

The System of Kafala and the Rights of Migrant Workers in GCC Countries – With Specific Reference to Saudi Arabia

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Abstract

Under the Kafala system, which applies in all Arab countries, migrant workers must attain a work entry visa and residential permit, which is possible only if they are working for a domestic institution or corporation or a citizen of the respective country. Each and every employer is required, based on the Kafala system, to adopt all legal and economic responsibilities for all of the employer's workers during their contractual period. By giving wide-ranging powers and responsibilities unilaterally to employers, the Kafala system subjects workers to abysmal and exploitative working conditions, violence, and human rights abuses. Some of these problems have recently made headlines in the United States and in Europe in connection with the campus being built by New York University in Abu Dhabi. While NYU imposed a code of labor standards on its direct contractual partners, it claimed to have no means of controlling subcontractors. Nor did NYU try very hard, it seems, to verify compliance even by its direct contractual partners.

Migrant workers make up at least 30 percent of the population of Saudi Arabia and 49 percent of Saudi Arabia's entire workforce. Employers control Saudi Arabia's Kafala system, in which migrant workers are the weakest link. Studies and international organizations report that foreigners employed in Saudi Arabia have returned home with many complaints. In 2006, Saudi Arabia re-examined all laws including its labor law. This re-examination resulted in abolishing some terms used in labor law, such as the kafala system, but the system remains as is. The new labor law includes many positive changes, but not enough according to the assessment of local and international scholars and observers. In this paper, I will reveal laws, practices and patterns that essentially cause the vulnerability of migrant workers, and I will suggest effective alternative strategies. This paper should contribute to our growing understanding of issues of concern for migrant workers in Saudi Arabia and other Arab countries and help to develop specific and necessary legal and institutional responses.

Keywords: migrant workers rights, GCC, Saudi, Kafala system, labor.

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A. The Background of Migration Movements in the Arab Countries

Between 1950 and 2005, the population in the six states that constitute the Gulf Cooperation Council (GCC) grew from a total of around four million to over forty million. This includes the influx of over 12.5 million foreigners.¹

The MENA region and the Gulf countries have played host to one of the largest refugee populations in the world since the mid-1950s. According to some estimates, there were 900,000 refugees in the region in 1950, 1.3 million in the 1960s, 1.6 million in the 1970s and as many as 2 million in the 1980s. Since 1947, the Palestinian refugee population has steadily grown to about 4.5 million refugees.² These numbers do not include the Sudanese Internally Displaced or the international refugees, who alone exceed six million refugees. There has been an addition of approximately 1.5 million Iraqi refugees in Syria and Jordan since 2006,³ and most recently more than 2 million people have been displaced by the war in Syria.⁴

The region has also been harbouring refugees from the Horn of Africa, in particular from countries like Eritrea, Sudan and Somalia. There have been Eritreans in Sudan, Yemen and Saudi Arabia after the war of independence from Ethiopia in 1960. There have also been Somali populations in Ethiopia and in Yemen since the 1980s, with a rapid increase in their numbers since 1991. Palestinians, Eritrean, Somalia and Sudanese refugees from the first to the third generation are included in foreign labour statistics, especially in GCC states.⁵

Emphasis has been laid on the complexity of the underlying patterns of migration in the Middle East. Different migration systems are centred in sub-regional zones like the Afro-Arab, the Mashrek and the Arabian Peninsula zones. These regions have different emigration and immigration drivers such as economics, population growth, international relations and security.⁶

Economic factors, oil wealth in particular, and conflict are the two major factors that dominate the region's mobility. The oil economy in GCC states has been labour-intensive since the 1970s and has caused huge levels of economic migration owing to the demand for temporary or contract labour. The Arab-Israeli conflicts of 1947, 1967 and 1973, the first Gulf War (the Iran-Iraq conflict of 1980-1988) and the subsequent Gulf wars of 1991 and 2003 have substantially

- 1 A. Kapiszewski, Arab Versus Asian Migrant Workers in the GCC Countries, United Nations Expert Group Meeting on International Migration and Development in the Arab Region, Population Division, Department of Economic and Social Affairs, United Nations Secretariat, Beirut, 15-17 May 2006, available at <www.un.org/esa/population/meetings/EGM_Ittmig_Arab/P02_Kapiszewski.pdf>.
- 2 See the Data of The United Nations Relief and Works Agency (UNRWA), <www.unrwa.org/palestine-refugees>.
- 3 UNHCR Country Operations Profile 2014, <www.unhcr.org/pages/49e486566.html>.
- 4 <www.humancaresyria.org/news/item/syria-the-crisis-in-numbers?gclid=ClaRt5CSxb0CFeZDMgodlxEAww>.
- 5 The Cooperation Council for the Arab states of the Gulf (GCC) includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.
- 6 R. Appleyard, *Emigration Dynamics in Developing Countries, Volume IV: The Arab Region*, Ashgate Publishers, Aldershot, 1999.

increased the refugee populations. Generally, conflict is presented as the most significant determinant of population movements in the Middle East. There has not been any exploration of structural and political determinants of labour-force mobility.⁷

Oil production in the Arabian Peninsula, which was, and to some extent remains, sparsely populated, led to an increase in labour demand and an urgent need for foreign workers in Bahrain, Kuwait, Qatar, Saudi Arabia and the United Arab Emirates (UAE) after the end of World War II. The demand for labour was met mainly by regional inflows from other highly populated neighbouring Arab countries such as Yemen, Egypt and, to a lesser extent, Jordan, Syria and Iraq. This also led to displacement of populations in Palestinian refugees after 1947. Public and private companies from oil producing states resorted to recruiting employees over a wide spectrum, from construction workers to blue and white collar workers.⁸

Privately or semi-privately owned Western oil companies such as ARAMCO and BP shifted the price-setting power for crude oil to the Arab states of the Peninsula. This move led to a massive increase in oil prices. The increase was further enhanced by the regional political context. During tafra, which was a period of high oil income from 1973 to 1987, development took place, accompanied by massive inflows of Arab immigrants.⁹

The steady increase in demand for oil and the oil embargo of 1973-1974 generated huge incomes for oil producing countries and opened paths for economic development. Oil revenues tripled within a decade, from about 200 billion dollars during 1971-1975 to close to 600 billion dollars per year during 1976-1980. These revenues financed socio-economic development projects in sectors such as agriculture, education, industry, infrastructure and service delivery. Most oil producing countries relied heavily on foreign labour to achieve this level of economic development. In the 1970s, the foreign labour force increased by up to 72% in the GCC countries. Migration studies during the oil boom are based on data surveys, population-oriented reports and International Labor Organization (ILO) economic articles.¹⁰

It is evident that economic and demographic factors of migration do not exhaustively account for the counter-intuitive variations witnessed in the volume of migration during the economic recessions of the late 1980s. According to analysts, the collapse of oil revenues caused neither a large-scale re-export of foreign labour nor a drastic fall in regional migration trends. There was political pressure on migration policies that caused a lack of correlation between economic factors

7 H. Thiollet, 'Migration as Diplomacy: Labor Migrants, Refugees, and Arab Regional Politics in the Oil-Rich Countries', *International Labor and Working-Class History*, Vol. 79, No. 1, 2011, pp. 103-121.

8 J.B. Ernst, *Migrants in the Gulf: A Critical Assessment of the Social, Cultural, and Economic Implications of Migrant Workers in the Countries of the Gulf Cooperation Council*, University of Arizona, Tucson, 2011, p. 12.

