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**Protecting the Rights of Temporary Foreign ‘Low-Skilled’
Workers in the Saudi Construction Industry: A Case for
Legal Reform**

A Thesis Submitted for the Degree of Doctor of Philosophy

By

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Dedication

I dedicate this work to the soul of my father.

Affirmation

This thesis, submitted for the Degree of Doctor of Philosophy, is an original work of my own and has not been submitted before for any other degree.

Abstract

This thesis is a socio-legal study of the employment conditions of temporary foreign workers (TFWs) in the Saudi Arabian labour market in general and the construction sector in particular, with emphasis on low-skilled TFWs. This thesis adopts a socio-legal approach to the human rights situation of low-skilled TFWs working in the Saudi construction sector. By using migration theories, a human rights-based approach and Islamic perspectives on labour rights, the study questions the efficacy of Saudi domestic law in providing protection to low-skilled foreign workers in the construction sector. This is done by examining the current labour admission policies and the structure of the regulatory framework, including the ‘*kafala*’ system, recruitment procedures, employment law, working conditions, occupational safety and health hazards and access to the justice system.

Grounded theory methodology is followed, with empirical data collection using semi-structured interviewing techniques in two major Saudi cities, Riyadh and Makkah. The data collected from the fieldwork provides the basis for understanding the current situation of low-skilled TFWs, by listening to their experiences. The thesis finds a link between the legal status of temporary foreign workers and the work visa system, which leads to a continuation of exploitation, mistreatment, discrimination, forced labour and the servitude of foreign labour in Saudi Arabia.

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List of Abbreviations

ACHR	Arab Charter on Human Rights
CDHRI	Cairo Declaration on Human Rights in Islam
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CMW	Committee on the Protection of Migrant Workers and Members of their Families
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CSR	Corporate Social Responsibility
FNs	foreign national
GAUN	General Assembly of the United Nations
GCC	Gulf Cooperation Council
HR	Human rights
HRC	Human Rights Council
UNHRC	United Nations Human Rights Office of the High Commissioner
UNCHR	United Nations Commission on Human Rights
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
IOM	International Organization for Migration
KSA	Kingdom of Saudi Arabia
LAS	League of Arab States
OHCHR	Office of the United Nations High Commissioner for Human Rights
RBA	rights-based approach
SCS	Saudi construction sector

SLL	Saudi labour law
SLM	Saudi labour market
NSHR	National Society for Human Rights
SHRC	Saudi Human Rights Commission
TFWs	temporary foreign workers
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
UN	United Nations
UNC	United Nations Charter

Glossary

Authorised labourer	TFW employed by and working for their original sponsor according to the residency and employment regulations of the Saudi authority.
Unauthorised labourer	This study uses the term ‘unauthorised’ rather than ‘illegal’ labourer because it focuses on legal workers who enter the country through official channels. It is important to note that unauthorised labourers generally have all the necessary legal documentation to work in KSA; their violation is working on a freelance basis, which is against the rules of employment and residency in KSA. Such labourers are usually recruited through individual employers involved in trading visas. For the purpose of the study, an ‘unauthorised TFW’ is defined as a worker with legal documentation such as residency and work permits under the <i>kafala</i> system who works without legal authorisation for someone other than the sponsor (<i>kafeel</i>) or independently on a freelance basis.
Structured companies	Well-established companies with official contracts and real business in the construction sector. The sponsor usually uses formal channels (local recruitment agencies) and is not involved in any illegal recruitment practices such as visa trading.
Unstructured companies	Individual unstructured companies established by Saudi employers mainly for visa trading. These companies usually have no jobs for TFWs or official contract with clients, so many TFWs recruited by such companies work in the Saudi labour market illegally as freelancers.
Free visa	Illegal work visa purchased for a fixed monthly premium from a sponsor to work under their sponsorship and maintain legal status in the country. Used widely by TFWs intending to work as freelancers, but officially there is no free visa under Saudi regulations.
<i>Kafala</i>	The sponsorship system governing and regulating labour recruitment.
<i>Kafeel</i>	A local sponsor (individual or company) that recruits and employs foreign workers.
<i>nitaqat</i>	Saudisation programme introduced by the Saudi Government to increase the number of local labourers in the private sector.

Amal ajnabi	Worker (<i>amal</i>) and stranger (<i>ajnabi</i>)
Iqama	Saudi residency permit
Huiat mmuqim	Resident identity
<i>Wasta</i>	Contacts (nepotism)
<i>Nazaha</i>	<i>National Anti-Corruption Commission</i>
<i>Huroob</i>	<i>Run Away (Absent From Work)</i>
Saudi <i>Jawazaat</i>	Saudi Passport Department
<i>Mu'aqb</i>	private agency dealing with government offices
Fiqh	Islamic jurisprudence
Hadith	The verbalised form of a tradition of the Prophet (<i>pbuh</i>), constitutive of his Sunnah (plural, <i>ahadith</i>).
Ijma'	Islamic legal consensus
Ijtihad	Juridical reasoning of a qualified Muslim jurist
Sunnah	The tradition of Prophet Muhammad (<i>pbuh</i>)
Qiyas	Analogical reasoning opinion
Sura	A chapter of a Qur'an verse
Ummah	The Muslim community at large
Ulama	Scholars or jurists
<i>Haqq</i>	(<i>Haqq</i> , Plural <i>huquq</i>) a right
<i>Ifta</i>	Opinion of an Islamic scholar
<i>Fatwa</i>	Opinion
<i>Makrooh'</i>	Disliked
<i>Diwan A Mazalem</i>	Board of Grievances
<i>Shura</i>	Consultation
<i>Mawlid</i> festival	celebrating the Prophet's Birthday
<i>Zulm</i>	<i>oppression</i>
<i>Haram</i>	<i>prohibited</i>

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Research background

Temporary labour migration has emerged as a major global human rights issue that affects every country in the world,¹ particularly countries such as the Kingdom of Saudi Arabia (hereinafter referred to as KSA) which have substantial structural populations of ‘temporary’ foreign workers (hereinafter referred to as TFWs). While the Arabian Peninsula (particularly the Hejaz) has always been a multi-ethnic immigration destination for the wider Arab world and the trading networks between Africa and Asia, the phenomenon of TFWs is a distinctly modern one that has addressed the developmental needs of KSA since the discovery of oil in the 1930s, and particularly since the 1950s, when large-scale oil production and infrastructure development began.² As of July 2016, the population of TFWs is an estimated 11.2 million, representing over a third of the total national population of approximately 31 million.³

As the most important economy in the Gulf Cooperation Council (GCC), KSA has some of the largest inflows of TFWs in the world.⁴ According to the United Nations Development of Economic and Social Affairs Population Division (2015), most international migrants are heavily concentrated in just ten countries, of which KSA is ranked fourth, after the US (46 million), Germany (12 million) and Russia (11.6 million).⁵ In contrast to other regions of the world, especially the industrial developed countries in Europe and the Americas, KSA does not have a ‘global’ immigration influx generally understood in the internationalist framework to be ‘south–south’ labour migration.⁶ The status of foreign workers in the country is that of temporary foreign labourers; they are not immigrant labourers in the sense of permanent migrants, and their visas are short-term agreements requiring a native employer in order for them to be allowed to enter and work in the country. While these short-term visas can

¹ Susan Kneebone, ‘ASEAN: Setting the Agenda for the Rights of Migrant Workers?’ in Hitoshi Nasu and Ben Saul (eds) *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge 2011) 146. See also for further discussion Nicola Piper, ‘Obstacles to, and Opportunities for, Ratification of the ICRMW in Asia’ in Ryszard Cholewinski and others (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (Cambridge university press 2009).

² Zakir Hussain, *Saudi Arabia in a Multipolar World: Changing Dynamics* (Routledge 2016) 36 and 68-71.

³ General Authority for Statistics, ‘Population by Gender, Age Groups and Nationality (Saudi/Non-Saudi)’ (Stats, 2016) <<http://www.stats.gov.sa/en/4068>> accessed 7 December 2016.

⁴ Ghazy Mujahid, ‘Demographic Change in Countries of the Gulf Cooperation Council (GCC): Reducing Dependence on Immigration’ in Hans Groth and Alfonso Sousa-Poza, *Population Dynamics in Muslim Countries* (Springer 2012) 184.

⁵ United Nations Population Division, ‘International Migrant Stock 2015’ (UN,2015) <<http://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesgraphs.shtml?3g3>> accessed 7 December 2016. See also JH Lee, J Helke and F Laczko, *World Migration Report 2015* (1st edn, International Organization for Migration (IOM) 2015).

⁶ Mohammed Ebrahim Dito, Dito ME, ‘GCC Labour Migration Governance’ (UN Expert Group Meeting on International Migration and Development in Asia and the Pacific, Bangkok, Thailand, 20-21 September 2008) 6.

generally be renewed indefinitely, it is clearly understood that their residency and employment in the country is conditional and not a 'right' in the sense of immigration *per se*. TFWs are contracted to meet the private labour needs of Saudi citizens or companies within the framework of national developmental requirements.⁷

In addition to massive infrastructure development, the demand for cheap labour is particularly fuelled by certain sectors, notably construction, as natives do not undertake dangerous, low-status occupations.⁸ Consequently, there is a 'dual labour market' in KSA in terms of skills, wages and sectors of employment for citizens and non-citizens.⁹ Indeed, the defining characteristic of the Saudi labour market is its highly segmented nature in numerous respects, most fundamentally in the primary (state) and secondary (private) sectors. Primary market jobs are associated with good working conditions, high income, employment stability, chances of advancement, equity, and due process in the administration of work rules, and thus they are the favoured roles for nationals. Meanwhile, low-skilled jobs in the private sector are filled by low-skilled TFWs who experience low pay, poor working conditions and fringe benefits with little chance for advancement, high labour turnover and often arbitrary management practices.¹⁰ Consequently, these low-skilled jobs, especially in the construction sector, are commonly known to be difficult, dangerous and dirty, and are therefore shunned by Saudi workers.¹¹

Al-Dosary and Rahman point out that the Saudi private sector has some general characteristics of developing countries. They argue that "the distinctive features of the private sector are based on the following: a) businesses are family owned with commercial orientation; b) the administration strategies are short-term in application; and c) this sector is

⁷ *ibid.*

⁸ Mustapha M Achoui, 'Human Resource Development in Gulf Countries: An Analysis of the Trends and Challenges Facing Saudi Arabia' (2009) 12 (1) Human Resource Development International 35.

Kapiszewski A, 'Arab Versus Asian Migrant Workers in the GCC countries' (United Nations Expert Group Meeting on International Migration and Development in the Arab Region, Beirut, Lebanon, 15-17 May 2006)

⁹ Ugo Fasano and Rishi Goyal, 'Emerging Strains in GCC Labour Markets' (2004) International Monetary Fund, Working Paper WP04/71, 7 < <https://www.imf.org/external/pubs/ft/wp/2004/wp0471.pdf> > accessed 1 September 2016

¹⁰ Salah Mahdi, 'Labour Shortages, Migration, and Segmentation: The Case of Saudi Labour Market' (Paper presented at the Workshop 'The Interdependence of Migration Politics and Demography' (*irmgard-coninx stiftung*, 2009) < http://www.irmgard-coninxstiftung.de/fileadmin/user_upload/pdf/Population_Politics/PopPolitics/Mahdi.pdf > accessed 28 November 2015.

¹¹ Julia Connell and John Burgess, 'Migrant Workers, Migrant Work, Public Policy and Human Resource Management' (2009) 30 (5) International Journal of Manpower 412, 414-415.

somewhat small and young”.¹² Business services, construction and manufacturing, which rely predominantly on TFWs, are the largest employers in KSA. As of August 2016, the majority of TFWs (around 56.5%) were drawn from other Arab countries (particularly Egypt) and the Indian subcontinent (India, Bangladesh and Pakistan) and held manual positions, including 25.6% employed in the construction sector.¹³ The following table shows the number of TFWs according to their nationality who work and reside in KSA.¹⁴

Country	Number of TFWs in KSA (million)
India	1.76
Pakistan	1.32
Bangladesh	1.31
Egypt	1.30

Table 1: Four largest TFWs in KSA, according to nationality.
Source: Valenta and Jakobsen (2016).

Despite the implementation of positive discrimination (affirmative action) and labour nationalisation policies to replace TFWs with national workers in the private sector, progress has been limited. The wage gap, the rentier socio-political formula and the long-term objective of the government to diversify the economy and reduce reliance on fuel exports have all directly contributed to sustained, structural dependence on TFWs.¹⁵ The strongest recruitment of low-skilled TFWs in KSA can be found in the construction sector, where they work for long hours for relatively low wages, to keep building costs low.¹⁶ It is worth noting that TFWs are not allowed to enter the country without the sponsorship (*kafala*) of an eligible employer, which is the legal basis for employment and residency.¹⁷ Therefore, TFWs are legally allowed to take up employment only with their sponsors and cannot easily transfer from one employer to another. This residency regulation essentially ensures that the Saudi sponsor or business has to vouch for the TFWs’ conduct while in the country. TFWs, especially low-skilled labourers, are recruited for specific jobs and for limited periods,

¹² Adel S Al-Dosary and Syed Masiur Rahman, ‘The Role of the Private Sector Towards Saudisation (Localisation)’ (2009) 1(2) International Journal of Arab Culture, Management and Sustainable Development 131, 134.

¹³ General Authority for Statistics, ‘Labour Force Survey’ (*Stats*, 2016) <<http://www.stats.gov.sa/en/4572>> accessed 7 December 2016.

¹⁴ Marko Valenta and Jo Jakobsen, ‘Moving To The Gulf: An Empirical Analysis Of The Patterns And Drivers Of Migration To The GCC Countries, 1960–2013’ (2016) 57 (5) Labor History, 627, 633.

¹⁵ Onn Winckler, ‘Labor Migration To The GCC States: Patterns, Scale, And Policies’ (*Middle East Institute*, 2010) <<http://www.mei.edu/content/labor-migration-gcc-states-patterns-scale-and-policies>> accessed 31 May 2016.

¹⁶ Mohamed A Ramady, *The Saudi Arabian Economy Policies, Achievements and Challenges* (Springer 2010) 210-356,360.

¹⁷ Steven D Roper and Lilian A Barria, ‘Understanding Variations in Gulf Migration and Labor Practices’ (2014) 6 Middle East Law and Governance 32, 34.

usually without accompanying family members, on the understanding that they will return to their native countries after the specified period of service.¹⁸

Although the employment of TFWs contributes to the growth and development of both the country of employment and the country of origin, the TFW employment process poses serious issues and challenges in terms of labourers' rights for researchers and policy-makers alike.¹⁹ This research underscores the way the employment issues of low-skilled TFWs in the construction sector are frequently intertwined with issues of basic human rights violations associated with unequal opportunities and treatment that are institutionalised in draconian labour laws and residency policies. TFWs are not expressly excluded from general labour laws and are granted the same basic labour rights as native workers, with a few exceptions due to the *kafala* system restriction.²⁰ However, in reality, malpractice in the secondary labour market (including recruitment) and labour exploitation are widespread. These violations can include delaying or not paying salaries, poor working conditions, an absence of social protection and the denial of freedom of association and workers' rights.²¹ This study therefore adopts a qualitative approach and conducts individual interviews with participants (low-skilled TFWs, employers and individual policy stockholders) in order to provide an opportunity to get to know the views of insiders concerning the current situation of the low-skilled TFWs in the Saudi construction sector. The findings from the field enable the researcher to identify the gaps in the Saudi labour market and propose amendments by considering legal and administrative strategies that could provide an effective protection mechanism to improve the situation of TFWs in the Saudi construction sector.

Research problem

The issue of low-skilled TFWs' rights is multifaceted, and can be viewed from various perspectives (e.g. political, national security, economic or social) which pertain to how labour-receiving countries such as KSA respond to the problem.²² It is worth noting that the

¹⁸ *ibid* 35-37.

¹⁹ Nicola Piper 'Governance of Migration and Transnationalisation of Migrants' Rights – An Organisational Perspective' (Paper presented at the Conference on 'Transnationalisation and Development(s): Towards a North-South Perspective' (Center for Interdisciplinary Research, Bielefeld, Germany, 31 May-1 June 2007)19.

²⁰ Hamid S Atiyyah, 'The Sponsorship System and Infringements of the Rights of foreign workers in the Gulf Countries' (1990) 3 (4) *Employee Responsibilities and Rights Journal* 267, 269.

²¹ Human Rights Watch (HRW), 'Saudi Arabia Steps Towards Migrant Workers' Rights: But Reforms Exclude Domestic Workers, Discriminate Against Women' (*HRW*, 2015) <<https://www.hrw.org/news/2015/11/15/saudi-arabia-steps-toward-migrant-workers-rights>> accessed 12 November 2016.

²² Piper (n 19) 19.

increasing number of TFWs in KSA is considered a major challenge by the Saudi Government due to the increasing unemployment among Saudi nationals in recent years. Consequently, tougher recruitment policies have been introduced, surplus TFWs have been deported and the renewal of residence and work permits has been made stricter. In addition, the quota system (*nitaqat*) mandating the employment of Saudis has been aggressively implemented by the Ministry of Labour to reduce the number of TFWs.

This study argues that unfavourable governmental policy and legislation limits the ability of TFWs to exercise their rights in KSA and increases their vulnerability, which leads to widespread labour exploitation by unprincipled employers. It further argues that TFW issues are inadequately addressed by various authorities (particularly the Ministry of Labour and the Ministry of the Interior), which have overlapping and sometimes contradictory roles. All parties concerned in the Saudi Government recognise the significance of reducing the country's dependence on TFWs in order to avoid undesirable socio-economic consequences in the future, but by reviewing the consequent policies and regulations, this study exposes that the recent restrictive employment policies applied by the government to the recruitment of TFWs (e.g. *nitaqat* quotas and imposing extra fees on renewing work permits) have a negative impact on the rights of TFWs.

KSA continues to face constant criticism for its poor human rights record, with many low-skilled TFWs being forced to work in abusive conditions, and constant haranguing from the international community about the 'modern-day slavery' of the restrictive *kafala* system, which binds the legal status of TFWs to their original employers, affords such employers irrational control over TFWs and encourages violation of their rights.²³ Examples abound of employers violating the rights of TFWs in various ways, for instance by confiscating labourers' official documents (e.g. passports and residency permits), delaying or not paying salaries, coercing workers to undertake jobs not included in their employment contracts (if they have them) and failing to comply with health and safety standards in the workplace.²⁴

Additionally, the Saudi Government has been reluctant to adopt key international frameworks that protect TFWs, and the overlap between employment and residency jurisdictions creates difficulties in attaining justice (such as it exists in current law) for low-skilled TFWs.

²³ Sevil Sönmez and others, 'Human Rights and Health Disparities for Migrant Workers in the UAE' (2013) 13(2) Health and Human Rights Journal 17, 18-21.

²⁴ HRW (n 21).

Therefore, it could be argued that there is a disconnect between the TFWs' rights as identified in international human rights law and the rights they are granted by national laws and policies.²⁵

Despite these limitations, the Saudi Government has endeavoured to develop various policies and regulations for the legal protection of TFWs, along with more restrictive residency policies in recent years that enact control over both employers and workers. This study argues that the current labour admission practices and the structure of the regulatory framework, including the *kafala* system, are insufficient to protect the human rights of TFWs and their families.

Research aim

This research study questions the efficacy of Saudi domestic law in providing protection to low-skilled foreign workers in the construction sector. It addresses the issue of the employment conditions of temporary foreign workers (TFWs) in the Saudi labour market in general and the construction sector in particular, with an emphasis on low-skilled TFWs. The main aim of this research is to critically assess existing Saudi employment legislation and propose legal and policy reform that could be used to endorse the rights of low-skilled TFWs and fill the gaps in the existing employment laws.

Research objectives

The general objective of this study is to investigate the existing residency system and labour regulations governing the employment of low-skilled TFWs and present individual TFWs' experiences in the Saudi construction sector. The specific objectives are:

- To identify the main cases of human rights violations and discrimination against low-skilled TFWs.
- To identify which international and national organisations have actively participated in addressing the issue of human rights violation among TFWs and what they have specifically contributed towards the prevention of human rights violations.

²⁵ Martin Ruhs, 'Openness, Skills and Rights: An empirical analysis of labour immigration programmes in 46 high- and middle-income countries'(2011) Centre on Migration, Policy and Society, Working Paper WP-11-88<https://www.compas.ox.ac.uk/2011/wp-2011-088_ruhs_migrants_rights_full/> accessed 20 May 2016

- To critically assess the current legal protection of TFWs under Saudi law and its implications for the security and welfare of foreign workers.
- To critically evaluate measures undertaken by the Saudi Government to address human rights violations against low-skilled TFWs.
- To explore the effectiveness of legal mechanisms in solving the employment-related issues in the Saudi labour market.

Contribution of this study

This research contributes to the existing knowledge by identifying the main loopholes within the existing legal structure governing the employment of TFWs in KSA. This is achieved through examining the current labour admission policies, the structure of the regulatory framework, the *kafala* system, recruitment procedures, employment law, working conditions and access to the justice system. The research also significantly contributes to understanding the institutional structure for managing TFWs, which involves overlapping jurisdictions and policies between Saudi entities, in greater depth in order to comprehend the situation of low-skilled TFWs in the SCS. This research explores the legal and administrative deficiencies of the current employment structure of TFWs' admission that lead to an exploitative and discriminatory work environment.

Furthermore, the research examines the application of international human rights and labour standards in KSA. This analysis contributes to exploring the extent to which the SLM and economic interests are in line with the objectives of international standards of protection for TFWs' rights. The research identifies four potential obstacles that are preventing the Saudi Government from endorsing the rights of low-skilled TFWs, which are political, security-related, social and economic. To add a further contribution, this research provides a comprehensive and systematic evaluation of current Saudi employment policies and legislation for the employment of TFWs.

Research significance

This research is significant as it covers several important aspects of the protection of TFWs. The first aspect is that this research helps to give a better understanding and insight into the

actual experiences and lived reality of TFWs in the Saudi construction industry, examining whether labour laws, employment standards and human rights legislation in KSA are designed to consider the special situation of TFWs in the country. Despite the efforts made by the Saudi Government to redress labour rights issues, these regulations are found to be uncertain, fragmented and subject to government discretion. TFWs are unlikely to benefit from the current protection granted by labour law because several barriers such as language and the *kafala* system prevent them from seeking legal redress. Consequently, it is vital to address the TFW situation and to call for the urgent implementation of specific measures to provide protection to TFWs.

Furthermore, the second aspect is the notable absence of representatives of foreign workers, such as trade unions or associations; coupled with a lack of academic research, this indicates the need to conduct fieldwork using appropriate research methods. It is proposed here that this be achieved by conducting semi-structured interviews with key policy stakeholders (e.g. labour inspectors, passport officers and human rights representative groups), employers and TFWs themselves in KSA. Thus, the fieldwork element of this study is a vital source of data.

The third aspect is that the scale of recruiting low-skilled labour in the SLM has increased gradually, especially in the construction sector. However, the Saudi Government is reluctant to endorse the rights of TFWs due to the need of the SLM to access a temporary, cheap and flexible workforce in the country. Furthermore, the negative perceptions towards foreign workers' influx into KSA that compete for scarce jobs with national workers, making them unwelcome. The major risks of these negative public perceptions, if left unchecked, could be violations of the rights of TFWs. They may result in increased forced labour, irregular labour and the spread of corruption within various institutions in the SLM, such as those issuing trade visas.

In view of the above, this thesis aims to assist policy-makers to identify the specific regulations and policies that cause a negative impact on the employment of low-skilled TFWs and on their family members. The findings of this thesis are supported by the main challenges, issues and impediments that prevent the endorsement of the rights of TFWs. These findings help us not only fill the gaps in the literature, but also provide practical recommendations for legal and policy reforms. This may assist the Saudi authorities to improve the human rights of TFWs and comply with international labour standards in this regard.

Terminology

It is worth mentioning that the terminology used to define migrant workers by the GCC states, especially labour-receiving countries such as KSA, is not uniform. In KSA, the term ‘foreign workers’ (*amal ajnbi*) is most commonly used to describe workers who are admitted to work in the labour market for temporary periods. However, the official terminology used by the Saudi Government is ‘temporary contractual workers’ and ‘temporary foreign workers’. It is worth noting that the term migrant worker is rejected by the Saudi Government because there is no comprehensive migration policy in KSA. Instead, an ‘*iqama*’ regulation (residency regulation) exists, which acts as a set of laws referring to foreign labour status and rights in the country.²⁶ As there is no single term used for migrant workers in KSA, in this thesis the terms ‘migrant workers’, ‘temporary foreign workers’, ‘temporary contractual workers’, ‘non-Saudis’ ‘foreigners’ and ‘non-citizens’ are used interchangeably.

In this study, I generally use the term ‘temporary foreign workers’ (TFWs). However, as the term migrant workers is used in international conventions, in analysing international human rights and the International Labour Organization’s (hereinafter referred to as the ILO) labour instruments, the term ‘migrant worker’ is not changed to TFW, and the thesis adheres to the same terminology used by the United Nations and ILO.

Scope and delimitation of the study

The research focuses on individual low-skilled TFWs working legally in the construction sector in Saudi Arabia. Thus, undocumented or irregular/illegal foreign labourers are not considered as they are not included within the scope of this research. The study is confined to the private construction sector because the clear majority of low-skilled (male) TFWs are recruited into this sector.

This empirical study is limited to individual sponsors. Placement agencies are not considered because they usually provide services to all sectors (including agriculture, factories, construction and domestic workers). This study is also limited to a sample of labourers from India, Egypt, Pakistan and Bangladesh who work and reside in Riyadh and Makkah. The

²⁶ Regional Mixed Migration Secretariat (RMMS), ‘The Letter of the Law: regular and irregular migration in Saudi Arabia in a context of rapid change’ (RMMS, No. 4/2014) 47 < http://www.regionalmms.org/images/ResearchInitiatives/RMMS_Letter_of_the_Law_-_Saudi_Arabia_report.pdf > accessed 20 September 2016.

justification for selecting these nationalities is that they comprise the clear majority of the TFW population in Saudi Arabia. The sample is thus both diverse and representative, offering access to the necessary data to answer the research question. Furthermore, the study is restricted to two sites, Riyadh, the capital city and largest metropolitan city in the Kingdom and a major destination for TFWs, and Makkah, where large-scale construction projects are underway, employing a large number of TFWs.

Literature review

This section provides a brief review of the literature which underpins this thesis.²⁷ Over the last few decades, there has been a growing focus by scholars on labour migration in the GCC states. The literature focuses on human rights, economic labour migration, globalisation, transnationalism, integration, citizenship, immigration, family reunion, remittances and other socio-economic aspects of the issue of migrant workers.²⁸ The literature on migration and human rights commonly argues that foreign workers in the second stage of migration, at their destination, face a set of challenges.²⁹ Bel-Air argues that KSA does not conceive of itself as an immigration country that would “allow long-term settlement”, and that “family reunion and citizenship acquisition are not issues”.³⁰ Therefore, TFWs are expected to leave the country at the end of their employment contract.

Most of the literature confirms that the chief reason for employing TFWs is that they are easier to exploit and receive less remuneration.³¹ Moreover, studies link issues of labour in

²⁷ It is worth mentioning that the appropriate literature review is addressed in the relevant chapters.

²⁸ Roper and Barria (n 17); see also Nasra Shah, ‘Labour Migration from Asian to GCC Countries: Trends, Patterns and Policies’ (2013) 5 (1-2) *Middle East Law and Governance* 32; Chowdhury R Abrar, ‘Bangladeshi Labour Migrants in the Gulf: Coping with a Large Unmet Need for Social Protection’ in Rachel Sabates-Wheeler and Rayah Feldman, *Migration and Social Protection* (Palgrave-Macmillan 2011) 262; James Sater, ‘Citizenship and Migration in Arab Gulf Monarchies’ (2013) 18(3/4) *Citizenship Studies* 292, 296; Andrew M Gardner, ‘Gulf Migration and the Family’ (2011) 1 *Journal of Arabian Studies* 3.

²⁹ Andrzej Kapiszewski, ‘Arab Versus Asian Migrant Worker in the GCC Countries’ in Prakash Jain and Ginu Zacharia Oommen (eds), *South Asian Migration To Gulf Countries* (Routledge 2016) 46-69. See also Martin Ruhs and Philip Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ (2008) 42(1) *International Migration Review* 249; Martin Ruhs, ‘Migrant Rights, Immigration Policy and Human Development’ (2010) 11 *Journal of Human Development and Capabilities* 259; Piyasiri Wickramasekara, ‘Globalisation, International Labour Migration and the Rights of Migrant Workers’ (2008) 29 (7) *Third World Quarterly* 1247.

³⁰ Françoise De Bel-Air, ‘The Socio-Political Background and Stakes of “Saudizing” the Workforce in Saudi Arabia: the Nitaqat Policy’ (2015) *Gulf Labour Markets and Migration, Explanatory Notes No. 3*, 5-6< http://cadmus.eui.eu/bitstream/handle/1814/34857/GLMM_ExpNote_03_2015.pdf > accessed 20 September 2016

³¹ Martin Baldwin-Edwards, ‘Labour Immigration and labour markets in the GCC countries: National Patterns and Trends’(2011) *Kuwait Programme on Development, Governance and Globalisation in the Gulf States*, Research Paper 15< <http://eprints.lse.ac.uk/55239/>> accessed 1 September 2015; Md Mizanur Rahman,

GCC states with the temporary nature of contracts, which render low-skilled workers mostly uninformed of their rights in their country of employment.³² Arif points out that even those using official recruitment channels are not protected from abuse, trafficking or forced labour by their employers or third parties involved in the recruitment and employment process, such as brokers and subcontractors.³³

Vlieger adopts a socio-legal approach in order to analyse the issues of women domestic workers and explores the employment situation and possible conflicts between domestic workers and their employers in KSA and the United Arab Emirates.³⁴ This study takes the perspective of the sociology of law, and includes various aspects of legal anthropology. It effectively examines the experiences of women domestic workers in the major labour-receiving countries in the GCC. This study highlights the fact that many of these workers are vulnerable, being both women and migrants. Vlieger makes a significant contribution to the field of women domestic worker studies in the Gulf region.

Longva³⁵ and Pande³⁶ identify the *kafala* system as a central factor in the problems faced by foreign workers. During the recruitment process, foreign workers receive work contracts based on the permit for entry and residence issued to them. Their employment and residency permits bind them to their original employer only. Consequently, the *kafala* system grants their employer almost complete control over their ability to seek other jobs with other employers or even return home without the employer's consent.

'Migrant Indebtedness: Bangladeshis In The GCC Countries' (2013) 53(6) *International Migration* 205,209; Philippe Fargues, 'Immigration Without Inclusion: Non-Nationals In Nation-Building In The Gulf States' (2011) 20 *Asian and Pacific Migration Journal* 273; Froilan T Malit and George Naufal, 'Asymmetric Information under the Kafala Sponsorship System: Impacts on Foreign Domestic Workers Income and Employment Status in the GCC Countries' (2016) Institute of Labor Economics, Discussion paper No. 9941 <<http://ftp.iza.org/dp9941.pdf>> accessed 02February 2017; Valenta and Jakobsen (n14) 1-5.

³² S Irudaya Rajan, *India Migration Report 2015: Gender and Migration* (1st edn, Routledge 2016); Henelito Sevilla, 'Nationalization Scheme (Nitaqat) in Saudi Arabia and the Condition of Filipino Migrant Workers' (2014) 8 *Journal of Identity and Migration Studies* 7; Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and the Emirates: Trafficking Victims?' (2012) 50 (6) *International Migration* 180.

³³ Ghulam M Arif, 'Recruitment of Pakistani Workers for Overseas Employment: Mechanisms, Exploitation and Vulnerabilities' (2009) International Labour Office, Geneva, Working Paper No. 64, 36-38 <http://www.ilo.org/global/topics/forced-labour/publications/WCM_041928/lang--en/index.htm> accessed 20 May 2016. Neha Wadhawan, 'From Rupees to Dirhams: Labour Migration from Nepal to the GCC Region' in Prakash C Jain and Ginu Zacharia Oommen, *South Asian Migration to Gulf Countries* (Routledge India 2015).

³⁴ Antoinette Vlieger, *Domestic Workers in Saudi Arabia and the Emirates: A Socio-legal Study on Conflicts* (Quid Pro Books 2011).

³⁵ Anh Nga Longva, 'Keeping Migrant Workers in Check: The Kafala System in the Gulf' (Middle East Research and Information Report 211, 1999) 20-22.

³⁶ Amrita Pande, 'The Paper that you Have in Your Hand is my Freedom: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon' (2013) 47 (2) *International Migration Review* 414, 420.

Degorge, in her work, describes the *kafala* system as modern-day slavery. Foreign workers are vulnerable to a wide range of forced labour practices and human trafficking, causing serious abuses of human rights during the period of their employment contract.³⁷ Sönmez carries out a highly significant study of a large number of foreign worker issues.³⁸ The author argues that foreign workers still face abusive labour practices and challenges of inadequate nutrition and salaries. There are further problems with the confiscation of labourers' official documentation, which limits their movement within the country. The author argues that, due to the *kafala* system, most foreign workers face a range of discrimination types.

Walker investigates the conditions for women and migrant workers in KSA in terms of their rights surrounding health.³⁹ This study suggests that migrant workers and women experience health inequalities in the country, and it deliberates on the explanations for these inequalities which, according to the author, arise from cultural, traditional and social factors that can lead to harming the health of women and migrant workers. The author highlights the lack of human rights protection that puts migrant workers in vulnerable situations. She proposes that legislative and social change is required in order to provide the necessary protections.

Non-governmental organisations (hereinafter referred to as NGOs) such as Human Rights Watch (hereinafter referred to as HRW) and Amnesty International have highlighted the issues of migrant workers in KSA and other GCC countries in their reports. HRW has reported that many migrant workers are subject to a range of exploitation and deception by their sponsors, such as the confiscation of passports, the withholding of salaries, physical abuse, imprisonment, long working hours, public segregation from nationals, lack of health care and poor living conditions.⁴⁰

HRW has also highlighted the vulnerability of domestic workers in KSA, who often find themselves in "highly exploitative situations",⁴¹ and has assessed a wide range of human

³⁷ Barbara Degorge, 'Modern Day Slavery in the United Arab Emirates' (2006) 11(6) *The European Legacy* 657-661; see also Virginia Mantouvalou, 'Temporary Labour Migration and Modern Slavery' in Joanna Howe and Rosemary J Owens (eds), *Temporary Labour Migration in the Global Era* (Bloomsbury 2016).

³⁸ Sevil Sönmez and others (n 22); also see David Keane and Nicholas McGeehan, 'Enforcing Migrant Workers' Rights in the United Arab Emirates' (2008) 15 *International Journal on Minority and Group Rights* 81.

³⁹ Lara Walker, 'The Right to Health and Access to Health Case in Saudi Arabia with a Particular Focus on Women and Migrants' in B Toebe and others (eds), *The Right to Health: A Multi-country Study of Law, Policy and Practice* (Springer 2014) 165-181.

⁴⁰ HRW, 'Exported and Exposed: Abuses against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates' (HRW, 2007) <<https://www.hrw.org/sites/default/files/reports/srilanka1107webwcover.pdf>> accessed 2 December 2016

⁴¹ HRW, 'As If I Am Not Human' (HRW, 2008) <<http://www.hrw.org/reports/2008/07/07/if-i-am-not-human>> accessed 2 December 2016.

rights abuses faced by migrant workers. Their study presents a number of cases of workers who claim to have been exploited by their employers, based on interviews with migrant workers in Bangladesh, India and the Philippines who had worked in KSA.⁴²

An Amnesty International report identifies similar cases of human rights violations faced by Indian labourers (returnee workers) who had worked in KSA.⁴³ This report provides first-hand instances of recruitment procedures and how basic human rights abuses are predominant. The study argues that both the Indian Government and the Saudi Government are accountable for monitoring recruitment agencies and brokers, who are usually blamed for providing misleading information regarding the employment conditions in KSA, which in turn leads to violations of the rights of migrant workers when they arrive. This report also shows that human rights violations are very common in KSA and include withholding wages, restriction of the movement of workers and excessive work.

Although the above studies have highlighted human rights issues relating to foreign workers, their scope is still limited by the fact that they focus on the situation of women domestic workers, returnee workers and foreign labours in general. Most of the studies focus on the abuse of labourers by their employer or *kafeel*. This is evident from the work of key non-governmental organisations and human rights activists, who focus on the malpractices of unprincipled sponsors and call for the abolition of the sponsorship system. However, this is not to disparage these studies, which are certainly very respected and pioneering in the field of economic labour migration and human rights.

This study is distinctive, because no previous research has adequately examined legal admission policies, specifically the structure of the regulatory framework, and the temporariness of the legal status of foreign labour and its negative impact on labourers' rights. There is no other research work which takes an empirical approach to TFWs working in construction in KSA. This subject requires a study that provides in-depth analysis of the impact of the current legislation and administrative measures on protecting the human rights of low-skilled TFWs in general and in the Saudi construction sector in particular.

⁴² HRW, 'Bad Dreams: Exploitation and Abuse of Migrant Workers in KSA' (HRW, 2004) 19 and 105 <<https://www.hrw.org/reports/2004/saudi0704/>> accessed 15 May 2016.

