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THE *KAFĀLA* 'SPONSORSHIP' SYSTEM IN SAUDI ARABIA: A CRITICAL ANALYSIS FROM THE PERSPECTIVE OF INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW

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ABSTRACT

This article will explore the complex relationship between Islamic law, international human rights laws, and the Saudi adaptation of its sponsorship system regarding migrant workers, known as *kafāla* in Arabic. It will argue that Islamic law is compatible with international human rights law with specific reference to migrant workers' protection, and that Saudi Arabia with its continuous application of the *kafāla* opposes its own basic law. By analysing the above issues, it is hoped that by the end of this paper, the reader will achieve a clear understanding of the dangerous implications of the *kafāla* in perspective to Sharīa and international law. The topic of *kafāla* is rarely touched in the Saudi scholarly sphere; thus, it is hoped that this article will provoke more research on the subject. The article aims to establish a distinction between the *kafāla* deficiencies and Islamic law and to suggest that they are inconsistent with each other; therefore, such defects are caused by the application of the *kafāla* rather than an imperfection in Sharīa. The paper will conclude with some recommendations, namely the immediate reformation and abolishment of the system by replacing it with a new sponsorship system that can protect in practice migrant workers' rights.

INTRODUCTION

And We have certainly honoured the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.¹

With its strategic location in the Arabian Peninsula, Saudi Arabia holds two of the most sacred destinations for Muslims around the world: Makkah and Al-Madinah. It considers itself an Islamic state that follows the *Hanbalī* school of Islamic jurisprudence.² However, statutory laws are issued to address legal questions, which were not described clearly in *Sharīa* and they must not diverge from its directions.³ One of these legal matters that were passed as statutory law is the *kafāla*.

The Saudi government has formed a system that controls the mobility of migrant workers inside the Kingdom. After the abolishment of slavery, a new scheme has been established to monitor these workers' conditions.⁴ Conceptually, the *kafāla* 'sponsorship' does not differ from other immigration policies around the world; however, its regulations make it distinctive.⁵ It has been criticised for its cruelty. This has reflected on the Kingdom's international position. While Saudi Arabia enforces its migration control to monitor its state sovereignty through the *kafāla*, analysts argue that the system is a breach of international human rights.

Nevertheless, there is no substantive research done on the *kafāla* within the context of Islamic law and international law specifically. There are several scholarly works that discuss the *kafāla* as a system and its violations to human rights in different Middle Eastern countries, but none of these works examined its relationship to Islamic law and international law. This subject should be given more attention. Questions of compatibility between international human rights and Islamic law are commonly asked, but comparative legal research on the *kafāla* is lacking.

Saudi Arabia considers itself an Islamic state and its primary constitution sources are the *Qur'ān* –'Islamic Holy Book'– and the *Sunnah* –'Prophet's tradition'; however, it could be suggested that the application of the *kafāla* in Saudi Arabia conflicts with Islamic law. This results in a paradox. This paper aims to tackle this controversy by breaking down the issues surrounding the *kafāla* regulations in Saudi Arabia, and by critically analysing the stances of international law and Islamic law towards the *kafāla* in a comparative legal matter. The paper will argue that the *kafāla* with its on-going regulations and their application in Saudi Arabia conflicts with Islamic law and International law. Furthermore, it will provide

¹ Qur'ān, Surat Al-'Isrā', verse (70).

² Sunni Islam is majorly influenced by the four schools of Islamic thought and Jurisprudence which are Malīkī, Shāfi, Hanafī and Hanbalī.

³ 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*.

⁴ Martin Baldwin-Edwards, "Labor Immigration and Labor Markets in the GCC Countries: National Patterns and Trends", http://eprints.lse.ac.uk/55239/1/Baldwin-Edwards_2011.pdf [accessed 9 September 2015].

⁵ Heather Murray, "Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries" [2012] 45(2) *Cornell International Law Journal* 461.

recommendations, namely the reformation of the sponsorship system to ensure better protection of migrant workers' human rights, which would mean also a correct application of the *Sharīa*.