9 Thiollet, 2011, at 3.

10 The Middle East Institute, *Viewpoints, Migration and the Gulf*, The Middle East Institute, Washington, DC, 2010, p. 9.

and migration. Nevertheless, recession saw a change in migratory levels. Migration patterns extended further eastwards, leading to a similar increase in immigration from Southeast Asia.¹¹

This change in the composition of the migrant labour force was progressive. There had been Asian workers in the Gulf since the 1940s, specifically in former British-controlled states. The first flow of Commonwealth workers from Pakistan and India to the region was triggered by trade and the activity of the British East India Company in the Indian Ocean area, with a focus on the service and administrative sectors. The process was accelerated by the 1820 Treaty that put Gulf Trucial states or Sheikdoms under British rule for economic and strategic matters.¹²

The British then imported large volumes of Indian workers in the mid-1930s to secure total control of the oil sector in the Gulf region. There were about two million foreign workers in the oil producing states in 1975, 68% of whom were Arab and the rest mainly from Asia. The number of foreign workers increased in 1983 to five million, 55% of whom were Arab. The Arab workers' population proportion kept declining throughout the 1980s and the 1990s. This was because the non-Arab populations maintained higher growth rates in absolute numbers in the GCC countries. The change varied between countries.¹³

There was a relative decrease in the Arab share of the overall workforce in Saudi Arabia between 1975 and 1985 from 90% to 30%. Between 1986 and 1989, 44.3% of the three million Egyptian expatriates in Libya and other oil producing countries returned home. This is famously referred to as the 'third and fourth migration phases.' The Asian migration trends became more complex in the 1980s. South Korea, Taiwan, Malaysia, Indonesia, Pakistan and Thailand emerged as significant source countries.¹⁴

Arab immigrants began to be considered as a source of political activism and potential threats to oil producing states and the GCC countries as early as the 1960s. Arabs in the diaspora were considered to be a transnational network through which issues could travel and political actions could be organised. According to online economic articles, the risk of 'foreign agitation' was repeatedly put forward by the GCC states in times of crisis. The labour unrest of the 1950s in the Eastern province of Saudi Arabia supports the idea. There were more substantial threats to national identity as it was viewed by the GCC states.¹⁵

Oil-rich countries started closing access to 'ethnic' Arab migrants in the 1960s and the beginning of the 1970s as naturalisation was becoming virtually impossible by the mid-1970s. There emerged more strict nationality and citizenship laws based on lineage. Such laws barred non-nationals from getting access to

11 G. Feiler, 'Migration and Recession: Arab Labor Mobility in the Middle East 1982-1989', *Population and Development Review*, Vol. 17, 1991, p. 134.

12 K. Ahmadi, *Islands and International Politics in the Persian Gulf: Abu Musa and the Tunbs in Strategic Perspective*, Durham Modern Middle East and Islamic World Series, University of Durham, Durham, 2008, p. 67.

13 Thiollet, 2011, at 6.

14 Thiollet, 2011, at 6.

15 K.C. Ulrichsen, 'Internal and External Security in the Arab Gulf States', *Middle East Policy Council*, Vol. XVI, No. 2, 2009, pp. 39, 58.

socio-economic and political rights. Asian immigrants without pretence to Arab or Gulf citizenship and with lower wage expectations became the preferred group of workers, for both male and female jobs, in the 1980s. This was, at least in part, a consequence of the 'anti-integration' policies that were aimed at controlling the nation's boundaries and excluding non-nationals from both the welfare system and the polity. Asian workers were not expecting to gain access to indigenous resources and active participation in political activities. They were disenfranchised and would act as 'passive' observers of political activities rather than potential political activists or human rights activists and with regard to other economic or social services and citizenship benefits.¹⁶

The mode of selection of foreign workers demonstrated a regional political block strategy, beyond the economic rationale and the response to immediate market incentives and interests. Oil producing states have justified their labour import policy on the basis of cost effectiveness, and not only demand. Dynamics of labour migration require an intensive and a thoroughly elaborate analysis of its policies and motivations that help determine the structure, nature and volume of migrant labour flows, along with the results of other push-pull factors and local and/or temporal labour shortages. Politics, and not economic rationale alone, has greatly shaped labour circulation trends in the Middle East or Arab region.¹⁷

Migration crises have occurred at different times. Nazli Choucri did a study of the 1980s phases of Asian migration. The study calls for a direct interpretation of public policies of both receiving and sending countries.¹⁸

The case of Thailand is a good example at the binational level. From 1973, the flow of workers from Thailand to the GCC increased significantly every year, growing from just a handful to 105,016 between 1973 and 1982. The largest share of Thai workers went to Saudi Arabia. This trend continued until the Saudi Arabian national government banned Thai immigration after a diplomatic row in 1990. Saudi Arabia refused renewal of approximately 250,000 Thai workers' visas and work permits in June 1990 after a heist and the killing of three Saudi diplomats and a famous businessman in Bangkok.¹⁹ This move signalled the exclusion of Thailand from a blooming migration network in Southeast Asia.²⁰

Another example of how migration politics played an important role in the Arab nations is the Gulf War of 1991. When Saddam Hussein invaded Kuwait, the Palestinian Liberation Organization (PLO) and the national governments of Yemen and Jordan did not support the use of force against Iraq. The PLO had enjoyed the support of both Kuwait and Iraq before, and its leader Yasser Arafat, together with several other Arab leaders, now sided with Iraq. Since the GCC countries had already become concerned about Iraq's growing power, they were

16 N. Choucri, 'Asians in the Arab World: Labor Migration and Public Policy', *Middle Eastern Studies*, Vol. 22, 1986, p. 253.

17 M. McCombs & S. Valenzuela, 'The Agenda Setting Theory', *Journal of Information*, Vol. 20, 2007, pp. 44-50.

18 Thiollet, 2011, at 13.

19 See <<http://content.time.com/time/world/article/0,8599,1969920,00.html>>.

20 Thiollet, 2011, at 7.

eager supporters of a Western-led liberation of Kuwait. Subsequently, the Palestinians in the Gulf had to pay the price for Arafat's miscalculation.²¹

Information by the Central Statistical Bureau in Sana'a states that the 1991 'migration crisis' saw 800,000 Egyptians expelled from Iraq, Jordan and Kuwait and a further 731,800 Yemeni refugees from Saudi Arabia. Close to a million refugees returned from other GCC countries as 350,000 Palestinians returned from Kuwait and another 100,000 from Saudi Arabia.²²

In conclusion, an estimated two million workers of Arab origin and their descendants were forced to leave the Gulf. The Middle East experienced massive repercussions on the political economy of labour migration as a result of this movement. Most importantly, the movement accelerated the replacement of Arabs by Asian and Southeast Asian workers. This clearly signifies the political nature of labour imports. It is also evident that political stability is very essential in a region's development. From the data displayed in this article, wars and conflicts in the Middle East are the major causes of human migration activities.

B. The Kafala System and Its Application

Today, some 50% of the total population of GCC countries are classified as migrants.²³ This explains why legislators in the GCC countries have been busy drawing up and garnering support for a system that is quite openly intended to prevent the interest and influence of the migrants in the entire region from overriding the interests of the nationals in each of the six states of Gulf. Statistically, all migrants combined make up at least 25% of the entire population in every state and account for 35%-70% of the workforce.²⁴ In Kuwait, Qatar and the UAE, foreigners are in the majority, the UAE being the most extreme with foreigners constituting about 80% of the total population. Oman and Saudi Arabia have the lowest proportion of foreigners, 20% and 27% respectively. Overall, about two thirds of the entire workforce of the GCC states comprises foreign or migrant employees.²⁵

Following the initial movement of labour migration to the Gulf in the 1970s, the six governments started imposing restrictions on the rights of migrants with a view to protecting the interests of their citizens. A decade later, all the states of the GCC had embraced and implemented laws to govern the issue, focused on a system of Kafala (sponsorship). Although there are some differences in terms of the structure of the Kafala system from one state to the other, the establishment and the practice of the system is the same. In essence, the Governments restrict

21 S.S. Russell, 'International Migration and Political Turmoil in the Middle East', *Population and Development Review*, Vol. 18, 1992, p. 719.