⁴³ Amnesty International (AI), 'India: Exploited Dreams: Dispatches from Indian Migrant Workers in KSA' (Amnesty, 2014) <<https://www.amnesty.org/en/documents/ASA20/025/2014/en/>> accessed 17 May 2016.

Structure of the thesis

Chapter 1 sets out the theoretical framework for the research used to address the issue of TFWs in the Saudi construction sector. The first section begins by discussing the theoretical perspectives on international labour migration, and it is argued that theories of international labour migration such as dual labour market theory and social network theory can provide suitable clarification of the employment situation in which most low-skilled TFWs find themselves in the Saudi construction industry. The second section takes a human rights-based approach as a framework for the recognition of foreign workers' rights as determined by human rights standards. This section analyses the principle of the rights-based approach (RBA) to labour migration. The main objective is to analyse the principles of accountability and the roles of law, participation, empowerment, non-discrimination and human dignity in order to understand to what extent the rights-bearers (the Saudi authorities) protect, promote, and fulfil the rights of the rights-holders (the TFWs) during their employment in the country. Using the principles of the RBA allows us to analyse the impact of the labour admission practices and the structure of the regulatory framework, including the *kafala* system, on TFW rights in KSA.

While a great part of the theoretical framework of this study is informed by the RBA, the study would be deficient if the concept of dignity of labour in the Islamic legal tradition were not taken into account. KSA is a Muslim country where, according to the Saudi constitution, all laws have to be in accordance with the Qur'an and Sunnah. Therefore, it is pertinent to explore the notion of labour rights within the Islamic legal tradition. This section examines the Islamic concepts of rights (*haqq*), dignity of labour, justice and fairness in the light of Qur'an verses and the Sunnah of the Prophet Mohammad. However, the discussions provided in this chapter are not intended to offer a thorough description of the themes; rather, they aim to serve as a theoretical basis for subsequent chapters.

Chapter 2 explores first the relevant ILO Conventions and United Nations international human rights instruments, with a special focus on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the ILO Migration for Employment (Revised) Convention, 1949 (No. 97), the Migrant Workers' (Supplementary Provisions) Convention, 1975 (No. 143) and two ILO recommendations for migrant workers.

In addition, the reports of the United Nations Special Rapporteur on the Human Rights of Migrant Workers are taken into consideration in the framework of temporary low-skilled foreign labourers. This chapter attempts to highlight the role of the International Organization for Migration and other non-governmental organisations in promoting the RBA to labour migration and protecting labour rights. The chapter also examines Islamic human rights instruments such as the Universal Islamic Declaration of Human Rights, the Cairo Declaration of Human Rights in Islam and the Arab Charter on Human Rights adopted by the two regional organisations, the Organization of Islamic Cooperation and the League of Arab States. The objective of this chapter is to illustrate how international and regional human rights conventions and standards can guide states' policies and regulations to achieve better practices regarding the protection of migrant workers.

Chapter 3 discusses the relationship between Saudi legislation on human rights and various international human rights conventions. The aim of this chapter is to examine the application of international human rights conventions in Saudi legislation where Sharia is the main source of law, and to explore KSA's position on reservations and ratifications generally and in the context of migrant workers' rights. Therefore, it is important to identify the main obstacles leading KSA to not ratify conventions.

This study argues that KSA, as a member of the international community, has a legal obligation to adhere to and maintain international human rights standards and harmonise its domestic law to provide protection to TFWs. This chapter examines the significance of non-discrimination provisions in the International Convention on the Elimination of All Forms of Racial Discrimination, as KSA became a party to this convention to advance TFW protection in the country. This chapter also examines the efforts made to address the issue of TFWs by analysing the national report for universal periodic review submitted by KSA. Finally, the chapter examines the role of national human rights organisations in KSA in implementing and promoting human rights in the country and explores the significant efforts made by these organisations to implement and protect the rights of TFWs.

Chapter 4 addresses the institutional structure for managing TFWs and the overlapping jurisdictions and policies administering them in greater depth, in order to understand the situation of low-skilled TFWs in the Saudi construction sector. Examining the policies of labour recruitment is essential in order to highlight the role of formal recruitment channels in protecting workers' rights and to distinguish them from informal channels. This chapter

highlights the role of labour-sending countries and the negotiation of labour agreements concerning recruitment between KSA and those countries. The chapter examines issues related to human rights created by the admission of low-skilled TFWs. Although KSA has still not adopted any key human rights conventions related to labour migration, this study uses the international norms, standards and principles that underpin the RBA to labour migration as tools to evaluate domestic laws and policies that may affect TFW rights. This analysis explores the extent to which the Saudi labour market and economic interests are in line with the objectives of international standards of protection for TFW rights.

Chapter 5 examines the framework governing the legal status of low-skilled TFWs in the Saudi labour market. The first section examines labour and employment law in relation to employment of TFWs, health and safety issues and the dangers of the construction sector. The second section gives a general overview of the sponsorship, or *kafala*, system. The need to recruit low-skilled TFWs to fill gaps in the workforce has led to a split labour market that is blatantly segmented in terms of Saudi and non-Saudi workers, which has caused a debate over working conditions and practices that violate the TFWs' rights. Since the Saudi Government is still developing policies under its various authorities to regulate the employment of TFWs, especially low-skilled workers, it is essential to examine the impact of these policies on TFW rights and their legal status in the country.

Thus, this chapter also evaluates the sponsorship system in light of international law and examines the Saudi *kafala* system and its commitment to its international obligations. A number of issues related to such a system are examined, such as forced labour practices and human trafficking. This research identifies four major potential obstacles, which include political, security-related, social and economic obstacles, that collectively prevent TFWs from being treated in the same way as Saudi workers. These obstacles also potentially prevent the promotion and protection of human rights in the country.

Chapter 6 provides an insight into the legal protection of foreign employees within the legal system in KSA. Due to the absence of a labour court in the existing judicial structure, this study traces back the impact of *modernist* (legal professionals) and *traditionalist* (religious scholars) approaches to the legislative process and the judicial system, and their approaches to enacted law such as the Saudi labour law (SLL). The negative traditionalist approach to the SLL and other rules and regulations related to the settlement of labour disputes has caused the government to transfer such cases to administrative committees under the executive

authority of the Ministry of Labour, which are not recognised by the Basic Law as a part of judicial authority. Such committees have quasi-judicial functions and make decisions with legal implications, and thus this study identifies several important legal deficiencies of these committees that could have an impact on the settlement of labour disputes. Despite a number of regulations and laws governing employment relationships and protecting TFWs, many human rights violations that TFWs experience in the Saudi construction sector are interrelated with employment contract and residency regulations in a way that the existing legal structure fails to sufficiently address. In this regard, this chapter highlights the key labour cases related to residency regulations (e.g. confiscating labour passports, runaway *huroob* workers' cases and transferring the *kafala*) in order to review the jurisdiction of the commissions. Finally, this chapter provides a suggestion to resolve and override the outcomes of these different approaches, in order to eliminate the confusion in the Saudi legal system.

Chapter 7 discusses using grounded theory methodology for conducting empirical data collection. For empirical purposes, field research was conducted in two cities, Riyadh and Makkah. The data was collected using a semi-structured interviewing technique. This method is one of the key tools of qualitative research. Conducting individual interviews with participants (governmental and non-governmental bodies, employers and foreign labourers) provides an opportunity to get to know the views of insiders concerning the current situation in the Saudi private labour market.

Chapter 8 analyses the data from the field and explores the experiences of respondents regarding the issues of low-skilled TFWs in the construction sector.

Finally, the researcher concludes the thesis, taking into consideration the findings based on the arguments in the previous chapters and suggesting a way forward by considering legal and administrative strategies that provide an effective protection mechanism and improve the situation of TFWs in the Saudi construction sector. Recommendations are put forward for further research.

Chapter 1: The Theoretical Foundations Relating to the Situation of TFWs in the Saudi Construction Sector

Introduction

This chapter sets out the theoretical framework that this research uses to address the issue of TFWs in the Saudi construction sector (hereinafter referred to as SCS). The theoretical framework presented in this chapter is divided into three sections. The first discusses international migration theories. Dual labour market and social network theories are used to assess the Saudi labour market with particular reference to the employment of TFWs in the construction sector. Social network theory is used to understand the formal and informal recruitment procedures used to secure employment and the impact of the recruitment process on the rights of TFWs in pre- and post-labour migration.

The second section takes a human rights-based approach as a framework for the recognition of TFW rights. This section analyses the key principles of the rights-based approach (hereinafter referred to as RBA) to labour migration, which includes accountability and the rule of law, participation and empowerment, and equality and non-discrimination, in order to understand the extent to which the Saudi authorities (the rights-bearers) protect, promote and fulfil the rights of TFWs (the rights-holders) during their employment in the country. Using the RBA to examine TFW rights in KSA helps to analyse the impact of legal admission policies and Saudi labour laws.

While a major part of the theoretical framework of this study is informed by the RBA, the study would be deficient if Islamic perspectives on labour rights were not taken into account. The final section analyses TFW rights in the light of Islamic principles of the dignity of labour. Using the primary sources of Islamic law, i.e. the Qur'an and the Sunnah of the Prophet Mohammad, it is argued that under the Islamic legal tradition there is legal and moral accountability of the state as well as individual employers to safeguard and ensure the socio-economic well-being of the labour force.

1.1 Theoretical perspectives on international labour migration

During the past four decades, international labour migration from developing countries to the developed countries in the West and oil-rich countries in the Middle East has increased dramatically. International labour migration is a multidimensional phenomenon that has been viewed from various perspectives.¹ Castles and Miller state that the earliest approaches to migration focused on the ‘push–pull’ factors, with the ‘push’ factors being those that forced people to leave their countries of origin, and the ‘pull’ factors being those that attracted them to other destinations.² Push factors include poor living conditions, economic and political instability, and unemployment in the country of origin, while the pull factors include better job prospects and improved standards of living in the country of destination.³

Massey et al. claim that migration takes place because of a combination of push and pull factors.⁴ They consider push–pull factors to have always been a part of migration, and the reasons for it to be mainly economic.⁵ This approach basically works on the parameters of achieving economic equilibrium through the movement of labour forces from one geographic location to another, and vice versa.⁶ However, the push–pull models of economists may help elucidate the direction that people migrate in, but they do not explain the causes or timings of these migrations.⁷ Neo-classical economic theory is one of the oldest migration theories, stating that wage differences between regions is the main reason for labour migration. Such differences are due to geographic variances in labour demand and supply, although other factors might play an important role as well, e.g. labour productivity, or the degree of organisation of workers. Applying neo-classical economics to international migration implies

¹ Hein de Haas, ‘Migration and Development: A Theoretical Perspective’ (2007) International Migration Institute, Research Paper 9 <<http://www.imi.ox.ac.uk/publications/imi-working-papers/wp-9-2007-migration-and-development-a-theoretical-perspective>> accessed 10 February 2015.

² Stephen Castles, Hein de Haas and Mark J Miller, *Theories of Migration* (5th edn, Palgrave Macmillan 2014) 28.

³ *ibid.*

⁴ *ibid.*

⁵ Douglas S Massey, Joaquin Arango and Graeme Hugo, *Worlds in Motion: Understanding International Migration at the End of the Millennium* (Clarendon Press 2005) 12.

⁶ Castles (n 2) 28-29.

⁷ Prasannan Parthasarathi and Donald Quataert, ‘Migrant Workers in the Middle East: Introduction’ (2011) 79 *International Labor and Working-Class History* 4.

that countries with a shortage of labour relative to capital have a high equilibrium wage, whereas countries with a relatively high labour supply have a low equilibrium wage.⁸

Neo-classical economic theory is limited in its approach as it fails to take into account other factors that play a significant role in international labour migration.⁹ Bakewell suggests that there is no single theory that can be applied to all aspects of migration, and that different theories need to be used in order to understand the various issues of migration, depending on the contexts in which they arise.¹⁰

Ghosh argues that international migrations are largely equated with labour, and therefore existing migration theories seek to explain labour movement.¹¹ However, while it is true that wage factors and push-pull factors are important in migration, they are not the only reasons for international population flows. Cohen establishes various contrasts that exist in the area of international migration: “a) forced versus free migration; b) settler versus labour migration; c) temporary versus permanent migration d) illegal versus legal migration”.¹² Borjas is of the view that much of the recent research into the economics of migration is based on the fact that there is a market available for potential immigrants across the world, depending upon where they choose to go to.¹³

Massey et al. differentiate theoretical approaches to international migration on the basis of the inception and perpetuation of international migration.¹⁴ International migration theories that explain the inception of migration can be characterised into four types of economic models: neo-classical macro-economic theory, neo-classical micro-economic theory, the dual labour theory and the new economics of migration, as well as one political model which is known as the world systems theory.¹⁵ International migration theories that deal with the perpetuation of international movement can also be characterised into four types: network theory,

⁸ Castles (n 2) 29.

⁹ *ibid* 31.

¹⁰ Oliver Bakewell, ‘Some Reflections on Structure and Agency in Migration Theory’ (2010) 36 *Journal of Ethnic and Migration Studies* 1692.

¹¹ Bimal Ghosh, ‘Managing Migration: Towards the Missing Regime’ in Antoine Pecoud and others (eds), *Migration Without Borders: Essays on the Free Movement of People: An Investigation into the Free Movement of People (Social Science Studies)* (1st edn, Berghahn 2007) 99.

¹² Robin Cohen, *The Cambridge Survey of World Migration* (CUP 2010) 6.

¹³ George J Borjas, ‘Economic Theory and International Migration’ (1989) 23(3) *Special Silver Anniversary Issue: International Migration an Assessment for the 90s: International Migration Review* 457, 457-461.

¹⁴ Douglas S Massey and others, ‘Theories of International Migration: A Review and Appraisal’ (1993) 19(3) *Population and Development Review* 431, 432 and 448.

¹⁵ *ibid*.

institutional theory, cumulative causation and migration systems theory.¹⁶ Massey et al. consider that there is no single coherent and comprehensive theory of international migration. There is a fragmented set of theories that have evolved mainly in isolation from each other.¹⁷ Castles et al. mention that research into migration is interdisciplinary, since sociology, political science, history, economics, geography, demography, psychology, cultural studies and law are all relevant, but look at different aspects of population mobility, and a full understanding of this trend requires contributions from all these fields. A comprehensive theory can only be developed from a number of models, perspectives and platforms.¹⁸ While there is a wide range of international migration theories, for the purposes of this thesis, examining economic migrant theories is limited to the dual/segmented labour market theory and the social network theory. This is because the decisions of TFWs to move to KSA for work is linked to economic, social and sometimes religious factors, which is consistent with most international migration theories such as dual labour market theory and social network theory. Dual labour market theory explains the segmentation of the SLM in the primary (state) and secondary (private) sectors; the employment of TFWs in the latter is frequently linked to issues of human rights associated with unequal opportunities and treatment, which are institutionalised in stricter residency laws and labour policies. Social network theory explores the role of social networks in securing jobs in advance in KSA, whether through formal or informal recruitment procedures. This theory helps identify the impact of the migratory process on the rights of TFWs after their arrival in KSA.

Dual labour market theory, also known as the segmented labour market theory, provides that international labour migration stems from more-developed countries' demand for immigrant labour, usually from less-developed countries.¹⁹ This theory, developed in the early 1970s, seeks to clarify the initiation of migration by placing emphasis on the economics of receiving countries. Michael Piore is often regarded as the most enthusiastic promoter of the theory. This theory underplays the push factors prevalent in the home countries and highlights the pull factors present in the target countries as the major determinants of migration.²⁰ Arango argues that, in advanced economic societies, there is a continuing demand for migrant labour

¹⁶ *ibid* 448.

¹⁷ *ibid* 432.

¹⁸ Castles (n 2) 27.

¹⁹ Massey (n 5) 127.

²⁰ *ibid* 127.

because local workers in these societies do not want to perform low-skilled jobs, creating a gap to be filled by migrant workers.²¹

Piore and Doeringer maintain that the merit of dual labour market theory lies in the fact that it seeks to provide a technical answer for the reasons behind labour migration.²² According to this theory, there are two sectors in the labour market. There is a primary sector that consists of jobs with high wages, good working environments, stable employment, rewards for education and job experience, and opportunities for advancement. Conversely, there is the secondary sector, which has low wages, poor working conditions, unstable work, no rewards for education or job experience and no opportunities for advancement. Secondary sector jobs are often known as '3D jobs' – difficult, dangerous and dirty.²³

In light of this, Piore provides three potential reasons for the demand for a foreign labour force in advanced industrial countries: i) labour force shortages, ii) the need to fill the lowest posts in the occupational hierarchy and iii) labour shortages within the secondary sector of a dual labour market.²⁴ These reasons show that shortages of low-skilled labour within the secondary sector compel employers to recruit foreign workers. The significance of dual labour market theory does not lie in providing a general elucidation of the causes of international migration.²⁵ Rather, it consists of focusing on an essential aspect of international labour migration, namely, the structural demand for cheap temporary migrant workers. This is inherent in the structure of the Saudi economy and labour market. Moreover, it gives substantial justification for such a demand for recruiting cheap and flexible foreign labour in secondary labour markets, which helps us develop a better understanding of the current situation of temporary foreign 'low-skilled' workers in the SCS.²⁶

Saudi Arabia's economy is reliant on labour-intensive sectors such as construction, for which it needs to recruit migrant workers.²⁷ These migrant workers have traditionally come from

²¹ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *Int'l Social Science J* 283.

²² Peter B Doeringer and Michael J Piore, *Internal Labor Markets and Manpower Analysis* (ME Sharpe 1985) 165-166.

²³ Caroline Brettell and James Hollifield, *Migration Theory* (Routledge 2000) 52.

²⁴ Doeringer and Piore (n 22) 165-167. Many guest worker programmes operating between 1945 and the late 1960s are commonly understood as a government policy designed to employ temporary foreign workers to fill a gap in labour shortages. See Rachel Stevens, *Immigration Policy from 1970 to the Present* (Routledge 2016) 176.

²⁵ Arango (n 21) 289-290.

²⁶ *ibid.*

²⁷ IOM, 'World Migration Report 2011: Communicating Effectively about Migration' 75-76 <publications.iom.int/bookstore/free/WMR2011_English.pdf> accessed 27 February 2012.

South and South East Asia, but now also from North and East Africa. This migration is mainly temporary, and most are unskilled men looking for low-skilled jobs. The trend in these countries is mainly for construction and similar industries, and these workers accept low wages. Despite nationalisation policies, the number of TFWs in the workforce is still high.²⁸ According to the General Authority for Statistics (hereinafter GAS), non-Saudi nationals accounted for approximately 31% of the population in Saudi Arabia in 2015. The reliance on TFWs has, however, come at the cost of a highly segmented labour market.²⁹ According to the Ministry of Labour's Annual Statistics, Saudi nationals constituted just 29% of total private-sector employment in 2013 and 2014.³⁰ This means that TFWs have filled in the gaps that existed in the labour force.³¹ Saudi nationals therefore do not take up these jobs as these are considered to be low status and the wages paid in the construction sector are also low compared to those in other employment sectors. This results in a labour force shortage in the construction sector, forcing employers and companies to recruit foreign workers who are willing to accept these low-skilled jobs.³²

Arango asserts that recruitment was a vital mechanism of immigration in advanced economic societies such as North America and Western Europe in the third quarter of the last century.³³ Today, recruitment is still a common practice, particularly in the Arabian Gulf and other Asia-Pacific regions such as Malaysia and Singapore.³⁴ It could be said that dual labour market theory provides a basis for understanding the reasons behind the recruitment of foreign workers and unstable employment practices in KSA. Thus, to analyse the issues associated with the recruitment of TFWs in KSA, the 'social network', or 'migration network', theory is used in this research study.³⁵ Migration network theory has been extensively accepted in migration studies since the 1980s. This theory focuses on the collective agency of migrants and communities during the processes of migration.³⁶ According to Massey et al., "migrant networks are sets of interpersonal ties that connect

²⁸ Annelies Zoomers and Gery Nijenhuis, 'Does Migration Lead to Development? Or Is it Contributing to a Global Divide?' (2012) 2 *Societies* 127.

²⁹ General Authority for Statistics, 'Population [sic] by Gender, Age Groups and Nationality (Saudi/Non-Saudi)' (2016) <<http://www.stats.gov.sa/en/4068>> accessed 13 August 2016.

³⁰ Ministry of Labour (MOL), 'Data & Statistics' (*Portal MOL*, 2016) 30 <<https://portal.mol.gov.sa/en/statistics>> accessed 13 August 2016.

³¹ IOM (n 27) 75-76.

³² Such a difference shows that what is a low wage in a developed country (e.g. KSA and other GCC states) can be a substantial wage in a developing country.

³³ Arango (n 21) 290.

³⁴ *ibid.*

³⁵ In this context, the researcher will use both terms.

³⁶ Stephen Castles, 'Understanding Global Migration: A Social Transformation Perspective' (2010) 36 *Journal of Ethnic and Migration Studies* 1579.

migrants, former migrants, and non-migrants in countries of origin and destination through ties of kinship, friendship, and shared community origin”.³⁷ These networks in international migration play an important role in creating employment opportunities for foreign migrant workers.³⁸

Portes argues that a contemporary migration theory is required in order to explain the central forces driving the processes of migration, and that it is necessary to identify how social networks, community expectations and household strategies alter structural determinants.³⁹ This approach views migration as a form of social capital that facilitates access to other aspects of economic importance, such as a salary or improved employment opportunities.⁴⁰ However, it has been recognised that network theory does not take into account what instigates the migration, but rather focuses on how the migration flow is extended.⁴¹

Boyd considers migration as a process of developing links between the country of origin and the desired destination. Migration networks represent one such link in the migration system, connecting migrants and non-migrants “across time and space”.⁴² Hence, connections with earlier migrants may provide potential migrants with specific knowledge, facilitating access to information about procedures, employment opportunities, financial assistance and appropriate accommodation.⁴³ Thus, potential migrants are capable of taking advantage of social networks and ethnic communities within the destination country. In the case of labour-receiving countries such as KSA, social networks embody both the formal and the informal procedures for how foreign workers plan ways of funding their travel and securing a job and accommodation prior to joining the workforce in KSA. As a result, individual relationships play a key role in increasing and promoting international labour migration.⁴⁴

³⁷ Douglas Massey and others, ‘Principles of Operation: Theories of International Migration’ in Marcelo M Suárez-Orozco and others, *The New Immigration* (Routledge 2005) 29.

³⁸ Jean-Baptiste Meyer, ‘Network Approach Versus Brain Drain: Lessons from the Diaspora’ (2001) 39 *Int’l Migration* 93.

³⁹ Alejandro Portes, ‘Immigration Theory for a New Century: Some Problems and Opportunities’ (1997) 31 *International Migration Review* 801.

⁴⁰ Arango (n 21) 291-292.

⁴¹ Nana Oishi, *Women in Motion, State Policies, and Labor Migration in Asia* (Stanford University Press 2005) 8.

⁴² Monica Boyd, ‘Family and Personal Networks in International Migration: Recent Developments and New Agendas’ (1989) 23 *International Migration Review* 641.

⁴³ Meyer (n 38) 93.

⁴⁴ Castles (n 36) 1579.

Among the South and South East Asian labour-supplying countries, immigration for employment is subject to little institutional control and is prearranged mostly on the basis of relationships or family networks through recruiting agencies.⁴⁵ Informal social channels play a crucial role in the recruitment process between labour-sending countries and KSA. The common practice of recruitment takes place via recruitment agencies as well as migrant networks. TFWs in KSA are employed on temporary labour contracts, with many of them seeking work visas from *kafeel*, or sponsor-employers, through their personal networks. Work visas may be arranged through a migrant broker in KSA in order to allow potential foreign workers in labour-sending countries to work there, thereby avoiding local recruitment agencies. Once a migrant broker finds a job and has obtained a work visa for a friend or relative, they notify the prospective foreign worker in his or her home country and request his or her arrival within a specified time frame.⁴⁶ Shah and Menon argue that social networks and personal networks also play a critical role in assisting TFWs to secure employment in KSA in advance.⁴⁷ Hence, social network theory is relevant in the context of KSA as social networks play a significant role in assisting foreign migrant workers to find jobs. Since policies towards low-skilled and unskilled migrants are restrictive in KSA, social relationships constitute the most effective way to achieve successful and mutually beneficial recruitment.⁴⁸ The relationship between the potential migrant and employer (sometimes a contractor), when established through an intermediary (recruitment agency or broker) known by both, not only helps the potential migrant with information about employment opportunities, but may also satisfy the employer that the migrant is suitable for the job.⁴⁹

⁴⁵ Ian J Seccombe, 'International Labor Migration in the Middle East: A Review of Literature and Research, 1974-84' (1985) 19 *International Migration Review* 343.

⁴⁶ Md Mizanur Rahman, 'Does Labour Migration Bring about Economic Advantage: A Case of Bangladeshi Migrants in Saudi Arabia' (2011) Institute of South Asian Studies Research Working Paper 135, 12<<http://www.isas.nus.edu.sg/PublicationByCategory.aspx>> accessed 20 February 2015

⁴⁷ Nasra M Shah and Indu Menon, 'Chain Migration through the Social Network: Experience of Labour Migrants in Kuwait' (1999) 37 (2) *International Migration* 363.

⁴⁸ The researcher believes that conducting an empirical study about employment and foreign work reveals the significance of social networks and individual relationships in securing the employment abroad in the light of restricted labour migration, especially in the context of Saudi Arabia. See Chapter 8.

⁴⁹ Meyer (n 38) 93.

1.2 Human rights-based approach

1.2.1 The foundations of rights

The concept of rights often involves legal and moral debates to ensure fundamental well-being and dignity.⁵⁰ Many philosophers make a distinction between moral rights and legal rights. According to Cranston, legal rights are normally restricted to a specific jurisdiction or legal system, but moral rights are universal entitlements.⁵¹ The difference between moral and legal human rights is intimately connected to the vagueness intrinsic to these rights, which could indicate that a certain amount of osmosis has occurred between moral and legal rights over time.⁵² The fact that not every moral right becomes a legal right signifies that the public has already made a decision as to which rights need to become a part of the legal sphere in order to guarantee a suitable degree of protection and independence to the rights-bearers, and hence the selected rights are viewed as most essential.⁵³

Legal scholars and philosophers generally differentiate between various kinds of rights. Hohfeld presumes that rights consist of four notions: liberty, claim, immunity and power.⁵⁴ They are all rights, even though they are of different types. He suggests that a distinction should be made between a right to our own actions and a legal right to somebody else's actions. He calls the first a 'privilege' and the second a 'claim-right' or a 'right in the strict sense'. In contemporary language, there is a tendency to favour the terms 'liberty' and 'claim'.⁵⁵ Orend points out that "a Hohfeldian liberty right is quite different from a claim-right. Whereas a claim-right imposes correlative duties, a liberty-right is, so to speak, duty free".⁵⁶ Other terminology has been employed to create similar distinctions, for instance

⁵⁰ Matthew H Kramer, NE Simmonds and Hillel Steiner, *A Debate Over Rights* (Oxford University Press 2002); Paul Gready and Jonathan Ensor, *Reinventing Development? Translating Rights-Based Approaches from Theory into Practice* (Zed Books 2005) 237; Tom Campbell, 'Parliamentary Review with a Democratic Charter of Rights' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection Of Human Rights* (OUP 2011) 453.

⁵¹ Cited in Linda Hajjar Leib, *Human Rights and the Environment* (Martinus Nijhoff 2011) 40; Brian Galligan and CJG Sampford, *Rethinking Human Rights* (Federation Press 1997) 27-28.

⁵² *ibid.*

⁵³ *ibid.* 40.

⁵⁴ Brian Orend, *Human Rights: Concept and Context* (Broadview Press 2002) 21; Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *The Yale Law Journal* S52<<http://www.law.harvard.edu/faculty/cdonahue/courses/prop/mat/Hohfeld.pdf>> accessed 9 March 2016.

⁵⁵ Paulos Z Eleutheriadēs, *Legal Rights* (Oxford University Press 2008) 108.

⁵⁶ Orend (n 54) 21.

negative and positive rights. Negative rights are principle or ‘first-generation rights’, which often include the notion that one is entitled to not be mistreated by a state or individuals.⁵⁷

A common illustration would be the view that states must not deny anyone ‘due process of law’ and must grant equality to their people.⁵⁸ On the other hand, possessing a negative right to something implies that the individual has the right not to be interrupted or restricted in carrying out the privileges linked to that right.⁵⁹ Political and civil rights (e.g. the right to freedom of speech and association and freedom from torture), along with the right to property, are deemed to be negative rights. In contrast, a positive right (or ‘second-generation right’) is one that states or people are obliged to adhere to.⁶⁰ Positive rights, which include socio-economic rights (e.g. the right to employment, health care and education), are addressed as rights which are recognised only via a positive act from the state as well as the community.⁶¹ These rights are incorporated in the United Nations International Bill of Rights.⁶²

In relation to the employment realm, there are rights and duties or contractual rights between specific persons. Contracts or legal agreements offer people reciprocally binding duties according to a legal system with outlined terms and conditions.⁶³ Weiss stresses that contracts and agreements between contractual parties should also apply the following moral principles: (1) the agreement must not make the parties be dishonest or immoral; (2) all parties ought to openly and with no force enter into the contractual arrangement; (3) a person should not misrepresent or misunderstand information from the contract; and (4) both parties must have a full understanding of the type of contract and its particular conditions prior to being bound by it.⁶⁴

Given the broadly recognised inspiration of rights, one may conclude that contemporary civilisation interprets human rights protection from natural rights to positive rights, and that

⁵⁷ Such rights are embedded in the US Bill of Rights, the English Bill of Rights and the Canadian Charter of Rights.

⁵⁸ Vincent N Parrillo, *Encyclopedia of Social Problems* (Sage 2008) 460.

⁵⁹ Herman T Tavani, *Ethics and Technology* (Wiley 2011) 64.

⁶⁰ Parrillo (n 58) 460.

⁶¹ Zehra F Kabasakal Arat, *Human Rights Worldwide* (ABC-CLIO 2006) 40.

⁶² The UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights together constitute the UN International Bill of Rights. These will be discussed in detail in Chapter 3.

⁶³ Carl Wellman, *Rights and Duties* (Routledge 2002) 46.

⁶⁴ Joseph W Weiss, *Business Ethics: A Stakeholder and Issues Management Approach with Cases* (5th edn, South-Western 2009) 109.

the responsibility for the protection and promotion of the human rights of people (whether citizen or non-citizen) lies with the state in which they live. Therefore, the state's responsibility to uphold human rights is an integral and inseparable part of its duty to safeguard human rights inspired by the dichotomy between passive rights and positive rights.⁶⁵

For the purpose of this study, the above analysis has a significant connection to how the human rights-based approach (applied in this thesis) fits into the discourse of protection of workers by concentrating on government obligations and legal frameworks in order to apply further developments of policies and legal protections of historically excluded groups, such as low-skilled TFWs in KSA.

1.3. The rights-based approach to TFW

The RBA attempts to apply the laws and principles outlined by human rights instruments as a framework to fill the gap between human rights in theory and practical action. Donald asserts that “there is no single definition of the human rights-based approach”.⁶⁶ Nevertheless, it is essential to understand that the idea of the RBA is somewhat specific and grounded in the human rights commitments stipulated by international conventions and established bodies.⁶⁷ According to Robinson, “A rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed at protecting and promoting human rights. The rights-based approach integrates the norms, standards and principles of the international human rights system into plans, policies and processes of development.”⁶⁸

Gabel points out that the RBA does not suggest a unique human rights protection agenda; instead, it examines procedures and policies based on criteria laid out in the human rights laws and instruments adopted by a state.⁶⁹ Globally, there is a growing effort to stress the RBA in foreign workers' rights issues. The RBA to labour migration places the individual who migrated from his or her country at the heart of migration management and related

⁶⁵ Pinghua Sun, *Human Rights Protection System in China* (Springer 2014) 54.

⁶⁶ The human rights-based approach and the rights-based approach will be used interchangeably in this study.

⁶⁷ Kate Donald, ‘Human Rights Practice: A Means to Environmental Ends?’ in Anna Grear and Evadne Grant (eds), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar 2015) 202.

⁶⁸ Mary Robinson, ‘What Rights Can Add to Good Development Practice’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005) 38.

⁶⁹ Shirley Gatenio Gabel, *A Rights-Based Approach to Social Policy Analysis* (Springer International 2016) 10.

policies and creates a specific focus on the situation of a disadvantaged and marginalised category, especially those who are low-skilled workers. Since this approach is normatively grounded in human rights law and international labour standards, the state has obligations established by international law to endorse and protect the human rights of foreign workers in the country of employment.⁷⁰ Oberoi affirms that the RBA is a predominant and valuable tool for ‘migration policy-makers’ because it puts a particular emphasis on disempowerment and marginalisation. The RBA makes a special effort to reach the most excluded and marginalised populations.⁷¹

The RBA is centred on the conviction that “every human being, by virtue of being human, is a holder of rights. The rights-based approach involves not charity or simple economic development, but a process of enabling and empowering those not enjoying their economic, social and cultural rights to claim their rights”.⁷² Several international and regional human rights conventions, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as ICMW) are reflective of the RBA to labour migration. According to Ruhs, the crucial aspect of a rights-based approach is that it contains “the observance of international human rights norms, including equality and non-discrimination, standard setting and accountability, the recognition of migrants as subjects and holders of rights, the participation of communities and the integration of a gender, children’s rights and ethnic perspective”.⁷³

The RBA endorses the accountability of institutions for ensuring protection of the rights of all vulnerable individuals, thus keeping power-holders and institutions accountable for their obligations to groups and individuals with less power. This often makes the RBA divergent from ‘needs-based’ approaches, which create dependency on development organisations. The RBA instead promotes and employs participation and empowerment to recognise human

⁷⁰ François Crépeau, ‘A Rights-Based Approach to Labour Migration’ (*Oppenheimer McGill*, 2014) 5426 <<http://oppenheimer.mcgill.ca/A-Rights-Based-Approach-to-Labour>> accessed 21 March 2016.

⁷¹ Pia A Oberoi, *Empowering Migrants: Human Security, Human Rights and Policy* (Cambridge University Press 2010) 246.

⁷² Janki Andharia, ‘Universities and Interdisciplinary Community Development: Reconceptualising Community Organization in India: Transdisciplinary Perspective’ in Alice K Johnson Butterfield and Yossi Korazim-Körösy (eds), *Interdisciplinary Community Development: International Perspectives* (1st edn, Haworth Press 2016) 115.

⁷³ Martin Ruhs and Philip Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ (2008) 42(1) *International Migration Review* 4.

rights infractions and abuse.⁷⁴ De Gaay Fortman summarises several essential factors with regard to changes resulting from shifting to a RBA:

“Firstly, that struggle is deepened because it is now placed in a normative, ethical setting: it is no longer a matter of just economic interests but of right. Secondly, that struggle is widened to involve the whole community in which the community live: public justice is at stake. Thirdly that struggle is lifted up to the global level: realization of those rights is a universal responsibility.”⁷⁵

The principles of human rights indicate the direction that should be employed throughout all phases of intervention and assistance, “including assessment and analysis, programme planning and design (such as setting goals, objectives, and strategies), and implementation, monitoring and evaluation”.⁷⁶ The goal of the RBA is to create dynamic involvement in the social and political processes of human rights, which demands an interdisciplinary viewpoint to reinterpret and extend the concept of the main principles of human rights, i.e. “universality, indivisibility and interdependence, equality and non-discrimination”, as established by international human rights protocols.⁷⁷

When UN Secretary-General Kofi Annan⁷⁸ stressed that the protection and promotion of human rights principles, including political, economic, civil, cultural and social rights, are considered essential for dignifying life, he reiterated the principles of “indivisibility, interrelatedness and interdependence”. The principle of universality is the idea that everyone is equally entitled to human rights, as stated in Article 1 of the Universal Declaration of Human Rights (hereinafter referred to as UDHR): “all human beings are born free and equal

⁷⁴ Andrea Cornwall and Celestine Nyamu-Musembi, ‘Putting the “Rights-Based Approach” to Development into Perspective’ (2004) 25 *Third World Quarterly* 1417, 1418.

⁷⁵ Bas De Gaay Fortman, ‘Economic, Social and Cultural Rights: From Rhetoric to Reality’ in I Boerefijn, M Brouwer, and R Fakhreddine (eds), *Linking and Learning in the Field of Economic, Social and Cultural Rights* (SIM-Netherlands Institute of Human Rights 2001), cited in Emma Harris-Curtis, Oscar Marley and Oliver Bakewell, ‘The Implications for Northern NGOs of Adopting Rights-Based Approaches: A Preliminary Exploration’ (2005) *Intrac, Papers Series* No 41 <<http://www.intrac.org/resources.php?action=resource&id=322>> accessed 20 March 2016

⁷⁶ United Nations Development Group (UNDG), ‘Report of the Second Interagency Workshop on Implementing a Human Rights-Based Approach to Development in the Context of U.N. Reform’ (Stamford, USA, 3-5 May 2003) <http://www.undg.org/archive_docs/4128-Human_Rights_Workshop_Stamford_Final_Report.doc> accessed 16 March 2016; see also UNDG, ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among UN Agencies’ (2003) <https://undg.org/main/undg_document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/> accessed 16 March 2016; OECD and The World Bank, *Integrating Human Rights into Development* (2nd edn, The World Bank 2013) 247.

