the 2005 labour law reforms was the impotency of its enforcement mechanisms. On this issue alone, the 2018 Anti-Harassment Law and implementing resolution goes much further than previous laws in the Kingdom's anti-abuse provisions with "teeth". Yet, to the extent that the Saudi government now seemed prepared to take a more strident position on workplace protections, it is striking that so few of the measures prescribed under the Anti-Harassment law would be formally incorporated in the next round of revisions to the labour law in 2019. Both pieces of legislation should, of course, be read in conjunction with the other, and the protective measures set out in the 2018 Anti-harassment law used to supplement the interpretation and application of labour law amendments.⁷⁹⁶ It remains the case, that any references to employer abuses in the 2019 reforms appear rather insubstantial given the bold scope and purposes of the Anti-Harassment laws. The only recognition given to the "enforcement gap" in the existing regulation of industrial relations under the 2019 reforms is a modest increase in the fines chargeable for employer violations of existing rules (on passport confiscation etc).⁷⁹⁷ To the extent that labour reforms do not explicitly acknowledge or address other structural forms of discrimination and exploitation amounting to abusive behaviour, there is reason to doubt the Saudi government's avowed commitment to safeguarding the equal or equivalent treatment of migrant workers towards eliminating institutionalised biases and selective enforcement of the applicable (employment) law.⁷⁹⁸

There is also a deeper problem with the Anti-Harassment Law. The Anti-Harassment Law should be credited for its attempt to establish a means and process for raising, investigating and sanctioning provable allegations of employee mistreatment and abuse. However, in common with the rather meagre provisions of the 2019 labour law reforms on the same issue, both pieces of legislation are deficient. Neither piece of legislation acknowledged, much less addressed,

⁷⁹⁵ Implementing Ministerial Resolution No. 20912 (on Employer Anti-Harassment Investigation and Disciplinary Procedure)(Saudi Arabia).

⁷⁹⁶ For an overview of the limitations of the Anti-Harassment Law see Mohammed Aljeday Alsubaie, 'Review of the Saudi Anti-Sexual Harassment Law' (2020) 14 *Law and the World* 21.

⁷⁹⁷ Increased in the 2019 ministerial order amending the Labour Law Implementing Regulations.

⁷⁹⁸ Amnesty International, *Saudi Arabia: Dozens of Sri Lankan women wrongfully detained for months due to abusive kafala system* (Amnesty Press Release, April 15, 2021) <<https://www.amnesty.org/en/latest/press-release/2021/04/saudi-arabia-dozens-of-sri-lankan-women-wrongfully-detained-for-months-due-to-abusive-kafala-system>>.

the way in which employer domination was in effect “written into” the Kafala’s system and its regulation of visa sponsorship rules and conditions.

The 2018 implementing resolution (on harassment in the workplace) focuses on isolated cases of abuse by individuals within a given workplace, rather on exploitative practice of the company as the employer. Similarly, the 2019 labour law amendments do not establish a formal mechanism for investigating complaints for migrant workers employed under the Kafala rules on sponsorship. While fines can be imposed for certain abuses that were already prescribed by law (rather than for other forms of harassment not covered by the Labour law), there is no evidence to suggest that these act as an effective deterrent in what has been described by many as a legally permitted culture of worker exploitation.

Herein lies the more fundamental problem identified by this chapter’s analysis of the Kingdom’s “black letter” labour reforms. Migrant workers have benefited from various round of labour related legislative reforms, each round imbuing these workers with additional (though discrete) employment rights and in-work benefits. However, it is arguable that the discrete nature of these reforms, absent more comprehensive reform, only skirted around the deeper dysfunctions of the Kafala sponsorship system and the role of law (and court justice) has played in restricting the fundamental rights of migrant workers.⁷⁹⁹

2. Gaps in Migrant Worker Protections under the Kafala System

For many migrants, the Kafala system, prior to the most recent reforms, was abusive because they denied them the basic right to end their contractual work.⁸⁰⁰ For example, Human Rights Watch has reported that Indian workers have voiced grievances regarding the process under which contracts are signed. For most workers from India, contracts are not signed with a private employer but with local third-party recruitment agencies.⁸⁰¹ These contracts are, at first, drafted to comply with the Labour Law’s formality and substantive (Sharia) requirements, but without the involvement of the company for which they are later employed. The anonymity of the employer, and profit seeking mentality of recruitment agencies, contributes to the employee’s

⁷⁹⁹ K Mellahi, ‘The Effect of Regulations on HRM’ (2007) 18(1) *The International Journal of Human Resource Management* 85, 88.

⁸⁰⁰ United States Department of State, *Saudi Arabia 2016 Human Rights Report* (United States Department of State, 2016) 50, 51.

⁸⁰¹ “‘Bad Dreams’: Exploitation and Abuse of Migrant Workers in Saudi Arabia,” last modified July 13, 2004, https://www.hrw.org/report/2004/07/13/bad-dreams/exploitation-and-abuse-migrant-workers-saudi-arabia_

feeling of powerlessness during the employment bargaining process. These inequalities are also present during the state-governed process of approving work and residency rights which are mainly handled by third party recruitment agencies.

The impression that employment arrangements are negotiated in the shadow of state oversight is further intensified because Saudi employers would then confiscate the original employment contracts upon the worker's arrival in the country,⁸⁰² and replace these with new contracts now drafted in Arabic. Practices such as these have deprived migrant workers of opportunities to read, understand and, crucially, challenge or contest the revised terms of their employment.⁸⁰³ From there on in, the Kafala system, pursuant to Article 31 (mandating employer consent) of the (new amended) Labour Law, takes on the features of a deregulated labour regime. The role of state institutions in regulation of industrial relations is self-limited. As a result, the purpose of labour market regulation is simply to establish a procedural framework under which company employment policies can be coordinated at the state level, while allowing companies the freedom to set and implement their own employment terms and policies in the weakest shadow of state oversight.⁸⁰⁴ In short, this governance mode keeps legal intervention minimal in agreements made between employers and individual employees.

The above preference for an arm's length approach to employment contract (and company) regulation is exemplified by the resolution implementing the Anti-Harassment Law.⁸⁰⁵ Any allegations of abuse are to be investigated not by state appointed (independent) regulatory authorities. These are instead to be entirely managed, reviewed and sanctioned under corporate self-regulation procedures.⁸⁰⁶ Thus, even where employer actions do constitute a violation of the Kingdom's law (including Sharia provisions on the good faith enforcement of contractual terms), the law requires that such "abuses" be first handled by internal disciplinary committees under its own privately set rules of conduct and procedure. Employers are only required to forward complaints which meet the high threshold of a criminal offence. This model will only

⁸⁰² Human Rights Watch, *Bad Dreams': Exploitation and Abuse of Migrant Workers in Saudi Arabia* <<https://www.hrw.org/report/2004/07/13/bad-dreams/exploitation-and-abuse-migrant-workers-saudi-arabia>>.

⁸⁰³ Ibid; Michele Gamburd, 'Sri Lankan Migration to the Gulf: Female Breadwinners' in *Domestic Workers'* (Middle East Institute, 2010), 13.

⁸⁰⁴ Mellahi, 'The Effect of Regulations on HRM' (2007) 18(1) *The International Journal of Human Resource Management* 85, 89.

⁸⁰⁵ Marion Crain, "Arm's-Length Intimacy: Employment As Relationship" (2011) 35 *Washington University Journal of Law and Policy* 9.

⁸⁰⁶ Richard Fischl, 'Self, Others, and Section 7' (1989) 89 *Columbia Law Review* 789, 864. (discussing the influence of a contractual understanding of employment as one essentially between two private individuals dealing with each other from "arm's length").

improve on the presumed inefficiencies of formal state regulation if the company has the resources and commitment to establish independent disciplinary procedures to hold even the company's most senior officials and board members to account. Most companies in Saudi Arabia are run as family businesses, running the risk that internal procedures instituted in these companies will be tainted by bias and partiality.⁸⁰⁷ In recognition of the fact that migrant employees might have good reasons not to pursue a complaint, including the possibility of future work-based persecution or retaliation that might result in the termination of their work permits, the Saudi government has set up a direct helpline for migrant workers. But this measure, too, seems to barely scratch the surface of the migration exploitation problem. There is a historic diffidence with which Saudi authorities have responded to sector-wide claims of migrant worker abuse and unfair treatment.

These above shortcomings should draw the reader's attention to back to central matter of why the Kafala system was so problematic to begin with. By restricting the ability of workers end the contract with their employer's consent - a stipulative condition of the continued validity of the residence and work permits – sponsors were able to “misuse migrants’ residency permits as leverage to financially exploit workers”.⁸⁰⁸ Human Rights bodies have reported evidence of cases where the original sponsor will release employees from an employee agreement if they pay a sum of money.⁸⁰⁹ These, like many other abuses are nominally prohibited by the Labour Law. However, such laws have little practical impact if these practices are not adequately policed or effectively sanctioned.⁸¹⁰ Domestic workers employed by households, moreover, may have no remedy at all under the mandated statutory “anti-harassment” measures and procedures.

The Kingdom's labour law compliance and control regime has been showed to be deficient in several ways. But there are areas in which Saudi Arabia has imposed stricter statutory duties and controls on local employers. Viewed in this light, the next section notes that Saudi Arabia

⁸⁰⁷ Ayman Adham and Anita Hammer, ‘Understanding Arab Capitalisms’ (2021) 32(21) *International Journal of Human Resource Management* 4578.

⁸⁰⁸ Americans for Democracy Against Bahrain, *Submission to the Committee on the Elimination of Racial Discrimination: Concerning Abuses Perpetrated by Saudi Arabia against Migrant Laborers* (ADHRB, 2016).

⁸⁰⁹ Ibid. See also Melani Cammett and Marsha Posusney, ‘Labor Standards and Labor Market Flexibility in the Middle East: Free Trade and Freer Unions?’ (2010) 45 *Studies in Comparative International Development*. 250, 260.

⁸¹⁰ For a perspective critical of the impact of self-disciplining corporate governance controls see Melani Cammett and Marsha Posusney, ‘Labor Standards and Labor Market Flexibility in the Middle East: Free Trade and Freer Unions?’ (2010) 45 *Studies in Comparative International Development*. 250, 260; Mizanur Rahman, ‘Beyond Labour Migration’ (2018) 33(1) *International Sociology* 86.

has made most progress in respect of elements of migrant worker rights protection (and enforcement) with a firm basis in Islamic law and jurisprudence.

3. Embedding Employment Rights in General Principles of Law: The Case of Wage Protection

Turning away from Saudi Arabia's statutory framework, the principle of wage security finds its basis in the traditional (religious) law of the Kingdom.⁸¹¹

The timely payment of wages is a principle find extensive scriptural support in the *Quran and Sunnah*. Indeed, Prophet Mohammed is narrated, in an authenticated Hadith (prophetic sayings) to have urged his followers to: "Give the employee his/her wages before the sweat is dry on him". Another Hadith offers a more explicit prescription still, and proffers that: "The rich, despite his riches, cannot delay of payment to the worker, for it is a crime".⁸¹² These narrations help illuminate, once more, the intricacies of labour regulation in Saudi Arabia. One of the few statutory protections that appear to have been robustly enforced by Saudi labour authorities and courts is the timely payment of wages. Article 39(2) which states that "an employer may not allow a worker to work for his own account and a worker may not work for his own account". This vaguely worded provision has been judicially construed as imposing an obligation on employers to honour the wage payment terms of their employment contract, in accordance with Article 90 of the amended Labour Law.

The uneven and convoluted development of the Kingdom's domestic labour law regime is in many ways tied to the constitutional foundations of the Saudi legal system. To the extent that Sharia precepts such as sanctity of contract and wage security are constitutive of Saudi Arabia's contract law, and therefore deeply interwoven with Kingdom's traditional law and customs, it should not be surprising that the labour law would seek to codify and give effect to these principles.⁸¹³ In a further instantiation of how Islamic customs have shaped the limits and

⁸¹¹ This is the highest law of the law, in effect the constitutional law of the Kingdom,

⁸¹² Al-B Bukhari, *Hadiths* (Translated by Dr. Muhammad Muhsin Khan (Darussalam Publishers, 1997).

⁸¹³ Hassan Hussein, 'Contracts in Islamic Law: The Principles of Commutative Justice and Liberality' (2002) 13(3) *Journal of Islamic Studies* 257, 257-297; Lawrence Rosen, *The Anthropology Of Justice: Law As Culture In Islamic Society* (Cambridge University Press, 1989) 17.

boundaries of Saudi law and legislation, the fair and timely payment of employee wages would emerge as a focal point of several legislative initiatives in the Kingdom. In 2013 in the most significant development of its kind, the Ministry of Human Resources and Social Development launched a new Wages Protection System by Ministerial Decision no. 803, thus building on the previous Royal decree no. 5574 “concerning the payment of workers’ salaries in the private sector”. The Wage Protection Program establishes an electronic wage monitoring systems with two main purposes. First, is the creation of a unitary system of employer payment procedures and methods. Second, is ensuring the timely settlement of wages in accordance with the value agreed by the employee and employer.⁸¹⁴

Under the Wage Protection System, all private sector employers are required to disclose information relating to their employees, namely: the employee’s personal details and identity number, basic salary and any new wage payments deposited to the employee’s bank account, any benefits to which the employee is entitled including health care and housing allowance, any amounts deducted, as well as the date and status of any outstanding payments.⁸¹⁵ Though ostensibly a system for monitoring wage payment procedures, the broader objective of this these procedural reforms is to promote higher levels of contractual compliance (in respect of any payment obligations) through the use of “a database with updated information on wage payments to employees in the private sector”.⁸¹⁶ By submitting private employers to stricter disclosure requirements, the scheme intends to “support transparency of the private sector workers’ salary information and provide a reference source documenting the rights of the employment parties.”⁸¹⁷ Further supplementing the introduction of tighter auditing and inspection rules under the amended 2005 and 2019 labour law reforms, the Wage Protection program also enables Saudi authorities to track any discrepancies between financial statements submitted to the General Organisation of Social Insurance, including information relating to the income of salaried employees (for social insurance purposes), and data registered under the Wage Protection Scheme.⁸¹⁸ Employers will be held strictly liable and subject to monetary penalties if they are found to have misrepresented their payment obligations or submitted false

⁸¹⁴ Wage Protection System (WPS) 21/3/1434H (Saudi Arabia); based on Ministerial Decision no. 803, dated 12/2/1434H (Saudi Arabia), that builds on the Decision of the Council of Ministers no. 361, 3/12/1429H (Saudi Arabia); and the Royal Decree no. 5574, 17/8/1432H (Saudi Arabia). See also The Ministry of Human Resources and Social Development, *Initiatives* <<https://mlsd.gov.sa/ar/initiatives>>.

⁸¹⁵ *Ministerial Decision no. 803* (Saudi Arabia).

⁸¹⁶ ILO, Information Note: *Details of the Wage Protection System in KSA* <<https://www.ilo.org>>.

⁸¹⁷ *Ibid.*

⁸¹⁸ Meshal Alharbi, ‘Protecting Employees’ Wages in Accordance with Saudi Labour Law: Should We Do More?’ (2021) 12(2) *Beijing Law Review* 320.

or erroneous information to the relevant authorities. This is all to show that wage protection remains the one area in which Saudi law is most closely reconciled with constitutionally protected labour safeguards and the emerging norms of international law.

Saudi Arabia, already a signatory of the ILO Equal Remuneration Convention, 1951 (No. 100), has taken steps, perhaps under increased international pressure, to safeguard the wage rights of migrant workers. This has left many leaving the country in ever growing number due to persistent objections to the Kingdom's poorly enforced labour laws.⁸¹⁹ In a further vindication of the Kingdom's renewed commitment to labour rights protection and the regular payment of direct wages to employees, the Saudi government deposited the instruments of ratification to ILO's Protection of Wages Convention, 1949 (No. 95) in 2020.⁸²⁰ The Saudi government also ratified the ILO Hygiene (Commerce and Offices) Convention, 1964 (No. 120) in the same year. By ratification of these instruments, the Kingdom has committed itself to implementing minimal international standards on health and safety, including by imposing a duty on employers to maintain sanitary facilities and administer basic first aid. Each of the ILO conventions are widely ratified, with the former now receiving its 99th ratification, and the latter its 52nd. Both instruments have been championed for their role in establishing crucial safeguards for ensuring fair, stable, and secure working conditions. The Wage Convention establishes rules that protect worker rights to remuneration and any benefits by contract; the freedom of employees to dispose of their wages without restriction or deduction without justification as well as compensation benefits due to the worker because of company insolvency (or takeover).⁸²¹

As noted earlier, the Saudi government has already enacted measures aimed at safeguarding and implementing several of these protections, including the introduction of new rules governing wage claims following employer insolvency or takeover.⁸²² It is not insignificant that the Kingdom would choose to ratify the ILO Wages Convention in 2020, during the peak of Covid Pandemic, amidst widespread reports of a mass exodus of foreign workers, many

⁸¹⁹ Amnesty International, *COVID-19 Makes Gulf Countries' Abuse of Migrant Workers Impossible to Ignore*, <<https://www.amnesty.org>>.

⁸²⁰ International Labour Organisation, *Saudi Arabia Ratifies ILO Conventions Setting Out Safeguards with Crucial Importance for the Response to COVID-19*, <<https://www.ilo.org/global/standards/>>.

⁸²¹ Minimum Wage Fixing Convention, 1970 (No. 131); Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries (Entry into force: 29 Apr 1972) arts 2, 6 8, 9 and 11.

⁸²² *Labour Law* (Saudi Arabia) art 18, 19.

claiming to have not received due wages over consecutive months.⁸²³ In this way, the Kingdom's ratification of the Wages Conventions represented an important step in the safeguarding migrant workers' right to subsistence in periods of acute economic security. Even if there was an absence of a regulated minimum wage for private sector workers (and especially domestic workers) under the existing provisions of Saudi Labour Law. On this issue, the Saudi Ambassador Abdulaziz M.O. Alwasil confidently asserted that Kingdom's further engagement with the ILO framework was a milestone in "Saudi Arabia's efforts and commitment to develop and protect the labour environment to reach the highest international standards."⁸²⁴

4. The Kingdom's Wage Protection Regime: A Step in the Right Direction or Labour Governance without "Teeth"?

Against this policy backdrop, the Kingdom's Wage Protection Program was further amended in 2020. First piloted as a scheme for monitoring rates of salary and wage (contract) compliance in larger Saudi companies with the resources to provide the necessary financial information, the Wage Protection program was gradually extended to all private sector companies, regardless of their size.⁸²⁵ Although wage disclosure requirement rules are effectively mandatory by act of Ministerial decree, a new scheme has also been introduced under the Wage Protection scheme. Within this new scheme, all payments that fall due are paid through the same (and unitary) electronic payments transfer system. In its combined effect, the wage payment protection scheme aims to promote higher levels of company compliance (with labour laws and other legislative instruments) towards stabilising market expectations and fostering a more business and investment friendly climate. An information note accompanying the 2020 rollout of the update payment protection scheme states that the:

[The Wage Protection Scheme] contributes to improving the investment environment in Saudi Arabia, and the work environment in specific, and is part of the National Transformation Program's initiatives related to raising labour market accessibility and attractiveness.....and allows the monitoring of salary

⁸²³ Amnesty International, *COVID-19 Makes Gulf Countries' Abuse of Migrant Workers Impossible to Ignore*, <<https://www.amnesty.org>>.

⁸²⁴ International Labour Organisation, *Saudi Arabia Ratifies ILO Conventions Setting Out Safeguards with Crucial Importance for the Response to COVID-19*, <<https://www.ilo.org/global/standards/>>.

⁸²⁵ Ministry of Human Resources and Social Development *Wages Protection System*. <<https://mlsd.gov.sa/ar/initiatives>>.

statements, and helps entities through enabling them to manage payrolls and submit employees' wage files.⁸²⁶

The scheme also undoubtedly strengthens the rights and interests of employees in various ways. The electronic payment guarantees certainty of payment, and the monitoring system draws attention to delinquent or fraudulent employers. Notably, a private organisation assumes direct responsibility for monitoring transactions, though its formally obliged to forward any evidence of illegality or abuse to the relevant governmental authorities. This is a model in which transparency is treated as both the means and end of good corporate governance. This means that it is a model that blends “soft” accountability mechanism (information disclosure, peer review and reputational sanctions such as blacklisting non-compliant employers) with traditional (hard and coercive) modes of “command and control” regulation.⁸²⁷ The coercive dimension of labour regulation is more obviously present in respect of the electronic payments system, in effect by removing an employer’s power to deny or withhold wages. Details concerning how this payment system works in practice are, however, currently hard to come by, and it remains unclear whether state authorities are expected, or even required to, intervene in cases of repeated wage payment related breaches.

There is also a potential conflict between the Wage Protection regime and the Kingdom’s rules on insolvency. The Kingdom’s rules on special administrative measures are triggered for companies that are on the brink of insolvency or otherwise facing cash flow shortages.⁸²⁸ These rules allow for special administrative measures to be applied to companies, pursuant to which any payment obligations to employees or creditors may be suspended until they company becomes financially solvent again. Though provisions of the labour law address the wage claims of employees, Saudi Arabia’s labour courts have interpreted these provisions in ways that are favourable to the employer, discussed below.

Before going on to assess how Saudi Arabia’s Labour courts and tribunals have adjudicated employment disputes, or enforced wage claims, discussed in the next section, it is necessary to first touch briefly on the overall design of the Kingdom’s regulation of industrial relations. It

⁸²⁶ International Labour Organisation, *Details of the Wage Protection System in KSA* <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/meetingdocument/wcms_816083.pdf>.

⁸²⁷ Sarosh Kuruvilla and Anil Verma, ‘International Labor Standards, Soft Regulation, and National Government Roles’ (2006) 48(1) *Journal of Industrial Relations*.

⁸²⁸ The New Bankruptcy Law, Royal Decree No. M05 28/05/1439H (2018)(Saudi Arabia).

can be argued that Saudi Arabia has followed many other jurisdictions to embrace a light touch to labour market regulation, in line with emerging discourse and (neoliberal) orthodoxies regarding the legitimate role of government in private bargains. The turn to “new governance” methods may be based on widely held assumptions that market actors are more compliant with state enforced labour laws if they see themselves not as rule-takers of state-imposed laws, but as joint participants of a multi-stakeholder regime based on cooperation between public and private entities.⁸²⁹ Indeed, the Saudi Council of Ministers has stressed the value of the scheme for employers as well as employees, including its function in the early settlement of labour disputes, the “promotion of healthy work environment that promotes productivity” and “increased competitiveness” in the labour market.⁸³⁰ Employers are also expected to benefit from the improved cost-efficiency of payment procedures (an electronic payments system that eliminates the need for invoicing and paper filing systems).

The creation of a centralised database with national labour statistics is also expected to create more stability in the market by enabling private and public actors to gather information regarding labour value, talent shortages and other market trends. By bridging the gap between state regulation and corporate self-governance, Saudi authorities may well be better positioned to “steer” private conduct using a combination of “hard” rules and soft enforcement tools. On first inspection, the Wage Payment System has achieved high levels of public sector participation. According to the most up to date official statistics, 42,418 Saudi companies, employing 6,154,636 labourers, were registered under the scheme in 2018 alone.⁸³¹ Yet, other official data, much of it out of date, indicates that the private sector participation in the wage scheme is not matched by levels of industry compliance with wage related requirements, and with labour standards more generally.⁸³² This is particularly evident when we move away from the national framework of labour regulation to the practical enforcement of migrant worker rights under the vagaries of the Kafala sponsorship system. Given these realities, the next

⁸²⁹ Vanitha Sundra-Karean, ‘In Defense of Soft Law and Public-Private Initiatives: A Means to an End? -- The Malaysian Case’ (2011) 12(2) *Theoretical Inquiries in Law* 465.

⁸³⁰ Ministry of Human Resources and Social Development *Wages Protection System*. <<https://mlsd.gov.sa/ar/initiatives>>.

⁸³¹ Al Riyadh, *42,418 Establishments Enrolled in Protecting Wages System Last Year* <<http://www.alriyadh.com/1669393#?>>.

⁸³² Al Madina, *30% of the Establishments Do Not Comply with the Rules of the Protection of Wages and the Labour Ministry Threatens to Suspend All Their Services* <<https://www.al-madina.com/article/543839>>.

section turns more specifically to the question of the role, actual or incipient, played by Saudi Arabia's newly established courts and dispute settlement bodies.

E Building a Principle-Based Law of Labour Market Regulation: Saudi Courts (and Tribunals) as Judicial Law Makers or Apologists?

In theory, the Kingdom's statute paints a picture of a country that is increasingly dedicated to safeguarding the wage security of all employers. Article 19 of the labour law secures the wage claims of employees as a priority debt under the Kingdoms' bankruptcy and securities laws.⁸³³ All employee shall, therefore, be entitled of wages "equivalent to one month [sic] wage prior to payment of any other expenses including judicial, bankruptcy or liquidation expenses".⁸³⁴ Article 92 also prohibits employers from reducing salaries of deducting costs or penalties from a worker's salary without their prior knowledge and consent.⁸³⁵ Certain exceptions to this rule exist under Article 94 of the amended labour Law. A competent court may, for instance, determine that the worker is, through fault or breach of contractual duties, liable to pay compensation to their employer for losses incurred.⁸³⁶ However, a statutory limit of 25 percent of the worker salary has been set on the value of any remedial compensation claimable by employers.

In practice though, non-judicially sanctioned salary reductions (and deductions) are routinely tolerated under the Kafala system. Human Rights Watch and other bodies have reported instances in which whole communities of Bangladeshi and Filipino workers have been forced to accept arbitrary salary reductions in breach of the terms of their original employment agreement, as well as unlawful deductions from their monthly wages.⁸³⁷ Employers, even those known to persistently violate the country's labour laws and implementing regulations, have rarely been investigated or appropriately sanctioned for their actions by the relevant enforcement authorities.

⁸³³ Labour Law (2005) (Saudi Arabia) art 19.

⁸³⁴ Ibid.

⁸³⁵ Ibid, art 92

⁸³⁶ Ibid, art 94.

⁸³⁷ Al Madina, *80 Workers Complain of Not Paying Their Wages for 12 Months* <<https://www.al-madina.com/article/613702>>; Anita Hammer and Ayman Adham, 'Mobility Power, State and the 'Sponsored Labour Regime' in Saudi Capitalism,' (2022) *Journal of Work, Employment and Society*; Human Rights Watch, *Bad Dreams': Exploitation and Abuse of Migrant Workers in Saudi Arabia* <<https://www.hrw.org/report/2004/07/13/bad-dreams/exploitation-and-abuse-migrant-workers-saudi-arabia>>.

Saudi Labour courts and dispute settlement bodies may still play a role in upholding wage and other social rights, where other national authorities have not. The next section will consider the elements of the Kingdom's new labour dispute settlement system alongside evolving case law.

1. The Kingdom's Dispute Settlement Machinery and Enforcement Framework

One of the most important reforms to have been implemented under the labour law reforms is the creation of a multitier dispute resolution framework. Under the new procedure, disputing parties (the employer and employee) are required to seek amicable resolution in collaboration with their Local Labour Office.⁸³⁸ All disputes are to be referred for informal negotiation and conciliation proceedings via an electronic portal after which a mediator is appointed by the Amicable Settlement Department. Disputants are required to attend two sessions of negotiation for the purposes of achieving early settlement of a dispute. Failure to attend these meetings may result in police action. If a resolution is reached, the Amicable Settlement Department will issue a decision that is directly enforceable upon both parties. In cases where both parties fail to comply with the decision, the Kingdom's Enforcement Court may issue a payment order with immediate effect.⁸³⁹ If the adverse party fails to make any payments due within 5 days of being issued with the order, the court may impose various penalties as appropriate, including a travel ban on non-compliant party or parties.⁸⁴⁰

Only after parties have attempted to resolve their dispute through this ADR mechanism, can parties file a complaint with the newly created Labour Court.⁸⁴¹ These courts have jurisdiction over any disputes relating to employment rights, agreements, compensation, dismissal or termination of the employment agreement as well as social insurance claims.⁸⁴² Under the new court rules, a judgement should be issued within 30 days from the date of the first hearing.

Different procedures apply to domestic workers. While domestic workers have limited rights under the Labour framework, they may nonetheless seek a judicial remedy for certain types of

⁸³⁸ Royal Decree No. M/14 of 1440 (2018) (Saudi Arabia).

⁸³⁹ Ministerial Decision No. 2835/1427 (2006) (Saudi Arabia).

⁸⁴⁰ The penalties are set out under article 46 of the Enforcement Law: Alarabiya News, Saudi Justice Ministry: Labor Mediation Reports Are Now Enforceable Documents", 1 January 2019.

⁸⁴¹ Ministerial Decision No. 2835/1427 (2006).

⁸⁴² Law of Civil Procedures, (Saudi Arabia) art 34; Supreme Judicial Council Resolution No. 413/10/40 of 1440 (2018) (Saudi Arabia).

financial (wage) claims.⁸⁴³ These first forum of resort for aggrieved domestic workers is the Labour Dispute Settlement Committee, a specialized and ad hoc tribunal with jurisdiction to hear certain employment related disputes. Once a claim has been filed with the Committee, and jurisdiction established, the Committee is competent to perform de novo review into the facts of the dispute.⁸⁴⁴ Formally speaking, these Committees are required to follow the Kingdom's Sharia governed rules on civil procedure. Despite this, these bodies generally have more autonomy to develop and apply their own rules of evidence and procedure.⁸⁴⁵ The Committee's rulings are binding on both parties and may be fully enforced by the Kingdoms domestic court circuit,⁸⁴⁶ though a nominal right to appeal such decisions to the Labour Court does exist in certain cases.⁸⁴⁷

The decisions of the Labour Dispute Settlement and Labour Court may, in certain cases, be appealed to the Saudi Court of Appeal under the relevant provisions of the Labour Law. No right of appeal exists for small claims, or for judicial (payment) order with a value lower than SAR 50,000. In both instances, these judgements of the Labour Court are treated as final and unappealable.⁸⁴⁸ The adverse party is also denied a right to appeal a judgment concerning an employee's objection to any contractual actions or penalties imposed by the employer, except for unfair dismissal suits. This significantly narrows the grounds on which an employee may appeal other potentially unfair or unwarranted decisions, including an employer's withholding of salaries, a general reduction in salary from what was agreed upon, or other any other punitive actions unilaterally imposed on employees.⁸⁴⁹

2. The Adjudicative Function of Saudi Arabia's Courts and Tribunals

⁸⁴³ Ministerial Decision No. 310/1434 (2013) (Saudi Arabia) art 21.

⁸⁴⁴ Hassan Al-Fayoumi, 'Legal note- Quasi-Judicial Committees and Arbitration in Saudi Arabia' <<https://www.hg.org/legal-articles/quasi-judicial-committees-and-arbitration-in-saudi-arabia-46678>>; Ayoub Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia,'(2004) 19 (4) *Arab Law Quarterly* 5.

⁸⁴⁵ In other words, the committee applies rules which have not been laid down by law or governed by statute. *Law of Procedure before Shari'ah Courts, Royal Decree No. (M/21) 1421 (2000) (Saudi Arabia) art 1.*

⁸⁴⁶ *Enforcement (Execution) Law* issued by Royal Decree No. M/34 (2012)(Saudi Arabia).