THE ROLE OF THE *KAFĀLA*: HISTORICAL AND LEGAL BACKGROUND

'*Wa kafalahā Zakariā'*:⁶ this is one of the various instances of *kafāla* indication in *Sharīa* both in the *Qur'ān* and the *Sunnah*. In the *Sunnah*, for example, the Prophet was reported using the word *kafāla* to refer to the good deed of sponsoring and guarantying the welfare of an orphan, which would result in being rewarded by existing side by side with the Prophet (in his company) in heaven.⁷ In the Arabic language, the noun *kafāla* comes from the original word 'k-f-l'; which could have different meanings: to provide for, to be responsible for, or to be the legal guardian.⁸ However, the word *kafāla* itself means guarantee.⁹ This guarantee may refer to numerous aspects of life. It could be in money '*al-kafāla fī al-māl*, or it could be in a person '*al-kafāla fī al-nafs*; therefore, the *kafāla* as a term in Arabic could be employed in different contexts with different meanings.¹⁰ In *fiqh* –Islamic Jurisprudence– *kafāla* is interpreted in the same way; for instance, the four schools of Islamic jurisprudence define *kafāla* as a guarantee, which means that the '*kafil*' and the sponsored will be united by the same burden and pact. Therefore, the *kafāla* in general is a form of contract between two parties, which unites them as one.¹¹ However, as will emerge in this paper, the concept of *kafāla* analysed is considered in a different context.

EMERGENCE

The *kafāla* is a sponsorship system that applies to migrant workers in several Middle Eastern countries. It emerged with the discovery of oil and emerging development in the area. Simply put, the system ties the migrant worker to the *kafil* (sponsor).¹² Between 1950 and 2005, the Gulf Cooperation Council's (GCC) population grew tremendously; it increased from 4 million in the 6 countries that make the GCC to over 40 million, with 12.5 million of them being foreigners.¹³ Since the mid-1950s, the Arab States, and the Gulf countries in particular, have been the destination of many refugees. Consequently, their number

⁶ Surat 'Āli 'Imrān verse (37), *Qur'an*.

⁷ Jamila Baragach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Rowman and Little Field 1964).

⁸ Hans Wehr in Anh Nga Longna, *Walls Built on Sand* (WestviewPress 1997).

⁹ Nicholas Foster, "Islamic Law of Guarantees" [2001] 16(2) *Arab Law Quartely*.

¹⁰ Ibrahim Al-obaidi, *Al-Kafeel: Al-Athar Al-Mutarateba Ala Aqd Al-Kafala AlMalliyya Fe Al-Sharia Al-Islamiya wa Al-Qanun Al-Imarati* (1st edn, Islamic Affairs and Charitable Activities 2014).

¹¹ Ibid.

¹² AnwarAlkhateeb, "Alaraby", http://www.alaraby.co.uk/opinion/2015/7/12/Kafala_system_in_GCC_reformations_and_pressures [accessed 1 September 2015].

¹³ 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", www.un.org/esa/population/meetings/EGM_Ittmig_Arab/P02_Kapiszewski.pdf. [accessed 2 September 2015].

increased from 1.3 million to 2 million in the 1980s.¹⁴ Moreover, population growth, economics, security and international relations are dynamics that affect each region's emigration and immigration policies.¹⁵ The GCC region has the highest labour migration because of the oil-based economy. As a result, the GCC states began initiating strict nationality and citizenship laws to ban immigrants from any political or socio-economic rights and to preserve the national identity.¹⁶ Legislators in the GCC actively drafted a system to assure the interests of the local citizen over the migrant.¹⁷ Thus, the *kafāla* system was born to govern the rights of the citizens and to control the entrance of migrants; a Saudi citizen can request for a foreign worker to come and to work for them, and in return, the *kafīl* must be responsible for the worker as guarantee for the government.¹⁸ The system shifts the legal burden directly to the Saudi nationals; it helps the authorities to monitor migrant workers through their sponsors.¹⁹

THE KAFĀLA SYSTEM IN THE SAUDI LEGAL FRAMEWORK

As Saudi Arabia perceives itself as an Islamic state, its laws are primary based on the Qur'an and the Sunnah.²⁰ However, as any sovereign country, the government has introduced laws that aim to guard it against threats to its political territory. The *kafāla* is one of these laws, although it has been criticised for its cruelty and its inconsistency to international human rights. It may come as a surprise that there is no single legal source that identifies the *kafāla* system in Saudi Arabia. It could be described as a collection of policies premised on Saudi Labour law and Residency regulations.

PROTECTION OF MIGRANT WORKERS UNDER INTERNATIONAL LAW

Firstly, under international law a migrant worker generally refers to overseas workers who may be short- or long-term migrants.²¹ The long-term group are those who typically migrate with their families to live permanently in a new state, in most cases due to socio-economic

¹⁴ Alzahrani, (n.3).

¹⁵ R. Appleyard, *Emigration Dynamics in Developing Countries, Volume IV: The Arab Region* (Ashgate Publishers 1999).

¹⁶ Ibid.

¹⁷ Worldbankorg, "World bank: Migration and Remittances Factbook", <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/MENA.pdf> [accessed 8 August 2015].

¹⁸ Anh Nga Longva, "Keeping Migrant Workers in Check: the Kafala System in the Gulf" [1999] (211) *Middle East Report* 20-22.