⁷⁷ James A Gross and Lance A Compa, *Human Rights in Labor and Employment Relations* (Labor and Employment Relations Association, University of Illinois at Urbana-Champaign 2009) 96-97.

⁷⁸ Opening of the first session of the Human Rights Council in June 2006.

in dignity and rights”.⁷⁹ The principle of indivisibility is that “no human right is inherently inferior to any other”. Social, cultural and economic rights need to be recognised and protected on equal grounds with political and civil rights.⁸⁰ These principles have already been affirmed in international instruments and conventions.⁸¹

Gready points out that RBAs may be applied to the law either directly or indirectly, and this is usually based on whether RBAs are utilised with the aim of informing “the outcomes or the processes”. RBAs recognise legal criteria (i.e. human rights are respected, protected and fulfilled) for legal enforcement and the monitoring of outcomes.⁸²

However, the political and social processes linked with labour migration represent obstacles to human rights because there are issues of cultural differences as well as differences in socio-economic backgrounds between national and foreign workers. Arowolo highlights several basic questions with regard to the RBA to examining population movement. He argues that these queries about the country of destination need to be directed to the migrants themselves. Arowolo suggests that these queries could be relevant research:⁸³

- Do migrant workers possess a right?
- If so, what is the best way to claim the right?
- Who guarantees that migrants have rights?
- Are there capacity gaps at the national, community and regional levels in attaining such rights?
- What is the obligation of the migrants in order to obtain social services (education, employment, health, etc.) in the country of employment?

In the case of temporary foreign ‘low-skilled’ workers in Saudi Arabia, they are commonly at greater risk of human rights violations. However, RBAs can offer adaptable and inventive

⁷⁹ Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217 A(III).

⁸⁰ Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation’ (HR/PUB/06/8, 2006) 2; René Provost and Colleen Sheppard, *Dialogues on Human Rights and Legal Pluralism* (Springer 2013) 51.

⁸¹ Yvonne Donders and Vladimir Volodin, *Human Rights in Education, Science, and Culture* (Ashgate 2007) 309.

⁸² Paul Gready, ‘Rights-Based Approaches to Development: What Is the Value Added?’ (2008) 18(6) *Development in Practice* 738; Peter Uvin, *Human Rights and Development* (Kumarian Press 2004) 175-176.

⁸³ Oladele O Arowolo, *Human Rights in Life and Death: Basic Considerations for Development Planning* (Xlibris Corporation 2010) (no page number available).

approaches to guaranteeing their human rights, regardless of the difficulties of the issues related to foreign workers.⁸⁴ Kapoor states that the “RBA aims at the process which expands the capabilities or freedoms of the individuals to improve their well-being and to realise what they value. This is characterised by adherence to principles derived from the texts of international human rights instruments.”⁸⁵ The RBA to labour migration can serve as a model for national migration policies and employment guidelines to enforce the rights of foreign workers in Saudi Arabia.⁸⁶ This approach to labour migration is expected to provide for the treatment of foreign workers, especially low-skilled workers, as human beings, which should top the agenda of all dialogue on labour migration.⁸⁷ Therefore, this study analyses the basic principles of accountability within the rule of law, with non-discrimination, participation, empowerment and the inherent and inalienable dignity of humans serving as the theoretical bases.

1.3.1 Accountability and Rule of law

The RBA emphasises the value of accountability to disadvantaged groups in the host society.⁸⁸ Berthold argues that the significance of the RBA is the emphasis on the accountability of law-makers as well as other actors whose actions may affect individual rights.⁸⁹ The accountability approach determines a rights–duty correspondence through the provision of corrective or remedial measures; these measures might be applied by regulations where feasible, while others may be applied through suitable monitoring systems.⁹⁰

⁸⁴ Peter Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’ (2007) 17 (4/5) *Development in Practice* 597, 601.

⁸⁵ Vineet Kapoor, ‘Human Rights Based Approach to Development and People’s Empowerment Through Participatory Governance’ (*lse*, 2009)
<<http://www.lse.ac.uk/humanRights/aboutUs/articlesAndTranscripts/kapoorAug2010.pdf>> accessed 24 March 2016

⁸⁶ Lori A Nessel, ‘Human Dignity or State Sovereignty?’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 345.

⁸⁷ OHCHR, ‘Migration and Human Rights: Improving Human Rights-Based Governance of International Migration’ (2013) 22
<http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf> accessed 20 March 2016.

⁸⁸ Rosalind Eyben and Clare Ferguson, ‘How Can Donors Become More Accountable to Poor People?’ in Leslie Christine Groves and Rachel Hinton (eds), *Inclusive Aid: Changing Power and Relationships in International Development* (1st edn, Earthscan 2004) 12.

⁸⁹ Megan Berthold, *Human Rights-Based Approaches to Clinical Social Work* (Springer International 2015) x.

⁹⁰ Kapoor (n 85) 16; see also Anna Krūsteva and Elinor L Brown, *Migrants and Refugees: Equitable Education for Displaced Populations* (Information Age 2013) 8.

Rights are worthless when there is a lack of corresponding obligations towards ‘duty-bearers’, from whom rights are often claimed.⁹¹ This accountability approach suggests that “rights imply duties, and duties demand accountability”.⁹² Gready affirms that “without accountability (remedies, redress), human rights mean nothing”.⁹³ Therefore, the principle of accountability supports a process of developing efficient and suitable redress mechanisms. This principle indicates the responsibilities of the state to enhance commitment to human rights by advocating human rights monitoring, improving access to information and justice and addressing dispute resolution mechanisms.⁹⁴

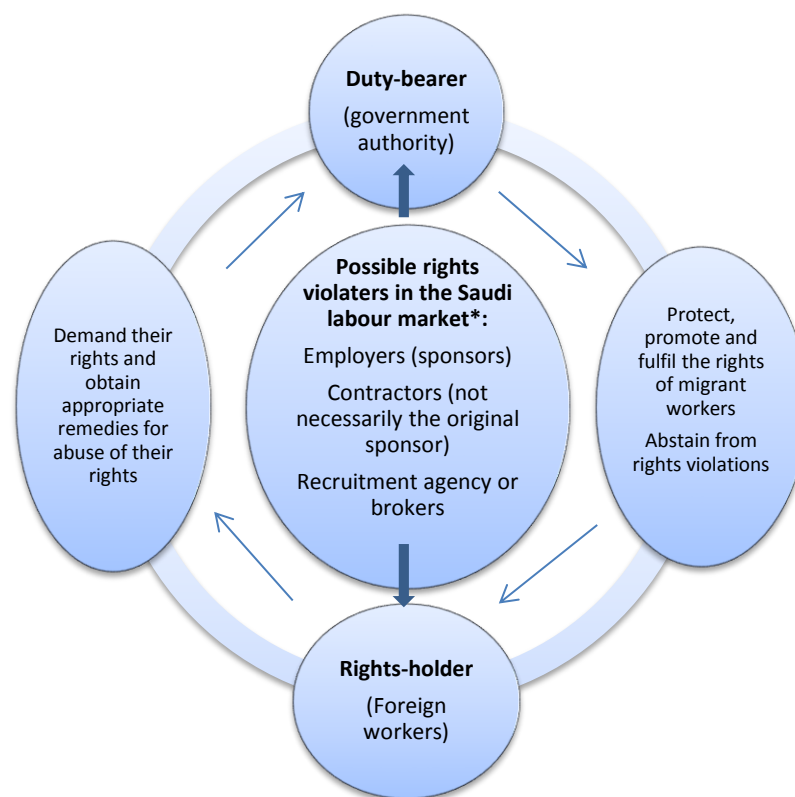


Figure 1: RBA and the relationship between duty-bearers and rights-holders.⁹⁵

*This list of possible violaters is identified in the first section of this chapter.

Source: Theis.⁹⁶

⁹¹ Gready (n 81) 741.

⁹² OHCHR, ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies HR/PUB/06/12’ (2006) <<http://www.refworld.org/docid/46ceaf92.html>> 5 accessed 17 March 2016.

⁹³ Gready (n 82) 741.

⁹⁴ Siobhan McInerney-Lankford and HO Sano, *Human Rights Indicators in Development* (World Bank Publications 2010) 34-35.

⁹⁵ This diagram was adapted from the work of Joachim Theis, *Promoting Rights-Based Approaches* (1st edn, Save the Children Sweden 2004).

⁹⁶ Some of the information is linked to the work of Gabel (n 69) 10; McInerney-Lankford (n 94) 34-36.

With regard to migrant worker exploitation, the above illustration reveals that states (as duty-bearers) have two kinds of responsibilities to safeguard rights-holders (foreign workers) from employment exploitation (including dangerous work conditions, non-payment and long working hours). The first obligation is a duty ‘to protect, promote and fulfil’ the rights of foreign workers. These rights could embody a broad range of potential political and civil rights, together with social and economic rights. The second responsibility is to refrain from rights violations. Hence, in the event that foreign workers’ rights are violated, the duty-bearers are accountable.

As seen in the analysis above, this approach emphasises the empowerment of rights-holders (foreign workers)⁹⁷ and the accountability of duty-bearers (state authorities). It assumes the accountability of duty-bearers to rights-holders, as well as rights-holders having acceptable remedies in case of mistreatment or abuse of their rights.⁹⁸

1.3.2 Equality and non-discrimination

The principles of non-discrimination and equality are central principles of the RBA. These principles play a significant role in challenging injustice and advancing the growth of concepts of equality of treatment, equal protection before the law and equality of opportunity in the country of employment. The Charter of the United Nations (hereinafter the UN Charter) reaffirms a faith “in fundamental human rights, in the dignity and worth of the human person”,⁹⁹ and engages in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.¹⁰⁰ These commitments are repeated in the preamble to the UDHR¹⁰¹ and are bolstered in the first two articles, which declare: “All human beings are born free and equal in dignity and rights”,¹⁰² and “everyone is entitled to all the rights and freedoms set forth in this declaration,

⁹⁷ Rights-holders of human rights are, by definition, ‘everyone’, ‘all persons’ and ‘every human being’ except when a legal instrument defines a specific, more vulnerable group of persons (for example, migrant workers, children or women); see A Reis Monteiro, *Ethics of Human Rights* (Springer 2014).

⁹⁸ Anna Krasteva, ‘Integrating the Most Vulnerable: Educating Refugee Children in the European Union’ in Elinor L Brown, Anna Krasteva (eds), *Migrants and Refugees: Equitable Education for Displaced Populations* (1st edn, Information Age 2013) 8; see also Oberoi (n 71) 246-247.

⁹⁹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, see Preamble, s 2.

¹⁰⁰ *ibid* art 1(3).

¹⁰¹ UDHR (n 79) Preamble, paras 5 and 6.

¹⁰² *ibid* art 1.

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹⁰³

These commitments are contained in the principles of non-discrimination and equal rights.¹⁰⁴ Article 7 of the UDHR stipulates: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”¹⁰⁵ This article, then, offers equal safeguards to both citizens and foreign nationals. The right to non-discrimination is strictly linked to the principle of equality; that is, equality is the objective of the principle of non-discrimination.¹⁰⁶ Furthermore, the ICMW, as a specialised convention concerning migrant workers and their families, denies any discrimination against migrant workers based on their race, language, nationality or legal status as foreigners in the country of employment.¹⁰⁷ Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as ICERD)¹⁰⁸ covers the rights of all individuals to enjoy all human rights without discrimination “based on race, colour, descent, or national or ethnic origin”.¹⁰⁹

Heymann et al. argue that the principle of non-discrimination under a RBA is directed towards the most vulnerable people in society, such as foreign workers.¹¹⁰ The RBA can be applied to assess all policies, measures or legislation (employment regulation or migration laws) that focus on the presence of foreign workers in the country of employment (who are usually disadvantaged by the host country) where their existence in the country is restricted by strict laws and regulations. In relation to employment, the principle of non-discrimination includes both indirect and direct discrimination. It includes behaviour that is purposefully discriminatory (purposeful acts) and behaviour that has the effect of discriminating against

¹⁰³ *ibid* art 2.

¹⁰⁴ Theo C van Boven and Fons Coomans, *Human Rights from Exclusion to Inclusion: Principles and Practice* (Kluwer Law International 2000) 4.

¹⁰⁵ UDHR (n 79) art 7.

¹⁰⁶ Basil E Ugochukwu, Opeoluwa Badaru and Obiora C Okafor, ‘Group Rights under the African Charter on Human and Peoples’ Rights: Concepts, Praxis and Prospects’ in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples’ Rights* (1st edn, Martinus Nijhoff 2011) 109.

¹⁰⁷ Ryszard Cholewinski and Shauna Olney, ‘Migrant Workers and the Right to Non-Discrimination and Equality’ in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (1st edn, OUP 2014) 281.

¹⁰⁸ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

¹⁰⁹ *ibid* art 1.

¹¹⁰ Jody Heymann, Adèle Cassola and Michael Ashley Stein, *Making Equal Rights Real* (CUP 2012) 301.

workers (the discriminatory effects of policies).¹¹¹ According to this principle, all migrant workers are equal human beings and hence migrant workers are entitled to the right to be protected from abuse without any kind of discrimination.¹¹²

1.3.3 Principle of participation and empowerment

The RBA has another goal: altering power relationships that act as barriers to improving the ability of both duty-bearers and rights-holders to understand human rights. In this particular approach, the right to participation is very important because it leads to recognition of other rights, i.e. the right to participate effectively is the right to claim other rights.¹¹³ Participation rights are closely based on the general standards of human rights. The International Bill of Rights ensures the right to engage in government and public matters and to have admission to all public service.¹¹⁴ Thus, the principle of participation confirms that “every person and all peoples are entitled to active, free, and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized”.¹¹⁵

The principle of participation claims that rights-holders should be meaningfully and positively associated with programmes targeted at satisfying rights. This approach recognises individuals as active agents with needs to be met, instead of objects. Apodaca affirms that “the human rights framework places individual agency and participation within a context of state responsibility for realizing the rights”.¹¹⁶ The right to participation is globally and regionally acknowledged as a human right. Migrant workers need to have the right to voice their opinion regarding employment matters (which include employment abuse, poor living and work situations and social protection). Migrant workers are deemed to have separate

¹¹¹ Patrick J Cihon and James Ottavio Castagnera, *Employment and Labor Law* (Cengage Learning 2015) 213; the ILO recognised the significance of discrimination issues in the workplace in 1991 it launched the project ‘Combating Discrimination against (Im)migrant and Ethnic Minority Workers in the World of Work’ to document levels of discrimination and to propose possible remedies; see Patrick Taran and Eduardo, Geronimi ‘Globalization, Labour and Migration: Protection is Paramount’ (Conferencia Hemisférica sobre Migración Internacional: Derechos Humanos y Trata de Personas en las Américas, Santiago de Chile, 20-22 November 2002) 9.

¹¹² Cholewinski (n 107) 281.

¹¹³ Jessica Campese, *Rights-Based Approaches* (Center for International Forestry Research 2009) 148.

¹¹⁴ Daniel Aguirre, *The Human Right to Development in a Globalized World* (Ashgate 2008) 94.

¹¹⁵ UNDG, ‘The Human Rights Based Approach to Development: Cooperation Towards a Common Understanding among UN Agencies’ (2016) <https://undg.org/wp-content/uploads/2015/05/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN1.pdf> accessed 11 March 2016.

¹¹⁶ Clair Apodaca, *Child Hunger and Human Rights* (Routledge 2010) 22.

needs. They need to have a voice on issues that affect their daily lives, for example problems relating to migration, integration, employment and combating xenophobia.¹¹⁷

Miller is of the view that the most recent participation work has centred on empowering groups and communities to review their reality and also to determine and undertake strategies to tackle local challenges. Thus, recognising the issues of migrant workers and asking exactly what they themselves think about employment exploitation is a crucial facet of this principle which represents a substantial recognition of the need to give foreign workers a chance to speak about their own personal lives.¹¹⁸

In relation to empowerment, Elangwe affirms that the RBA is focused on “empowering people to take their own decisions, rather than being the passive object of choices made on their own behalf”.¹¹⁹ In this way, it seeks to assist and empower communities and people to claim their rights.¹²⁰ Empowerment is the procedure through which people are able to claim and utilise their human rights. This principle empowers individuals to claim their rights instead of merely waiting for policies, regulations or the provision of services. It needs to be centred on developing the capabilities of people and societies, especially marginalised groups such as low-skilled TFWs. The aim is to provide individuals with the power and ability to improve their own lives, enhance their own communities and control their own destinies.¹²¹

1.3.4 Principle of inherent and inalienable human dignity

The concept of human dignity is another central principle of the RBA. Human dignity is one of the key theoretical bases of human rights.¹²² It stresses that human rights derive from a “common humanity” as well as the “inherent dignity of each human person”, rather than from

¹¹⁷ Victor Abramovich, Pablo Ceriani Cernadas and Alejandro Morlachetti, ‘The Rights of Children, Youth and Women in the Context of Migration’(2011) Social And Economic Policy, Working Paper No. 1106 <http://www.unicef.org/socialpolicy/files/The_Rights_of_Children_Youth_and_Women_in_the_Context_of_Migration_FINAL.pdf> 19 accessed 6 March 2016

¹¹⁸ Valerie Miller, Lisa Vene Klasen and Cindy Clark, ‘Rights-Based Development: Linking Rights and Participation–Challenges in Thinking and Action’ (2005) 36 IDS Bulletin 32.

¹¹⁹ Linus Elangwe, *The Rights-Based or Citizen-Centered Approach, Tensions and Contradictions in Implementing the Approach: Reflections on the Chad-Cameroon Pipeline Project* (GRIN Verlag 2012) 3.

¹²⁰ United Nations Educational, Scientific and Cultural Organization/UN International Children’s Emergency Fund, *A Human Rights-Based Approach to Education for All* (UNESCO/UNICEF 2007)11.

¹²¹ *ibid.*

¹²² Paulus Kaufmann and others, *Humiliation, Degradation, Dehumanization* (Springer Science+Business Media BV 2011) 1-2.

the fact of being a national of any specific country.¹²³ It signifies the absolute and inherent worth that individuals have because they are human beings rather than because of any societal position or specific properties they hold.¹²⁴ In its preamble, the UN Charter states that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice”.¹²⁵ The UN Charter reaffirms “faith in fundamental human rights, in the dignity and worth of the human person”.¹²⁶ This is also expressly acknowledged in the UDHR¹²⁷ and in core international human rights conventions. The UDHR mentions “the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family,”¹²⁸ and claims that “all human beings are born free and equal in dignity and rights”.¹²⁹ Berthold argues that respect for human rights and dignity establishes the basis for all those political, economic, civil and social objectives that aim to create particular criteria of well-being for all individuals. The RBA endeavours to eliminate the charity aspect by recognising that individuals are not merely receivers, but active rights-holders.¹³⁰

By referring to the international agreements,¹³¹ the ICMW calls on source and destination states to promote the dignity of migrant workers. Certain articles in key international human rights conventions further strengthen the view that human rights reflect and aim to enhance people’s inherent and inalienable human dignity. For example, the right to work is an individual and also a collective right that ensures the chance to perform dignified work in healthy and safe situations with a reasonable salary that can provide a fair sustenance that guarantees an existence and values human dignity, regardless of legal status.¹³² These legal instruments not only reaffirm faith in the dignity and value of the human individual, but also

¹²³ Cited in Ayesha Shahid, ‘Migrant Filipino Domestic Workers in Pakistan; Agency, Rights and the Limits of the Law’ in Siobhán Mullally (ed), *Care, Migration and Human Rights: Law and Practice* (1st edn, Routledge 2015) 155.

¹²⁴ Wenche Barth Eide and Eleni MW Maunder, ‘A Human Rights-Based Approach to Community and Public Nutrition: Theoretical Underpinnings and Evolving Experiences’ in Norman J Temple and Nelia Steyn (eds), *Community Nutrition for Developing Countries* (1st edn, Athabasca University Press and UNISA Press 2016) 13.

¹²⁵ UN Charter (n 99) Preamble.

¹²⁶ *ibid*; see also Urban Jonsson, *Human Rights Approach to Development Programming* (UNICEF 2003) 8.

¹²⁷ UDHR (n 79) Preamble.

¹²⁸ *ibid*.

¹²⁹ *ibid* art 1.

¹³⁰ Berthold (n 89) x; David K Androff, *Practicing Rights: Human Rights-Based Approaches to Social Work Practice* (Routledge, Taylor & Francis Group 2016) 34.

¹³¹ See Chapter 2 for further discussion on international human rights conventions.

¹³² Shahid (n 123) 155.

demonstrate that human rights are inherent and inalienable.¹³³ This principle, therefore, is focused on a dignified remedy for all people, and discourages the idea of charity because of the indignity this could create for vulnerable or marginalised categories of people. It also promotes an atmosphere in which individuals can get food and housing through dignified work.¹³⁴

According to all the principles discussed above, human rights apply everywhere and to everyone (including migrants), and they cannot be rejected or abandoned voluntarily. There is no hierarchy of rights, and some kinds of rights cannot be split from others. It is additionally asserted that the rights of workers need to be identified not simply as a tool that can be used within the legal system, but because adding a more humanised view of work stresses the inherent value and dignity of labour.¹³⁵

1.4 Islamic perspectives on human rights

While a large part of the theoretical framework of this study is informed by the RBA, the study would be deficient if the concept of dignity of labour in the Islamic legal tradition were not taken into account. Saudi Arabia is a Muslim country where according to the Saudi Constitution all laws have to be in accordance with the Qur'an and the Sunnah,¹³⁶ and therefore it is pertinent to explore the notion of labour rights within the Islamic legal tradition. This section examines the Islamic concepts of rights (*haqq*), dignity of labour, justice and fairness in the light of Qur'an verses and the Sunnah of the Prophet Mohammad.

The mutually agreed-upon term for human rights in Islamic legal scriptures is the word '*haqq*' which means right, truth and reality. The plural form of this word is '*huquq*'. Saeed is of the view that *haqq* has several meanings, depending on the context in which it is applied, for instance 'right', 'claim', 'truth' and 'duty' are commonly implied by the Arabic term *haqq*. The literal meaning can also be a well-established 'fact', 'truth', 'justice' or 'reality'.

¹³³ Orend (n 54) 15; Rhoda Howard, 'Dignity, Community and Human Rights' in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 2002) 82-84.

¹³⁴ Eide and Maunder (n 124) 13; Jon Werlesen, 'Inherent Dignity as Grounds of Human Rights: A Dialogical Approach' in Werner Maihofer and Gerhard Sprenger, *Revolution and Human Rights* (1st edn, Franz Steiner Verlag 1989) 98-100.

¹³⁵ Shahid (n 123) 155.

¹³⁶ Basic Law of Governance, Royal Order No. A/91 27 (1 March 1992), art 1: 'The Kingdom of Saudi Arabia is an Arab and Islamic Sovereign State... and its constitution is the Qur'an and the Sunnah.'

Haqq is mentioned in the Qur'an with the meaning 'justice', 'right', 'truth' and 'certainty'.¹³⁷ Similarly, *haqq* is at times used to encourage a specific course of behaviour.

The concept of rights is fully embraced by two primary sources of the Islamic tradition and by Muslim scholars.¹³⁸ Islam divides the concept of rights into two distinct categories: *huquq Allah* (the rights of God) and *huquq al'ibad* (the rights of individuals).¹³⁹ The rights of God are those that have been clearly mentioned in religious scripture and are backed by religious reasoning, such as dealing with man–Allah relations (prayers, fasting, etc.) and the earthly or mundane related to man–man relations, such as payment of *zakat*.¹⁴⁰ The rights of individuals are categorised into three types: (a) familial, that is, matters related to marriage (for example, divorce and inheritance); (b) contractual, which covers business dealing and trading; and (c) societal, which deals with civil and criminal law, and public order.¹⁴¹

The Sharia makes a distinction between *ibadat*, worship, and *muamalat*, social relations.¹⁴² The rights of individuals are specific to the field of *muamalat* (transactions), and labour rights fall under *muamalat*, but under this classification, the implementation of rights depends on

¹³⁷ Abdullah Saeed, 'Muslim Debates on Human Rights and Freedom of Religion' in Thomas WD Davis and Brian Galligan (eds), *Human Rights in Asia* (1st edn, Edward Elgar 2011) 25-26.

¹³⁸ The term *haqq* is mentioned in the works of classical Muslim jurists. Since the advent of the Islamic faith, the term *haqq* has been utilised juristically. According to Saeed, the 16th century Hanafi legal scholar, Ibnu Nujaym seems to be the first to define the term. He characterised it as *mayastahiqquhu al-insan*, meaning 'that to which a man is entitled'. See for further discussion Saeed (n 137) 26. Furthermore, Ansari and Salman point out that the jurists of the Maliki school of thought have separated the 'rights of man' into three categories: special, general and private rights. Special rights are those given only to individuals who fulfil the obligation of worshipping God. General rights are those that guarantee the prosperity of each individual inside the state; they are innate in human instinct and appear with no additional proof other than the actuality of being human. Private rights are the rights of one individual against another or a group of people. It is noteworthy that there are four Sunni schools of thought (*madhahib*), namely *Maliki*, *Hanbali*, *Hanafī* and *Shafē'i*. These schools stemmed from four Imams, namely *Imam Malik*, *Imam Hanbal*, *Imam Hanafī* and *Imam Shafē'i*. See for more discussion Abdul Haseeb Ansari and RK Salman, 'Human Rights, Human Dignity and Justice: The Islamic Perspective' (2011) 71(1) *Journal of Islamic Law Review* 91, 93.

¹³⁹ Abdul Azeez further explains that the right of individuals is superior and distinct from the viewpoint of secular Western human rights. Yusuf Abdul Azeez, 'Perspective From Shariah on Legal and Human Rights' (2012) 2 *Global Journal Al Thaqafah* 17. Also, some scholars have added dual rights that are shared by both God and individuals. This is a mixture of both religious and mainstream goals and justifications. For instance, the obligatory interval of three menstrual periods to check for pregnancy after a divorce or death of the husband is seen as an occasion to which dual rights apply. Ebrahim Moosa, 'The Dilemma of Islamic Rights Schemes' (2000) 15 *Journal of Law and Religion* 185, 192.

¹⁴⁰ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law* (Kluwer Law International 2000) 32. Ansari also explains that the rights of God impact hugely on the interactions between human beings. They force correlative obligations upon people as all rights that have related requirements that guarantee specific key rights are preserved both in private individual dealings and in dealings between people and the state. See, for further discussion, Ansari and Salman (n 138) 96.

¹⁴¹ *ibid* 32.

¹⁴² *ibid* 23.

the claims of the affected party.¹⁴³ Ansari argues that these parties may claim or request them, relinquish them, reconcile them or accept a compromise. These rights are unlike the rights of God, which cannot under any circumstance be reconciled, compromised or relinquished.¹⁴⁴ Moosa's view is as follows:

“The significance of this rights scheme in traditional Muslim jurisprudence is that civil and devotional obligations are accorded the same moral status. Muslim law deems certain collective civil rights and specific individual religious rights as inviolable and disallows their forfeiture, especially when they involve the right or claim of another person. There are however, some types of rights that can be transferred while others can be forfeited by the consent of the owner of such rights. The relationship between rights and duties is an interpersonal and correlative one. In the enforcement of right jurists understand that one party has a claim to have a ‘right’ (*haqq*) and another ‘obligation’ (*wajib*) to honour a right: every right thus has a reciprocal obligation.”¹⁴⁵

In light of the above discussion, it can be argued that rights in Islam originate from a religious–moral framework where the omission of a duty or right is subject to sanction and the endorsing of a right-duty becomes virtuous.¹⁴⁶ In the modern day, many Muslim scholars are of the view that Sharia comprises human rights principles as now claimed by the West.¹⁴⁷ Abdul Azeez and Baderin are of the view that “this is mainly because the sources and methods of Islamic Law contain common principles of good governance and human welfare that validate the ideals of modern international human rights law”. They contend that “respect for justice, the protection of human life and dignity, as well as the equality of all human beings are central principles that are inherent in Sharia”.¹⁴⁸ As a result, there is a growing

¹⁴³ The term *haqq* is mentioned in the works of both classical and contemporary Muslim jurists. Since the advent of the Islamic faith, the term *haqq* has been utilised juristically. The 16th century Hanafi legal scholar Ibn Nujaym seems to be the first to define the term. He characterised it as *mayastahiqquhu al-insan*, meaning ‘that to which a man is entitled’. Yusuf Musa characterised *haqq* as ‘established benefit’ (*maslahah thabitah*) ‘surrendered by the law-makers to the individual or to a group or to both’. Shalabi characterises the term as ‘each benefit (*kull maslahah*) compatible with the *shari’ah*’.

¹⁴⁴ Ansari and Salman (n 138) 95-96.

¹⁴⁵ Moosa (n 139) 6.

¹⁴⁶ *ibid.* 6.

¹⁴⁷ This section is not intended to counter the argument made by some scholars who assert the idea that human rights are a modern achievement by ‘Western’ countries and that the term human rights is absent from religious beliefs. Furthermore, the issue of the incompatibility of Islam with human rights is outside the scope of this research because it is focused on the rights of labourers which are fully recognised under Sharia.

¹⁴⁸ Yusuf Abdul Azeez, ‘Perspective from Shariah on Legal and Human Rights’ (2012) 2 *Global Journal Al Thaqafah* 17; Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2003).

engagement with the discourse on human rights among civil society and human rights groups in most parts of the Muslim world.¹⁴⁹

Following the above clarification of rights, the next section investigates the degree to which the Islamic traditions promote and establish Islamic principles of labour rights.

1.4.1 Islamic perspective on labour rights

Earning a living and performing work with one's own hands is considered an act of worship in Islam.¹⁵⁰ Islam gives a considerable amount of attention to work and the requirement for people to work and gain an income in order to sustain themselves and their dependants and to become independent in order to maintain his/her dignity in the eyes of others and in his or her community/society.¹⁵¹ This is confirmed by numerous verses of the Qur'an and the Sunnah that praise the value of work and earning a living.¹⁵² The Qur'an clearly expresses that God created the daytime for earning a living (through work)¹⁵³ and made trade permissible.¹⁵⁴ The Prophet Mohammed himself illustrated on numerous occasions the dignity of labour, both in action and in words. In one tradition it is stated that he said: "Nobody has ever eaten a better meal than that which one has earned by working with one's own hands."¹⁵⁵ The Prophet Mohammed is also reported to have said: "One would rather take a rope (and cut wood and carry it than to ask others)."¹⁵⁶ The dignity gained through work is further signified in another tradition from the Prophet, who said, "earning a livelihood through something as unskilled as chopping and selling firewood is still preferable to begging".¹⁵⁷ Therefore, the Islamic tradition considers work as obligatory in order for individuals to earn money and to have a decent standard of living to attain a respected life.¹⁵⁸ The Qur'an and Sunnah also emphasise 'adl', or justice. This is one of the main principles of Islam, and the Qur'an greatly

¹⁴⁹ Abdullah Saeed, 'Muslim Debates on Human Rights and Freedom of Religion' in Thomas WD Davis and Brian Galligan (eds), *Human Rights in Asia* (1st edn, Edward Elgar 2011) 26.

¹⁵⁰ Sherine Hafez, *An Islam of Her Own: Reconsidering Religion and Secularism in Women's Islamic Movements* (New York University Press 2011) 129.

¹⁵¹ Shukri Ahmad and Musa Yusuf Owoyemi, 'The Concept of Islamic Work Ethic' (2012) 3 *International Journal of Business and Social Science* 117.

¹⁵² Baderin (n 148) 177.

¹⁵³ Qur'an 78:11 (see Muhammed Taqî-ud-Dîn Al-Hilâlî and Muhammed Hushin Khân M (trs), *Translation of the Meaning of Noble Qur'an in the English Language* (King Fahad Complex 1427 AH).

¹⁵⁴ Qur'an 2:275.

¹⁵⁵ Reported by al-Bukhâri, *Hadith* No. 2072. (see Muhammad Muhsin Khan (trs), *The Translation of the Meaning of Sahîh Al-Bukhâri* (Darussalam 1997).

¹⁵⁶ *ibid* *Hadith* No. 2075.

¹⁵⁷ *ibid* *Hadith* No. 2074.

¹⁵⁸ Jihad Mohammad and Farzana Quoquab, *Inculcating Ethics and Citizenship Behaviour in Islamic Financial Institutions* (Partridge Singapore 2016) (no page number found).

encourages people to be fair at all times without exception. According to the Islamic tradition, justice needs to apply in all aspect of life, political, legal, economic, social or cultural.¹⁵⁹

The Islamic tradition uses the principle of *adl* when creating obligations for various groups of individuals. Adherents of the faith are urged to accept and fulfil the rights of people, for example employers are under an obligation to protect their employees. Dismissing their rights (i.e. by being neglectful of one's commitments) is equivalent to '*zulm*' (injustice), which is strictly forbidden. In cases where this type of *zulm* takes place, the responsibility for arranging the appropriate recompense for the aggrieved party falls to the state and community '*umma*'.¹⁶⁰ Consequently, Islam is against injustice and discrimination in the workplace and this is supported by the statement of the Prophet Mohammad that: "when you hire, compensate the workers and treat them fairly".¹⁶¹ Thus, from the perspective of the Qur'an and the Sunnah, everyone should be treated fairly in their place of work irrespective of their nation, colour, race, origin, age, gender, social class or religion. Employers should implement rules and regulations that foster fairness and justice.¹⁶²

It is often argued that a contractual relationship between an employee and his employer is seen as a coming together of two separate parties based on terms of equality set out in the employment contract.¹⁶³ In fact, Islamic '*fiqh*'¹⁶⁴ creates general principles for forming '*aqd*' (a contract). The Islamic legal code sets out norms and limitations that control the role of both parties in the contract. All arrangements, whether oral or written, must be clear and transparent, ensuring they are just and entirely legal. The Islamic faith examines the completion of the contract according to the requirements of the offer (*ijab*) and acknowledgement (*qabul*).¹⁶⁵ In relation to the workplace, workers have the responsibility of being aware of their obligations and should be informed of their rights related to annual leave, remuneration and other contractual clauses. Allah says in the Qur'an: "O you who

¹⁵⁹ Khadija Alarkoubi, 'The Islamic Faith: Implications for Business Management' in Judi Neal (eds), *Handbook of Faith and Spirituality in the Workplace* (Springer New York 2013) 112.

¹⁶⁰ M Ramzan Akhtar, 'An Islamic Framework for Employer-Employee Relationships' (1992) 9(2) *The American Journal of Islamic Social Sciences* 203, 208.

¹⁶¹ Masudul Alam Choudhury, *God-Conscious Organization and the Islamic Social Economy* (Taylor and Francis 2016) 78.

¹⁶² Alarkoubi (n 159) 112.

¹⁶³ Akhtar (n 160) 206.

¹⁶⁴ The term *fiqh* "literally means knowledge or understanding". See Mohammad Kamali, '*Fiqh and Adaptation to Social Reality*' (1996) 1 *The Muslim World* 62, 68. In the context of Islamic jurisprudence, *fiqh* refers to "the product of human understanding that has sought to interpret and apply the Divine Law". See Niaz A Shah, *Women, The Koran And International Human Rights Law* (Martinus Nijhoff 2006) 237.

¹⁶⁵ Christopher G Weeramantry, *Islamic Jurisprudence* (St. Martin's Press 1988) 65.

believe! Fulfil (your) obligations”¹⁶⁶ and: “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent.”¹⁶⁷ This implies that any terms and conditions stipulated in a contract that contradict Sharia principles are not valid. It is the obligation of both employer and employee to meet their requirements to the best of their abilities.¹⁶⁸ It is often stated that the concept of fairness in contractual dealings spans the whole process from beginning to end, without any form of injustice being permitted.

In fact, Islamic scholars have discussed employment contracts and demonstrated their general rules and fundamental principles, leaving the details to be determined by the ruler in accordance with the interests of society.¹⁶⁹ The Prophet Muhammad set out a general law for forming a contract, declaring: “Muslims shall be bound by the conditions which they make.”¹⁷⁰ The employer and the worker, and even the servant and the master, are viewed as two contracting parties, and are bound by the terms set out in the contract. The Prophet Muhammad said, “(Allah says) I am opponent of three on the Day of Resurrection, and if I am someone’s opponent I will defeat him: A man who makes promises in My Name, then proves treacherous; a man who sells a free man and consumes his price; and a man who hires a worker, makes use of him, then does not give him his wages.”¹⁷¹

With regard to workers’ wages, the Sunnah demonstrates that Islam mentions both the minimum and the ideal/just wage, but clearly describes the minimum wage so a worker can fulfil his fundamental needs. The Prophet Muhammad explains that those working under you are like your brothers, “so whoever has a brother under his command, should feed him of that which he eats and dress him of that which he wears”.¹⁷² Furthermore, Islamic traditions ask that a worker is paid a fair wage, on time. The Prophet Muhammad stated: “Give the worker his wages before his sweat dries.”¹⁷³ Moreover, the Prophet said, “[S]o, if one has one’s brethren under one’s control, one should feed them with the like what one eats and clothe

¹⁶⁶ Qur’an 5:1.