⁸⁴⁷ Ministerial Decision No. 310/1434 (2013) (Saudi Arabia) art 21.

⁸⁴⁸ *Supreme Judicial Council Resolution* No. 413/10/40 of 1440 (2018)(Saudi Arabia).

⁸⁴⁹ Article 70 of the Saudi Labour Law, the employer is prohibited from deducting from a worker's wage, for payment of fines, an amount of money equal to more than five days' wages during one month's time. Further, the employer is not allowed to suspend an employee from work without pay for more than five days in a month. Moreover, Article 97 of the Saudi Labour Law forces the employer to pay 50% of the labourer's wage in cases when the worker has been detained "or taken into custody by the competent authorities" for issues "related to work or occasioned by it". Saudi Labour Law (Saudi Arabia), art 97.

Despite these limitations on the appeal jurisdiction of the Kingdom's higher courts, the labour law has significantly expanded and refined the subject matter and review jurisdiction of the country's courts. The creation of a Labour Court follows on broader reforms to the Kingdom's judicial system under the 2007 New Judiciary Law, to establish a court with dedicated powers to hear employment related cases. These courts are ideally positioned to address silences in the Kingdom's legislative framework, and to develop legal principles and interpretative standards to supplement the application of the law.⁸⁵⁰ As part of these interpretative functions, the Kingdom's courts may be expected to balance the competing rights and interests of the parties, in view of the Kingdom's broader public policy goals and investment agenda. It is striking that there has been little research and scholarship on the adjudicative and interpretative, and therein constitutional, functions of Saudi Arabia's overhauled courts.

It is therefore worth posing the question of whether the Kingdom's judiciaries have self-imposed limits on their own review functions. This would imply that Saudi court is best viewed and understood a formal theory of adjudication.⁸⁵¹ Here, courts mechanistically apply statutory provisions in an act of judicial deference to the letter of the law. The scope of judicial review is confined to matters of procedural law and legality, and courts will generally refrain from substituting the legislative will (of the Saudi government) with their own purposive and subjective interpretation of the law. Alternatively, there are signs Saudi courts have come to embrace a more substantive, 'holistic [and] value-based' approach to labour equality rights (and contract) adjudication.⁸⁵²

Saudi courts and tribunals operate within a legal system in which Sharia takes primacy over all conflicting laws and regulations. At the same time, all law-making authority is heavily concentrated in the executive branches of government, at the head of which sits the King and his Council of Ministries. In this regard, it might well be assumed that the courts of general jurisdiction will give effect to executive interpretation of a statutory instrument, since the executive is also the main initiator and approver of legislation.⁸⁵³ These tensions give rise to

⁸⁵⁰ Eusebi Colàs-Neila and Estela Yélamos-Bayarri, access to Justice: A Literature Review on Labour Courts in Europe and Latin America" (International Labour Organisation, 2020).

⁸⁵¹ Felipe Jiménez, 'A Formalist Theory of Contract Law Adjudication' (2021) *Utah Law Review* 1121; Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89(9) *Harvard Law Review* 1685.

⁸⁵² *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC) para 46.

⁸⁵³ Ayoub M Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19(1/4) *Arab Law Quarterly* 5, 8.

what Vogel has termed the ‘duality of the Saudi legal system’.⁸⁵⁴ In theory, Saudi authorities cannot explicitly deviate from mandatory rules of Islamic law and jurisprudence. Yet, it is also true that the current labour law framework is undoubtedly the embodiment of the executive’s will and political sovereignty, whereby for reasons of self-interest and social harmony, foreign migrant workers have been excluded from many equality related protections.

The question for the next section is whether Saudi Arabia’s Labour Courts have been prepared to eschew their traditional deference to executive authority to uphold the higher values and principles of what Dworkin might call the “law of the community”.⁸⁵⁵ Given the facts of legal pluralism, there is no single legal community to speak of. Only limited analogies can be drawn between the common law tradition, and any legal principles or values shared by an Islamic “legal community”.⁸⁵⁶ Even nation states that ground their statutory (positive) law in Islamic principles will follow different Islamic schools of thought.⁸⁵⁷ Now that these differences have been considered, can it be argued that Saudi judges are, like their common law counterparts, engaged in a process of “constitutional building”, drawing widely from numerous “sources”. These sources include official law, religious tradition, and local norms to embed the Kingdom’s statutory labour laws in higher legal principles and values. The next section will therefore consider the rulings of the Kingdom’s Labour courts and tribunals.

3. The Evolution of Labour Law Jurisprudence in Saudi Arabia

In principle, Saudi courts of general jurisdiction, or Sharia courts, are bound to apply Islamic procedural and substantive law. The Labour court, and perhaps to a lesser extent, the specialised Labour Settlement Dispute Committees, would fall under this category.⁸⁵⁸ These judicial and quasi-judicial bodies may prove to be important allies of migrant workers, with

⁸⁵⁴ Frank Vogel, ‘Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction’ in Sick and Potter (eds), *The Persian Gulf at the Millennium; Essays in Politics, Economy, Security, and Religion* (Saint Martin’s Press, 1997) 275.

⁸⁵⁵ Ronald Dworkin, ‘The Model of Rules I’ (Harvard University Press, 1977).

⁸⁵⁶ Paul Schiff Berman, ‘Global Legal Pluralism’ (2007) 80 *South California Law Review* 1155.

⁸⁵⁷ Engy Abdelkader, ‘To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt, and Iran)’ (2013) 37(2) *Fordham International Law Journal* 309, 310-311, 325.

⁸⁵⁸ The General Directorate of the Commission for the Settlement of Labour Disputes, Superior Commission for the Settlement of Labour Disputes, *The Code of the Labour Principles and Judgments Vol 2* (The Ministry of Human Resources and Social Development, 2011) 311-316, 363-372, 401-405.

the Labour Court functioning as the primary guardian of their statutory rights (and other rights). To date, most cases decided by the Labour Courts and Dispute Settlement bodies have concerned the wage claims of unpaid employees.⁸⁵⁹ It should come as little surprise that the Kingdom's dispute settlement bodies have been most prepared to uphold equality protections where the labour law explicitly provides for this treatment.

4. Judicial Enforcement of Wage Rights

The Islamic law principle, that employers are obligated above all to pay their employee's wages as they fall due, has for been recognised and robustly enforced by Saudi Arabia's judicial authorities.⁸⁶⁰ In 2009, some years before the recent advances in worker protections were contemplated, the Primary Commission for the Settlement of Labour Disputes, the first chamber of the Committee, ruled that any unjustified delay in the payment of worker wages constituted a material breach of an employer's contractual obligations, thus entitling the worker to seek monetary compensation.⁸⁶¹ The facts of the dispute in question concerned the dismissal of a non-Saudi employee that had been absent from work for 71 days. In its reasoning, the Committee affirmed that long term absences, without medical justification, may provide grounds for fair dismissal under Article 81 of the labour law, and thus overriding any financial compensation claims due to the employee under contract or statutory law. However, the Primary Commission looked beyond these statutory grounds for fair dismissal to consider the broader terms and conditions of the employment contract. On its review of the facts, the Commission noted that the contract was terminated only after the employee had already filed a claim against the employer for wage payment delays. This was a violation of Sections 1 and 2 of Article 94 of the Saudi labour law and punishable by administrative fines.⁸⁶² Since the claim was filed when the employment contract was still in force, and because the employer was found to have breached its contractual obligation to pay the agreed wages on time, the Committee ruled that the employer's breach rendered the termination invalid.⁸⁶³ The dismissal

⁸⁵⁹ See for a discussion of how Committees operate in a dual system designed to limit the substantive application of Sharia, see: Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19(1) *Arab Law Quarterly* 91, 112.

⁸⁶⁰ R Alrayes and R Alabd, "*Describing the Legislation of Saudi Labour Law in Accordance with the Amendments Issued by the Royal Decree No. M/46 Dated on 5/6/1436 H* (Al-Shegry, 2017).

⁸⁶¹ Primary Commission for the Settlement of Labour Disputes in Medina Case No. 188 22 June 2001 (Saudi Arabia); cited in *The Code of the Labour Principles and Judgments* (2011) (Saudi Arabia) 359-367.

⁸⁶² *Ibid.*

⁸⁶³ Superior Commission for the Settlement of Labour Disputes judgment No. 228/2/431 (10 March 2010)

proceedings were ultimately settled by a ruling requiring that the employee be returned to their position, and all employment rights and benefits restored.

The de facto appellate chamber of the Labour Dispute Settlement Commitment, the Superior Commission for the Settlement of Labour Disputes, later upheld the decision of the Primary Commission.⁸⁶⁴ In support of its decision to uphold the first instance ruling, the Superior Commission concluded that the employee may not invoke the freedom to terminate a contract for non-performance of employee duties under Article 81 of the labour law, and that the employer had waived such rights upon violating the wage rights of the dismissed employee.⁸⁶⁵

On first glance, the reasoning applied in the above decision appears to imply that Saudi Arabia's Labour tribunals have been prepared to restrict the employer's rights. This includes any rights protected by statute (in this case the right to dismiss employees for nonattendance), in order to safeguard the wage and dismissal due process rights (in this case by providing the employer with the opportunity to take corrective action following disciplinary proceedings) of both Saudi and foreign workers.⁸⁶⁶ Yet, it is possible that the Committee's tribunals took a less expansive view of its own adjudicative jurisdiction, and simply applied principles of Islamic contract law to the facts of the dispute.⁸⁶⁷ Thus, the primary and appellate commission, faced with a conflict between statutory and Sharia law, may have reached the conclusion that that Sharia rules (relating to material or anticipatory breach of contract) should ultimately prevail, even if both parties had rights under the applicable labour provisions.⁸⁶⁸ Alternatively, the courts may have considered the wider statutory context to give effect to the preferred ministerial interpretation of the applicable labour law rules. In this case, by taking due account of governmental proposals for the creation of (a later implemented) Wage Protection Scheme.⁸⁶⁹

⁸⁶⁴ Primary Commission in its judgment No. 228/2/431 10 March 2010 (Saudi Arabia).

⁸⁶⁵ "The Code of the Labour Principles and Judgments (2011) (Saudi Arabia) 303-308; Meshal Nayef Alharbi, 'Protecting Employees' Wages in Accordance with Saudi Labour Law: Should We Do More?' (2021) 12(2) Beijing Law Review 320.

⁸⁶⁶ Labour Law (2005) (Saudi Arabia) art 66, 71. Article 66 refers to statutory grounds for dismissal, through to Article 71, which deals with the due process rights of an employee that is the subject of disciplinary proceedings resulting in dismissal.

⁸⁶⁷ Abdullahi Ahmed An-Na'im, *Islam, State and Politics: Separate but Interactive*, (Brookings Institute, 2007).

⁸⁶⁸ Mohammad Rahim Uddin et al, 'Compensation Management from Islamic Perspective' (2004) 17(6) *European Journal of Business and Management* 37, 49.

⁸⁶⁹ Stephen Breyer, 'On the Uses of Legislative History in Interpreting Statutes' (1992) 65 *Southern California Law Review* 845.

As this demonstrates, it is difficult to get a true insight into in what laws, or considerations, the Committee based its reasoning on. This is due to the Saudi's judicial bodies lack a tradition of *stare decisis*, which is grounded in a system of precedent and rooted in an accumulated body of legal principles and authoritative legal opinions.⁸⁷⁰ Any conclusions drawn from what might have behind the Committee's reasoning is speculative and inferential. Although, this still demonstrates something about judicial process in Saudi Arabia. Saudi courts do not generally function as an independent check on political power, despite the lip service the Basic Law pays to the doctrine of separated powers.⁸⁷¹ In a similar way, Saudi courts are not likely to override or supplant explicit provisions of statutory law to apply, as common law courts have done, their own judge-made law (the law of equity).⁸⁷² Nonetheless, this decision did consolidate a broader trend towards the judicial protection of fundamental labour rights.

5. The Right to Change Employers

In some cases, the Kingdom's Labour tribunals have shown signs of their willingness to interpret labour law provisions to minimise, or impose conditions upon, the freedoms of employers under the Kafala sponsorship system. One way that court have been able to do this is by interpreting statutory right (in this case wage rights) expansively to elaborate related labour protections that are not explicitly provided for under the text of the labour law. It has been noted that foreign migrant workers, were under the old system unable to change employers without their consent. However, it can be argued this power exists only to the extent that sponsoring employers respect and comply with other provisions of the labour law, including any financial or payment related obligations owed to their workers. Pursuant to Article 14 of the Implementing Regulation for Saudi labour law, workers may change their employers.⁸⁷³ This is possible, if they have not been paid for a period of no less than three consecutive months, and if the employer has not taken any action to honour their payment obligations.⁸⁷⁴ The previous rule was that employees would still be required to file a request with the Minister of Human Resources and Social Development before a sponsorship permit

⁸⁷⁰ Soliman Solaim, 'Saudi Arabia's Judicial System' (1971) 25(3) *Middle East Journal* 403, 403-408; Mohammad Hashim Kamali, *Shari'ah Law: An introduction* (Oneworld Publications 2008) 179.

⁸⁷¹ John Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 109; International Constitutional Law Project Information, *Saudi Arabia Constitution* <http://www.servat.unibe.ch/icl/sa00000_.html>.

⁸⁷² Congressional Research Institute, *Statutory Interpretation: Theories, Tools, and Trends* <R45153.pdf (fas.org)>

⁸⁷³ Implementing Regulation for Saudi Labour Law (Saudi Arabia) art 14.

⁸⁷⁴ *Ibid.*

could be transferred from an old to new employer. However, the Primary Commission for the Settlement of Labour Disputes (*preliminary ruling No 481*) has ruled that employees have an automatic right to seek alternative employment if the sponsoring employer has not been paid the agreed wages as they fall due over a continuous period.⁸⁷⁵

The interpretative controversy in question in this dispute (*preliminary ruling No 481*) was whether the plaintiff had the right to end the employment agreement for breach of contract, without the consent of their sponsoring employer, or by approval by the relevant ministry if the cumulative period of non-payment exceeded three months. The plaintiff employee had in this case not been paid regularly over a period of 6 months but received periodic payments in instalments.⁸⁷⁶ As the employee had not gone without any payment for statutory period of 3 months, the Dispute Settlement Committee was asked whether the employee should be able to exercise their freedom to seek alternative means of subsistence (with a new employer) and an effective remedy for recovering their lost earnings via compensatory damages.⁸⁷⁷ In short, the Committee was being asked to adjudicate between two sets of principles and legal methods: strict legalism (and hence strict statutory interpretation) and a more purposive approach in which the statutory scheme was to be applied with respect for general principles of equity and justice.⁸⁷⁸

The first approach to statutory interpretation limits the scope for adjudicative discretion, while the other allows for the judge to consider a wider range of “sources”. In this case, the Primary Commission to the Dispute Settlement Committee undoubtedly drew from Islamic law principles governing the termination of an employment contract (commonly referred to as an “*ijarah contract*”). An *ijarah contract* is only valid when services are exchanged for a fixed payment.⁸⁷⁹ While employers may pay their workers in instalments under contract form, the

⁸⁷⁵ Ruling of the Primary Commission for the Settlement of Labour Disputes in Jeddah No. 481, No. 8/2/432 12 December 2012 (Saudi Arabia); The Code of the Labour Principles and Judgments, (2011) (Saudi Arabia) 187-194.

⁸⁷⁶ Ruling of the Primary Commission for the Settlement of Labour Disputes in Jeddah No. 481, No. 8/2/432 12 December 2012 (Saudi Arabia).

⁸⁷⁷ Meshal Alharbi, ‘Protecting Employees’ Wages in Accordance with Saudi Labour Law: Should We Do More?’, (2021) 12(2) *Beijing Law Review* 320.

⁸⁷⁸ Stephen Breyer, ‘On the Uses of Legislative History in Interpreting Statutes’ (1992) 65 *Southern California Law Review* 845, 847. (observing that purposive approach to statutory interpretation requires the judge to identify “widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the ‘reasonable expectations’ of those to whom it applies”)

⁸⁷⁹ Kamal Hassan, ‘Contractualism In Employment Relationships: A Conceptual Discourse Of Common Law And The Shari’ah’ (2012) 26 *Arab Law Quarterly* 175–192; Al Khatib Al-Shirbini, Mugheni Al-Mhtaj, *Ila Ma Rifat Ma Ani Alfaz Al-Minaj* (1957) 322.

date and amount of any payments may be agreed in advance, by consent of both parties. Where the employer fails to satisfy the agreed payment obligations, the worker has the right to terminate the contract and seek fair compensation.

Under the Kingdom's statutory labour law regime, by contrast, a migrant worker may seek compensation and change employers only after the 3-month cooling period has lapsed.⁸⁸⁰ This is intended to give employers the opportunity to take steps to redress any temporary cash flow shortages and avoid the company's bankruptcy. This policy justification for this rule may appear prudent from a business law perspective, but it does so at great expense to the fundamental rights of workers. These workers are denied an effective legal remedy even several months after their salary had been reduced, withdrawn or paid irregularly.

Notably, the Dispute Settlement Committee found in the plaintiff employee's favour. The Committee ruled that the employee had the right to seek immediate compensation and to change employment under the provisions of the Labour, when construed harmoniously with the applicable rules of Sharia (the basis of the Kingdom's contract law and enforcement regime).⁸⁸¹ The decision of the Primary Commission was, however, later overturned by the Superior Commission (the appellate tribunal). The case was then put before the Kingdom's general court of appellate jurisdiction. In its reasoning, the Court paid deference to the letter of the labour law in its assessment of the material facts of the case. While the plaintiff employee was found to have suffered a disruption to their contractual wage rights over an extended period, the Court found that they had not demonstrated that these the wages had been delayed or withheld for a continuous period of three months, as specified by Article 14 of the (then unamended) labour law. Applying this reasoning to its final ruling, the Court concluded that the employee lacked the right to end their employment contract. The Court also ruled that the terms of their sponsorship, and any rights therein, could not be transferred to a new employer without the consent of the sponsoring employer (pursuant to Article 32 concerning the rules

⁸⁸⁰ Decree of the Minister of Human Resources and Social Development No. 111/1 28 January 2007(Saudi Arabia).

⁸⁸¹ In the Islamic legal tradition both parties to a contract will pay any compensation of an amount that ensures that any "damage/harm is removed" , Thus under Sharia, the State (and law) must intervene in contractual bargains ensure that the duty to enforce contracts does not result in substantial injustice or harm, to the detriment of one party to the contractual bargain. Different schools differ on the question of whether the ijirah contract can be terminated or rescinded in good faith. Proponents of the Hanbali school, the de facto official school of Sharia applied in Saudi Arabia outline that a material change of circumstances may provide grounds for voiding the ijirah contract for instance if the employer faced an unforeseen change in their business circumstances.

and conditions of employee sponsorship under the Kafala permit system).⁸⁸² Tellingly, the Court of Appeal opted for a strict reading of the relevant provisions of the labour law. In doing so, the Court's primary motivation was to give effect to the express intent of its drafters to the exclusion of broader considerations of (Sharia-derived principles) of fairness and equity.⁸⁸³

5. Compensatory Damages

In later cases, the right of all employees to seek compensatory damages for non-payment of wages has been repeatedly affirmed in numerous rulings of the Commission for the Settlement of Labour Disputes. The Superior Commission for the Settlement of Labour Disputes has, in this regard, ruled that employers are obligated to pay monetary compensation of a value no less than any wages due to them, but may also extend to any remedial compensation or benefits due to them under the terms of their employment agreement.⁸⁸⁴ Employers may in some cases invoke defences to non-payment, as governed under statutory law and general principles of Sharia.⁸⁸⁵ The Primary Commission for the Settlement of Labour Disputes in Riyadh presided over a case in which the plaintiff employee sought compensation two years after her employer had delayed payment of wages for three consecutive months.⁸⁸⁶ In this case, the Superior Commission invoked general principles of Sharia to protect the rights of the employer. Under Islamic theories of damages, compensation can only be claimed if based on justified reasons (Such as where the party claiming damages is not at fault) and where a clear financial loss or liability can be traced to original "wrong" or breach. In this case, the Superior Commission deviated from the text of the labour law to determine that since the plaintiff had failed to pursue an action until sometime after the breach had occurred, this implied that the employee had not suffered any material harm or had at the very least, failed to provide sufficient evidence for this.⁸⁸⁷ In contrast to the strict approach to statutory interpretation seen in previous decisions of the Supreme Commission and Appeal Court, this seems to be a prime example of ruling in

⁸⁸² Meshal Alharbi, 'Protecting Employees' Wages in Accordance with Saudi Labour Law: Should We Do More?' (2021) 12(2) Beijing Law Review 320.

⁸⁸³ Court of Appeal Ruling No. 1389/1/432 3 October 2014 (Saudi Arabia); The Code of the Labour Principles and Judgments, (2011) (Saudi Arabia) 187-194.

⁸⁸⁴ Ruling of the Primary Dispute Settlement Committee (No. 1109/2/431)(Saudi Arabia); Judgment No. 1457/1/432 2011(Saudi Arabia).

⁸⁸⁵ The Code of the Labour Principles and Judgments (Saudi Arabia) 69-378.

⁸⁸⁶ Primary Commission for the Settlement of Labour Disputes in Riyadh No. 458 n 24 January 2010 (Saudi Arabia).

⁸⁸⁷ Discussed in: Code of the Labour Principles and Judgments (Saudi Arabia) 187-194; Meshal Nayef Alharbi, 'Protecting Employees' Wages in Accordance with Saudi Labour Law: Should We Do More?' (2021) 12(2) Beijing Law Review 320.

which the court substitutes its own understanding of the law to supplant the implied of a statutory provision (in this case the three-month rule for statutory compensation). The important point is that the Court applied Sharia law in a manner that indicates less concern for enforcing the statutory rights of employees, than with exempting the employer from any duty to pay compensation for unfair compensation claims. Viewed in this light, Saudi Arabia's tribunals and courts have not, at least historically, been the guardian of worker rights one might hope they would be.

The above cases, of course, do not provide the full picture of labour rights and equality adjudication. Indeed, many of these rulings were issued before the Labour Courts became fully operational. The prevailing position of the Kingdom's labour tribunals is that employees, of any status or origin, shall have the right to seek compensation in the courts and that employers judicially ordered to pay any provable damages. These rights have been progressively strengthened because of statutory developments including the most recent amendments to the labour law and Wage Protection System. Article 94 of the amended labour law does however impose a cap on any judicially enforced damages payable to workers, set at no more than twice the amount of the salary in arrears.⁸⁸⁸ Under the Wage Protection scheme, employers may, nonetheless, also incur an additional fine of up to SR 10,000 as penalty, presumably as a way of dismantling a "culture" of gross misconduct and withholding of wages (of predominantly migrant workers) across the entire private sector.⁸⁸⁹

The exact fine that can be imposed on delinquent employer (in respect of financial right violations), or the value of compensatory damages payable to the employee, remains indeterminate, the absence of clear statutory guidelines or interpretative standards. This, in turn, offers the Kingdom's courts and tribunals with a large measure of discretion to decide what forms of employer conduct are valid and justified, and which not, the amount of compensation to be paid and so forth. For example, the Superior Commission for the Settlement of Labour Disputes has upheld the decision of the Primary Commission to impose a substantial fine on an employer that had failed to comply with their payment obligations in case No. 1305/1/432. In reaching its decision, the Commission considered the scope and severity of the

⁸⁸⁸ Amended Labour Law (Saudi Arabia) art 94.

⁸⁸⁹ The Ministry of Human Resources and Social Development, *Wages Protection System* <<https://mlsd.gov.sa/ar/initiatives>>.

employer's breach of payment obligations.⁸⁹⁰ In this case, the employer had failed to pay the salaries of 13 Saudi employees. Since the employer failed to provide justifying evidence for these breaches, and because his actions had significantly impaired the financial circumstances of the plaintiff employees (in a joint action suit), the Commission ruled that it was competent to impose the severest financial penalties allowed by statutory law.

Building on this basic principle of wage equality, the Saudi Labour courts and dispute settlement bodies have more regularly intervened in employment contracts. The Saudi Labour courts and dispute settlement have enforced statutory compensations for migrant workers employees that have suffered payment delays, including the right to terminate their contract and demand that employers reimburse the travel costs of returning to their home country.⁸⁹¹ With the implementation of the Wage Protection and subsequent ratification of the ILO Wage Convention, the Kingdom's Dispute Settlement bodies might also be seen to have taken a more robust stance against large companies with a record of persisting or egregiously violating statutory labour protections.⁸⁹² Seeking to clamp down on employer abuses during the Covid pandemic, the Committee for the Settlement of Labour Dispute reversed the Kingdom's historic policy of shielding large businesses, many with political or familial connections to the Saudi elite, from legal liability. In the year of 2020, punitive sanctions were imposed on a Saudi firm that had fail to pay the salaries of some 80 workers, most foreign, over a period of 12 months.⁸⁹³

6. Judicial Balancing of Employer Freedoms with Employee Rights

While the above developments may be seen to herald a new era in migrant worker right, or at the possibility of progressive incremental reform, a broader survey of Labour Court rulings – which can only be published 5 or more years after they have been rendered - indicate that there is less to be optimistic about than one might expect. Recent cases indicate that Courts have been increasingly activist in their interpretation of Saudi Arabia's bare-thread labour law

⁸⁹⁰ Code of the Labour Principles and Judgments (Saudi Arabia) 401-405.

⁸⁹¹ Ibid, 303-308.

⁸⁹² Khalid Moussa, *The labor and social security laws in the KSA*, (2018) 256.

⁸⁹³ Al Madina, *80 Workers Complain of Not Paying Their Wages for 12 Months*, <<https://www.al-madina.com/article/613702>>; Meshal Nayef Alharbi, 'Protecting Employees' Wages in Accordance with Saudi Labour Law: Should We Do More?'(2021) 12(2) Beijing Law Review 320.

provisions. However, expanded protection for migrant workers right does not seem to figure prominently on the judicial agenda. There are exceedingly few cases that deal with the rights of migrant workers either directly or indirectly. The most recent and high-profile judgements of the Court has revealed a willingness to enforce the private freedoms of employers. This includes the freedom to set the conditions under which a contract is negotiated, performed, and terminated, even when shown to have adverse consequences for worker rights.

Several cases brought before the court in recent years have concerned unfair dismissal suits. In case 1338/1/431, the Labour Court was asked to uphold the plaintiff's claim that he had be unfairly dismissed from his employment after the corporate merger of the company had resulted in mass layoff (without the input of employees). The Court was also asked to enforce the plaintiff claim that he be remedied for the breach through restoration of his rights to "return to work, be compensated for the damages he sustained throughout the dismissal period and receive wages from date of dismissal to date of reinstatement and rehabilitation".⁸⁹⁴ The Labour Court of First Instance ruled in favour of the merger company based on its reasoning that Saudi businesses shall exercise the general freedom to hire whom they please, and to terminate work contracts according to the requirements of their business. The Court ruled that an absolute right of compensation for early termination of employment, even in cases where the worker is not at fault or has suffered financial losses, is a not a fortiori rule of Saudi law. As in other jurisdictions, Saudi employers are only required to comply with a compulsory notice period (of either 30 or 60 days depending on whether it is a fixed or temporary employment contract). As the employer had terminated the employee contract with immediate effect, the Court therefore ruled that the Defendant company (employer) was only obliged to pay the dismissed employee the wages he would have received during the proper notice period, in addition to any redundancy benefits specified under the employment contract. The claim for compensatory damages was consequently dismissed.

The Plaintiff employee then appealed the decision (*1338/1/431*) before the Supreme Court. The Supreme Labour Court, however, upheld the ruling of the Labour Court of first instance on the basis that the employee had failed to demonstrate any evidence of bad faith by the defendant employer, or breach of obligations under the relevant provisions of the Saudi labour law. In reaching its decision, the Supreme Court referenced the fact that nothing in the law prevented

⁸⁹⁴ Labour Court Ruling, 1338/1/431 (Saudi Arabia); discussed in Labor Principles and Case Compendium, Riyadh, 1431 H 2009/2010 (2009) (Saudi Arabia).

employers from restructuring their companies, including by eliminating a job position, based on objective business criteria. In this regard, the Supreme Court averred that “terminating the worker’s service because of elimination of the job position is deemed a valid termination of the employment contract.”⁸⁹⁵

A similar decision was reached by the Supreme Labour Court in case *No. 193/2/431*, where again it was affirmed that employers shall be freedom to set the terms of an employment contract, and to terminate or modify such rights on objective business criteria. While the employer may be liable for unpaid wages, they were not liable to pay indirect damages to dismissed workers. In effect, any change or termination of a contract will be justified except where such actions violate any protections proscribed by statutory law with the court stating that “worker shall be entitled to receive his formal rights including end-of-service award and leave allowance if not used already.”⁸⁹⁶

On first view, it appears that Labour Court has exercised its adjudicative authority to further the freedoms of Saudi employers. If the Labour Court has done so when interpreting and adjudicating dismissal cases involving the rights of Saudi workers, it seems highly unlikely that the Courts will be prepared to look beyond statutory law to elaborate stronger protections for migrant workers. As a result, Saudi Labour Courts appear to have aligned their own jurisprudence with broader approaches and methods of labour regulation in the *lassiez faire* era. In these new legal contexts, social and equality rights regulation gives way to the law of labour market regulation. Mirroring these comparative jurisprudential trends, Saudi courts will generally uphold the terms of a contractual bargain “but for” any statutory exceptions to this rule whereby the courts will enforce any rights or guarantees that are explicitly mandated by law. The difficulty is this “arms-lengths” approach to not take account of the inequality of bargaining power in industrial relations and its impacts on a whole range of legal and public interest issues. This ranges from collective bargaining rights, fair pay, workplace due process and summary dismissal or the, now highly topical, case law emerging around the legal characterisation of employees versus contractors for workers employed by digital platforms.⁸⁹⁷

⁸⁹⁵ Higher Court for the Labor Dispute Settlement case no. *1338/1/431*, 28/7/1431H (July 10, 2010) (Saudi Arabia) (translated from Arabic).

⁸⁹⁶ *Ibid.*

⁸⁹⁷ International Labour Organisation, *Employment Legislation Protections : Summary indicators in the area of terminating regular contracts* (International Labour Organisation, 2015). See also the two appeals jointly heard by the Australian Court in *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 (“*Personnel*”); *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2

These imbalances are most visible in respect of the high number of migrant workers employed in insecure work (such as delivery drivers), because the legal (Kafala) system that regulates and constitutes these rights is already skewed towards the rights of employers.

7. The Legality Related Challenge of a Labour Law Regime under Development

The Saudi labour court is still in a growing stage of development. Broader aspects of the Saudi legal system lack the mature legal doctrines and principle-based jurisprudence that defined labour rights adjudication in more advanced common law systems.⁸⁹⁸ It has been noted that Saudi Arabia's conservative view on the employment relationship appears to be influenced by the "arm's length" approach to labour adjudication adopted by courts in other jurisdictions such as the UK.⁸⁹⁹ Despite recent jurisprudential shifts, other legal systems have developed legal doctrines to ensure minimal equality and due process protections for workers. This includes the obligation to deal in good faith or the just cause requirement which mandates that businesses shall take only dismiss or otherwise take actions affecting their statutory rights based on well-defined, compelling, and justifiable reasons and only after following appropriate procedures.⁹⁰⁰ This reflects the long-standing common-law assumption that the employment is a fundamental right and that any loss or change to their employment should not be undertaken without respect fundamental legal guarantees of due process and legality related requirements. While there have been some attempts to development equivalent test and doctrines by the Saudi

("Jamsek") (examining whether the workers involved in both cases were employees or independent contractors).