¹⁹ Sara Hamza, "Migrant Labor in the Arabian Gulf" (2014), University of Tennessee Honors Thesis Projects, http://trace.tennessee.edu/utk_chanhonoproj/1710.

²⁰ See 'the Basic Law of Governance' of Saudi Arabia on <http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/aboutKingDom/SaudiGovernment/Pages/BasicSystemOfGovernance35297.aspx>.

²¹ Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Clarendon Press 1997).

reasons; the second group are short-term workers who move overseas for a brief employment period with a possibility of their work contract being renewed or extended²². Migrant workers in the GCC are usually identified with the short-term category.²³ Further, these workers are considered 'contract' workers, whose employment arrangements are usually organized between the country of employment and their national state.²⁴

Unfortunately, while this group of workers is commonly considered 'indispensable' by receiving countries, they are also perceived to be 'disposable'.²⁵ Therefore, the international community has emphasised the need to ensure and protect the rights of this group. Following Cholewinski, the structure of the international protection law for migrant workers and their families could be analysed by a three-component model.²⁶ The first component is a United Nations Charter-based system which could be described as three provisions: (1) authorising individuals or organisations to submit complaints to the Human Rights Council in the UN to evaluate and to address any violations occurring around the world;²⁷ (2) authorising special reporter[s] and human rights independent expert(s) to study any human rights obstacles that complicate the life of migrant workers, such as any complexity for non-documented migrant labourers who want to return to their country of origin;²⁸ (3) performing review reports by the UN Human Rights Council on UN Member States reports, which comprise the so-called quadrennial periodic review, a review that ends with recommendations by the Council on how to improve a certain analysed situation.²⁹

The second component consists a number of international human rights and labour conventions.³⁰ There are several treaties that focus on migrant workers' rights, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)³¹ the International Covenant on Civil and Political Rights (ICCPR),³² the Convention on the Elimination of All Forms of Discrimination Against

²² Ibid.

²³ DG Papademetriou and PL Martin, *The Unsettled Relationship: Labor Migration and Economic Development* (New York: Greenwood Press 1991).

²⁴ Ibid.

²⁵ Lori Nessel, "Human Dignity or State Sovereignty? The roadblocks to full realization of the UN Migrant Workers Convention", in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited 2014).

²⁶ Ryszard Cholewinski, "The Human and Labor Rights of Migrants: Visions of Equality in David Weissbrodt and Justin Rhodes, United Nations treaty bodies and Migrant Workers", in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited 2014) 303.

²⁷ UN Human Rights Council, *Resolution 5/1: Institution Building of the United Nations Human Rights Council*, [2007] at para 85.

²⁸ UN Commission on Human Rights, *Resolution 1999/44: Human Rights of Migrants*, [1999], para 3.

²⁹ Cholewinski in Weissbrodt and Rhodes (n.26).

³⁰ Ibid.

³¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2220 UNTS [1990] (entry into force:2003).

³² International Convention on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (entry into force: 1967).

Women (CEDAW),³³ the International Covenant of Economic, Social and Cultural rights (ICESCR),³⁴ the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)³⁵ and the International Labor Organization (ILO).³⁶ The preface of the ILO constitution highlights the importance of governing the rights of migrant workers; therefore, there are many instruments adopted by the ILO, which focus on the rights of workers, such as the elimination of all forms of forced labour³⁷ and the elimination of discrimination.³⁸ Many member states of the ILO have ratified several conventions. Regardless of ratification, however,³⁹ all member states have a commitment, stated in the ILO declaration on fundamental principles and rights,⁴⁰ to endorse and appreciate the foundation of the labour standards set out in the rest of the ILO conventions.

Finally, 'regional instruments' comprise the third component of the international protection law of migrant workers;⁴¹ the European Convention on the Legal Status of Migrant Workers is one such example.⁴²

While there are many ILO and Human Rights treaties that focus on migrant workers' issues, the ICRMW is the only convention that concerns this group of workers explicitly.⁴³ Most of the 45 states that have ratified the convention are migrant-sending states.⁴⁴ It generally combines all the human rights declared in other treaties in one instrument that addresses migrant workers and their families.⁴⁵ Saudi Arabia has not yet ratified this convention, something which will be considered carefully in following sections.

Saudi Arabia is a member state of the ILO and has ratified 16 conventions of it. Moreover, in addition to the ILO conventions, there are several other conventions that it adheres to, which consider the rights of workers, including those who are migrants. However, only by ratifying the ICRMW would protection for migrant workers in Saudi Arabia be fully guaranteed. It may also be noted that the Saudi government has only ratified ICERD and CEDAW.⁴⁶

³³ Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS [1979], (Entry into force: 1981).