22 N. Van Hear, 'The Impact of the Involuntary Mass "Return" to Jordan in the Wake of the Gulf Crisis', *International Migration Review*, Vol. 29, 1995, p. 352.

23 World Bank, *Migration and Remittances Factbook 2011*, 2011, pp. 67, 155, 198, 209, 216, 250, <<http://siteresources.worldbank.org/INTLAC/Resources/Factbook2011-Ebook.pdf>>.

24 N.A. Colton, 'The International Political Economy of Gulf Migration', in *Viewpoints, Migration and the Gulf*, The Middle East Institute, Washington, DC, 2010, p. 34.

25 Kapiszewski, 2006.

access for foreign workers but grant exceptions for citizens who wish to employ foreign workers in exchange for those citizens accepting the responsibility for the foreigners, in particular their good conduct, their adherence to the immigration laws, and their departure after the work assignment comes to an end. The citizen/employer has to accept a kind of guarantee or suretyship²⁶ towards the Government for the foreign worker. If the foreign worker should leave his employer without leaving the country, at least in theory, the Government could hold the citizen/employer accountable. This explains why employers often take custody of the passports and other documents of migrant workers, essentially to make sure that they will not be able to leave and get the employer into trouble with the immigration authorities.

According to the Kafala system, all migrant workers have to attain a work entry visa and residence permit. They will only be able to get these permits if they are working for an institution or a citizen of the GCC. Each and every employer in the GCC is required, by the Kafala system, to handle all legal and economic responsibilities for their workers during the entire contractual period. In practice, this is done via a signed agreement between the migrant and the worker or through an institutional declaration by the Ministry of Social Affairs and Labor. Once the agreement is signed, the migrant's employer (kafeel) effectively becomes the legal manager of the migrant for the agreed contractual time frame. On the basis of the agreement, the kafeel also has the responsibility of notifying the immigration department about any alteration that may arise in the contract. Additionally, the kafeel always has to take full responsibility for deportation of the employee if the contract is prematurely terminated. Although the kafeel also has various obligations towards the employee, starting with payment of the salary, the Government is not likely to enforce these stipulations unless a suit is brought against the kafeel.²⁷

The power of the kafeel over the employee is further enhanced because under the Kafala system, a migrant worker who has acquired a GCC work permit and a residential permit under a contract with a certain kafeel is prohibited from seeking to work for another kafeel in the same state. This restriction ensures that all migrant workers are always dependent on their employers to keep their work and residence permits, which in turn keeps all foreign workers under control.²⁸

It is clear that working in any Gulf state as a migrant employee is a gamble. While most of the migrant workers are treated well, there have been cases of abuse, in particular in the domestic environment, but also in various industrial positions. Domestic workers are even more at risk than industrial or commercial

26 The German law notion of 'Bürgschaft' probably comes closest to the construct used in the Gulf countries. The employer has a secondary liability in case the employee violates the terms of the visa and work permit. This must not be confused with the system of Kafala applied for orphans and discussed by Malingreau starting below on p. 401. See <<http://dare.uva.nl/document/493244>>.

27 A.N. Longva, 'Keeping Migrant Workers in Check: The Kafala System in the Gulf', *Middle East Report, No. 211, Trafficking and Transiting: New Perspectives on Labor Migration*, Summer 1999, pp. 20-22.

28 A. Rahman, 2010, at 16.

staff because they are usually working alone. If they were to complain about the working conditions or any abusive conduct by their employers, their word would stand against the word of the kafeel. In addition, there is no public supervision of employment practices, and no auditing or similar authorities to oversee domestic employment. Consequently, most kafeels are not really accountable to anyone for their actions towards their employees.²⁹

Furthermore, many of the migrants, especially those working as domestic workers, find it difficult to make the acquaintance of other migrant workers that are in a similar situation or at least to stay in regular and close contact. This makes them unable to express their concerns to anyone, especially when they feel that they are not treated fairly by their employers.

The introduction of the Kafala system in various Gulf states was initially intended to lower the level of reliance on foreign workers. It was also a convenient way for various Governments that had insufficient administrative capacity for the handling of foreigners and their migration in and out of the states to transfer various responsibilities to the kafeel of the migrants. Thus, the Kafala system brought about a shift of liability and control from the state to the employer of the migrant workers.³⁰

Provided they assume this responsibility, any GCC citizens and corporations are authorised to outsource any work and to look for any kind of foreign personnel that they need to successfully execute various operations in their companies and homes. In the end, the shift of power and control from the Governments of the Gulf states to the sponsors/employers did nothing to lower the level of reliance on foreign workers; instead it introduced a system where the respective power in an employment relationship is very unevenly distributed and most kafeels can essentially treat their domestic and commercial employees either inhospitably or satisfactorily as they wish.

One of the requirements of the Kafala system is that both the sponsor and the migrant worker should always agree on the compensation and working terms in a written contract. This contract should then be forwarded to the governmental department responsible for migrant workers. Although this is largely done, various studies show that some employers make alterations on the contracts after the migrant employees have started working for them. This is often a violation of the contractual agreement because the new terms are not negotiated but unilaterally imposed and may not even conform to legislative and regulatory requirements.

In spite of the obvious problems created by the uneven distribution of power under the Kafala system, even critics of the system do not like the idea of scrapping and eradicating it altogether. Attiya Ahmad, one of the renowned scholars of migration issues in the Gulf region based at George Washington University, argues that most migrant employees in Gulf States are not without alternatives. She claims that all migrant employees have the right to file for criminal charges if they feel abused either sexually or physically by their kafeels. Furthermore, if they

29 Ernst, 2011, at 18.

30 R. Owen, *Migrant Workers in the Gulf*, Report No. 68, Minority Rights Group, London, 1985, p. 8.

believe that there is a violation of their contractual agreement with their employers, they also have the right to file for a civil legal case related to contract disputes. Thus, the migrant workers should be able to protect their limited rights by calling on the authorities of their host states.³¹

Other commentators, however, argue that most of the migrant employees, while technically entitled to present charges against their employers for violation of the contractual agreement or other forms of abuse, encounter practical barriers that will hinder them from obtaining justice. These include language barriers, problems of providing evidence in court, and the propensity of various courts of GCC countries to side with their own legal citizens. Theoretically, it is also possible for migrant employees to seek help from their home country embassies in their host states. Again, practical problems make this harder than it sounds. First, most migrant employees are required to perform their duties all day every day, throughout the opening hours of the embassies, and this makes it hard for them to seek an appointment at the embassies. Avoiding duties in order to visit an embassy would be jeopardising the ability of the embassy to assist a certain employee. Although the Philippines have a 24-hour hotline that overseas employees can use in Saudi Arabia, this service is not advertised much and not widely known.³² Moreover, migrant employees may not have a phone and may be afraid to use a phone line of the employer to make risky calls.³³ Other migrant workers may find themselves in countries that lack their home embassies, or if they are available they could be hundreds or thousands of miles away in the capital. Finally, even if an embassy gets involved, it is not at all clear that it will side with its citizen against his or her kafeel because the opportunities for the country's migrant workers to find jobs in the Gulf and the remittances sent home by hundreds of thousands of such workers every month may be more important for the country than the protection of an individual citizen at the risk of burdening the relations with the host country. All of this makes it hard for the migrants to depend on their embassies to assist them with various problems they might be facing with their contracts and/or employers. In the end, the system of Kafala, as implemented today in the Gulf, offers little or no inducements for the kafeel to treat their workers with care and respect. Kafeels that choose to exploit this lack of oversight almost have a licence to commit various human rights abuses and violations of contractual promises made to their workers.³⁴

31 A. Ahmad, 'Migrant Domestic Workers in Kuwait: The Role of State Institutions', in *Viewpoints, Migration and the Gulf*, The Middle East Institute, Washington, DC, 2010, p. 27.