¹⁶⁷ Qur’an 4:29.

¹⁶⁸ Raja Raziff and others, ‘The Concept of Rights and Protection to Employees: A Comparative Overview’ (2013) 4 International Journal of Islamic Thought 60.

¹⁶⁹ Zaidan Abdul, *haqi aleamal waleimal fi al’islam* (rights of labour in Islam, Arabic edn, Wahba Library 1978) 101.

¹⁷⁰ Reported by At-Tirmidhi, *Hadith* No. 1325 Abu (see Khaliyl (trs), *English Translation of Jāmi’ At-Tirmidhi* (Darussalam 2007).

¹⁷¹ Reported by At-Tirmidhi, *Hadith* No. 2442.

¹⁷² *ibid* *Hadith* No. 30.

¹⁷³ Reported by Sunan Ibn Majah, *Hadith* No. 2443 (see Nasiruddin Al-Khattab (trs), *English Translation of Sunan ibn Mājah* (Darussalam 2007).

them with the like of what one wears. You should not overburden them with what they cannot bear, and if you do so, help them (in their hard job).”¹⁷⁴ The Prophet Mohammad reiterated this in his farewell sermon: “See that ye feed them with such food as ye eat yourselves, and clothe them with the stuff that ye wear.”¹⁷⁵ This suggests that the Islamic tradition pays more attention to the necessities and the minimal quality of living conditions of the labourer and imposes an obligation on employers to pay fair and just wages for work.¹⁷⁶

Islamic teaching also places a great emphasis on brotherhood and prohibits any form of discrimination against others.¹⁷⁷ In general terms, the foundation of Islam is equality between people in spite of differences in gender, colour, speech, race or origin.¹⁷⁸ The Qur’an clarifies: “O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honourable of you with Allâh is that (believer) who has At-Taqwâ (i.e. he is one of the Muttaqûn (the pious. See V.2:2)). Verily, Allâh is All-Knowing, All-Aware.”¹⁷⁹

The Prophet Mohammad said: “O people! Verily your Lord is one and your father (Adam) is one. An Arab is no better than a non-Arab, and a non-Arab is no better than Arab; a white man is not better over a black man nor a black man over a white man - except in piety.”¹⁸⁰

This prohibition can be extended to the relationship between employer and employee, and does not allow the employer to hold a superior position to the employee. They are equals with equal rights.¹⁸¹ In Islam, the right to respect the honour and dignity of labour is considered sacred and the state has a responsibility to safeguard the honour and dignity of its people. This emphasises that the state does not have the authority to pass any directive or involve itself in activity which brings humiliation to any individual.¹⁸² The Prophet Mohammed, in his final pilgrimage, during his well-known farewell speech, stated: “O people! Surely your

¹⁷⁴ Reported by al-Bukhâri, *Hadith* No. 2545.

¹⁷⁵ Cited in Eric Schroeder, *Muhammad’s People: An Anthology of Muslim Civilization* (Dover Publications 2002) 135.

¹⁷⁶ Iftikhar Ahmad, ‘Religion and Labor: Perspective in Islam’ (2011) 14 *The Journal of Labor and Society* 598.

¹⁷⁷ Weeramantry (n 165) 64-65.

¹⁷⁸ Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam* (Islamic Texts Society 2002) 85.

¹⁷⁹ Qur’an 49:13.

¹⁸⁰ Musand Ahmad bin Hanbal, *Hadith* No. 22978, (cited in Abu Elias, ‘The Prophet’s Farewell Sermon: Your Lord Is One and Your Father Is One’ (*Daily Hadith Online*, 2011) <<http://dailyhadith.abuaminaelias.com/2011/12/30/farewell-sermon-your-lord-is-one-your-father-is-one-your-lives-are-sacred/>> accessed 19 May 2016.

¹⁸¹ Weeramantry (n 165) 64-65.

¹⁸² Tahir Mahmood, *Human Rights in Islamic Law* (Genuine 1993) 87.

blood, your property and your honour are as sacred and inviolable as the inviolability of this day of yours, this month of yours and this very town of yours. Surely you will soon meet your Lord and you will be held answerable for your actions.”¹⁸³

In this regard, the Islamic tradition prohibits forced labour and obliges employers to take care of their workforce, not to overburden them, to provide them with a justifiable amount of work and offer them satisfactory working circumstances.¹⁸⁴ In this context, the Prophet Mohammad is reported to have said: “Do not ask them to do things beyond their capacity and if you do so, then help them.”¹⁸⁵ The Qur’an made a universal regulation according to which no one should be overburdened their capacity: “Allâh burdens not a person beyond his scope.”¹⁸⁶

It can thus be argued that the use of Islamic perspectives on labour rights suggests that justice and equality are the main principles for enhancing human dignity and welfare of employees and every individual in the state, regardless of class, religion, wealth, gender or race, possesses respect, which cannot be infringed by anyone, even the state itself.¹⁸⁷

Furthermore, Islamic tradition lays great emphasis on work ethics which are rooted in both the Qur’an and Sunnah.¹⁸⁸ Both these sources consider ethics as the central objective of Islam.¹⁸⁹ Ahmad and Owoyemi are of the opinion that work ethics in Islam refers to “a set of values or system of beliefs derived from the Qur’an and Sunnah concerning work and hard work”.¹⁹⁰ The concept of Islamic work ethics covers all social, moral and economic dimensions. Islam teaches humbleness and respect towards others, which should be reflected in all aspects of life, including employment relationships.¹⁹¹

Ethics in the workplace from an Islamic perspective indicate that the relationship between employees and employers should be based on the honesty, sincerity, integrity and trust that

¹⁸³ Musand Ahmad, *Hadith* No. 22978.

¹⁸⁴ Radwa S Elsaman, ‘Corporate Social Responsibility in Islamic Law: Labor and Employment’ (2011) 2 *Yonsei Law Journal* 83.

¹⁸⁵ Reported by Bukhari, *Hadith* No. 30.

¹⁸⁶ Qur’an 2:286.

¹⁸⁷ Mahmood (n 182) 87.

¹⁸⁸ Abbass F Alkhafaji, *Competitive Global Management* (St. Lucie Press 1995) 207.

¹⁸⁹ Mohammad and Quoquab (n 158) (page not available from original source).

¹⁹⁰ Shukri Ahmad and Musa Yusuf Owoyemi, ‘The Concept of Islamic Work Ethic’ (2012) 3 *International Journal of Business and Social Science* 118.

¹⁹¹ Muhammad Umar Bin Ajmal and Sana Irfan, ‘Understanding the Moderating Role of Islamic Work Ethics Between Job Stress and Work Outcomes’ (2014) 16 *IOSR Journal of Business and Management* 64.

reflects their brotherhood in the workplace.¹⁹² Mohammad and Quoquab identify some characteristics of Islamic work ethics, which include hard work, tolerance and responsibility.¹⁹³ Therefore, they argue, practising Islamic work ethics in the workplace improves employees' honesty, trustworthiness and creativity.¹⁹⁴

Furthermore, it is argued that work ethics stress collaboration and consultation in the workplace as a means of overcoming problems and enhancing social relationships at work, in order to meet the needs of people, individually or collectively.¹⁹⁵ Interestingly, Maudoodi mentions that Islam provides people with the right to freedom of association and collective bargaining.¹⁹⁶ This right, however, is subject to certain general guidelines. It should be used for the spreading of good deeds and uprightness and should never be used for propagating wickedness or disobedience.¹⁹⁷ The Qur'an states: "You (true believers in Islâmic Monotheism, and real followers of Prophet Muhammad and his Sunnah) are the best of peoples ever raised up for mankind; you enjoin *Al-Ma'rûf* (i.e. Islâmic Monotheism and all that Islâm has ordained) and forbid *Al-Munkar* (polytheism, disbelief and all that Islâm has forbidden), and you believe in Allâh."¹⁹⁸

In the same vein, the Prophet Mohammed said, "[W]hoever among you sees an evil action, let him change it with his hand (by taking action); if he cannot, then with his tongue (by speaking out); and if he cannot, then with his heart (by hating it and feeling it is wrong), and that is the weakest of faith."¹⁹⁹ It could be said that Islamic tradition grants the right to stand against injustice, as it is a way to rectify inequality, but this right has certain limits too, and never supports those who cross these limits.²⁰⁰ Ahmad argues that Muslim scholars accept the main objective of Islamic tradition as basically "promoting benefit" and "relieving hardship",

¹⁹² Salih Yesil, Zumrut Hatice Sekkeli and Ozkan Dogan, 'An Investigation into the Implications of Islamic Work Ethic (IWE) in the Workplace' (2012) 4 *Journal of Economics and Behavioral Studies* 613.

¹⁹³ Mohammad and Quoquab (n 158) (page not available from original source). See also further discussion Abbas Ali, *Handbook of Research on Islamic Business Ethics* (Edward Elgar 2015).

¹⁹⁴ *ibid.*

¹⁹⁵ Mohammad and Quoquab (n 158) (page not available from original source).

¹⁹⁶ Syed Abul A'la Maududi, 'Human Rights in Islam' (2016) <http://www.muslim-library.com/dl/books/English_Human_Rights_in_Islam.pdf> accessed 15 September 2016.

¹⁹⁷ Syed Abul 'Ala Maudoodi, *Human Rights in Islam* (Islamic Foundation 1976) 29.

¹⁹⁸ Qur'an 3:110.

¹⁹⁹ Reported by Muslim, *Hadith* No. 177. See Nasiruddin Al-Khattab (trs), *English Translation of Sahih Muslim* (Darussalam 2007).

²⁰⁰ A good example of this limitation is found in the Universal Islamic Declaration of Human Rights (UIDHR), which states that "the right to free association in the article XIV is limited to the right to establish institutions and agencies meant to enjoin what is right (*ma'rûf*) and to prevent what is wrong (*munkar*)". See Islamic Council, 'Universal Islamic Declaration of Human Rights' (1981) <<http://www.ntpi.org/html/uidhr.html>> accessed 13 July 2016. For more discussion, see Chapter 3.

but the importance of the first is far more than the latter, and the benefit of society should always be given more value than the benefit of an individual or group.²⁰¹

Conclusion

In this chapter, three main theoretical perspectives are used to understand the labour rights of TFWs in the SCS. The two international migration theories (the dual labour market theory and the network theory) help explain the various aspects of labour migration. The dual labour market theory explains the segmentation of the Saudi labour market, where nationals can be found in the primary (state) sector and foreign worker in the secondary (private) sector. Most TFWs in the Saudi secondary (private) sector are recruited and employed in jobs known as ‘3D jobs’ – difficult, dangerous and dirty. Several types of 3D jobs, including in the construction sector, are generally rejected by native workers.²⁰² As a result, the employment of TFWs is mainly in the SLM and is often associated with human rights issues concerning unequal employment opportunities, unequal treatment, work-related hazards and other discriminatory conduct.

Social network theory is useful in identifying informal recruitment procedures on the basis of which TFWs secure jobs in KSA. The theory helps explain the recruitment process and how job searches in the Saudi labour market are facilitated by relatives or friendship networks along with recruitment agents and sub-agents.

The RBA is used to understand the challenges faced by the TFWs in the SCS or the secondary labour market. TFWs in KSA are not offered adequate protection because of two factors. Firstly, inadequate and undeveloped employment regulations (e.g. the sponsorship (*kafala*) system), and secondly, abuse, discriminatory behaviour by employers and other government policies.²⁰³ Therefore, the use of the RBA and its key principles highlights the human rights entitlements of TFWs.

The RBA forms the basis of the critique of the existing legal framework as a tool for the protection and enforcement of TFW labour rights. Finally, Saudi Arabia’s constitution states that all laws have to be in accordance with the Qur’an and Sunnah, and therefore Islamic perspectives on labour rights are used to analyse the rights of TFWs in KSA. In this regard,

²⁰¹ Ahmad (n 176) 606.

²⁰² Andrew L Stoler, Jim Redden and Lee Ann Jackson, *Trade and Poverty Reduction in the Asia-Pacific Region* (CUP 2009) 556.

²⁰³ These issues are examined in more detail in the coming chapters.

emphasis is laid on the concepts of dignity of labour, equality, respect, and just and fair treatment of employees in the Islamic tradition.²⁰⁴ To achieve the study objectives, these themes form the theoretical framework of this research, which are linked in the succeeding chapters and the empirical findings from the fieldwork.

²⁰⁴ Elena Platonova, 'Corporate Social Responsibility from an Islamic Moral Economy Perspective' (2013) 2 *Afro Eurasian Studies* 277.

Chapter 2: The Protection of Migrant Workers' Rights in International and Regional Law

Introduction

This chapter examines selected international human rights instruments concerning labour migration. The development of the protection of migrant workers in contemporary international law consists of two complementary and mutually reinforcing elements. The first provides protection through the ILO Conventions and Recommendations, and the second provides protection using the international human rights framework. There are a number of international human rights conventions that have been adopted to promote and protect the human rights of individuals. However, this chapter focuses on the ICMW¹ and the ILO Migration for Employment (Revised) Convention, 1949 (No. 97),² the Migrant Workers' (Supplementary Provisions) Convention, 1975 (No. 143)³ and two ILO recommendations for migrant workers. The chapter also examines protections available to family members of migrant workers. In addition, this chapter attempts to highlight the role of UNHCR, IOM and other non-governmental organisations in promoting the RBA to labour migration and protecting labour rights.

The chapter also examines Islamic human rights instruments such as the Universal Islamic Declaration of Human Rights (hereinafter referred to as UIDHR),⁴ the Cairo Declaration of Human Rights in Islam (hereinafter CDHR)⁵ and the 2004 Arab Charter on Human Rights (hereinafter referred to as the ACHR)⁶ adopted by the two regional organisations, the Organization of the Islamic Cooperation and the League of Arab States. The objective is to

¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS.

² Convention concerning Migration for Employment (Revised 1949) (ILO No. 97) (adopted 1 July 1949, entered into force 22 January 1952).

³ Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143) (adopted 24 June 1975, entered into force 9 December 1978).

⁴ Universal Islamic Declaration of Human Rights, adopted by *the Islamic Council of Europe* on 19 September 1981/21 *Dhul Qaidah* 1401.

⁵ Cairo Declaration on Human Rights in Islam, 5 August 1990, U.N. GAOR, World Conf. on Hum. Rts. 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation]. The full text of the Declaration is available at <<http://hrlibrary.umn.edu/instree/cairodeclaration.html>> accessed 22 November 2016.

⁶ Arab Charter on Human Rights, May 22, 2004, reprinted in 12 International Human Rights Reports. Rep. 893 (2005), *entered into force* March 15, 2008.

illustrate how international and regional human rights conventions and standards can guide states' policies and regulations to achieve better practices regarding the protection of migrant workers.

2.1. Migrant workers in international and regional law: definitional issues

There is no uniform definition or classification of a clear migration phenomenon as migration is attributable to the complex and multidimensional movement of the population.⁷ Economic growth and globalisation has facilitated and increased labour migration.⁸ The Organization of Economic and Cooperation Development (hereinafter OECD) states that “the human being is born free and mobile and in every culture and civilization examples of migration can be found and so, migration is not something new and should not be considered unnatural”,⁹ and emphasises that “migration is a normal part of people’s individual and collective lives”.¹⁰

This study focuses on the economic migrant worker. The ILO’s Migration for Employment Convention (No. 97) defines the term migrant for employment as “a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment”.¹¹

The scope of the Convention excludes some types of employment, such as “frontier workers, the short-term entry of members of the liberal professions and artistes, and seafarers”.¹² Furthermore, the Migrant Workers (Supplementary Provisions) Convention No. 143 provides the same definition of the term ‘migrant worker’ and excludes two further categories of workers, “persons coming specifically for purposes of training or education ... and employees admitted temporarily to a country at the request of their employer to undertake specific duties or assignments for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments”.¹³

⁷ Le Thi Kim Anh and others, ‘An Analysis of Interprovincial Migration in Vietnam From 1989 to 2009’ (2012) 5 *Global Health Action* 2.

⁸ ILO, ‘International Labour Standards on Migrant Workers’ (2016) <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang--en/index.htm>> accessed 6 August 2016.

⁹ Pierre Laroque, *The Future of Migration* (OECD, 1990) cited in Guofu Liu, *The Right to Leave and Return and Chinese Migration Law* (Martinus Nijhoff 2007) 27.

¹⁰ *ibid.*

¹¹ ILO Convention (No. 97) (n 2) art 11(1).

¹² *ibid* art 11(2).

¹³ ILO Convention (No. 143) (n 3) art 11(2).

The UN, in Article 2(1) of the ICMW, defines ‘migrant worker’ as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national”.¹⁴ The ICMW also excludes some types of employment such as “seafarers, students and trainees, refugees and stateless persons, investors, persons sent or employed by a state or on its behalf outside its territory who participate in development programmes and other cooperation programmes, persons sent or employed by international organizations and agencies or persons sent or employed by a state outside its territory to perform official functions”.¹⁵

At the regional level, the Arab Agreement 1975 No (4) issued by the Arab Labour Organization on the Movement of Arab Manpower (revised) in Article 1(1) defines the term migrant worker as ‘*Eamaluh Wafida*’, which refers to an Arab worker who moves to work from one Arab country to another Arab country, or from a foreign “non-Arab” country. There is a special reference to Palestinian workers who work and move between the state parties, which grants them privileges to enjoy the same rights as the citizens of the country. The Agreement also excludes some types of employment in Article 1(3), including frontier workers, seafarers and temporary employment such as the liberal professions and artists.

The International Organization for Migration (IOM) defines an economic migrant as “a person leaving his or her habitual place of residence to settle outside his or her country of origin in order to improve his or her quality of life ... It may equally be applied to persons leaving their country of origin for the purpose of employment.”¹⁶

2.2. The protection of migrant workers’ rights in international law

2.2.1. The United Nations’ human rights system

The international community has been developing human rights law since 1945.¹⁷ The UN Charter¹⁸ might be a pertinent foundation for analysing “the primary source of many of the

¹⁴ ICMW (n 1) art 2(1).

¹⁵ *ibid* art 3.

¹⁶ International Organization for Migration (IOM), *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy* (IOM 2008) 493. See also the UN Recommendations on Statistics of International Migration, which offer different definitions of long-term and short-term migration. See United Nations Statistics Division, ‘Demographic and Social Statistics’ (*UNSTATS*, 2016) <<http://unstats.un.org/unsd/demographic/sconcerns/migration/migrmethods.htm>> accessed 4 May 2016.

¹⁷ Heikki S Mattila, ‘Protection of Migrants’ Human Rights: Principles and Practice’ (2001) 38 *International Migration* 55.

¹⁸ Charter of the United Nations (adopted 26 June 1945, *entered into force* 24 October 1945) 1 UNTS XVI.

most fundamental norms of contemporary international law”.¹⁹ The significant provisions are Articles 55 and 56 which, in part, repeat Article 1 in referring explicitly to the commitment to safeguard human rights. These provisions oblige the UN to promote the “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”.²⁰ Furthermore, one should note Article 1, which declares that one of the foremost principles of the UN is the “promoting and encouraging of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.²¹ Therefore, international human rights law is constructed on the general principle that every individual is inherently entitled, by virtue of being human, to claim their human rights.²²

The foundational UN document on human rights, adopted in 1948 by the UN General Assembly, is the Universal Declaration of Human Rights (hereinafter referred to as UDHR).²³ Even though the UDHR cannot be legally enforced, it is widely acknowledged to be the cornerstone of the formulation of human rights as a universal notion, and many of its principles are deemed customary law.²⁴

International human rights law frequently calls for the equal treatment of nationals and non-nationals. The UDHR proclaims that “all human beings are born free and equal in dignity and rights”.²⁵ Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.²⁶ This provision is clearly applicable to all, including non-nationals.²⁷ Fornalé argues that terms such as “everyone has the right to”, “all persons” and “no one shall be” are important marks of a universal attitude.²⁸ Melton states that “the power of international human rights law lies in large part in its universality. The rights recognised in such instruments flow from the

¹⁹ Richard B Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 41.

²⁰ UN Charter (n 18) art 55(c).

²¹ Lillich (n 19) 41.

²² Kate Parlett, *The Individual in the International Legal System* (CUP 2011) 278.

²³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res. 217 A (III).

²⁴ Elisa Fornale, *The Protection Of Human Rights Of Irregular Migrants* (Peter Lang 2012) 54.

²⁵ UDHR (n 23) art 1.

²⁶ *ibid* art 2.

²⁷ David Weissbrodt, *The Human Rights of Non-Citizens* (OUP 2008) 35.

²⁸ Fornalé (n 24) 53. Art 1 refers to ‘All human beings’; arts 4, 5, 9, 11, 12, 15, 17 and 20 refer to ‘No one’; arts 2, 3, 6, 8, 10-15 and 17-29 refer to ‘Everyone’; and art 7 refers to ‘All’.

respect owed to all humankind.”²⁹ The fundamental individual rights and freedoms are contained within the UDHR and in key international human rights conventions and the accompanying optional protocols.³⁰

2.2.2. Human rights and the rights of non-citizens

The application of international human rights instruments to non-citizens has been authorised by the General Assembly, which states that “the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live”.³¹ In December 2013, a resolution was adopted reaffirming this point. The General Assembly “calls upon States to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status”,³² declaring that foreign workers have human rights which need to be promoted and protected by the principles in the general framework.³³

Weissbrodt is of the view that core human rights conventions such as the International Covenant on Civil and Political Rights (hereinafter refer as ICCPR)³⁴ apply to both citizens and non-citizens.³⁵ They use inclusive terms such as “everyone”, “all persons” and “no one”, as well as incorporating non-discrimination provisions calling for every state party to respect and guarantee the rights acknowledged therein to every person within its jurisdiction, applying no distinction of any kind with regard to religion, race, language, colour, gender, political affiliation or opinion, national or social origin, property, birth or any other status.³⁶

Furthermore, the Human Rights Committee, the body in charge of monitoring the application of the ICCPR, in General Comment 15/27 declares:

“In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the

²⁹ Gary B Melton, ‘Building Humane Communities Respectful of Children: The Significance of the Convention on the Rights of the Child’ (2005) 60 *American Psychologist* 919.

³⁰ OHCHR, ‘The Core International Human Rights Treaties’ (2014) <http://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf> accessed 14 November 2015.

³¹ UNGA, ‘Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live’ UNGA Res 40/144 (adopted 13 December 1985).

³² UNGA, ‘Protection of Migrants’ UNGA Res 68/179 (adopted 28 January 2014).

³³ *ibid.*

³⁴ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, *entered into force* 23 March 1976) 999 UNTS 171.

³⁵ David Weissbrodt and Michael Divine, ‘international human rights of migrants’ in Brian Opeskin and others (eds), *foundations of international migration law* (Cambridge University Press 2012) 157.

³⁶ ICCPR (n 34) *ibid* art 26.

general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in Article 2 thereof. This guarantee applies to aliens and citizens alike.³⁷

The Human Rights Committee³⁸ expressly confirms that all rights from the ICCPR should be given without distinction between nationals and non-nationals.³⁹ There are two exclusions: political rights, including the right to vote, are available to nationals only; and total freedom of mobility,⁴⁰ such as the right to residence, is not available to irregular migrants.⁴¹

Fitzpatrick categorises the rights in the ICCPR relevant to migrants:⁴²

- i. Rights assured equally to citizens and migrants, for instance the right to life (Article 6) or equality before the law and a fair trial (Article 14) and the prevention of any activism based on national, ethnic or religious hatred that promotes discrimination, hostility or violence (Art. 20 (2) ICCPR)
- ii. Arbitrary state measures are banned by some clauses, which can otherwise permit a distinction between citizens and migrants; for example, immigration detention does not come under the prevention on arbitrary arrest and detention
- iii. Biased treatment of migrants may be justified on the basis of national security or public order, if the state objective is legitimate and the action undertaken is deemed fair; for example, freedom of expression (Article 18)
- iv. Several rights are designed in order to safeguard all migrants, for example particular regulations regarding dismissal (Article 13), or the right to liberty of movement within a state's territory (Article 12(1)).⁴³

³⁷ OHCHR, 'CCPR General Comment No. 15: The Position of Aliens under the Covenant' (adopted at the twenty-seventh session, 11 April 1986) UN Doc HRI/GEN/1/Rev.6 at 140 (2003). For more discussion, see Richard Plender, *Basic Documents on International Migration Law* (Martinus Nijhoff 2007) 23.

³⁸ The human rights treaty bodies are committees of independent experts that monitor the implementation of the core of international human rights treaties: ICCPR, CESCR, CERD, CEDAW, CAT, ICMW, CRC, CED and OPCAT. In addition, the committees have published several decisions and resolutions interpreting specific human rights provisions. For more information, see OHCHR, 'Human Rights Treaty Bodies' (2015) <<http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>> accessed 18 November 2015.

³⁹ OHCHR (n 36).

⁴⁰ ICCPR (n 34) art 12.

⁴¹ Fornalé (n 24) 59.

⁴² Joan Fitzpatrick, 'The Human Rights of the Migrant' in Thomas Alexander Aleinikoff and Vincent Chetail (eds), *Migration And International Legal Norms* (TMC Asser 2003) cited in François Crépeau and Delphine Nakache, 'Controlling Irregular Migration In Canada Reconciling Security Concerns With Human Rights Protection' (2006) 12 *Immigration and Refugee Policy* 3, 8.

⁴³ *ibid.*

The International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICESCR)⁴⁴ obliges states to safeguard migrant workers' rights as human rights. Therefore, states have a legal responsibility to support individuals whose rights within the ICESCR are violated. Gibney claims that "the primary responsibility for protecting human rights lies with those states where these individuals who are being denied human rights protection live".⁴⁵ This means that where migrant workers are not receiving sufficient protection from violations by employers, it would be deemed a human rights infringement by the member state, as governments are obliged to safeguard all those residing in their territory, regardless of their status being permanent or temporary.⁴⁶

The rights of non-nationals in the ICESCR seem, to some extent, minimal compared to the rights enjoyed under the ICCPR. Even though the ICESCR is also expressed in comprehensive terms, there are disparities in views about whether or not the non-discrimination clauses in Article 2(2) can apply to non-citizens.⁴⁷ The ICESCR protects economic and social rights which include employment rights, the right to social security, family reunification and trade union rights. That being said, the rights enshrined in the ICESCR are the same as some of the rights of migrant workers in the host country.⁴⁸

In this context, Gallagher claims that in two important components, the ICESCR is weaker on non-national rights compared to the ICCPR. There are no particular details regarding the applicability of the rights of all persons living within the territory of the state party. Furthermore, in Article 2(3), developing states are expressly allowed to decide the level to which they will ensure economic rights for non-citizens.⁴⁹

This kind of exclusion is applicable only to economic rights, and not to civil and political rights. The gradual implementation of socio-economic rights may be discouraged by the absence of appropriate economic means, but this restriction can only exist for a limited period of time.⁵⁰ Tiburcio argues that even if resources are minimal, countries still have the

⁴⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁴⁵ Mark Gibney, *International Human Rights Law* (Rowman & Littlefield 2015) 5-6.

⁴⁶ *ibid.*

⁴⁷ For further discussion, see Kristina Touzenis and Ryszard Cholewinski, 'The Human Rights of Migrants - Editorial Introduction' (2009) 11(1) *IJMS: International Journal on Multicultural Societies* 1, 2.

⁴⁸ See ICESCR (n 44) arts 6, 7 and 8.

⁴⁹ For further discussion, see Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 137.

⁵⁰ Katharina Eisele, *The External Dimension of the EU'S Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill 2014) 171.

responsibility to offer sufficient measures to fully protect vulnerable individuals. There is a generic responsibility to respect and promote the human rights of all persons when they are within the jurisdiction of signatory states.⁵¹

Nevertheless, migration and non-nationals continue to be included by treaty bodies under several forbidden grounds of discrimination.⁵² The ICESCR applies to all individuals within the legal system of the state party, irrespective of citizenship and status.⁵³ The Special Rapporteur on the Rights of Non-Citizens has interpreted the Committee's General Comments on the right to health and the right to sufficient accommodation for non-nationals as encouraging.⁵⁴ This was affirmed in 2009 by the ICESCR Committee's General Comment No. 20 on Non-Discrimination:

“The Covenant rights apply to everyone including non-nationals such as... migrant workers ... regardless of legal status and documentation.”⁵⁵

Article 1(2) of the ICERD⁵⁶ declares that “this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”.⁵⁷ The UN Committee on the CERD has called for a narrow interpretation of this exclusion, asserting that “xenophobia against foreigners, mainly refugees, asylum-seekers and migrants forms one of the primary causes of modern-day racism”, together with the treatment of undocumented and displaced persons.⁵⁸ The Committee, in General Recommendation 30, includes migrants in the category of non-citizens and forbids discrimination. It goes on to define discrimination as follows: “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and

⁵¹ Carmen Tiburcio, *The Human Rights of Aliens Under International and Comparative Law* (Martinus Nijhoff 2001) 145-147.

⁵² Gallagher and David (n 48) 137-138.

⁵³ UN Economic and Social Council (ECOSOC), ‘Report of the United Nations High Commissioner for Human Rights’ (1 June 2010) E/2010/89.

⁵⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, ‘The Rights of Non-citizens: Preliminary Report of the Special Rapporteur, Mr. David Weissbrodt’ (6 June 2001) E/CN.4/Sub.2/2001/20, paras 60-61.

⁵⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009) E/C.12/GC/20, para 30.

⁵⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, *entered into force* 4 January 1969) 660 UNTS 195.

⁵⁷ *ibid* art 1(2).

⁵⁸ Mark Bell, *Racism and Equality in the European Union* (OUP 2008) 140.

purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.⁵⁹

Oberoi points out that differential treatment must not obstruct entitlement to other human rights. All human rights are assured to all migrants, irrespective of their immigration status, whether in countries of transit or their host country. However, it is often argued that discrimination towards migrants is more prevalent and, perhaps, legitimised in countries where it is not legislated or advised against in national laws and regulations. Such laws might exclude migrant workers from safeguarding measures under domestic labour law (as in KSA), or bar irregular migrant children from entry to school.⁶⁰

At the beginning of the 1970s, the UN began to focus attention on the well-being of migrant workers. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights asked Halima Warzazi⁶¹ to investigate unlawful and clandestine labour trafficking. The subsequent report encouraged the UN Economic and Social Council to conclude that international conventions and recommendations were not satisfactory in safeguarding specific rights of migrant workers.⁶²

The UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities has focused on the human rights of non-citizens, recommending the adoption of a draft declaration on “human rights of individuals who are not citizens of the country in which they live”.⁶³ In 1985, ECOSOC adopted a resolution identifying the necessity for additional efforts to improve conditions for migrant workers. Calling on states to develop and enhance welfare provisions for migrant workers, the resolution repeated the importance of the protection of migrant workers and their families. Alongside this, and with the increasing urgency of the situation of migrant workers and their families, the first United

⁵⁹ Committee on the Elimination of Racial Discrimination (CERD), ‘General Recommendation No. 30: Discrimination Against Non-Citizens’ (1 October 2004).

⁶⁰ Pia Oberoi, ‘Defending the Weakest: The Role of International Human Rights Mechanisms in Protecting the Economic, Social and Cultural Rights of Migrants’ (2009) 11 *International Journal on Multicultural Societies* 19, 23-24.

⁶¹ Halima Warzazi, former member of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (1970s).

⁶² See UNGA, ‘Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers’ Resolutions 35/198 of 15 December 1980, 36/160 of 16 December 1981, 37/170 of 17 December 1982, 38/86 of 16 December 1983, 39/102 of 14 December 1984, 40/130 of 13 December 1985, 41/151 of 4 December 1986, 42/140 of 7 December 1987, 43/146 of 8 December 1988 and 44/155 of 15 December 1989.

⁶³ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘International Provisions Protecting the Human Rights of Non-citizens, Baroness Elles’ (1980) E/CN.4/Sub.2/392/Rev.1 <http://hrlibrary.umn.edu/International%20Provisions%20Protecting%20the%20Human%20Rights%20of%20Non-citizens_Elles.pdf> accessed 21 November 2016.

Nations World Conference to Combat Racism and Racial Discrimination in 1978 was the first to propose drafting a convention, and in 1980 a working group began drawing it up.⁶⁴

There are other instruments which can, to some extent, be utilised to safeguard the rights of migrant workers.⁶⁵ However, the ICMW continues to be considered one of the most comprehensive sources of international legal rights for migrant workers, even though the ILO introduced labour standards specific to migrant workers before the ICMW. The ICMW does not provide an innovative list of rights, but instead provides a more exact interpretation of migrant workers' rights.⁶⁶

2.3. UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The ICMW came into force on 1 July 2003 with 46 signatories, including five from Arab countries, but none from the major labour-receiving countries such as KSA or other oil-rich Gulf states.⁶⁷ The ICMW is divided into nine parts which together comprise 93 articles.⁶⁸ Part I (Articles 1 to 6) provides definitions and outlines the scope. The convention is applicable to all migrant workers and their families and prohibits all discrimination based on “sex, colour, race, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”.⁶⁹ It covers sub-categories of migrant workers, such as “project-tied”, “self-employed” and “special employment” workers, and provides a universal definition of the term ‘migrant worker’.⁷⁰ Part II (Article 7) enshrines the non-discrimination principle. Part III (Articles 8 to 35) covers the basic rights enjoyed by all migrants and members of their families, some of which are

⁶⁴ Javaid Rehman, *International Human Rights Law* (Longman/Pearson 2010) 683.

⁶⁵ Maria Deanna P Santos, *Human Rights and Migrant Domestic Work* (Martinus Nijhoff 2005).

⁶⁶ Global Commission on International Migration, ‘Migration, Human Rights and the United Nations: An Investigation into the Law Ratification Record of the UN Migrant Workers Convention’ (Global Migration Perspectives No. 3, October 2004). See also David Weissbrodt, ‘The Protection of Non-citizens in International Human Rights Law’ in Ryszard Cholewinski and others (eds), *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press 2003) 226.

⁶⁷ There are only five states from the Arab League signed up: Egypt, Morocco, Libya, Algeria and Syria.

⁶⁸ For further information on the aspects underlying the adoption of the ICMW, see Roger Bohning, ‘The ILO and the New UN Convention on Migrant Workers: The Past and Future’ (1991) 25 *International Migration Review* 698.

⁶⁹ ICMW (n 1) art 1.

⁷⁰ See arts 2, 58 and 63. The Convention does not apply to people who are engaged or employed by international organizations, national governments, refugees or stateless workers, students, or seafarers and workers on an offshore installation. International law identifies ‘migrant worker’ as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. See OHCHR, ‘Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families - Frequently Asked Questions (FAQs)’ (2015) <<http://www2.ohchr.org/english/bodies/cmw/faqs.htm>> accessed 29 December 2015.

stipulated generally in other treaties. Part IV (Articles 36 to 56) is an additional set of rights for regular migrants and members of their families. Many of the clauses in Parts III and IV are addressed by the UDHR, the ICCPR, the ICESCR and ILO Conventions and Recommendations.⁷¹

Part V sets out various human rights standards pertinent to particular categories of migrant workers, such as seasonal workers, itinerant workers, frontier workers, project-tied workers, specified-employment workers and self-employed workers (Articles 57 to 63). Part VI deals with common instructions for forming and applying fair labour migration policy and practices. It is meant to encourage international collaboration in improving the situation of migrant workers. States commit to preserving acceptable services for migrant workers and their families. Also included is the commitment to cooperate in implementing measures for the organised return of migrant workers, whether their leaving is by choice or force (Articles 64 to 71).⁷²

Part VII creates a body responsible for supervising the execution of the application of the convention by state parties.⁷³ Article 74 provides a specific role for the ILO (Secretariat of the International Labour Organization), in agreement with the preamble, which invokes the mandate of the ILO with regard to the protection of the rights of migrant workers.

Part VIII affirms the sovereign right of states to decide on and give their consent to who can enter their territory,⁷⁴ and Part IX deals with the provisions concerning the ratification of the convention. Article 91 permits states to record their reservation about certain parts of the convention at the time of signature, ratification or accession.⁷⁵

Generally, the rights founded in the ICMW are split into two generic groups:⁷⁶

⁷¹ OHCHR, Europe Regional Office, 'Migrant Workers Rights in Europe' (2011) 11 <http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf> accessed 20 November 2015.

⁷² Ryszard Cholewinski, 'Migration for Employment' in Richard Plender (ed), *Issues in International Migration Law* (Brill/Nijhoff 2015) 53.

⁷³ The members of the Committee are to be "experts of high moral standing, impartiality and recognized competence in the field covered by the Convention", ICMW (n 67) art 72(1). Parties, within a year of the Convention's entry into force and "thereafter every five years and whenever the Committee so requests", must submit a report to the Committee regarding the implementation of the Convention.

⁷⁴ ICMW (n 1) art 79.

⁷⁵ *ibid* art 91.

⁷⁶ ClaimingHumanRights, 'ProtectedRights'(claiminghumanrights 2015) <http://www.claiminghumanrights.org/icrmw_protected_rights.html> accessed 18 November 2015.

- The rights of migrant workers and families relevant to all migrant workers (including the illegal ones) (Part III)
- Particular rights of migrant workers and their families relevant in a regular situation (Part IV).