³⁴ International Covenant on Economic, Social and Cultural Rights, 993 UNTS [1966], (Entry into Force:1976).

³⁵ International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 [1966], (Entry into force: 1969).

³⁶ David Weissbrodt, "United Nations treaty bodies and Migrant Workers", in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited 2014) 303.

³⁷ Convention concerning Forced or Compulsory Labor (ILO no.29), 39 UNTS 55 [1930], (Entry into force: 1932).

³⁸ Equal Remuneration Convention (ILO No. 100), 165 UNTS 303 [1951], (Entry into Force: 1953).

³⁹ Weissbrodt and Rhodes (n.36).

⁴⁰ ILO Declaration on Fundamental Principles and Rights at Work, 37 ILM 1237, [1998], para 2.

⁴¹ Cholewinski (n.21).

⁴² Weissbrodt and Rhodes (n.36).

⁴³ Nessel (n.25).

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Alzahrani (n.3).

ISLAMIC LAW AND MIGRANT WORKERS' PROTECTION

To evaluate the role of Islamic law in the protection of migrant workers within the context of the application of the *kafāla*, a general understanding of its nature and its compatibility with human rights laws is an imperative.

Human Rights in their entirety have never been a by product of modern life nor an innovation of the West. Islam has the precedence in calling for human rights, their protection, and the conception of the individual, society, and the state as the guardians of human rights in the sense that human rights are essentially religious duties.⁴⁷

Baderin has observed that jurisprudence in Islamic law contains a pluralistic understanding of its major sources. This observation is crucial in a comparative legal analysis sphere, for it allows for variation in juristic opinions and beliefs.⁴⁸ However, the failure to differentiate between the methods and sources of Islamic law creates the erroneous belief that Islamic law is utterly 'divine' and 'unchallengeable'.⁴⁹ For instance, in a Human Rights Watch (HRW) report of Saudi's human rights violations, it is implied that one of the legal issues in the Saudi law is 'the absence of codified *Sharia* laws'.⁵⁰ This suggests some confusion about the nature of Islamic law. In fact, there is a difference between *Sharia* and *fiqh*; the former is the 'divine' and primary source, which is the holy *Qur'an* and *Sunnah*, and the latter is the human understanding and method of analysing the two 'divine' sources of Islam, which makes *Sharia* unchallengeable, but *fiqh* based on human interpretations.⁵¹

Therefore, it could be argued that *Sharia* protects migrant workers' rights and dignity as part of the human rights guaranteed in Islamic law. The positive legal instruments granted by international law regarding civil and political rights are demonstrated in the provisions of the ICCPR.⁵² The latter covers many rights that are directed to all human beings including migrant workers. A comparative legal analysis will be undertaken hereafter, which will demonstrate that the objectives of the ICCPR articles, specifically the ones related to migrant workers' protection, are in effect governed by the *Sharia*.

ICCPR ARTICLES RELATED TO MIGRANT WORKERS' PROTECTION WITH PERSPECTIVE TO ISLAMIC LAW

Article 7 is concerned with 'the prohibition of torture or cruel, inhuman or degrading treatment or punishment'.⁵³ In *Sharia*, a human person has a special dignified position among all species. Furthermore, the *Qur'an* and the Prophets' *Sunnah* as sources of *Sharia* defend

⁴⁷ Ibid.

⁴⁸ Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003).

⁴⁹ Ibid.

⁵⁰ Human Rights Watch, "As if I am not Human: Abuses Against Asian Domestic Workers in Saudi Arabia", https://www.hrw.org/sites/default/files/reports/saudiArabia0708_1.pdf [accessed 1 September 2015].

⁵¹ Baderin (n.48).

⁵² Ibid.

⁵³ ICCPR, Article 7, (n.32).

human safety and security for all living things in many instances, and have banned brutality even against animals.⁵⁴ Bassiouni has observed that the prohibition of harassment and cruelty is mentioned in the Qur'an 99 times.⁵⁵ Moreover, Caliph Omar Ibn AbdulAziz is reported to have said the following:

I wonder at your asking permission from me to torture people as though I am a shelter for you from God's wrath, and as if my satisfaction will save you from God's anger. Upon receiving this letter of mine accept what is given to you or let him give an oath. By God, it is better that they should face God with their offenses than I should have meet God for torturing them.

This was a response the Caliph gave to a request made by his administrators to torture those who refused to pay their taxes; his reply is an example of Islamic teachings that follow the path of Prophet Mohammad. In fact, Islam prohibits all forms of racism and assures the equality of all humans: 'O mankind, we have created you from a male and a female and have made you into nations and tribes for you to know one another...'.⁵⁶ This verse indicates how the Qur'an promotes diversity among people, which is clearly contrary to national arrogance against migrants, which could be instead a result of the *kafāla* regulations.