32 D.M. Forman, 'Protecting Philippine Overseas Contract Workers', *Comparative Labor Law Journal*, Vol. 16, 1994, pp. 26, 56.

33 Ernst, 2011, at 26.

34 Human Rights Watch, *Walls at Every Turn, Abuse of Migrant Domestic Workers Through Kuwait's Sponsorship System*, Human Rights Watch, New York, 2010, p. 8.

C. Inadequate Laws and Lack of Implementation and Oversight – Or Why the Kafala System Survives in Spite of Criticism

Migrant employees are always at risk of exploitation by their kafeels, sponsors and other governmental agencies. This is because they are not sufficiently protected by laws, regulations and functioning government authorities nationally or internationally. There are a number of reasons why their protection is limited or does not exist at all.

First, considerable monetary benefits are harvested by states conventionally referred to as the 'labour exporting states' when their citizens leave their country of origin to work abroad and send allowances home. These financial benefits have been acknowledged and become part of government policies of the countries exporting labour. Consequently, they have shown much less or no interest at all in providing protection or even a modicum of oversight for their employees once they are in the country of their employment.³⁵ Some of the key beneficiaries of these activities include states such as Pakistan, Sri Lanka, India, Indonesia, Philippines and Bangladesh.³⁶ Migration to the GCC states has contributed significantly to their growth, especially in terms of political, social and economic growth and development. It has been observed that several of these countries have actively taken initiatives to maximise the outflow of migrant workers in an effort to maximise remittances while also relieving impending and actual issues of unemployment. India, for instance, receives roughly \$21 billion through transfer of funds annually. Most of these remittances come from thirteen countries from the Middle East. As a consequence, the Indian state of Kerala has been able to reduce the level of poverty by 12% through remittance income associated with migration.³⁷

In 2003, the total remittance value from various migrant workforces around the world was estimated at about \$100 billion.³⁸ According to World Bank estimates, this number has grown beyond \$500 billion by now.³⁹ Understandably, the labour exporting countries have no incentive and simply cannot afford to jeopardise their participation in the labour migration trade.

The Gulf states, as one of the most important destination regions, do not really have an interest in changing the system either. They acquire the badly needed workforce at a very low cost and usually do not have to offer social services, such as child and elder care. Provisions for the migrant workers can be extremely poor, in spite of the extremely rich environment they are in. There have been sev-

35 G.S. Manseau, *Contractual Solutions for Migrant Labourers: The Case of Domestic Workers in the Middle East*, The University of Nottingham, Nottingham, 2006, p. 35.

36 A. Kapiszewski, 'Nationals and Expatriates: Population and Labour Dilemmas of the Gulf Cooperation Council States', *British Journal of Middle Eastern Studies*, Vol. 29, No. 2 2002, pp. 201-203.

37 R. Skeldon, 'Linkages Between Migration and Poverty: The Millennium Development Goals and Population Mobility', in *International Migration and the Millennium Development Goals*, United Nations Population Fund, New York, 2005, p. 55.

38 A. Waldman, 'Sri Lankan Maids Pay Dearly for Perilous Jobs Overseas', *New York Times*, 8 May 2005, <www.nytimes.com/2005/05/08/international/asia/08maids.html?pagewanted=all&_r=0>.

39 <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTDECPROSPECTS/0,,contentMDK:22759429~pagePK:64165401~piPK:64165026~theSitePK:476883,00.html>>.

eral cases of migrant workers going hungry, with the worst cases usually reported among the women and girls. The reason why women and girls are affected even more than men is their vulnerability and isolation in the homes of their employers. This is worsened by the fact that they often have little or no formal education and, while working in the Gulf, will not be allowed to pursue the education they would need to ultimately improve their lives. Thus, they have virtually no voice politically and are often denied even basic human rights. Many of the migrant workers, especially those on temporal contracts, are not even covered by the host state's labour laws. This is one factor that has led to an increase in strikes and other forms of labour threats organised in several of the GCC countries. Of course, even if there are protective labour laws in a state, there is often little or no enforcement at all. Saudi Arabia, for instance, has several laws put in place to regulate the practice of withholding passports of the migrants, but illegal practices remain widespread, showing the limits of the adoption, implementation and/or enforcement of these laws.⁴⁰

As is well known, it is a common practice in many workplaces for the employers (kafeels) to impound the passports of their workers. They do this to prevent their migrant workers from returning to their home countries before the end of their contracts if they are unhappy with the working conditions, and from running away to look for another employer (kafeel) that might offer better employment benefits and conditions. In extreme cases, the practice of impounding the passports and other documents can pave the way for modern slavery, where the employee effectively becomes part of the property of the employer, at least for the duration of the contract, and may be treated no better than a piece of chattel. According to some scholars, one justification provided for employers to exert this tight control over their migrant workers is because of widespread stereotypes about the over-sexualisation of women,⁴¹ essentially suggesting that a female employee needs to be particularly tightly controlled and might otherwise run away and engage in illegal prostitution. However, if there is over-sexualisation of women, the risk of sexual exploitation by an employer would seem much more prevalent, and yet the system offers no protection at all against this problem.

Third, many of the international labour laws are ineffective. This exacerbates the situation of many migrant workers in the GCC States, as they have largely been left to fend for themselves. To begin with, many of the receiving nations around the world and indeed all six GCC countries have failed to ratify the Migrant Workforce Convention of the United Nations.⁴² This convention would mandate far-reaching protection against discrimination (Article 7), as well as a string of basic human rights (Articles 8-33), including the right to leave and go back home (Article 8), as well as a provision that safeguards against the confisca-

40 R. Jureidini, 'Management and Regulation of Human Resource in the Arab World', in *Arab Migration in a Globalized World*, International Organization for Migration, Geneva, 2004, p. 14.

41 Manseau, 2005, at 45.

42 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Was Signed in New York on 18 December 1990 and entered into force on 1 July 2003 (see UNTS Vol. 2220, p. 3; Doc. A/RES/45/158). In the Middle East, only Egypt and Libya have ratified the Convention, both of which are labour exporting countries.

tion of passports and residence documents (Article 21). In addition, Articles 36-56 provide "Other Rights of Migrant Workers and Members of Their Families Who Are Documented or in a Regular Situation," such as the right to return home temporarily for family and similar matters (Article 38), as well as access to educational institutions, social and health services on a par with the nationals of the host state (Article 43).