⁸⁹⁸ For an Australian perspective see 'Statutory Norms And Common Law Concepts In The Characterisation Of Contracts For The Performance Of Work' (2019) 42(2) *Melbourne University Law Review* 370; Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 119.

⁸⁹⁹ *Uber BV and others (Appellants) v Aslam and others (Respondents)* [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748. However, for an Australian perspective see Steven Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29(3) *Industrial Law Journal* 223.

⁹⁰⁰ See the Australian case *Dare v Hurley* [2005] FMCA 844 (Driver FM, 12 August 2005). See also *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (Unreported, Allsop J, 30 July 2002). In this case, Judge Allsop applied purposive reasoning to apply the principle of employer's duty not to destroy mutual trust and confidence in the employment relationship in support of the finding that the employer had breached the employment contract by failing its own human resource policies, even policies were not expressly referred to in the employment contract.

courts, the case decisions of Saudi courts and tribunals is yet to be grounded in fully developed and elaborated labour rights, principles and (interpretative) standards.

It is Saudi Arabia's district Labour Courts that have shown themselves, at least in part, to perform a *de minimis* review of the due process elements of employment bargains and workplace practices. District courts are, with the newly reordered judicial hierarchies of the Saudi court system, bound to follow the judicial rulings and interpretations of the Supreme Labour Court. This suggests that District Courts has also adopted "arm's length" approach to its adjudication of employment disputes. However, in jointly rendered cases addressing the right of employers to terminate an employment contract based on objective economic criteria, Saudi Arabia's District Courts ruled that while employers take corrective measures to secure their business interest,⁹⁰¹ the court was still competent to intervene in employment arrangements to restore the rights of employees where the employer was found to have engaged in an "arbitrary exercise of power or abuse of right".⁹⁰² Though one should be careful to draw broad conclusion from these isolated decisions, the Kingdom's district labour courts may have taken a more progressive view of the employment relationship. This is when compared with those in which the judicial (rule of law) limits can and should be imposed on business freedoms. In this regard, Saudi courts may yet have an important role to play in ensuring that employer actions do not excessively encroach upon the fundamental rights of workers, construed in accordance with general principles of (Sharia) law.⁹⁰³

The doctrinal contours of Saudi Arabia's evolving labour law regime and jurisprudence is still being worked out. As such, it remains to be seen the extent to which Saudi courts will be prepared to go beneath the "private" form of employment contracts to assess its public interest dimensions. Saudi courts do so by applying a purposive mode of judicial reasoning that aims for greater parity, mutual trust and fairness in the employment relationship. The above case law analysis demonstrates how variably Saudi courts have recognised and enforced fundamental rights protections. Furthermore, this shows the extent to which judicial decision-making has faithfully adhered to statutory texts, or otherwise incorporated general principles

⁹⁰¹ Joint case 759/2/431 and 1535/1/432, the Higher Court for the Labor Dispute Settlement, discussed in Labor Principles and Case Compendium, Riyadh, 1431 H 2009/2010 (2010) (Saudi Arabia).

⁹⁰² Joint case 759/2/431 and 1535/1/432, the Higher Court for the Labor Dispute Settlement, discussed in Labor Principles and Case Compendium, Riyadh, 1431 H 2009/2010 (2010) (Saudi Arabia).

⁹⁰³ Fathi Aldrainy, *alnazariat alfaqhia [Islamic Jurisprudential Theories]* (Brill, 1996) 150.

of justices and fairness. At times, the Saudi Courts and Tribunals have been seen to take a sympathetic view to the employee rights and have issued rulings that restore their status quo ante rights even when the employee has been at fault. At other times, the Courts have favoured the narrowest interpretation of worker rights, as construed in accordance with the statutory provisions of the labour law. Further highlighting this inconsistency, other decisions court seem more willing to supplement, or even supplant, statutory rules and guidelines by invoking the equity like law of Sharia to reach decisional outcomes that materially disadvantage the subsistence rights of workers. Given that trade unions and any form of collective bargaining is outlawed under the Saudi law, the absence of judicial certainty outcomes seem to further undermine the position of migrant workers. Overall, Saudi Arabia's higher courts have deferred to the legislative will of the Saudi government, although district courts may well have opened up a space for more equitable forms of judicial balancing between fundamental rights and business freedoms.

Putting optimism to one side, perhaps the more important point uncovered by the above analysis is just how absent Saudi courts have been in their treatment and review of the most systemic abuses perpetuated against migrant workers under the Kafala system, including those abuses that are disguised or explained away under the "neutral" equal protection provisions of the labour law. The Kafala system operates in such a way that Saudi Arabia's regulatory authorities will rarely intervene to monitor employer practices after a contract has been signed, providing that certain contractual formalities have been complied with. But, this is precisely what is so problematic about the Kafala system. In the absence of tighter regulation, regular inspection and effective enforcement by law authorities, private businesses in Saudi Arabia have been free to pursue a "business as usual" corporate ethos. This is an ethos that has too often aligned with the popular will of Saudi society and the Kingdom's own labour nationalisation policy.⁹⁰⁴ Leaving aside the gap between the "law on the books" and workplace realities for many migrant workers, challenges remain in respect of those laws or initiatives under which migrant workers can claim minimal protections. The Wage Protection scheme is a good example. Under the existing rules, employers are required disclose any deductions in wages. However, no clear rules exist for litigating any wage claims concerning the post-reduction of worker salaries once the contract has already been signed by both parties. Furthermore, there is no a mechanism for investigating whether such contractual changes but

⁹⁰⁴ Ayman Adham and Anita Hammer, 'Understanding Arab Capitalisms' (2021) 32(21) *International Journal of Human Resource Management* 4578.

have been effectuated with the informed consent of employees (as the weaker party to the bargain.).⁹⁰⁵

8. Reflections on the Kingdoms' Labour Law Regime and its Impact on Migrant Worker Rights

The above-mentioned legislative gaps and omissions significant consequences for all workers, particularly migrant workers. One of the most enduring challenges faced by migrant workers is the arbitrary or unjustified reduction of their salaries once a contract has been formally approved as a condition of a Kafala work visa. There are other challenges as well. Article 93 of the Saudi labour law states that employers may not deduct more than half the amount of a worker's due wage, unless a competent authority determines otherwise, in which cases further deduction amounting of up to half of a worker's wage may be approved.⁹⁰⁶ The application of this rule invites abuses of wage rights and opens the door to unchecked agency discretion. This is because there are no rules or guidelines concerning the ways in which substantial wage deduction would be based on "just cause". As a result, is arguable that an agency decision to deduct wages summarily, without due process, goes against Islamic principles of justice and fairness and the "spirit" of the wage protection scheme and its commitment to implementing international labour standards.

A more general concern is that neither the labour law, nor the Wage Protection scheme, establishes remedies for rights abuses beyond wage claims, such as injury compensation. In this way, the labour protections provided under both national frameworks is excessively narrow in ways are likely to obscure and divert attention from other exploitative, unfair, or abusive employment practices. The danger is that the minor victories won in wage protections will slow the path to more meaningful and wide-ranging labour law reforms. Providing that employers can show that they have complied with wage payment obligations, no laws may have been broken. Even if laws have been broken, employees, and in particular migrant workers, have limited guarantees of an effective legal remedy. The right of pursue claims before the country's

⁹⁰⁵ Meshal Alharbi, 'Protecting Employees' Wages in Accordance with Saudi Labour Law: Should We Do More?' (2021) 12(2) Beijing Law Review 320.

⁹⁰⁶ Ibid, Labour Law (2005)(Saudi Arabia) art 93.

labour tribunals and courts has been widened and sharpened. However, this is to no avail, if victims of rights abuse are left to the mercy of Saudi Arabia courts in the absence of settled rules of law and clear interpretative standards. As the above analysis has shown, Saudi Arabia's dispute settlement interpreted their review powers sometimes broadly and at other times narrowly. Either way, there is a problem. A formalistic adherence to statutory law only serves to reinforce the narrowness of migrant worker rights protections. A more purposive form of judicial reasoning, especially when titled in favour of employer rights and freedoms, will only further undermine the certainty with which migrant workers can rely on those statutory protections that do exist.

This analysis has focused on legislative and interpretative gaps or ambiguities that may conceivably affect the rights of both Saudi and foreign (temporary, migrant) workers, albeit that these factors are shown to disproportionately impact the rights of the latter. There are more obvious ways in which the Kafala system (and its underpinning labour legislation) undermine the human rights of migrant workers, particularly with regard to their right to end a contract. The basic rights of migrant workers, such as freedom of movement, the right to bargain collectively or to seek remedies for discriminatory application of the law, have been restricted by law, as well as in fact.⁹⁰⁷ Article 33 of the labour law explicitly prohibited employees from leaving the country or changing jobs without first seeking prior permission by an employer, regardless of the nature of that work.⁹⁰⁸ It is difficult to escape the conclusion that the Kingdom's statutory framework has, at times, served to legitimise, codify, and reinforce the most abusive or discriminatory aspects of the Kafala system. Moreover, under the rules of the Wage Protection Scheme, migrant workers cannot challenge an employer or recover unpaid wages until a minimum period of three months has passed without payment. Given that migrant workers rely on remittance income and cannot depend on private sources of financial help in foreign country, this rule is likely to impose an unfair economic burden on such workers (a legal situation deemed inequitable under Islamic rules and principles).⁹⁰⁹ Other rules with discriminatory effect are that-Saudi nationals may not be self-employed, marry Saudi

⁹⁰⁷ Labour Law No. 14 of 2004, Art 116 (2004) (Saudi Arabia). Committees in the same industry are permitted to form a general committee (for example, the General Committee for the Workers of Trade and Industry), which can in principle be reconstituted as a general trade union or body. In practice, Saudi Arabia has taken a dim view of collective bargaining organisations. See Daniel Blackburn, 'International Union Rights' (2018) 25(2) *Muse International Centre for Trade Union Rights* 24, 25.

⁹⁰⁸ Labour Law (2005)(Saudi Arabia) art 33.

⁹⁰⁹ Muhammad Wohidul Islam, *Dissolution of Contract in Islamic Law*, 13 *Arab Law Quarterly* 336–368 (1998); Fathi Aldrainy, *alnazariat alfaqhia [Islamic Jurisprudential Theories]* (Brill, 1996) 149–151.

(female) spouses or apply for citizenship or naturalisation under the country's residency and immigration laws.⁹¹⁰ The Wage Protection Scheme was being marketed as a powerful symbol of the Kingdom's renewed commitment to international labour standards. Despite this, migrant workers were being stigmatised, racially abused, and summarily deported in large numbers - some only after they had been arbitrarily detained for indefinite periods in deportation centres without a right to a legal hearing or process of appeal.⁹¹¹

⁹¹⁰ Interior Ministry, Law of Marriage of Saudi Citizen with a Non-Saudi, Number 874, 12/20/1422 H (Saudi Arabia).

⁹¹¹ Amnesty International, *Saudi Arabia: Dozens of Sri Lankan Women Wrongfully Detained for Months Due to Abusive Kafala System*, (Amnesty Press Release, 2021).

F The New Kafala Reforms and Labour Law

As noted in previous chapters, the Kafala system has endured, often with high degree of social acceptance by Saudi citizens. While the labour law has been amended over several decades to expand the rights of Saudi workers, the more exclusionary and discriminatory aspects of the Kafala system remained in place until very recently. This too reflects broader dynamics in Saudi society, wherein the government has honed a policy of transferring wealth. This ranges from prestige jobs in the public sector, to ruling classes and to wider society in lieu of strong democratic guarantees and other democracy-enabling political rights (primarily freedom of speech, religion, assembly and association). Although, this is now changing. Under new youthful leadership, Saudi Arabia is remaking the social contract, and in doing so realigning the boundaries between its legal traditions and its economic brand of modernisation.

It is in this period and context that we can assess the Kingdom's recent efforts to dismantle some, but not all, elements of the Kafala system. As part of the 2030 Vision ambition to foster competition in the Kingdom's domestic labour market, a closed set of highly qualified, highly skilled workers were the first to be made exempt from the old rules of the Kafala system. In May 2019 the government made the step of administering a work permit system that dispenses with the need for a sponsor consent by enactment of Royal Decree No. M/106 dated 10.9.1440H.⁹¹² Under the new 'Privileged Iqama Law', certain white-collar employees are no longer required to obtain a sponsor's consent as a condition of obtaining temporary rights to enter, reside and work in the Kingdom.⁹¹³ Under the previous rules, a change of employment, without the sponsor's approval, risked invalidation, suspension or cancellation of a work and residence permit.⁹¹⁴ This requirement has now been removed for professionals in unserved sectors, such as IT and the STEM fields. Workers in these occupations also acquire special rights and privileges, including the right to apply direct to the government for work permits on permanent or renewable basis.⁹¹⁵ The new law also permits these selected workers to work any private establishment of their choosing, and to change employers without restriction, providing they comply with the end of service notification period set by law. Eligible workers also exempt

⁹¹² Royal Decree No. M/106 dated 10.9.1440H (Saudi Arabia).

⁹¹³ Ibid.

⁹¹⁴ Ibid, art 3

⁹¹⁵ This circumvents the rule that migrant workers must first enter into agreements with a foreign employer who would then apply for the relevant governmental permits on the employee's behalf.

from the previous requirement of “exit authorisation”, thus removing previous barriers to worker freedom of movement in and out of the Kingdom.⁹¹⁶ Further implementing rules have also relaxed previous restrictions on foreign ownership and enterprise. So called “privileged” workers may now carry out commercial activities that were previously restricted under Foreign Investment Law.⁹¹⁷

It is abundantly clear that the above reforms were introduced for economic purposes, including the Kingdom’s stated aim of promoting greater mobility in the job market, attracting new talent, and driving reinvestment to the Kingdom.⁹¹⁸ As such, improved labour rights protection, or the national compliance with international human rights standards, do not appear to be a central or even prominent factor behind the 2019 reforms. Yet, incremental developments such as these would fire the starting pistol for the further overhaul of the Kafala system and further changes were introduced in 2020,⁹¹⁹ and brought into effect in 2021, with the passing of a ministerial resolution. This resolution introduced important changes to core elements of the Kafala system: the freedom (of migrant workers) to change jobs and leave the country.

First announced in November 2020 as part of the Saudi Ministry of Human Resources and Social Development’s Labour Reform Initiative, one of the stated aims of the new reforms is to “enhance the contractual relationship between workers and employers.”⁹²⁰ Effective from March 14, 2021, the new rules stipulate that any migrant worker that falls within the scope and jurisdiction of Saudi Arabia’s labour law may now change jobs and form new employment agreements without the prior and explicit consent of a sponsoring employer, under certain conditions. One condition is that migrant workers may not end their work contracts until one year after their employment agreement has commenced, or once their contract expires whichever comes latter. Pursuant to new guidelines articulated in the ministry-issued Labor Reform Initiative (LRI) Services Guidebook, migrant workers may also end their contract and seek new employment if they meet two conditions. Firstly, they must not have been paid for

⁹¹⁶ Ibid, art 2.

⁹¹⁷ Ibid.

⁹¹⁸ Labour Reform Initiatives Guidebook, *National Transformation Program*, <<https://hrsd.gov.sa/sites/default/files/1112020.pdf>>.

⁹¹⁹ Ministerial Resolution number 51848 on 19/03/1442 5 November 2020 (Saudi Arabia).

⁹²⁰ Labour Reform Initiatives Guidebook, *National Transformation Program*, <<https://hrsd.gov.sa/sites/default/files/1112020.pdf>>.

three consecutive months. Secondly, is where labour dispute settlement proceedings are in motion, if the employer fails to attend two litigation hearings.⁹²¹

As the next chapter will explore many of the same challenges identified in this chapter. This includes the 3-month employer adjustment period, the lack of a mechanism to investigate and contest salary reductions, the impotency of enforcement mechanisms with which to monitor and investigate employer abuses, and the barriers to effective legal remedies, and the lack of legal representation in dispute settlement mechanisms have yet to be adequately addressed under these reforms. Moreover, while migrant workers can first time apply to the government directly for an exit permit without the employer's permission, the reforms do not abolish the system of exit permit itself, in violation of customary international human rights norms on freedom of movement.⁹²² While certain restrictions have been eased, migrant workers can only end their contracts without employer consent, by force of law, under certain narrow circumstances.⁹²³ In cases where the migrant workers cannot establish valid legal grounds, (such as through persistent non-payment of wages, or the expiration of a work permit), employers will still wield excessive power over the freedoms and legal status of their workers.⁹²⁴

Above all, the new reforms are still highly exclusionary in their scope. The reforms exclude workers that are not covered by the labour law, including manual workers, gardeners, domestic workers, agricultural workers and drivers.⁹²⁵ These new reforms may have undoubtable symbolic value. However, the practical impact of these reforms, and their effective enforcement, remains questionable not least because they further legitimise the exclusion of vast swathes of workers from equal or fair protection under the law.⁹²⁶ It is worth recalling that migrant workers constitute more than 80 percent of the Saudi workforce, and consist mostly of

⁹²¹ Ibid.

⁹²² International Labor Organization. Convention No. 189 Concerning Decent Work for Domestic Workers arts. 3-4, 11, June 16, 2011.

⁹²³ Migrant Forum Asia, *Reform Of The Kafala (Sponsorship) System Policy Paper No 2* (International Labour Organisation, 2021).

⁹²⁴ Heather Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries' (2012) 45(2) *Cornell International Law Journal* .461, 470-471.

⁹²⁵ Under the existing law, domestic workers are obligated by law to obey their employers commands, and may only leave with a "legitimate reason". See Human Rights Watch, *Saudi Arabia: Shura Council Passes Domestic Worker Protections* <<http://www.hrw.org/news/2009/07/10/saudi-arabia-shura-council-passes-domestic-worker-protections>>.

⁹²⁶ International Labour Organisation, *100th ILO Annual Conference Decides to Bring an Estimated 53 to 100 Million Domestic Workers Worldwide Under Realm of Labour Standards* <<http://www.ilo.org/ilc>>.

manual, clerical and service sector workers. It is difficult to see how the new reforms can be celebrated as milestone in the Kingdom's commitments to improved labour and human rights, if many of the workers that the reforms claim to empower are not entitled to its protections. The remaining limitations of the Kafala and labour law framework will be discussed in the next chapter with a view to developing a conceptual and doctrinal framework for its meaningful reform, in line with constitutional standards of Sharia and emerging human rights norms and discourses.

G Conclusion

This chapter has shed light on barriers that exist, now and then, to the equal and effective labour rights protection. It has examined the Kingdom's legislative framework on labour law, its ongoing reform, and labour case law and dispute settlement. It is against this that the chapter has argued that the statutory framework has often provided the warrant for legalised discrimination of temporary migrant workers, rather than the means to challenge or enforce labour rights and protections.

By examining the case decisions of Saudi Labour courts and tribunals, and by identifying a shift from traditional "command and control" regulation to "privatised" and soft governance and compliance mechanisms, this chapter has reflected on the ways that labour protections have been strengthened, and weakened, in various ways. This chapter has identified ongoing gaps in the Kingdom's labour law framework. This includes the limited scope of statutory protections, the impotency of enforcement mechanism and absence of effective legal remedies in the context of labour judicial or tribunal rulings that have too often championed the freedoms of employers, at the expense of the rights of migrant workers.

Some victories towards improved migrant worker rights protections have been won, including the rules that have been established to secure worker wages. But even with these victories, there are challenges. This chapter concluded by considering how the existing provisions of the labour law, and the rules regulating the Kafala system – each regime parasitic on the other – have been reformed, and dismantled, following the latest reforms. It is arguable that the Kafala reforms do not go far enough and is still fundamentally exclusionary. Like Saudi Arabia's courts, issues of justice are increasingly being viewed through an economic lens, in a way that leads to the further trivialisation of human rights concerns. Any claims that the Kingdom has now entered a new era of migrant rights protection are overstated, and downplays the need for deeper and more meaningful reform.

As the next chapter will argue, incremental change may be necessary. Piecemeal reforms to the Kingdom's labour regulation framework and migrant workers policy are more likely to win the support of local merchants and businesses who have long become accustomed to a steady supply of cheap foreign workers. Indeed, the legislation is primed to have effect on job mobility

and retention rates. Saudi employers, who no longer exercise sole control over the exit and entry rights of their employees, may be provided with strong incentives to improve working conditions now that foreign employees may be poached by local competitors. Market practices are also likely to track broader developments in Saudi labour law, including the very recent decision to adopt a minimum wage for Saudi public workers. While no minimum wage is prescribed by law for foreign workers, Saudi companies that face challenges retaining loyal and talented workers may come to institute a soft minimum wage for expatriate workers in exchange for continued service. Market self-regulating measures will be further supported by the new private information exchange and reporting scheme. Although, this “softly softly” approach does not adequately address the endemic forms of abuse, discrimination and exploitation suffered by workers excluded from the most basic protections provided under the labour law. It is these sectors that are most deserving of and in need of stronger protections, and it on this area that the Kingdom has more work to do.

The effectiveness of these reforms has yet to be proved, or robustly tested in the courts. These reforms have only recently been announced, and contain little information to support the claim that repealed provisions of the Kafala system are being complied with by Saudi employers, and enforced. The 2020 Kafala reforms may well create momentum for further legislative change or measures. These changes may include reform of immigration and labour law reform, the expansion of social rights and entitlements to migrant workers and dependents that have settled in the Kingdom. In the sphere of political rights, it seems untenable that the right to associate collectively in trade unions or other political organisation will be a right extended to foreign nationals, since such freedoms do not exist even for Saudi nationals.

Looking optimistically to the future though, it is not inconceivable to speculate that migrant workers might be offered strengthened opportunities to seek legal representation, or the right to appeal the decision of a Saudi immigration authority. Joint cooperation between regional partners of the GCC may also provide a solution to certain collective action problems, including the cross-border trafficking of migrant workers. The Courts may have a role in elaborating justice principle in labour rights adjudication, informed by the Kingdom’s new commitments to implementing international labour and human rights standards. The next chapter builds on these ideas to develop a framework and pathways to reform in the sphere of migrant rights protections.

CHAPTER VI: SAUDI ARABIA AND THE KAFALA SYSTEM: A CRITICAL ANALYSIS OF THE NEW REFORMS

A Introduction

Upon analysing the Kafala system from a human rights, Sharia and domestic perspective, it becomes time to enter a detailed discussion featuring all perspectives. This discussion chapter will proceed to answer the research sub-question: ‘Can international and constitutional sources of rights protection be mobilised towards the future abolition of the Kafala system?’

To do so, this chapter aims to synthesise several themes that have emerged in this study’s assessment of the Kingdom’s Saudi Arabia’s Kafala (labour migration) laws and underpinning labour law framework, historically and in view of the Saudi leadership’s recently announced reforms to this system. More than previous chapters, this chapter situates the Saudi Kafala and labour law reforms in regional and international context to explore the divergences between the Kingdom’s proclaimed human rights commitments and real-life developments in the global political economy.

At the level of critical legal enquiry, the chapter takes as a normative starting the question of how to secure the dignity and social justice for migrant workers beyond the limiting boundaries and dichotomies of state centred conceptions of international and domestic migration law and policy. This type of enquiry is closely bound up with the ambitious task of reimagining - the ‘conceptual questions that lie beneath the facts of globalization’.⁹²⁷ There is a need to reassess questions of international migration in ways that escape an overly moralistic approach that denies the state’s legitimate rights to police its national borders and set its own immigration policies. This requires an assessment of the close relationship between the positivised dimensions of international law and sovereignty, particularly regarding a state’s territorial

⁹²⁷ Chantal Thomas, ‘What Does the Emerging International Law Of Migration Mean For Sovereignty?’ (2013) 14 *Melbourne Journal of International Law* 408.

control over its borders. Any appeals made to a cosmopolitan notion of rights⁹²⁸ have been used to reinforce structural inequalities between the Global South and North.

In contemporary discourse, the idea of “civilized and uncivilized” has become prominent. The dichotomisation of civilized and uncivilized cultures can be traced to a cultural contingent natural rights tradition, and to modern democratic political theory. A utopian theory of migrant rights across and beyond borders fails to attract the political and social acceptance of modern Gulf societies. These modern Gulf societies now look to reap the same benefits of a globally mobile and disposable migrant workforce as European powers have enjoyed, historically and even today in the contemporary global political economy.⁹²⁹ At the same time, the recent construction of migrant worker’s rights as a secondary function of population management is to reduce questions of migrant rights, and limits imposed by sovereign governments. This leads to a calculated trade-off between national economic interest and international legitimacy. This utilitarian calculus provides a palpably unsatisfactory moral resolution to the dilemmas of globalisation, further subordinating the needs and interest of the Global poor to whatever is considered political expedient by Gulf’s all powerful ruling regimes.

The central contention of this chapter is the need to avoid this type of binary thinking, whereby international, migration is reduced either to “apologetic pragmatics of population management”, on the one hand, versus a utopian cosmopolitanism, on the other.⁹³⁰ To do so, is to abandon any hope that Gulf may yet design migration policies, underpinned by social and political rights, that may operate to the mutual advantage of Gulf societies and foreign workers.

⁹²⁸ The cosmopolitan notion of rights are now embodied by international instruments that attempt reimagine notions of citizens are one that reaches beyond national borders and boundaries is a more fundamental sense forgets too easily the postcolonial dimensions of international law, both historically and in the global political economy of today, as well as how colonial representation of “natural” universal rights.

⁹²⁹ Amr Sabet, ‘Islamic Paradigm of Nations: Toward a Neoclassical Approach’ (2003) 31 (2) *Religion, State and Society* 17, 18.

⁹³⁰ Chantal Thomas, ‘What Does The Emerging International Law Of Migration Mean For Sovereignty?’ (2013) 14 *Melbourne Journal of International Law* 408, 409-410.

B Learnings of the Kafala System: The Unifying Themes and Framework

A central armature of this study concerns the dual character and dichotomies of the Kingdom's Kafala sponsorship. On one hand, is the Kingdom's Kafala sponsorship as part of a contextual analysis of the country's waiving commitments to 'internationalisation' of the Kingdom's labour markets. On the other, is the domestic "control" and exclusivity of national migration and labour standards.⁹³¹ Between these two mindsets, lies the contentious question of how Saudi's migration policies and law compares with, and conflicts, with emerging international human rights standards.⁹³²

This analysis has noted that the conditions governing the sponsorship of a foreign temporary worker, including residency and entry (and exit) into Kingdom, are nominally governed by state (regulatory) law. Beyond establishing a statutory regime for imposing immigration controls on the flow of foreign workers into the country,⁹³³ this includes the power to arbitrarily deport workers without appeal, the sphere of migrant-employer relations. Furthermore, this also includes any responsibilities Saudi employers may have to migrant workers, have historically been 'privatized'.⁹³⁴ Put differently, critical issues regarding the governance of the Kafala sponsorship system have effectively been removed the legitimate sphere of public regulation, supervision and contestation.⁹³⁵

On the most important issues of migrant rights protection,⁹³⁶ it is private market participants (sponsoring employers), and not national authorities and courts, that have been given the power to decide which protections shall apply to migrant workers, and which are denied.⁹³⁷ This

⁹³¹ Hanan Kalaeb, 'The "Kafala" System and Human Rights: Time for a Decision' (2005) 29(4) *Arab Law Quarterly* 307.

⁹³² This implicates a familiar tension between international (integration) law and its domestic enforcement.

⁹³³ Residence Regulations, Law No. 17/2/25/1337 (Saudi Arabia) art 5, 14.

⁹³⁴ Karin Kelly et al., 'Hegemony of Saudi Arabia's Kafala System in The Relationship Between Employer and Indonesian Female Domestic Migrant Workers 2018-2020' (2022) 3(1) *International Journal of Social Sciences Review* 18.

⁹³⁵ This includes the extent to sponsorship processes are administered with respect for the equal dignity of all workers, foreign and national. Artin Oelz, *Domestic Work Policy Brief No. 1: Remuneration In Domestic Work* <<http://www.ilo.org/wcmsp5/groups/p>>; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1685.

⁹³⁶ Including fair employment terms, safe working conditions, and the freedom to change jobs without penalty,

⁹³⁷ Alzahrani, 'System of Kafala and the Rights of Migrant Workers in GCC Countries – With Specific Reference to Saudi Arabia' (2014) 2 *European Journal of Law Reform*.

deliberate political choice by Saudi Arabia's ruling political authorities to deregulate the process of migrant worker sponsorship has established the conditions for the well documented abuse and exploitation of migrant workers under the Kafala system.⁹³⁸

This study has argued that the inadequate regulation of migrant worker rights protection in Saudi Arabia is the consequence of the Kingdom's historic policy of overregulating and engineering the social rights and protections of its Saudi citizens. In Saudi Arabia, as in other Gulf countries, indigenous workers have been granted extensive labour protections by laws, particularly as it concerns wage protection guarantees.⁹³⁹ These guarantees have some basis in the Islamic laws of Sharia, a customary and constitutional source of law in all GCC legal system.⁹⁴⁰ However, other rights, chiefly political and civil rights (such as the freedom of movement and association, as well as general rights of political participation and free speech) are less protected for Saudi and migrant workers under the current the Kingdom's law and constitutional order.⁹⁴¹ Historically, in the Saudi model of law and society, the primary function of the state is to ensure the smooth running of the administrative state, and to ensure that wealth is appropriately distributed through extensive wealth transfer and guarantees of employment in the public sector.⁹⁴² The function of the court is to ensure that employment bargains are enforced in accordance with the Kingdom's Sharia governed contract regime.

The strength of the Kingdom's social insurance system and private contract regime stands in direct contrast to the near-absent recognition and protection of collective bargaining rights, as well as the enduring cultural barriers to workplace equality and non-discrimination.⁹⁴³ This can be traced to more foundational features of the Saudi constitutional order and the state-society

⁹³⁸ Matthew Wallerer, 'Commodification and Resistance: Migrant Labor in Jordan' (2018) *International Development, Community and Environment* 211; Nizar Sagheh, *Lebanon Unlimited: Neoliberalism Dominates the Workplace* <<https://english.legal-agenda.com/lebanon-unlimited-neoliberalism-dominates-the-workplace>>

⁹³⁹ International Labour Organisation, *Policy Brief No. 2: Reform of The Kafala (Sponsorship) System* <<https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>>.

⁹⁴⁰ Policy Note, *The Legal 500 Country Comparative Guides Saudi Arabia: Employment & Labour Law* <<https://www.addleshawgoddard.com/globalassets/insights/employment/saudi-arabia-employment-labour-law.pdf>>.

⁹⁴¹ Fred Halliday, 'Relativism and Universalism in Human Rights: The Case of the Islamic Middle East' (1995) 43 *Political Studies* 152,154-156.

⁹⁴² Mohammed Dito, 'Kafala: Foundations of Migrant Exclusion in GCC Labour Markets' in Abdulhadi Khalaf, Omar AlShehabi and Adam Hanieh (eds), *Transit States. Labour, Migration and Citizenship in the Gulf* (Pluto Press, 2015) 81; Kristian Coates Ulrichsen, 'Migrant Labour in the Gulf' In *The Gulf States in International Political Economy* (Palgrave Macmillan, 2016) 16.