Moreover, Article 8 postulates freedom from slavery and forced labour.⁵⁷ In the Saudi case, many opponents have described the *kafāla* system as a slave-like structure, which ties the migrant to the national. However, Article 8 bans signatory states from exercising slavery and/or forced labour; this prohibition of slavery is considered to be one of the main foundations of customary international law, although it was practised as a source of income in most of the world, including the Arabian Peninsula.⁵⁸ After the revelation of Islam, slaves were treated as fellow human beings with special rights; the Prophet set free slaves who had been treated in the most cruel ways.⁵⁹ The *Qur'an* mentions in many verses the liberation of slavery as amends for several Islamic wrongdoings,⁶⁰ such as the example that follows:

Allah will not call you to account for what is futile in your oaths, but will call you to account for your deliberate oaths...for expiation, feed ten indigent persons . . . or clothe them; or give a slave his freedom. If that is beyond your means, fast for three days.⁶¹

⁵⁴ Baderin (n.48).

⁵⁵ M.C Bassiouni, "Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System", in Baderin (n.48) 76.

⁵⁶ Qur'an, Surat Al-Ĥujurāt, verse 13.

⁵⁷ ICCPR [Article 8](n.32).

⁵⁸ Baderin (n.48).

⁵⁹ Ibid.

⁶⁰ Baderin (n.48).

⁶¹ Qur'an, Surat Al-Mā'idah, verse 89.

In reference to this *hadith*, Yamani asserts that although Islam did not directly abolish slavery because in the time of the Prophet Mohammad slavery had a worldwide socio-economic importance, it created new notions that paved the way to its abolishment.⁶²

Additionally, regarding forced labour, the *Shari'a* provides special rights for workers concerning their incomes and working hours.⁶³ It includes direct teachings and instructions of the relation between the employers and employees. The *Qur'an* emphasises the importance of fairness in the distribution of wages and in trade, also by aligning income levels to the amount and value of the work performed by the worker.⁶⁴ Moreover, in the *Sunnah* it is reported that the Prophet commanded that the employee must know his earnings before working; he even ordered that employers must pay his worker(s)' salaries before the sweat from their work dries up on their skin.⁶⁵ Abu Huraira narrated that the Prophet stated the following: 'I will be against three persons on the Day of Resurrection: [...] 3. And one who employs a labourer and gets the full work done by him but does not pay him his wages'.⁶⁶ Unlike the *kafala* system, Islamic law illustrates a work relationship based on mutual cooperation between the worker and the employer, and not one that is premised on dominance and submissiveness; the *Qur'an* and the *Sunnah* could not be more precise about the critical necessity of treating employees and workers with humanity and fairness without any injustice or forced labour.⁶⁷

Article 9 of the ICCPR is concerned with the right to liberty and the security of the person.⁶⁸ According to Article 9(1) the due process of law is the only exception in which a person may be denied his/her freedom; on the other hand, article 9 is aimed to direct governments in guaranteeing security and not to divest the people of their liberties. Moreover, Article 9(1) of the Human Rights Charter broadens the prohibition of deprivation of liberty to special cases, such as immigration control.⁶⁹ Islamic law has guaranteed this right: it is a governor's duty to secure his people's liberty and security, and no one can be deprived of his/her liberty without a valid justification.⁷⁰ However, the *kafala* is a disproportionate system, which gives the *kafil* the power to control the liberty of the sponsored worker violating international law on human rights standards and Islamic law.

Article 12 of the ICCPR includes 'The Rights to Freedom of Movement and Choice of Residence'⁷¹ and it is integral to the migrant worker's protection. Without this right being guaranteed, liberty is a hypothetical privilege. Any person who is a lawful resident or citizen of a state shall have the right to move and to choose where to live within the territory;

⁶² AhmedZaki Yamani, "Social Justice in Islam" [2002] 41(1), *Islamic Studies*, <http://www.jstor.org/stable/20837162>. [accessed 17 August 2017]

⁶³ Alzahrani (n.3).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Sahih Bukhari*, Vol. 3, Book 34, No. 430 in Alzahrani (n.3).

⁶⁷ Alzahrani (n.3).

⁶⁸ ICCPR [Article 9](n.32).

⁶⁹ Baderin (n.48).