Generally, the links between the rights of migrant workers and mainstream human rights law are recognised by the ICMW. This is evident from the Preamble, which refers to the International Bill of Rights and other core human rights conventions.⁷⁷ Dialite identifies the key features of the ICMW. Generally, the ICMW repeats and overlaps with established rights in other conventions. Furthermore, it increases some of those rights significantly. It also takes a distinctive position on human rights law.⁷⁸

The Preamble considers the steps that are necessary to undertake more of the work done by various UN organisations regarding the protection of migrant workers and their families. It acknowledges the safeguards developed by some states at both the regional and the bilateral level. It highlights the urgent need to provide safeguards for all migrant workers. It requests that both workers and employers adhere to and abide by the laws and procedures of the states concerned.⁷⁹

As stated, migration and human rights issues occur at all stages of the migration process. The ICMW imposes responsibilities and obligations on both sending and receiving states. In doing so, the ICMW attempts to set minimum standards that are applicable to migrant workers and their families, regardless of their status.⁸⁰ It has been argued that, although migrant workers and refugees are “aliens in the host society”, the former have “traditionally been provided with far less attention and protection ... even though they outnumber the refugees considerably”. One example would be the fact there have been refugee conventions at both the regional and the international level since 1951,⁸¹ but, until recently, none existed

⁷⁷ Rehman (n 64) 684.

⁷⁸ Arthur Robinson Dialite, ‘A Brief Look at the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’ in Udmundur Alfredsson and others (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller* (2nd edn, Nijhoff 2009) 118.

⁷⁹ *ibid.*

⁸⁰ The rights granted to documented and undocumented workers are not exactly the same. Those rights applicable to all migrant workers irrespective of their legal status are listed in Part III of the Convention, whereas those applicable to migrant workers in a regular situation are mentioned in Part IV of the same document.

⁸¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

to satisfy the particular requirements of migrant workers. Therefore, the enactment of the ICMW is considered a vital and promising step in recognising migrant workers' issues.⁸²

Oger points out that the ICMW provides two key aims: to eliminate clandestine mobility by endorsing international collaboration and to guarantee equal treatment for migrant workers and their families.⁸³ It categorises a variety of rights applied universally and has a framework for their operative enjoyment. Its strategy is reliant on equal treatment, not minimum standards. The ICMW therefore depends on the fundamental idea that all migrants need to have access to a minimum level of protection, in recognition of their vulnerable status, even though the rights of regular migrants are broader.⁸⁴

The ICMW has been criticised because the rights are restricted out of respect for state sovereignty. It frequently indicates the sovereignty principle, such as in Articles 34, 35, 69, 79 and 82. Furthermore, it does not provide any different rights to migrant workers, with the exception of consular protection and support (Article 65(2)). For instance, Articles 16(7) and 23 regarding remittance offer several benefits for states to help ease financial transfers; nevertheless, they do not have any direct effect regardless of the uniqueness of their scope.⁸⁵

Nessel observes that those who criticise the ICMW for failing to deliver its promise of genuinely protecting the rights of migrants assert that its concentration on a state's right to determine immigration policy and its support to control borders undercut protection. In fact, domestic immigration regulations frequently embody this pressure between the state's right to regulate and control its borders and the protections granted to every individual, irrespective of immigration status.⁸⁶

Within the UN human rights system, the function of safeguarding migrants falls under two bodies: the Committee on the Rights of Migrant Workers (hereinafter referred to as CMW) and the Special Rapporteur on the Human Rights of Migrants.⁸⁷

⁸² Santos (n 65) 103.

⁸³ Helene Oger, 'The French Political Refusal on Europe's Behalf' in Antoine Pecoud and Ryszard Ignacy Cholewinski (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (CUP 2009) 296.

⁸⁴ *ibid.*

⁸⁵ *ibid.* 306.

⁸⁶ Lori Nessel, 'Human Dignity or State Sovereignty? The Roadblocks to Full Realization of the UN Migrant Workers Convention' in Vincent Chetail and Céline Bauhoz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 335.

⁸⁷ The Committee on the Rights of Migrant Workers is established in Part VII of the ICMW.

The three main procedures for tackling violations of human rights treaties are individual communications, state-to-state complaints and inquiries. Each UN treaty has a “treaty body” to monitor application of the provisions by states parties. There are nine core international human rights treaties bodies which may, under certain situations, examine individual grievances or communications from individuals. Only eight have entered into force.⁸⁸ Regarding the CMW, the individual complaint mechanism has not yet entered into force. However, it is allowed to consider individual complaints against the state parties that have made a declaration under Article 77.⁸⁹ Such communications can be considered when ten states have accepted the individual complaint mechanism and made the necessary declaration; however, only two states, Mexico and Guatemala, accepted the mechanism in 2011.⁹⁰

The CMW monitors the implementation of the ICMW. It began its work in 2004. It provides a good prospect for improving the safeguards of migrant workers;⁹¹ however, it does not have absolute jurisdiction over individual grievances.⁹²

The UN mandate of the Special Rapporteur on the Human Rights of Migrants was founded by the UN Commission on Human Rights and appeared in 1999. The Special Rapporteur has various promotional and protective mandates, which include the mandate to evaluate methods and means of eliminating the challenges to the human rights of migrants, to ask for and obtain facts about the infringements of such human rights, to develop effective suggestions to stop and remedy violations of these rights, and to enhance the efficient application of established international migration standards and rules. In contrast to the CMW, the mandate of the Special Rapporteur addresses all countries, even those countries that were not interested in ratifying the ICMW.⁹³

⁸⁸ Treaty bodies are CCPR, CERD, CAT, CEDAW, CRPD, CED, CMW, CESC and CRC.

⁸⁹ See OHCHR, ‘Human Rights Bodies - Complaints Procedures’ <<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#inquiries>> accessed 25 November 2015.

⁹⁰ Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 139.

⁹¹ ICMW (n 1) Art 77.

⁹² OHCHR, ‘Committee on Migrant Workers’ (2015) <<http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx>> accessed 15 October 2015.

⁹³ Piyasiri Wickramasekara, ‘Protection Of Migrant Workers in an Era of Globalization: The Role of International Instruments’ in Roger Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (1st edn, Kluwer Law International 2012) 247. See also Asia Pacific Forum, ‘Promoting and Protecting the Rights of Migrant Workers: The Role of National Human Rights Institutions’ (2012) <<http://www.asiapacificforum.net/resources/manual-on-migrant-workers/>> accessed 21 October 2015.

2.4. The ‘vulnerability’ of migrant workers

The increase in temporary employment opportunities for migrants has led to an increase in a range of challenges in guaranteeing safeguards.⁹⁴ The UN states that

“the situation of vulnerability in which migrants frequently find themselves, owing, inter alia, to their absence from their states of origin and to the difficulties they encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their states of origin of migrants who are non-documented or in an irregular situation”.⁹⁵

In light of this, the UN Human Rights Commission appointed a working group of intergovernmental specialists to collect information about challenges to safeguarding the human rights of migrants and suggested strategies to enhance, protect and apply these rights. In 1999, one of this working group’s suggestions contributed to the appointment of a Special Rapporteur on the Human Rights of Migrants.⁹⁶ The first Special Rapporteur offered substantial evidence of extreme violations of the human rights of migrants, including discrimination and intolerance, violence against female migrant workers, discrimination against migrant children, the vulnerability of migrants and the severe obstacles to safeguarding migrants’ rights.⁹⁷

The Special Rapporteur⁹⁸ has confirmed that the vulnerability of migrants is caused not just by issues frequently stressed in cultural discourses as being the fault of foreigners (such as racism, xenophobia and prejudice), but by the “distribution of power within the State”. This recognises that this condition is directly linked to the lack of empowerment that migrants

⁹⁴ Shauna Olney and Ryszard Cholewinski, ‘International Framework For Non-Discrimination And Equality Applicable To Migrant Workers’ in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (1st edn, OUP 2014) 276.

⁹⁵ UNGA, ‘Protection of Migrants’ (28 February 2002) UN Doc A/RES/56/170; see also UNGA, ‘Protection of Migrants’ (25 February 2016) UN Doc A/RES/70/147.

⁹⁶ Nana Oishi, *Women in Motion: Globalization, State Policies, and Labor Migration in Asia* (Stanford University Press 2005) 182.

⁹⁷ United Nations, ‘Special Rapporteur on Migrants Human Rights (Ms Gabriela Rodriguez Pizarro), Report submitted to the UN Human Rights Commission in its 56th Session’ (6 January 2000) UN Doc E/CN.4/2000/82. The Special Rapporteur Gabriela Rodriguez Pizarro of Costa Rica was appointed by the United Nations Commission on Human Rights on 6 August 1999, pursuant to Resolution 1999/44 passed at its fifty-fifth session. For more discussion see BG Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff 2009) 171.

⁹⁸ Gabriela Pizarro (1999-2005), Jorge A Bustamante (2005-2011), and François Crépeau (2011-present). UNCHR, ‘Human Rights of Migrants’ (20 April 2005) UN Doc E/CN/RES/2005/47 and UNHRC, ‘Human Rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants’ (18 June 2008) UN Doc A/HRC/RES/8/10. See UNCHR, Working Group of Intergovernmental Experts, ‘The Working Paper Prepared by Mr. Jorge A. Bustamante, Chairman/Rapporteur of the Working Group of Intergovernmental Experts on the Human Rights of Migrants (6 January 2000) UN Doc E/CN.4/AC.46/1998/5. See also Fornalé (n 24).

have in the country of employment, which stems from the power structure and implies that in every given national society, some groups possess more power than others.⁹⁹

These types of problems are particularly relevant in connection with schemes for low-skilled TFWs. They may find themselves in dangerous work conditions, where access to basic labour rights is probably not offered or they might be prevented from exercising these rights. Clearly, this is much more problematic when TFWs move to employment countries through the sponsorship system (used in KSA), which imposes restrictions on TFWs changing sponsors, jobs or workplaces.¹⁰⁰

Despite the efforts made by the international human rights system to deal with issues of migrant workers as a vulnerable group, the system fails to promote and endorse migrant workers' rights. This is evident from the slow process of ratification of the ICMW and the failure of both origin countries and countries of employment such as KSA to become parties to human rights conventions related to migrant workers.¹⁰¹

It is often argued that ratification and implementation is expensive for countries of origin. The labour market is very competitive and such countries hesitate to ratify conventions which may lead to lost labour markets abroad and remittance.¹⁰² Employment countries usually claim that migrant workers are protected in their capacity as workers under national legislation. Furthermore, the compatibility of these conventions with domestic laws or repetitions of existing rights may make receiving countries unwilling to ratify.¹⁰³

2.5. The International Labour Organization and migrant workers' rights

The ILO's predominant interest was to deploy an effective and comprehensive plan of action which would operate in coalition with member states to ensure measures were in place to address the economic and moral pressures created by flows of migrant workers.¹⁰⁴ The Preamble to the Constitution of the ILO states that the "protection of the interest of workers when employed in countries other than their own"¹⁰⁵ is considered one of its goals. Both the

⁹⁹ Jorge A Bustamante, 'Immigrants' Vulnerability as Subjects of Human Rights' (2006) 36 *International Migration Review* 333, 339; and Fornalé (n 24) 47.

¹⁰⁰ Olney and Cholewinski (n 94) 279.

¹⁰¹ United Nations, *World Economic Situation and Prospects 2004* (United Nations 2004) 202.

¹⁰² *ibid.*

¹⁰³ *ibid* 202-203.

¹⁰⁴ See for more discussion, Cholewinski (n 72) and Bustamante (n 99).

¹⁰⁵ Preamble to the ILO Constitution 1919. It is worth noting here that the first text of the ILO Constitution adopted in 1919 was subsequently changed by amendment of 1922, entered into force on 4 June 1934;

Treaty of Versailles¹⁰⁶ and the Preamble to the Constitution of ILO express concern regarding exploitation of, and discrimination towards, migrant workers.¹⁰⁷

In 1944, the ILO adopted the Declaration Concerning the Aims and Purposes of the International Labour Organization, known as the Declaration of Philadelphia.¹⁰⁸ It gave the issue of migrant workers special attention by developing its objectives for a course of action. Article III provides responsibilities to be adhered to in order to ensure better working conditions and adequate protection for the lives of workers. To achieve this, the adoption of measures taken for the benefit of foreign workers during the entire process of moving from their home countries to their countries of employment was incorporated.¹⁰⁹ Thus, it strengthened the obligation of the ILO to support full employment by facilitating “the transfer of labour, including migration for employment”.¹¹⁰

The first set of instruments dealing specifically with migrant workers was adopted by the ILO in 1939. This included the Migration for Employment Convention, 1939 (No. 66),¹¹¹ along with two accompanying recommendations. The first recommendation provided guidance on the recruitment, placing and working conditions of labour migrants,¹¹² while the second concerned cooperation between state parties on related matters.¹¹³ These three documents

amendment of 1945, entered into force 20 April 1948; amendment of 1953, entered into force 20 May 1954; amendment of 1962, entered into force 22 May 1963; and amendment of 1972, entered into force 1 November 1974. See, for more details, International Labour Organization, ‘Constitution of the International Labour Organisation and Selected Texts’ (2010) <<http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>> accessed 28 October 2015.

¹⁰⁶ Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920). Part XIII of the Treaty of Versailles is deemed to be the foundation of the ILO as an international organization. At its first session of the International Labour Conference, held in Washington D.C. in October 1919, ILO Recommendation No. 2 was adopted regarding the ‘Reciprocity of Treatment’ of Foreign Workers, calling to guarantee equal treatment between migrant workers and citizens, related to conditions of reciprocity. For more details see Ved P Nanda, ‘The Protection of the Rights of Migrant Workers: Unfinished Business’ (1993) 2 Asian and Pacific Migration Journal 162, 162; see also Jean Claude Javillier, Alberto Odero and M Humblet, *International Labour Standards* (International Labour Office 2002).

¹⁰⁷ See ILO, *Migrant Workers* (2nd edn, International Labour Office 1999) 17.

¹⁰⁸ The Declaration of Philadelphia concerning the aims and the objectives of ILO was adopted by the Twenty-sixth Conference of the ILO on 10 May 1944 and it has been added as an Annex to the ILO Constitution.

¹⁰⁹ See art III, Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the ILO Constitution, 1946, available at International Labour Organization, ‘Key Document - ILO Constitution’ (ilo, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO> accessed 6 November 2016.

¹¹⁰ Guy Davidov and Brian Langille, *The Idea of Labour Law* (OUP 2011) 371.

¹¹¹ Convention concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment (ILO No. 66) (adopted 28 June 1939).

¹¹² Recommendation concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment (ILO No. 61) (adopted 28 June 1939).

¹¹³ Recommendation concerning Co-operation between States relating to the Recruitment, Placing and Conditions of Labour of Migrants for Employment (ILO No. 62) (adopted 28 June 1939).

opened for signatures on 28 June 1939. This was the first comprehensive set of ILO standards regarding migrant workers' issues. However, no member states ratified it.¹¹⁴ The Permanent Migration Committee revised it to become Convention No. 97 concerning Migration for Employment (Revised).¹¹⁵ This is accompanied by Recommendation No. 86 of 1949.¹¹⁶ Under these conventions, the principle of equal treatment was expanded, but the principle of 'reciprocity' was withdrawn.¹¹⁷

Currently, under the ILO framework, there are four core instruments concerning migrant workers, composed of two conventions: the Migration for Employment (Revised) Convention, 1949 (No. 97)¹¹⁸ and the Migrant Workers' (Supplementary Provisions) Convention, 1975 (No. 143)¹¹⁹, and two recommendations: the Migration for Employment Recommendation (Revised), 1949 (No. 86)¹²⁰ and the Migrant Workers' Recommendation, 1975 (No. 151).¹²¹

Under the ILO system, international labour standards are legal instruments formulated by the ILO's tripartite constituents (governments, employers and workers). They consist of conventions, which are legally binding treaties that need to be ratified by member states, and recommendations, which function as non-binding guiding principles. In some cases,

¹¹⁴ For more discussion, see Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights* (Routledge 2012) 37.

¹¹⁵ According to Fornalé, a comparative analysis of the provisions concerning migrant workers founded in Convention No. 97 and in Convention No. 66 creates a strong pioneering approach; in fact, the Conventions focused on the promotion of migrant workers by assisting their migration, which included departure, travel and reception and encouraged bilateral agreements between the labour-sending countries and labour-receiving countries. See Fornalé (n 24) 86.

¹¹⁶ According to the ILO, "The International Labour Conference, at its 88th Session in May-June 2000 decided to withdraw Convention No. 66 (the Migration for Employment Convention), in conformity with article 45 of its Rules. The decision to withdraw is taken by the Conference when it appears that a convention is not in force or when a recommendation has lost its purpose, so that they no longer make a useful contribution to attaining the objectives of the Organization" For more details see ILO, *Lists of Ratifications by Convention and by Country: International* (3rd edn, International Labour Office 2002) 63.

¹¹⁷ The International Labour Conference at its 92nd session on 1 June 2004 decided to withdraw the Reciprocity of Treatment Recommendation, 1919 (No. 2). For more details, see International Labour Conference, 'Provisional Record 4-2 Ninety-Second Session, Reports of the Selection Committee, Second report' (2004) <<http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/pr-4-2.pdf>> accessed 19 November 2015.

¹¹⁸ ILO Convention (No. 97) (n 2).

¹¹⁹ ILO Convention (No. 143) (n 3).

¹²⁰ Recommendation concerning Migration for Employment (Revised 1949) (ILO No. 86) (adopted 1 July 1949).

¹²¹ Recommendation concerning Migrant Workers (ILO No. 151) (adopted 24 June 1975).

recommendations can be put forward independently, rather than in association with a convention.¹²²

Convention No. 97 deals with the protection of migrant workers in the host country and seeks to prevent any kind of discriminatory practice.¹²³ It, along with Recommendation No. 86, consists of a more detailed list of standards in comparison with earlier versions. They provide a more nuanced and adaptable response to the needs and protection of foreign workers.¹²⁴ Convention No. 97 aims to regulate the conditions in which labour migration processes happen and seeks to protect foreign workers by providing, *inter alia*, measures to ensure transparency and accuracy regarding information about the migration procedure and the transfer of workers' wages; it guarantees free support services and promotes the principle of non-discrimination between foreign and native workers. It protects foreign workers and their families in the event that illness or any other incident renders them incapable of carrying out the remunerated task after gaining admission to the country of employment.¹²⁵ Article 6 is deemed to be the main provision ensuring that migrant workers be treated "without discrimination in respect to nationality, race, religion or sex".¹²⁶

Recommendation No. 86 includes more comprehensive guidance on the policy-making of member states to provide, at every opportunity, free services to assist migrants, such as providing mediators during the recruitment process and family-reunification services. Furthermore, there are recommendations to promote the elimination of constraints on the employment of migrants and eligible family members after lawful residence of five years. A Model Agreement on Temporary and Permanent Migration for Employment is provided to encourage member states to use bilateral agreements to assist labour migration. Protection extends to regular migrant workers and members of their families.¹²⁷ Furthermore, the ILO adopted Recommendation No. 100 in 1955 regarding the Protection of Migrant Workers in

¹²² International Labour Organization, 'Conventions and Recommendations' (2015) <<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>> accessed 26 November 2015.

¹²³ ILO, 'Migrant Workers, General Survey on the Reports on the Migration for Employment Convention (Revised) (ILO No. 97)' and 'Recommendation (Revised) (No. 86) (1949)'.

¹²⁴ Touzenis and Cholewinski (n 46) 5-6.

¹²⁵ ILO, 'International Labour Migration. A Rights-Based Approach' (2010) 120 <http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_125361/lang--en/index.htm> accessed 18 November 2015.

¹²⁶ ILO Convention (No. 97) (n 2) art 6 (see for more discussion, Olney and Cholewinski (n 94); see also Wickramasekara (n 93).

¹²⁷ Nicolas Valticos, *International Labour Law* (Kluwer 1979) 209. See also Richard Plender, *Issues in International Migration Law* (Brill Nijhoff 2015) 35

Underdeveloped Countries and Territories to supplement the 1949 Convention.¹²⁸ This was followed by the adoption of the Equality of Treatment (Social Security) Convention No. 118 in 1962.¹²⁹

In June 1971, a resolution was adopted by the International Labour Conference calling for an evaluation of the current conventions and the drafting of new conventions to cover any gaps, with the aim of guaranteeing equal rights for migrant workers in law and practice concerning all employment and social issues.¹³⁰ This was in response to international labour trafficking, clandestine migration and a growing number of cases of discrimination towards foreign workers in many parts of the world.¹³¹ Following discussions in 1974 and 1975, the ILO adopted Convention No. 143¹³² and Recommendation No. 151.¹³³

Convention No. 143 is categorised into two fundamental parts, migrations in abusive conditions (Part I, Articles 1-9) and the promotion of equality of opportunity and treatment of migrant workers (Part II, Articles 10-14),¹³⁴ with guidance from Migrant Workers Recommendation No. 151.¹³⁵

Part I¹³⁶ obligates every state party to respect the “basic human rights of all migrant workers”,¹³⁷ whether legal or illegal, and to adopt measures which are “necessary and appropriate” to eliminate the clandestine mobility of workers and the unlawful employment of migrants. States are obliged to apply sanctions against businesses employing illegal immigrants and prosecutions must be brought against people traffickers. Article 9¹³⁸ states

¹²⁸ Recommendation concerning the Protection of Migrant Workers in Underdeveloped Countries and Territories (No. 100) (adopted 22 June 1955).

¹²⁹ Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (ILO No. 118) (adopted 28 June 1962).

¹³⁰ ILO, ‘Record of Proceedings of the Fifty-Sixth Session of the International Labour Conference, Geneva, 1971’. The main labour-sending countries were considered a leading force in issuing a resolution, adopted at the International Labour Conference in 1971, which led them to ask the ILO to prioritise investigation of the problems. These issues were the equality of opportunity and treatment, recruitment practices and illegal migration. There were also economic and social concerns for the countries of origin and destination. For more information see Bohning (n 68) 698-705.

¹³¹ Touzenis and Cholewinski (n 47) 5.

¹³² To date, 23 states have ratified Convention No. 143 (1975) (n 3).

¹³³ Convention No. 143 (1975) (n 3) is flexible; member states can select which parts to ratify. However, the flexibility in Convention No. 97 (1949) (n 2) is limited to the Annexes only. See Fornalé (n 24) 88.

¹³⁴ ILO, ‘Migrant Workers: General Survey by the Committee of Experts on the Application of Conventions and Recommendations: Report III, Part 4B’ (International Labour Conference, 66th Session, 1980a, Geneva).

¹³⁵ Valticos (n 127) 209-210.

¹³⁶ See ILO Convention No. 143 (n 3), Part I. For further discussion, see Ved P Nanda, ‘The Protection of the Rights of Migrant Workers: Unfinished Business’ (1993) 2 Asian and Pacific Migration Journal 162.

¹³⁷ ILO Convention No. 143 (n 3) art 1.

¹³⁸ *ibid* art 9.

that citizens and illegal migrants (including their families) must receive equal treatment regarding rights and benefits arising from previous employment, such as social security and other owed remuneration. Furthermore, there is protection in the case of redundancy insofar as residence and work permits will not automatically be withdrawn. This establishes equal treatment between legal migrants and indigenous workers regarding security of employment, the provision of other employment and the right to re-training and work assistance.¹³⁹

Part II asserts that state parties are responsible for making prominent a national strategy promoting equality of treatment between nationals and migrant workers regarding work and employment, cultural rights, social security, trade union rights and individual and collective freedoms.¹⁴⁰ Article 12 calls for all member states to cooperate with labour unions and other organisations at the domestic level. It addresses measures to implement national migration strategies, giving particular consideration to the protection of the cultural and national identities of migrant workers and their families and the bolstering of connections with their home countries.¹⁴¹ In pursuance of this, Article 13¹⁴² deals with issues surrounding family reunion. Lastly, Article 14¹⁴³ addresses the principle of freedom of movement and the right to choice of employment, although the enjoyment of these rights is subject to the acquisition of the necessary professional qualifications.

In addition, Recommendation No. 151 offers guidelines for safeguarding the health of migrants, for guarding against unfair dismissal and, if this happens, enabling access to social services.¹⁴⁴ It provides various measures intended to enhance the basic welfare of migrant workers, improving their rights by promoting equality with citizens and reiterating that states should consider all attainable measures to assist in family reunification.¹⁴⁵ Ratifying states are allowed to exclude Part I or Part II of the Convention. However, when a state decides to ratify only one part, if they later carry out measures applicable to the unratified part, they must report on the measures taken.¹⁴⁶

It is worth mentioning that the ILO supervisory bodies have outlined the significance of applying measures to guarantee a powerful safeguard against direct and indirect

¹³⁸ *ibid* art 8.

¹⁴⁰ *ibid* art 10.

¹⁴¹ *ibid* art 12.

¹⁴² *ibid* art 13.

¹⁴³ *ibid* art 14.

¹⁴⁴ ILO Recommendation No. 151 (n 120).

¹⁴⁵ ILO Convention No. 143 (n 3) art 13.

¹⁴⁶ See Valticos (n 127) 209–210 and also Nanda (n 136).

discrimination by evaluating laws and regulations in this area.¹⁴⁷ Goodwin-Gill argues that the ILO has identified the specifically vulnerable situation of migrant workers. They are more likely to be subjected to violence and exploitation and encounter significant difficulties in attempting to adapt to and integrate into their new surroundings. In addition, they experience difficulty in protecting the assertion of their ethnicity, language and national identity.¹⁴⁸ The ILO, along with other international bodies, identifies that particular efforts are needed to ensure the protection of families. However, family reunification is not generally guaranteed, and may be affected by whether the family members in question are temporary or permanent migrants.¹⁴⁹

Olney and Cholewinski emphasise that the presence of regulations prohibiting discrimination and offering compensation for violations is not adequate to guaranteeing equal treatment in practice. A dynamic strategy is needed to obtain approval of and adherence to the basic principles and to help migrant workers and their families enjoy the equal opportunities available to them. They suggest that international efforts between states and the participation of employers and workers' organisations are necessary to attain the goals of Conventions Nos. 97 and 143.¹⁵⁰

The number of ratifications is still low and their practical effectiveness is correspondingly inadequate, especially in the major labour-importing states such as KSA.¹⁵¹ KSA has not ratified any of the ILO Conventions related to migrant workers (this will be examined further in the next chapter). The table below shows the key conventions ratified by the Saudi Government¹⁵²:

¹⁴⁷ Committee on the Application of Standards, 'Conclusions' (International Labour Conference, 98th Session 2009) ILO No. 143.

¹⁴⁸ Guy Goodwin-Gill, 'Immigration Policy' in *Encyclopaedia of Government and Politics* (3rd edn, Routledge 2013) 739.

¹⁴⁹ *ibid* 741.

¹⁵⁰ Olney and Cholewinski (n 94) 266 and 268.

¹⁵¹ Goodwin-Gill (n 148) 741.

¹⁵² In addition, technical Conventions have been ratified by KSA. These include the Hours of Work (Industry) Convention, 1919 (No. 1) (adopted 28 November 1919, entered into force 13 June 1921); the Weekly Rest (Industry) Convention, 1921 (No. 14) (adopted 17 November 1921, entered into force 19 June 1923); the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30) (adopted 28 June 1930, entered into force 29 August 1933); the Underground Work (Women) Convention, 1935 (No. 45) (adopted 21 June 1935, entered into force 30 May 1937); the Night Work (Women) Convention (Revised), 1948 (No. 89) (adopted 9 July 1948, entered into force 27 February 1951); and the Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90) (adopted 10 July 1948, entered into force 12 June 1951). Others include the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106) (adopted 26 June 1957, entered into force 4 March 1959); the Minimum Age (Underground Work) Convention, 1965 (No. 123) (adopted 22 June 1965, entered into force 10 November 1967); and the Prevention of Major Industrial Accidents Convention, 1993 (No. 174)

Convention	Date	Status
Migration for Employment Convention (Revised), 1949 (No. 97)		Not ratified
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)		Not ratified
Abolition of Forced Labour Convention, 1957 (No. 105)	15 Jun 1978	In force
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	15 Jun 1978	In force
Minimum Age Convention, 1973 (No. 138)	02 Apr 2014	In force
Worst Forms of Child Labour Convention, 1999 (No. 182)	08 Oct 2001	In force
Forced Labour Convention, 1930 (No. 29)	15 Jun 1978	In force
Equal Remuneration Convention, 1951 (No. 100)	15 Jun 1978	In force
Labour Inspection Convention, 1947 (No. 81)	15 Jun 1978	In force

Table 2.1: List of the key ILO Conventions ratified by KSA
Source: ILO (2016)

Despite the fact that KSA and other GCC countries have ratified several of the abovementioned conventions, their “inadequate implementation and oversight of current legal provisions means they rarely translate to worker protections in practice and ... employers can pick and choose what protections to offer, with relative impunity”.¹⁵³ To monitor the application of the conventions, in 1926 the ILO Committee of Experts on the Application of Conventions and Recommendations (hereinafter referred to as CEACR) was created.¹⁵⁴ When a state has ratified an ILO Convention, it is obligated to routinely report on the

(adopted 22 June 1993, entered into force 3 January 1997). See International Labour Organization, ‘Ratifications of ILO Conventions: Saudi Arabia’ (2015) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103208> accessed 10 November 2015.

¹⁵³ HRW, ‘Building a Better World Cup’ (2012) <<https://www.hrw.org/report/2012/06/12/building-better-world-cup/protecting-migrant-workers-qatar-ahead-fifa-2022>> accessed 1 December 2015.

¹⁵⁴ The CEACR produces two types of commentary on the application of the Conventions: observations and direct request. Observations contain comments on fundamental questions raised by the application of a particular Convention by a member state. These observations are reproduced in the annual report of the Committee of Experts, which is then submitted to the Conference Committee on the Application of Standards in June every year. Direct requests usually relate to questions of a more technical nature or of lesser importance, or contain requests for information. They are not published in the report of the Committee of Experts, but are communicated directly to the government concerned. ILO, ‘Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Convention)’ (International Labour Conference, 99th Session, 2010) 2 <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_123424.pdf>.

procedures it has introduced to apply the Convention and, every two years, member states should send reports outlining the actions they have already adopted in order to apply the eight Fundamental Conventions (these are discussed in more detail below).¹⁵⁵

In relation to KSA, the CEACR made observations in respect of ILO Convention (No. 111), which highlights discrimination against migrant workers and requests the government “take the necessary measures to monitor closely the effective abolition of the sponsorship system in practice”.¹⁵⁶ Furthermore, the CEACR made observations regarding ILO Convention (No. 29), calling on the government to “take measures to protect migrant domestic workers from abusive practices and conditions that amount to forced labour” and “provide information on the penalties applied to recruitment agencies for abusive practices, including forced labour”.¹⁵⁷ In addition, the CEACR noted that “the Labour Code does not contain any specific provisions prohibiting forced labour”. The CEACR requested the government “take the necessary measures to ensure that persons who impose forced or compulsory labour are subject to really adequate and strictly enforced penalties”.¹⁵⁸

Regarding Labour Inspection Convention, 1947 (No. 81),¹⁵⁹ the CEACR highlighted “the primary duty of labour inspectors is to protect workers and not to enforce immigration law”. It also requested the government provide information “on the number of inspections, violations found and penalties imposed, classified according to the legal provisions to which they relate, with reference, in particular, to migrant workers”.¹⁶⁰ It also raised issues related to wage protection systems and requested the government provide further information.¹⁶¹ It is worth mentioning that these labour inspectorates in the SLM generally deal with wages, safety and health, working hours, forced labour, child labour, etc.¹⁶²

¹⁵⁵ ILO, ‘Committee of Experts on the Application of Conventions and Recommendations’ (2015) <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>> accessed 20 November 2015. For further discussion, see Gerd Oberleitner, *Global Human Rights Institutions* (Polity 2007).

¹⁵⁶ ILO, ‘Observation (CEACR) 2014’ (104th ILC session, 2015) Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

¹⁵⁷ ILO, ‘Observation (CEACR) 2014’ (104th ILC session, 2015) Forced Labour Convention (No. 29).

¹⁵⁸ ILO, ‘Direct Request (CEACR) 2014’ (104th ILC session, 2015) Convention (No. 29).

¹⁵⁹ Convention concerning Labour Inspection in Industry and Commerce (No. 81) (adopted 11 July 1947, entered into force 7 April 1950).

¹⁶⁰ ILO, ‘Observation (CEACR) 2013’ (103rd ILC session, 2014) Labour Inspection Convention (No. 81).

¹⁶¹ ILO, ‘Direct Request (CEACR)’ (adopted 2013, 103rd ILC session, 2014) Convention (No. 81)

¹⁶² Technical conventions have been ratified by Saudi Arabia (see n 151). For more discussion, see the committee report available at: ILO, ‘Comments By The Supervisory Bodies’ (ILO, 2016) <<http://www.ilo.org/dyn/normlex/en/f?p=1000:20010::NO::>> accessed 18 September 2016.

2.6. Fundamental labour standards

Almost all ILO Conventions have universal application and character, i.e. they apply to virtually all workers, whether they are citizens or foreign nationals.¹⁶³ These principles form part of the eight Fundamental Conventions comprising the ILO system which, in accordance with paragraph 2 of the Declaration binding on all members, apply regardless of whether they have ratified the full set of Conventions or not. The Declaration includes four aspects: “(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation”.¹⁶⁴

These principles are incorporated into eight ‘Fundamental ILO Conventions’: “the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Equal Remuneration Convention, 1951 (No. 100); and the Discrimination (Employment and Occupation) Convention, 1958, (No. 111)”.¹⁶⁵

Cholewinski argues that even though there are a number of different ILO standards available for the protection of migrant workers, they are mostly overlooked in practice; however, they continue to be important “in theory” and are “in many respects superior to the provisions” of the ICMW.¹⁶⁶ The International Labour Conference of 2012 adopted a set of conclusions on fundamental principles and employment rights, which listed the particular groups, including migrant workers, that tend to be subjected to abuses of such principles and rights.¹⁶⁷ The conclusions also detailed the conditions needed for the fulfilment of the ILO’s other objectives, namely the advancement of decent jobs that form part of a healthy market, which

¹⁶³ Fornalé (n 24) 54.

¹⁶⁴ ILO, ‘Declaration on Fundamental Principles and Rights at Work’ (International Labour Conference, 86th Session, Geneva, June 1998).

¹⁶⁵ *ibid.* See also Sarah H Cleveland, ‘Human Rights Sanctions and the World Trade Organisation’ in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (Hart 2001) 206-207.

¹⁶⁶ Olney and Cholewinski (n 94) 269.

¹⁶⁷ International Labour Conference, ‘Resolution concerning the Recurrent Discussion on Fundamental Principles and Rights at Work: Conclusions’ (101st Session, 2012).

promotes a good relationship between economic growth, sustainable enterprise and social progress.¹⁶⁸

2.7. Protection standards for admission of migrant workers' families under ILO and the UN: Joint effort

As shown above, the ICMW forms part of the charter of human rights specific to migrants and their families, with two ILO standards on migrant workers. The right to family reunification is incorporated into several international legal conventions¹⁶⁹ which outline the concept of 'family member' for the purposes of safeguarding the civil, political, economic, social and cultural rights of migrant workers and their families and creating the requirements for family reunion.¹⁷⁰ For instance, Convention No. 143 called on its members "to facilitate the reunification of the families of all migrant workers legally residing in its territory".¹⁷¹ Convention No. 97 also states that family members should not be returned to their countries due to the migrant worker's inability to work because of sickness or personal injury.¹⁷² Furthermore, the ICMW expands a number of entitlements to family members.¹⁷³

In 1997, the ILO recognised that "prolonged separation and isolation of family members lead to hardships and stress affecting both the migrants and the dependants left behind, which may give rise to social, psychological and health problems, and even affect workers".¹⁷⁴ The same remark appeared in 1974 during the preparatory meetings for the adoption of Convention No. 143, which states that "prolonged separation and isolation of migrants from their families lead to hardship and stress situation affecting both the migrants and the families left behind and prevent them from leading normal life".¹⁷⁵ Reuniting migrant workers and their families is crucial not just to the well-being of the workers, but also to boosting labour market effectiveness and productivity in the host country.

¹⁶⁸ *ibid.*

¹⁶⁹ Currently there is no internationally legal definition of 'family' and therefore no accepted definition of a migrant's family. See also Tania Kaiser, 'Crisis? Which Crisis? Families and Forced Migration' in Anna Lindley (ed), *Discussion Crisis and Migration: Critical Perspectives* (Routledge 2014) 186.

¹⁷⁰ The right to found a family is deemed as one of the basic human rights recognised both nationally and internationally. See UDHR (n 23) art 16, para 1; ICCPR (n 34) art 17(1), art 23(1); the CRC and ICMW (n 67).

¹⁷¹ Convention (No. 143) (n 3) art 13.

¹⁷² Convention (No. 97) (n 2) art 8.

¹⁷³ ICMW (n 67) art 45 and see art 44(2).

¹⁷⁴ ILO, 'Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration' (21-25 April 1997) Annex I, para 6.1.

¹⁷⁵ ILO, 'Migrant Workers' (Report VII (1) 59th Session, International Labour Conference, Geneva, 1974) 27.