⁹⁴³ Gwenn Okruhlik and Patrick Conge, 'National Autonomy, Labor Migration, and Political Crisis: Yemen and Saudi Arabia' (1997) 51 (4) *Middle East Journal* 556.

relation one which it has depended.⁹⁴⁴ Firstly, is the centrality of Islam to Saudi Arabia. Centrality in this regard, refers to the founding origins of the modern state of Saudi Arabia, along with in judicial enforcement of Sharia as the supreme law of the Saudi legal system. Outside of the role of religion in the production of law, and limits of political authority, the Saudi model of labour relations and law is arguably more the inevitable by-product of the Gulf's rentier model of government and politics. This is because Saudi citizens have been promised guaranteed wealth and generous welfare guarantees in lieu of political rights; a strategy that was devised as a way of overcoming deep divisions in Saudi society while also assuring the continued survival of the Gulf's ruling monarchs.⁹⁴⁵

Against this backdrop, this study has cast light on the mutually reinforcing and facilitating relationship between the Kingdom's internal legal and political order, its external policies on migration, and the human rights of migrant workers.⁹⁴⁶ As a rentier economy, Saudi Arabia has structured its economy on the exploitation of natural resources, preventing it from tapping into more diverse sources of government revenue. A central conceptual claim made in this thesis is that settlement achieved between Saudi states and their societies is beginning to change. As Saudi Arabia's leader grapple with modern policy challenges,⁹⁴⁷ there is renewed impetus for modernising legal reforms.⁹⁴⁸ This study's overarching analysis of the in-tension forces that have animated the Kingdom's labour law and policies⁹⁴⁹ provides important social context for analysing the rights deficiencies of Saudi Arabia's Kafala system, and the extent to which international criticism of this system has been remedied or mitigated under the new reforms.⁹⁵⁰

⁹⁴⁴ Ibid.

⁹⁴⁵ Fred Halliday, *The Middle East in International Relations: Power, Politics and Ideology* (Cambridge: Cambridge University Press, 2005) 265.

⁹⁴⁶ Zahra Babar, 'The Cost of Belonging: Citizenship Construction in the State of Qatar' (2014) 68 (3) *Middle East Journal* 413.

⁹⁴⁷ These Challenges include the diversification away from oil, the retrenchment of the welfare state and partial move towards privatisation, a growing youth unemployment problem and continued demand for high skill foreign workers.

⁹⁴⁸ Priyanka Motaparthi, *Understanding Kafala: An Archaic Law at Cross Purposes with Modern Development* <<https://www.migrant-rights.org/>>; J E Peterson, 'The GCC states: Participation, Opposition and the Fraying of the Social Contract', (2012) 4 *Research Paper of the Kuwait Programme on Development, Governance and Globalisation in the Gulf States* 4.

⁹⁴⁹ Such as the pursuit of market liberalisation and the Kingdom's default policy of labour nationalism.

⁹⁵⁰ For a parallel analysis see Shafeeq Ghabra, 'Kuwait and the Dynamics of Socio-Economic Change,' (1997) 51 (3) *Middle East Journal* 364.

This thesis has explored the in-tension relationship between three levels of law and obligation: Saudi law, international law and Sharia. As its starting point, this chapter has noted the relative informality and rule of law dysfunctions of the Saudi Arabia's legal system.⁹⁵¹ This informality is also revealed in the scope of administration discretion to determine the rights and status of foreign temporary workers and the absence of legal mechanisms available to migrant workers to challenge abuses or infringement of these rights by public bodies or private employers.⁹⁵² At the level of the Kingdom's obligations and commitments under international law, this thesis has considered the implications of the Saudi Kafala system from the perspective of ILO standards and other applicable UN Charter and treaty based human norms, elements of which have attained the status of customary law.⁹⁵³

This study has observed key failures by the Saudi government to bring its domestic migration regime and Kafala system into ever-increasing compliance with international norms and standards in this area. At the level of Saudi Arabia's internal (domestic) customary law, analysis has also considered the extent to which the Saudi legal order has been progressively reformed to comply with mandatory norms of Sharia, including the Kingdom's statutorily implemented wage protection scheme.⁹⁵⁴ The recent analysis of the Kingdom's interpretation of Sharia and judicial discretion in the enforcement of employment contract has shown that mere compliance with Sharia is not sufficient to address existing gaps in Saudi Arabia's labour law. This is even the case, if this research has argued the values immanent in Islam are broadly supportive of worker rights and fair contractual outcomes.⁹⁵⁵ The difficulty lies within how

⁹⁵¹ For a rule of law perspective see Nathan J Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press, 1997) 155; Esmacili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26(1) *Arizona Journal of International and Comparative Law* 1, 27-30. See also, George N Sfeir, 'The Saudi Approach to Law Reform' (1988) 36(4) *The American Journal of Comparative Law* 729, 729-759.

⁹⁵² Chantal Thomas, 'Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context' (2010) 48 *American Journal of Comparative Law* 987. For a macroeconomic perspective, see World Bank, *Striving for Better Jobs: The Challenge of Informality in the Middle East and North Africa Region* (2011); United Nations Development Programme (UNDP), *Arab Development Challenges Report: Towards the Developmental State in the Arab Region* (2011).

⁹⁵³ Migrant Rights, *Saudi Arabia Announces Labour Reforms for Private-Sector Workers* <MigrantRights.org>; Human Right Watch, *Saudi Arabia: Labor Reforms Insufficient* <<https://www.hrw.org/news/>>; United States Department of State, *Trafficking in Persons Report* <<https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf>>.

⁹⁵⁴ Migrant Rights, *Saudi Arabia to Begin the Final Phase of the Wage Protection System* <Migrant-Rights.org>.

⁹⁵⁵ Emilia Truluck, 'Using Islam to Protect the Rights of Migrant Workers: Bringing Kafala into Sharia Compliance in Saudi Arabia' (2023) 20(1) *UCLA Journal of Islamic and Near Eastern Law* 155.

Islamic principles and values are interpreted, implemented or qualified in accordance with the political traditions, and preferences, of modern Arab nations such as Saudi Arabia.⁹⁵⁶

Previous chapters have argued that the rights of migrant workers can only be adequately protected if Saudi Arabia engages in further efforts to bring aspects of its migrant worker laws and policies into conformity with emerging standards of international human rights law, as well as the more emancipatory and social justice related provisions of Sharia.⁹⁵⁷ However, from a realpolitik perspective, it might be equally argued that the preferential treatment of Saudi workers is both an appropriate and legitimate expression of national policy.⁹⁵⁸ Immigration law and policy is, after all, considered the exclusive preserve of sovereign states.⁹⁵⁹ In the above light, the relevant question posed in this discussion chapter is the extent to which this sovereignty can, or should, be circumscribed or limited in accordance with hard and soft instruments of international and regional human rights law.⁹⁶⁰ Yet, as this study's analysis has shown, the policy motivations of Saudi leadership are complex and are not reducible to a single set of policy preferences.

A central claim that has emerged from this study's previous chapter is that the abstract labour policies and rights protections cannot be examined in isolation from the concrete social conditions in which these rights are interpreted and applied.⁹⁶¹ These social conditions, as implied by this study's analysis, include cultural, as well as legal, barriers that exist to

⁹⁵⁶ Kasule Omar, *Contemporary Muslims and Human Rights Discourse: A Critical Assessment* (IIUM Press, 2009) 10, 11; Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an* (UTP, 2002) 123.

⁹⁵⁷ Ray Jureidini and Said Fares Hassan, 'The Islamic Principle of Kafala as Applied to Migrant Workers' in Ray Jureidini and Said Fares Hassan (eds) *Traditional Continuity and Reform, Migration and Islamic Ethics* (2020) 92, 93.

⁹⁵⁸ Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36(6) *International Organization* 182.

⁹⁵⁹ Jar Nafziger, 'The General Admission of Aliens Under International Law' (1983) 77(4) *American Journal of International Law* 804; Chantal Thomas, 'What Does The Emerging International Law Of Migration Mean For Sovereignty?' (2013) 14 *Melbourne Journal of International Law* 1.

⁹⁶⁰ Alan Desmond, 'From migration crisis to migrants' rights crisis: The centrality of sovereignty in the EU approach to the protection of migrants' rights' (2023) *Leiden Journal of International Law* 1. For a critical perspective of the colonial origins of international law and resistances by the non-Western world to submit to imperialistic human rights discourses or other international law instruments that reduce their regulatory autonomy, or require submission to culturally relative human rights constructs 'made universal', see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

⁹⁶¹ Maartin Bos, 'Theory and Practice of Treaty Interpretation' (1980) 27 *Netherlands International Law Review* 3. (as Maartin Bos has explained the process of interpreting as well as articulating rights must be "an activity . . . designed to clarify the text of a written manifestation of law" while at the same defining such in ways that reflect and concrete application to "the realities of daily life and practice.") Ibid, 15.

enforcement of equality protections.⁹⁶² From this starting point, it is also important to consider why states choose to reform their domestic migration laws and policies to protect human rights, particularly when there may be little popular or social appetite for such reforms.⁹⁶³ Saudi citizens have largely benefited from the import of cheap foreign labour. As unemployment rates continue to rise in Saudi Arabia, the lack of popular support for more far-reaching reforms to the Kafala system seems likely to become more, and not less, entrenched.⁹⁶⁴ Traditional constituencies may also come to regard pressure by treaty bodies and other international stakeholder as a hegemonic attempt to impose culturally specific (non-Islamic) human rights traditions on Saudi Arabia “from above”.⁹⁶⁵ At the same time, religious arguments, including religious discourses, including culturally relativized human rights conceptions, can be exploited to reinforce existing social hierarchies and exclusions, including the legal exclusion of migrant workers, in services of state interests and power.⁹⁶⁶

Given these barriers to strengthened migrant rights protections, the motivation for reform may instead arise from a combination of internal and external pressures. Internally, Saudi Arabia, now diversifying away from oil to new infrastructure heavy reforms, is still heavily dependent on the steady supply on foreign workers from abroad. In addition, the Saudi 2030 Vision agenda to move from a rentier to knowledge economy brings its own demands, as the Kingdom looks to compete with other regional leaders, such as the, UAE, to attract professional workers for their own evolving market segments.⁹⁶⁷ The Saudi leadership has therefore had strong political, self-interested, reasons to progressively dismantle the Kafala system to suit the needs of the Kingdom’s domestic labour market, in addition to meet the developmental needs of the Kingdom’s shifting demographics and socially immobile youth population.⁹⁶⁸ The decision to relax the requirement of employer consent before workers may leave the country, for example,

⁹⁶² Toon Moonen and Laurens Lavrysen, ‘Abstract but Concrete, or Concrete but Abstract? A Guide to the Nature of Advisory Opinions under Protocol No 16 to the ECHR’ (2021) 21 *Human Rights Law Review*.

⁹⁶³ Fairsquare, *Migrant Workers in Saudi Arabia* 4 <<https://fairsq.org/wpcontent/uploads/2020/11/FS-Policy-Brief-1-Saudi-Arabia-1020.pdf>>.

⁹⁶⁴ Ibid; Caroline Kimeu, *Modern-day Slavery’: Kenyan Domestic Workers Tell of Abuse in Saudi Arabia* <<https://www.theguardian.com/global-development>>.

⁹⁶⁵ Neil Patrick, ‘Nationalism in the Gulf States’ (2009) 5 *Research Paper on Kuwait Programme on Development, Governance and Globalisation in the Gulf States* 32; Amr Sabet, ‘Islamic Paradigm of Nations: Toward a Neoclassical Approach’ (2003) 31 (2) *Religion, State and Society* 17, 18.

⁹⁶⁶ Peter Mandaville and Shadi Hamid, *Islam as Statecraft: How Governments Use Religion in Foreign Policy* (Brookings Paper, 2018) 25–26; Chatham House, *Identities and Islamisms in the GCC* (Middle East and North Africa Programme: Future Trends in the GCC Workshop, 2012).

⁹⁶⁷ Priyanka Motaparthy, *Understanding Kafala: An Archaic Law at Cross Purposes with Modern Development* <Migrant-Rights.org>.

⁹⁶⁸ World Bank, *The Jobs Agenda for the Gulf Cooperation Council Countries* (World Bank Group, 2018).

appears to be grounded, primarily, on this economic rationale.⁹⁶⁹ However, obvious dangers lie ahead if it is pragmatism, rather than principle, that provides the justification for the Kingdom's labour rights reforms.⁹⁷⁰ If this is the case, the instrumentalization of rights rhetoric in service of what are in market facing reforms may only weaken the position of workers who command little market power.⁹⁷¹

The marketisation of labour rights cast doubts on the emancipatory potentialities of the new Kafala reforms. The exercise of political power is defined, not only by the exceptions to the "rule," but also its exclusions. It is arguable that the new Kafala reforms simply embolden the will and authority of Gulf states to determine how it shall reconstitute its political and territorial boundaries. From this perspective, the purpose of the reforms is not just to simply to reinforce the existing insider/outside dichotomies of citizens versus "aliens". But, the reforms represent the Kingdom's willingness to redefine rule-exception relationship by linking "rights" to market objectives, albeit by enforcing, through police power, the same divisive exclusionary entry/exit exceptions for the Gulf's dispossessed migrant workers.⁹⁷² The exclusion of low-value workers has set the terms for the consolidation of a differentiated system of rights protection now not merely for Saudi versus foreign workers, but also between privileged (Western) foreign workers and non-privileged (racialised and othered) foreign workers from the Global South.⁹⁷³ This two-tier system further entrenches experiences of alienation, discrimination and legal exclusion, and state-legitimated coercion - for the most vulnerable workers.⁹⁷⁴ The nature of the political dilemma is neatly captured by Abizadeh, observing that:

⁹⁶⁹ BBC News, *Saudi Arabia Eases 'Kafala' System Restrictions on Migrant Workers* <<https://www.bbc.com/news/world-middle-east-54813515>>.

⁹⁷⁰ Mohammed Dito, 'Kafala: Foundations of Migrant Exclusion in GCC Labour Markets' in Abdulhadi Khalaf, Omar AlShehabi and Adam Hanieh (eds), *Transit States. Labour, Migration and Citizenship in the Gulf* (Pluto Press, 2015) 81.

⁹⁷¹ For a Marxist analysis of similar conceptual issues see Nizar Saghie, *Lebanon Unlimited: Neoliberalism Dominates the Workplace* (Legal Agenda, 2015).

⁹⁷² Chantal Thomas, 'Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics' (2003) 24 *Michigan Journal of International Law* 549, 572.

⁹⁷³ UN DESA 2008 Revision, UN Doc POP/DB/MIG/Stock/Rev.2008, 3; Edna Bonacich, 'A Theory of Ethnic Antagonism: The Split Labor Market' (1972) 37 (5) *American Sociological Review* 547; Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004) 43.

⁹⁷⁴ Linda Malone, 'Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements' (2001) 25 *Fordham International Law Journal* 54.

It is clear that the state's exercise of political power is ultimately backed by coercion. ... The question is how the exercise of political power could be reconciled with a vision of human beings at the normative core of both liberalism and democratic theory ... as inherently free and equal.⁹⁷⁵

The difficulty is that the assumptions that human rights rest on pillars of modern liberal and democratic theory (as it we know it in the Western constitutional tradition) is a projection of a contingent and ethno-centric (European) worldview 'made universal'. The civil rights paradigm that has shaped much of modern conceptions of law and polity, based on notion of abstract individual rights and notions of popular sovereignty, has no obvious analogue or counterpart in the developmental histories of the Gulf societies, or in the Islamic traditions and customs in which modern Gulf systems are stepped. Saudi Arabia shares the sensibilities in common with other Gulf states. If the demand for human rights protections is only one, and rarely the most significant motivation behind domestic and constitutional reform, it is necessary to consider the motivations behind the Gulf's recent shift in policy.

The next sections will look to parse these issues. This will begin through an overview of the economic imperative behind the Gulf's labour law reforms, before going on to provide a synoptic analysis of the fundamental weaknesses, and reform possibilities of the Kafala system (in light of broader aspects of the Saudi legal system, international law and judicial enforcement of Sharia).

⁹⁷⁵ Rash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (2008) 36 *Political Theory* 37, 39.

C The External and Internal Drivers of the GCC's Kafala Reforms: Between Theory and Practice

All GCC states, have introduced their own economic reform “Visions”, a trend that is often taken to imply a collective shift from the old “command economies” of the past to the Western model of free enterprise.⁹⁷⁶ This shift from closed to open economies has been accompanied, or perhaps even precipitated some legal and political reforms Gulf countries, a process that has ebbed and flow even since the Arab Spring intensified civil society opposition to the region’s authoritarian regimes.⁹⁷⁷ In recognition of their fragile political authority, Gulf states such as Oman, the UAE, Kuwait and Qatar have for instance undertaken various, and sometimes largely symbolic constitutional reforms, including by expanding the rights of citizens to vote in periodic local elections,⁹⁷⁸ and by amending laws discriminating against women (many formerly justified on Islam grounds).⁹⁷⁹ All GCC states have also looked to strengthen legitimacy perceptions of the regimes by the international community by reforming element of their own statutorily enforced and nationally administered Kafala systems.⁹⁸⁰ While the UAE has primarily focused its diplomatic energies on commercial law reforms aimed at establishing an attractive “host” environment for foreign investors and litigants,⁹⁸¹ Qatar has made social and progressive legal reform a more central component of their reform agendas.⁹⁸² In this way, GCC countries have pursued different strategies to secure their own standing, influence and

⁹⁷⁶ Government of Qatar, *Qatar Second National Development Strategy 2018-2022* <<https://www.psa.gov.qa/en/knowledge/Documents/NDS2Final.pdf>>; Danyel Reiche, ‘Energy Policies of Gulf Cooperation Council (GCC) countries—Possibilities and Limitations of Ecological Modernization in Rentier States’ (2010) 38 *Energy Policy* 2396.

⁹⁷⁷ Uriel Abulof, ‘“Can’t Buy Me Legitimacy”: The Elusive Stability of Mideast Rentier Regimes’ (2017) 20(1) *Journal of International Relations and Development* 55.

⁹⁷⁸ Jurist, *Kuwaiti Constitutional Court Judgment of 22 Oct. 2009* <<http://jurist.org/paperchase/2009/10/kuwait-constitutional-court-rules-women.php>>; M A Tétreault, ‘Kuwait. Slouching towards Democracy?’ in Joshua Teitelbaum (ed.) *Political Liberalization in the Persian Gulf* (Columbia University Press, 2009) 31; Cihat Battaloğlu, *Political Reforms in Qatar: From Authoritarianism to Political Grey Zone* (Gerlach Press, 2018) 73.

⁹⁷⁹ Kristin Diwan, ‘Clerical Associations in Qatar and the United Arab Emirates: Soft Power Competition in Islamic Politics’ (2021) 97(4) *International Affairs* 945. Gregory Gause notes that: “None of the ‘GCC leaders (with the partial exception of Kuwait) has to face an elected parliament with real powers, or a free press. Strong lobbies on foreign policy issues do not exist; public opinion is a minimal constraint.” Gregory Gause, ‘Understanding the Gulf States. Democracy’ (2015) 36 *Journal of Ideas*.

⁹⁸⁰ Hanan Malaeb, ‘The “Kafala” System and Human Rights: Time for a Decision’ (2015) 29(4) *Arab Law Quarterly* 307-342, 309; Heather Murray, ‘Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries’ (2012) 45(2) *Cornell International Law Journal* 461, 461.

⁹⁸¹ N Janardhan, *The UAE Evolves into a ‘Smart Power* (Gulf Today, 2019).

⁹⁸² Kristin Diwan, ‘Clerical Associations in Qatar and the United Arab Emirates: Soft Power Competition in Islamic Politics’ (2021) 97(4) *International Affairs* 945; Abdulaziz Al Horr, Ghalia Al Thani, Mohamed Evren Tok and Hany Besada, ‘Qatar’s Global–Local Nexus: From Soft to Nested Power?’ In *Policy-Making in a Transformative State: The Case of Qatar* (Palgrave Macmillan, 2016) 355.

power within the region vis a vis the international community. Under the gaze of international condemnation of the country's treatment of migrant workers, recruited in droves to assist in the construction of Qatar's World Cup Stadium, Qatar has worked constructively with the ILO as a part of process to bring the country's labour legislation into further conformity with ILO benchmarked minimal labour standards and protections.⁹⁸³ The critical point is that Qatar and to a lesser extent Kuwait and the UAE, has looked to utilise the "soft power" of domestic labour reform as a tool for enhancing the country's reputation as a progressive (by GCC standards), open and democracy-leaning regime.⁹⁸⁴

Saudi Arabia, like other dominant economic powers in the region has set its sights on strengthening its already leading role in the Islamic and Arab world, and as the world's largest exporter of oil.⁹⁸⁵ The Kingdom's privileged position as the crucible of the Islam's most revered holy sites and repository of the world's largest oil reserves, has solidified Saudi Arabia's status as global power with the purchasing power to secure relatively stable strategic and military backing by Western governments.⁹⁸⁶ The Western world, and in particular the United States', formal support for successive Saudi ruling regimes has endured even when Saudi leaders have adopted domestic or foreign policies deemed contrary to the norms and consensus of the international community. This is both in the field of security, and in the sphere of human rights protection.⁹⁸⁷ The strategic importance of the Saudi-Western alliance to peace and security of the region, and to the stability of international oil commodity markets is also the reason why Saudi Arabia has appeared less outwardly influenced by civil society (and international) demands for progressive democratic and rights reform than other GCC states.⁹⁸⁸ On the surface, Saudi Arabia's leadership has expressed a more ambivalent position on rights reform, differentiating its external foreign policy from Qatar's more overt attempts to court

⁹⁸³ Mustafa Qadri, 'Qatar Labour Reforms Ahead of the FIFA 2022 World Cup' (2022) 7(2) *Business and Human Rights Journal* 319.

⁹⁸⁴ Nick Webster and Patrick Ryan, *Qatar World Cup to Give Gulf Tourism Lift as Neighbours Tap Into Demand* (The National, 2022).

⁹⁸⁵ Nasser Al-Mawali, 'Intra-Gulf Cooperation Council: Saudi Arabia Effect' (2015) 30(3) *Journal of Economic Integration* 532.

⁹⁸⁶ Louisa Dris-Aït-Hamadouche and Yahia Zoubir, 'The Us-Saudi Relationship And The Iraq War: The Dialectics Of A Dependent Alliance' (2007) 24(1) *Journal of Third World Studies* 109.

⁹⁸⁷ Thomas Juneau, 'U.S. Power in the Middle East: Not Declining' (2014) 21(2) *Middle East Policy* 40; Gregory Gause, 'The Political Economy of National Security in the GCC States' In *The Persian Gulf at the Millennium* (St. Martin's, 1997) 61.

⁹⁸⁸ Eman Alhussein, *Emirati and Saudi Women: Time for High Positions, Not Yet for Power* (Italian Institute for International Political Studies, 3 June 2022); David Rundell, *Vision or Mirage: Saudi Arabia at a Crossroads* (Tauris, 2020) 202.

⁹⁸⁸ Mohammed Al-Rasheed, *No Saudi Spring* (Boston Review, 2012); Caroline Montagu, *Civil Society in Saudi Arabia: The Power and Challenges of Association* (Chatham House, 2015) 14.

international legitimation (and commerce) through the progressive integration of international standards and practices, including in the area of rights.

Whatever their differences, all GCC states, including Saudi Arabia, have sometimes instrumentalized the rhetoric of rights for political capital, particularly when such policies align with national strategic policy interests. This has been achieved in ways that further mask or deny the lived realities of the Gulf's excluded communities, including migrant workers.⁹⁸⁹ External stakeholders have often reinforced false narratives of "progress", often by equating meaningful reform in Gulf region not by the strength of respect and protection of human dignity, equality and minority rights, but by the extent to which the GCC rulers have integrated their laws with Western economies to assure of preserve the property rights and interest capital owners through private law reforms and effective enforcement.⁹⁹⁰ The status quo legitimation of draconian migrant control policies illuminates the broader conceptual questions posed by global migration phenomena, and double-edged predicament of what Andreas has defined "open markets, closed border" policies, whereby international law and instruments plays a part in legitimating the bright and dark sides of globalisation.

On globalization's 'bright side,' trade facilitated by multilaterally coordinated market rules yields aggregate welfare gains. On this dark side, in law's shadow, massive disparities between (poor) 'sending' and (rich) 'receiving' countries combine with sophisticated technologies of production and distribution to produce volatile dynamics of supply and demand.⁹⁹¹

Thomas illuminates the paradoxes of international solutions to migration flows whereby international and regional institution coordinate inter-state policies that facilitate a "borderless

⁹⁸⁹ On the concept of soft power see Joseph Nye, *The Future of Power* (New York: Public Affairs, 2011) 7. (describing a state ability to persuade others 'to want the outcomes that you want' by utilizing more attractive policy shifts and reputational strategies to gain the support of other state and institutional actors). On the application of soft power in the GCC Context, see Steffen Hertog, *A Quest for Significance: Gulf Oil Monarchies' International 'Soft Power' Strategies and their Local Urban Dimensions* (LSE, 2017) 42. See also Eman Alhusein, *Saudi Arabia's Nation-Branding Strategy* (The Arab Gulf States Institute, 2022). For criticisms, see Amnesty International, *Qatar Reforms Strike at Heart of Abusive Kafala System* (August 2020) <<https://www.amnesty.org/en/latest/news/2020/08/qatar-announcement-kafala-reforms/>>.

⁹⁹⁰ Matt Godwin et al., *Think Again: Inside the Modernisation of the New Middle East* (Tony Blair Institute for Change, 2022); Bessma F Al Momani, 'Reacting to Global Forces: Economic and Political Integration of the GCC' (2008) 14 *Journal of the Gulf and Arabian Peninsula Studies* 52; Philippe De Lombaerde and Luk Van Langenhove, *Indicators of Regional Integration: Conceptual and Methodological Issues* (UNU-CRIS Working Paper, 2004) 1; Bhikhu Parekh, 'Liberalism and Colonialism: A Critique of Locke and Mill' in Bhikhu Parekh, et al., *The Decolonization of the Imagination; Culture, Knowledge and Power* (1995) 81-91.

⁹⁹¹ Chantal Thomas, 'Undocumented Migrant Workers in a Fragmented International Order' (2010) 25 *Maryland Journal of International Law* 187, 188-9.

economy”, while legitimating the state’s ability imposes regulatory controls, nationally and internationally, that limit the rights of the same migrant populations from developing countries that sustain these borderless economies. From this perspective, international and domestic migration policies have a mutually reinforcing effect. International instruments pay lip service to the welfare of migrant workers, despite operating in a civil rights paradigm that necessarily limits rights of “aliens” against sovereignty. The resulting consequence is a “structural equivocation within international law encompasses opposing positions of realpolitik apology for sovereign power on the one hand and aspiration towards utopian universality on the other.”⁹⁹²

This recent discussion how the dynamic between realpolitik and aspirations to utopian universality plays out in the institutionalised context of the GCC. By some scholar’s estimations, the GCC has transpired as the site and locus of emerging “regional customary human rights norms.”⁹⁹³ If this depiction is accurate, the GCC’s institutionalized structures provides the most regionally appropriate and culturally sensitive forum to constitute and map the boundaries of transnationalised GCC “politics”. As a result, the limitations of traditional dichotomies of international/domestic law (and associated tension between law and politics, monism and dualism, and associated conceptual debates between universal rights and sovereignty) can be overcome. If the GCC is emerging as a site of new GCC “politics” and community, institutionalised process of norm construction in the GCC have the potential to redefine the moral and legal responsibilities of GCC states owe to their citizens. The question for this chapter, is whether the GCC has indeed succeeded in strengthening the human rights protections for GCC citizens, and how such a project may, paradoxically, legitimate the status quo exclusion of “others”. In this regard, the GCC, as a regional organisation, has also flirted with rhetoric of international human rights. Part of the reasoning for this, is to counteract the destabilizing threats of civil society opposition to monarchical rule in the wider region. Another part of the reasoning behind this is to rebrand the GCC, and its member states, as credible participants of a liberal international legal order.⁹⁹⁴ The GCC, acting in its capacity as a regional intergovernmental organisation, eventually passed the GCC Declaration on Human

⁹⁹² Chantal Thomas, ‘What Does The Emerging International Law Of Migration Mean For Sovereignty?’ (2013) 14 *Melbourne Journal of International Law* 1, 1.

⁹⁹³ Declaration Alfadhel, ‘The GCC Human Rights Declaration: An Instrumentation of Cultural Relativism’ (2017) 31(1) *Arab Law Quarterly* 89.

⁹⁹⁴ Alfadhel, ‘The GCC Human Rights Declaration: An Instrumentation of Cultural Relativism’ (2017) 31(1) *Arab Law Quarterly* 89; Mustafa El-Mumin, ‘The GCC Human Rights Declaration: An Instrument of Rhetoric?’ (2019) 34(1) *Arab Law Quarterly* 1.

Rights (GDHR) in 2014, a few years after the events of Arab Spring unfolded in front of an international and domestic audience eager for political and democratic reform.⁹⁹⁵ The GDHR is a non-binding document setting out the GCC's political commitments to implementing regional human standards in accordance with international and Islamic human rights standards.⁹⁹⁶

Though symbolically significant in some respects,⁹⁹⁷ the declaration appears to have had little meaningful pact or “compliance pull” on the human right practices of the 6 GCC member states, as discussed below.⁹⁹⁸ The GCC declaration adopts a highly ambivalent posture in respect of those rights that are most likely to positively impact the lives and protections of migrant workers. For example, the right to freedom of association is framed in highly limiting language, while the right to free movement extends only to citizens of the GCC political and economic community.⁹⁹⁹ More notable still, are the Declaration's meagre equality provisions (liberty is not mentioned anywhere in the document). Article 2 of the Declaration states that all individuals will be equal in dignity but omits reference to equality in contradistinction to the UDHR's universal commitments to equality and non-discrimination for all persons, regardless of sex, race, ethnicity, religion and so forth. The GHDR's rhetorical commitments to non-discrimination are also couched in qualifying language.¹⁰⁰⁰ In sum, the equivocations and silences of the GDHR treaty framers¹⁰⁰¹ are further exacerbated by the absence any kind of meaningful GCC level review mechanisms for ensuring, or even evaluating, state compliance

⁹⁹⁵ Bernard Kayel, *Saudi Arabia and Qatar in a time of Revolution* <<http://csis.org/publication/gulf-analysis-paper-saudi-arabia-and-qatar-time-revolution>>; Rhea Abraham, *Confronting the Challenge of Political Reforms in GCC States: Domestic Transition via Regional Integration* (Arab Center for Research and Policy Studies, 2015) 2-5.

⁹⁹⁶ Said Mahmoudi, 'International Human Rights Law as a Framework for Emerging Constitutions in Arab Countries' In Grote and Röder (eds), *Constitutionalism, Human Rights and Islam after the Arab Spring* (Oxford University Press, 2016) 535, 536.

⁹⁹⁷ Due to Saudi Arabia being the first Gulf instrument to recognise a highly qualified right of all GCC citizens to participate in political processes, supported by a vague right to freedom of speech, assembly and association.