⁷⁰ *Ibid.*

⁷¹ ICCPR [Article 12](no.32).

paragraph (2) asserts that a person has the right to leave the country.⁷² A migrant worker therefore should be guaranteed this right without restriction to his/her liberty, provided that they are legally in the hosting country. Nonetheless, it is normal for states to be concerned about their security and sovereignty, which could lead them to limit such rights and liberties to immigrants. While it is a state's duty and concern to regulate its political territory, it is also a state's responsibility to protect the migrant workers' rights once they reside in the country lawfully. The *Qur'ān* mentions: 'It is He (God) Who Has made the earth tractable for you (mankind), so traverse through its tracts and enjoy of the sustenance which He (God) furnishes; but unto Him is the Resurrection'.⁷³ According to Pande's study on the *kafāla* system in Lebanon, which is similar to the one enforced in Saudi, passports are usually confiscated by the sponsors, which creates automatic restrictions on the migrant workers' mobility and freedom of movement.⁷⁴ This is due to the misuse of power by the *kafil*. The *kafāla* as a system fails to protect the migrant workers' lawful right to freedom of movement under both Islamic and International law.

ICESCR ARTICLES RELATED TO MIGRANT WORKERS' PROTECTION WITH PERSPECTIVE TO ISLAMIC LAW

This convention refers to the economic, social and cultural rights of the people of the signatory countries. It was ratified by 41 out of 57 member states of the Organization of Islamic Cooperation (OIC) but not Saudi Arabia. This means that the majority of Islamic states of the OIC accepts the terms of the covenant and believes that they are consistent with Islamic law. The right to work, the right to enjoy fair conditions of work, the right to social security and social insurance and the right to an adequate standard of living, are some of the rights governed by ICESCR related to the welfare of immigrant workers.

Article 6⁷⁵ postulates the right to work, making it not only lawful, but endorsing it as the only possible way to make a living.⁷⁶ A state may not be able to secure a job for everyone, but it is its duty to make working chances available; moreover, this right has been mentioned in the UDHR in Article 23(1)⁷⁷. Islam *inter alia* assures the right to work and stresses the importance of this right in the *Sharia* sources:⁷⁹ 'And made the day for livelihood'.⁸⁰ In this *Qur'anic* verse, God declares that He has assigned the day as the time for labour to earn a living. It follows that the same right should be ascertained for migrant workers. The problem with the *kafāla* in the context of this Article is that it controls the sponsored employee's

⁷² Baderin (n.48).

⁷³ *Qur'an*, Surat Al-Mulk, verse 15.

⁷⁴ A Pande, "'The Paper that You Have in Your Hand is My Freedom': Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon" [2013] 47(2) *International Migration Review* 414-441.

⁷⁵ ICESCR (Article 6), (n.34).

⁷⁶ Baderin (n.48).

⁷⁷ *Universal Declaration of Human Rights*, (Article 23), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁷⁸ Baderin (n.48).

⁷⁹ *Ibid*.

⁸⁰ *Qur'an*, Surat An-Naba', verse 11.

movement and the choice of employment by conditioning those on the *kafil's* legal permission.

Article 7 refers to the right to fair and favourable conditions of work.⁸¹ In terms of provisions, it guarantees positive working conditions, including in relation to working hours and resting periods.⁸² Moreover, many ILO conventions cover the provisions of this Article.⁸³ As mentioned earlier, Saudi Arabia is a member state of the ILO and has ratified 16 conventions that include: Convention No.1 on the hours of work (industry), Convention No.14 on weekly rest (industry), Convention No.106 on weekly rest (Commerce and offices). These conventions are consistent with the conditions stipulated by the committee of the ICESCR in Article 7.⁸⁴ *Shari'a* provides for such terms of equity, humanity and fair treatment.⁸⁵

Woe to those who give less in measure and weight. Those who, when they receive from men demand full measure; but when they have to give by measure or weight, give less than due.⁸⁶

As evident in this verse, the *Qur'an* forbids injustice in aspects concerning giving and taking; the word 'woe' emphasises the hideousness of the act of unjust remuneration; this verse serves to sanction the promotion of fair trade and fair compensations to workers according to their assigned job.⁸⁷ Additionally, according to Islamic expectations, the employer has the duty to terminate the contract of a worker in the case that the latter so wishes it. He must do so fairly and justly: 'Deal not unjustly and you shall not be dealt with unjustly'⁸⁸. It is undeniable that Islamic law protects the human rights of migrant workers. Hence, the continuous application of the *kafāla* in its current form, which violates the human rights of this group of workers, is contradictory to Islamic values.

RETHINKING THE KAFĀLA

It emerges from the analysis above that the application of the *kafāla* system cannot be described as just according to International and Islamic Law; it actually creates a dilemma that allows both sponsors and workers to manipulate the law. Such defects place the Kingdom of Saudi Arabia in a critical position internationally. Several local and international human rights organisations have already compiled studies and produced reports on the *kafāla* system and its violations. The Saudi labour committees and bodies are especially

⁸¹ ICESCR (Article 7), (n.34).