The GCC countries did ratify the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁴³ Although the provisions of CERD do not stop countries from differentiating between citizens and non-citizens, the Convention makes it clear that such possible differentiation must not be applied in such a manner that it becomes discriminatory. It is not clear what this may mean in practice and how it might be enforced. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴⁴ mandates signatory states to protect women from discrimination. This obligation appears explicitly in Article 2, where it makes it mandatory for women to be effectively protected against discrimination and to channel such cases through the courts of law and other institutions. In other words, the application of the standards set by CEDAW can be used as a litmus test for countries with a high percentage of female migrant workers as well as countries where abuses of female domestic workers seem common to determine whether progress is being made towards ensuring that women are effectively protected from such abuses and discrimination.⁴⁵

Besides the UN Conventions, there are numerous ILO Conventions that would be of interest to migrant workers in the Gulf, to the extent they have been ratified and implemented domestically by the GCC countries. These include ILO Convention 105 on the Abolition of Forced Labour,⁴⁶ ILO Convention 111 Concerning Discrimination in Respect of Employment and Occupation,⁴⁷ ILO Convention 66, revised by ILO Convention 97 Concerning Migration for Employment,⁴⁸ and ILO Convention 143 Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers,⁴⁹ as well as the very recent ILO Convention 189 Concerning Decent Work for Domestic Workers.⁵⁰ Because of more than patchy ratifications by the GCC coun-

43 See <www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

44 See <www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

45 Manseau, 2005, at 41.

46 Available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO> and ratified by all six GCC countries.

47 Available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312256:NO> and ratified by all GCC countries except Oman.

48 Available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312242:NO>; not ratified by any GCC country.

49 Available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312288:NO> and not ratified by any GCC country.

50 Available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:2551460:NO>. This Convention entered into force as recently as 5 September 2013 and has so far been ratified by only thirteen countries, not including any of the GCC countries.

tries, there is limited impact of the ILO for the benefit of migrant workers in the Gulf.⁵¹

However, there are a number of international rules and regulations that could be invoked. The Universal Declaration of Human Rights, while not binding as such,⁵² provides some guidelines that also apply to foreign employees.⁵³ At least Bahrain and Kuwait – although not the other four GCC countries – have ratified the International Covenant on Civil and Political Rights (ICCPR)⁵⁴ and are bound, for example, by its Articles 2 and 26 prohibiting discrimination and demanding effective remedies in cases of human rights violations, such as Article 3 on equality of men and women, Article 8 prohibiting servitude and slavery, Article 12 on the right to leave a country, Article 18 on the freedom of thought and religion, Articles 21 and 22 on the freedom of association and assembly, and Article 23 on the right to found a family. Bahrain and Kuwait – and again not the other four GCC countries – have also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) with Article 3 on equality of men and women, Article 7 on the right to just and favorable conditions of work, Article 8 on the freedom to form or join trade unions, Article 9 on the right to social security, Article 11 on the right to an adequate standard of living, and Article 13 on the right to education. However, even for those GCC members that did ratify the Covenants, there is no real threat of enforcement. As is well known, individuals whose rights may have been violated do not have standing to bring a case against a sovereign state before the International Court of Justice and, since neither Bahrain nor Kuwait have ratified the Optional Protocols to the ICCPR and the ICESCR, individuals cannot bring complaints to the UN Human Rights Committee either. This leaves the reporting system under Part IV of the ICCPR (Article 40) and Part IV of the ICESCR (Articles 16 *et seq.*). Bahrain ratified the ICCPR in 2006 and should have submitted its first cycle report by 20 December 2007. The report has not been submitted, however. As for the ICESCR ratified in 2007, Bahrain has not been given a deadline for the first cycle report as yet.⁵⁵ Kuwait, by contrast, which ratified the ICCPR and the ICESCR already in 1996, has gone

51 C. Vittin-Balima, 'Migrant Workers: The ILO Standards', in *Migrant Workers Labour Education*, 2002/4, No. 129, p. 6, < www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111462.pdf >.

52 The Universal Declaration was adopted by the UN General Assembly and, contrary to the two Covenants, is not a treaty that has been ratified by the member states. Nevertheless, because the Universal Declaration is almost automatically being referred to whenever there is a discussion of international human rights, Steiner and Alston, without being more specific or providing sources, mention "arguments [...] for viewing all or part of the Declaration as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter"; see H.J. Steiner & P. Alston, *International Human Rights in Context*, Oxford University Press, Oxford, 2000, at p. 143. While such arguments have certainly been presented, they do not represent the dominant view among academics, let alone a consensus among states.

53 See <www.un.org/en/documents/udhr/>, in particular Arts. 2, 4, 7, 8, 13, 16, 18, 19, 20, 21, as well as 23 and 24.

54 United Nations Treaty Series Vol. 999, p. 171. For the status of ratifications, see <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en>.

55 See <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx>.

through several cycles of reporting already and has been rather frank about problems with the practical implementation of the Covenants.⁵⁶

This chart shows the status of ratification of the principal international human rights treaties for GCC states⁵⁷:

	ICCPR	CERD	ICESCR	CEDAW
Saudi Arabia	X	√ R	X	√ R
UAE	X	√	X	√ R
Qatar	X	√	X	X
Oman	X	√	X	√ R
Kuwait	√ R	√	√ R	√ R
Bahrain	X	√	X	√ R

√ = Ratified the treaty.

X = Not bound by the treaty.

R = With reservation, in case the treaty conflicts with Islamic Law.⁵⁸

Although the GCC countries have not ratified many treaties that are central to human rights issues or in some cases have ratified them only with reservations, these countries may still be held responsible for breaches of customary international law in the form of human rights violations that happened within their jurisdictions. It has been argued that some of the more egregious violations may amount to slavery and slavery-related practices such as debt bondage and, consequently, may be prohibited under customary international law.⁵⁹ The practical value of such a prohibition for the migrant workers and their rights towards employers and authorities in the host countries, however, is probably non-existent.

Some scholars have suggested that migrant workers in the Gulf countries could try to bring cases against multinational corporations or even against individual citizens of the GCC before US Federal Courts on the basis of the so-called Alien Tort Claims Act.⁶⁰ However, the recent decision by the United States Supreme Court in *Kiobel v. Royal Dutch Petroleum*⁶¹ has all but eliminated this option.

56 *Ibid.*

57 For analysis see, e.g., M.L. Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers', *Yale Human Rights & Development Law*, Vol. 8, 2005, p. 12.

58 It is important in this respect to remember that the interpretation of Shari'ah varies from one country to another and is generally rather on the orthodox or traditionalist side in the region.

59 A.Y. Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law', *Virginia Journal of International Law*, Vol. 39, 1999, p. 303 at 349.

60 28 U.S.C. § 1350.

61 *Kiobel v. Royal Dutch Petroleum Co.* No. 10-1491, Opinion of the Court, slip op. at 3 (U.S. Apr. 17, 2013). The Supreme Court affirmed and expanded this view even more recently in *Daimler AG v. Bauman*, No. 11-965 (U.S. Jan. 14, 2014).