2.8. Standards related to the recruitment and admission of migrant workers

Wickramasekara is of the view that there are three types of international instruments that are highly significant to the protection of migrant workers:¹⁷⁶

- Universal human rights instruments which cover all individuals, including migrant workers
- Instruments which specifically focus on migrant workers
- Labour standards which cover all workers in the workplace, including migrant workers.

Article 1(2) of the ICMW confirms that this convention “shall apply during the entire migration process of migrant workers”.¹⁷⁷ The labour migration process includes three key phases: (1) planning for migration, departure and transit, (2) the total duration of residence and the remunerated activities in the country of employment and (3) the return to the state of origin or habitual residence.¹⁷⁸ Similarly, ILO Convention No. 97 addresses the entire labour migration process. ILO Convention No. 143 is broader, since it addresses irregular migration and also the responsibility of states to respect the fundamental human rights of migrant workers. However, it is often argued that ICMW has an extensive mandate because it details the fundamental social, cultural and economic rights for all migrants and their families (regardless of their migration status), even though some migrants possess more restricted rights.¹⁷⁹

With the growing potential of private recruitment agencies, the UN and the ILO continue to advise states to consider suitable measures to eliminate clandestine migration and the irregular employment of migrants.¹⁸⁰ Together with the enforcement of administrative, civil and penal punishment against employers and the coordinators of clandestine migration, it has been suggested that states must authorise all recruitment processes of public authorities and should create powerful regulatory mechanisms for private recruiting agencies or

¹⁷⁶ Wickramasekara (n 93) 260.

¹⁷⁷ ICMW (n 67) art 1(2).

¹⁷⁸ *ibid.*

¹⁷⁹ Oger (n 82) 295.

¹⁸⁰ See the ILO Convention No. 97 (n 2) art 2. Measures that states should undertake to address clandestine migration are detailed in Part I of Convention No. 143 (n 3), and the ICMW (n 67) arts 68 and 69.

companies.¹⁸¹ Additionally, the public regulator needs to observe the efficiency of such agencies.¹⁸²

Responsibility for the recruitment process is divided between the labour-sending countries and the labour-receiving countries. As such, among the important responsibilities of origin countries are to give information regarding admission arrangements and remunerated activity, to manage and control recruiting agencies, to provide the right to emigrate and return and to support migrants during resettlement and reintegration activities; they should also offer overseas voting rights. More importantly, the essential responsibilities for labour-sending countries are to provide pre-departure related information and training sessions, to oversee workers overseas and to impose sanctions on brokers and recruiters working unlawfully.¹⁸³

Provisions governing the first two stages of migration have continued to be directed by the promotion of humane migration, at least from the labour-sending countries' viewpoint. These provisions all integrate measures targeted to protect against deceptive information and support the smooth movement of labour between countries. The measures consist of utilising migration information between countries,¹⁸⁴ providing sufficient and free-of-charge support to help migrants, supplying sufficient and correct information about requirement conditions for admission and the procedures thereof, assisting with preparations for departure, travel, arrival and residence, providing information about accessible remunerated activities, conditions of employment, living conditions and other substantial related information to help potential migrants decide whether or not to migrate.¹⁸⁵

At the same time, the ICMW requires labour-receiving countries to guarantee equality of treatment in terms of payment and conditions of employment, to observe the right to join labour unions and also to create associations and trade unions for legal migrants, to offer minimal social welfare (for example medical care), to permit documented migrants to be temporarily absent without affecting the authorisation to remain in the country or work, to permit freedom of mobility and the selection of the residence, to permit legal migrants to change jobs, to provide the right to look for other employment in the case of contract

¹⁸¹ See Annex I, para 3 and Annex II, para 2 to Convention No. 97 (n 2). See also ICMW art 69.

¹⁸² See Annex I, paras 3, 4, and 5, and Annex II, paras 4, 5 and 6 of Convention No. 97 (n 2).

¹⁸³ Nicola Piper, 'Obstacles to, and Opportunities for, Ratification of the ICRMW in Asia' in Antoine Pecoud and Ryszard Ignacy Cholewinski (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers* (CUP 2009) 178.

¹⁸⁴ See the ILO Convention No. 97 (n 2) art 1 and the ICMW (n 67) art 65(1)(b).

¹⁸⁵ See the ILO Convention No. 97 (n 2) art 2 and ICMW (n 67) arts 37 and 65(1)(d).

termination, and to provide the right to family reunion, including the right of migrants' children to education.

While many of the clauses in Convention No. 97 and its Annex II concerning the government-sponsored transfer of workers became redundant as a result of the weakening role of a country in recruitment, Annex II continues to be related to promoting humane conditions in the transfer of labour.¹⁸⁶ The clauses concerning recruitment agents are increasingly significant. Private agents and individuals play a very important role in recruitment processes, since they are deemed an official recruitment channel for the majority of temporary low-skilled workers.¹⁸⁷

With the increasing importance of this role, the ILO adopted a special convention related to recruitment agencies in 1997, namely, Private Employment Agencies (No. 181).¹⁸⁸ Article 7(1) declares that "private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers".¹⁸⁹ Article 8 forces states to consider all vital and suitable measures in offering sufficient safeguards for preventing violations of migrant workers recruited or placed in their territory by private employment agencies by regulations and laws.¹⁹⁰

ILO Convention No. 181 addresses the function of private employment agencies in executing both labour hiring functions and recruitment. Generally, the Convention acknowledges there presently exist two major roles carried out by the broader type of private employment agencies. The first is the service of matching applications with employment offers that are available, but without the agency being party to the employment relationships that may arise. The second is employing workers with the purpose of making them available to a third party that assigns their duties and manages the performance of the duties.¹⁹¹ However, one of the most important articles is Article 7, which bans agencies from charging workers service fees.

¹⁸⁶ See the ILO Convention No. 97 (n 2), Annex II 'Recruitment, placing and conditions of labour of migrants for employment recruited under government-sponsored arrangements for group transfer.'

¹⁸⁷ See ILO, 'Social and Labour Issues Concerning Migrants in the Construction Industry' (ILO, Tripartite Meeting on Social and Labour Issues Concerning Migrant Workers in the Construction Industry, Geneva, 1995) 71 <http://staging.ilo.org/public/libdoc/ilo/1995/95B09_209_engl.pdf> accessed 25 November 2016.

¹⁸⁸ Convention concerning Private Employment Agencies (No. 181) (adopted 19 June 1997, *entered into force* 10 May 2000).

¹⁸⁹ *ibid* art 7(1).

¹⁹⁰ *ibid* article 8.

¹⁹¹ Paul Benjamin, 'The Persistence of Unfree Labour: The Rise of Temporary Employment Agencies in South Africa and Namibia' in Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge 2014) 120.

In 2007, the ILO released a report that gave guidance to countries forming their domestic frameworks on private employment companies.¹⁹² Even though the Convention does not develop a mandatory licensing system for ratifying countries, it does require that they possess sufficient mechanisms for accommodating and investigating grievances regarding agencies.¹⁹³ Some countries, for instance KSA, still have not adopted Convention No. 181, nor have they adopted or created standards for the regulation of private employment agents in their jurisdictions.¹⁹⁴

However, several studies show that many of these agents engage in illegal and abusive practices, which include charging excessively high costs and purposely misleading aspiring migrants regarding the accessibility of work, the working situations and the housing situations in the country of employment.¹⁹⁵ Piper points out that, with the exception of the role of government in regulating migration issues, problems with recruitment companies and agencies appear in all countries. Furthermore, this situation creates illegal recruitment networks of different brokers and intermediaries that connect workers with recruitment agencies. This scheme has caused an increase in irregularities and violations at every phase of migration activity, leading migrants and their families to bear the costs. Unauthorised migrants and trafficked persons become more vulnerable, since they are viewed as immigration violators and have restricted or no access to aid services or to help with redressing issues.¹⁹⁶

2.9. The role of international organisations and NGOs in promoting the RBA to labour migration

While the discussion in Chapter 1 recognises the main principles of the RBA, it is now necessary to examine non-governmental institutions' involvement with the RBA to addressing the rights of TFWs. Patrick Taran points out that “the ILO conventions and the

¹⁹² ILO, ‘Guide to Private Employment Agencies - Regulation, Monitoring and Enforcement’ (2007) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/wcms_083275.pdf> accessed 8 October 2016.

¹⁹³ See ILO Convention (No. 181) (n 187) art 10.

¹⁹⁴ In the current recruitment practices in KSA, the Ministry of Labour supervises private recruitment agents. More details will be given in Chapters 5 and 6.

¹⁹⁵ See the series of reports usually produced by Human Rights Watch and Amnesty International and other regional non-governmental organisations such as Asia Pacific Forum of National Human Rights Institutions.

¹⁹⁶ Piper (n 183) 174.

1990 Convention represent explicit and comprehensive symbols of a rights-based approach to regulating/managing international migration”.¹⁹⁷

As stated in Chapter 1, the international community as a whole has an obligation to assist in recognising universal human rights.¹⁹⁸ Ghere points out that “accountability is the key to protection and promotion of human rights”.¹⁹⁹ It is widely believed that supervisory processes should not be limited to states, but should also involve a worldwide network of actors, including non-governmental organisations (international and national NGOs), the contributor (donor) community and transnational corporations.²⁰⁰ Uvin argues that the particular change from charity to human rights claims results in an emphasis on the mechanisms of accountability and that “strategies for holding people who violate claims responsible should occur too”.²⁰¹

Several UN agencies and migration NGOs²⁰² call for countries to “respect the human rights of migrants”.²⁰³ NGOs focusing on migrant workers and human rights provide a significant focus on dealing with migration and the human rights of foreign workers.²⁰⁴ The ILO agenda notes that it specialises in endorsing social justice and globally acknowledges human and labour rights (including the rights of migrant workers), using its founding vision that social justice is crucial to achieving universal and permanent peace.²⁰⁵ The ILO illustrates the necessity for the RBA to labour migration, identifying that the key to successful safeguarding

¹⁹⁷ Cited in Oger (n 83) 296.

¹⁹⁸ In international law, the state is the key duty-bearer with regard to the human rights of every individual residing under its jurisdiction.

¹⁹⁹ Richard K Ghere, *Rhetoric in Human Rights Advocacy* (Lanham 2015) 178.

²⁰⁰ Andrea Cornwall and Celestine Nyamu-Musembi, ‘Putting The “Rights-Based Approach” to Development into Perspective’ (2004) 25 *Third World Quarterly* 1415, 1417-1418.

²⁰¹ Peter Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’ (2007) 17 (4/5) *Development in Practice* 597, 602-603.

²⁰² This study is limited to most leading international organizations, i.e. those advocating and promoting human rights approaches to labour migration. However, there are other international human rights organizations focusing on migrant workers’ issues, such as Human Rights Watch, Amnesty International and others. These will be discussed in this thesis where relevant. See the list of United Nations Agencies, Programmes, and NGOs at OHCHR, ‘List of United Nations Agencies, Programmes, NGOs and Foundations Working on Contemporary Forms of Slavery’ (*OHCHR*, 2016) <<http://www.ohchr.org/EN/Issues/Slavery/UNVTFCFS/Pages/SlaveryList.aspx>> accessed 1 May 2016.

²⁰³ Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press 2013) 189.

²⁰⁴ Mary Hyland and Ronaldo Munck, ‘Labour, Migration, and Regional Integration: A North/South Comparative Approach’ in Carl-Ulrik Schierup and others (eds), *Migration, Precarity, and Global Governance: Challenges and Opportunities for Labour* (1st edn, OUP 2015) 272.

²⁰⁵ ILO, ‘Mission and Impact of the ILO’ (*ILO*, 2016) <<http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>> accessed 11 March 2016.

of migrants' rights is based on effective governance and regulation of migration.²⁰⁶ The ILO Multilateral Framework was key in offering practical meaning and impact for the rights of migrant workers. Furthermore, the function of the ILO's supervisory mechanism helps member states by offering technical guidance for evaluating whether national legislation and practices are in conjunction with the ILO Conventions, and by reviewing the enforcement of related laws and policies. The ILO works closely with social partners and motivates their involvement in policy formulation in order to guarantee the promotion and safeguarding of migrant workers' rights.²⁰⁷

The IOM, an intergovernmental body, functions with its partners within the international community in order to assist in meeting the expanding operational difficulties of migration management. It encourages economic and social development through migration and calls for an upholding of the human dignity and welfare of migrants.²⁰⁸ The IOM's initiatives are founded on the RBA, and its projects assist states in designing rights-based migration guidelines that minimise discriminatory or exploitative treatment and assist in raising awareness of migrants' rights.²⁰⁹ The IOM endorses the RBA in order to guarantee migrants' access to economic and social rights, bearing in mind the differentiated vulnerabilities determined by legal status based on age, health, gender and other factors. The IOM endorses a RBA to migration management according to current international and regional legal frameworks that guarantee sustainability and respect for the rule of law. It works specifically with governments in an effort to help them apply international standards and with other international institutions and NGOs to help promote respect for international law regarding migration, since the enjoyment of rights is built in to human development.²¹⁰

The UN Office of High Commissioner for Human Rights (hereinafter referred to as OHCHR) also promotes a RBA to development according to international human rights standards.

²⁰⁶ HRBA Portal, 'International Labour Migration: A Rights-Based Approach' (*HRBA Portal*, 2010) <<http://hrbaportal.org/resources/international-labour-migration-a-rights-based-approach>> accessed 14 March 2016.

²⁰⁷ *ibid* 8-9.

²⁰⁸ International Organization for Migration, 'Health and Migration: Bridging the Gap' (Migration Policy and Research Programme of the International Organization for Migration 2005) 5.

²⁰⁹ IOM, 'Mainstreaming a Human Rights-Based Approach to Migration within the High Level Dialogue' (*IOM*, 2013) <<https://www.iom.int/speeches-and-talks/mainstreaming-human-rights-based-approach-migration-within-high-level-dialogue>> accessed 18 March 2016.

²¹⁰ See the IOM contribution to the theme of the UN High Level Dialogue on International Migration and Development (2013) at IOM, 'Input of the International Organization for Migration to the 11th Coordination Meeting on International Migration' 5 <http://www.un.org/en/development/desa/population/migration/events/coordination/11/docs/UNHCR_Paper_11th_Coord_Meeting_on_Intl_Mig_15022013_final.pdf> accessed 19 March 2016.

Through the Global Migration Group (hereinafter referred to as GMG), the OHCHR strives to uphold and mainstream a human rights approach to migration.²¹¹ The GMG joins sixteen UN agencies and various international organisations in endorsing a broader application of all related legal instruments and increasing coherence in the international response to migration issues in the world.²¹² Its role is to target the human rights of migrants, specifically those in irregular situations. The OHCHR is an establishing member of the GMG, which was founded by the United Nations' Secretary-General at the beginning of 2006 following a suggestion of the Global Commission on International Migration.²¹³

2.10. Joint efforts by Arab and Muslim states to promote human rights instruments at regional level

By the end of the twentieth century, many Muslim states adopted measures relating to human rights in general and labour rights in particular, including the UIDHR,²¹⁴ the CDHR²¹⁵ and the ACHR.²¹⁶ The UIDHR was prepared under the auspices of the Islamic Council, a London-based organisation associated with the Muslim World League. The UIDHR reflects its religious nature more than the UDHR, opening the declaration with the following phrase from the Qur'an: "This is a declaration for mankind, a guidance and instruction to those who fear God."²¹⁷

The UIDHR is founded on the Qur'an and the Sunnah and the laws gathered from them. Generally, the UIDHR offers different protections of human rights, including the rights to justice, equality, work, participation in public affairs (*shura*) and education. It states that Islam respects work, and, therefore, workers should be treated "justly and generously".²¹⁸ In the preamble, it notes that it abhors slavery and forced labour. It offers the right of free association to every person to participate individually and collectively. It demands the immediate agreed payment of employees' salaries and also the right to rest and leisure. It prohibits very young children from working. Finally, it agrees with everyone's right to a free

²¹¹ OHCHR, 'Report of the United Nations High Commissioner for Human Rights' 17 (*OHCHR*, 2009) <http://www.ohchr.org/Documents/Publications/I_OHCHR_Rep_2009_complete_final.pdf> accessed 17 March 2016.

²¹² See the list of United Nations Agencies (n 201).

²¹³ OHCHR, 'Global Migration Group' (*OHCHR*, 2016) <<http://www.ohchr.org/EN/Issues/Migration/Pages/GlobalMigrationGroupIndex.aspx>> accessed 16 March 2016.

²¹⁴ UIDHR (n 4).

²¹⁵ CDHR (n 5).

²¹⁶ The Charter (n 6).

²¹⁷ Qur'an, 3:138.

²¹⁸ UIDHR XVII. Status and Dignity of Workers.

choice of occupation and job.²¹⁹ It is worth noting that the UIDHR does not have specific rules for the rights of migrant workers, but rather general rules that apply to everybody. It provides the right to education as well as the right to privacy and the freedom of movement and residence.²²⁰

In relation to the rights of minorities, “in a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic law, or by their own laws”.²²¹ It has been argued that these provisions are not explicit as to whether these principles are to be applied to non-Muslims or are restricted to the ‘*ahal al-kitab*’. It is also unclear about the fundamental rights to which non-Muslim minorities are entitled in an Islamic state.²²²

The CDHR agrees that “all the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia”.²²³ It is composed of a preamble and 25 articles created to “serve as a guide for Member States in all aspects of life”.²²⁴ It does contain some provisions similar to the UDHR because it stresses collective and individual duties. However, the CDHR has been criticised for repeating international and Islamic factors that cause confusion with the International Bill of Human Rights. Moreover, it has been blamed for being unclear on certain issues such as equality between men and women. It mentions only fundamental human dignity instead of a guarantee of equality in rights and freedoms or offering guarantees of safeguards to women and non-Muslims.²²⁵

Articles 24 and 25 of the CDHR also cause concern. Article 24 states that “all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’a”, and Article 25 states, “The Islamic Shari’a is the only source of reference for the explanation or clarification of any of the articles of this Declaration.”²²⁶ In response to these provisions, the member states of the Organization of the Islamic Cooperation (hereinafter referred to as OIC)²²⁷

²¹⁹ *ibid* XXI (b) Right to Education.

²²⁰ *ibid* XXI(a).

²²¹ *ibid* X Rights of Minorities.

²²² Rehman points out that “there are also noteworthy dissimilarities between the Arabic and English version, which signify the possibility of different views of the drafters of the declaration”. See Javaid Rehman, *Islamic State Practices, International Law and the Threat From Terrorism* (Hart 2005) 69.

²²³ CHDR (n 5) art 24.

²²⁴ *ibid* Preamble.

²²⁵ Radwa S Elsaman and Mohamed A Arafa, ‘The Rights of the Elderly in the Arab Middle East: Islamic Theory Versus Arabic Practice’ (2012) 4 Marq Elder’s Advisor 30.

²²⁶ CDHR (n 5) arts 24 and 25.

²²⁷ Organization of the Islamic Cooperation (OIC) was founded on 25 September 1969 on the occasion of the first Conference of the Muslim World. The OIC has 57 member states, and 30 of them are the founding states.

issued a controversial but established international consensus framed on universal standards instead of on the principles of one faith.²²⁸ According to Tadjdini, “the use of religious discourse and reference to religious sources has led to a religionization of the political landscape”.²²⁹

The CDHR includes certain provisions relating to employment, for instance the right to work, the right to freely choose work, the right not to be given work which goes beyond the employee’s ability, the right not to be subject to exploitation or injury, the right to enjoy safety, security and social assurances, and the right to have a reasonable salary with no discrimination between men and women.²³⁰ Nevertheless, the articles regarding labour have been criticised because they fail to offer sufficient assurances against discrimination for women denied particular work in certain Muslim countries.²³¹

In 2011, the OIC concluded the Statute of the Independent Permanent Human Rights Commission (IPHRC).²³² It proposes to establish an enforcement mechanism to endorse human rights. However, it has been argued that the new commission will be unlikely to have any power to enhance the condition of human rights in its member states since its mandate has a limited function under the CDHR. This is because it does not have the same standards as outlined under general international law, and the commission’s statute granted it limited authority to address human rights abuses. Additionally, the IPHRC can only issue non-binding recommendations.²³³

The ACHR was initially adopted by the Arab League by Resolution 5437 of 15 September 1994, after which it was substituted by another version in 2004 and came into force on 24 January 2008.²³⁴ It consists of a preamble and 53 articles, which remain consistent with the

See for more information the Organisation of Islamic Cooperation (2015) <http://www.oic-oci.org/page_detail.asp?p_id=52> accessed 11 December 2015.

²²⁸ Robert Blitt, ‘A Case Study of the Migration of Anti-Constitutional Ideas’ in Austin Sarat, *Human Rights: New Possibilities/New Problems* (Emerald Group 2011) 172.

²²⁹ Azin Tadjdini, ‘The Organisation of Islamic Cooperation and Regional Challenges to International Law and Security’ (2012) 4(2) ALF 36, 44.

²³⁰ CDHR (n 5) art 13.

²³¹ Ann Elizabeth Mayer, ‘Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?’ (1994) 15 Michigan journal of international law 307, 329.

²³² Organization of the Islamic Cooperation Statute (OIC/IPHRC/2010/DR (adopted 28-30 June 2011).

²³³ Tadjdini (n239) 45.

²³⁴ Member states of the Arab League are Algeria, Bahrain, the Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, KSA, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

international standards of human rights.²³⁵ An-Na'im pointed out that the "development was particularly surprising not only because none of the seven states that had objected to the draft had changed its view,²³⁶ but also because the Charter contained rights, such as the right to strike, prohibited in almost all Arab states".²³⁷

The ACHR's provisions are extensive. They focus on many human rights in detail, including the right to self-determination, protection from racism and foreign domination, the right to equality and prohibition of discrimination based on race, colour, sex, language, religion, opinion, thought or the like, equality between men and women and the right to be protected by the law. It also places limitations on the death penalty, prohibiting its application to individuals under eighteen years old and women that are pregnant.²³⁸ Furthermore, it forbids all physical or psychological torture and cruel, degrading, humiliating or inhumane treatment.²³⁹ It also ensures the rights to fair trial and judgment, offers the right to political activity, ensures the right of privacy and protects minorities' rights. In addition, it offers freedom of movement, political asylum, the right to nationality, the right to freedom of thought, the right to education, the right to own property, freedom of expression and the right to marriage and having family.²⁴⁰ It confirms the right to development, the right to an adequate standard of living, the right to health care and health insurance, the obligation to fight illiteracy, the right to participate in cultural life, the freedom of scientific research and the protection of vulnerable groups such as children, minorities and the disabled.²⁴¹

With regard to labour, the ACHR clearly forbids slavery and forced labour. It also agrees with the significance of the right to work, and guarantees in Article 34 "equality of opportunity without discrimination of any kind", asserting the necessity of offering appropriate working conditions. It prevents exploitation of children and calls for state parties to define the minimum age of employment and determine hours of work for children. In addition, it agrees with equality between men and women employees, and guarantees "workers who migrate to its territory the requisite protection in accordance with the laws in

²³⁵ Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5 Human Rights Law Review 361, 364. See also Malcolm N Shaw, *International Law* (CUP 2003) 283.

²³⁶ The states which objected to the draft in 1992 were Bahrain, Kuwait, Oman, KSA, Sudan, United Arab Emirates and Yemen.

²³⁷ Abd Allah Ahmad Naim, 'Human Rights in the Arab World: A Regional Perspective' (2001) 23 Human Rights Quarterly 701, 714.

²³⁸ ACHR (n 6) arts 2, 6 and 7.

²³⁹ *ibid* art 8.

²⁴⁰ *ibid* arts 13-25 and 33.

²⁴¹ *ibid* arts 37-45.

force”. Lastly, it offers the right to form trade unions, the right to strike and the right to social security and social insurance.²⁴²

In contrast to the CDHR and the UIDHR, the ACHR offers a mechanism for monitoring its implementation (Article 48). The ACHR has a committee, which began in 2009, of seven members who are “highly experienced and competent in the committee’s field of work”. They evaluate periodic reports handed in by the member states, then issue recommendations on the actions to be taken to enhance the compliance of the state parties.²⁴³

There have been promising developments in Arab regions related to labour migration. The Agreement of the Council of Arab Economic Unity, adopted the League of Arab States (hereinafter referred to as LAS) in 1965,²⁴⁴ which “provides for freedom of movement, employment and residence, and abolishes certain restrictions on movement within the region”.²⁴⁵ In 1968, the Arab Labour Organization (hereinafter referred to as ALO) established the Arab Labour Agreement,²⁴⁶ which aims to assist movement of labour and is mainly concerned with Arab workers within the region.²⁴⁷ In 1970, these same provisions were repeated with the aim of endorsing measures to preserve work in Arabic-speaking labour markets for Arab workers and reduce non-Arab workers in the region. This was made obvious throughout the 1980s, with the adoption of the Strategy for Joint Arab Economic Action and the Charter of National Economic Action.²⁴⁸ The former states that “Arab manpower must be resorted to increasingly to reduce dependence on foreign labour”, while the latter removes legal obstacles between citizens and migrants from other Arab-speaking countries and guarantees equal treatment and freedom of movement. The Arab Declaration of

²⁴² *ibid* arts 34.

²⁴³ Rishmawi (n 235) 366.

²⁴⁴ League of Arab States, ‘Arab Economic Council Resolution No. 77 (March 1965) on the Freedom of Movement, Residence and Labour, as stipulated in the Agreement on Arab Economic Unity’ (approved 1962, entered into force 1965). Available at LAS, ‘Treaties and Agreements’ (*LAS Portal*, 2016) <http://www.lasportal.org/ar/legalnetwork/Pages/agreements_treaties.aspx> accessed 22 August 2016.

²⁴⁵ Ahmed Farouk Ghoneim, ‘Investigating the Relationship Between Trade and Poverty: The Case of Egypt’ in Mahmoud AT Elkhafif and others (eds), *Economic and Trade Policies in the Arab World* (Routledge 2012) 56-57.

²⁴⁶ League of Arab States, ‘Summit (No. 4) adopted Agreement on the Movement of Arab Manpower No. 4’ (amended on 13 March 1975, Libya). Available at LAS, ‘Treaties and Agreements’ (*LAS Portal*, 2016) <http://www.lasportal.org/ar/legalnetwork/Pages/agreements_treaties.aspx> accessed 22 August 2016.

²⁴⁷ ECLAC and others, *International Migration and Development in the Americas* (United Nations 2001) 441 and 442; see also Francesca Ippolito and Seline Trevisanut, *Migration in the Mediterranean* (CUP 2015) 80.

²⁴⁸ League of Arab States, ‘Summit (No. 11) adopted the Joint Arab Economic Charter (25-27 November 1980, Amman). Available at LAS, ‘Treaties and Agreements’ (*LAS Portal*, 2016) <http://www.lasportal.org/ar/legalnetwork/Pages/agreements_treaties.aspx> accessed 22 August 2016.

Principles on the Movement of Manpower²⁴⁹ gives the Arab worker priority, and calls for inter-regional cooperation.²⁵⁰ The OIC encourages its members to develop coordinating mechanisms to safeguard the social security rights of migrant workers, but these initiatives have not been achieved.²⁵¹

In 2006, the LAS adopted the Arab Declaration on International Migration, which acknowledged the benefits of labour migration for both states of origin and states of destination whether labour is moving to, among or out of the Arab region states. The Declaration emphasised the significance of easing the movement of labour among Arab states to meet their needs, with the aim of enhancing their competitiveness and achieving regional integration.²⁵² Despite the fact that the declaration called on all labour-receiving states to improve the “human rights and fundamental freedoms of all immigrants”,²⁵³ the provisions remained non-binding. In practice, most countries in the Arab region, especially those in the GCC, still impose restrictive labour migration policies, considering that labour migration may cause a national threat and thus limiting the number of foreign nationals.²⁵⁴

In practice, freedom of movement in the Arab region has been subject to political influences. A good example of this is the expulsion of Yemeni workers from KSA during the Gulf War in 1990. The Yemeni Government supported Iraq during the Iraqi invasion of Kuwait. Before 1990, Yemeni workers did not need to obtain a work visa to work or live in KSA and they could open a business without a sponsor (*kafeel*). KSA decided to revoke these privileges and expelled Yemeni workers from the country.²⁵⁵

Conclusion

This chapter has shown that efforts have been made at the international and regional levels to provide protection to migrant workers and their families. The ILO and UN have made significant progress in developing international standards to improve working conditions and

²⁴⁹ League of Arab States, ‘Declaration of Principles on the Movement of Arab Manpower among Arab States’ (adopted ,1980). Available at LAS, ‘Treaties and Agreements’ (*Las Portal*, 2016) <http://www.lasportal.org/ar/legalnetwork/Pages/agreements_treaties.aspx> accessed 22 August 2016.

²⁵⁰ ECLAC (n247) 441-442.

²⁵¹ Laszlo Dux, ‘The Role of Regional Organizations in the Protection of Migrant Workers’ Rights’ in Roger Blanpain and others, *The Global Labour Market* (Wolters Kluwer Law & Business 2008) 125 and 126.

²⁵² Arab Declaration on International Migration (2006) (adopted 17-18 July 2006).

²⁵³ *ibid* art 6.

²⁵⁴ Furthermore, there was no specific legal protection for migrant workers in these above instruments despite the fact that Arab and Muslim countries have, since ancient times, experienced migration, especially to holy places.

²⁵⁵ Douglas S Massey, *Worlds in Motion* (Clarendon Press 1998) 156.

protect migrant workers' rights. The ILO, on the one hand, has made valuable contributions to promoting decent work by developing two legally binding conventions and two recommendations dealing with labour migration issues. These instruments cover the recruitment processes, labour market information, working conditions and a number of rights, such as social, cultural, civil and economic rights. On the other hand, the UN has also been proactive in advancing the protection of migrant workers. It has adopted a comprehensive international convention for protecting migrant workers' rights, the ICMW.

Both the ILO and the UN instruments provide "a legal basis for national policy and practice regarding non-national migrant workers and their family members. They serve as tools to encourage States to establish or improve national legislation in harmony with international standards."²⁵⁶ However, despite these guiding principles, the rights of migrant workers have still not been given sufficient protection. This is evident from the slow process of ratification and the failure of both origin countries and countries of employment, such as KSA, to become parties to these human rights conventions relating to migrant workers.²⁵⁷ Furthermore, poor implementation of existing labour standards at workplaces in the country of employment are often linked to conflicts of interest and agendas which lead to obstructions in the countries of employment, such as KSA, recognising these rights.²⁵⁸

Regarding regional instruments, as outlined above, it is obvious that the protection of migrant workers by various Islamic instruments (UDIHR, CDHR and the ACHR) and Arab League agreements is limited, particularly when compared to the protection provided by international instruments. Firstly, these instruments are declarations, with the exception of the ACHR, that do not have binding authority on the signatory states and have poor legal mechanisms. Kapiszewski stresses that "these declarations had little effect".²⁵⁹ Secondly, the declarations and agreements related to labour movement in the Arab region exclude non-Arab workers, who represent the majority of foreign labourers in the GCC, revealing legal deficiencies. Implementing them is likely to lead to discrimination. However, in practice, these declarations and agreements have had little effect and the right to form labour unions in the Arab region has been curtailed, which is indicative of the superiority of state sovereignty.

²⁵⁶ Patrick A Taran, 'Globalization/Migration: Imperatives for Civil Society and International Organizations' in Barbara Bogusz, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004) 279.

²⁵⁷ UN (n 101) 202.

²⁵⁸ These obstructions include political and economic ones and will be discussed in detail in Chapters 5 and 6.

²⁵⁹ Andrzej Kapiszewski, 'Arab Labour Migration to the GCC States' (2004) IOM 115.

Even so, OIC has encouraged its members to develop coordinating mechanisms to safeguard the social security rights of migrant workers, but these aims have so far not been achieved.²⁶⁰ One may conclude that adherence to the international human rights system by both origin countries and countries of employment are vital in order to promote and endorse migrant workers' rights. The following chapter examines, in-depth, the domestic application of international human right conventions in KSA.

²⁶⁰ Dux (n 251) 125-126.

Chapter 3: The Domestic Application of International Human Rights Conventions in Saudi Arabia

Introduction

The discussion in the previous chapter would be incomplete without an examination of the relationship between Saudi human rights legislation and various international conventions. The aim of this chapter is to examine the application of international human rights conventions in Saudi legislation where Sharia is the main source of law, and to explore KSA's position on reservations and ratifications generally and in the context of migrant workers' rights. Some conventions experience more participation from states generally, and KSA in particular, than others. KSA has ratified a number of human rights conventions, including the ICERD. This chapter examines the significance of non-discrimination provisions in the ICERD, as KSA became party to this convention to advance TFW protection in the country. This section also examines the efforts made to address the issue of TFWs by analysing the national report for universal periodic review submitted by KSA. It is important to identify the main obstacles leading KSA not to ratify conventions.

Finally, this chapter examines the role of national human rights organisations in implementing and promoting human rights in KSA and explores the significant efforts made by these organisations to implement and protect the rights of foreign workers.

3.1. Human rights under the Basic Law of Governance

According to the Basic Law of Governance (*al-nizam al-asasi li-l-hukm*) of KSA (also known as the Basic Law),¹ Sharia is the supreme law. In Article 7, the Basic Law stipulates that the Qur'an and the Sunnah are supreme, ruling over all other laws. The Basic Law is subordinate to Sharia sources, that is, the Qur'an and the Sunnah of the Prophet (*pbuh*). Therefore, any legal concerns, including human rights, must be regulated based on the Sharia.² The Basic Law makes note of human rights in Article 26, which declares that "the state protects human rights in accordance with the Islamic Sharia".³

¹ Basic Law of Governance, Royal Order No. A/91 27 (1 March 1992).

² Ann Elizabeth Mayer, 'Islam and Human Rights Policy' in Sohrab Behdad (ed), *Islam and the Everyday World: Public Policy Dilemmas* (Routledge 2008) 83.

³ Basic Law (n 1) art 26.

Under the Basic Law the state is responsible for “the rights of citizens and their families in the case of emergency, illness, disability and old age”,⁴ but it does not identify or list these rights. In addition, the Basic Law claims that KSA will provide job opportunities for every individual, establish laws to safeguard employees and employers (Article 28), support public education (Article 30) and offer health care for all citizens (Article 31). The Basic Law also protects property rights and personal privacy. Article 38 declares that individuals will not be penalised for crimes for which they are not responsible without referring to the law and “punishment shall not be imposed *ex post facto*”.⁵

The Basic Law does not address freedom of expression, association or assembly, or the right to information.⁶ Saudi legislation has banned all demonstrations and those who participate are penalised. Labour trade unions are forbidden and the collective organisation of workers and workers’ strikes is banned.⁷ FNs are defined as “residents”.⁸ Article 36 states that “the State shall provide security for all citizens and residents on its territories. No one may be confined, arrested or imprisoned without reference to the Law.”⁹ Regarding the rights and duties of residents, Article 41 indicates that residents “shall abide by its laws and shall observe the values of Saudi society and respect its traditions and feelings”. Article 47 provides the right of litigation, which “is guaranteed to citizens and residents of the Kingdom on an equal basis”.¹⁰

Zartner argues that KSA does not safeguard individual rights.¹¹ Although the Basic Law contains a section entitled “Rights and Duties”, the degree to which the rights of citizens are protected is minimal and the Basic Law does not explicitly clarify these rights.¹² Although the Basic Law accepts the concept of human rights protection, such safeguarding is somewhat limited to those rights viewed as consistent with Sharia, as stated in Article 26. However, it

⁴ *ibid* art 27.

⁵ Dana Zartner, *Courts, Codes and Customs* (Oxford University Press 2014) 159.

⁶ Narendra S Sisodia and Ashok K Behuria, *West Asia in Turmoil* (Academic Foundation in Association with Institute for Defence Studies and Analyses 2007) 326.

⁷ HRW, ‘Empty Reforms. Saudi Arabia’s New Basic Laws’ (Washington, DC: Human Rights Watch 1992) 35–36.

⁸ It is worth mentioning here that the Saudi Basic Law and other regulations related to residency in Saudi Arabia do not define the minimum length of residency.

⁹ Basic Law (n 1) art 36.

¹⁰ *ibid* art 47.

¹¹ Zartner (n 5) 159.

¹² *ibid*.

could be suggested that this statement is ambiguous, as Quershi and Hashemi do, because what rights the Sharia limits are not defined.¹³

Generally, the Sharia is vital to KSA's constitution and the lives of Saudi citizens. In Article 70, the Basic Law specifies that "international regulations, treaties, conventions and privileges shall be promulgated and amended under the terms of royal decrees".¹⁴ Thus, any clauses within international treaties or conventions that have been ratified by royal decree are enforced.¹⁵

The protection of rights within Saudi domestic law is minimal. Saudi domestic law has powerful roots within the legal traditions of the Hanbali School of Law and Wahhabi jurisprudence. Saudi domestic law tends to consider the acknowledgement, endorsement and internationalisation of secular and externally drafted international human rights laws. To some extent, these rights are restricted in the Kingdom.¹⁶

3.2. Application of international human rights conventions in KSA

The issue of international human rights in KSA is extremely complicated and controversial. KSA encounters difficulties in this context because the legal system provides insufficient protection.¹⁷

The relationship between national and international law is typically explained using monism and dualism, two competing theories.¹⁸ In monistic systems, national and international law are viewed as a single legal system. The process of ratification immediately integrates the regulations into national law. Individuals are able to invoke those regulations in court as national law.¹⁹ In the event of a conflict between an international law and a local law, nearly all monists assert that international law takes precedence.²⁰

Dualists focus on the difference between national and international law. Dualism interprets international law in the context of national law. Without adopting international laws into

¹³ Nader Hashemi and Emran Qureshi, 'Human Rights - Oxford Islamic Studies Online' (*Oxford Islamic Studies*, 2017) <<http://www.oxfordislamicstudies.com/article/opr/t236/e0325>> accessed 2 February 2017

¹⁴ Basic Law (n 1) art 70.

