

The Kingdom of Saudi Arabia's Kafala System concerning Migrant Domestic Workers and its Impact on the Fight against Human Trafficking

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ملخص المقال بالعربي

تتحدد العلاقة بين عمال المنازل المهاجرين وأرباب عملهم في إطار أحكام الكفالة السعودي، التي بموجبها يكتسب صاحب العمل صلاحيات واسعة على العامل. وقد أدى ذلك إلى إساءة استخدام بعض أصحاب العمل تعسفاً لهذه الصلاحيات الواسعة، وحرمان العامل من السفر إلى بلده الأصلي حتى في الظروف الطارئة، وإجبار العامل على أداء عمل غير ذلك المنصوص عليه في عقد العمل. بالإضافة إلى ذلك، وفقاً لنظام الكفالة، يجب على العامل طلب إذن صاحب العمل عندما يرغب في العمل في مكان آخر. وايضا، يمكن لصاحب العمل الإبلاغ عن العامل لدى المديرية العامه للجوازات وتصنيفه على اعتبار انه "هارب" إذا كان يتصرف بدون إذنه مما يجعل العامل أكثر عرضة للترحيل أو السجن. يقدم هذه المقالة تحليلاً لممارسة نظام الكفالة وأثره على مكافحة الاتجار بالبشر في السعودية. يركز المقال على شرح وتحليل انتهاكات نظام الكفالة لاحكام القانون الدولي لحقوق الإنسان ومبادئ الشريعة الإسلامية، وكيف يمكن معالجة هذه القضية. يقترح هذا المقالة أن يتم تفسير الشريعة الإسلامية من خلال عملية الاجتهاد وفقاً للمذهب الحنبلي الذي تبنته الدولة السعودية في محاولة لإصلاح نظام الكفالة. يناقش المقال الإجراءات التي اتخذتها السلطات السعودية لتحسين الوضع الإنساني لقوتها العاملة من المهاجرين من خلال إطلاق مبادرة تحسين العلاقة التعاقدية (IICR) وإصلاح نظام الكفالة. كما توصي بالخطوات والتدابير التفصيلية التي يتعين تنفيذها للتخفيف من القواعد الحالية والآثار المترتبة على توفير نظام الكفالة فيما يتعلق بخدم المنازل الوافدين من خلال تبني ممارسة الشريعة الإسلامية وفقاً للمذهب الحنبلي.

Abstract

The relationship between migrant workers and their employers is determined within the framework of the Saudi provisions of Kafala, under which the employer gains wide prerogative over the worker. This has resulted in some employers arbitrarily misusing these broad powers, depriving the worker of travelling to his or her country of origin even in emergency circumstances and forcing the worker to perform work other than that stipulated in the employment contract. In addition, according to the Kafala system, the worker must seek the permission of the employer when he or she wishes to work elsewhere. Also, the employer can report the worker as a runaway

if he or she acts without their permission which therefore makes the worker more susceptible to being deported or imprisoned.

This article provides an analysis of the practice of the sponsorship system (Kafala) and its impact on the fight against human trafficking. The article focuses on how this system violates international human rights law and the principles of Islamic Sharia in particular in relation to migrant domestic workers, and how this issue can be addressed. This article proposes that Islamic Sharia should be interpreted through a process of *ijtihad* in accordance with the Hanbali school of thought which was adopted by the Saudi state in an effort to reform the Kafala system. The article also discusses the measures taken by the Saudi authorities to improve the humanitarian condition of its migrant work force by launching the Initiative to Improve the Contractual Relationship (IICR) and revising the Kafala system. It also recommends detailed steps and measures to be implemented to mitigate the current rules and implications of the provisions of the Kafala system with respect to migrant domestic workers by adopting the practice of Islamic sharia in accordance with the Hanbali doctrine.

Research methodology

This research adopts a doctrinal legal approach. The study employs a critical analytical research method and a qualitative research approach. The doctrinal methodology involves analysis and interpretation of primary sources of data that include treaties, legislation and case law.¹ Secondary sources involve the study, review and critical analysis of materials written by scholars in books and articles in journals. This research examines the extent of the convergence and divergence between Saudi regulations drawn from Islamic Sharia with international conventions on human rights and human trafficking. The investigation has been carried out through a desk-based qualitative study.

Research Questions

The main research questions are

1. How does KSA's Kafala system for migrant domestic workers affect the fight against human trafficking?
2. Does the Kafala system comply with and balance international human rights law (IHRL) and Islamic law principles and respective concepts of dignity?

Aim and Objectives of the article

Although a number of scholars² have made attempts to discuss the problem of the Kafala system in KSA, there remain gaps in scholarship in terms of exploring some of the existing systemic failures. These failures include the legal gaps concerning the nature, and understanding of the problem in KSA. The aim of this study is to

¹ McConville and Chui, *Research Methods for Law* (2nd edn, Edinburgh University Press, 2007); see also, Duncan, N. J. and Hutchinson, T. Defining and describing what we do: Doctrinal Legal Research. *Deakin Law Review*, (2012) 17(1) 83-119.

² Such as Mohammed Matter, and Abdulhamid Al-Harqan,

analyse and determine how effective the Saudi government has been in combatting the crime of human trafficking by adhering to both Islamic Sharia, and the legal tools provided by international law. In an attempt to achieve these critical objectives, this article investigates the Kafala system which is allowing human trafficking to thrive, and those aspects that are hindering the effective enforcement of laws against traffickers.

The article also discusses how Islamic Sharia complements and harmonises with international human rights law. The article argues that the KSA will continue to face critical challenges in efforts to eliminate human trafficking unless its domestic legislation is improved. The difficulty set forth in this article involves the Kingdom's failure to fulfil both international human rights law and Islamic obligations in order to effectively combat human trafficking. In essence, the thesis explores the following:

- I. The impact of the Kafala system on migrant domestic workers in the fight against human trafficking
- II. The extent to which Saudi Arabian legislation on human trafficking is compatible with Islamic law and international human rights law.

1 Introduction

The KSA has faced significant human trafficking challenges in recent decades.³ This article focuses on the Saudi state's application of the provisions of the sponsorship system (herein the Kafala system) and how this violates IHRL and the principles of Islamic Sharia, as well as on how the issue can be tackled.

The Saudi Arabian economy has gained global recognition through the trading of crude oil, which has resulted in economic growth while largely preserving long-held traditions and cultural heritage.⁴ This growth has also attracted a global workforce to strengthen its economy.⁵ This workforce consists of millions of migrant workers coming from the southern and eastern parts of Africa and Asia to work in agriculture, domestic services, and the construction industry.⁶ Unfortunately, this movement of labour has not been impervious to the perils of human trafficking and the Saudi authorities have been unable to stop the growth of trafficking or adequately prosecute the orchestrators.⁷ Most of the abuses are adjudicated through Islamic Sharia; however, the Saudi state's interpretations of Islamic Sharia have been inconsistent with international human rights standards.⁸

³ Karim Tahir, 'the kafala system in Saudi Arabia as a form of modern slavery' (MSc in Globalization and Sustainable Development, Norwegian University of Science and Technology 2019)

⁴ The embassy of Saudi Arabia: Washington DC, 'Economy & Global Trade' (Saudi Embassy) <<https://www.saudiembassy.net/economy-global-trade>> accessed on 02 January 2023

⁵ UNODC, 'UNODC & Saudi Arabia Join Forces to Protect Victims of Human Trafficking' (UNODC, November 2020) <<https://www.unodc.org/unodc/en/frontpage/2020/November/unodc-and-saudi-arabia-join-forces-to-protect-victims-of-human-trafficking.html>> accessed 05 July 2022.

⁶ Global Detention Project, 'Submission to the UN Committee on the Elimination of Discrimination against Women: Saudi Arabia' (June 2017) <<https://www.globaldetentionproject.org/submission-to-the-un-committee-on-the-elimination-of-discrimination-against-women-saudi-arabia>> accessed 22 July 2022; see also Sarah Zimmerman, 'Mending the protection and prosecution divide: looking at Saudi Arabia human trafficking flaws and possibilities' (2016) 15(3) Washington University Global; Study Law Review <https://openscholarship.wustl.edu/law_globalstudies/vol15/iss3/9/> accessed 22 July 2022

⁷ Hélène Harroff-Tavel and Alix Nasr, *Tricked and Trapped: Human Trafficking in The Middle East* (Geneva, ILO, 2013) 42.