Next, there is the option of the home countries of the migrant workers to rely on the General Agreement on Tariffs and Services (GATS) to offer protection to their citizens, especially those working abroad on a temporal basis. This might open a door to the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) in Geneva. However, the general provisions of the GATS – outside of specific commitments – only provide for Most Favored Nation (MFN) treatment of services and service providers (Article II). This could be useful, for example, if a WTO member⁶² treats service suppliers from Western countries better than services or suppliers from countries such as Pakistan or Indonesia. National Treatment, *i.e.* equal treatment of foreign services and suppliers with domestic services and suppliers (Article XVII), is required only in sectors where the members have made specific commitments. Even if an obligation under the GATS is being breached, there is the question of whether a labour exporting country will put the interest of individual migrant workers before the interests of the state and its economy that heavily depends on the remittances from the workers in the Gulf.⁶³

What remains to be seen is whether the relatively new Arab Charter on Human Rights will make a difference. As is well known, this Charter was first drawn up in 1994 but did not receive any ratifications. After an update in 2004, it was ratified by Bahrain, Kuwait, Qatar, Saudi Arabia, the UAE, as well as eight other Arab countries, and entered into force in 2008. Among other rights, it includes a prohibition of discrimination “on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability” (Article 3), a prohibition of torture and cruel or inhuman treatment (Article 8), a prohibition of slavery or servitude as well as human trafficking (Article 10), the protection of privacy, family, home and correspondence (Article 21); the right to freedom of movement (Article 26) and the right to leave the country (Article 27), the right to freedom of thought, conscience, and religion (Article 30), the right to marry and found a family (Article 33), and the right to ‘just and favourable conditions of work’ (Article 34). The member states have undertaken the obligation to submit regular reports to the ‘Arab Human Rights Committee’ pursuant to Article 48. The reports, and the observations and recommendations by the Committee, will be public. The procedure, while still in its infancy, is comparable to the one applied under the ICCPR and the ICESCR, and may produce some real incentives for the member states to address human rights violations, including those against migrant workers.⁶⁴

In conclusion, the current predicament for migrant workers in Saudi Arabia and other countries in the Gulf is the lack of essential safeguards regarding their employment status in labour legislation both locally and internationally. Until appropriate rules and mechanisms are put in place to assure people travelling to the GCC states of their human rights, a good place to begin will be to remember

62 All six GCC countries are members of the WTO and have ratified the GATS, *see* <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

63 O. Sands, ‘Temporary Movement of Labor Fuels GATS Debate’, MPI (Migration Policy Institute), at <www.migrationpolicy.org/article/temporary-movement-labor-fuels-gats-debate>.

64 For further discussion see the contribution by Mattar in this issue.

the cultural traditions that govern the Kafala system, such as the rule that a safe and peaceful place must be offered to a refugee.

D. Are There Other Solutions to the Problems Inherent in the Kafala System as Currently Applied?

While legal obligations of the host countries are patchy and legal remedies are largely ineffective, it does not mean that they cannot be improved. The ILO, UN and other human right groups such as KAFA and Migrant Forum Asia should urge all GCC states to approve, implement, and apply the core conventions of the ILO among other conventions that ensure migrant workers are protected and given their human rights wherever they might be working.

In many ways, however, it seems likely that improvements will happen only if and when the economics underlying the Kafala system change. At the present time, all Gulf countries lack free labour markets. This means that there is intense competition between different individuals and groups in the general workforce, especially for high-paying jobs and jobs with decent working conditions. However, because of widespread poverty and lack of economic opportunity in the home countries of the less educated migrant workers, there is also a surplus of job seekers for the poorly paid positions in the Gulf, including those where working conditions are known to be poor. This has traditionally kept wages down. The situation is exacerbated, as already mentioned, by the lack of enforcement of even basic labour laws and the difficulties, at least for foreigners, of enforcing even unambiguous contractual rights. Consequently, it remains common that employees in Gulf states report issues of being paid less than what was initially agreed upon. They also complain of not getting free room and board upon assuming their domestic responsibilities as well as various other provisions they had been promised at the beginning of the contractual period.⁶⁵ Recruitment agencies have also played a shady role in this. Quite many instances have been reported where recruitment agencies made flowery promises to potential workers to lure them into employment relations while being fully aware that some of the promised benefits and rights would never materialise. Sometimes, agents have been offered better commissions and other incentives in order to play down various conditions that are undesirable at a given place of work. Typically, migrants first interact with a recruitment agent in their home country when they are promised employment and a one-way ticket to the Gulf by their recruiting agency. This motivates them to save and borrow the needed money to pay for the agency fee. The fee usually varies from a few hundred dollars to more than one thousand dollars.⁶⁶ So it looks as if the agency is actually working on behalf of the migrants and should be representing their interests. Yet the agencies, which may be the only contact a migrant has besides the employer to voice grievances, are known to protect the employers rather than the employees in case of trouble. Last but not least, if

65 Longva, 1999, at 21 and Ahmad, 2010, at 27. As well as Owen, 1985, at 5.

66 Ernst, 2011, at 25.

migrant workers had to borrow the money for the agency fee, they will also be reluctant to terminate the employment early, even though the initial promises were not kept or the situation is outright abusive.

To the extent the recruitment agencies are based in, or at least have branches in, the home countries of the migrant workers, there would be an opportunity to regulate their conduct better and to potentially hold them accountable for misrepresenting the rights and obligations of the migrants in the destination countries. However, again the economics of the labour trade, in particular the high level of dependency of the home countries on remittances, work against effective remedies in this regard.

It is clear that the Kafala system has been of great help in terms of both long- and short-term economic benefits to corporations and private citizens of GCC states. This includes in particular the employers in domestic and private service sectors. These benefits have also reached various customers of private and public services as the low cost of labour has been passed on. However, the system has also brought about some long-term problems related to the economy of various states in the region, and here may lie a major agent for future change. One major issue is the increase in the level of domestic unemployment, especially for less well-educated GCC nationals, who can no longer secure a job in the private sector in the face of competition from low-cost migrant workers.⁶⁷ Clerical and other mid-level positions in the public sector, while usually reserved for citizens, are often not particularly attractive for them. Better educated citizens, on the other hand, compete with even better educated professionals from the West for top-level management positions. This leaves a very limited job market for the citizens of the GCC countries and increasingly creates problems, in particular in Saudi Arabia, the country with the largest domestic population.

In response, GCC countries have been tightening the rules for migrant workers. Some countries have introduced quota systems, usually justified with the need to maintain and protect their national security and identity,⁶⁸ rather than an express admission that their own citizens are otherwise not competitive in the labour market. Most of these countries have set some policies that aim at restricting immigration, and those migrant workers that get admitted are strictly on temporal permits, with fewer or even no chances of acquiring permanent residence in the GCC countries. Other policies focus on making the renewal of residence permits as difficult as possible in order to force some of the migrants to return to their home countries before they can claim a right to a permanent resident status.⁶⁹ Thus, stiffer competition on account of tighter economic conditions and growing domestic populations is again affecting migrant workers negatively. What remains to be seen is whether the GCC countries will eventually

67 N.M. Shah, *Restrictive Labour Immigration Policies in the Oil-Rich Gulf: Implications for Sending Asian Countries*, Department of Economic and Social Affairs, United Nations Secretariat, Mexico City, 2005, p. 14.

68 Nasra, 2005, at 10.

69 M. Ruhs, *Migrant Rights, Immigration Policy and Human Development*, HDRP-2009-23, Human Development Research Paper, Human Development Reports, United Nations Development Programme, 2009, p. 22.

recognise that they can recover some of the competitiveness of their domestic workforce by mandating higher salaries and better social protection for the migrant workers. It may be counter-intuitive, but giving migrants better protection for their human rights will actually lead to lowering their numbers.⁷⁰

E. The Kafala System from the Perspective of Islamic Law

According to Article 1 of the Saudi Kingdom's Basic Law of Governance (1992),⁷¹ the Qur'an and the Sunna of Prophet Mohammed (PBUH)⁷² has a status above the Constitution: The Holy Qur'an, and the Sunna of the Prophet Mohammed are considered to be the actual words of Almighty God. Saudi Arabia considers Islamic law or Shari'ah the law of the land. The normative substance of Shari'ah is obtained by reading and interpreting the Holy Quran and from the pronouncements and habits of Prophet Muhammad. It provides the basic rules, directly or indirectly, for the conduct and activities of Muslims and, in some special cases, of non-Muslims who come to this part of the world.