⁸² Baderin (n.48).

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Qur'an, Surat Al-Muṭaffifin, verses 1-3.

⁸⁷ Baderin (n.48).

⁸⁸ Qur'an, Surat Al-Baqarah, verse 279 in Baderin (n.48).

aware of the complications that result from the current system; they regularly receive large amounts of cases concerning such issues.⁸⁹

According to the Saudi National Society for Human Rights (NSHR), the long experience of Saudi Arabia with the sponsorship scheme has revealed many deficiencies, which have been described as follows:

1. It causes administrative and regulatory complexities: several governmental sectors and public institutes are preoccupied with regulating the provisions of the *kafāla*, from visas to stamps and agreements. Other sectors' work focuses exclusively on investigating workers' problems, and ensuring that the sponsor maintains his contract and financial obligations toward the sponsored workers.⁹⁰ This slows down the government's progress in its attempt to gratify both parties and to protect their rights, hurting also the government's budget.
2. Failure of the *kafāla* to fulfil its purpose: even though it offers many advantages and places control in the hands of the employer, it has not deterred an increase in illegal activities by some workers. The control it places in the hands of employers has led many sponsors to violate the employees' basic human rights, which led many to try to escape the brutality by becoming illegal residents.⁹¹ However, like Al-Ghanim, many would argue that Labour law and Residence regulations are enough to control the actions of the *kafil to sponsor and to protect the sponsored migrant worker*.⁹² Additionally, some GCC citizens, including Saudis, are concerned about the rising number of migrant workers in the country, and that they might influence the demography, social customs and culture substantially.⁹³ Subsequently, they consider the *kafāla* to be a necessary regulating system for entry-exit procedures and residence.⁹⁴ This is clearly incorrect. The *kafāla* policies have not deterred some sponsors from practising arbitrary judgments and taking arbitrary actions.⁹⁵ Moreover, the core principle of the *kafāla* is to 'guarantee' the sponsored status in the country by the sponsor: the sponsor is responsible for all of its worker's actions and law violations inside Saudi territories; nevertheless, in effect this is not respected most of the time.⁹⁶ If employers were given the option to keep such power and control by taking full responsibility of the employees' acts, they would likely not accept such a burden; the

⁸⁹ Alyaum, "Ending the Kafala: Advantages and Disadvantages", <http://www.alyaum.com/article/3136286> [accessed 9 September 2015].

⁹⁰ National Society for Human Rights, Saudi Arabia, "A Study Regarding the Abolishment of Kafala Regulations and Correction of the Relationship between the Employer and the Migrant Worker", http://nshr.org.sa/wp-content/uploads/2013/10/76_PDF1.pdf [accessed 8 September 2015].

⁹¹ Ibid.

⁹² Kaltham Al-ghanim, "Kafala System Remains Resilient in the GCC" (*Oxgaps.org*, October 2015), https://www.oxgaps.org/files/analysis_al-ghanim.pdf [accessed 16 August 2017].

⁹³ H Malaeb, "The *Kafāla* System and Human Rights: Time for a Decision", [2015] 29(4) Arab Law Quarterly 307-342.

⁹⁴ Ibid.

⁹⁵ NSHR (n.91).

⁹⁶ NSHR (n.91).

government would become the sole accountable of any violations by migrant workers.⁹⁷ This makes the *kafāla* a burden to the sponsor, sponsored, and the government.

3. Hesitation of competent workers to come to work in Saudi: the Kingdom needs expat experts to work in many fields; nonetheless, the temptation of good wages may not be enough to convince them to enter a country where their freedom and passports might be confiscated by their sponsors illegally.⁹⁸
4. The deficiency of the regulations concerning the correction of *kafāla* outcomes: the government has in the last three years passed unsuccessfully new instructions to force the *kafil* to respect the sponsored worker's rights.. While various methods for the alien worker to claim his/her rights and even sue their sponsor have been provided, statistics show that most of the workers do not complain, as they fear the sponsors' power given to them by law; many workers are concerned that the sponsor may report them for falsely accusing the employer of illegal activities, resulting in their deportation.⁹⁹

Moreover, the NSHR argued in a relevant study that the *kafāla* is indeed in violation with the principles of the *sharia*. Islamic law prohibits exploitation and injustice, and the continuous application of the *kafāla* leads to contradictions with Islamic law.¹⁰⁰ In addition, this system of sponsorship violates many international legal treaties.¹⁰¹ It is legally accurate that Saudi Arabia should be only concerned with the international conventions that it signed and ratified, but human rights conventions are a special case. Even if a state is not a signatory country, it does not mean that it should not be concerned with the human rights standards in its territory, considering that it still is a member of the international community.¹⁰²

Likewise, the *kafāla* as a sponsorship system in the Middle East has been the subject of much debate and several studies. One should mention the work of Malaeb, in which she discusses the *kafāla* in the GCC countries from an international legal perspective and calls for immediate reformations. In this paper, the Saudi case specifically was put under the microscope under the rationale that is important to break down the issue of the *kafāla* and to analyse the role of *Sharia* –if any– and its stances with respect to international legal standards regarding migrant workers.