⁸ UN Office on Drugs and Crime (UNODC), 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' (Refworld, June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed 20 May 2022.

The Kafala system presents particular difficulties in relation to human trafficking and is addressed in detail in this article. The second section discusses the slave trade and the introduction of the Kafala system, whilst the third section critically analyses the provisions of the Kafala system and work visas in the KSA. The fourth section evaluates the Kafala system which is derived from the Saudi state's application of Islamic Sharia when dealing with migrant domestic workers. The fifth section focuses on both the KSA school of Hanbali thought and Sharia principles for combating human trafficking and exploitation. Section six will reach the conclusion that the Kafala system is a major contributor to the problem of human trafficking in the KSA.⁹ This section also discusses the failures in legal protection and support for trafficked victims. Instead of solving the influx of human trafficking in the region, the continuation of certain practices, justified on the basis of Islamic law, allows human trafficking to thrive.

Although KSA's reliance on Islamic law has contributed significantly to defending people's rights and dignity, there remains a contradiction in the way Islamic law is applied. This contradiction results in human trafficking and modern forms of slavery continuing to thrive and go unpunished. It is sometimes argued that violations of IHL such as human trafficking in the KSA are permitted and even encouraged by Islam.¹⁰ This article briefly discusses how the Saudi government abolished the practice of slavery and the slave trade and how Islamic law responds to international anti-trafficking principles through legal methods. This article argues that Islamic Sharia not only discourages human trafficking but offers solutions for combating it, since Islamic Sharia condemns exploitation.¹¹ In addition, the protection of the rights of the vulnerable, particularly women and children, is grounded in Islam. The principles of Islamic Sharia mostly do comply with international standards as an ideal framework for curbing human trafficking.¹² Therefore, the Islamic legal system has the potential to supplement international laws against human trafficking as demonstrated in this article. In summary, despite the KSA's constitutional adherence to Islamic Sharia which promotes human rights, there still remains a contradiction in the way Islamic law is applied in the Kingdom.

5.2 The Slave Trade and the Kafala system in the KSA

Although, the slave trade and slavery were previously practised within the Arabian Peninsula for centuries prior to the advent of Islam,¹³ the legal position on slavery today is based on Islamic principles and traditions. The Saudi government issued a royal directive in 1937 to the princes of the regions, known as 'Instructions

⁹ Americans for Democracy and Human Rights in Bahrain (ADHRB) report 26 Jan 2018, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SAU/INT_CEDAW_NGO_SAU_29966_E.pdf accessed on 14 May 2022

¹⁰ The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 04 January 2022.

¹¹ UN Office on Drugs and Crime (UNODC), 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' (Refworld, June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed 30 June 2022.

¹² The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 06 January 2022.

¹³ Murray Gordon, *Slavery in the Arab World* (New Amsterdam, 1989) 225; See also John Hunwick, 'Arab Views of Black Africans and Slavery" West Africa, Islam, and the Arab world' (2006) 75-90.

Concerning Trafficking Slaves' which contains provisions that forbid the slave trade or slavery.¹⁴ Article [a] of the royal decree provides for the liberation of the victims free of charge, while article [c] provides for the punishment of human traffickers by imprisonment for a period not exceeding one year.¹⁵ However, even with these provisions, slavery and the slave trade have been on the rise.¹⁶ This view has been supported by both American and British slavery investigative bodies, which in 1955 considered KSA to be a state that bred the slave trade.¹⁷ However, in 1962 the enactment of article 10 in the ministerial statement of the new policy of the country abolished slavery and other related practices completely.¹⁸ The government was also compelled to compensate former slave owners.¹⁹ The abolition of slavery in the KSA was based on Islamic jurisprudence in line with new developments. Thus, in principle, Islamic Sharia, which forms the basis of KSA's secular policy in the fight against human trafficking, meets the international standards required to end the problem.²⁰ Despite the progress toward abolition of slavery discussed above, the phenomenon has persisted and evolved into a variety of forms, including what is now known as human trafficking.

As a result of its geographical location, strategic location for religious rituals, and stable economy, the KSA faces widespread immigration issues. The Kingdom is the spiritual centre of all Muslims for the annual pilgrimage and other religious observances which attracts millions of visitors, many of whom remain illegally in the country.²¹ In addition, as an oil-rich country geographically close to some vulnerable poverty-stricken nations, the KSA has become a desirable destination for expatriate workers who become exposed to human

¹⁴ The Saudi government issued a regulation to this effect in 1937 in the form of a royal decree entitled "instructions concerning trafficking slaves." Article 1 of this royal decree states the following: Since the provisions of the Noble Sharia prohibit the enslavement or purchase of nationals of states in treaty relations, it is therefore strictly forbidden:

1. Importing slaves from any country to the Kingdom of Saudi Arabia by sea.
2. Importing slaves into Saudi Arabia by land, unless the slave trader had a government document evidencing that the importing person was recognized as a slave in the country from which he was imported at the time of the issuance of this regulation.
3. It is forbidden to enslave free people in Saudi Arabia.
4. Purchasing or owning any imported or enslaved person in violation of the previous provisions after the issuance of this Law.

The royal decree further adds:

Any violation of the previous provisions entails punishing the perpetrators, as follows:

- (a) Freeing the slave free of charge
- (b) The application of customs regulations applicable to smugglers.
- (c) Aggravated imprisonment for a period not exceeding one year.

¹⁵ *ibid*

¹⁶ Bernard Lewis, *Race and Slavery in the Middle East: An Historical Enquiry* (Oxford University Press, 1990) 167.

¹⁷ Murray Gordon, *Slavery in the Arab World* (New Amsterdam, 1989) 225 (228).

¹⁸ James Lee Ray, 'The Abolition of Slavery and the End of International War' (1989) 43 *International Organization* 405.

¹⁹ Murray Gordon, *Slavery in the Arab World* (New Amsterdam, 1989) 233; As a result of the emancipation of 1,682 slaves that year, the government paid 8,679,242 riyals to their masters (equivalent to £1,785,000) in compensation to their masters

²⁰ Myada O. El-Sawi, 'Beyond the "Tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39 *Georgia Journal of International & Comparative Law* 391.

²¹ Muhammad Humaidan, 'Umrah Pilgrims Warned Against Overstaying' (Arab News, 07 August 2009) <<https://www.arabnews.com/node/326880>> accessed 17 February 2023.

trafficking.²² The flow of migrant labourers into Saudi Arabia became more prominent from the early 1970s, as increased production of petroleum products created a need for both skilled and unskilled labourers.²³ As living standards improved for its citizens, opportunities for domestic services and the rate of immigration labour expanded. It is no accident, therefore, that when the Organization of Petroleum Exporting Countries (OPEC) began to raise oil prices, many countries started sending workers to KSA.²⁴ Recently, Saudi Arabia has become the largest recipient of domestic labourers, with over 66% of households having a domestic labourer.²⁵ This necessitated the establishment of rules for regulating the affairs of these expatriate workers, which eventually resulted in the provisions of the Kafala system.²⁶ This system has been abolished, except for these five categories of employment: private drivers, guards, domestic workers, shepherds and gardeners,²⁷ due to the fact that they are not covered by the Saudi labour law.²⁸ Alhayja and Alkhasawna argued that the exclusion of domestic workers from the labour law is a result of their nature of work.²⁹ This nature allows the existence of a direct link between the domestic worker and the homeowner that goes beyond the limits of the worker's relationship with their employer. Therefore, the relationship between employers and domestic workers enables the domestic workers to see the fine details of the homeowner's private lives which would deepen bonds between them. This is what prompted some legislation such as the Saudi legislation to exclude domestic workers from the labour law.³⁰ The following section will review the provisions of the Kafala system and work visas in detail.³¹

3 The Provisions of the Kafala System and Work Visas in the KSA

In order for a migrant worker to enter the Saudi State and be licensed to work, the migrant must find a Saudi national who is willing to sponsor and bear all the obligations imposed by the state, as well as a passport and entry visa.³² This is in accordance with the provisions of Article 11 of the Saudi Residency Law crowned with

²² Duraid Al Beik. Gulf News. Available at the following link: <https://www.dw.com/ar/>; See also 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*.