⁹⁹⁸ Amnesty International, *GCC Summit: Systematic Clampdown on Freedom of Expression in Gulf* <<https://www.amnesty.org/en/latest/news/2016/12/gcc-summit-systematic-clampdown-on-freedom-of-expression-in-gulf/>>.

⁹⁹⁹ Article 31 of the GDHR. The language used is more qualified than equivalent protections in ILO instruments and human rights treaties, see ICCPR, Art 22, ICESCR, Art 8, Art 26 of ILO Convention, and paragraph (3) to the International Labour Organisation (ILO) Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise (Convention no. 87)). No GCC state is a member to this treaty.

¹⁰⁰⁰ Annelle Sheline, *Declaration Proliferation: The International Politics of Religious Tolerance* (Georgetown University Berkley Center for Religion, Peace, & World Affairs, (Berkley Forum, 2019).

¹⁰⁰¹ Which is consistent with the highly statist orientation of the GCC's legislative institutions, are the GCC states themselves.

with the rights expressed within the GCC Declaration.¹⁰⁰² These deficiencies have bearing on the limited progress made by the GCC regional bodies in coordinating the joint implementation of national policy aimed at combating migrant rights abuses. This includes for example, the unified GCC law to Prevent Human Trafficking, as will be discussed shortly.¹⁰⁰³

At the level of national law, and often to the exclusion of the institutionalized regional decision making of the GCC, all Gulf states have mobilized the symbolic language of human rights. Qatar has, however problematically, led the way in migrant rights reform,¹⁰⁰⁴ while Saudi Arabia has focused on incremental social changes, for instance by reforming the decades law enforcement of male guardianship laws in accordance with its obligations under CEDAW.¹⁰⁰⁵ However, outside these fragmented human rights related reforms, all GCC states have maintained, or even doubled down, on measures restricting the political freedoms of all persons subject to their rule. Bahrain and Saudi Arabia are particularly noteworthy, as both countries have passed sweeping emergency legislation to restrict any forms of political dissent, suppress religious minorities and imprison, deport or even execute individual in summary justice proceedings.¹⁰⁰⁶ These developments have unfolded in seeming disregard for minimal international standards guaranteeing the right to life, the right not to be arbitrarily detained and the positive right to fair trial.¹⁰⁰⁷

¹⁰⁰² Khalid Alhaiyaf, 'A Critical Analysis of the Legal Role and Functions of the Gulf Cooperation Council (GCC)' (University of Sussex, 2014) 130.

¹⁰⁰³ Abdullah Baabood, 'Gulf Countries and Arab Transitions: Role, Support and Effects' (2014) *IEMed Mediterranean Yearbook* 42-47.

¹⁰⁰⁴ Government of Qatar Planning Council, *Turning Qatar into a Competitive Knowledge-Based Economy: Knowledge Economy Assessment of Qatar, Qatar Knowledge Economy Project* (Government of Qatar, 2007) 5; Human Rights Watch, *Qatar: Significant Labor and Kafala Reforms: Enforcement Needed, Other Provisions in Effect Still Carry Risk of Abuse* <<https://www.hrw.org/news/2020/09/24/qatar-significant-labor-and-kafala-reforms>>.

¹⁰⁰⁵ B Shanee, *The Saudi Royal Decree Easing Guardianship Requirements for Women, and Responses to It in Saudi Arabia* (The Middle East Media Research Institute, 2017); Caroline Montagu, *Civil Society in Saudi Arabia: The Power and Challenges of Association* (Chatham House, 2015) 14.

¹⁰⁰⁶ Mandates of the Working Group on Arbitrary Detention; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment," UA THA 5/2018); Amnesty International, *Bahrain: Denial of medical care for seriously ill imprisoned activist 'latest act of cruelty'* (Press release, 11 September 2019) <https://www.amnesty.org/en/latest/news/2019/09/bahrain-denial-of-medical-care-for-seriously-ill-imprisoned-activist-latest-act-of-cruelty/>; South China Morning Post, *Fury as Saudi Arabia Executes Indonesian Maid Tuti Tursilawati Without Warning* <<https://www.scmp.com/news/asia/southeast-asia/article/2171121/fury-saudi-arabia-executes-indonesian-maid-tuti-tursilawati>>.

¹⁰⁰⁷ The Conversation, *Qatar's death row and the invisible migrant workforce deemed unworthy of due process* <<https://theconversation.com/>>; Human Rights Council, *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies*, U.N. Doc. A/HRC/31/66 (4 Feb 2016) Para 16.

In these and numerous other respects, the human rights records of all GCC states remain highly chequered, and the national implementation of international standards in these dualist legal systems remains largely dependent on the political whims and preferences of incumbent rulers.¹⁰⁰⁸ All regimes have looked to secure their own authority by utilising some combination of “velvet glove” and “iron fist” strategies.¹⁰⁰⁹ Just as political freedoms are being suppressed on the pretext of public order and security, even in the Western facing regimes of the UAE and Qatar, all GCC governments recognise that their continued survival depends on their ability to balance and accommodate external demands for reform with the social consent and legitimation domestic interest groups and constituencies.¹⁰¹⁰

As a result, Saudi rulers are not immune to internal domestic pressures, even if the “social contract” between state and society is neither constituted or cabined through formal constitutional checks and balances (such as fully independent judiciary or legislature) nor legitimated through democratic forms of representation (through regular elections representing the “will of the people”).¹⁰¹¹ The continued legitimacy of GCC rulers is, in the most generous reading, more reactive and dialogical in nature. Rulers will continuously negotiate social policy, and define the limits of their own political authority, depending on the strength of opposition and support for modernising reforms among competing constituencies of powers (for example, a growing youth population, entrenched religious establishments, and powerful merchant and other business interests).¹⁰¹²

This attempt to balance out the progressive erosion of political freedoms with the provision of extensive social rights and entitlements for citizens has been a defining feature of the GCC

¹⁰⁰⁸ Thomas Risse and Kathryn Sikkink, ‘The Socialization of International Human Rights Norms into Domestic Practice’ In *Domestic Politics and Norm Diffusion in International Relations* (Routledge, 1999) 117.

¹⁰⁰⁹ Daniel Brumberg, *Liberalization Versus Democracy: Understanding Arab Political Reform* (Carnegie Endowment for International Peace, 2003) 22.

¹⁰¹⁰ Rafi Hossin, ‘The Role Of Human Rights As A Soft Power In America’s Foreign Policy’ (2016) 8(32) *Political Science And International Relations Journal* 177, 213; Basak Çali and Nazila Ghanea, ‘Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council’ (2016) 38 *Human Rights Quarterly* 21.

¹⁰¹¹ Basak Çali and Nazila Ghanea, ‘Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council’ (2016) 38 *Human Rights Quarterly* 21, 27.

¹⁰¹² Kristin Diwan, *Breaking Taboos: Youth Activism in the Gulf States* (Atlantic Council, 2014) 1-6. For an example of how religious elements within Gulf societies have held back social reform, see News Wires, *Qatari Women Fail to Break Through in First Legislative Elections* <<https://www.france24.com/en/middle-east>>. On the governmental capture by power wielding interest groups, including merchant, see Larbi Sadiki and Layla Saleh, ‘The GCC in Crisis: Explorations of ‘Normlessness’ in Gulf Regionalism’ (2020) 55(2) *Italian Journal of International Affairs*.

model of government.¹⁰¹³ This trade-off, however, has only worsened the plight of migrant workers across GCC states, who are being denied routes to citizenship or permanent residence rights are granted few enforceable rights under relevant aspects of GCC law.¹⁰¹⁴ In other words, while GCC citizens are compensated for the restrictions on other political and civil freedoms, migrants suffer these same burdens but with minimal social and labour rights protections.¹⁰¹⁵ All GCC citizens, even Qatar with its grand overtures to work constructively with the ILO towards meeting international labour standards, have, silently tolerated or even legitimised ongoing violations of international labour related and human rights standards. This includes the non-discrimination, freedom of movement, and freedom of association of migrant workers.¹⁰¹⁶

What, then, has motivated recent changes in GCC state policy in this arena? There is still evidence of a relaxed sponsorship requirements under the relevant national Kafala systems, the joint adoption of the GCC's unified law to prevent against trafficking,¹⁰¹⁷ the increased drive among GCC nations to accelerate process of ILO treaty ratification, and the barriers erected to the effective socialisation, and formal enforcement, of regional and international human rights standards at the level of national law.¹⁰¹⁸

With this question in mind, the next section considers the unique factors influencing the ongoing, and potential future reform, of Saudi Arabia's Kafala system and what shows about the Kingdom's evolving attitude to the migrant worker question. By first assessing the market drivers of Saudi Arabia's Kafala reforms, the following sections will divert its focus on the ever-widening Saudi Arabia's regional and international commitments and the continued application of right restricting measures under the Kingdom's labour migration laws and

¹⁰¹³ Ien Ang, Yudhishtir Raj Isar and Phillip Mar, 'Cultural Diplomacy: Beyond the National Interest?' (2015) *International Journal of Cultural Policy* 366; Charlotte M Levins, 'The Rentier State and the Survival of Arab Absolute Monarchies' (2013) 14 *Rutgers Journal of Law and Religion* 388, 400.

¹⁰¹⁴ Anita Hammer and Ayman Adham, 'Mobility Power, State and the 'Sponsored Labour Regime in Saudi Capitalism' (2022) *Journal of Work, Employment and Society*.

¹⁰¹⁵ Noha Aboueldahab, *Social Protection, Not Just Legal Protection: Migrant Labourers in the Gulf* (Brookings, 2021). For a critical analysis see Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006). See also Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books, 2010) 20.

¹⁰¹⁶ S Bollier, *What's Holding Up Labor Reforms in Qatar?* <<http://jmepp.hkspublications.org/2016/05/21/qatar-labor-reform/>>

¹⁰¹⁷ Details of the GCC's unified laws are available in Cooperation Council for the Arab States of the Gulf Secretariat, *Achievements Synopsis of the Arab States of the Gulf* (2009) [in Arabic].

¹⁰¹⁸ Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practice' In *Domestic Politics and Norm Diffusion in International Relations* (Routledge, 1999) 117.

policies. This analysis will be supported by a critical legal theory analysis of elements and practices under the Saudi Labour framework and Kafala system that if not in direct violation of customary human right standards, are nonetheless the spirit and text of UN treaties and ILO principles. It will also be argued that more explicit abuses or derogations from international human standards both mirrors, and reinforces, widespread experiences of indirect or structural discrimination that exists in Saudi culture, often in the absence of effective state oversight or judicial review.

D Balancing Labour Mobility with Labour Rights Protections in the GCC: The Dilemma of Rentier State Politics

Like the other GCC Vision documents, the Saudi Vision sets out concrete social and economic indicators for measuring the country's reform:

Saudi Arabia's 2030 Vision sets out an ambitious program for restructuring all aspects of the Saudi law, culture and economy, the primary objective of which is to establish the Kingdom a pioneering and successful global model of excellence on all fronts.¹⁰¹⁹

Unlike Qatar's Vision, however, the Saudi Vision plays down the trade and labour (and human rights) nexus, along with the relation between international business perceptions and Saudi legal order and the political legitimacy question.¹⁰²⁰ These differences in statecraft and cultural diplomacy can be explained by the Kingdom's relative dominance within institutional settings such as the GCC, its prominent standing in the Islamic world and its geopolitical position in the world economic order.¹⁰²¹ Any distinctions in state policy, including in relation to Saudi Arabia's attitudes to the outside world and international community writ large, are also closely bound up with the novelties of its constitutional order, and its founding.

The modern origins of the Saudi state originate from a constitutional pact between Saudi ruling elites and religious establishment (ulema), whereby any path of modernisation must gain the formal (if not actual) approval of the Kingdom's religious authorities.¹⁰²² The very first sovereign of the modern and unified state of Saudi Arabia began a pathway of development based on the twin pillars of "Islam and modernisation".¹⁰²³ The drivers of the Kingdom's legal and developmental histories – religious legal tradition and the Kingdom's integration with

¹⁰¹⁹ Kingdom of Saudi Arabia, *Kingdom of Saudi Arabia Vision 2030* <https://www.vision2030.gov.sa/media/rc0b5oy1/saudi_vision203.pdf>

¹⁰²⁰ International Labour Organisation, *Labour Reforms in Qatar: Coming Together Around a Shared Vision* <https://www.ilo.org/beirut/countries/qatar/WCMS_859843/lang--en/index.htm>; For an analysis of how international pressures have shaped Qatar's policy responses, see Robert Boothby, *UN Gives Qatar a Year to End Forced Labour of Migrant Workers* <<https://www.theguardian.com/world/2016/mar/24/un-gives-qatar-year-end-forced-labour-migrant-workers>>; Mustafa Qadri, 'Qatar Labour Reforms Ahead of the FIFA 2022 World Cup' (2022) 7(2) *Business Human Rights Journal* 319.

¹⁰²¹ Steffen Hertog, 'The GCC Economic Model in the Age of Austerity' In *The Gulf Monarchies Beyond the Arab Spring: Changes and Challenges* (European University Institute, 2015) 5.

¹⁰²² Courtney Freer, *Rentier Islamism: The Influence of the Muslim Brotherhood in Gulf Monarchies* (Oxford University Press, 2018).

¹⁰²³ Muddassir Quamar, 'Islamic Modernism and Saudi Arabia: Confluence or Conflict?' (2015) 2(1) *Contemporary Review of the Middle East* 71, 71-73.

Western market economies - have not always shared an easy coexistence. Religious authorities, whose power is constitutionally recognised and legitimated by Saudi law, have often resisted the Kingdom's slow lurch towards constitutional (rule of law) and human rights reform.¹⁰²⁴

By extension, the centrality of Islam in the Saudi legal system, and the judicial enforcement functions of the Kingdom's religious courts and jurists in this regard, has often manifested itself as a culturally relativist attitude to human rights and hostility to international and foreign law influences.¹⁰²⁵ The UAE and Qatar have, in different ways, been more receptive to "legal transplants" from Western legal systems.¹⁰²⁶ These nations have otherwise courted the approval and legitimation of the international business community and global governance institutions via their membership in international (investment and human rights) treaty frameworks.¹⁰²⁷ By contrast, Saudi Arabia has exhibited a more cautious attitude to these issues partly because of complexities of its own domestic political order in the post Arab Spring landscape. As one scholar noted:

The Arab Spring represent[s] a set of challenges, the likes of which have not been seen in the Arab world for a half-century or more. Shifts underway ... are a potential source of threat to the GCC states' stability. In response, Qatar has been active, building on confidence in its domestic support ... Saudi Arabia has been considerably more cautious, reflecting its own diverse internal politics and the leadership's distrust of sweeping change. Both Qatar and Saudi Arabia seek to use their wealth as an instrument of their foreign policy, shaping the external environment to secure their internal one.¹⁰²⁸

¹⁰²⁴ Justin Gengler and Laurent Lambert, 'Renegotiating the Ruling Bargain: Selling Fiscal Reform in the GCC' (2016) 70(2) *Middle East Journal* 321.

¹⁰²⁵ Antonina Bakardjieva Engelbrekt, 'Legal and Economic Discourses on Legal Transplants' in Antonina Bakardjieva Engelbrekt (ed.) *Law and Development* (Scandinavian Studies in Law, 2015) 111. For an analysis of how foreign law have shaped, or otherwise, the legal systems of MENA countries and Saudi Arabia see Mohammed AM Ismail, *International Investment Arbitration: Lessons from Developments in the MENA Region* (Routledge, 2016) 1-2; Maren Hanson, 'The Influence of French proced the Legal Development of Saudi Arabia' (1987) 2(3) *Arab Law Quarterly* 272, 272-291.

¹⁰²⁶ Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David M Trubek and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 19, 27–8 (stating that: "Continental legal science of the age influenced codifications across the globe as a co-traveller with the 'first globalization' enacted by the colonial encounter," id at 28.

¹⁰²⁷ Basar Çali, *Comment Qatar's Reservations to the ICCPR: Anything new under the VCLT Sun?* <<https://www.ejiltalk.org/>>; 'The Dubai International Financial Centre (DIFC) Courts: A Specialised Commercial Court in the Middle East' <<https://ssrn.com/abstract=3237126>>.

¹⁰²⁸ Bernard Kayel, *Saudi Arabia and Qatar in a time of Revolution* <<http://csis.org/publication/gulf-analysis-paper-saudi-arabia-and-qatar-time-revolution>>.

For these reasons, the Saudi Vision is framed less a declaration of an “internationalist” commitment to improved cooperation on sovereignty-sensitive issues of human rights and international migration law, than as domestic blueprint for internal market related reforms, including the efficient functioning of the Kingdom’s national labour market.¹⁰²⁹ In the context of a globalizing labour and investment market, the Saudi leadership’s goal of establishing diverse and sustainable economy does not exist in clinical isolation from its internationalist trade goals. These trade goals include the quest to establish the Kingdom as a global hub of commerce connecting the continents of Europe, Asia and Africa.¹⁰³⁰ In an increasingly interconnected world, no state that seeks access to the world’s trade and investment markets can risk exclusion from the liberal community of nation states.¹⁰³¹ As such the Kingdom’s grand economic ambitions cannot be achieved without further international integration, on issues such as human rights as well as trade policy. This inextricable relation between the internal aspects of a political order and integration into the world markets provides some explanation into why the efficiency of the Kingdom’s labour market was a key motivating factor and rationale for the Saudi Arabia’s Kafala reforms. Although they do contain unclear implications for Saudi Arabia’s engagement with broader international discourses on migrant worker rights.

Lurking beneath the economic triumphalism of its text, the Saudi Vision draws an implicit connection between low levels of local labour participation (and resulting levels of high domestic unemployment) and the consistent demand for foreign migrant workers.¹⁰³² Migrant workers have played a significant role in the production, and consumption of GCC resources, and have contributed substantially to development and growth of Saudi Arabia’s and other gulf economies.¹⁰³³ GCC labour markets have, for political as well as economic reasons, been structured to ensure that native employers enjoy favourable terms and conditions of

¹⁰²⁹ Jane Kinninmont, *Vision 2030 and Saudi Arabia’s Social Contract: Austerity and Transformation* (Chatham House, 2017) 3.

¹⁰³⁰ Karen Young, *The Difficult Promise of Economic Reform* <<https://www.bakerinstitute.org>>.

¹⁰³¹ The Economist, *Saudi Arabia’s economic reforms are not attracting investors* (22 December 2018); Fred Lawson, ‘Economic Liberalization and the Reconfiguration of Authoritarianism in the Arab Gulf States’ (2005) *Orient* 1, 19.

¹⁰³² De Bel-Air (n 5).

¹⁰³³ Steffen Hertog, ‘Defying the Resource Curse: Explaining Successful State-Owned Enterprises in Rentier State’ (2010) 62(2) *World Politics* 261-301; AJ Shin, ‘Tyrants and migrants: Authoritarian immigration policy’ (2017) 50(1) *Comparative Political Studies* 14.

employment.¹⁰³⁴ The resulting consequence of these GCC labour policies has been the development of a highly segmented labour market, in which private sector employers were free to employ migrant workers on dissimilar and often discriminatory terms from indigenous workers, with minimal regulatory intervention by the state.¹⁰³⁵ The structure of the labour market in GCC countries has not been historically rooted in a system of economic patronage whereby the state subsidizes high-wage public sector jobs that are exclusively reserved for the native population, with the most prestigious positions offered to those with social or dynastic ties to ruling elites.¹⁰³⁶ These policies have played an important function in securing the political legitimacy of the GCC rulers, whereby the state enforces job guarantees in exchange for the loyalty of civil society and powerful business and merchant interests, thereby fostering a common sense of nationhood and destiny within GCC's hierarchical, dispersive and ethnically fractured societies.¹⁰³⁷

In contemporary context, high levels of native unemployment have stimulated demand for greater flexibility in the labour market. The drive to reform the Kafala system in Qatar, the UAE and Saudi Arabia is reflective of this demand to ensure the most efficient use of available labour. This has been achieved through the introduction of new rules that firstly, liberalise migrant sponsorship requirements and entry conditions to attract foreign talent to the GCC's labour markets. Secondly, these new rules relax existing requirement to allow in-demand foreign professionals to end their work contracts, without employer consent, to take up positions in higher growth companies.¹⁰³⁸ As part of the national agenda to attract foreign talent, new policies have been issued to relax or eliminate previous restrictions on the right of free movement, enabling workers to exit and enter the country without requiring their sponsors to submit a formal application on their behalf.¹⁰³⁹

¹⁰³⁴ CNN Money, *How Many Saudis are Only Working One Hour a Day?*

<<http://money.cnn.com/2016/10/20/news/saudigovernment-workers-productivity/index.html>>.

¹⁰³⁵ Moshin Khan, *Working Toward Vision 2030: Key Employment Considerations in Saudi Arabia*, *Society for Human Resource Management* <<https://www.shrm.org/>>.

¹⁰³⁶ De Bel-Air (n 5).

¹⁰³⁷ Júlia Palik, *The Challenges of Dual-Societies* in Philippe Fargues and Nasra Shah (eds), (Peace Research Institute, 2018) 108-109; Toby Matthiesen, *The Other Saudis: Shiism, Dissent, and Sectarianism* (Cambridge University Press, 2015).

¹⁰³⁸ International Labour Organization, *Saudi Arabia: Regulatory Framework Governing Migrant Workers* <<https://www.ilo.org/>>.

¹⁰³⁹ BBC, *Saudi Arabia Eases 'Kafala' System Restrictions on Migrant Workers* <<https://www.bbc.com/news/world-middle-east-54813515>>.

Before this chapter analyses the rights related deficiencies of the reformed Kafala framework, it is useful to compare Saudi Arabia's efforts to balance local interests with the demand for flexible labour market rules with labour reforms implemented in other Gulf countries.¹⁰⁴⁰ Qatar has, for some decades, adopted more open and liberal sponsorship rules to encourage low-cost migrant workers. These policies have proved, in retrospect, damaging to the Qatari economic development. Firstly these policies have discouraged optimal levels of native employment. Secondly, these policies have fuelled the country's dependency on external outsourcing of labour.¹⁰⁴¹ In the face of these realities, the Qatari National Development Strategy 2011-2016 identified the link between "high levels of immigration" and the Qatari's slow growth as a "low-wage, labour-intensive, low-productivity economy".¹⁰⁴² At the same time, even before Qatar's organisation of the World Cup which brought renewed attention to the plight of migrant workers, the country's leadership had long since acknowledged that the Kafala system "constrained the mobility of migrant workers and their ability to respond to market signals."¹⁰⁴³ The essential difficulty with the Kafala system was, in other words, attributed to the imbalance between the under-regulation of private employers and the over-regulation of controls on the free movement of migrant workers. These imbalances would in turn generate a labour market that would neither address the under-employment of natives, whilst also failing to attract foreign workers commensurate with the needs of a knowledge economy.¹⁰⁴⁴

Turning to the Saudi context, the politically charged question of labour mobility and the re-regulation of private employment bargains would be addressed through the introduction of a new Saudization policy.¹⁰⁴⁵ As noted in previous chapters, this policy aimed to increase the ratio of Saudi to foreign workers employed by Saudi companies.¹⁰⁴⁶ Though the Saudi Arabia's oft-cited Saudization policy has been in effect since the mid-1990s, this program was only

¹⁰⁴⁰ Maysa Zahra, *The Legal Framework of the Sponsorship Systems of the Gulf Cooperation Council Countries: A Comparative Examination* (Explanatory Note No. 10, 2015); Gulf Labour Markets, *Migration and Population (GLMM) programme of the Migration Policy Center (MPC) and the Gulf Research Center* <<http://gulfmigration.eu>>.

¹⁰⁴¹ Qatar General Secretariat for Development Planning, *Qatar National Development Strategy, 2011-2016: Towards Qatar National Vision 2030* (Qatar General Secretariat for Development Planning, 2011).

¹⁰⁴² *Ibid.*

¹⁰⁴³ Ibrahim Awad, *The Reform of the Kafala System in the GCC States in the 21st Century*, *The Oxford Handbook of Comparative Immigration Law* (2023) 14.

¹⁰⁴⁴ Qatar General Secretariat for Development Planning, *Qatar National Development Strategy, 2011-2016: Towards Qatar National Vision 2030* (Qatar General Secretariat for Development Planning, 2011).

¹⁰⁴⁵ World Politics Review, *What's Behind Saudi Arabia's Pivot Away From Foreign* <<https://www.worldpoliticsreview.com>>.

¹⁰⁴⁶ Patricia Cortes, Semiray Kasoolu and Carolina Pan, 'Labor Market Nationalization Policies and Firm Outcomes: Evidence from Saudi Arabia' (2020) *CID Working Paper Series* 381.

effectively enforced in the 2011, in the immediate aftermath of Arab Spring. Following the formal implementation of Nitaqat (Saudization) program in 2013, Saudi companies face severe penalties for failing to comply with mandatory employee quotes. This underscores the implicit relation between the inclusiveness of Saudi Arabia's labour policies, including their continual adaptation to preserve and promote employment opportunities for Saudi nationals, and the internal legitimacy (and political sustainability) of the ruling regime.¹⁰⁴⁷ The introduction of the Nitaqat program would later result in a substantial reduction in the number of migrant workers employed in Saudi firms.¹⁰⁴⁸

At the same time, the Saudization policy refocused international attention to the rights and plight of migrant workers that were now being forcibly deported from the country in large numbers.¹⁰⁴⁹ Migrant workers were forced to seek illegal employment in informal sectors after their sponsorship visa were revoked. Those that were allowed to remain in the country were frequently expected to endure unfair or discriminatory terms and conditions of work, on threat of expulsion and the loss of income, all with the implied consent of the country's labour and immigration authorities.¹⁰⁵⁰ The efficient functioning and localisation of the Kingdom's labour market has in many ways be revealed to be the most obvious rationale for the Kafala reforms, and functional counterpart to the national program for economic growth and development.¹⁰⁵¹ However, this has also sparked debate around the Kingdom's treatment of migrant workers. The economic justification for policies that could more effectively reconcile the Kingdom's conflicting labour indigenisation and labour mobility aims would also, through a process of regulatory or policy "spillover", provide the impetus for significant labour law reforms.¹⁰⁵² The next section will therefore consider how Gulf states have looked to "square" market reforms with external "legitimacy" demands at the regional and national levels.

¹⁰⁴⁷ Al-Jabril, *Labor Launches Three-color Nitaqat Program to End Phantom Saudization in the Private Sector* [Translated from Arabic] <http://www.aleqt.com/2011/05/09/article_536140.html>.

¹⁰⁴⁸ Jennifer Peck, 'Can hiring quotas work? The effect of the Nitaqat program on the Saudi private sector' (2017) 9(2) *American Economic Journal: Economic Policy* 316, 330-332.

¹⁰⁴⁹ Equidem, *The Cost of Contagion: The Human Rights Impacts of Covid-19 on Migrant Workers in the Gulf* (2021) <<https://www.equidem.org/reports/the-cost-of-contagion>>.

¹⁰⁵⁰ Hanan Malaeb, 'The "Kafala" System and Human Rights: Time for a Decision' (2015) 29(4) *Arab Law Quarterly* 307-342, 309.

¹⁰⁵¹ Embassy Riyadh, *Saudis Discuss Localizing Manufacturing, Transferring Technology*, <<https://wikileaks.org>>.

¹⁰⁵² Embassy Riyadh, *A Possible Retreat on Saudization?* <<https://wikileaks.org>>.

E The Saudi Kafala Reforms in Context: A Critical Assessment

Despite divergences among the applicable national regulatory regimes, all Gulf Kafala systems share remarkable similarities. In saying this, a 2017 ILO report identifies Saudi Arabia as the country with the most rights-restricting of all legal systems in the region.¹⁰⁵³

It has already been observed that migrant workers would, prior to the new reforms, require the consent of their employer during all phases of the migration journey. In various respects the Saudi Kafala system appeared contrary to GDHR's and other international treaty provisions on the right to freedom of movement (Article 9), equal dignity (Article 2) and the right to due process (including the right to legal representation, the right to be presumed innocent and the right to challenge an administrative decision infringing their rights before an impartial court of law and seek remedies for any breaches of their rights).¹⁰⁵⁴

To what extent then, has the legal and material circumstances of migrant workers living and working in the Kingdom been improved under the new reforms, and to what extent are such reforms compliant with emerging international law norms and standards?

This section will argue that the rights of some of the most vulnerable workers, including domestic workers, remain bound to a non-severable (and thus inequitable) legal relationship with their sponsors under the Saudi legal system. This is despite the largely superficial reforms announced to the Kafala system.¹⁰⁵⁵ Before going on to assess these issues, it is necessary first to return to relevant aspects of the Saudi legal order, particularly in respect of the role of Saudi Arabia's judiciary.

1. Revisiting Constitutional Aspects of the Saudi Legal System and its Impact on Human Rights Recognition

¹⁰⁵³ International Labour Organisation, *Employer-migrant Worker Relationships in the Middle East*: <<https://www.ilo.org/>>.

¹⁰⁵⁴ GDHR, art 33.

¹⁰⁵⁵ Human Rights Watch, *Qatar: Little Progress on Protecting Migrant Workers* <<https://www.hrw.org/news/2020/08/24/qatar-little-progress-protecting-migrant-workers>>; Human Rights Watch, *World Report 2021: Rights Trends in Qatar* <<https://www.hrw.org/world-report/2021/country-chapters/qatar>>; Amnesty International, *Qatar Reforms Strike at Heart of Abusive Kafala System* <<https://www.amnesty.org/en/latest/news/2020/08/qatar-announcement-kafala-reforms/>>.

No instrument of Saudi Law gives explicit recognition to the concept of the equal dignity of all individuals and non-discrimination. Moreover, the Kingdom's Basic Law – the functional equivalent to the country's constitutional document – omits any reference to the question of women's rights and gender equality entirely.¹⁰⁵⁶ These omissions and silence can be explained, at least in part, by the informality of Saudi law and procedure. While Saudi Arabia has previously expedited its efforts to pass legislation commensurate with market needs, and to supplement gaps in Sharia, a great deal of Saudi law is still applied or “made” by Saudi Arabia's Sharia courts.¹⁰⁵⁷ Sharia is not ‘written’ or codified under Saudi law, partly because of the religious expectation that state authorities should not seek to issue their own interpretation of Islamic Sharia, as divine law.¹⁰⁵⁸ Instead, the task of ‘discovering’ the correct interpretation of Sharia is one that has been traditionally for the Kingdom's religious leaders and courts of law.¹⁰⁵⁹

The customary prominence of a particularistic (Hanbali) tradition of Islamic jurisprudence in Saudi Arabia has meant that courts imitate the culturally relativised opinions of certain closed circle of Islamic jurists and thinkers when interpreting Sharia.¹⁰⁶⁰ Beyond the role of courts in making as well as discovering the correct interpretation of Sharia, there has been little attempt by Saudi Arabia's legislative (the Saudi executive branch of law) to provide guidance on how Islamic rights conceptions might be read or understood in light of international human rights standards.¹⁰⁶¹ Various scholars, of a liberal or classical disposition, have argued that Islam provides its own definition of human dignity, the rights of workers and corresponding duties of employers, freedom of movement and qualifications to this right. Furthermore, this applies

¹⁰⁵⁶ Al-Fahad, ‘Ornamental Constitutionalism: The Saudi Basic Law of Governance’ (2005) 30 *Yale Journal of International Law* 383.