As others have elaborated in this volume, Shari'ah is neither beyond the easy access of laypeople, nor is it a clear set of instructions. Jurists and legal scholars need to study the Qur'an, the Sunna and the relevant previous works of Islamic scholars to understand the precepts, origins and applications of Shari'ah and how it should be applied today. Shari'ah scholars implement certain approaches and methods (*usul al-fiqh*) to authenticate the traditions of the Prophet. Usually Sunnis follow one of the four legal schools in their study of jurisprudence (*fiqh*), named after their founding scholars, *i.e.* Shafi'i, Hanafi, Hanbali or Maliki. Although there are other schools, most Shia follow the Ja'fari or Zaidi schools of legal thought.⁷³

Saudi Arabia's leadership provided shelter and then contributed to the reformist concepts of the eighteenth-century nomadic scholar and preacher Muhammad Abd al-Wahhab. His practical approach is adjacent to that of the Hanbali School of Jurisprudence, where Hanbali jurists like to employ their own unique legal reasoning (*ijtihad*) to both the Qur'an and the Sunna to come up with suitable interpretations governing each case under consideration.⁷⁴

Since Saudi judges and official arbiters of public ethics follow the Hanbali school of thought in the particular interpretation given to it by al-Wahab, the

70 M.E. Dito, *GCC Labour Migration Governance*, Paper prepared for the United Nations Expert Group Meeting on International Migration and Development in Asia and the Pacific, Population Division, Department of Economic and Social Affairs, Bangkok, 2008, p. 8.

71 Basic Law of Governance, *Umm al-Qura* Gazette No. 3397, 5 March 1992.

72 Abbreviation for saying peace be upon him.

73 M.G.S. Hodgson, *The Venture of Islam: History and Conscience in a World Civilization*, Vol. 1, Chicago University Press, Chicago, 1974, p. 319, <[www.krizma-ebooks.com/books/Hodgson%20-%20The%20Venture%20of%20Islam,%20Vol.%201%3B%20the%20Classical%20Age%20of%20Islam%20\(1974\).pdf](http://www.krizma-ebooks.com/books/Hodgson%20-%20The%20Venture%20of%20Islam,%20Vol.%201%3B%20the%20Classical%20Age%20of%20Islam%20(1974).pdf)>.

74 Human Rights Watch, 'Precarious Justice: Arbitrary Detention and Unfair Trials in the Deficient Criminal Justice System of Saudi Arabia', Vol. 20, No. 3(E), 2008, p. 13, <www.hrw.org/sites/default/files/reports/saudijustice0308webwcover.pdf>.

Saudi understanding of Sharia has come to be known as Wahabism. The partition of individual areas of impact between both the absolute rulers of the House of Sa'ud and the spiritual foundation has endured through successive centuries and periods of weakness of the Saudi state. The spiritual foundation of Saudi Arabia has a wide-ranging influence over normal daily life. For example, its scholars and officials both write and vet textbooks utilised in schools.⁷⁵

The duty of interpreting and applying Sharia falls mainly on the judiciary, comprising several bodies like the Council of Senior Scholars, the courts and judges, the Supreme Judicial Council, a mufti, and the Ministry of Justice. Article 48 of the Basic Law specifies that according to the Holy Qur'an and the Sunna, the courts shall apply the rules of the Islamic Sharia in cases brought before them. Literally, Article 48 says:

The courts shall apply to cases before them the provisions of Islamic Sharia, as indicated by the Qur'an and the Sunnah, and whatever laws not in conflict with the Qur'an and the Sunnah which the authorities may promulgate.⁷⁶

However, Sharia is silent on many issues that in today's life need the implication of specific legal standards. To fill this gap, Saudi Arabia's prime minister (a post presently held by the King) may issue statutory laws called rules to distinguish them from the God-gifted laws of Sharia as long as they never deviate from the prescriptions of Sharia. Under Article 48, mentioned earlier, the courts have to apply Sharia rules according to laws that are dictated by the ruler in accordance with the Holy Qur'an and the Sunna. Hundreds of such statutory laws have been published in Saudi Arabia to provide rules in areas where Sharia models or explanations have little bearing, for example laws on traffic or banking.⁷⁷

Another area where the worldly authorities have provided rules is the Kafala system for migrant workers. However, the crucial question here is whether the Kafala system conforms to the requirements of the Islamic Sharia, which is always the ultimate source of law and authority in Saudi Arabia. To answer this question, we have to look at the basic principles of Islamic law and its overall spirit and intent. Under Islamic law, the state has the responsibility to make sure that the right of everyone is secured in the private and the public sectors of the labour market, to enjoy fair and favorable conditions of work.⁷⁸ The state may provide regulations and create institutions through which the rights of workers are ensured. The right to decent working conditions, while not mentioned literally in Islamic law, is documented in numerous provisions of the Sharia:

75 M. alRasheed, *A History of Saudi Arabia*, Cambridge University Press, Cambridge, 2002, p. 15, <<http://catdir.loc.gov/catdir/samples/cam033/2001043609.pdf>>.

76 Basic Law of Governance, Royal Order No. (A/91), 1 March 1992, Published in *Umm al-Qura Gazette* No. 3397, 5 March 1992, < [www.sagia.gov.sa/ Documents/ Laws/ Basic%20Law%20of %20Governance_En.pdf](http://www.sagia.gov.sa/Documents/Laws/Basic%20Law%20of%20Governance_En.pdf)>.

77 Human Rights Watch, 2008, p. 14.

78 Labor and Workmen Law [1969], Royal Decree No. M/21 dated 6 Ramadan 1389 (15 November 1969), Decision of the Council of Ministers No. 745, dated November 1969, <www.saudiembassy.net/about/country-information/laws/Labor_and_Workmen_Law-1of4.aspx>.

On several issues like equity, non-exploitation, humane treatment of peers and underlings etc., the regulations of Sharia provide the basis in Islamic law for both revenues of labour and hours of work, together with instructions on the general relations between the workers and the employers. For example, the Qur'an provides for fairness in trade, fair and reasonable levels of income for workers, as well as similar, if not equal, wages for work of equal value. There are many Prophetic Traditions that specifically encourage equity and the fairness of wages of workers. In one such tradition, the Prophet is documented to have instructed that a worker needs to be informed about his wages at the time when he is appointed. In another example, employers are instructed that their workers should be paid their salaries before the sweat they worked up in their work can dry on their skin. Other relevant passages in Sharia include the following:

- [83.1] Woe to the diminishers,
- [83.2] who, when people measure for them, take full measure,
- [83.3] but when they measure or weigh for others, they reduce!
- [83.4] Do they not think that they will be resurrected
- [83.5] for a great Day,
- [83.6] the Day when people will stand before the Lord of the Worlds?
- [83.7] No indeed, the Book of the immoral is in Sijjeen.
- [83.8] What could let you know what the Sijjeen is!
- [83.9] (It is) a marked Book.
- [83.10] Woe on that Day to those who belied it,
- [83.11] who belied the Day of Recompense!
- [83.12] None belies it except every guilty sinner.
- [83.13] When Our verses are recited to him, he says: 'Fictitious tales of the ancients!'
- [83.14] No indeed! Their own deeds have cast a veil over their hearts.
- [83.15] No indeed, on that Day they shall be veiled from their Lord.
- [83.16] Then they shall roast in Hell,
- [83.17] and it will be said to them: "This is that which you belied!"

and

[7.85] And to Midian, their brother Shu'aib. He said: "Worship Allah, my nation, for you have no God except He. A clear sign has come to you from your Lord. Give just weight, and full measure; and do not diminish the goods of people. Do not corrupt the land after it has been set right, that is best for you, if you are believers".