²³ Fairsquare Policy Brief No 1, 'Migrant Workers in Saudi' (2020) <<https://fairsq.org/wp-content/uploads/2020/11/FS-Policy-Brief-1-Saudi-Arabia-1020.pdf>> accessed 11 July 2022

²⁴ Md Mizanur Rahma' 'Beyond labour migration: the making of migrant entrepreneurship in Saudi Arabia' , (2018) 33 *International Sociology*86.

²⁵ Abdullah Al-Yousef, 'Domestic workers. Social relevance that entrenches dependency and sows negativity in children' *Al-Riyadh* (Riyadh, 23 January 2016) <<http://www.alriyadh.com/1121909>> accessed 17 May 2022.

²⁶ Omar Al Shihabi, "The Date of The Creation of the Sponsorship System for Migrant Workers in the Gulf States" (2018) *Gulf Center for Policy and Development*.150-173

²⁷ KSA labour legislation does not apply to these five groups of workers. This is why the Kafala system reforms cannot be extended to these five categories of workers.

²⁸ Nisha Varia, 'Sanctioned Abuses: The Case of Migrant Domestic Workers' (2007) 14(3) *Human Rights Brief* < <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1227&context=hrbrief>> accessed 25 July 2022

²⁹ Bander Al-Haija' and Al-Khasawneh, *Legal Regulation of the Work of Domestic Workers and the like*, (2016) *Studies of Sharia and Law Sciences* 322 838

³⁰ *ibid*.

³¹ Romina Halabi, R., (2008). *Contract Enslavement of Female Migrant Domestic Workers in Saudi Arabia and the United Arab Emirates*. S. Bania-Dobyns et al, pp.48-58.

³² Legal Center for Foreigners in the Gulf Arab States (Study of The Ring), Abbas Mohammed Abbas, e-publishing house "A-Books" London, England, 2017 166; also see *International Protection of the Rights of Migrant Workers and Their Family Members*, Adnan Daoud Abdel Shammari, First Edition, Center for Arab Studies for Publishing and Distribution, Giza, Egypt 2015 308.

Royal Attestation No. 17-2/25/1337 on 09/11/1371 AH [1952/07/30]. This is a secular law derived from the Saudi state's application of Islamic Sharia, which stipulates that

The sponsorship of the sponsors in this Regulation is final and may not be released except in case another sponsor offers the same obligations and has the same satisfactory characteristics of the sponsor who is requesting release.

In case no other new sponsor offer was submitted, and insistence of the current sponsor on cancelling his sponsorship due to legitimate reasons, the foreigner will be detained if found, and shall be instructed to leave within one week maximum.³³

The Kafala system is considered a type of guarantee in the KSA. This type of guarantee is applied to the expatriate workforce, specifically migrant domestic workers, where permission for the expatriate to work is linked to being sponsored. Thus, the sponsorship represents the legal identity of the expatriate and his/her ability to work within the jurisdiction of the state.³⁴ The Kafala system is thus considered to be a network of legal-labour relations, linking the sponsor, the state, and the sponsored person.³⁵ The sponsor, in theory, represents and is legally responsible for the expatriate workers during their stay in the Kingdom.³⁶ As a result of the Kafala system, the state delegates authority to the citizen/employer to supervise the migrant worker's entry into the country and their well-being during employment.³⁷

The Kafala system has been implemented through a set of bureaucratic and legal procedures that regulate the relationship between the sponsor, the expatriate, and the state. Among the most important of these measures are the following:

- i. Entry/Residence Visa - An expatriate must obtain a state-issued visa in order to be able to work legally in the country.³⁸ This visa needs a citizen sponsor (or someone authorised by the state).
- ii. Exit visa - a state-issued visa that allows an expatriate to legally exit the country.³⁹

³³ The Residency Regulation (Supreme Royal Order No 17/2/25/1337) 1952 art 11.

³⁴ Omar Al Shihabi (n 27)

³⁵ Anh Nga Longva, 'Keeping Migrant Workers in Check: the Kafala System in the Gulf' (1999) 211 MERIP 20.

³⁶ Sara Hamza, 'Migrant Labor in the Arbaian Gulf' (Supervised Undergraduate Student Research and Creative Work, University of Tennessee-Knoxville 2014).

³⁷ Sponsorship, dependency and exclusion in Gulf Arab societies, fixed and transformed: the Gulf between societal discord and the interdependence of money and power (Beirut: Gulf Center for Development Policy and Knowledge Forum, 2015) 442.

³⁸ Circular No. 51/8/T issued by the Ministry of Justice on 04/20/14009 prohibits foreign workers from working in Saudi Arabia unless they are sponsored by a Saudi, confirming the non-Saudi disqualification.

³⁹ These powers are outlined in Ministerial Order No. 8/451, dated 04/02/1406. The Ministry of the Interior's Special Rights Procedures Guide (1406) 1 65: Bandar Hajjar. Amending the bail provisions and correcting the relationship between the employer and the migrant worker (National Association for Human Rights Riyadh, Saudi Arabia, 2008) 10.

iii. No Objection Certificate - A certificate is required before an expatriate change his/her job within the country.⁴⁰ The certificate proves that the current sponsor has no objection to the worker transferring his/her sponsorship to work for another sponsor.⁴¹

4 Evaluating the Kafala System in light of IHRL and Islamic Sharia

Many authors across the globe criticise the Kafala system for failing to comply with minimum international standards for eradicating human trafficking.⁴² For this reason, the Kafala system can be considered a source of human suffering in Saudi Arabia.⁴³ Various reports from international media, social media, and the US State Department reveal atrocities faced by these migrants at the hands of their hosts.⁴⁴ The following section addresses the extent to which the Kafala system breaches Islamic and international human rights law, and the Kingdom's efforts to reform the Kafala system.

4.1 The Kafala system, Islamic Law and IHRL

The Kafala system is based on the state's application of Sharia in the KSA. The state's Kafala system restricts the freedom of the migrant domestic worker to change jobs and to leave the country temporarily or permanently, with the exit permit linked to the approval of the sponsor.⁴⁵ The Saudi law imposes on domestic service workers the necessity of submitting an exit permit signed by the sponsor before the competent authority.⁴⁶ This strict application of the Kafala system has led to the flight of many migrant workers as a result of practices imposed on them by employers.⁴⁷ Therefore, KSA has put in place a law requiring the sponsor to report the 'escape', the terminology used in this circumstance. If found, the sponsor must bring back the sponsored worker unless his/her place of residence cannot be obtained.⁴⁸ Referring to these laws, we find that there is a conflict between the Kafala system and provisions of international law, such as article 8 of the 1975 Migrant Workers Convention and articles 6, 7 and 13 of the 1948 Universal Declaration of Human Rights (UDHR), article 6 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and articles 8, 12, 13 and 16 of the 1966 International Covenant on Civil and Political Rights (ICCPR). It also conflicts with articles 1, 5 and 6 of the 1926 Convention to Suppress the Slave Trade and Slavery and article 1 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

⁴⁰ *ibid*

⁴¹ Omar Al Shihabi (n 27)

⁴² Joshua Nelson, 'The Ethical Implications of the Kafala System' (2014) 11 *Pitt Political Review* 41.

⁴³ Hanan Malaeb, 'The "Kafala" system and human rights: time for a decision' (2015) 29 *Arab Law Quarterly* 307.

⁴⁴ Human Rights Watch, 'Decent work for domestic workers' available at https://www.hrw.org/sites/default/files/related_material/HRW_ILO_brochure_lores.pdf, and The report of the European Saudi Organisation for Human Rights, for more information, please see the following website: <https://www.esohr.org/en/>, accessed 05 April 2022

⁴⁵ These powers are outlined in Ministerial Order No. 8/451, dated 04/02/1406. The Ministry of the Interior's Special Rights Procedures Guide (1406) 1 65: Bandar Hajar. (n 810) 44.

⁴⁶ Circular No. 51/8/T issued by the Ministry of Justice on 04/20/1409 prohibits foreign workers from working in Saudi Arabia unless they are sponsored by a Saudi, confirming the non-Saudi disqualification.

⁴⁷ Migrant forum in Asia Policy Brief No 2, 'Reform of the Kafala (Sponsorship) System' (2012) <<https://pdfslide.net/documents/policy-brief-no-2-reform-of-the-kafala-sponsorship-policy-brief-no-2-reform.html?page=1>> accessed 16 September 2022

⁴⁸ The Residency Regulation (Supreme Royal Order No 17/2/25/1337) 1952 art 57.