¹⁰⁵⁷ Hassan Mahassni and Neal Grenely, ‘Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court’ (1987) 21(3) *The International Lawyer* 836, 838; Abdulrahman Baamir and Ilias Bantekas, ‘Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice’ (2009) 20(2) *Arbitration International* 230.

¹⁰⁵⁸ Al-Fahad, ‘Ornamental Constitutionalism: The Saudi Basic Law of Governance’ (2005) 30(2) *Yale Journal of International Law* 375, 376, 384-385.

¹⁰⁵⁹ Abdulrahman Yahya Baamir, *Saudi Law and Judicial Practice in Commercial and Banking Arbitration* (Routledge, 2010) 119-120.

¹⁰⁶⁰ Al-Fahad, ‘Ornamental Constitutionalism: The Saudi Basic Law of Governance’ (2005) 30(2) *Yale Journal of International Law* 375, 376, 384-385.

¹⁰⁶¹ Shamsul Falaah, ‘Theocratic Constitutionalism: A Discourse on the Political System, Democracy, Judiciary and Human Rights under Islamic Theocratic Constitutionalism’ (2016) 2(2) *Waikato Islamic Studies Review* 66, 67.

to the more contested question of what the Quran does, or does not, prescribe regarding the existence of political and democratic forms of representation in the workplace and in public life.¹⁰⁶² It is, however, almost impossible to identify any legislative instruments or statements that clarifies the Saudi leadership's position on these issues. Instead, most regulations in Saudi Arabia will simply incorporate a portmanteau provision that affirming that laws in question should be applied and enforced in conformity with its principles.¹⁰⁶³ The labour law and implementing regulations contain provisions to this effect. However, there is little in the way of statutory interpretative aids, or commentary, that can provide insight into what Sharia compliance demands in practice, particularly in respect of the rights of workers that do not otherwise qualify for protections under statutory (state enacted) law.¹⁰⁶⁴

Under the formal provisions of Saudi Arabia's Basic Law, Sharia is described as the supreme law of the Saudi legal system. However, a review of the Saudi court's permissive attitude to the question of any international obligations that Saudi Arabia's sovereign rulers may be bound to suggests that Kingdom's judicial authorities are not the independent guardians of Islamic justice (and conceptions of human rights) we might wish to believe.¹⁰⁶⁵ Under the Saudi Basic Law, it is Saudi Arabia's ruling political authorities, and specifically the sovereign/King, who exercises final authority to decide whether a treaty shall be ratified, and on what terms, and not Saudi Arabia's religious courts.¹⁰⁶⁶ This is irrespective of any constitutional provisions of Saudi law that stress the ultimate sovereignty of Sharia as the supreme source of all law.¹⁰⁶⁷

The constitutional dynamics between Saudi Arabia's internal laws and international obligations provides an important context when considering why there has been such resistance to framing the Kingdom's labour and migration law as a "human rights" issue. Saudi Arabia's engagement and disengagement with international law and legal processes has more often been shaped by

¹⁰⁶² Knut Vikor 'Inscrutable Divinity or Social Welfare: The Basis of Islam' In Guttorm Fløistad (ed), *Philosophy of Justice* (Springer, 2015) 146; For a critical perspective see Nimer Sultany, 'Against Conceptualism: Islamic Law, Democracy, and Constitutionalism in the Aftermath of the Arab Spring' (2014) 31 *Boston University International Law Journal* 435.

¹⁰⁶³ Frank Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (Harvard University Press, 1994) 169-222.

¹⁰⁶⁴ Migrant Rights, *Saudi Arabia introduces new amendments to Labour Law regulations* <Migrant-Rights.org>; Hadi Fathallah, *Challenges of Public Policymaking in Saudi Arabia* <<https://carnegieendowment.org/sada/79188>>

¹⁰⁶⁵ Ayoub Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19(1/4) *Arab Law Quarterly* 5, 8.

¹⁰⁶⁶ Basic Law of Saudi Arabia (Saudi Arabia) art 81, 70.

¹⁰⁶⁷ Mossa Ghazi, 'Constitutional Human Rights: Saudi Perspective' (2010) 4(3) *Journal of Middle Eastern and Islamic Studies* 28, 29.

geopolitical factors, than through domestic constitutional law.¹⁰⁶⁸ After a brief moment of collectivism fostered by NATO and United States intervention in the Gulf Wars against a common animus, the now toppled Saddam Hussein regime, all Gulf states,¹⁰⁶⁹ including Saudi Arabia, would seek to strengthen their diplomatic alliances with Western powers. This was achieved by ratifying UN human rights treaties, including the UDHR, Convention of the Rights of the Child (CRC), the Convention for the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination Against Women (CEDAW), in addition to a handful of ILO instruments as delineated in earlier chapters of this dissertation.¹⁰⁷⁰ In more recent times though, this willingness to participate in the emerging human rights order has waned, as the Kingdoms has continued a general trend of refusing to bind its own legislative autonomy through greater policy integration on key issues of common global concern.¹⁰⁷¹

To date, Saudi Arabia is yet to ratify many core and critical international human rights. Most significantly, this includes the two international covenants (the ICCPR and ICESCR), as well as the Convention on Protection of the Rights of All Migrant Workers and Members of Their Families. More broadly, the Saudi leadership has, historically and generally, only been prepared to cede some of its authority and sovereignty to global governance institutions, for instance, its long-awaited decision to join the WTO or the Kingdom's ratification of ILO Conventions in 2020, when the political benefits of regulatory cooperation and national implementation of international standards exceeds the costs of 'lost' power and authority.¹⁰⁷²

The adoption of rules relaxing the requirement of sponsor (*Kafeel*) consent, along with other more contentious aspects of the Kafala system, mark the latest, and perhaps the most promising, attempt by the Saudi to find balance between the traditionalist sovereigntist approach to labour and migration policy, and the progressive integration of the Kingdom's labour law with

¹⁰⁶⁸ John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1.

¹⁰⁶⁹ Gregory Gause, 'Balancing What? - Threat Perception and Alliance Choice in the Gulf' (2003) 13 (2) *Security Studies* 273, 273-305.

¹⁰⁷⁰ United Nations Office of the High Commissioner for Human Rights, *Status of Ratification* <<https://indicators.ohchr.org>>; Samid Darawsheh, 'Human Rights in the Constitutions of the Gulf Cooperation Council Countries (GCC): Texts and Realities' (2020) 11(2) *Beijing Law Review*.

¹⁰⁷¹ Vera van Hüllen, 'Just Leave Us Alone: The Arab League and Human Rights' In *Governance Transfer By Regional Organizations: Patching Together A Global Script* (Springer, 2015) 125, 140.

¹⁰⁷² International Labour Organisation, *Ratifications for Saudi Arabia* <<https://www.ilo.org>>; Steffen Hertog, 'Two-level Negotiations in a Fragmented System: Saudi Arabia's WTO Accession' (2008) 15 *Review of International Political Economy* 650, 665; Kristen Roy, 'The New York Convention and Saudi Arabia: Can a Country Use Public Defence Policy to Refuse Enforcement of Non-domestic Arbitral Awards' (1994) 19 *Fordham International Law Journal* 920, 920.

existing regional and international human rights standard.¹⁰⁷³ The most optimistic interpretation of the Kingdom's grand motive for reforming the deeply entrenched system of Kafala sponsorship reflects the Kingdom's leading role in sponsoring and authoring the final text of the GDHR Declaration.¹⁰⁷⁴ The decision to adopt ILO Conventions may have been a response to higher levels of ILO treaty body engagement in the region following heightened media attention of Qatar's World Cup,¹⁰⁷⁵ just as it may have been a pragmatic resolution to the economically damaging consequences of migrant 'exodus' from Kingdom during the height of the Covid Pandemic.¹⁰⁷⁶

Before we begin to attribute great symbolic and or practical significance to Saudi Arabia's seemingly more willing participation in international frameworks, it is worth noting that Saudi Arabia has maintained a general policy of broad reservations to instruments that qualify or condition its obligations on respect for the Kingdom's national laws and tradition. The most damning criticism of the Kingdom's engagement in the international human rights is order is that its policy rulers have instrumentalised the "Sharia supremacy" clauses of Saudi law to disguised what are in fact thinly veiled political preferences.¹⁰⁷⁷ In the context of these broader political and constitutional complexities, the next section will therefore go on to examine the "gap" between the Kingdom's proclaimed commitments to (Sharia compliant) labour and human rights protection and the national enforcement and exclusions of the Kingdom's Kafala related reforms.¹⁰⁷⁸

¹⁰⁷³ Lori Nessel, 'Human Dignity or State Sovereignty? The roadblocks to full realization of the UN Migrant Workers Convention' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited, 2014).

¹⁰⁷⁴ Lori Nessel, 'Human Dignity or State Sovereignty? The roadblocks to full realization of the UN Migrant Workers Convention' In Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited, 2014).

¹⁰⁷⁵ Mustafa Qadri, 'Qatar Labour Reforms Ahead of the FIFA 2022 World Cup' (2022) 7(2) *Business Human Rights Journal* 319.

¹⁰⁷⁶ Equidem, *The Cost of Contagion: The Human Rights Impacts of COVID-19 on Migrant Workers in the Gulf* (2021) <<https://www.equidem.org/reports/the-cost-ofcontagion>>.

¹⁰⁷⁷ Clark Lombardi, 'Constitutional Provisions Making Sharia "A" Or "The" Chief Source Of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?' (2013) 28 *American University Of International Law Review* 733, 743–46. Article 1 of the Basic Law of Governance states: The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital. The Islamic foundation of the Saudi legal system was also acknowledged in Royal Decree No. 1320 July 19, 1950 (Saudi Arabia); Joseph Brand, 'Aspects of Saudi Arabian Law and Practice' (1986) 9 *Boston College International and Comparative Law Review* 1.

¹⁰⁷⁸ Rhea Abraham, *Confronting the Challenge of Political Reforms in GCC States: Domestic Transition via Regional Integration* (Arab Center for Research and Policy Studies, 2015); Ray Jureidini and Said Hassan, *The*

2. The Saudi Labour Model: Between Continuity and Change

This section reviews key innovations in the Kingdom's labour reforms. Previous chapters have already outlined the most abusive elements of the Kafala system. These abusive elements include the unilateral power of sponsoring employees and recruitment agencies to demand exorbitant fees or bonded labour, confiscate passports, impose exploitative employment contract terms, withhold pay or modify contracts after sponsorship contracts has been formally approved without the employee's consent, restrictions on their movement physical and sexual abuse, as well as threats of deportation.¹⁰⁷⁹ Under the previous rules, foreign workers could not exit the country without obtaining the authorisation of their sponsor, who would then apply for an exit or re-entry visa on their behalf.¹⁰⁸⁰ In this way, the Kafala system came to embody a *lassiez faire* model (of employment law), subject to which the wages and conditions were to be determined by the market participants themselves, with a minimal role for the state in remedying or correcting labour inequalities.¹⁰⁸¹ While this model assumes that bargains will be achieved through the mutual negotiation of the employer and employee (and their trade representatives), wider aspects of the Saudi labour law framework meant that power was concentrated in the sponsoring employer to unilaterally dictate the terms of employment (often through the medium of profit seeking recruitment agencies).¹⁰⁸²

These policy changes have been informally implemented since 2014, but only recently come into prominence following the high-level announcement by Saudi governments of its intentions to make sweeping changes towards the eventual dismantling or paring down of the Kafala system.¹⁰⁸³ Pursuant to the relevant amendments to the 2005 labour law in 2012 and 2016, all employers were not formally required to provide foreign workers with written employment contracts stipulating the material terms of work, compensation and benefit and termination clauses. All Kafala contracts are now also required to be documented and registered on an

Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform, Migration and Islamic Ethics (Brill, 2020) 92, 93.

¹⁰⁷⁹ Saudi Gazette, *Sponsorship System Violates Human Rights, Asserts NSHR* (17 May 2015) <<https://saudigazette.com.sa/article/123250>>.

¹⁰⁸⁰ Priyanka Motaparthy, *Understanding Kafala: An Archaic Law at Cross Purposes with Modern Development* <Migrant-Rights.org>

¹⁰⁸¹ Migration Policy Control, *Saudi Arabia's Legal Framework of Migration* <https://gulfmigration.grc.net/media/pubs/exno/GLMM_EN_2018_03.pdf>.

¹⁰⁸² Human Rights Watch, *Saudi Arabia: Labor Reforms Insufficient* <<https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>>.

¹⁰⁸³ Arab News, *Saudi Arabia's labor reforms seen as big boost for private sector* (2020) <<https://www.arabnews.com/node/1758456/saudi-arabia>>.

online platform known as *Qiwa*.¹⁰⁸⁴ The 2016 implementing regulations to the labour law also prescribe statutory fines for any employers found to have breached these conditions.¹⁰⁸⁵ In their most transformative application, the new rules may come to restore conditions of equity and equality of bargaining power in the employment relationship.¹⁰⁸⁶ Substantively, the new rules amount to the legal recognition and enforcement of the fundamental right to work, encompassing the associated rights of freedom of contract and the freedom to change employers without undue restriction or coercion (outside of minimal duration of employment requirement set by statutory law).¹⁰⁸⁷

What is most significant about the latest reforms to Saudi Arabia's Kafala policies is the extent to which they signal an increased willingness by the Saudi authorities to reassert control over mobility related aspects of the domestic labour market. In this regard, the Kingdom's public law-governed regime on immigration have also been reformed to allow for national immigration authorities to assume greater control over exit and entry requirements. Pursuant to the new Labour Reform Initiative issued in 2020, migrant workers seeking to enter or reenter the Kingdom for work purposes may make a direct application for a visa via the Saudi government's immigration websites.¹⁰⁸⁸

Certain categories of workers that are already gainfully employed in the Kingdom have also been given unprecedented freedom to sever their employment relation by offer of a new job position.¹⁰⁸⁹ Eligible categories of workers may leave their jobs prior to the formal expiration of their employment contracts providing that they have been resident in the country for a least a year and have provided notice to their employers of a period no less than 90 days. Moreover, migrant workers have more autonomy to post notifications and respond to job adverts on a newly established electronic portal.¹⁰⁹⁰ Under the previous rules, migrant workers were unable to apply for transfer requests or respond to job adverts without the explicit consent of their sponsor.¹⁰⁹¹ The new rules strengthen migrant worker protection by limiting the potential abuse

¹⁰⁸⁴ Ibid.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Ibid.

¹⁰⁸⁷ International Labour Organisation, *Saudi Arabia: Regulatory Framework Governing Migrant Workers* <<https://www.ilo.org>>.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Human Rights Watch, *Saudi Arabia: Labor Reforms Insufficient* (25 March 2021) <<https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>>.

¹⁰⁹⁰ Migration Policy Control, *Saudi Arabia's Legal Framework of Migration* <https://gulfmigration.grc.net/media/pubs/exno/GLMM_EN_2018_03.pdf>.

¹⁰⁹¹ Ibid.

of sponsorship rules by current or prospective employers. This is achieved through the withholding of personal documentation as an inducement to carry work duties not specified by the terms of the contract, by preventing workers from leaving the country, or by subjecting continued sponsorship of the visa on satisfaction of bonded debt under conditions of compulsory or forced labour.

Certain exceptions have also been established to these rules to allow greater flexibility and mobility in the Saudi labour market. These expectations include a rule allowing migrant workers to apply for a job transfer request before the statutory period of one year, or stipulated expiration period of an employment contract has lapsed, whichever comes earlier. One example pertains to judicial determination of an employer's failure to pay wages for three consecutive months as regulated under the Saudi wage protection scheme.¹⁰⁹² In addition, the Kingdom's Labour Dispute Settlement Framework has been comprehensively overhauled to enhance migrant workers' access to remedies in the event of a breach of labour law provisions.¹⁰⁹³

On paper, these policy reforms mark a significant attempt by the Saudi government to promote procedural due process and equality protections for foreign workers. In the above regard, much ado has been made of the 2016 reforms to the labour law, including a new provision that increases the monetary fines that can be imposed against employers who have confiscated the passports of migrant workers.¹⁰⁹⁴ The 2019 implementing regulations of the labour law formalised these statutory increases and clarifies that the retention of any personal documents belonging to migrant workers is prohibited by law (except when requested by the workers themselves).¹⁰⁹⁵ Yet it is not at all clear that the experiences of structural as well as direct discrimination impacting the rights and dignity of the Kingdom's most oppressed migrant workers has been effectively remedied or enforced under provisions of the new law and sponsorship policies. The tension between the Kingdom's unification of labour market policies and deepening exclusion of certain categories of workers only becomes apparent when we take an alternative viewpoint. Looking beneath the focus on "procedural" equality shows how the

¹⁰⁹² Migrant-Rights. *Saudi Arabia to Begin the Final Phase of the Wage Protection System* <Migrant-Rights.org>.

¹⁰⁹³ International Labour Organisation, *Employer-Migrant Worker Relationships in the Middle East* <<https://www.ilo.org/>>; Alarabiya News, *Saudi Justice Ministry: Labor Mediation Reports Are Now Enforceable Documents* (1 January 2019); Arab News, *Saudi Labor Reports Are Now 'Enforceable Documents'* (1 January 2019) <<https://www.arabnews.com/node/1429016/saudi-arabia>>.

¹⁰⁹⁴ Implementing Regulations, which came into effect in April 2016, The penalties are set out under article 46 of: Enforcement Law, Ministerial Decree No. 1982/1437 (2016) (Saudi Arabia) art 46.

¹⁰⁹⁵ Ministerial Decision No. 178743/1440 (2019) (Saudi Arabia).

Kafala system has been structured to further entrench, rather than dismantle, substantive inequalities in the treatment of privileged versus non privileged workers, both foreign and domestic.¹⁰⁹⁶

The preferential treatment of Saudi workers is still a defining feature of the Kingdom's labour regulation frameworks, irrespective of the Kingdom's decision to ratify the ILO Convention concerning Discrimination in Respect of Employment and Occupation (Convention 111). In principle, this treaty obligates Saudi authorities to enforce the general rule of non-discrimination under international law, without distinction between national or foreign workers, and with uniform application to all sectors of activity, public or private.¹⁰⁹⁷ In practice, many elements of the Saudi labour market, and under state policy amounts to a barely disguised discrimination. In respect of in-work entitlements, foreign migrant workers continue to have few additional statutory rights to be treated equally, regardless of any attributes other than their ability to do the job. For example, no minimum wage exists for private workers, a sector in which migrant workers are vastly represented (compared with the nationalized private sector workforce).¹⁰⁹⁸ To satisfy internal demands for labour nationalisation, while countering the potentially harmful effects of public-private sector wage disparity on labour mobility, the Saudi government has announced plans to increase the minimum wage applied in the public sector, and gradual its extension to private sector workers covered by national social insurance in 2020.¹⁰⁹⁹

While the introduction of a private sector minimum wage has yet to be formally implemented even for Saudi workers, these reforms exclude migrant workers from coverage from the outset, given that migrant workers are disqualified from the Kingdom's national social insurance scheme and associated health care and other in-work entitlements (pensions and so forth).¹¹⁰⁰ The exclusion of migrant workers for national social insurance regimes, and other insurance

¹⁰⁹⁶ Jennifer Hainfurther, 'A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers' (2009) 24(5) *American University International Law Review* 843.

¹⁰⁹⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights UN Doc. E/C. 12/GC/20, 2 July 2009, art 2 (2).

¹⁰⁹⁸ Gulf Labour Markets and Migration (GLMM), *Percentage of Nationals and NonNationals in GCC Countries Employed Populations* (Migration Policy Centre, 2010); De Bel-Air (n 5)

¹⁰⁹⁹ The Ministry of Human Resources and Social Development mandates that all private firms pay citizens salaries of no less than minimum of 4,000 Riyals/month in order to qualify for Nitaqat nationalization quotas.

¹¹⁰⁰ Key distinction also exist in terms of minimum working hours and other labour protections. Thus while, private sectors benefit from legal provisions that limit daily working hours to no more than 8 hours per day and overtime, whereas domestic workers can be required to work up to 15 hours per day, without legal guarantees of overtime payment.

funded social entitlements, is by no means uncommon. Many states limit the ability of foreign workers to benefit from social protections that only citizens are eligible to pay into. However, the current policy position of the Saudi government does raise an interesting question of what it meant to be achieved by these highly publicized labour policy announcements. The new labour reforms often have the appearance of being symbolic or performative in nature, signalling to labour market participants that the Kingdom has broken free of the “old”–parochial, protectionist and paternalist – rentier model of law and economy to embrace a more modern – functional, open and internationalist – approach to labour market regulation.¹¹⁰¹ Yet, this pursuit of a more integrated and cohesive labour market often comes at the expense of the adoption and implementation of egalitarian and inclusive labour laws and policies for the Kingdom’s excluded migrant workers anchored in respect for political freedoms as the natural complement to social justice protections.

The next section will now argue Kingdom’s reforms have resulted in the creation of a two-tier system of labour protections. This existence of this two-tier system further undermines the Kingdom’s proclaimed commitments to equal dignity, non-discrimination and social justice in accordance with Sharia and international law.

3. Right Construction and Exclusion under the Saudi Model of Societal Constitutionalism

It has already been noted that Saudi Vision 2030 has been billed as an attempt to remake the Saudi “social contract”. In this emerging landscape, religion may also become less central as the social fabric that binds Saudi Arabia’s civil society, paving the way for the Kingdom’s diverse constituencies coalesce around different interests and visions of social reform.¹¹⁰² As Saudi Arabia’s civil society undergoes processes of transformation, Saudi citizens are likely to see themselves as active participants in, and contributors, to the new economy, and not mere recipients of government handouts.¹¹⁰³ In these new landscapes, it becomes increasingly less sustainable for the Saudi government or indeed Gulf regime to deny their citizens with certain, in this case, economic freedoms. This model of economic democratisation also provides the context for the GCC’s decision to provide its population with economic citizenship rights (to

¹¹⁰¹ Bina Fernandez, ‘Racialised institutional humiliation through the Kafala’ (2022) 19 *Journal of Ethnic and Migration Studies* 4344.

¹¹⁰² Jane Kinninmont, *Vision 2030 and Saudi Arabia’s Social Contract: Austerity and Transformation* (Chatham House, 2017),

¹¹⁰³ Rhea Abraham, *Confronting the Challenge of Political Reforms in GCC States: Domestic Transition via Regional Integration* (Arab Center for Research and Policy Studies, 2015) 2-5.

the right of free movement of persons, capital and labour across a borderless GCC economic community). An economic conception of citizenship, and labour rights, can however, be criticised on principled grounds since it involves abandoning even the pretence that the human dignity and integrity of all people is worth upholding as a moral value and imperative on its own terms. This is instead of a mere “means to an end”, in this case, the efficient functioning of Saudi Arabia’s labour market.¹¹⁰⁴

The most fundamental critique of the Kafala system from a human rights perspective, is that it legitimated a transactional approach to the sponsorship of temporary migrant workers. Beyond the more overt preferential treatment and substantive (social) rights protections of Saudi nationals, this was the fundamental difficulty with the Kafala system. By enabling employers to simply pay a government tax in order to source cheap labour from abroad, employers naturally come to regard employees as their property for the temporary duration of their contract.¹¹⁰⁵ The creation of what many have described as modern system of bonded labour or slavery was not simply overlooked by GCC state authorities but routinised by the enforcement and police arm of the state.¹¹⁰⁶ To the extent that workers could not exercise basic liberties without the formal approval and knowledge of their sponsors, in the private workspace, but also in respect of other public freedoms, such as right to travel from one place to another, the Kafala system denied its most vulnerable workers of their dignity, autonomy and self-determination.¹¹⁰⁷

As noted above, the most significant change introduced under Saudi Arabia’s is that the requirement of employer consent has now been waived for some but not all workers.¹¹⁰⁸ Some workers may also bypass the sponsorship process altogether, allowing prospective employees to apply to directly for a work visa, without mediation by a sponsoring employer or recruitment agency.¹¹⁰⁹ It is certainly true that the reforms may prevent certain kinds of abuses of power, including the financial exploitation of workers by recruitment agencies, or the withholding of

¹¹⁰⁴ Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (Mary Campbell Smith trans, George Allen & Unwin, 1917).

¹¹⁰⁵ Kristian Coates Ulrichsen, ‘The Politics of Economic Reform in Arab Gulf states’ (Center for the Middle East, Rice University’s Baker Institute for Public Policy, 2016) 15; Jane Kinninmont, *Vision 2030 and Saudi Arabia’s Social Contract: Austerity and Transformation* (Chatham House, 2017).

¹¹⁰⁶ Mohammed Ell-Mumin, ‘Gulf Declaration of Human Rights (GDHR) Protection against Slavery: A Double-edged Sword’ (2020) 34(3) *Arab Law Quarterly* 241-266, 241.

¹¹⁰⁷ Joseph Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49 *Review of Politics* 251.

¹¹⁰⁸ Al Jazeera, *Saudi Arabia Announces Changes to Kafāla System* <Al Jazeera.com>.

¹¹⁰⁹ Human Rights Watch, *Saudi Arabia: Labor Reforms Insufficient* <<https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>>.

consent as a tool of domination or coercion by bad faith employers.¹¹¹⁰ It is doubtful whether the failure of employers to respect rights will be automatically remedied if the resolution to this challenge is simply to hand back to the state to decide which workers will have rights - to labour protections, freely enter or exit the country, and other guarantees of decent pay and safe working conditions – and who will not.

In Saudi Arabia, domestic workers and other low skill workers in the informal economy continue to be either excluded from labour protections extended to other categories of foreign and local workers, or otherwise granted qualified or weaker rights under the evolving Kafala regime. Some policy protections have been granted to the special category of domestic workers, albeit these are largely cosmetic.¹¹¹¹ A 2009 bill sponsored by the Kingdom's labour ministry, along with the new Labour Reform Initiative, issued in 2020, both offer some recognition of the rights of domestic workers but are substantially weaker than those provided under the ILO Convention on Domestic Workers.¹¹¹² Key distinctions exist, in terms of minimum working hours and other labour protections. Private can now benefit from legal provisions that limit daily working hours to no more than 8 hours per day and overtime. Domestic workers, on the other hand, can be required to work up to 15 hours per day, without legal guarantees of overtime payment.¹¹¹³ In a telling provision of the 2009 draft law, domestic workers are proclaimed as having a duty to obey their employers' orders to the effect that they may not leave their employers to change jobs or leave the country without a "legitimate reason."¹¹¹⁴ If a fundamental failing of the old Kafala regime was that it denied workers of their dignity under Islamic law, and related international standards on all individual rights to freedom of movement, it is not clear that these rights infringements have been overcome with the new reforms.¹¹¹⁵ The more striking point is that discriminatory practices, many enforced through

¹¹¹⁰ Caroline Kimeu, 'Modern-day Slavery': Kenyan Domestic Workers Tell of Abuse in Saudi <<https://www.theguardian.com/global-development/2022/sep/27/modern-day-slavery-kenyan-domesticworkers-tell-of-abuse-in-saudi-arabia>>.

¹¹¹¹ Human Right Watch, *Saudi Arabia: Labor Reforms Insufficient Abusive Elements Remain; Changes Exclude Domestic Workers* (Human Rights Watch, 2021).

¹¹¹² International Labour Organization, *Regulatory Framework Governing Migrant Workers* (International Labour Organization, 2019).

¹¹¹³ International Labour Organisation, *Regulatory Framework Governing Migrant Workers in Saudi Arabia* <<https://www.ilo.org>>.

¹¹¹⁴ Human Rights Watch, *Saudi Arabia: Shura Council Passes Domestic Worker Protections* <<http://www.hrw.org>>.

¹¹¹⁵ Abdullah Hanif, 'Akad Kafalah Dalam Perspektif Filsafat Ditinjau dari Asas Kemaslahatan' (2019) 15(1) *Tahkim: Jurnal Hukum dan Syariah* 88–97.

law, no longer applies to the differential treatment of native and foreign workers but extends to the different categories of high or low value foreign migrant workers.¹¹¹⁶

The idea that rights fall on sliding scale depending on that individual's labour value appears not just anathema to the liberal foundations of modern international human rights law but also with the communitarian basis of Islamic rights conceptions.¹¹¹⁷ In the positivistic sphere of national implementation of regional and international treaty law, those workers that are excluded from the Kafala reforms are not only denied equal treatment as other privileged workers under the Saudi labour law, but they are also in a more fundamental sense denied basic guarantees of liberty, justice and equality in conflict with Saudi Arabia's treaty commitments.¹¹¹⁸ While non-Western Gulf and Arab countries are not the only ones to have doggedly refused to ratify the ILO's Domestic Workers Convention, it is arguable that broader socio-legal dynamics and power structures in Saudi Arabia reinforce the exclusion and degradation of the most vulnerable workers.¹¹¹⁹

4. The Social Institutions and Structures Underpinning the Kafala System

The legitimacy of slavery has long been considered contentious in Islamic theological debate. As we move to Gulf context, however, the line dividing religious law from custom is often muddled. At times, this provides a legitimating ideological basis for authoritarian methods of government, as well as the perpetuation of social and economic hierarchies in the non-state regulated domains of private law and life (matters to be governed and adjudicated by religious courts and jurists).¹¹²⁰

¹¹¹⁶ Chantal Thomas, 'Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context' (2010) 48 *American Journal of Comparative Law* 987, 989.

¹¹¹⁷ Abdullah, An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry' (1990) 3 *Harvard Human Rights Journal* 3; Jason Morgan-Foster, 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2014) 8(1) *Yale Human Rights and Development Law* 67,90; Kevin Reinhart, 'Islamic Law as Ethics' (1983) 11(2) *Journal of Religious Ethics* 186, 196.

¹¹¹⁸ Arab Charter on Human Rights to which Saudi Arabia is member. Under Article 26, 'The State shall protect human rights in accordance with the Sharia'. Furthermore, Article 36 provides for the rights of security and liberty, while Article 37 provides for privacy rights and Article 39 prohibits any acts that '[undermine] human dignity and rights': Arab Charter on Human Rights art 36, 37, 39.

¹¹¹⁹ Heather Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries' (2012) 45(2) *Cornell International Law Journal* 461, 466.

¹¹²⁰ For example Esmaeili notes that in Saudi Arabia, 'customary tribal law are commonly practiced in the area of family law' and many of these informal justice mechanisms continue to operate in parallel to, or even supervene, the formal court system. Esmaeili, 'The Nature of Law in the Saudi Arabian Legal System' 26(1) *Arizona Journal of International & Comparative Law* 1, 22. However, it should also be noted that traditional

This can be seen through the Kingdom's attitude to slavery. By the early twentieth century, slavery and the slave trade was widely condemned internationally, and its prohibition now widely assumed to be a peremptory norm of international law.¹¹²¹ However, this practice was only formally banned by law in Saudi Arabia in 1962, making it one of the last countries in to abolish slavery. The abolition of slavery, in name, would in many respects also come to cast a light on the shifting dynamics between state power, custom and religious authority in modern Gulf societies.