¹⁵ *ibid* art 70.

¹⁶ Zartner (n 5) 159.

¹⁷ Lara Walker, 'The Right to Health and Access to Health Care in Saudi Arabia with a Particular Focus on the Women and Migrant' in Brigit Toebes (ed), *The Right to Health: A Multi-Country Study of Law, Policy and Practice* (Springer 2014) 167.

¹⁸ Zartner (n 5) 2017.

¹⁹ Antoinette Vlioger, *Domestic Workers in Saudi Arabia and the Emirates* (Quid Pro Books 2012) 144.

²⁰ Rebecca MM Wallace, *International Law* (5th edn, Sweet & Maxwell 2005) 37.

national laws, citizens cannot invoke the laws of a treaty that has been ratified by the government. According to the Committee on Economic, Social and Cultural Rights, a dualistic country “adheres to the principle that international treaties do not automatically, on ratification, become part of [the domestic] law. To become directly applicable, international treaties must either be transformed or incorporated into [the domestic] law”.²¹

Article 70 of the Basic Law notes, “Laws, treaties, international agreements and concessions shall be issued and modified by royal decrees.” Vlioger indicates that the Basic Law itself is not decisive. International agreements must be transformed into national laws. However, this practice is rare. Legal representatives and judges are frequently unclear as to whether they can immediately make an appeal to an international law in court.²²

KSA commonly encounters issues regarding human rights because these rights are not effectively addressed by the legal system. International organisations frequently mention this (see Chapter 6).²³ Saudi law does not safeguard fundamental rights. The few rights that are safeguarded are subject to rigorous restrictions. These restrictions raise serious concerns regarding employment, sponsorship systems, a lack of official liability, random detention and exploitation. In KSA and other states, it has been observed that “traditional values are frequently used as a justification to undermine human rights”.²⁴ Baderin has rightly observed that Muslim countries do not typically refuse or neglect to carry out their responsibilities, but some international human rights interpretations may “not take Islamic values into consideration”.²⁵

The Basic Law indicates that the Law of Criminal Procedure, the Law of Procedure before Sharia courts and all other Saudi regulations (which depend on Islamic law) must be in agreement with the provisions of Sharia, specifically the Qur’an and the Sunnah of the Prophet Mohammed.²⁶ Both the Qur’an and the Hadith stress the value of protecting human

²¹ United Nations Economic and Social Council (ECOSOC), ‘Implementation of the International Covenant on Economic, Social and Cultural Rights. Replies by the Government of Sweden to the list of issues’ (E/C.12/SWE/Q/5/Add.1) (4 September 2008) <<http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.SWE.Q.5.Add.1.pdf>> accessed 28 November 2015. See also Mario Méndez, *The Legal Effect of EU Agreements* (Oxford University Press 2013).

²² Vlioger (n 19) 144.

²³ The role of and reports from non-governmental and intergovernmental human rights organizations on the rights of migrant workers will be discussed in the coming chapters.

²⁴ Walker (n 17) 167.

²⁵ Mashood Baderin, ‘A Macroscopic Analysis of the Practice of Muslim States Parties to International Human Rights Treaties: Conflict or Congruence?’ (2001) 1(2) *Human Rights Law Review* 267.

²⁶ See the Basic Law (n 1), the Law of Procedure before Sharia Courts, Royal Decree No. M/21 (19 August 2000) art 1 and the Law of Criminal Procedure, Royal Decree No. M/39 (16 October 2001) art 1.

rights. Though Islamic texts bind legal orders, international conventions and treaties do not perform the same function.

Saudi laws often adopt the dualistic approach. In addition, in order for KSA to implement international conventions, they must be ratified so they are in agreement with the Qur'an and the Sunnah. This is typically completed using the constitution, through which all judgments are made by legal authorities, as indicated in Article 1 of the Basic Law, Article 1 of the Law of Criminal Procedure and Article 1 of the Law of Procedure before Sharia Courts. In reality, KSA usually applies international law according to domestic law, unless there is a specific provision that explicitly breaches international law. Therefore, domestic law usually complies with international law. Nevertheless, when there are conflicts, KSA is obliged to adhere to Sharia.²⁷

Though there have been many developments on the subject of human rights in the country, further improvements are required to safeguard the rights of migrant workers. A current issue centres on migrant workers with few practical skills, namely those working in construction.²⁸ Various human rights divisions and local human rights institutions exist to promote human rights. However, due to inadequate reporting and documentation, trustworthy information is scarce. This makes it extremely difficult to generate an accurate image of the Saudi legal system, specifically with regard to the actions of Saudi authorities on human rights issues.²⁹

3.3. The Saudi Government's position on the ratification of and reservation to international human rights conventions

Information regarding the position of the Saudi legal system regarding the implementation of international conventions within its system is substantial. This subject matter has drawn extensive scholarly interest.³⁰ KSA is among several countries that are known to hold a controversial position towards human rights. This position was revealed when KSA abstained from voting for the UDHR in 1948. The government's opposition, expressed by Al-Barudi (the ambassador to the UN at the time), was that the UDHR demonstrated components of

²⁷ Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions, A Critical Assessment' (1998) 15 RIMO 28.

²⁸ Walker (n 17) 167.

²⁹ *ibid* 170.

³⁰ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations* (British Institute of International and Comparative Law 2008); Kamran Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States* (Martinus Nijhoff 2008); Madawi Al-Rasheed, *A History of Saudi Arabia* (Cambridge University Press 2010). Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law* (Kluwer Law International 2000).

Western traditions that did not adhere to the cultural beliefs of Eastern countries.³¹ KSA's specific opposition was towards Article 18,³² which offers individuals the right to change their religious faith. Al-Barudi noted that this right was incompatible with the precepts of the Sharia, which prohibits Muslims from changing their religious beliefs.³³

The Saudi Government also claimed that some principles from the declaration were recognisable to Islam but were incomplete and required a unifying framework. Marnia Lazreg makes the following observation:

“[The Saudis] took the declaration to be a competing document claiming universality when, in fact, its contents were limited to the particularistic goal of applying a Western mode of social, political and economic practice onto a culturally and philosophically different world. Implicit in the Saudi position is the reasoning that the Islamic conception of man and the legal system elaborated upon it is just as good, if not better than, the abstract principles enunciated in the declaration and subsequent covenants and conventions. ... They maintain that, while international conventions seem to strike for what essentially is ‘the unity of the European family,’ the Saudis want to go further toward the unity of the whole human family.”³⁴

KSA has not ratified core human rights conventions, such as the ICCPR, the ICESCR and, more importantly, the ICMW. This demonstrates weak international commitment to human rights issues in an economic, cultural and social sense, as well as in a political and civil sense. Even when key conventions regarding fundamental human rights (e.g. ICERD) have been ratified, they have done little improve human rights in KSA. Since KSA is not a signatory to the ICESCR, which includes basic rights such as the right to work, information is limited on the protection of economic, cultural and social rights within KSA. In terms of vulnerable populations, women's rights receive greater protection in comparison to those of migrant workers because KSA has ratified the International Convention on the Elimination of all Forms of Discrimination against Women (hereinafter referred to as CEDAW).³⁵ However,

³¹ Abdulhamid Al-Hargan, ‘Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation’ (2005) 9 (4) *International Journal of Human Rights* 491, 499.

³² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 18 states, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

³³ Donna E Arzt, ‘The Application of International Human Rights Law in Islamic States’ (1990) 12 *Human Rights Quarterly* 202, 217.

³⁴ Marnia Lazreg, ‘Human Rights, State and Ideology: A Historical View’ in Adamantia Pollis (ed), *Human Rights: Cultural and Ideological Perspectives* (Praeger 1979). Quoted from Arzt (n 33) 216, 217.

³⁵ International Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, *entered into force* 3 September 1981) 1249 UNTS 13

KSA has not ratified the convention concerning the rights of migrant workers and members of their families.³⁶

In general, there are two main explanations provided for KSA's reluctance to sign human rights documents. Firstly, KSA insists that the language of the declaration breaches the teachings of Islam, such as the freedom of religious beliefs. Secondly, authorities in KSA have stated that human rights are given more protection within Sharia compared to the UDHR.³⁷ However, reservations about, and the misunderstanding of, the provisions of human rights conventions prevent the acceptance of international human rights. Even though the Basic Law does clearly express a process of dealing with international law, the dualist legal system means that international conventions do not immediately obtain the force of law upon ratification.

Therefore, to use international conventions, they must be obtained through the national legal system, alongside the involvement of *Majlis Ash-Shura* (hereinafter referred to as the *Shura Council*),³⁸ to incorporate them with national laws, as stated in Articles 15 and 18 of the *Shura Council Law*.^{39 40}

However, KSA provides an alternative method for ratification by expressing reservations. According to the Vienna Convention on the Law of Treaties (1969), states can submit reservations to particular aspects of a treaty. The state may be concerned that the treaty is incompatible with state policies or beliefs. For instance, in 2000, KSA ratified the CEDAW and submitted subsequent reservations regarding its provisions:⁴¹

1. In case of contradiction between any term of the convention and the norms of Islamic law, KSA is not under obligation to observe the contradictory terms of the Convention.

³⁶ Walker (n 17) 171.

³⁷ HRW (n 7) 25.

³⁸ Shura Council Law, Royal Order No. (A/91) (5 March 1992) <http://www.saudiembassy.net/about/country-information/laws/Majlis_Ash_Shura_Law.aspx> accessed 10 September 2015.

³⁹ For further discussion, see Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (2010) 10 Human Rights Law Review 1.

⁴⁰ Shura Council Law (n 37) art 15: "Majlis Ash-Shura shall express its opinion on general policies of the State referred by the Prime Minister. Specifically, the Council shall have the right to do the following: discuss the general plan for economic and social development; study laws and regulations, international treaties and agreements and concessions and make whatever suggestion it deems appropriate; interpret laws." Art 18: "Laws, international treaties and agreements and concessions shall be issued and amended by royal decrees after being studied by Majlis Ash-Shura."

⁴¹ United Nation (UN), 'Declarations, Reservations and Objections to CEDAW' (UN, 2015) <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>> accessed 19 November 2015.

2. KSA does not consider itself bound by paragraph 2 of Article 9 of the convention and paragraph 1 of Article 29 of the convention.

As evidenced by the reservations mentioned above, KSA did not want to be bound by Article 9, which mandates that the state is able to offer women rights equal to those of men and that women can alter or maintain their nationality if they marry a non-native Saudi citizen. Additionally, KSA did not wish to adhere to the condition that women were to be given rights equal to those of men concerning the nationality of their children.⁴² KSA also submitted a reservation about the Convention on the Rights of the Child (hereinafter referred to as CRC)⁴³ with respect to all such articles as are in conflict with the provisions of Sharia.⁴⁴

KSA indicated that it would apply the provisions of the ICERD⁴⁵ “to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction”.⁴⁶ These provisions do not conflict with the principles of Sharia. KSA did not wish to be bound by ICERD Article 22, which notes that any dispute must be submitted to the International Court of Justice.⁴⁷

KSA’s domestic legal and policy framework regarding non-discrimination and equality fails to meet international requirements.⁴⁸ Discrimination against FNs exists at societal and cultural levels. Tolerance of TFWs exists in KSA because these individuals satisfy the need for low-cost labour in the industrial sectors. However, TFWs with limited practical skills experience discrimination, racism and xenophobia from some members of the Saudi community. Even though TFWs often receive some form of assistance from neighbouring Muslim communities and authorities, discrimination towards these individuals persists.⁴⁹

⁴² *ibid.*

⁴³ Convention on the Rights of the Child (CRC) (adopted 20 November 1989, *entry into force* entry into force 2 September 1990) 1577 UNTS 3.

⁴⁴ Abiad (n 30) 70.

⁴⁵ As mentioned above, the ICERD is necessary for migrant groups that comprise the minorities in their country of residence. The ICERD is usually ratified and functions with the use of crucial safeguard instruments, specifically in states that have not ratified the Conventions on labour migration. It is necessary to discuss the ICERD in this research because it was ratified by Saudi Arabia in 1997.

⁴⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 3.

⁴⁷ *ibid* art 22: “Any dispute between two or more states parties with respect to the interpretation or application of this convention, which is not settled by negotiation or by the procedures expressly provided for in this convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement”.

⁴⁸ Human Rights Watch (HRW), ‘Bad Dreams: Exploitation and Abuse of Migrant Workers in KSA’ (*HRW*, 2004) 15 and 16 <<https://www.hrw.org/reports/2004/saudi0704/>> accessed 15 May 2016.

⁴⁹ Equal Rights Trust, ‘Equal Only in Name the Human Rights of Stateless Rohingya in Malaysia’ (*IHRP*, 2014)<<http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Malaysia%20-%20Full%20Report.pdf>> accessed 24 November 2015.

This discriminatory treatment of low-skilled TFWs has a significant impact on other human rights, such as their right to an education, employment and a high quality of life; their right to liberty and security of person; and to acceptable standards of health. It is controversial that KSA, along with other countries that receive foreign labourers, has not yet ratified the ICMW and has never considered ILO migration conventions.

It is necessary to promote and protect the rights of migrant workers, especially in countries that receive a large number of international labourers. Addressing the obstacles that prevent ratification of human rights conventions would help promote these rights. The UN Human Rights Commission appointed a working group of intergovernmental experts to explore the rights of migrants⁵⁰ which collects information related to impediments to providing adequate protection and submits recommendations for promoting, implementing and guaranteeing the rights of migrants. In 1999, this group's recommendations resulted in the appointment of a special rapporteur for the human rights of migrants.

The group's final report, presented in 1999,⁵¹ lists the obstacles preventing effective and complete protection of the rights of migrant workers. These obstacles are classified as institutional, social and economic.⁵² The fundamental institutional impediment is the "absence or non-application of standards and norms in national law".⁵³ The working group stressed the vulnerability of migrants as a result of the absence of legal protection or because of other weaknesses, which some states consider dangerous to public order. Additional institutional impediments include disregard for basic human rights, specifically regarding expulsions, and inadequate training of authorities in human rights.⁵⁴

The second impediment focuses on social obstructions, social differences resulting from housing segregation and the accommodation provided to migrants in cities that struggle economically. This creates disadvantages in employment, public education and medical care.⁵⁵

⁵⁰ Nana Oishi, *Women in Motion* (Stanford University Press 2005) 182.

⁵¹ United Nations Commission on Human Rights, Working Group of Intergovernmental Experts, 'The Working Paper Prepared by Mr. Jorge A. Bustamante, Chairman/Rapporteur of the Working Group of Intergovernmental Experts on the Human Rights of Migrants, Third session, 23-27 November 1998, Fourth session, 8-12 February 1999, Item 14 (a) of the provisional agenda, UN Doc E/CN.4/1999/80 (9 March 1999).

⁵² *ibid.*

⁵³ *ibid.* 17.

⁵⁴ *ibid.* and see also Heikki S Mattila, 'Protection of Migrants' Human Rights: Principles and Practice' (2001) 38 *Int'l Migration* 53, 59.

⁵⁵ Bustamante (n 51) 19.

The third impediment focuses on economic issues: discrimination as workers attempt to access employment in their host country. When employed, TFWs tend to be at the low end of the labour market, in jobs typically referred to as dirty, degrading and dangerous (3D), which can lead to racial segmentation. This is linked to the growing informal sector, which usually employs temporary, low-skilled labour and undocumented migrants, who often experience abuse.⁵⁶

KSA may not recognise the rights of workers due to the temporary legal status of foreign workers in the country. In most cases, temporary work visas are granted through a sponsorship system, which restricts employment to the migrant's original sponsor in a specific location. Unlike permanent immigration programmes, temporary employment is frequently perceived as a method of using labour migration to meet specific demands in the labour market (see Chapters 5 and 6).⁵⁷

KSA has consented to the CDHR and ratified the ACHR. However, though the latest version of the ACHR shows some improvements, it is still widely criticised.⁵⁸ The main issue of regional conventions is the weak enforcement mechanisms or assurance of remedies.⁵⁹ Some might suggest that a country that ratifies a convention is obliged to adhere to all the prerequisites of the treaty. In accordance with the Vienna Convention, a state that submits their reservation to the treaty prior to ratifying it can be exempt, according to its reservations. The UN identifies a reservation as follows:

“a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state”.⁶⁰

One may suggest that the system of ratification is flexible to encourage all countries to participate in international conventions, particularly if a requirement of the convention

⁵⁶ *ibid.*

⁵⁷ Manolo Abella, ‘Policies and Best Practices for Management of Temporary Migration’ (International Symposium on International Migration and Development Turin, Italy, 28-30 June 2006).

⁵⁸ Walker (n 17) 172; Vera van Hullen, ‘Just Leave Us Alone: The Arab League and Human Rights’ in Tanja A Börzel (ed), *The Governance Transfer by Regional Organizations: Patching Together a Global Script* (Palgrave Macmillan 2015) 129.

⁵⁹ See, for more discussion, Mervat Rishmawi, ‘The Revised Arab Charter on Human Rights: A Step Forward?’ (2005) 5 *Human Rights Law Review*; see also Walker (n 17) 172 and ICNL, ‘League of Arab States - NGO Law Monitor - Research Centre - ICNL’ (2015) <<http://www.icnl.org/research/monitor/las.html#members>> accessed 15 November 2015.

⁶⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 2.

appears to conflict with a country's values.⁶¹ Such a system allows countries, such as KSA, to apply a treaty in a manner that is in accordance with domestic laws. Thus, a reservation applies treaty law to domestic law.⁶² Articles 20 and 21 of the Vienna Convention describe the method with which reservations operate. If a country suggests a reservation, then every other country may agree to the reservation or oppose it. If the objection is not made within one full year, then the state is required to approve the reservation.⁶³

In specific circumstances, a reservation may not be granted. For instance, Article 19(a) enables states to vote in favour of reservations unless "the reservation is prohibited by the treaty".⁶⁴ In addition, Article 19(b) states that a reservation is permitted, excluding when "the treaty provides that only specified reservations, which do not include the reservation in question, may be made".⁶⁵ Nevertheless, though reservations are allowed, they must satisfy Article 19(c), which suggests that a state may not produce a reservation that is "incompatible with the object and purpose of the treaty".⁶⁶

It can be concluded that the Government of KSA demonstrates non-ratification and non-compliance with international human rights instruments because these instruments are incompatible with the Islamic Sharia. Furthermore, any discriminatory practice or non-fulfilment of the rights in international conventions by KSA results from interpretation of the Qur'an and Sharia. This is evident because Sharia is not codified and is subject to various interpretations, making it difficult to determine a reservation based on the Sharia. However, conflicting opinions exist as to whether these reservations, made by a number of Islamic countries, are actually crucial.⁶⁷

Ali rightly argues that political, socio-economic and religious considerations exist that lead to reservations made by states with a predominantly Muslim population. She also states that

⁶¹ Ann Elizabeth Mayer, 'Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?' (1996) 23 *Hastings Constitutional Law Journal* 727, 731.

⁶² VCLT (n 60).

⁶³ Duncan B Hollis, *The Oxford Guide to Treaties* (OUP 2012) 290. It is worth noting that, in some cases, treaties explicitly ban reservations. This is evident from Article 120 of the Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) which stipulates that "No reservations may be made to this statute". In addition, reservations are banned in a number of environmental treaties (for instance, art 37 of the United Nations Convention on Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 12 September 1994) and art 37 of the Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993). Other treaties allow reservations or refuse any reservations provided by the state.

⁶⁴ VCLT (n 60) art 19(a).

⁶⁵ *ibid* 19(b).

⁶⁶ Mayer (n 61) 731.

⁶⁷ Walker (n 17) 171.

“the situation is further complicated where no uniform position vis-à-vis Islamic law is adopted by Muslim states since each jurisdiction presents its own specific blend of an ‘operative’ and ‘cultural’ Islam, distinct from other Muslim jurisdictions”.⁶⁸

Furthermore, Mashood argues that “in practice Muslim States do not generally plead the Sharia or Islamic law as justification for ‘failure to perform’ their international human rights obligations. They often argue not against the letter of the law but against some interpretations of international human rights law which, they claim, does not take Islamic values into consideration.”⁶⁹

Saudi authorities are still subject to external pressures from critics due to continual violations of civil rights. For instance, though KSA authorities assert that Sharia law takes priority over the rights of women (as laid out in the CEDAW), some critics indicate that this reservation must be viewed as political rather than religious.⁷⁰

3.4. The significance of non-discrimination provisions for the protection of the rights of migrant workers

The prevention of discrimination comprises the most common and basic principle of the protection of human rights and is integrated in all the main UN human rights conventions and regional human rights systems.⁷¹ In light of this, clauses on non-discrimination hold excellent potential for interpreting the human rights entitlement of persons, including those who, for various reasons, move to live in another country, whether by force or voluntarily.⁷² The ICERD is of unique significance to migrant groups that comprise minorities in the state of residence, functioning as a valuable protection instrument, specifically in countries that have not ratified the conventions related to migrant workers. The ICERD is among the most generally ratified human rights instruments and it obligates state parties to eradicate all types

⁶⁸ Shaheen Sardar Ali, ‘The Twain Doth Meet! A Preliminary Exploration of the Theory and Practice of *as-Siyar* and International Law in the Contemporary World’ in Javaid Rehman (ed), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff 2007) 101.

⁶⁹ Mashood A Baderin, ‘Modern Muslim States Between Islamic Law and International Human Rights Law’ (PhD, University of Nottingham 2001) 4.

⁷⁰ Elizabeth Ann Mayer, ‘Religious Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: What Do They Really Mean?’ in Courtney W Howland (ed), *Religious Fundamentalisms and the Human Rights of Women* (Palgrave Macmillan US 2001) 105-106.

⁷¹ See UN Charter arts 1 and 8, ICESCR art 2(2), ICCPR arts 2(1) and 26, ICERD art 1, CEDAW art 1, and ICMW art 2.

⁷² Lillich (n 10) 42; see also Sandesh Sivakumaran, ‘Rights of Migrant Workers One Year on: Transformation or Consolidation’ (2004) 36 (1) *Georgetown Journal of International Law* 113, 119.

of discrimination against every person in their jurisdiction on the basis of colour, race, sex, or national or ethnic origin.⁷³

The importance of the ICERD derives from the simple fact that this convention was signed and ratified by KSA in 1997.⁷⁴ Moreover, it also includes several rights connected to the rights of migrant labourers as non-citizens in regard to their residence and employment in Saudi Arabia. Significantly, the ICERD has adopted the Bill of Rights, opened for signature in 1965 and entered into force in 1969.

State parties to the ICERD must condemn and eradicate racial discrimination, explained as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.⁷⁵ Notably, Article 1(2) prevents its application to distinctions, exceptions, limitations or preference given by a state party to the ICERD between inhabitants and non-nationals.⁷⁶

However, some provisions were introduced on the insistence of national authorities in order to allow them to limit specific rights to foreign nationals, for instance political rights. Nevertheless, non-nationals may assert entitlement protection when they become victims of racial or ethnic discrimination. According to Article 3(1), state members should not discriminate against any nationality.⁷⁷ In 2003, the UN Special Rapporteur of the UN Commission on Human Rights concluded that “all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate state objective and are proportional to the

⁷³ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, *entered into force* 4 January 1969) 660 UNTS 195, arts 1-4.

⁷⁴ Saudi Arabia ratified the Convention on 23 September 1997. Accession to the ICERD was approved by Royal Decree M/12; art 70 of the Saudi Basic Law stipulates: “International regulations, treaties, conventions and privileges shall be promulgated and amended under the terms of Royal Decrees.” Therefore, the provisions of any international convention or treaty which is approved by royal decree is considered to be enforceable.

⁷⁵ ICERD (n 71) art 1.

⁷⁶ *ibid* art 1(2).

⁷⁷ This provision applies in the cases of discrimination against non-citizens: “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and noncitizens.” Arts 1(3) and 1(2) state: “Nothing in this Convention may be interpreted as affecting in any way the legal provision of State Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”

achievement of that objective”.⁷⁸ In several countries, there are still institutional and widespread issues facing non-citizens. Xenophobia and racial discrimination, mistreatment and harassment remain in host countries, regardless of international human rights standards which are either not imposed or are ignored or violated by discriminatory legal regulations or policies.⁷⁹

The CERD investigates periodic reports submitted by its member states and also investigates personal grievances as well as incidents that raise special awareness of certain problems. The UN Committee on ICERD Concluding Observations in KSA stated:⁸⁰

While observing the fact that Basic Law, and provisions of royal decrees, rules and codes, and also Sharia, ensure equal rights, the Committee is of the view that the assertion in the basic principle of non-discrimination in these regulations is not an adequate response to the demands of the Convention. The Committee suggests that this state party undertake regulations that fit the requirements of Articles 2, 3 and 4 from the Convention.

General Recommendation XXX highlights the state’s obligation to prevent discrimination and recognises five vital aspects for non-citizens: admission to citizenship, administration of justice, safeguards against racist speech, expulsions and removal, and social, cultural and economic rights.⁸¹

Notwithstanding, Saudi authorities have not made any practical efforts to guarantee the rights in the ICERD. This lack of compliance has led to many criticisms.⁸² However, under the legal responsibilities of this treaty, the Saudi authority is required to offer a remedy:

“assure to everyone within its jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate

⁷⁸ David Weissbrodt, ‘The Protection of Non-Citizens in International Human Rights Law’ in Ryszard Cholewinski, Euan Macdonald and Richard Perruchoud (eds), *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser 2007) 228-232; and see, Katharina Eisele, *The External Dimension of the EU’s Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill Academic 2014) 174.

⁷⁹ *ibid.*

⁸⁰ CERD, ‘Concluding Observations, Saudi Arabia’ (Sixty-second session, 2 June 2003) CERD/C/62/CO/8.

⁸¹ CERD, ‘CERD General Recommendation XXX on Discrimination Against Non-Citizens’ (1 October 2002).

⁸² HRW (n 46) 15.

reparation or satisfaction for any damage suffered as a result of such discrimination”.⁸³

KSA submitted a national report for periodic review (2008) which stated that various measures had been applied to implement its provisions.⁸⁴ These included ratifying various international conventions (even though none of these conventions relate to migrant workers).⁸⁵ The report highlights the Council of Ministers Decision No. 166 regulating employment relationships between employers and migrant workers,⁸⁶ which bans an employer from retaining the passports of migrant workers or their families. It also grants them freedom of movement within the country if they hold a valid residence permit and rights to have a driving license issued, or buy a car or have a telephone connection, etc., without needing the consent of their employers. The report asserts that the word “sponsor” be replaced by the term “employer” in official documents. Furthermore, the report highlights SLL Article 40 regarding the responsibility of employers to bear all the costs of recruitment, issuance and renewal of work and residence permits and other expenses.⁸⁷

The report highlights the Implementing Regulations for the SLL, promulgated on 29/2/1428 AH (2007G), which provide wide-ranging provisions to protect migrant workers. These include an employment contract providing full details of salary, working hours, type and place of work and the length of the contract, and the responsibility of a recruitment agency to inform the worker, before concluding an employment contract, of the working and living conditions in KSA.⁸⁸

KSA has submitted its second national report for periodic review and claims that the enactment of several ministerial resolutions and the execution of observing mechanisms provide adequate protection for migrant workers’ rights. The report lists a number of initiatives that increase the protection of migrant workers, including wage protection schema, regulation of recruitment companies to regulate the activities of intermediaries, access to

⁸³ ICERD (n 71) art 6. See, for more discussion, M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd rev edn, Brill 2012) 959.

⁸⁴ UNHRC, ‘National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1 - Saudi Arabia’ (4 December 2008) UN Doc A/HRC/WG.6/4/SAU/1 (paras 30, 35, 36, 37; page 11, 12 and 13).

⁸⁵ See Chapter 3.

⁸⁶ Council of Ministers Decision No. 166 (2000) Regulating relations between migrant workers and their employers.

⁸⁷ Labour Law, Royal Decree No. M/51 (27 September 2005).

⁸⁸ The Implementing Regulations of Saudi Labour Law (6 April 2016) in accordance with art 243 of Labour Law (n 85).

health insurance, no discriminatory restrictions on remittances, a ban on outdoor work in the heat of the sun, and resolution of labour disputes and inspections in the workplace.⁸⁹

3.5. The need to ratify conventions on migrant workers with reference to the ICMW

Based on the above, it is clear that an insufficient commitment to human rights exists in general, though this is more pronounced for migrant workers. Saudi law does not safeguard many fundamental rights of TFWs, and, in some cases, the few safeguarded rights that exist are subject to rigid restrictions. Policy strategies regarding immigrant entry remain restrictive in labour-receiving countries, particularly in KSA. These countries express concerns regarding the ICMW, preventing ratification.⁹⁰ In practice, the ratifications of the ICMW (as well as relevant ILO Conventions on migrant workers) are discouraging. With 48 ratifications made in 2015, the ICMW has received the lowest number of ratifications compared to other key human rights conventions. The few countries that have ratified are mainly labour-sending countries.⁹¹

Devasahayam argues that, in Asian countries, there are substantial variations in the responses of labour-receiving and labour-sending countries towards the ICMW:

“The human rights approach has been received with greater ease in the sending countries; by contrast, in the receiving countries, the term ‘human rights’ has been variously interpreted according to local definitions of civil liberties. As such, these countries have been found to ‘lack... political will’ to enforce the protection of migrant rights and, subsequently, have not ratified the international instruments related to migrant workers.”⁹²

It is argued that KSA, as an affiliate of the UN and the ILO, has a legal responsibility to support the values of such organisations. This includes the promotion of universal human rights and adequate working conditions for the workers in their territory, regardless of nationality or migration status. KSA has ratified numerous UN and ILO instruments that are applicable to all humans. As a signatory to some of these instruments, KSA must apply all the

⁸⁹ United Nations Human Rights Council (UNHRC), ‘National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Saudi Arabia’ (5 August 2013) UN Doc A/HRC/WG.6/17/SAU/1 (paras 68, 70, 71 and 72; pages 17-18).

⁹⁰ Kristina Touzenis and Alice Sironi, ‘Current Challenges in the Implementation of the UN International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families’ (*Europarl* 2013) 23 <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-DROI_ET%282013%29433715> accessed 17 November 2015.

⁹¹ Martin Ruhs, *The Price of Rights* (Princeton University Press 2013) 16.

⁹² Theresa Devasahayam, ‘Human Rights and Female Migrant Labour in Asia’ in Ann Brooks (ed), *Gender, Emotions and Labour Markets - Asian and Western Perspectives* (Routledge 2010) 60.

obligations stemming from these conventions “in good faith ... and refrain from acts which could defeat the object and purpose of the treaty”.⁹³

Grange argues that the ICMW is necessary and useful for the Middle East, inviting labour-receiving countries to ratify it.⁹⁴ It is often argued that the general goals of the ICMW do not contradict the principles of the Sharia on the topic of safeguarding the rights of labour, specifically concerning the relationship between an employer and an employee. This can be seen through the aims of the ICMW, some of which are mentioned below:

- The preamble states that “one of the objectives of the ILO, as stated in its constitution, is the protection of the interests of workers when employed in countries other than their own”.⁹⁵
- Most of the rights are acknowledged in the Sharia and are relevant to employment relationships, such as the right to work and free choice of employment.
- The primary purpose is to safeguard migrant workers and their families against exploitation and abuse of their rights.
- The ICMW is based on the principle that every migrant must have a minimum level of protection.
- The ICMW includes specific clauses on equality and non-discrimination, which are relevant to the ICERD, and KSA is party to this.⁹⁶

3.6. Examining the role of national human rights organisations in promoting the rights of migrant workers in KSA

The Saudi Government has established the National Society for Human Rights (NSHR)⁹⁷ and a Saudi Human Rights Commission (SHRC)⁹⁸ as a national strategy to implement and

⁹³ Art 18 of VCLT (n 58) explores the concept of good faith. See also Mark Eugen Villiger, *Customary International Law and Treaties* (Martinus Nijhoff 1985); Amelia Porges and Cairo AR Robb, *International Environmental Law Reports* (Cambridge University Press 2001).

⁹⁴ Mariette Grange, ‘The International Convention on Migrant Workers and its Relevance for the Middle East’ (CMW25, 2014) 11 <<http://cmw25.org/test-photo-for-ratification-campaign/>> accessed 29 November 2015.

⁹⁵ See the Preamble of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS.

⁹⁶ As discussed above, the ICERD is valuable to this research project because, in 1997, KSA signed the ICERD and ratified the ICERD. The ICERD also outlines many rights that relate to those of migrant workers, namely their employment and residency in KSA. Therefore, it is rational to implement the CERD and other international human rights instruments because the world has increased its recognition of discrimination and exploitation of non-citizens, especially low-skilled workers.

⁹⁷ National Society for Human Rights, ‘The Constitution of the National Society for Human Rights’ (2015) <http://nshr.org.sa/en/?page_id=130> accessed 17 December 2015. See the English version of Royal Decree No. 24/2 (2004) which provides approval to establish the NSHR in accordance to the Basic Law of

promote human rights. The SHRC was created in September 2005 and reports directly to the President of the Council of Ministers.⁹⁹ This governmental agency is charged with observing and applying human rights and raising public awareness.¹⁰⁰

The SHRC also expresses opinions on draft laws, reviews existing laws and suggests amendments, in accordance with Article 5(2). The SHRC is also required to monitor and supervise government entities to ensure they take adequate measures to implement human rights standards, as stipulated in Article 5(3). The SHRC is responsible for submitting KSA's reports on human rights to the President of the Council of Ministers after their approval by the SHRC's Board, as stated in Article 5(5). Other duties include, for instance receiving "complaints from individuals, institutions, organizations and others with regard to human rights issues",¹⁰¹ following up "any complaint until it is resolved" and visiting "prisons and detention centres".¹⁰²

While the SHRC is a governmental supervisory body, rather than an independent civil organisation, the NSHR, established in 2004, is a non-governmental institution. The constitution of the NSHR includes the following:¹⁰³

- Protecting human rights as stipulated in the Basic Law
- Ensuring implementation of regional and international human rights conventions as long as there is no contradiction with Sharia
- Collaborating with non-governmental organizations (NGOs) to promote and protect human rights
- Receiving complaints regarding human rights violations and following up with relevant authorities
- Examining the application of international human rights conventions and contributing to regional and international conferences in the field of human rights.

Governance; NSHR, 'The Royal Approval' (2015) <http://nshr.org.sa/en/?page_id=127> accessed 17 December 2015.

⁹⁸Saudi Human Rights Commission Regulation (SHRC) (adopted by Council of Ministers Resolution No. 207 of 12 September 2005).

⁹⁹ SHRC, art (1).

¹⁰⁰ *ibid* art (1).

¹⁰¹ *ibid* art 11(c).

¹⁰² *ibid* art 11(e).

¹⁰³ *ibid* art 3.

The NSHR has 41 members and the majority occupy senior government positions. Similar to the SHRC, the NSHR is sponsored by government. It has dealt with numerous complaints concerning political prejudice, fraud, worker exploitation, the mistreatment of women and other personal security abuses.¹⁰⁴ According the NSHR there have been 4,503 labour cases received since its formation, 214 of them in 2015.¹⁰⁵

It should be emphasised that the SHRC has not achieved an effective role in promoting human rights. In contrast, the NSHR has played a vital role, conducting several studies into the field of human rights and collaborating with representatives of key international human rights organisations.¹⁰⁶

3.6.1. NSHR proposal and the view of adopting the ICMW

In 2008, the NSHR conducted a study to examine the compatibility of the ICMW with Saudi legislation in relation to the employment of migrant workers,¹⁰⁷ which found that considerable parts of Saudi law and regulation do comply. This study suggests that to become a party to the ICMW, the Labour Law, residency regulations, foreign labourers' recruitment standards, social insurance regulations and some rules and regulations relating to the Passport Department require revision.¹⁰⁸

The study examines some of the Saudi laws and regulations which are in conflict with the ICMW, specifically Article 20, which prevents exile for "failure to fulfil an obligation arising out of a work contract"¹⁰⁹ and Article 22, which prohibits collective deportation and asserts that expulsion should be decided on an individual basis.¹¹⁰ The NSHR believes that the rights mentioned in these articles are not applicable to currently existing deportation rules in Saudi Arabia.¹¹¹

Furthermore, this study notes that, in order to meet the requirements of Article 24, the compulsory sponsorship (*kafala*) system must be abolished, and highlights a significant

¹⁰⁴ Madawi Al-Rasheed, *A History of Saudi Arabia* (Cambridge University Press 2010) 252.

¹⁰⁵ NSHR, 'The NSHR 12th Annual Report' (NSHR, 2015) <http://nshr.org.sa/en/?publication_category=reports-and-studies> accessed 27 October 2016.