Accordingly, international human rights organisations such as Human Rights Watch have called on Saudi Arabia to abide by international labour laws and human rights standards in its dealings with this category of migrant workers.⁴⁹ The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization indicated in its observations related to the Forced Labour Convention of 1930 No. (29) that:⁵⁰

The so-called visa-related Kafala system may in some countries of the Middle East constitute a fertile ground for forced labour and urged governments to adopt legislative provisions specifically designed for the difficult conditions faced by this category of workers and to protect them from exploitative and abusive practices.⁵¹

In order to explain how some provisions of the Kafala system violate international instruments relating to human rights and the laws of the International Labour Organization, this article will discuss some of the broad authorities granted to sponsors over workers in light of Islam and IHRL.

4.1.1 Deportation of the Migrant Worker

Article 13 of the ICCPR obligates the state to limit the reasons for expulsion.⁵² It stipulates the necessity of enabling deported foreigners to file a grievance against the decision to deport them before it is implemented. The Kafala system in Saudi Arabia is inconsistent with this provision, for example, Article 33 of the Saudi residency system issued by Royal Order No. 17-25/2/1338 on 09/11/1371 AH [13-7-1952] stipulates that ‘the Ministry of Interior may withdraw from any foreigner the right of residence and instruct him or her to leave the country whenever without giving reasons’. Although the state has the right to prevent foreigners from residing in the country, the wording of this provision is inconsistent with the text of Article 13 of the ICCPR.

The Kafala system also allows the sponsor to deport the sponsored person immediately after the end of the contractual relationship with him/her. Thus, the sponsored person is not allowed to avail of the time-consuming process of suing the sponsor or claiming his/her right through official channels; the system links the loss of residence permits to the loss of work itself.⁵³ This is inconsistent with the text of Article 8(1) of the Migrant Workers (Supplementary Provisions) Convention, No. 143 of 1975, relating to migration in abusive conditions and the promotion of equal opportunities and treatment for migrant workers, which was formulated as follows:

1- On condition that he/she has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of

⁴⁹ UNGA, ‘Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the annex to human rights council resolution 5/1’ 4th session (14 November 2008) UN Doc A/HRC/WG.6/4/SAU/3 para 37.

⁵⁰ Khalid Al Sayed, GCC and Arab Spring Countries, Orient Printing and Publishing House, Doha, Qatar, 2013 105.

⁵¹ ILO, ‘Employer-Migrant Worker Relationships in the Middle East: Exploring scope for internal labour market mobility and fair migration’ (May 2017) <https://www.ilo.org/beirut/publications/WCMS_552697/lang-en/index.htm> accessed 16 September 2022.

⁵² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 13; This convention has yet to be ratified by the Kingdom of Saudi Arabia.

⁵³ ILO, ‘(n 52)

his/her employment, which shall not in itself imply the withdrawal of his/her authorisation of residence or, as the case may be, work permit.⁵⁴

4.1.2 Freedom of Movement for the Domestic Migrant Worker and the Right to leave the Country.

Migrant workers in the KSA are often subjected to illegal detention and denied the right to movement and travel, or to leave the country without obtaining the consent of the sponsor.⁵⁵ This denial to the right to free movement is inconsistent with a number of international human rights instruments. For example, Article 13 of the UDHR stipulated that: '1- Everyone has the right to freedom of movement and to choose his/her place of residence within the borders of the state. 2- Everyone has the right to leave any country, including his/her own, and to return to his/her country.' This was confirmed by Article 12 of the ICCPR, which gives everyone lawfully present in a territory the right to freedom of movement and freedom to choose his/her place of residence within that territory.⁵⁶

Freedom of movement, as stipulated by the provisions of IHRL, is compatible with Islamic law.⁵⁷ The human right to freedom of movement is achieved through the means of Islamic Sharia, and therefore it is one of the established rights in Islam. The Quran stipulated that 'He is the One Who smoothed out the earth for you, so move about in its regions and eat from its provisions'.⁵⁸ Islam does not restrict the freedom of the individual to move from one place to another, except for a matter necessitated by the individual's own interest or the public interest, as in the case of a pandemic outbreak in a town, for example, where it is feared that an individual's transfer to another city will lead to the transmission of infection to the people of that city. The Prophet Mohammed (PBUH) said: 'If you hear of a plague in a land, do not enter it'.⁵⁹

The Prophet Mohammed (PBUH) wrote in the book of rules which regulates relations between Muslims and other Jews living in the city of Medina stating 'whoever wants to leave the city is safe, and whoever stays in it is safe'.⁶⁰ This is an explicit text ensuring the right of movement for each individual to leave whenever he/she wants.⁶¹ The Qur'an confirms this: 'Have they not journeyed through the earth, and had hearts to reason with, or ears to listen with? It is not the eyes that go blind, but it is the hearts, within the chests, that go blind'.⁶²

Islam urges people to host immigrants as well as be kind to them, help them and provide them with safety. The Qur'an made this act obligatory for Muslims, even if those who migrated to them were non-Muslims. The Qur'an affirmed this by saying,

⁵⁴ C143- Migrant Workers (Supplementary Provisions) Convention (adopted 24 June 1975, entered into force 09 December 1978) art 8; This convention has yet to be ratified by the Kingdom of Saudi Arabia.

⁵⁵ ADHRB (n 85); Bandar Hajjar. Amending the bail provisions and correcting the relationship between the employer and the migrant worker (National Association for Human Rights Riyadh, Saudi Arabia, 2008)

⁵⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12.

⁵⁷ Nasser Al-Baqmi, *Human Rights in Islam and its Applications in Saudi Systems* (King Fahd Security College 2015) 3 183

⁵⁸ Quran, 67:15.

⁵⁹ Narrated by Al-Bukhari 7/130 (5728) on the authority of Usama bin Zaid (NOT SURE HOW TO CITE THIS).

⁶⁰ Mojob al-hawikli. *Human Rights and Security Measures* (Naif Arab University of Security Sciences, 2006) 46

⁶¹ Abdulmalik Al-Maafry, *The Biography of the Prophet* (Dar Al-Ghad Al-Jadid, Egypt 2004) 2 103

⁶² Quran, 22:46.

And [also for] those who were settled in the Home [i.e.,al-Madinah] and [adopted] the faith before them. They love those who emigrated to them and find not any want in their breasts of what they [i.e., the emigrants] were given but give [them] preference over themselves, even though they are in privation. And whoever is protected from the stinginess of his soul – it is those who will be the successful.⁶³

4.1.3 Changing job

According to the rules applicable to changing job in the KSA, a domestic worker cannot transfer to work for another employer without the written approval of the first employer.⁶⁴ The primary sponsor can accept or reject the request. This is inconsistent with the text of Article 6(1) of the ICESCR which gives the migrant worker the right to choose to work freely and without guardianship from anyone. Paragraphs 1 and 3 of Article 8 of the ICCPR also gives the migrant worker freedom from being forced to work.⁶⁵

The Kafala system violates international law in two particular aspects. The first is in relation to the concept of slavery contained in Article 1 of the Slavery Convention 1926, as amended by the 1953 Protocol. This provision defines slavery in terms of a person over whom all or part of the powers arising from the right of ownership are exercised.⁶⁶ Although Article 1 links the concept of traditional slavery to ownership in which a person is no different from a commodity, it also adopts an expanded definition of the concept of slavery, as the exercise of ownership powers over another person. Powers akin to ownership exist for the Saudi sponsors over workers. For example, a domestic worker cannot work for someone other than his/her sponsor, except with the permission and approval of the latter.⁶⁷ It is also acceptable for the sponsor to waive the worker's sponsorship in favour of another employer in return for financial consideration.⁶⁸ These powers are similar to the powers of the master over the slave in terms of selling a slave. Other authorities granted to the sponsor are in relation to his/her dealings with the worker, including dealing with the escape of a worker. Consequently, such authority and provisions included in the Kafala system are considered as acts of slavery as specified in the Convention and contrary to upholding human dignity and measures required to combat human trafficking.⁶⁹

Article 5 of the 1926 Convention on Slavery states:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction,

⁶³ Quran, 59:9.