[7. 86] "Do not sit in every road, threatening and barring from the path of Allah those who believed it, nor seek to make it crooked. Remember how He multiplied you when you were few in number. Consider the end of the corrupters".

In Sahih Bukhari,⁷⁹ narrated by Abu Huraira, the Prophet said,

Allah says, 'I will be against three persons on the Day of Resurrection: 1. One who makes a covenant in My Name, but he proves treacherous. 2. One who sells a free person (as a slave) and eats the price, 3. And one who employs a labourer and gets the full work done by him but does not pay him his wages.'

It is more than clear from these provisions that under Sharia, the employer and the worker both have the responsibility of meeting their contracts entirely and dutifully. According to Islamic law, work is given higher value if it is done in partnership between employer and employee rather than in a relationship of superiority and subordination. In sum, Islamic law could hardly be more explicit and clear about the importance of meeting all promises made in the employment contract and always treating the employees with decency and dignity. How can this be squared with the rules and practices of the Kafala system? How can employers change the promises they have made unilaterally after a migrant worker has come to them? How can they treat their staff badly yet force them to stay because they require their sponsor's consent to seek alternative service or leave the country, hence have no choice and no freedom, making the employment contracts only binding in one direction?

No less than the Kingdom's highest Muslim religious authority, the Grand Mufti Sheikh Abdul Aziz Al Sheikh, has already admitted that the migrant workers often undergo 'exploitation and domination'. His notes included the observation that Islam does not allow domination of workers, irrespective of religion. As we require them to perform their responsibilities under the employment contract, we must adhere to our responsibilities and obey the terms of the agreement. The Grand Mufti evaluated the concerns of migrant workers brought before him and commented that it was not legal and a different form of dishonesty to withhold or delay their payment of wages under risk of exile. He stated that Islam proscribes blackmailing and intimidating [foreign] labourers with expatriation if they no longer wish to continue work for employers who are in breach of the contract, for example by unilaterally changing the rights and compensation of their staff.⁸⁰

In Saudi Arabia, according to the basic rule of Article 26, the state must protect human rights in accordance with Islamic Sharia. According to Article 37, the state must ensure the safety of all its inhabitants, including all migrants living within its dominions. No one is to be arrested, imprisoned or have restricted freedoms except under the provisions of the law.⁸¹

In 1994, the Saudi government provided the following information to the ILO:

79 Sahih Bukhari, Vol. 3, Book 34, No. 430.

80 Citing 'Saudi Cleric Preaches Workers' Rights', *BBC News World Edition*, 3 September 2002, and 'Saudi Mufti Warns Employers Against Breach of Contract', *Agence France Presse*, 2 September 2002.

81 Basic Law of Governance, Royal Order No. (A/91), 1 March 1992, Published in *Umm al-Qura Gazette* No. 3397, 5 March 1992.

The Sharia is the main constitution of the Kingdom whose doctrines suggest the foundation of justice and of fairness between all the individuals irrespective of gender, nationality or religion. The Sharia, the Constitution of the Kingdom – is considered as the supreme law as it serves the role of a divine source and its principles are articulated in the verses of the Koran and the hadiths (maxims of the Prophet), which demonstrates the modalities of application of the value of equality in the private sector are completely in accordance with the provisions of this Contract.⁸²

Thus, the Government of Saudi Arabia promised to the international community that it will honour its international commitments because they are anyway required by Sharia. Consequently, under Sharia law as well as international law, the state is now required to actively protect the rights of workers from violation caused by their employers. The state has to adopt the necessary rules and regulations requiring the observation and implementation of contracts made between workers and employers, and it has to provide effective remedies for breaches of contractual obligations. One important step could be the adoption of typical or model employment contracts that follow the present standards of human rights in international law, enacted under the provisions of Sharia.⁸³ In the end, it does not matter whether the GCC countries ratify the conventions of the UN or ILO or not. They are anyway bound by the law of God, and the Sharia is rather clear with regard to the rights of employees, migrant or otherwise. It is high time this was acknowledged and implemented in the Gulf.

F. Remedies

Finding an alternative to the current kafala system has become urgent. Most relevant studies⁸⁴ have concluded that many violations of migrant worker' rights occur because of the imbalance of power between migrant workers and their employers as the result of the current kafala system. At the same time, many of the relevant international organizations that call for the preservation of human rights, especially the rights of migrant workers, have called for the end of the kafala system and to replace it with another system that ensures the preservation of migrant worker rights.⁸⁵

However, the problem here from the perspective of government officials in Saudi Arabia is finding an alternative system to the current kafala system. The kafala system has been the effective hand of the government in controlling the flow of large numbers of migrant workers indirectly. This saves a lot of time and

82 ILO Convention No. 100, Equal Remuneration. ILCCR, Examination of individual case concerning Convention No. 100, 1994.

83 M.A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2003, at 183-185.

84 A. Rahman, 2010, at 16.

85 Manseau, 2005, at 29.

money for the responsible government bodies, as they deal with a limited number of employers, who act on behalf of migrant workers in government transactions.

The other reason why the Saudi government is reluctant to replace the kafala system is its concern about national security. The kafala system keeps the migrant workers as temporary residents, which does not cost the state treasury much welfare related expenses and permits the government to monitor the authority granted to employers.

Therefore, a study of an alternative to replace the kafala system is needed to craft a system that will effectively protect the interests of all parties and that will be consistent with international labor law and with the provisions of Islamic Sharia law.

Reform should include three levels at the same time to be a real value. The first should be at the international level; the second should be at the organizational level of the Ministry of Labour; and the third should be on the judicial level:

First, Saudi Arabia should join the international conventions relating to the defense of workers' rights and cooperate with international organizations, such as the ILO and human rights organizations.

Second, Saudi Arabia should provide recruitment agencies for migrant workers instead of the individual kafala system to limit the violation of migrant worker' rights and, at the same time, keep the interests of the employers.

Third, Saudi Arabia should replace the labor disputes offices, which belong to the Ministry of Labour with labor courts belonging to the Ministry of Justice to limit the violation of migrant worker' rights.

On the other hand, the countries exporting workers must work with all possible means of force to maintain the rights of their citizens abroad in several ways, including:

- 1 Entering into bilateral agreements with the Government of the Kingdom of Saudi Arabia and, when those agreements are breached, filing lawsuits before the International Court of Justice or other appropriate courts or tribunals.
- 2 Activating the role of their embassies and consulates to provide legal committees, which can defend the rights of their citizens.
- 3 Educating migrant workers and informing them of their rights prior to arriving in Saudi Arabia.
- 4 Using UN draft articles on diplomatic protection to plead in front of international courts for the rights of their citizens.
- 5 Saudi Arabia is a party to some treaties, conventions and organizations, which include the presence of a minimum of basic human rights, such as the WTO and CEDAW, CERD, that may support cases brought in front of international courts.

G. Conclusion

These days, the rights of migrant workers need a great deal of research from varied fields, including social, economic, and legal studies, to enable countries to preserve basic human rights regardless of gender, nationality and religion. As governments are trying hard to develop their economic and financial power, they must work hard to develop their own laws in order to preserve basic human rights.

The relationship between migrant workers and their employers must be very clearly governed by strict laws that protect the rights of all parties. Accordingly, it is necessary that legislators search for the best ways and means to help migrant workers on one side and employers and the government on the other. This paper sees the need for an alternative system to replace the current kafala system and for the creation of special labor courts that belong to the Ministry of Justice instead of the current settlement offices of labor disputes that belong to the Ministry of Labor. In addition, Saudi Arabia should join the ILO conventions, which will help preserve the rights of all parties.