The legal reformist argument against compulsory labour has generally prevailed in Islamic legal circles.¹¹²² Nonetheless, the historic influence of the Kingdom's conservative religious establishment on state policy may provide some explanation as to why Saudi rulers, and other rulers in the Gulf, were slow to fall into step with other jurisdictions on the issue of slavery. It is also significant that Saudi Arabia's political ruler, the Crown Prince, harnessed religious arguments, now turned on their head, in support of the contention that mistreatment of slaves was contrary Islamic requirements of mercy and justice (though avoiding any statement declaring slavery to be unlawful, as a rule).¹¹²³ However, it would be a mistake to attribute the social acceptance of slavery in the Gulf as rooted in religious law and doctrine alone. Slavery has also functioned, in Gulf societies, "as a clear marker of power and status among the wealthy, who kept as many slaves as possible for employment in domestic work and other services."¹¹²⁴ This example reveals the interdependent relation between three facets of the Kingdom's constitutional order. Namely, the near absolute power of the Kingdom's political authorities, private markers of power and status, and the ideological function of religion in sustaining these public and private hierarchies.¹¹²⁵

customary practices vary significantly from one Islamic country to another. See Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press, 1989) 17.

¹¹²¹ *Encyclopaedia Of Antislavery And Abolition: Greenwood Milestones In African American History* (Peter Hinks and John McKivigan eds., 2007) 65.

¹¹²² Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law* (Edward Elgar Publishing, 2018) 57.

¹¹²³ *Encyclopaedia Of Antislavery And Abolition: Greenwood Milestones In African American History* (Peter Hinks and John McKivigan eds., 2007) 64-65.

¹¹²⁴ Heather Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries' (2012) 45(2) *Cornell International Law Journal* 461, 466.

¹¹²⁵ Muhammad Al-Atawneh, 'Religion and State in Contemporary Middle East: The Case of Saudi Arabia' (2006) 2 *Journal of Islamic Practice of International Law* 28, 34; M Nehme, 'Saudi Arabia 1950-80: Between Nationalism and Religion' (1994) 30(4) *Middle Eastern Studies* 903.

The above social-legal and religious dynamics also provide the generative context with which to understand the Kingdom's (traditional) resistances to, and (contemporary) openness to, progressive social and labour rights reform of the Kafala system in accordance with regional and international human rights standards. This brings back the aspects of the Kafala system deemed most inconsistent with existing or emergent human rights standards back into relevance. These include unequal access to justice and effective remedies, arbitrary limitations on freedom of movement, discrimination in the workplace including social justice protections, and the denial of the right to freedom of association and collective bargaining as well as other rights of political participation. Before going on to assess the extent to which the new reforms have adequately mitigated these rights abuses and restrictions, two issues are worthy of consideration in the above regard. The general norm is the right incorporated in human rights treaties should, in principle, be "guaranteed without discrimination between aliens and citizens". This should be enjoyed equally and without discrimination for "all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons who find themselves in the territory" of a state.¹¹²⁶ It should be noted that the right to free movement, non-discrimination and access to justice are rights are qualified. However, UN treaty bodies such as the ICCPR Committee have interpreted the margin of discretion available to states narrowly, enabling states to derogate from such standards only when the measures in question are justified by legitimate policy aim and are reasonable, proportionate and non-arbitrary.¹¹²⁷ While certain exceptions exist in respect of the national border control, treaty bodies have determined that migrant workers shall enjoy the same rights and guarantees to liberty. This includes the right not to be arbitrarily detained, as nationals in a similar situation.¹¹²⁸

The second point to note is that the standards embodied by the GDHR (as a collective statement of the GCC's human rights policy) were adopted in 2014. This is several years before the Saudi leadership took meaningful steps towards reforming the Kafala sponsorship requirement. The logical implication is that the GDHR has little influence or compliance pull on Saudi

¹¹²⁶ UN Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant, HRI/GEN/1/Rev.9 (Vol. I), 11 April 1986, Para 2; UN Human Rights Committee, General Comment No.31: The Nature of the Legal Obligations Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/ Add.13, 26 May 2004, Para 10.

¹¹²⁷ Dominic McGoldrick, 'A Defence Of The Margin Of Appreciation And An Argument For Its Application By The Human Rights Committee' (2016) 65(1) *International and Comparative Law Quarterly* 21; *Finogenov and Others v Russia*, nos 18299/03 and 27311/03 (20 December 2011).

¹¹²⁸ UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158 (1990), art 17(7).

Arabia's human rights and labour policy. Any human rights reforms implemented by GCC states have mostly taken place outside of the institutionalised decision-making process of the GCC.¹¹²⁹ Inter-state competition, including competition for legitimacy, has likely been more a significant driver of reform. It was not until the UAE began the initiation on Kafala reforms that Saudi Arabia came under diplomatic pressure to follow suit. The very fact that the “soft power” of reputation management figured more prominently than a genuine concern with the exploitation of workers in the Kingdom's care, is also why the Saudi reforms represent a rather hollow and ultimately superficial attempt to “mainstream” regional human standards in the national laws and culture of the Saudi legal system. It is not incidental that private firms, many who lobbied for greater access to global labour markets, and elasticity in the Kingdom's local labour markets, are also the ones with most to gain from the new Kafala reforms.¹¹³⁰ To the extent that the Saudi Kafala reforms is less a vindication of the existence of universal human rights than a decisive retreat to the “apologetic pragmatics of population control”, there is little reason to assume Saudi state authorities,¹¹³¹ more than private employers, will be immune to discriminatory or abusive tendencies in national border control. In a meeting of the Committee to the Convention on the Elimination on Racial Discrimination, a report conducted by UN experts observed, for instance that:

Saudi Arabia had the second largest number of migrant workers in the world, and their situation was of particular interest during the dialogue. Experts were concerned about violence and abuse against migrant workers, especially domestic workers, instances of arbitrary detention and death sentences imposed on migrant workers, and their disproportionate representation in the prison population.¹¹³²

The previously mentioned report by CERD further observed that while Saudi Arabia has taken affirmative steps to bring its national laws into compliance with international standard by depositing instruments of ratification to the Convention on the Elimination of Racial Discrimination in 1997, it had not yet succeeded in adopting a legal definition of

¹¹²⁹ Vera van Hüllen, ‘Just Leave Us Alone: The Arab League and Human Rights’ In *Governance Transfer By Regional Organizations: Patching Together A Global Script* (Springer, 2015) 125, 140.

¹¹³⁰ Arab News, *Saudi Arabia's labor reforms seen as big boost for private sector* (2020) <<https://www.arabnews.com/node/1758456/saudi-arabi>>.

¹¹³¹ Chantal Thomas, ‘What Does The Emerging International Law Of Migration Mean For Sovereignty?’ (2013) 14 *Melbourne Journal of International Law* 408, 409.

¹¹³² UN Office of the High Commissioner for Refugees, *UN Committee on the Elimination of Racial Discrimination examines the report of Saudi Arabia* <<https://www.ohchr.org/en/press-releases/2018/04/committee-elimination-racial-discrimination-examines-report-saudi-arabia>>

discrimination in line with the Convention.¹¹³³ This was because Saudi Arabia failed to ratify the two International Covenants, on economic, social and cultural rights and on civil and political rights. These challenges were further underscored. The report went on to conclude, by the absence of effective enforcement machinery to compensate for the Kingdom's lack of submission to treaty and UN charter-based compliance controls and monitoring procedures.¹¹³⁴ In this way, the UN CERD's joint expert alluded strongly to obvious breakdown in cooperation between Saudi Arabia and the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation, and in more recent context, Saudi Arabia's continued political influence over the work of the GCC's Human Rights Office.¹¹³⁵

Bad faith actors and criminal organisations will continue to exploit gaps in Saudi law in the absence of effective national enforcement mechanisms, and culture of apathy towards "servants" and other racially and gendered stereotyped workers. Whatever hopes exist for the further socialisation of human rights in Saudi societies as the means to subvert or eradicate culturally entrenched biases and prejudices have the ring of wishful thinking. The real danger is the resiliency of cultural attitudes regarding the inferiority or superiority of some workers relative to others, and how religious and social norms may come to influence the policing and enforcement of the Kingdom's border controls. As Thomas noted legal critique of migration policies requires a careful assessment of

formal rules and informal norms and ideologies, as well as methods of implementation and enforcement (or lack thereof) by the state and the impact of economic and social forces ... [in order to]... to pay close attention both to administrative practices of the state and to forms of knowledge that shape power relations within state and social structures.¹¹³⁶

Human right bodies have noted that the mass deportation of migrants in 2020. This comment was strongly influenced by media narratives that would identify migrants as being responsible for the spread of the Covid 19 Virus, in ways that further reinforced and legitimated mainstream cultural perceptions regarding the racial inferiority or 'impurity' of non-Gulf Arabs, Africans

¹¹³³ Ibid.

¹¹³⁴ Ibid.

¹¹³⁵ Larbi Sadiki and Layla Saleh, 'The GCC in Crisis: Explorations of 'Normlessness' in Gulf Regionalism' (2020) 55(2) *Italian Journal of International Affairs*.

¹¹³⁶ Chantal Thomas, 'Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context' (2010) 48 *American Journal of Comparative Law* 987, 989.

and Asians.¹¹³⁷ Reports suggest that children and pregnant women were detained in prison-like deportation centres without due process protections of legal assistance (or the right to health assistance) and a right of appeal in accordance with customary norms established under the relevant provisions of the UDHR and ICCPR.¹¹³⁸

Other concerns exist in respect of the segmentation of the formal and informal processes of law making and dispute resolutions under Saudi Arabia's dual legal system. To the extent that issues of religious interpretation are the sole preserve of the Kingdom's religious establishment (rather than its civil or political authorities), any insistence that the Kingdom's new labour and sponsorship policies represent continuity with Islamic law and doctrine (rather than change), may further bolster the authority of religious authorities to deviate from international and regional standards of customary law.¹¹³⁹ As an example, Saudi Arabia's religious establishment have explicitly legitimated the differential treatment of Muslim and non-Muslim migrant workers.¹¹⁴⁰ In particular is one *Fatwa* (legal opinion), rendered by the Saudi Arabia Council of Islamic Scholars (*ulama*), in response to a legal question an individual's request for an ruling as to whether it was permissible for a Saudi citizen to employ a non-Muslim "servant" (i.e. domestic worker) or driver. The Committee decreed that it was not permitted by Islam for several reasons based their scholarly interpretation of *Hanbali fiqh* and the *Sunnah* (Prophet teachings) regarding inter-mixing with non-believers, a practice which the religious jurists ruled could lead to "numerous evil consequences."¹¹⁴¹ While Articles 61 and 104 of the labour law prohibit any religious discrimination in employment, religious processes of decision making operate in the shadow of formal (state) law. Without a more fundamental shift in cultural awareness, however, these human rights abuses and violations cannot be meaningfully addressed, regardless of whether it is governments that are oversee all aspects of the sponsorship process, or a private employer.¹¹⁴² The same racialised attitudes towards superior or inferior workers are likely to prevail regardless of whether its private entities or public

¹¹³⁷ Migrant-Rights, *Stranded Outside Saudi, Migrant Residents in Limbo* <<https://www.migrant-rights.org>>.

¹¹³⁸ Bayly Winder, *Challenges and Opportunities for the Saudi Economy* (Carnegie Middle East Center, 2020).

¹¹³⁹ Ray Jureidini and Said Hassan, 'The Islamic Principle of Kafāla as Applied to Migrant Workers: Traditional Continuity and Reform' (2020) 2 *Migration and Islamic Ethics* 92, 109.

¹¹⁴⁰ Ayaz Asadov, *Fatwa Making in the Context of Abnormal Justice: The Case of Migrant Workers in Saudi Arabia* <<http://isamveri.org/pdfdrg/G00315/ASADOVA.pdf>>.

¹¹⁴¹ Saudi Arabia Permanent Committie for Scientific Research and Legal Ops 28. Fatwa No. 9657 (Saudi Arabia).

¹¹⁴² Khalid Alnowaiser, *Human Rights Issues in Saudi Arabia: Existing Sponsorship System No Longer Conforms to the Life in the 21st Century* <<http://arabnews.com/opinion/columns/article408235.ece>>.

authorities that exercise final control over the lives and freedoms of Saudi Arabia's migrant workers.¹¹⁴³

Given the above societal and constitutional dimensions of the Saudi legal order and political economy, it must also be noted that Kafala reforms were also, quite deliberately, designed to appeal to high-value workers, while simultaneously excluding low value workers. These low value workers include driver, gardeners, manual workers, and other employees of the service industry, including domestic workers, from labour and other human rights related safeguards, for instance equal access to justice. This then, takes us to a more fundamental challenge with the attempts to frame processes of social modernisation in more value-neutral, secular, and market orientated term.

As recently noted, any attempt of construct a legal conception of “community” or “polity” based on shared economic goal also means deciding who will have “rights” and status in this new political order, and whom, being outside this community, shall not.¹¹⁴⁴ Migrant workers fall into this category of “excluded” identities. As a result, it is arguable that attempts to reconstitute the state society relation has heightened the political exclusion of marginalised groups and identities to create further obstacles to the meaningful protection of the human rights of some of those most vulnerable migrant workers.¹¹⁴⁵

The next section thus examines the exemptions and exclusions to the key rights identified in this study: right to access justice; freedom of movement, discrimination in the workplace and protection against abuse including forced labour and trafficking.

5. The Hierarchisation of the Saudi Migrant Workforce: Discrimination in New Bottles

This most recent analysis has shown that national labour reforms, of any hue, cannot be truly transformative or emancipatory if they exclude from its coverage the very categories of workers in most need of strengthened legal protections. This is especially the case when one considers

¹¹⁴³ Caroline Kimeu, ‘Modern-day Slavery’: Kenyan Domestic Workers Tell of Abuse in Saudi Arabia, <<https://www.theguardian.com>>.

¹¹⁴⁴ James Sater, ‘Migration and the marginality of citizenship in the Arab Gulf region: Human security and high modernist tendencies’ in Meijer Roel, Butenschøn Nils (eds.), *The Crisis of Citizenship in the Arab World* (Brill, 2017) 224–45; Amr Sabet, ‘Islamic Paradigm of Nations: Toward a Neoclassical Approach’ (2003) 31(2) *Religion, State and Society* 17, 18.

¹¹⁴⁵ Fair Square, *Migrant Workers in Saudi Arabia* (2020) <<https://fairsq.org/wpcontent/uploads/2020/11/FS-Policy-Brief-1-Saudi-Arabia-1020.pdf>>.

that excluded workers (who are low paid workers in the service, construction and domestic work sectors) may already hold little bargaining power to negotiate equitable terms of contract, or to even see or understand the terms of work. Given this, the pursuit of “continuity” in the Kingdom’s labour law policies and legal traditions has also served to reinforce the most exclusionary aspects of the Kingdom’s labour laws.

Among the most positive reform developments ushered in under the Kafala reforms, migrant workers are now given a formal right to an effective remedy before the country’s labour courts and dispute settlement bodies.¹¹⁴⁶ The leadership’s commitments to enhancing the procedural protections available to all workers, foreign and domestic, has ostensibly been further instantiated and vindicated by the implementation of a new Wage Protection Scheme (WPS). The WPS is, as noted in previous chapters, an electronic database that stores information on any wage payments made through bank transfers or financial institutions to any worker, male or female, national or foreign. This mechanism aims to promote greater transparency in the workplace towards the timely payment of any wages specified in an employment agreement.¹¹⁴⁷ First implemented in 2013, the scheme has since then been progressively extended to reach all private sector enterprises including all small businesses established in the Kingdom.¹¹⁴⁸ Under the new rules, all firms covered by the scheme are required to register details on a dedicated labour regulation platform, with the aim of allowing more effective state oversight over employer conduct and practices. This includes whether firm practices have complied with the national implementation of ILO standards on wage protection.¹¹⁴⁹

As a result, the Kingdom’s WPS and new labour dispute enforcement regime offers what is perhaps the most illuminating example of how the Kingdom’s policy leaders have looked reconcile demands for contractual stability with human rights protection. This is achieved by framing the same policies as having achieved distinct objectives, depending on which audience it is seeking to appeal to.

¹¹⁴⁶ Royal Decree No. M/51 adopted 2005, and Council of Ministers Resolution No. 219 26 September 2005 (Saudi Arabia).

¹¹⁴⁷ International Labour Organisation, *Regulatory Framework Governing Migrant Workers in Saudi Arabia* <<https://www.ilo.org>>.

¹¹⁴⁸ *Ibid.*

¹¹⁴⁹ *Ibid.*, 15.

For Saudi Arabia's (domestic) youth constituencies, the WPS associated labour reforms have been marketed as a means of securing equal wage security for the mixed and 'nativized' demographics of the private sector workforce. This includes the growing number of Saudi women (and men) that are now being recruited into the sector following the removal of regulatory-religious barriers to female integration into the local labour markets.¹¹⁵⁰ The most significant of the Kingdom's broader social policy reforms is the somewhat controversial decision to relax the application of male guardianship laws (pursuant to which women were not unable to seek work, other public services, or travel alone without a male guardian or male guardian consent).¹¹⁵¹ Viewed through the lens of the Kingdom's wider social modernisation agenda, the introduction of the WPS can be made to appeal to an increasingly dynamic and rapidly shifting private sector workforce representing the more progressive, or at the very least, less traditional and conservative, interests of a new generation of Saudi workers.¹¹⁵² Strikingly, the official justification given for the scheme focused less on the normative argument for reform, but on the more pragmatic grounds that a contractual (soft) enforcement mechanism. This is because the WPS would enhance the productivity of workers through increased guarantees of contractual security and the stabilisation of labour market expectations.¹¹⁵³

Outside of the Kingdom's internal legal order, Saudi Arabia has strategically aligned its labour policy reform with international criticism of the worst excesses of the Kafala system. This has been done as a means of boosting the legitimacy perception of the Kingdom's labour regime among the wider international community of states and associated stakeholders (e.g. transnational labour groups and federations).¹¹⁵⁴ In this way,¹¹⁵⁵ Saudi leaders have also framed the initiative as one that meets and exceeds the Kingdom's obligations (or soft "commitments") under various international instruments. Most notably, is the ILO's Convention No. 95 on the

¹¹⁵⁰ Kelly Benger, 'Behind the veil: The state of women in Saudi Arabia' (Institute of Gulf Affairs, 2008) 13.

¹¹⁵⁰ Office of the High Commissioner for Refugees, *End of Mission Statement Special Rapporteur on Extreme Poverty and Human Rights, Professor Philip Alston on his visit to Saudi Arabia* <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21094>>.

¹¹⁵¹ Kelly Benger, 'Behind the veil: The state of women in Saudi Arabia' (Institute of Gulf Affairs, 2008) 13.

¹¹⁵² Al Arabiya, *More Women than Men in Saudi Universities, Says Ministry* <<http://english.alarabiya.net>>; Eman Alhussein, *Triangle of Change: the situation of women in Saudi Arabia* <<https://www.files.ethz.ch/isn/181922/ef4fe5e44ede4d362d60a6804ed40437.pdf>>.

¹¹⁵³ Ministerial decision no. 803, 12/2/1434H (Saudi Arabia) that builds on the decision of the Council of Ministers no. 361, dated 3/12/1429H (Saudi Arabia) and the Royal decree no. 5574, dated 17/8/1432H (Saudi Arabia).

¹¹⁵⁴ Committee on the Elimination of Discrimination Against Women, Concluding Comments on Saudi Arabia, 40th Sess., Jan. 14-Feb. 1, 2008, U.N. Doc. CEDAW/C/ SAU/CO/2 (8 April 2008).

¹¹⁵⁵ This has been achieved despite more overt references to labour market efficiency as the paramount justification for the scheme.

Protection of wages, which Saudi Arabia ratified in 2020.¹¹⁵⁶ The 2015 labour law reforms and 2016 implementing regulations have extended several labour protections to migrant workers in certain sectors. This has been achieved by limiting working hours, and guaranteeing minimum rest breaks and days, annual leave, sick pay and overtime payment.¹¹⁵⁷ These reforms have been further reinforced by the Kingdom's decision to ratify the ILO Protection of Wages Convention, 1949 (No. 95) and the Hygiene (Commerce and Offices) Convention, 1964 (No. 120) in 2020.¹¹⁵⁸

The highly publicised decision by the Saudi leadership to adopt ILO instruments and to modify national laws accordingly would seem to instantiate the Kingdom's slow lurch towards more inclusive, progressive, and internationalised approach to labour regulation in response to global events such as the Covid Pandemic.¹¹⁵⁹ On a superficial reading, the Kingdom's Wage Protection Scheme shares similarities with provision of law in countries with more progressive labour laws. Singapore has for instance similarly passed new legislation that strictly penalises employers by judicial enforcement of the forfeiture of a paid-up bond for every migrant worker that the employer has failed to pay on time, and in full.¹¹⁶⁰ In contrast with countries like Singapore (which have unassailable record of enforcing wage protection provisions and prosecuting employers that deny all workers, including domestic workers, dignity in the form of social justice protections, safe working conditions and suitable accommodation), the Kingdom's enforcement authorities have demonstrated a more equivocal approach to the enforcement of contractual bargains.¹¹⁶¹ In this way, aspects of the Kingdom's new labour regime can appear less of a departure point in traditional judicial practices, than a predictable return to "business as usual".¹¹⁶²

¹¹⁵⁶ Cadmus, *Legal Framework of the Sponsorship systems in Qatar, Saudi Arabia and Kuwait* <http://cadmus.eui.eu/bitstream/handle/1814/32250/GLMM_ExpNote_07-2014.pdf?sequence=1>.

¹¹⁵⁷ International Labour Organisation, *Regulatory Framework Governing Migrant Workers in Saudi Arabia* <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms_728262.pdf> 19-20.

¹¹⁵⁸ International Labour Organisation, *Saudi Arabia Ratifies ILO Conventions Setting out Safeguards with Crucial Importance for the Response to Covid-19* <https://www.ilo.org/global/standards/WCMS_763422/lang-en/index.htm>.

¹¹⁵⁹ Equidem, *The Cost of Contagion: The Human Rights Impacts of COVID-19 on Migrant Workers in the Gulf* (2021) <<https://www.equidem.org/reports/the-cost-ofcontagion>>.

¹¹⁶⁰ Human Rights Watch, *Domestic Plight: How Jordanian Law, Officials, Employers, And Recruiters Fail Abused Migrant Domestic Workers* (2011) 27-28.

¹¹⁶¹ Human Rights Watch, *As If I Am Not Human: Abuses against Asian Domestic Workers in Saudi Arabia* <https://www.hrw.org/sites/default/files/reports/saudiarabia0708_1.pdf>.

¹¹⁶² Priyanka Motaparthi, *Understanding Kafala: An Archaic Law at Cross Purposes with Modern Development* <Migrant-Rights.org>.

Saudi Arabia's labour courts are constitutionally obligated to consider and settle any disputes brought before them in accordance with mandatory precepts of Sharia, and applicable principles of Islamic contract law. By establishing a wage protection scheme that impose duties on employers to make timely payments in accordance with the terms of the employment contract, it can be argued that the Saudi labour policies are far from representing a break from "tradition". These policies represent nothing more than codification of existing judicial practices, albeit under a newly strengthened and formalised labour contract enforcement regime.

In the more formal arena of court-based litigation and adjudicative dispute settlement, the judicial enforcement of the Kingdom's labour protections, including compensatory claims for the non-payment of wages, are still decided in accordance with discretionary interpretations of relevant principles of Islamic contract law (principles that have been extracted from the *Quran and Sunnah* but fleshed out by Islamic jurists applying their own human reasoning).¹¹⁶³ At the same time, the default policy of judicial deference to executive law and interpretation in Saudi Arabia points to a furthering blurring of the boundary between law and politics, justice and power in Saudi Arabia's constitutional order. In combined effect, both aspects of judicial practice in Saudi Arabia implicate "rule of law" challenges; challenges that are oftentimes overlooked in a "black letter" analysis of the Saudi legal system and (Islamic) sources of law.

¹¹⁶³ Knut Vikor, *Between God and the Sultan* (2005) 264.

F Conclusion

This discussion has offered a critical overview and overarching analysis of the core themes explored by this study to identify key limitation in the Saudi legal systems protection of migrant workers' rights.

This chapter has sought to cast light on the complex factors that have shaped and constituted Saudi Arabia's internal and external responses to the migrant labour, as well as the cultural as well as "rule of law" barriers that exist to the Kingdom's full and meaningful recognition of emerging international labour standards for the protection of migrant rights. By examining key provision of regional and international instruments on the right to effective justice, freedom of movement, non-discrimination, this chapter has identified key gaps and deficiencies in the implementation and enforcement of these rights under Saudi Arabia's sponsorship system, even after the new Kafala and Labour reforms.

The chapter's substantive analysis has taken a broadly critical perspective of the Kingdom's Kafala system, and its failures to live up to the promises of Islamic notions of justice and minimal international standards on migrant rights protection.

At the same time, the study has also acknowledged that the Saudi leadership has made important inroads toward strengthening procedural rights protections under several labour policy reforms. The drivers of these reforms can be attributed in part to economic self-interest, as well as the broader search for international legitimation. The instrumental drives for Kafala reform, including the global adaptability of the Kingdom's local labour market, and the normative pressure to eradicate discrimination and other human rights violation, may interact in various ways to shape the Saudi leadership's future response, in the interest of migrant workers, and against them.

CHAPTER VII: CONCLUSION

This thesis has engaged, with the central research question of how, and whether the recent reforms to Saudi Arabia's Kafala system achieve the purpose of protecting migrant worker rights.

In developing its analysis, this thesis has evaluated the governance and enforcement of migrant workers' rights through the lens of three distinct, but intersecting, frameworks of law. These are the Kingdom's obligations under international (treaty and customary) law, relevant Saudi regulations and policies, and constitutionally mandated principles of Sharia

By examining how migrant workers' rights have been justified and conceptualized under the relevant aspects of the Saudi Kafala system, the study has identified key innovations in Saudi Arabia's policy on migrant workers. Furthermore, this thesis has also identified key barriers to the effective and meaningful protection of the Kingdom's most vulnerable workers, before and after the reforms. This study identifies numerous ways in which the Kafala system has historically legitimated, normalised or obscured employer domination over migrant workers. This has restricted their fundamental rights, such as freedom of movement, substantive labour rights protections, including non-discrimination in the workplace, and to a more limited extent political rights, including freedom of association.

To conclude the thesis, this chapter will draw from the analysis conducted throughout the thesis to answer the research question: "To what extent are the recent reforms to Saudi Arabia's Kafala system legitimate, compatible with international instruments and compatible with Islamic law, for the purposes of protecting migrant workers?".

Analysing the research sub-questions through the chapter summaries and identifying key themes and future pathways will ultimately show that the answer to this question is nuanced. There is a positive movement toward a greater alignment with international law, Sharia law and Saudi Arabia's labour law regulations. Though, there is still significant room for improvement and further reform is a must.

A Answering the Research Questions

The concluding results have now made it possible to answer the research questions outlined in the introduction of this thesis. The research sub-questions will now be addressed, before answering the overarching research question, “To what extent are the recent reforms to Saudi Arabia’s Kafala system legitimate, compatible with international instruments and compatible with Islamic law, for the purposes of protecting migrant workers?”

1. What is the Kafala system in Saudi Arabia and what are the key issues?

Chapter II addressed this research sub-question. This chapter analysed how Kafala reform has yet to provide satisfactory safeguards from the Gulf’s invisible migrant workers, and how there are still many gaps in the regulation of the status of migrant workers that still need to be addressed by further reforms.

This analysis showed that new reforms have been framed precisely to exclude those workers that have traditionally been most marginalised or disadvantaged by the Kingdom’s discriminatory labour policies, including domestic workers and leave them without adequate mechanisms of external international oversight or domestic judicial review. These are the key issues concerning the Kafala system.

2. To what extent was or still is the Kafala system before and after the reforms in conflict with Saudi Arabia’s international obligations and emerging global labour standards and norms?

Chapter III examined the extent to which the Kafala system, before and after the reforms, conflicts with Saudi Arabia’s international obligations and emerging global labour standards and norms, and relevant human rights treaties applicable to migrant workers.

The chapter notes the Kingdom’s participation in ILO and associated UN human rights treaties of concern to migrant rights is ambivalent at best. Where the Kingdom has ratified relevant ILO treaties, there is some indication that the Kingdom has begun to take steps to implement its obligations on specific issues such as labour protection.

However, the chapter also notes that Saudi Arabia has been reluctant to bind itself formally to any international obligations that may dilute its sovereignty, including its authority to set and enforce its own domestic labour and associated immigration policies.

Over time, Chapter III concludes that Saudi Arabia and its Gulf neighbours have become more responsive to global “rights” discourses as they seek further integration into the international economic order.

Key drivers were also identified. Beyond the Kingdom’s economic modernization agenda, and desire to attract talent from global workforce to achieve its bold investment aims, the Kingdom is also facing pressure to reform its domestic laws in line with global labour standards, under the gaze of international media, international organization and transnational civil society groups. The competing pressures, such as economic globalization and shared consensus around minimal human rights standards, have been examined as possible drivers as the Kingdom’s most recent Kafala reforms.

3. Is the Kafala system in conflict with other sources of Saudi law, including domestic labour regulations and Sharia?

Chapter IV proceeded to examine labour rights from an Islamic law perspective, in the context of mandatory constitutional provisions of Saudi law. This chapter identified potential areas of conflict and compatibility between Islamic and international (labour and human) rights conceptions and reflected on the broader tension between relativist and universalist theories of human rights. Chapter IV also examined the more emancipatory provisions of Islamic law, and how such precepts of religious law might be mobilized as a normative resource towards the progressive reform, and potential abolition of the Kafala system.

At the level of conceptual analysis, Chapter IV also examined Islamic perspective and debates regarding Islamic interpretations of rights and responsibilities of an employer to their employees. The study does acknowledge that the Islamic human rights tradition diverges substantially from the liberal, secular foundations of the modern international human rights regime. The Saudi system’s Kafala policies have remained controversial because the amount that legal legitimation and enforcement of employer restrictions on migrant workers’ freedom of movement, freedom of association and associated principles derived from the notion of human dignity, including equality and non-discrimination based on, for instance, ethnicity,

religion or gender. While the analysis showed significant internal debate among Islamic jurists around the existence and basis of civil and political freedoms under Islamic, the study nonetheless concluded that Islamic values of equity justice are anathema to the most exploitative aspects of the Kafala system.

To the extent that the Saudi legal system is grounded in mandatory principles of Islamic law, the chapter contended that The Kafala system conflicts with other sources of domestic law. There are constitutional and religious-normative grounds for the further reform, or potential abolition, of the Kafala system.

4. Does the Kafala system represent a meaningful step towards legitimising Saudi Arabia's migrant population by ensuring that employers and administrative authorities are rights respecting?

Chapter V considered the legal basis of Saudi Kafala reforms, focusing on Saudi Arabia's labour law framework as the primary law regulating the rights of all workers, national and foreign. The chapter identifies key innovations in labour law protection and the expansion of strengthened in-work protections, including wage protection, under recent reforms.

Given the context of the Kingdom's economic modernization agenda, alongside international demand for respect for fundamental human and labour rights and norms, the Kingdom has taken significant steps to eliminate or relax the most rights-violating elements of the former Kafala system. Among the most recent reforms, the dual system of labour rights protection among migrant workers and Saudi nationals – a structural function of the Kafala system has been reformed to introduce greater equity in terms of pay and other in-work protections. Most significantly, the previous system of sponsorship system has been heavily relaxed. Many of the most problematic aspects of the Kafala process have been revoked, including the near absolute requirement of sponsor consent for the most basic freedoms, including the ability to change jobs and leave the country.