⁶⁴The requirements for transferring a worker to another employer are outlined in the Ministerial Order No. 8/451, dated 04/02/1406. Special Rights Procedures Guide (1406) 1 65; see also Shehata Ahmed, "Sponsorship of residence and travel (a comparative study between jurisprudence and the Saudi system)" (2021).

⁶⁵ International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 01 January 1976) 999 UNTS 3 (ICESCR) art 6(1); see also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 8.

⁶⁶ Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill/Nojhoff, 2015) page no.

⁶⁷ The requirements for transferring a worker to another employer are outlined in the Ministerial Order No. 8/451, dated 04/02/1406. Special Rights Procedures Guide (1406) 1 65

⁶⁸ Yousef Al-Adwani, an article entitled No legal text criminalizing the employer's waiver of the maid in return for money. Al-Anbaa newspaper, issue: 16575, September 13, 2019

⁶⁹ Hajjar (n 25)

protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.⁷⁰

The extended powers granted by the provisions of the Kafala system to the sponsor over the sponsored person could compel the domestic worker to perform work that is not stipulated in the work contract. Thus, this work could be a form of exploitation as stipulated in the Human Trafficking Law.⁷¹

Also, the excessive restrictions on the transfer of sponsorship make the migrant domestic worker feel compelled to work, regardless of poor working conditions, thus making it a form of forced labour.⁷² This action is prohibited by Article 5 of 1926 Slavery Convention which empowers the state to take measures to prevent forced labour and to punish perpetrators, as stipulated in Article 6 of the Convention:

Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions.⁷³

Furthermore, the Supplementary Convention for the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted in 1956, was more extensive in describing the concept of slavery. Article 1 of the Convention stipulates that:

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926.

One such practice, as included in Article 1(b) is

Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status,

This fully applies to the situation of the non-Saudi worker subject to the provisions of the Kafala system.

⁷⁰ Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 09 March 1927) 60 LNTS 253 art 5.

⁷¹ Anti-Trafficking in Persons Law (Royal Decree No M/40) 2009 art 2; Article 2 defines trafficking in persons as 'Prohibits trafficking in any person in any form including forcing, threatening, defrauding, deceiving, kidnapping him/her. Prohibiting exploiting position, authority, exploiting a person's weakness, or giving person money or benefits to gain approval of one person to control another person for the purpose of sexual assault. Prohibits forced work or service, begging, slavery or semi slavery practices, enslaving, removing physical parts, or subjecting a person to medical tests'.

⁷² Migrant forum in Asia Policy Brief No 2, 'Reform of the Kafala (Sponsorship) System' (2012) <<https://pdfslide.net/documents/policy-brief-no-2-reform-of-the-kafala-sponsorship-policy-brief-no-2-reform.html?page=1>> 29 November 2022. *Policy brief no. 2: Reform of the Kafala (sponsorship) system*. Available at: <https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>, accessed: November 29, 2022

⁷³ Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 09 March 1927) 60 LNTS 253 art 5.

Forced labour contravenes both international law and Islamic Sharia. The word 'work' and its derivatives are repeated in the Holy Qur'an 359 times. God made the value of a person according to the amount of work they achieve in this world. The Quran states that 'To each are degrees in accordance with what they have done. And your Lord is not unaware of what they do'.⁷⁴ This is in addition to other words that explain the importance of toil, striving and making an effort. Under Sharia, a person can refuse any job they do not want, unless the higher interest of the nation calls for it (such as during crisis or war) because the higher interest of the group takes precedence over an individual interest. Otherwise, it is not permissible to force a person to do specific work.⁷⁵ The employer has responsibilities in Islam, including:

1. Paying the worker's wages equivalent to their efforts without prejudice or procrastination.
2. Providing the worker with a decent life commensurate with their efforts and toil.
3. Giving what is worthy of honour without discrimination.
4. Providing elements of protection that prevent them from being unjustly exploited according to their circumstances.
5. The employer has no right to force the worker to work for them or ask them to work for longer hours than what were agreed upon. This should only be done by the full choice of the worker and provided that they are given a wage commensurate with the work done.⁷⁶

4.1.4 Recognition of the Worker's Legal Personality.

The procedure followed by the police following the arrest of a domestic worker on suspicion of a crime requires that the sponsor be present for the worker to be released from custody.⁷⁷ The migrant domestic worker remains detained without justification if the employer refuses to attend. This procedure is a violation of IHRL because the domestic worker is treated as if he or she has no legal personality. Thus, this is inconsistent with Article 16 of the ICCPR which states: 'Everyone shall have the right to recognition everywhere as a person before the law'. Moreover, the circulars relating to the Kafala system concerning migrant domestic workers use the phrase 'receiving the worker'.⁷⁸ It can be argued that this phrase violates human dignity because the Arabic phrase 'receive' is used for objects and should not be used or applied to people. It should be replaced by terminology such as informing the employer of the status of the worker or the time specified for his/her release.

The Saudi legal system also grants the sponsor the authority to notify the Ministry of Interior of the escape of the domestic worker if they are withdrawing their labour.⁷⁹ The employer can report the worker's absence as an escape or runaway, especially if there is a dispute between the two parties. The Arabic phrase 'escape' implies

⁷⁴ Quran 6:132.

⁷⁵ Hussein Shaheen, *Human Rights in Islam* (Safir Press, Riyadh, Saudi Arabia, 1993) (1) 51-53

⁷⁶ Rouaya Al-zahare, *Human Rights in Islam* (Dar Al-Mohammed, Jeddah, Saudi Arabia, 2002) (1) 279

⁷⁷ Bandar Hajjar, *Amending the bail provisions and correcting the relationship between the employer and the migrant worker* (National Association for Human Rights Riyadh, Saudi Arabia, 2008)

⁷⁸ These circulars and instructions can be found on the Ministry of Interior's website at the following link: <https://www.moi.gov.sa>, accessed 16 September 2022.

⁷⁹ Migrant rights, 'Abolish Absconding Charges' (Migrant-Rights, 20 November 2020) <<https://www.migrantrights.org/campaign/abolish-absconding-charges/>> accessed 30 July 2022

that the worker is held captive by the employer. Therefore, the use of this term should be declared unlawful in all Saudi legal regimes. I suggest that the phrase 'the worker's absence from work or departure' be used instead of a worker's escape. A penalty such as a fine, should be imposed on the employer and compensation must also be stipulated for the worker when the employer reports without justification that the worker is absent.

The lack of recognition by the Kafala system of migrant domestic workers' legal personality is inconsistent with Article 6 of the UDHR which states: 'Everyone has the right to recognition everywhere as a person before the law.' The Declaration also provides in Article 7 for the equality of all before the law and their right to enjoy protection from any discrimination or incitement that violates the Declaration. The Declaration is consistent with Islamic law in this regard. Islam has established the legal personality of the citizen and the immigrant on an equal basis, regardless of gender. Islamic jurists have detailed the provisions of civil capacity and criminal responsibility, and they have not neglected the capacity of the distinct and undistinguished person. Omar ibn al-Khattab's message to Abu Musa al-Ash'ari⁸⁰ included judging that all people are equal, with Omar writing: 'People are equal to one another'. This is an original rule in Islam.⁸¹

Therefore, no Islamic Sharia text differentiates immigrants from others. The principle of equality in this regard is clearly established in Islam. Among the texts that indicate equality is the saying of the Prophet Mohammed, (PBUH) 'O people, those who have gone before you were destroyed because if anyone of high rank committed theft amongst them, they spared him or her; and if anyone of low rank committed theft, they inflicted the prescribed punishment upon them'.⁸²

Among the general provisions of the Qur'an: 'O you who have believed, be constantly upright with equity (with others), witnesses for Allah, even if it be against yourselves or (your) parents and nearest kin'.⁸³ Residents of the Islamic nations enjoy equality before the law and the judiciary. The provisions of Islam are applied to all, whether they are Muslims or not, and they enjoy their rights and abide by their duties. Therefore, they are in the protection of the Islamic nation. The Prophet Mohammed, (PBUH) said: 'Whoever harms [others], Allah will harm them, and whoever causes hardship [to others] Allah will cause hardship to them'.⁸⁴

4.2 The KSA's Efforts to Reform the Kafala system

The KSA launched the Contractual Relationship Improvement Initiative (CRII) on 11th November 2020 to reconsider the issue of the Saudi sponsorship of the migrant worker. On 14th March 2021 the Labour Relations Improvement Initiative (LRII) officially abolished the main provisions of the Kafala system - the need to obtain the approval of the sponsor when changing a job, or travelling outside the country either permanently or

⁸⁰ Abu Musa Abd Allah ibn Qays al-Ash'ari, better known as Abu Musa al-Ash'ari (Arabic: أبو موسى الأشعري, romanized: *Abū Mūsā al-Ash'arī*) (died c. 662 or 672) was a companion of Muhammad and an important figure in early Islamic history.