Other *kafāla* related studies are available, such as the one conducted by Pande, which has focused on domestic migrant workers in Lebanon. These migrant workers have faced dreadful conditions in the host country because of a system that is similar to the Saudi one, especially in that it places considerable power on the sponsor. Her work underscores the argument that it is hard to control the actions of the *kafil* (as discussed earlier) when employers are given authority over migrant workers.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² NSHR (n.91).

CONCLUSION

This article attempted to discuss the *kafāla* system from a different perspective rarely taken before. The *kafāla* has been criticised for its provisions and application nationally and internationally. This article analysed how the *kafāla* as a statutory law in Saudi Arabia violates the *Sharīa*. It was argued that this system puts the country in a critical position internationally. The problem is, however, that there has been little research concerning the application of the *kafāla* under Saudi law. Most of the Saudi sources indicate that it violates the terms of Islamic law without giving a specific analysis of the matter and calling for an immediate reformation.¹⁰³ Careful examination is vital for the progress and protection of human rights according to international law and Islamic law. Thus, this study has aimed to distinguish between the application of the *kafāla* and the content of the *Sharīa*. It was found that Islamic law is compatible with international human rights with special reference to migrant workers. This paper has attempted to introduce new perspectives on this subject and to push forward the issue of ratification of conventions to guarantee an ideal application of the law and protection of migrant workers.

Lack of awareness is one of the major causes behind the slow improvements in protection laws concerning the human rights of migrant workers in Saudi Arabia. This combines with constant abuse by sponsors and their ignorance of workers' human rights. As Baderin has observed, most of the population of Islamic states lacks a clear understanding of human rights.¹⁰⁴ This lack of knowledge results in major violations, therefore, human rights education is fundamental to limit such abuses.¹⁰⁵ The government should promote an understanding of the importance of human rights inside the *Sharīa* context. Such comparative studies are crucial for the ordinary population.¹⁰⁶ The government should include in school curricula subjects that teach justice and human rights in Islam with emphasis on the equality of all persons. More research in economic, social, legal and religious fields is needed to focus on the migrant workers' rights and how to promote a fairer system.¹⁰⁷

The *kafāla* system should be abolished and replaced with a new governmental scheme that is only specialised in the affairs of migrant workers. One of the problems with the *kafāla* regulations is that there is no specific body that regulates all immigrants' matters.¹⁰⁸ While there are the Ministry of Labour and the Ministry of Internal Affairs, the *kafāla* laws are scattered everywhere with no specific codified document to be referred to, which creates favourable conditions for the *kafīls* to abuse the rights of migrant workers. A new body regulated by the Ministry of Labour should be established.¹⁰⁹ This new governmental

¹⁰³ Most of the Saudi sources are newspaper and online articles. There has been no Saudi scholarly research in support of the *kafāla*. In fact, there is not enough if any Saudi research on the topic in general; hence, the importance to encourage researchers to conduct more scholarly research in the subject.

¹⁰⁴ Baderin (n.48).

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Alzahrani (n.3).

¹⁰⁸ NSHR (n.91).

¹⁰⁹ Ibid.

institution should: (a) be responsible for all groups of migrant workers whether domestic or private employees; (b) organise the migrant workers' market in accordance with the Saudi market; (c) create plans and programmes that align the Kingdom's interests to alien workers' needs and circumstances; (d) collect and publish annual statistics; (e) organise processes between the Kingdom and migrant sending countries; (f) ensure the protection of the human rights and the welfare of the workers.¹¹⁰

Finally, international ratification is vital. Saudi Arabia should join the rest of the conventions of the ILO related to workers' rights and protection.¹¹¹ It should also ratify the ICRMW and proceed with its ratification to the ICCPR and ICESCR. As already explained, the terms of these conventions do not diverge from the context of the *Sharia*; therefore, they should not be perceived as a challenge to Saudi Arabia's participation.

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- Qur'an, Surat Al-Muṭaffifīn, verses 1-3
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¹¹⁰ Ibid.

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