The new reforms appear to bring Saudi Arabia's domestic law into further alignment with international standards, including respect for freedom of movement. The extension of labour standards also eliminates some of the most egregious of mistreatment and discrimination,

ensuring that migrant workers can access legal remedies before the Kingdom's Labour court and associated tribunals. Reforms, such as the newly enacted Wage Protection Scheme reforms, close the gap between the Kingdom's politically motivated migration policies and international and Islamic sources of rights protection.

The chapter does however, present for further questioning, whether such reforms are motivated less by global "rights" discourses than by economic desire to establish more favourable labour market conditions for high skill foreign workers. Key challenges were identified, many intimately related to the relationship between law and political power under the Kingdom's constitutional framework. Judicial deference by Saudi Arabia's official state policy has sometimes meant that economic imperatives, including the substitution of foreign low-skilled workers with foreign high skilled workers, prevail any labour rights protected under Saudi labour regulations or contractual aspects of Sharia.

5. Can international and constitutional sources of rights protection be mobilised towards the future abolition of the Kafala system

Chapter VI's discussion chapter adopts a synoptic view of the various themes and research issues to further probe the extent to which international, domestic and Sharia have been effectively implemented within the recent Kafala reforms.

Fundamentally, this chapter takes a critical view, identifying gaps, omissions and limitations of the Kafala reforms. While progress has been undoubtedly made toward achieving minimal labour standards and equivalent protections enjoyed by Saudi workers particular in the social policy arena, the most revealing detail of the new reforms is not which workers benefit from the new protections. Rather, the importance lies with which migrant workers are denied or excluded from the new proposals.

This chapter ultimately shows that the reforms are positive, but still have a long way to go. The Kafala reforms remove historic restrictions on civil liberties, such as the right of free movement, and the freedom to change work. Enhanced protections in working hours and other in work entitlements have been extended to a larger class of foreign workers. But meagre protections have been extended to some of the most vulnerable class of workers, such as service and domestic (home) workers. This class represents the most socially and legally disenfranchised and disadvantaged of the Kingdom's migrant population.

6. To what extent are the recent reforms to Saudi Arabia's Kafala system legitimate, compatible with international instruments and compatible with Islamic law, for the purposes of protecting migrant workers

Upon conclusion of this analysis, it becomes possible to answer the overarching research question, "To what extent are the recent reforms to Saudi Arabia's Kafala system legitimate, compatible with international instruments and compatible with Islamic law, for the purposes of protecting migrant workers?".

Based on the answers to the sub questions, it has become clear that Saudi Arabia's Kafala system is still in need of reform. The Kafala system, in its current state, is showing a positive movement toward a greater alignment with international law, Sharia law and Saudi Arabia's labour law regulations. Though, there is still significant room for improvement and deep reform is required to provide better conditions for migrant workers.

B Key Themes and Findings

By conducting this overarching analysis, this thesis has identified key themes and findings that can assist with future reform.

The motivation for the Kafala reforms is rooted in an economic rather than normative rationale.¹¹⁶⁴ In a competitive and highly mobile global labour market, Saudi Arabia's leaders have attempted to attract talent from abroad to support and enable the Kingdom's ambitious economic development goals.¹¹⁶⁵ The Kafala reforms are designed to outpace global recruitment strategies in neighbouring Gulf states. This is achieved by modernizing its migration administration system and by granting in-demand workers better employment conditions and entitlements, and by restricting the employment bargain to ensure that Saudi employers cannot exploit their dominant bargaining power to secure preferential contract terms, or otherwise deny employees fundamental rights.¹¹⁶⁶ Despite this, the Kingdom has been far more reluctant to extend the same privileges to lower-paid and lower-skilled workers. This reluctance is deep-rooted in the socio-political origins of the Kafala system as a mechanism that aimed to placate a population through strong wealth guarantees and the outsourcing of low paid jobs to a foreign workforce.¹¹⁶⁷

Regardless of the undergoing dramatic economic liberalization reforms, Saudi Arabia's political settlement still depends on political support of the Kingdom's merchant class and tribal (and other social) hierarchies. These socio-political dynamics provide the necessary context by which the Kafala reforms, their promises and their silences, can be evaluated. Saudi Arabia has sought to open its labour markets, while appeasing powerful constituencies within the country. As these powerful constituencies are opposed to any measures that would stem the supply of cheap labour, or place privileged Saudi classes on equal legal footing with a racialized 'other', the Saudi policy reform only reinforces the very form of structural discrimination that

¹¹⁶⁴ Embassy Riyadh, *A Possible Retreat on Saudization? Wikileaks cable: 06RIYADH4543_a*. <https://wikileaks.org/plusd/cables/06RIYADH4543_a.html>.

¹¹⁶⁵ Thriving Economy, *Vision 2030* <<https://vision2030.gov.sa/en/themes/2>>

¹¹⁶⁶ ILO Policy, *Note Reform of The Kafala (Sponsorship)* (System Policy Brief No. 10, July 2019); and M Zahra, *Gulf labour markets and migration* (Explanatory Note No. 4, 2013), Gulf Labour Markets and Migration (GLMM) Programme of the Migration Policy Center and Gulf Research Center: Geneva.

¹¹⁶⁷ Fairsquare, *Migrant Workers in Saudi Arabia* <<https://fairsq.org/wpcontent/uploads/2020/11/FS-Policy-Brief-1-Saudi-Arabia-1020.pdf>>.

pre-form Kafala system suffered from. These reforms do not dismantle this structural discrimination.¹¹⁶⁸

This study has critically assessed and identified potential rights abuses that may go unchecked under the Kingdom's dual system of labour relations. Though the new reforms do provide a response to increased international scrutiny of the world's international labour and human rights bodies, the economic lens through which migrant issues are often viewed in the Gulf has impeded more meaningfully progress in this arena. One clear example of this is the hesitancy of Gulf countries to ratify key international labour and other instruments including the UN treaty on Domestic Worker.¹¹⁶⁹ Formal participation in international treaty frameworks may create further pressure on Saudi Arabia bind to enact appropriate measures. These appropriate measures can ensure that workers that are not entitled to equivalent protections as workers subject that are still dependent on their sponsor's consent to exercise basic rights or are denied stronger protections under the labour law regulations.¹¹⁷⁰ Saudi Arabia has been moving in the right direction and is now taking positive measures to implement ILO treaties in areas such as occupational health and wage protection.¹¹⁷¹ In these areas, the gap is narrowing between Saudi Arabia domestic law and any obligations it has under international law.

One challenge that has yet to be overcome is that the Saudi leadership's 'pick and choose' approach to the international treaties and convention it is willing to be part of. This approach is not particularly unique for states that might wish to protect their sovereignty, especially in sensitive policy fields such as immigration and national labour strategy. However, Saudi Arabia is not yet a party to even the core UN human rights and ILO treaty frameworks, including the ICCPR and the ICESCR.¹¹⁷² Saudi Arabia has, through its membership in the GCC, been formally involved in the elaboration and adoption soft non-binding regional human

¹¹⁶⁸ Iqal Hadari-Bedouin, 'Conflict and the Formation of the Saudi State' in Madawi Al-Rasheed and Robert Vitalis eds. *Counter-Narratives: History, Contemporary Society and Politics in Saudi Arabia and Yemen* (Palgrave Macmillan, 2003) 35-37.

¹¹⁶⁹ Peter Taran, 'The Need for a Rights-Based Approach to Migration in the Age of Globalization', in Cholewinski, de Guchteneire, and Pécoud (eds), *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 150.

¹¹⁷⁰ Beza Nisrane, Ringo Ossewaarde, and Ariana Need. 'The exploitation narratives and coping strategies of Ethiopian women return migrants from the Arabian Gulf,' (2019) *Gender, Place & Culture* 1.

¹¹⁷¹ Arab News, *Saudi Ministry Launches Major Workplace Health and Safety Initiative* <<https://www.arabnews.com/node/1968521/saudi-arabia>>.

¹¹⁷² International Covenant on Civil and Political Rights, 16 December 1966, GA Res 2200A (XXI) (Entry into force 23 March 1976); International Convention on Economic, Social and Cultural Rights, 16 December 1966, GA Res 2200A (XXI) (entered into force 3 January 1976).

right instruments. For example, the GDHR, and through its informal endorsement of Islamic human rights treaties such as the CDIHR.¹¹⁷³ However, in the absence of effective monitoring and enforcement mechanism, any international pressure placed on the Saudi leadership to further protect the rights of migrant workers will invariably lack “teeth”.¹¹⁷⁴ Formal commitments to improve migrant rights protections, but then ignored when politically expedient. This study has found that the very workers that have been most alienated by the Kafala system, (by the denial of rights such as the denial of wages, intimidation and unfair contract terms; threats of deportation, violence, gendered violence and sexual abuse) are also the very identities that the Kafala reform excludes or provides weaker protections too.¹¹⁷⁵

Despite the above shortcomings, there are grounds for optimism and hope. Saudi Arabia has progressively integrated positive measures to promote rule of law values across all aspects of its legal system. Labour protections have been measurably improved under the Kingdom’s regulatory framework. Any reforms to the Kafala system are better than no reforms at all. Many more workers have won comprehensive social and economic protections that are broadly equivalent to those enjoyed by Saudi nationals.¹¹⁷⁶ The labour court system has been streamlined and its procedures made clearer and less burdensome for both sets of litigants.¹¹⁷⁷ The Labour regulations enshrines the principle of mutuality and good relations between employer and employees and expands the forms of dispute settlement available to include pre-trial mediation, a simpler process for recovering unpaid wages, and mechanisms that allow employees to raise complaints against abusive employers.¹¹⁷⁸ The Kafala reforms have also engendered further measures aimed at promoting occupational health and safety for the high number of workers employed in dangerous industries. These measures are designed to uplift the living and working conditions of Saudi and foreign workers alike. These measures represent

¹¹⁷³ Said Mahmoudi, ‘International Human Rights Law as a Framework for Emerging Constitutions in Arab Countries’ in Grote and Röder (eds), *Constitutionalism, Human Rights and Islam after the Arab Spring* (Oxford University Press, 2016) 535, 536.

¹¹⁷⁴ Larbi Sadiki and Layla Saleh, ‘The GCC in Crisis: Explorations of ‘Normlessness’ in Gulf Regionalism’ (2020) 55(2) *Italian Journal of International Affairs*.

¹¹⁷⁵ Rebekah Smith, *Saudi Arabia Could Rewrite Its Record on Labor Mobility by Ending Kafala* Centre for Global Development <<https://www.cgdev.org/end-of-kafala-labor-mobility>>.

¹¹⁷⁶ Migrant Rights, *Saudi Arabia Announces Labour Reforms for Private-Sector Workers* (5 November 2020) <[MigrantRights.org](https://www.migrantrights.org/)>; Human Rights Watch, *Saudi Arabia: Labor Reforms Insufficient*, <<https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>>.

¹¹⁷⁷ الوسيط في شرح التنظيم القضائي الجديد في المملكة العربية السعودية, [Ahmed Saleh Makhoulf] [The Intermediary in explaining the new judicial organization in the Kingdom of Saudi Arabia] (مطبوعات معهد الإدارة) [Publications of the Institute of Public Administration in Riyadh], 2013) 85

¹¹⁷⁸ S Bollier, ‘What’s Holding Up Labor Reforms in Qatar?’ (2016) *Journal of Middle East Politics and Policy*.

a continuation of the Kingdom's attempt to rebrand its political image in the international arena as a rights-respecting legal system committed to wider social and economic reform.¹¹⁷⁹

Migrant rights reforms also coincide with a nation-wide effort to modernize the Saudi workplace through positively impacting gender discrimination, and work-related entitlements.¹¹⁸⁰ Further advancements in migrant rights protection will most likely occur- as this thesis has aimed to demonstrate- when international demands for improved rights protection align with the strategic and political goals of the ruling regime. Popular opposition to more radical reform, will carry more support if local and regional discourses around fundamental rights become mainstreamed and socialized into Gulf societies. Greater recognition and acceptance of global labour norms and human rights standards cannot be imposed on Gulf societies 'from above', particularly in societies where the very concept of international, secular, and liberal rights may be considered alien and culturally specific to the non-Islamic traditions of the West.¹¹⁸¹

At the same time, it is impossible to see how local discourses around the existence and indivisible quality of human rights can be nurtured or cultivated,¹¹⁸² when no "political space" exists for the public contestation of these issues at the level of civil society.¹¹⁸³ It is relevant that political rights and freedoms are most clearly omitted from the Kafala policy reforms. An empowered civil society serves many political and democratic aims, including holding political power, and in particular state officials responsible for administering employment or migration policy, to the public's account. Civil society, moreover, has an important function in democratizing the workplace by establishing trade unions that act as a vital counterweight to employer domination. It is striking that little progress has been made before and after the latest

¹¹⁷⁹ Clyde and Co, *Workers' Health and Safety Regulations in the Kingdom of Saudi Arabia* <<https://www.clydeco.com/en/insights/2015/11/workers-health-and-safety-regulations-in-the-kingdom>>.

¹¹⁸⁰ Such as health care and pensions rights for Saudi Arabia's growing private sector workforce. *Ministerial Decision no. 803* (Saudi Arabia).

¹¹⁸¹ Belbagi, 'Renegotiating the Social Contract in the GCC: Lessons from the Rousseau Playbook' (2015) *Gulf Affairs* 2, 4.

¹¹⁸² Whether freedom of movement or more fundamental notions of equality and non-discrimination (the "ground norm" of the UDHR).

¹¹⁸³ Robert Blitt, 'The Organization of Islamic Cooperation's (OIC) Response to Sexual Orientation and Gender Identity Rights: A Challenge to Equality and Nondiscrimination Under International Law' (2018) 28 *Transnational Law & Contemporary Problems* 89, 154.

sweep of reforms with respect to political rights, such as including the right to form trade union, protest or form associations of any kind.¹¹⁸⁴

One of the most significant themes identified in this study is how the Kafala system structures and legitimates unequal employment relations. The Saudi labour law imposes formal requirements on both employer and employee to agree on fair employment terms. However, once a sponsor agreement had been approved in accordance with official immigration procedure, the state's role in policing and punishing exploitative recruitment practices, unfair employment terms, confiscation of wages was found to be largely absent and ineffective. It remains to be seen whether Saudi enforcement authorities, alongside the courts, will play a more activist role in upholding laws that have been written into legislation for many decades¹¹⁸⁵ but which have resulted in disappointingly few criminal prosecutions and unprincipled decisions in labour disputes alleging unfair employment practices.¹¹⁸⁶

This thesis has highlighted key enforcement failures include the adoption of effective state measures prevent trafficking, racial discrimination of migration population. Furthermore, the mistreatment and entrapment of female domestic employed in the home has also been highlighted. There is a gap between the Saudi official policy, (including the much-vaunted new gender inclusion reforms and legal realities) and the Kingdom's obligations under provisions of constitutional and international law. One way this could be remedied, is by facilitating a stronger activist presence for local and transnational labour organizations, including trade unions. Where the state makes the choice whether to intervene in the private realms of work and home life, the ability to collectively organize in labour associations becomes a crucial remedial resource. Labour organization could step forward to review contract forms and challenge inequitable terms or represent "voiceless" or marginalized workers in legal and administrative proceedings before the relevant immigration authorities, labour courts and informal tribunals. Furthermore, these bodies could form coalitions with other transnational labour organisations to lobby the Saudi government to continue efforts to ratify important international treaties. This could include the ILO's Domestic Workers

¹¹⁸⁴ Ayman Adham and Anita Hammer, 'Mobility Power, State and the 'Sponsored Labour Regime' in Saudi Capitalism,' (2022) *Journal of Work, Employment and 3*

¹¹⁸⁵ Such as the law preventing the withholding of passport, blackmail of employees, or indentured labour.

¹¹⁸⁶ Peter Burns and James Gimpel, 'Economic Insecurity, Prejudicial Stereotypes, and Public Opinion on Immigration Policy' (2000) 115(2) *Political Science Quarterly* 201, 225.

¹¹⁸⁶ Saudi Arabian Government, *Labour and Social Development* <https://hrsd.gov.sa/ar/node/415368>>.

Convention, the ILO Convention on the Right to Organise and Collective Bargaining, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. These bodies could even exert “soft” reputational pressures on Saudi Arabia to become signatory to core UN treaties such as the ICCPR, ICESCR or CERD. The difficulty is that political rights and freedoms are not firmly embedded in the Kingdom’s constitutional framework, and they do not attain equivalent importance or form under Gulf and Islamic law tradition.¹¹⁸⁷

The wider issue is how the Kingdom’s efforts to enforce or comply with international (migrant worker-related) standards might be effectively reviewed or monitored. Saudi Arabia has traditionally refused to formally assent to any international treaty framework that would require Saudi authorities to submit to a state complaints mechanism, or individual petition process (for instance under the ICCPR’s optional protocol). Even if the compulsory or optional jurisdiction of an international tribunal or committee was taken off the table, it is doubtful that the Saudi leadership would tolerate any enforcement mechanisms that would permit any meaningful degree of international interference in political affairs or intrusion on its territorial sovereignty. It is difficult to see a clear route whereby the ruling regime would grant an international expert body the power to conduct fact finding, monitoring, investigative or reporting functions on the Kingdom’s migrant policy and practice (for instance the special procedure of the OHCHR). Although, The Kingdom has shown that it is more willing to cooperate with international bodies when the stakes are high enough.¹¹⁸⁸

¹¹⁸⁷ Amnesty International, *Saudi Arabia: Arrest of Two Prominent Activists a Deadly Blow for Human Rights* <<https://www.amnesty.org/en/latest/press-release/2017/09/saudi-arabia-arrest-of-two-prominent-activists-a-deadly-blow-for-human-rights/>>.

¹¹⁸⁸ GCC Official Website, *The Permanent Mission of the Cooperation Council to the United Nations Participates in the Conference on Combating Human Trafficking in Vienna* <<https://www.gcc-sg.org>> [Arabic Version].

C Future Pathways

These key findings can be utilised to show the how future pathways for the protection of migrant workers can be paved.

It is easy to forget that the Kingdom became signatory to CEDAW,¹¹⁸⁹ after a painstaking international campaign to illuminate the restrictions imposed on the civil and political liberties of women under the previous (also religiously infused) male guardianship system. After significant pressure from activist organisations, and damning reports by the UN and foreign State bodies, the Kingdom made the domestic political calculation to relax, and now effectively phase out, this criticism. This was carried out despite opposition by the country's historically power religious establishment. Since large swathes of the Kingdom's youth demographic were open to the notion of gender reform, the political risk of introducing changes to longstanding rights-restricting policies was outweighed by the potential economic and political costs of maintaining the policy. By changing its gender policy, the Kingdom could project a new image as a more progressive and socially liberal country for future investors and international partners, while still persuading sceptical transnational human rights communities that the Kingdom was now taking gender equality – and by extension human rights norms – more seriously.¹¹⁹⁰

Certainly, a great deal of progress has been made in gender inclusion in the social policy fields, and education and work integration are at an all-time high. Any perception of the progressive legalization of the Kingdom's human rights commitments in this arena must be balanced against the fact that real reform comes slowly, and at a high cost. Gender and other political activists that demand further political reform face arbitrary detention and imprisonment. While social entitlements are expanded, political freedoms, particularly when seen as oppositional to the ruling authority, are in other ways being rolled back. The project to “socialize” human

¹¹⁸⁹ Committee on the Elimination of Discrimination Against Women, Concluding Comments on Saudi Arabia, 40th Sess., Jan. 14– Feb. 1, 2008, U.N. Doc. CEDAW/C/ SAU/CO/2 (8 Apr 2008).

¹¹⁹⁰ Ahmen Al Omra, *Saudi Arabia edges more women into work* <<https://www.ft.com/content/c55d6cf4-8cd3-11e7-9084-d0c17942ba93>>.

rights in the contingent contexts of the Saudi political economy is, in short, is one that demands nuanced thinking and solutions.¹¹⁹¹

The optimism and caution that one might approach other attempts to mainstream human rights in the Gulf also takes us to the final insights. Further reform to the Kafala System may just be the first step that marks a gradual transition of its “relaxation” to its complete abolition. What is important is not what has been reformed, but what has not. It is undeniable that the motivation for the reform came from external pressures. The intense scrutiny placed on Qatar after the reported death of migrant workers recruited to work in slave labour conditions in the construction of the country’s world cup stadium sent shockwaves throughout the region. As Qatar begun to hold discussions with the ILO, this sparked regulatory competition among Gulf states to win approval in the international legitimation contest. In turn, each Gulf state introduced broadly similar reforms to Kafala, with similar qualifications. International pressure can produce spillover effects. But, many Gulf states have maintained policies that were intended to preserve the privileged status of its national worker. Particularly, is Saudi Arabia, where internal power struggles between religious and political establishments threaten to overflow, not least by a region that has manage popular revolt against the backdrop of the Arab Spring, rising youth unemployment and decreasing living standards.¹¹⁹²

The future development, and implementation, of the Kafala reform will likely be influenced by this tension between international pressure and domestic political factors. International actors can play a role, including by sparking competition between states. Civil society must also play a meaningful role in developing the Kingdom’s labour standards and policies – if legal reform is to be followed by meaningful social change, including a change in social attitudes. As it stands, both Saudi and foreign workers are effectively banned from joining any political or employment organization. Although, this only contributes to more social dissatisfaction and instability. The new Kafala reforms hand back power to administrative authorities to oversee the migration process, instead of ‘contracting’ these functions out to sponsoring employees, excluding non-protected low-skilled workers. These measures may only be transformative. However, if states ensure that fair work practices are being implemented, and that employee’s

¹¹⁹¹ Bellin, ‘Reconsidering the Robustness of Authoritarianism in the Middle East: Lessons from the Arab Spring’ (2012) 44(2) *Comparative Politics* 127, 128.

¹¹⁹² Steffen Hertog, ‘The GCC Economic Model in the Age of Austerity’ In *The Gulf Monarchies Beyond the Arab Spring: Changes and Challenges* (European University Institute, 2015) 5.

rights are not being abused, the deep-rooted structural discrimination that has been observed in Saudi workplaces¹¹⁹³ can only be addressed at the societal level, and in workplace organisations.¹¹⁹⁴

Relationships of mutuality, fairness and equity – principles that are deeply rooted in the Islamic labour jurisprudence – can be further fostered through a different kind of industrial relations policy. Here trade unions and other workers associations can work together with employers to raise concerns and help improve work practices to support the goals of productivity, economic efficiency and worker empowerment. At its most constructive, the state acts as ‘regulator’ and umpire of these dialogical and deliberative processes, with the court acting as a forum of last resort. This is entirely consistent with the Islamic conception of democracy as a consultative process, rooted in higher principles of justice and equity. Migrant workers continue to represent a significant proportion of the Kingdom’s overall workforce. These types of integrative strategies are thus necessary to ensure that national and foreign workers are not pitted against each other, and instead regard themselves as engaged in the same solidarity movement to win stronger legal and participatory rights protections against the backdrop of new economic austerity measures. If the entire discourse around labour rights is denationalized or delocalized, it is also possible to envision a future where migrants (particularly from the Global South), are not summarily deported or racially othered, stigmatized, coerced or met with violence but are treated with the same integrity as other privileged Saudi or Western workers.¹¹⁹⁵

The combination of formal and structural (socially driven) reforms described above will not occur overnight. As this study has illustrated, the overall analysis of the Kafala reforms defies neat theorizations or explanations and instead presents a complex and variable picture of success and missed opportunities. The contribution of this study has been to explore the Saudi system in its wider historical, social, cultural and political context in a synoptic and comprehensive manner that, to the researcher’s knowledge, has not been achieved or undertaken elsewhere. This thesis has also explored the complex relational dynamics that exist

¹¹⁹³ And in the home, in the case of domestic manual and home workers.

¹¹⁹⁴ See for example, Mary Briggs, ‘Women migrant domestic workers in the Arab States: An annotated bibliography,’ (International Labour Organization, 2014).

¹¹⁹⁵ For racially motivated differences in public attitudes to White, middle class, professionals and low-skill workers from Asia and Africa see David Chaudoir, ‘Westerners in the United Arab Emirates: A View from Abu Dhabi’ In *Migration and the Gulf. The Middle East Institute* (Washington, D.C., 2010).

between the international, regional and national element of Saudi Arabia's migration policy and human rights practice to explore the underlying motivations and purposes of the Kafala reforms.¹¹⁹⁶

This thesis has also shown that while international actors may shift the normative parameters of local discourses around human rights, this can be achieved through more formal efforts to bring Saudi Arabia under the shadow of international scrutiny and obligation. These pressures will generally not be sufficient to produce meaningful changes in state practice if they conflict with the national and popular interest. In many ways, the study on the Kingdom's Kafala system, and its reforms, doubles as a case study on the relationship between global (labour) norms and its domestic enforcement. This thesis has also explored the relation between hard enforceable instruments of international and soft law mechanisms, such as the GCC human rights frameworks.

A critical theme identified is that there are dangers in the extremes of compulsory and consensual approaches to legal reform. On one hand, any commitment to international standards, such as ILO norms, risk being hollowed of any independent normative value. This is because there is no mechanism to ensure that national authorities interpret and comply with these standards in a meaningful way. Otherwise, international law standards can be wilfully ignored or deprived of any legal effects for the very individuals they aim to protect, in this case migrant workers. On the other hand, a country notorious for guarding its sovereignty and the final jurisdiction of its courts over matters of constitutional law are unwilling to respond positively to attempts to coerce or compel their adherence to global norms and standards. Softer reputational measures that might encourage states to seek enhanced international credibility and economic opportunity are more likely to deliver policy changes than abstract and culturally specific rights discourses.¹¹⁹⁷

Finally, long lasting and politically transformative change requires a change in social perceptions and attitudes, as well as formal legislative change. Civil society, through political activism and collective action, must necessarily be part of the equation of the Kafala system is

¹¹⁹⁶ Ibrahim Awad, *The Reform of the Kafala System in the GCC States in the 21st Century*, *The Oxford Handbook of Comparative Immigration Law* (2023) 14.

¹¹⁹⁷ Martin Ruhs, 'Protecting Migrant Workers: The Case for a Core Rights Approach' In McAuliffe, M. and M. Klein Solomon (Conveners) *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (IOM, 2017) 3-4.

to be phased out. Transnational and local groups could be shaped the attitudes of policy makers. This can be achieved by illustrating the pragmatic (self-interested) benefits of further Kafala reform in terms of improved labour productivity and international legitimation. For this to occur though, these actors need to be given further opportunity to influence labour policy and work environments. As a result of these points, this thesis offers the following recommendations as conclusions.

D Practical Recommendations and Reform Proposals

Drawing from this discussion on future pathways, there are practical recommendations and reform proposals to achieve higher levels of effective rights protection for all segments of the Kingdom's migrant population.

- Progressively extend Kafala reforms to include all workers, including domestic workers, construction workers
- Extend labour law protection coverage particularly in respect of working hours, and access to a remedy before the Labour Courts to all categories of workers.
- Engage local groups to form informal consultations between migrant workers and employers and lobby for stronger participatory rights in employee negotiations or internal HR policy.
- Increased international pressure and incentives by key economic partners and UN agencies for Saudi to become party to core international human rights and ILO treaties, including by exploring transitional measures to allow Saudi to tailor its migration and related policies in line with domestic policy interests.
- Increased pressure and oversight of Saudi enforcement of penalties for employers found to have engaged in abusive labour practice, including an increase in fines and criminal prosecutions.
- Increased police and judicial cooperation across and between Gulf states to address the most exploitative elements of employer domination, including gendered violence against women in the home, or indentured labour by unregulated recruitment agencies.
- Investment in legal education of immigration officials to ensure that applicable regulations are enforced including via international expert-based inspection and monitoring of workplaces, assisted ideally by international experts.

- Consultation with the ILO to identify gaps in enforcement of treaty obligations, including the possibility of country visits and reporting mechanisms.
- Greater opportunities for cross-judicial dialogue promote consistency in labour disputation, including the enforcement of the wage protection scheme, and case law, supported by clearer principles on applicable provisions of constitutional law, including Sharia principles.
- Social out-reach and public awareness campaigns to prevent social discrimination against migrant workers, including language teaching skills and better access to legal representation and court assistance.

E Final Conclusion and Space for Further Research

Analysis throughout this thesis has shown that the Kafala system, in its current state, is showing a positive movement toward a greater alignment with international law, Sharia law and Saudi Arabia's labour law regulations. Though, there is still significant room for improvement.

Firstly, the Kingdom's obligations under international (treaty and customary) law were assessed, which led to mixed results. There is some indication that the Kingdom has begun to take steps to implement its obligations on specific issues such as labour protection. However, Saudi Arabia has been reluctant to bind itself formally to any international obligations that may dilute its sovereignty, including its authority to set and enforce its own domestic labour and associated immigration policies. Despite this, there is evidence that Saudi Arabia and its Gulf neighbours have become more responsive to global "rights" discourses as they seek further integration into the international economic order.

Secondly, the constitutionally mandated principles of Sharia were assessed, which showed that there are constitutional and religious-normative grounds for the further reform, or potential abolition, of the Kafala system. While there is significant internal debate among Islamic jurists around the existence and basis of civil and political freedoms under Islamic law, this thesis has determined that Islamic values of equity justice are anathema to the most exploitative aspects of the Kafala system.

Thirdly, the relevant Saudi regulations and policies were examined, leading to a finding that the new reforms bring Saudi Arabia's domestic law into further alignment with international standards, including respect for freedom of movement. The Kingdom has taken significant steps to eliminate or relax the most rights-violating elements of the former Kafala system. Among the most recent reforms, the dual system of labour rights protection among migrant workers and Saudi nationals – a structural function of the Kafala system has been reformed to introduce greater equity in terms of pay and other in-work protections. Many of the most problematic aspects of the Kafala process have been repealed, including the near absolute requirement of sponsor consent for the most basic freedoms, including the ability to change jobs and leave the country. Key challenges were identified, many intimately related to the relationship between law and political power under the Kingdom's constitutional framework.

While conducting this analysis, a number of ways to increase levels of effective rights protection for migrant workers were identified. These include: (1) the extension of reforms to include all workers, (2) the extension of labour law protection coverage; (3) informal consultations with local groups; (4) increased international pressure and incentives; (5) increased pressure and oversight of Saudi enforcement of penalties for employers found to have engaged in abusive labour practice; (6) Increased police and judicial cooperation across and between Gulf states to address the most exploitative elements of employer domination; (7) investment in legal education of immigration officials; (8) consultation with the ILO to identify gaps in enforcement of treaty obligations; (9) greater opportunities for cross-judicial dialogue, and; (10) social out-reach and public awareness campaigns to prevent social discrimination against migrant workers.

There is still, however, significant space for further research on this pressing and important issue. As these reforms are only now being brought into effect, (even with questionable formality and legally binding force), there would be significant value in conducting empirical research to assess how the new reforms are being implemented in practice. This brings forth further questions, such as the effect on certain categories of workers in respect of the rights and other legal issues identified in this study. This thesis aspires to contribute to the existing research to support further doctrinal and practical analysis of Saudi legal developments and their impacts as the new reforms are phased in. The impact of the Kafala system on migrant workers is an important issue, and it is of hope that further research can assist with forming an appropriate solution for the benefit of all parties involved.

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