⁸¹ Muhammad Othman, *Human Rights between Islamic Law and Western Thought*, (Dar Al-Sharq, 1982) 130, available at the following link: <file:///C:/Users/40189862/Downloads/Noor-Book.com> accessed 30 July 2022

⁸² Ibid

⁸³ Quran, 4:135.

⁸⁴ At-Tirmidhi said, after quoting this report: This is a hasan ghareeb hadith. Al-Albaani also classed it as hasan in Saheeh at-Tirmidhi. It was also classed as hasan by the commentators on al-Musnad. Ibn Muflih said in al-Aadaab ash-Shar'iyah (1/11): Its isnaad is jayyid [good].

temporarily.⁸⁵ The initiative specifies procedures for these circumstances. Workers can change jobs or travel, provided that they have given their employer at least 90 days' notice and, employees have the right to change jobs after one year of service.⁸⁶ The CRII included two types of reforms and improvements to the conditions that affect expatriate workers: abolishing the term 'Kafala' and limiting the relationship of the expatriate worker to the employer within the framework of the working relationship.⁸⁷ Other specific improvements are represented in the development of new mechanisms that would improve the conditions of expatriate workers. The terminology of 'sponsor' and 'sponsored person' has been replaced with the terms 'employee' [العامل] and 'employer' [صاحب العمل]. The initiative also introduced controls related to the employer's relationship with the expatriate worker. For example, an electronic contract documentation programme, measures to raise the cultural awareness of workers, and an insurance programme for the rights of workers were all introduced.⁸⁸ In addition, measures were introduced to protect expatriate workers. In light of this, the Ministry of Interior issued specific instructions stipulating the necessity of disbursing the entitlements of all expatriate workers through commercial banks approved in the KSA by opening a bank account in the name of the worker and linking any procedure related to his/her financial transfers through the linked bank. This account is considered as a method of control over the worker's entitlements, obligating the expatriate worker to open an account in a Saudi bank, and obligating the employer to transfer the worker's salary to this account.

However, unfortunately this initiative does not include five professions: private drivers, guards, domestic workers, shepherds and gardeners.⁸⁹ As workers in these professions are isolated from the general public and unaware of many of their rights, the Kafala system still makes them even more vulnerable to human trafficking. The exclusion of these five categories, including domestic workers,⁹⁰ contradicts international conventions and reinforces the principle of slavery. In June 2021, a group of United Nations special rapporteurs expressed 'deep concern' about the conditions of migrant domestic workers in the KSA.⁹¹ Their report highlighted that some migrant domestic workers live in conditions similar to slavery and abuse in the modern era and that the treatment of these workers amounts to human rights violations and places migrants 'at the mercy of employers'. Legislation does not impose any significant penalty for mistreatment of migrant workers or provide protection by the competent authorities.

⁸⁵Human Resources and Social Development, 'Labor Reform Initiative (LRI) Services Guidebook' (HRDS) <<https://hrsd.gov.sa/en/policies/labor-reform-initiative-lri-services-guidebook>>, accessed 11 July 2022

⁸⁶ ibid

⁸⁷ Al-Arabiya website, "Saudi Arabia bids farewell to the sponsorship system for expatriate workers." March 14, 2021 at the following link: <https://www.alarabiya.net/aswaq/economy/2021/03/13>, accessed 11 July 2022

⁸⁸Human Resources and Social Development, 'Labor Reform Initiative (LRI) Services Guidebook' (HRDS) <<https://hrsd.gov.sa/en/policies/labor-reform-initiative-lri-services-guidebook>> accessed 22 September 2022; see also Al-Arabiya website "A new contractual system in Saudi Arabia folds the page of the "sponsorship system" on the following link <https://www.independentarabia.com/node> (in Arabic), accessed 22 September 2022

⁸⁹ KSA labour legislation does not apply to these five groups of workers. This is why the Kafala system reforms cannot be extended to these five categories of workers.

⁹⁰ Al-Arabiya, 'Four o'clock Bulletin: The abolition of sponsorship system in Saudi Arabia' (14 March 2021) <<https://www.youtube.com/watch?v=C9RZX-zjOGs>> accessed 20 June 2022.

⁹¹ Committee for justice, 'UN Concerned About Allegations Of Mistreatment Of Migrant Workers In Saudi Arabia Despite Recent Reforms' (Committee for justice, 08 August 2021) < <https://www.cfjustice.org/un-concerned-about-allegations-of-mistreatment-of-migrant-workers-in-saudi-arabia-despite-recent-reforms/>> accessed 11 September 2022.

5 The impact of the application of the Hanbali School of Thought and Islam on reforming Kafala System in Saudi Arabia.

Islamic Sharia generally stipulates that the exploitation of human beings is prohibited because any form of exploitation is considered to be contrary to human dignity.⁹² Islamic Sharia also explicitly prohibits certain forms of exploitation.⁹³ This prohibition includes several types, which are similar to what is contained in the Palermo Protocol for example, the prohibition of forced labour and the prohibition of the exploitation of the prostitution of others, as well as the prohibition of trafficking in human organs.⁹⁴ In addition to the practices covered by the Protocol in a specific form, the Hanbali doctrine in Islam prohibits other forms of exploitation, including what may occur as a result of illegal practices applied to expatriate workers.⁹⁵ This section discusses the impact of the application of Hanbali thought in Islam on combating human trafficking in KSA and is divided into three subsections; first, the prohibition of mistreatment of people; second, how the Kafala system violates the principle of freedom in Islam; third, the best mechanism to end the Kafala system and available alternatives.

5.1 Prohibition of Mistreatment of People, Forced Labour and Servitude.⁹⁶

Islamic Sharia forbids exploitation and emphasises the rights of workers, so the prophet Mohammed (PBUH)⁹⁷ said, 'Whoever hires a worker, let them know their wages.'⁹⁸ and "Give the hired workers their wages before their sweat dries up."⁹⁹ He also quoted 'Allah would be the enemy of three persons on the day of Resurrection and one of them would be the one who hired somebody for some stipulated wage, took full advantage of their labour and then did not give them their due'.¹⁰⁰

Benefiting from the work or service of others is a contractual relationship governed by conditions agreed upon by the two contracting parties. The emphasis on the employee's knowledge of their wages before commencing work was a guarantee of their rights, and the employer is obligated to pay their wages upon completion of the work.¹⁰¹

⁹² Nasser Al-Shahrani, *Combating Human Trafficking The National Legislative Framework in the Kingdom of Saudi Arabia*

⁹³ Zuraini Ab. Hamid & Khairil Azmin Mokhtar, *Human Trafficking: The International Malaysian Legal Law Framework and Shariah Perspective* (2013) 21 (2) IIUM IIUMLJ 287 302

⁹⁴ See the Article 3(a) of the Palermo Protocol.

⁹⁵ Adnan Zulfiqar "Religious sanctification of labour law: Islamic labour principles and model provisions", (2007) 9 *University of Pennsylvania Journal of Labor and Employment Law*, vol. 9, No. 2, 421

⁹⁶ It can be said that human trafficking for the purposes of forced labour and forced services is one of the most prevalent forms in all countries of the world, and in particular in the wealthiest Islamic countries. Due to the presence of large numbers of foreign workers and immigrants who work in manual labour and factories, as well as domestic service, many of them are exposed to the risk of exploitation.

⁹⁷ The abbreviation "PBUH" stands for "Peace Be Upon Him." When the Prophet Mohammed's name is mentioned, Muslims generally say this in honour of him.

⁹⁸ Sunan al-Tirmidhi: Faith and vows (3857), Ahmed's document: (3/59).

⁹⁹ Sunan Ibn Majah: Rulings (2443)

¹⁰⁰ Sahih al-Bukhari, Sales (2227), Sunan Ibn Majah: Rulings (2442), Ahmad's document: (2/357)

¹⁰¹ The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 04 January 2022.

The order by Prophet Mohammed (PBUH) that workers should receive what they are owed before their sweat dries up is a metaphor for the timely payment of wages.¹⁰²

Work itself is highly valued in Islam, and is considered to be an act of worship.¹⁰³ Islamic jurisprudence also includes recognised rights for both the employer and the worker.¹⁰⁴ It is important to note that in Islam, the notion of a contract (covenant) is not only regarded as a legal custom between two parties but also the very foundation upon which the contract is formed, being a covenant or a promise before God and mankind.¹⁰⁵ For example, there must be clear agreement before the worker implements the agreed work, in order to protect the worker and urge them to work honestly and safely, and to fulfil contracts according to the established principles.¹⁰⁶ The Quran, states 'O you who have believed, fulfil [all] contracts'.¹⁰⁷ Therefore, the nature of the contract with workers in Islamic law is different from others because the contract has prophetic tradition and also in the Quran Allah commanded people to fulfil contracts in general.¹⁰⁸

Offering and accepting work in Islamic Sharia involves important principles. For example, the agreed-upon work must be legally permissible. Conversely, this implies that trafficking for any illegal practice, such as selling organs or prostitution, is prohibited in Sharia.¹⁰⁹ Likewise, Islam encourages work and discourages the practice of laziness and begging, which can be one of the activities of forced 'labour.'¹¹⁰ The Prophet Mohammed (PBUH) praises people who work hard and condemns begging and laziness.¹¹¹ One Islamic scholar of the Hanbali School Ibn Taymiyyah¹¹² says that the act of begging is forbidden, although other Islamic scholars mention that begging is permissible if it is out of necessity, and no one is harmed.¹¹³ Also, if no one is lied to, it is permissible to ask for

¹⁰² Tariq A Al Maena, 'the worker his dues before his sweat has dried up' (Gulf News, 27 December 2014) <<https://gulfnews.com/opinion/op-eds/pay-the-worker-his-dues-before-his-sweat-has-dried-up-1.1432644#>> accessed 04 January 2022.

¹⁰³ Ali Abbas, 'Islamic work ethic: a critical review' (2008). *Cross Cultural Management: An International Journal* 15 (1) 5 19, available at: <https://www.emerald.com/insight/content/doi/10.1108/13527600810848791/full/pdf>, accessed 07 January 2022

¹⁰⁴ Kazi Arshadul, 'Rights of Labourers in Islam: Bangladesh Perspective' (2018) 9 *Beijing Law Review* 345.

¹⁰⁵ S B Choi, N H Han, M Khan, and J H Bae, 'Towards a Better Understanding of Good Faith Concept in Islamic Contract Law' (2018) 7 *International Journal of Engineering & Technology* 247.

¹⁰⁶ Kazi Arshadul, 'Rights of Labourers in Islam: Bangladesh Perspective' (2018) 9 *Beijing Law Review* 345.

¹⁰⁷ Quran, 5:1.

¹⁰⁸ Hussein Hassan, 'contracts in islamic law the principles of commutative justice and liberality' (2002) 13 *Journal of Islamic Studies* 257

¹⁰⁹ The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 06 January 2022.

¹¹⁰ Narrated Abu Huraira: Allah's Messenger (PBUH) said, "By Him in Whose Hand my life is, it is better for anyone of you to take a rope and cut the wood (from the forest) and carry it over his back and sell it (as a means of earning his living) rather than to ask a person for something and that person may give him or not." Muhammad Al Bukhari, *Sahih Al-Bukhari*, vol 3, Book 34, No 286. This statement demonstrates the respect and encouragement that Islam has for work.

¹¹¹ Myada O. El-Sawi, 'Beyond the "Tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39 *Georgia Journal of International & Comparative Law* 391.

¹¹² Ibn Taymiyyah (ابن تيمية), was a Sunni Islamic scholar, muhaddith, polymath, theologian, judge, philosopher, and sometimes controversial thinker and political figure who lived from January 22, 1263 until September 26, 1328.

¹¹³ Islamweb, 'Begging in Islam' (Islam Web, 18 April 2004)

<<https://www.islamweb.net/en/fatwa/87527/begging-in-islam>> accessed 12 December 2021.

material aid.¹¹⁴ Therefore, the exploitation of a person for the purpose of begging in the context of human trafficking is a prohibited act under Islamic law because there is no necessity for the perpetrator, whose only goal is to gain profit through deception. This act often also involves harm and threats for the victims of human trafficking.

In conclusion, the exploitation of human beings through forced labour and service is an explicit violation in Islam resulting in the denial of the dignity and rights of the worker.¹¹⁵ As a result, it necessitates the provision of civil compensation as well as criminal liability via the Ta'zir penalty. This sanction is consistent with the prohibition in IHRL of trafficking in persons for forced labour and forced services enshrined in the Palermo Protocol.

5.2 The Kafala system and the Freedom Principle in Islam.

The Kafala system grants the employer various opportunities to impose on the personal lives of those they sponsor. These impositions are closely related to the issue of exploitation of workers which is contrary to the principle of freedom in Islam.¹¹⁶ Several jurists view the existence of the Kafala system as a violation of the rights of workers in Islam. For instance, Yusuf al-Qaradawi has explicitly stated that this system contradicts the teachings of Islam and should be abolished.¹¹⁷

The Permanent Committee for Scholarly Research and Issuing of Fatwas in the KSA has prohibited the sponsor from taking compensation in return for sponsoring the worker in the state so that he can work freely.¹¹⁸ This ban was also acknowledged and endorsed by the Hanbali school.¹¹⁹ It has been justified on two bases: first, sponsorship in Islam is a contract of donation, not a contract of exchange, and it is not permissible for the sponsors to take a fee for it. Second, obtaining compensation in return for sponsoring a person is considered bribery, which is forbidden by Sharia. Opposing this, others have said that it is permissible to take compensation for the worker's sponsorship.¹²⁰ This is the view of the Islamic Fiqh Academy.¹²¹ In addition to provisions of the Kafala system contradicting Islamic Sharia and international law, the Kafala system's guiding principle is to help others. As a result, forcing the worker to pay in exchange for Kafala is illegal because it violates human dignity.¹²² When contemplating the elements on which the Kafala system are based, it becomes clear that the system leads to exploitation and abuse of foreign domestic workers. Such treatment may lead to a potential component of human

¹¹⁴ Fiqh al-Sunnah is available at the following link:

www.iiu.edu.my/deed/lawbase/fiqh_us_sunnah/vol2/fsn_vol2b.html, accessed 12 December 2021

¹¹⁵ Myada O. El-Sawi, 'Beyond the "Tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39 *Georgia Journal of International & Comparative Law* 391.

¹¹⁶ Fathi Al-Fauri, 'The Jordanian Law on Preventing Trafficking in Persons and Islamic Law' (Sharia and Law Sciences, 2019) 46 (3) 379 393.

¹¹⁷ The sponsorship system provides a black market for visas, leaving dozens of workers living in unworthy conditions. A large number of workers reside in a small space, and this is really flawed. The way of life is inconsistent with Islamic principles which calls for respect for human rights.

¹¹⁸ See Fatwas of the Permanent Committee for Scholarly Research and Iftaa, Part 13, 78-80

¹¹⁹ See the Journal of Islamic Research (41) 41: Wahbah Al-Zuhaili, Islamic jurisprudence and its evidence (Dar Al-Fikr, Damascus, 2014) (6) 41

¹²⁰ According to Imam Ishaq bin Rahwayh, taking money in exchange for Kafal is permissible. See Ali Al-Mawardi, Al-Hawi Al-Kabir (Dar Al-Kutub Al-Ilmia 1994) (8) 121 (in Arabic)

¹²¹ Journal of the Islamic Fiqh Academy of the Organization of the Islamic Conference in Jeddah, (2). 962

¹²² Mustafa Al-Khan and others, Systematic Fiqh on the Doctrine of Imam Al-Shafi'i (Dar Al-Qalam Edition, Damascus 1992) 4; See also Al-Zayla'i, Clarification of the Truths, Explanation of Kanz Al-Duqa'iq and Al-Shalabi's Note. 4 59

trafficking. Thus, it can be said that the authority exercised by the employer over the worker under this system is a prohibited act under the Hanbali doctrine in Islam.¹²³ This legal prohibition is in addition to the principles contained in the Saudi comprehensive legal framework for combating trafficking in persons. Therefore, this practice is not permissible at all, whether with or without compensation, since the provisions of this system are contrary to human dignity in Islam.

5.3 The Need to Abolish the Kafala System

The relationship between the migrant domestic worker and the employer should be within the framework of the labour relationship and thus those provisions of sponsorship that are not related to the working relationship should be abolished. It is clear from the previous sections that the powers granted to the sponsor (the employer) over the sponsored person (the worker) are the cause of the problem. These prerogatives go beyond the working relationship between the two parties. This extends to personal matters related to the migrant domestic worker and matters related to their relationship and dealings with others, in addition to matters relating to the domestic worker's relationship with the state of Saudi Arabia. This relationship should be restored to its normal state, limiting the relationship between employees and employers to the framework of labour law. Therefore, the provisions of the Kafala system and its authority over employees must be abolished.

There are three key relationships that shape the experiences of migrant domestic workers in KSA. The first is the employee-employer relationship. This relationship is related to the worker's carrying out of the agreed work and is solely a labour relationship between the two parties. It is therefore regulated by the labour contract and law. The Saudi Ministry of Labour oversees this relationship. The Ministry puts in place measures and mechanisms to ensure that the worker obtains his/her rights in accordance with the provisions of the contract and the law. The Ministry also develops the necessary means to activate the oversight bodies at the Ministry and expedite the bringing to a solution of labour cases between the two parties through qualified bodies in international and Sharia law. The worker may object to such decision before the High Labour Courts.

Second is the relationship of the migrant domestic worker with the state. The worker needs the services of some public institutions in the country (e.g. to obtain a travel visa or driver's license, or for the issuing or renewal of residence). They must also respect state regulations. The worker should enjoy security protection over themselves and their money. This worker-state relationship is not a matter for the employer, and the state must set the necessary controls to maintain this independence. This relationship should be clearly incorporated through the enactment of new residency and immigrations laws in Saudi Arabia. Any new residency law must cancel any requirement for the employer's approval of matters relating to the worker's personal life or relationship with others.

Third is the worker's relationship with other individuals or entities in the KSA that the worker may need to deal with. These relationships do not affect the employer and therefore, the employer should not be involved. The worker has an independent status with others, as is the case with any citizen.

¹²³ Asma Azhari, 'The Kafala 'Sponsorship' System in Saudi Arabia; A critical analysis of International human rights and Islamic Law' (2017) 10 The SOSA Journal of postgraduate Research 61.

The solution suggested by the researcher, in this case, is to abolish the Kafala system between the migrant domestic worker and sponsor. The relationship of the domestic worker with the employer must be restricted to the framework of work, as governed by contract and labour law. Thus, the relationship between them becomes that of an employer and an employee, not a sponsor and a sponsored person. As a consequence, the domestic worker's sponsorship should be considered void. A new residency law must be issued regulating the relationship of the migrant worker with the state. In addition, any regulation of sponsorship provisions should be removed from the bodies supervising the affairs of migrant workers, such as labour agencies and the General Directorate of Passports.

5.6 Conclusion

Islamic law is in principle powerful in preventing, punishing and suppressing human trafficking, especially when children and women are the victims.¹²⁴ Yet, the Saudi application of provisions of the Kafala system and the KSA's constitution, which is based on the Qur'an and Sunnah, has generated considerable controversy in dealing effectively with the human trafficking problem and in effect does not comply with the teachings of Islam and IHRL.

As human trafficking is a problem that affects the Muslim world in general, including the KSA, an Islamic approach that complements and supports the international legal framework to address this problem could be a valuable asset. The Saudi provisions of the Kafala system concerning migrant domestic workers are condemned not only by international laws but also by the Qur'an and Islamic principles; therefore, it should be abolished. It is suggested that Islamic Sharia should be interpreted through the process of *ijtihad* in accordance with the Hanbali school of thought which is adopted by the Saudi state in an effort to establish protection for victims of the crime of human trafficking by reforming the Saudi law particularly the Kafala system. Also, Muslim religious scholars should issue the necessary fatwas to strongly condemn the causes of human trafficking such as the Kafala system and the harmful and illegal acts that lead to it.¹²⁵ The main conclusion reached is that although the Kingdom has enacted domestic anti-trafficking legislation and implemented measures, it has also enacted provisions that have a negative impact on the fight against human trafficking such as the Kafala system. The Kafala system is not fully compliant with relevant international standards or with Islamic Sharia. Therefore, the approach of the Saudi legislative system regarding the Kafala system and human trafficking needs to be re-evaluated to take into consideration both the true spirit of Islamic law and international human rights standards.

The state's launching of the CRII on 11th November 2020 to review the issue of the Saudi sponsorship of the migrant worker represented a major step towards improving the humanitarian conditions of migrant workers. The subsequent launch of the LRII (see Secion 4.2) brought important reforms such as abolishing the requirement of obtaining approval from the sponsor when changing a job or traveling outside the country permanently or temporarily. Unfortunately, for unknown reasons, this initiative excluded five professions, including the migrant domestic worker. This is despite the fact that the most vulnerable groups to human rights

¹²⁴ Mohammed Mattar, (no 5)

¹²⁵ In Arabic, *فتاوى* a fatwas is a legal ruling given by a qualified jurist on a point of Islamic law (sharia) in response to a question posed by a private individual, judge, or government.

violations and exploitation are domestic workers. It is suggested that the State should abolish the Kafala system and re-evaluate Saudi laws on human trafficking in accordance with both the provisions of Islamic and international human rights law in order to establish a coherent and satisfactory framework when dealing with migrant workers.

Main Recommendations:

The Kafala system and human trafficking are a blatant assault on human rights, human dignity, and the entirety of the human species. As such, governments must take action by ratifying international treaties and enacting domestic legislation that prohibits human trafficking. A number of concerning shortcomings have been identified in the Saudi government's overall anti-trafficking policies. The adoption of certain recommendations including passing particular pieces of legislation in the fight against the crime of trafficking in persons, as discussed in this article, has the potential to correct these shortcomings. Based on the above conclusions, the following recommendations are proposed according to their priorities

1. The 1990 International Convention on the Protection of the rights of All Migrant Workers and Members of their Families, the ILO Domestic Workers Convention of 2011, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights should all be ratified to strengthen the protection of migrant workers from becoming victims of the crime of human trafficking. In addition, attention must be given to the Global Compact for Safe, Orderly and Regular Migration in 2019. Accession would enhance the position of the KSA in combating the crime of trafficking in persons.¹²⁶
2. The article also highlights the need to conclude bilateral and multilateral agreements between countries that would allow direct contact between the authorities for the investigation of instances of human trafficking without the obligation of following a long reporting line.
3. The Kafala system should be completely abolished, and Saudi laws pertaining to human trafficking should be re-evaluated while taking into account both the Islamic Sharia's concept of human dignity and IHRM, in order to establish a cogent, complementary and satisfactory legal framework.
4. Subjects related to human rights and dignity in line with Islamic Sharia and international law should be introduced at all academic levels.
5. It is recommended that an interpretative or executive regulation be prepared to provide a proper interpretation of the various articles of the Saudi system.
6. It is recognised that it is not easy to change the cultural perspective within the KSA. However, in order to eliminate the crime of trafficking in persons, it is important to eliminate all aspects of negative culture and traditions, including the provisions of the Kafala system and the exploitation of migrant workers.
7. It is necessary to educate people to distinguish between what currently passes as socially acceptable and what Islamic Sharia forbids. For example, the confinement of domestic workers in the house must be forbidden and they must be enabled to leave when desired. In particular, citizens must be made aware of hostile practices against migrant workers, the most important of which are the confiscation of identity

¹²⁶ Jane McAdam. "Global Compact for Safe, Orderly and Regular Migration" (2019). *International Legal Materials*, 58(1), 160-194. doi:10.1017/ilm.2019.6

documents and the employment of the worker by force or threats, all of which should constitute criminal acts punishable by law. In this context, it is preferable to adhere to the text of the Holy Quran and the Prophet's Sunnah, which prohibit exploitative practices and require good treatment of immigrants. Moreover, KSA should allow and facilitate the establishment of NGOs in Saudi Arabia, similar to the practice of other advanced countries.

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