¹⁰⁶ Al-Rasheed (n 103) 252.

¹⁰⁷ National Society for Human Rights (NSHR), 'Conformity of the Saudi Rules and Regulations with The Conventions on Basic Human Rights' (NSHR, 2008) 216 <http://nshr.org.sa/en/?publication_category=reports-and-studies> accessed 27 October 2016.

¹⁰⁸ *ibid* 216.

¹⁰⁹ ICMW (n 95).

¹¹⁰ *ibid*.

¹¹¹ NSHR (n107) 217.

negative of *kafala*, which can lead to the confiscation or destruction of migrant workers' identity documentation. The right of migrant workers to retain all his or her identity documentation is clearly defined in Article 21.¹¹²

This study also notes the right of foreign workers to enter and leave the country of employment as stipulated in ICMW Article 8. There are no provisions in KSA's bylaws that clearly stipulate the reasons for preventing a TFW from leaving KSA. However, it is worth mentioning that the *kafala* system provides the right of employers to allow their workers entry and exit from the country (see chapter 5).

This study calls for revisions to social security regulations and rules to provide equality between national and migrant workers, in line with ICMW Article 27. The study also calls on the Saudi authority to revise the current rules and regulations for the recruitment of workers to include a regulation to reunite the members of foreign workers' families, in order to meet the requirements of the ICMW (Article 44).¹¹³

Finally, this study identifies residency regulations and the *kafala* system as the main obstacles that prevent KSA from becoming a signatory to the ICMW. The NSHR critiques the *kafala* system, stating that it is "not based on any legitimate or logical foundation, particularly the current rules which have, over the years the age of the compulsory sponsorship led to building up economic and social interests".¹¹⁴ The NSHR suggests that the residency regulations and the *kafala* system should be revised to abolish the compulsory sponsorship system, which conflicts with international human rights instruments.¹¹⁵

3.6.2 Articles that may cause reservations about the ICMW

As discussed, KSA has specific reservations about international conventions. These reservations mainly apply to the provisions of international conventions on human rights. One reservation is that there is a possibility of taking human rights violations to the International Court of Justice. A second reservation is that the provisions may conflict with the principles of Sharia. However, the NSHR suggests a mechanism to prevent KSA from

¹¹² *ibid* 217.

¹¹³ *ibid* 217.

¹¹⁴ *ibid* 218.

¹¹⁵ *ibid* 218.

rejecting the ICMW.¹¹⁶ Their study indicates that the ICMW contains two provisions that may conflict with the principles of Sharia, which are described as follows.

Article 4 protects the migrant worker's family members, which includes a husband or other relationship 'equivalent to marriage'. This breaches the Sharia, which only acknowledges marital relationships. This may create a reservation about any relationship that is not considered marital.¹¹⁷

Article 12 provides freedom of religion to migrant workers. The NSHR notes that "freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others". According to the NSHR, because KSA is distinguished as being the holy land in which the Islamic faith originated, this makes the practice of other religions in public intolerable. Thus, based on this limitation, there is no need to have any reservations regarding this provision.¹¹⁸

Conclusion

If Saudi Arabia is genuine about its obligation to safeguard human rights, the country must use the instruments mentioned in Chapter 3 and this chapter as guides for the laws, regulations and policies of the country. It is often argued that human rights standards are universal, and efforts to protect workers' human rights must comply with domestic legislation. Therefore, the argument that laws on international human rights are the exclusive concern of Western countries is not justifiable.

It is evident from the readings of Islamic traditions (see Chapter 2) that Islam gives encouragement and provides protection to labour and work done for a living. From an Islamic legal viewpoint, the Sharia puts both a legal and a moral responsibility on the state to protect and ensure the social and economic well-being of all people.¹¹⁹

In general, KSA appears unable to formulate a coherent position on the relationship of its domestic laws to international human rights law. Some countries (including KSA) use Sharia

¹¹⁶ *ibid* 211.

¹¹⁷ *ibid*.

¹¹⁸ *ibid* 212.

¹¹⁹ Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 175.

as a reason for non-compliance with international protection standards, usually without providing any convincing argument.¹²⁰

It could be said that KSA cannot ignore the rights stipulated in international human rights instruments that are compatible with Islamic teaching and the Basic Law, especially those related to migrant workers. Signatory states are allowed to make these rights comply with national law. The acknowledgement of human rights by all Islamic countries is, generally, supported by Sharia, the UIDHR and the CDHRI and constitutions in Muslim countries, including Saudi Arabia.¹²¹ A 2008 NSHR study examined the compatibility of the ICMW with Saudi legislation in relation to the employment of migrant workers and found that considerable parts of Saudi law and regulation relating to the employment of migrant workers were in line with the ICMW. It is believed that the outcomes of this study should take into account the policy-makers in KSA.

Finally, since KSA has not ratified any of the conventions related to migrant workers, the Saudi Government is not legally bound to implement the principles laid out in them. For this reason, this thesis suggests that the international instruments ratified by KSA, such as the ILO Conventions and the ICERD, may help advance the protection of foreign workers in the country. It is often said that the general principles of human rights and labour rights are extended to include protection to all marginalised people, regardless of migration status or nationality. However, KSA has a moral obligation, as a member of these international organisations, to respect and promote their values and strengthen the universality of human rights.

The following chapter addresses the employment situation of TFWs in the SLM with special reference to the human rights issues surrounding the structure of the admission of TFWs into the SCS.

¹²⁰ Kirsten Zaat, 'The Protection of Forced Migrants in Islamic Law' (2007) UNHCR, New Issues in Refugee Research, Research Paper No. 146, 5 < <http://www.unhcr.org/research/RESEARCH/476652cb2.pdf> > accessed 20 May 2016. See also Baderin (n 69) 4.

¹²¹ Nadirsyah Hosen, *Shari'a & Constitutional Reform in Indonesia* (Institute of Southeast Asian Studies 2007) 115.

Chapter 4: Assessing the Structure of Admission of TFWs in KSA

Introduction

This chapter addresses the institutional structure for managing TFWs and the overlapping jurisdictions and policies administering them in greater depth in order to understand the situation of low-skilled TFWs in the SCS. Examining the policies of labour recruitment is essential in order to highlight the role of formal recruitment channels in protecting workers' rights and to distinguish them from informal channels. This chapter also highlights the role of labour-sending countries and the negotiation of labour agreements concerning recruitment between KSA and those countries.

The final section examines issues related to human rights brought forth by the admission of low-skilled TFWs. Although KSA has still not adopted any key human rights conventions related to labour migration, this study uses the international norms, standards and principles that underpin the RBA to labour migration as tools to evaluate domestic laws and policies that may affect TFWs' rights. The RBA does not suggest a unique human rights protection agenda; rather, it examines procedures and policies based on criteria laid out in human rights law and other instruments.¹ As stated in Chapter 2, the RBA to labour migration can serve as a model for national migration policies and employment guidelines to enforce the rights of TFWs. This chapter explores the legal and administrative deficiencies of the current structure of TFW admission, which lead to an exploitative and discriminatory work environment. This analysis explores the extent to which the SLM and economic interests are in line with the objectives of international standards of protection for TFWs' rights.

4.1. The status of TFWs

The laws and regulations in KSA commonly describe the admission of FNs for the purpose of employment under fixed-term employment contracts governed by based on the sponsorship system and conditional on the worker repatriating to the country of origin upon completion. The following declaration represents the official position of Gulf governments toward non-nationals living in the Gulf region:²

¹ Shirley Gatenio Gabel, *A Rights-Based Approach to Social Policy Analysis* (Springer International 2016) 10.

² Noora Lori, 'Temporary Workers or Permanent Migrants: The *Kafala* System and Contestations Over Residency in the Arab Gulf States' (Center for Migrations and Citizenship, Institut Français des Relations

“Workers hosted by ... GCC countries cannot be considered migrant workers, as they work on a temporary basis and according to fixed-term employment contracts. Upon expiration of these contracts, they return to their home countries. Therefore, the immigration laws applicable in Western countries cannot be applied to these workers ... the internationally accepted concept of migration does not apply to them.”³

El-Shamsi highlights that there is a legal difference between migrant workers and TFWs, which he claims is acknowledged by international agreements between the GCC and labour-exporting countries.⁴ He refers to the findings of the Third Asian Ministerial Consultation Conference (2005) held by the IOM in Bali to claim that “expatriate workers will be temporary, not migrant workers”.⁵ El-Shamsi emphasises the following:

“This concept, which has been approved in the Bali Conference by the GCC countries and presented at the 95th Session of the International Labour Conference held in Geneva in June 2006, has become one of the agreed upon concepts of IOM concerning foreign labour working in the GCC.”⁶

For this reason, this study adopts Ruhs’ definition of temporary migration programmes (hereinafter referred to as TMP): “the key feature of a TMP is that residence and employment on the basis of a temporary work permit alone does not create an entitlement to stay permanently in the host country”.⁷ Ruhs clearly suggests that TFWs whose temporary work permits have been terminated and who have not been accorded permanent residence status lose the right to reside in the receiving state and are therefore required to return to their own country.⁸ Abella points out that the distinction between temporary and permanent migration describes FNs “who have more and those who have fewer rights and entitlements under the laws of destination states”.⁹

Internationales, 2012) 9<<https://www.ifri.org/fr/publications/enotes/notes-de-lifri/temporary-workers-or-permanent-migrants-kafala-system-and>> accessed 23 May 2015.

³ The letter, dated 28 September 2006, was from Mr. Abdulaziz Nasser R. El-Shamsi (UAE Permanent Representative to the United Nations) to Human Rights Watch. A copy of this letter is available in the Human Rights Watch Report; see HRW, ‘Building Towers, Cheating Workers: Exploitation of Migrant Construction Workers in the United Arab Emirates’ <<https://www.hrw.org/reports/2006/uae1106/>> accessed 25 May 2016.

⁴ *ibid.*

⁵ Lori (n 2) 7.

⁶ HRW (n 3) 64.

⁷ Martin RUHS, ‘The potential of temporary migration programmes in future international migration policy’ (2006) 145 (1-2) *International Labour Review* 7, 9.

⁸ *ibid.*

⁹ Manolo Abella, ‘Policies and Best Practices for Management of Temporary Migration’ (International Symposium on International Migration and Development, United Nations, Turin, Italy, 2006).

4.2. Approaches to managing TFWs: The Abu Dhabi Dialogue

The management of TFWs by the Saudi Government and labour-sending countries involves substantial inter-ministerial coordination within the country, such as with the Ministry of Foreign Affairs (hereinafter referred to as MoFA), the Ministry of Labour (hereinafter referred to as MoL) and the Ministry of the Interior (hereinafter referred to as MoI). This is supported by various institutional mechanisms and has a clearly defined scope in terms of classifications of labour, jobs and sectors to meet labour market demand.¹⁰

Chanda et al. point out that institutional approaches and the national framework have developed in both sending and receiving states; however, the most prominent development was “the shift from a unilateral, notional policy response-based approach to a more coordinated and consultative approach to managing migration in many Asian countries”.¹¹ This change happened because of the increasing number of regional consultative negotiations between sending countries and receiving countries regarding cross-country and regional collaboration in managing migration as well as the rising number of bilateral agreements and memoranda of understanding signed by the main sending and receiving states. However, migration policy remains primarily formed by national policies, particularly in host countries. These policies are complemented by bilateral as well as consultative collaboration mechanisms that indicate that both sending and receiving countries acknowledge the complications in dealing with migration issues individually.¹²

In January 2008, 20 Asian governments met in Abu Dhabi to participate in the Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin and Destination in Asia.¹³ For KSA and other Gulf states, the Abu Dhabi Dialogue appears to be indicative of another potential source of leadership that may lead to the formation of an

¹⁰See Ministry of the Interior (MoI), ‘Home’ (*Moi.gov.sa*, 2017) <<https://www.moi.gov.sa/wps/portal/Home/Home>> accessed 12 February 2017; Ministry of Foreign Affairs, ‘Kingdom Of Saudi Arabia | Ministry Of Foreign Affairs’ (MoFA) (*Mofa.gov.sa*, 2017) <<http://www.mofa.gov.sa/sites/mofaen>> accessed 12 February 2017; Ministry of Labor (MoL), ‘Home’ (*Portal.mol.gov.sa*, 2017) <<https://portal.mol.gov.sa/en>> accessed 12 February 2017.

¹¹ Rupa Chanda and Sasidaran Gopalan, ‘Managing Migration In Asia: The Role Of Interstate Cooperation’ in Randall Hansen and others (eds), *Migration, Nation States, and International Cooperation* (Routledge, 2012) 183.

¹² *ibid.* 183

¹³ International Labour Organization (ILO), ‘Abu Dhabi Dialogue on Contractual Labour for Cooperation Between Countries of Origin and Destination in Asia’ (*ILO*, 2008) <http://www.ilo.org/global/topics/forced-labour/news/WCMS_090660/lang--en/index.htm> accessed 14 May 2015.

international labour migration regime.¹⁴ The Global Commission on International Migration (hereinafter referred to as GCIM) called on both sending and receiving states to set up a dialogue on expanding temporary labour migration programmes, thereby permitting individuals to work in the receiving state under a fixed-term employment contract and agreed-upon conditions.¹⁵

According to the official comments regarding the Abu Dhabi Dialogue, the Saudi Labour Minister, Dr Mofarrej Al-Haqbani, stated that its aims were to seek a cooperative approach to better managing temporary labour mobility among the governments of labour origin and labour destination countries, to help protect and maximise benefits for all parties in the contractual relationship.¹⁶

While each country clearly has its own agenda regarding the management of temporary contractual labour, preventing irregular migration and enhancing the welfare of migrant workers overseas have been two of the main objectives of both the receiving and the sending countries. The Abu Dhabi Declaration was unanimously adopted and proposed four objectives for the countries of origin and destination:¹⁷

- Illegal recruitment practices should be banned, and processes to protect TFWs and their well-being should be implemented. This, in turn, would prevent exploitation in their country of origin and the country receiving them.
- The ability to effectively coordinate the supply and demand of labour should be increased.
- A framework should be developed to enable countries to have a comprehensive approach to managing temporary contractual work. Such a framework should take into account the common interests of both the source and the receiving countries.
- Knowledge about SLM trends should be developed, along with skill profiles of TFWs.

¹⁴ Rey Koslowski, 'Global Mobility Regimes: A Conceptual Framework' in Rey Koslowski (eds), *Global Mobility Regimes* (Palgrave Macmillan, 2011) 9.

¹⁵ Global Commission on International Migration (GCIM), 'Migration in an Interconnected World: New Directions for Action' (Report of the Global Commission on International Migration, 5 October 2005) 34.

¹⁶ Alyaum, 'Kingdom Calls for the Activation of Dialogue Between the Receiving Countries and Sent to Labor' (*Alyaum*, 2014) <<http://www.alyaum.com/article/4030345>> accessed 19 May 2015.

¹⁷ ILO (n 13).

Furthermore, the Abu Dhabi Dialogue acknowledged the shared liability of both sending and receiving countries to ensure that recruitment agencies and other third parties involved in the labour recruitment process comply with domestic regulations and laws relating to the employment of TFWs, therefore providing effective enforcement mechanisms, which are key to ensuring the protection of labourers.¹⁸

Despite the political restrictions imposed by the Saudi Government on the admission of TFWs, there are several factors which have an impact on the management of the programme. The SLM, in the context of accelerated globalisation, needs to make hiring TFWs much more flexible to meet the economic demands of sending and receiving countries.¹⁹ Furthermore, the private sector, such as the Council of Saudi Chambers (National Recruitment Committee), has recently been given the responsibility of designing and managing the admission of TFWs. These actors have taken a lead role in influencing policy-makers in order to establish the legislative framework needed.²⁰ In June 2004, the International Labour Conference of the International Labour Organization adopted a resolution calling for increased opportunities for regular worker migration based on the SLM requirements and the sovereign rights of all countries to regulate their own migration rules.²¹

The International Organization for Migration (IOM) highlights the benefits of managing the employment of TFWs, pointing out that if they are appropriately managed, this can potentially benefit all parties involved in the process (i.e. origin and destination countries and migrant workers themselves).²² But Castles cautions that “to achieve these net-benefits in practice will almost certainly require a high degree of government involvement and intervention” in the SLM.²³

¹⁸ *ibid.*

¹⁹ Nilim Baruah, Ryszard Cholewinski and Nina Lindroos-Kopolo, *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (Organization for Security and Cooperation in Europe (OSCE), 2006) 117.

²⁰ Council of Saudi Chambers, ‘National Recruitment Committee’ (CSC, 2016) 4 <<http://www.csc.org.sa/Arabic/NationalCommittees/NationalCommitteesList/Comm28/Pages/default.aspx>> accessed 4 April 2016.

²¹ Abella (n 17) 3.

²² Organization for Security and Cooperation in Europe and others, ‘Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination’ (ILO, 2006) 5 <http://www.ilo.org/global/docs/WCMS_203851/lang--en/index.htm> accessed 19 May 2015.

²³ Stephen Castles, ‘Back to the Future? Can Europe Meet its Labour Needs through Temporary Migration?’ (2006) International Migration Institute, Working Paper No. 1, 1 <<http://www.imi.ox.ac.uk/pdfs/wp/wp-01-06.pdf>> accessed 18 May 2016

The employment of TFWs implemented by KSA and sending countries encompasses substantial inter-ministerial coordination between the countries. Institutional mechanisms for legal implementation, including incentives and disincentives for employers and TFWs, with a clearly defined scope in terms of categories of occupation, labour and sector, are needed. Thus, it is hard to judge how well the recruitment has functioned in stemming unlawful migration and addressing local SLM essentials. Additionally, it is a plan that is generally outlined from the receiving state's side, with limited recognition of the sending country's benefits and concerns.²⁴ However, such temporary employment is likely to increase in frequency and complexity as policy-makers attempt to devise innovative ways of channelling the lawful admission of TFWs on a short-term basis into some sectors, particularly low-skilled labour sectors such as construction.²⁵

Hence, managing the employment of TFWs takes on a variety of forms and policy structures that are usually applied to pre-entry controls, conditions, and rules and procedures for the admission of each category of foreign national. Admission for temporary employment is through the restricted *kafala* system, and workers are bound by the same selection criteria, conditions of stay and limitations, as explored in the next chapter.²⁶

4.3. Current administrative control after admission

The TFW is attached to a temporary residence permit that has a fixed term (usually up to two years) and is generally renewable. Longva identifies the unique features of current labour migration to KSA and other GCC states, whereby TFWs are eternally contract workers, with no prospect of permanent residency regardless of their length of stay.²⁷ The goals of the employment of TFWs in the SLM are unequivocally economic and antithetical to immigration per se.²⁸

The employment of TFWs is designed to meet the demands of the SLM without increasing the number of permanent residents in a population. It is supposed to produce only a temporary increase in the demographics of the receiving state for the purpose of economic need when the local workforce cannot meet the demand. The TFWs do not have free access

²⁴ Chanda and Gopalan (n 11) 183-185.

²⁵ Baruah (n 19) 113.

²⁶ Abella (n 9) 29.

²⁷ Anh Nga Longva, 'Keeping Migrant Workers in Check: The *Kafala* System in the Gulf' (Middle East Research and Information Report 211, 1999) 20.

²⁸ Lori (n 2) 7-8.

to the SLM, and the restrictions on their work visas tend to prevent them from being able to legally apply for permanent residency, to bring their families with them or to apply for naturalisation, whatever their length of stay in KSA.

The backbone of the admission of TFWs has been the *kafala* system, which devolves material benefit and considerable power over TFWs to the Saudi nationals who undertake this legal responsibility and which governs the daily administration and control of TFWs. This privatisation appoints employers as agents of national (i.e. labour and immigration) control over TFWs and helps target labour supply to where it is needed.²⁹ It has been calibrated to protect the native workforce and is designed for the convenience of local employers.³⁰

According to the Abu Dhabi Dialogue, the origin and destination countries set the key objectives of TFW mobility and guarantee the temporariness of stay, followed by reintegration into the labourers' country so that the initial employment agreement does not cause irregular employment experiences in the receiving countries.³¹ These arrangements are generally restricted to low- and semi-skilled labour, and sometimes do not extend to professionals. However, these often contradictory objectives have posed enormous difficulties for immigration authorities, who look for adjustments by permitting a greater scope for market-led admissions while at the same time imposing restrictions on such admissions through the sponsorship system to meet anti-immigration objectives.³² As employers are the main legal entity responsible for TFWs, they accrue immense power over them, rendering them more vulnerable to exploitation.³³

4.4. Institutional structure for managing TFWs

With the increase in the scale and complexity of TFW issues, authorities are struggling to cope, resulting in the establishment of governmental institutions to regulate TFW labour. Under the legal framework of the SLL (including the Executive Regulation of Labour Law

²⁹ Martin Baldwin-Edwards, 'Labour Immigration and labour markets in the GCC countries: National Patterns and Trends' (2011) Kuwait Programme on Development, Governance and Globalisation in the Gulf States, Research Paper 15, 37 <<http://eprints.lse.ac.uk/55239/>> accessed 1 September 2015.

³⁰ Abella (n 9) 26.

³¹ IOM, 'Managing Labour Mobility in Asia: A Holistic Approach: The Abu Dhabi Declaration and Pilot Project' (2008) 4 <http://publications.iom.int/bookstore/free/GFMD_Brochure_final_EN.pdf> accessed 21 May 2015.

³² Abella (n 9) 26.

³³ Lori (n 2) 16.

and the *nitaqat* system)³⁴, residency law (which includes the Statute for the Treatment of Persons Arriving in the Kingdom on Hajj, Umrah or Other Visas and the Rules for Dealing with Expatriates in Violation of the Laws) and visa administration regulation, there are three departments that administer TFWs, in different ministries.

Firstly, the MoFA, through the Consular Service Department (visa administration regulation) regulates visa entry for various purposes and sets general guidelines for applying for a Saudi visa. Secondly, the MoL and its related bodies are responsible for workforce planning and development, labour relations (including resolution of disputes, enforcement of labour laws and recruitment of TFWs) and the general monitoring of all matters relating to employment and the enforcement of labour laws and regulations in the private sector. Thirdly, the MoI administers, through residency law and the Passport Department, whether TFWs can enter KSA. They handle the workers' immigration documents relating to residency permits and the deportation system through the *kafala* system. The laws governing the *kafala* system after the labourer has been issued with a work permit are enacted by the regulations of the Passport Department.³⁵

The Passport Department plays a crucial role in determining the status of TFWs. However, an assessment of Saudi management of TFWs cannot be limited to immigration policy alone. SLM regulations, government institutions and nationalisation policies have also contributed to managing and regulating TFWs in the country. The table below clarifies the main points of managing the admission of TFWs in KSA.³⁶

Table 4.1: Management of admission of TFWs in KSA

Sectors	Duration	Key Policies and Legislation
Construction	Two years, and renewable	Admission policies tend to be short-term and needs-based in approach, and dependent on economic conditions <i>Kafala</i> system
Manufacturing		
Wholesale and retail trade		
Agriculture		
Transport		

³⁴ The *nitaqat* system is a Saudisation programme designed by the Ministry of Labour to boost the employment of Saudi workers in the private sector.

³⁵ MoI, 'Expatriate Affairs Organisation' (*MOI*, 2015) <<http://www.moi.gov.sa/wps/wcm/connect/7f7a9200426feb48ab84ff884cc5c2ae/expatriat+affairs+organisatio n.pdf?MOD=AJPERES>> accessed 21 May 2015.

³⁶ some of the data is generated from Abella (n13), Lori (n14) and Longva (41). See also for more details Mohamed Ramady, *The Saudi Economy* (Springer 2005).

Mining, oil and gas		<i>Nitaqat</i>
Electricity and water		Admission in selected sectors and occupations to protect local workers (see Chapter 5)
Civil services		Prevents any forms of integration of FNs into the country

4.4.1. Implementation of shared jurisdiction

The status of foreign employees and residents in KSA is a matter of shared responsibility and joint cooperation between the MoL and the MoI. In 2013, the Saudi Council of Ministers made amendments to Article 39 of the Saudi Labour Law 2005, proposed by the MoL. The amended law, enacted after the amnesty programme that finished in November 2013, delegates the MoL to carry out inspections and check the work permits and residency status of labourers without prior notice.³⁷ The role of the MoL inspectors is limited to investigating work and residency permit violations inside establishments such as workshops, companies, factories and worksites. It falls to the MoI to take firm legal action against those violating the regulations. Amended Article 39 is now actively enforced, stating as follows:

“It is not allowed for an employer to let his (foreign) worker go out and work for others. It is also not allowed for a worker to engage in work for another employer. The employer is not allowed to employ workers who are under the sponsorship of others. The Ministry of Labour shall inspect the firms and investigate the violations discovered by its inspectors, and then forward them to the Ministry of the Interior to take penal actions against them.”³⁸

Moreover, after the amendment, Article 39 explains the role of the MoI in dealing with unauthorised employment by TFW, implying that if the employer is not complicit then punitive measures will be taken only against the worker:

“The employer is not allowed to let his worker engage in work for his own benefit. The worker would also not be permitted to work on his own account. The Ministry of the Interior shall arrest, deport and take punitive measures against these violators who are working for their own benefit in the streets and public squares as well as against those who run away (from their sponsors).”³⁹

³⁷ Saudi Press Agency (SPA), ‘General/Deputy Minister of Labour Review the Decisions of the Cabinet for Amending Certain Articles of the Labour Law’ (SPA, 2013) <<http://www.spa.gov.sa/viewstory.php?lang=ar&newsid=1089466>> accessed 19 May 2015.

³⁸ See Labour Law, Royal Decree No. M/51 (27 September 2005). The amendments to Saudi Labour Law (Royal Decree No. M/46) were published in the Official Gazette No. 4563 dated 24 April 2015.

³⁹ Art 39.

Furthermore, according to the Rules of Dealing with Expatriates Violating the Regulations Issued by the MoI,⁴⁰ the security authority in charge of enforcing the penalties should arrest and deport TFWs, cracking down on those using public squares and streets as gathering points to search for jobs and work for their own benefit.⁴¹

Committees with members from the MoL and the MoI apply these amendments,⁴² and both ministries can issue ministerial regulations concerning temporary work, residency permit programmes and related issues. Furthermore, both frequently update administrative procedures in order to assist labour inspectors and passport officers make decisions regarding violations, for employers, such as imposing fines, and for FNs, such as jailing or deporting them.⁴³

4.4.2. Overlapping jurisdictions and administrative processes of TFW admission

While this shared jurisdiction provides a broad front for the regulation of labour issues, it can also create confusion due to potentially contradictory overlapping policies and regulations in different departments, as is evident in the process by which TFWs enter KSA. First, sponsors apply to the MoL and submit the documents and information required for the acceptance of requests regarding the recruitment of labour from abroad.⁴⁴ The MoL assesses the request to check if recruiting the TFWs would create competition with Saudi workers or impact negatively on the nationalisation programme in the private market. It then makes a decision and determines the number of work visas that will be granted to the employer to allow them to recruit TFWs.⁴⁵ After that, the work visas are issued by the MoFA. The general administration of visas is conducted by the Consular Affairs Department, a branch of the MoFA. This aims to follow up all matters relating to the recruitment of FNs to KSA for the purpose of either work or residency. The MoFA is responsible for monitoring the

⁴⁰ These rules have been discussed by the Shura Council and issued by Resolution (50/114). The Shura Council also approved amending art 39 and the abolition of art 233 of the Labour Law (n 38).

⁴¹ According to the Minister of Culture and Information, the Council of Ministers review the MoI report on TFWs working with those other than their sponsors and runaways informed the decision to amend Article 39.

⁴² These committees are not necessarily established as independent bodies but are basically meetings between the MoL and the MoI with the purpose of making a decision related to TFW issues. The decisions reached within the meeting are later announced in a Royal or Ministerial Decree. See Alriyadh Newspaper, 'Local News' (*Alriyadh*, 2013) <<http://www.alriyadh.com/818855>> accessed 24 May 2015.

⁴³ Saudi Press Agency (n 37).

⁴⁴ See Labour Law (n 38) art 41 regarding recruitment from abroad, and also the Executive Regulation of the Labour Law (art 15), adopted on 18 March 2007, regarding the general terms and conditions required to open the file in the MoL to accept requests for recruitment from abroad.

⁴⁵ See Labour Law (n 38) Part III, Employment of Non-Saudis, arts 32, 35 & 36. See also the Executive Regulation of the Labour Law art 15, paras 2, 3, 4, 10, 12, & 13.

implementation and interpretation of the regulations related to visas with the competent authorities in KSA and abroad.

The general administration of visas imposes several conditions and restrictions on the work visas issued to TFWs, including overlapping regulations concerning the religion of labourers, with the MoFA stating that “no work visa will be granted to non-Muslims to work in the Holy Places”.⁴⁶ The MoI is responsible for checking who enters or exits the Holy Places (Makkah and Madinah), and an employer who violates this requirement may negatively affect the rights of non-Muslims to stay and work in KSA, as their inability to work in these cities (which are particularly important in the SCS). Despite these restrictions on labour, the labour and residency laws do not grant non-Muslim TFWs exceptional rights to change their sponsor without the sponsor’s consent if they work with a company that takes a project in or shifts their business to the Holy Places.

Another major problem of overlapping policies and regulations between labour and residency laws, explored at length in this study, is that they iterate legal dependency between TFWs and their employers, by which the latter accrue immense power. Labour Law Article 40 imposes on the employer the obligation to pay fees and all fines resulting from their delay in issuing or renewing the residency or work permit. According to Labour Law Article 40, paragraph 1:

“An employer shall incur the fees pertaining to recruitment of non-Saudi workers, the fees of the residence permit (*iqama*) and work permit together with their renewal and the fines resulting from their delay, as well as the fees pertaining to change of profession, exit and re-entry visas and return tickets to the worker’s home country at the end of the relation between the two parties.”⁴⁷

As a result of Article 40, TFWs become legally and financially reliant on their employer, not just for recruitment and entry into the country, but also for maintaining their legal status. The negative effect of this legal dependency creates an imbalance of power between the labourers and the sponsors. In many cases this leads to labourers being forced to sign contracts without questioning their employers, because they are afraid their employers may terminate their work contract and deport them.⁴⁸

⁴⁶ MoFA, ‘Visa Services’ (*Visa Mofa*, 2015) <<https://visa.mofa.gov.sa/>> accessed 14 May 2015.

⁴⁷ See Labour Law (n 38) art 40, paras 1, 2, 3, & 4.

⁴⁸ Amrita Pande, ‘The Paper that You Have in Your Hand is My Freedom: Migrant Domestic Work and the Sponsorship (*Kafala*) System in Lebanon’ (2013) (2) *International Migration Review* 414, 419.

The regulations of the Residency (*iqama*) System Violations and Penalties states in Article 1 that FNs are legally responsible for reporting their *iqama* three days before expiration, otherwise the Residency Law requires the imposition of fines on those working for an individual or private company.⁴⁹ The same article states that “if the applicant’s employer is an individual or private company or establishment, he shall be required to pay double the *iqama* fees”.⁵⁰ Furthermore, the same article discriminates between the type of sponsor (individual, private company or government institution), which is another form of confusion that may create a conflict between the parties to an employment contract. The article states:

“If the applicant is working for a governmental institute, the institute is responsible for submitting new *iqama* and *iqama* renewal requests for their personnel within 2 months of recruiting them and before its expiry. In case of delay, the institution shall be required to investigate with the employee responsible for this delay to decide the disciplinary action for such violation.”⁵¹

Another issue caused by conflicting regulations is that of changing employer. Both the MoL and the MoI have roles in changing sponsors and transferring labour services to another employer. One of these regulations is the transfer service (*kafala*) fees, set as SR2,000 for the first time, SR4,000 for the second time and SR6,000 for the third time.⁵² These regulations have limited the rights of TFWs to change their sponsors no more than three times. However, the MoL announced that TFWs seeking to change their sponsorship without their current employer’s consent or looking to work for another employer have to meet three conditions in order to be granted a successful transfer:⁵³

⁴⁹ Regarding residency law violations, the MoI is heavily involved in the regulation of the status of TFWs under the *kafala* system.

⁵⁰ MoI, ‘About the Ministry of the Interior’ (*MOI*, 2015) <https://www.moi.gov.sa/wps/portal!/ut/p/z0/fY49D4IwFEX_ShfmFiUkjAx-oCYmOohdXhqt-JS2YAvqv7eURDe3d989uTmU05JyLXqshEOjRe3zkafAiiRZxslkvZ3mM5an8022y1hcxIzupaYryv9DfgVvbctzyk9GO_lytFQGyRmfQkdsOK9GSRJK7SI2pIg9ZNXVwSRi2AoliH1bJxXp0Yx_S4A00os6IDYMQQBhBOEHwheDs7yIrnbgzZv74vABXVvrjg!!/> accessed 22 May 2015.

⁵¹ MoI, ‘*Iqama* System Violations & Penalties’ (*MOI*, 2015) <https://www.moi.gov.sa/wps/portal/Home/sectors/moidiwan/contents!/ut/p/z0/fY49D4IwFEX_SpfOLdiAK3HAr8Sog9ilafSJvdqCLaj_XiiJbm7vvnctycwgnBeFGdqqUXIkjqz4feSLogrF5xOLVdDJjNEt223SzziOaxmQPhiwJ_w_1K-rWNDwj_GSNh5cnhbYKndVTGkyH82o1oFAaj-mQMH1A2VbBBFPVSC2RezsPGnXKjn-HBKqhF_UKXBgSARQjKH6g-GLiDBfZV1705vU9P3wAc_Bd4w!!/> accessed 22 May 2015

⁵² The MoI set regulations regarding changing sponsors and transferring labour services to another sponsor. See for more discussion GDP, ‘Procedures to Change the Sponsor’ (*GDP*, 2015) <<http://www.gdp.gov.sa/sites/pgd/ar-SA/Procedures/ForeignProcedures/SponsorShipChange/Pages/default.aspx>> accessed 25 May 2015.

⁵³ Due to objections by many sponsors regarding the right of labourers to change sponsorship without a letter of consent, the MoL allows a five-working-day objection period for the original employers to submit their objections to the Labour Department. See Arab News, ‘Sponsorship Transfer: Fresh Rules Unveiled’ (*Arab News*, 2014) <<http://www.arabnews.com/news/featured/618361>> accessed 26 May 2015.

- The sponsor did not issuing a work permit within three months of the worker's arrival to KSA.
- The labourer did not receive a salary for three months.
- The sponsor's company is in the red or yellow *nitaqat* category.⁵⁴

These labour and residency regulations do not clarify the rights of TFWs who have already changed employer three times and meet the conditions to change sponsors. In practice, these labour and residency regulations of the MoI, which is responsible for issuing the *iqama*, limit TFWs to changing sponsors three times; however, the MoL is generally responsible for issuing work permits, which shows another type of overlap in the jurisdiction of these governmental authorities. This overlap of regulations confuses workers about where to seek their rights, particularly in the absence of legal aid to navigate complicated Saudi bureaucracy.

4.5. Regulating recruitment agencies/companies: practical issues

With some exceptions, KSA has a comprehensive ban on permanent migration (due to political and social struggles), and the MoL issues licenses to labour-recruiting companies for temporary recruitment. In the early phases of contract labour inflows, part of the migration from Asian countries was arranged by the government to allow government requests through offices especially established for this purpose. As the demand for workers grew, receiving and sending countries could not handle the recruitment without private-sector involvement, and thus a system of licensed recruitment emerged and developed into a network of institutions, agents and practices.⁵⁵ The government created designated bureaus within the relevant ministries to manage recruitment agents and revise and approve the work visa requests received from employers. The current immigration rules were reviewed in nearly all the main sending countries during the 1970s and 1980s, and administrative mechanisms were set up to control outflows in an orderly way.⁵⁶ Therefore, the various aspects of the recruitment process caused the MoL to regulate the employment of TFWs through sharing the role of recruitment with the private sector by establishing recruitment agencies and companies. According to the SLL, the MoL requires private recruitment offices to obtain a

⁵⁴ See EMoL, '*Nitaqat*' (EMoL, 2015) <<http://www.emol.gov.sa/nitaqat/>> accessed 25 May 2015.

⁵⁵ Nasra M Shah, 'The Management of Irregular Migration and its Consequence for Development: Gulf Cooperation Council' (ILO Asian Regional Programme on Governance of Labour Migration Working Paper No. 19/2009) 2 <http://www.ilo.org/asia/whatwedo/publications/WCMS_105105/lang--en/index.htm> accessed 21 May 2016.

⁵⁶ *ibid* 2.

licence. Article 30 of the SLL stipulates that “a natural or corporate person may not engage in the recruitment of Saudis or in the recruitment of workers from abroad unless licensed for the same by the Ministry”.⁵⁷

In accordance with Article 243 of the SLL, the MoL issued executive regulations that outline the responsibilities of recruitment agencies,⁵⁸ while Article 14 of the Executive Regulation of the Labour Law bans recruitment agencies from charging labourers with any recruitment fees, as these fees can be collected from the sponsor only. The SLL stipulates in Article 40, paragraph 1: “An employer shall incur the fees pertaining to recruitment of non-Saudi workers.”⁵⁹ Paragraph 2 of the same article stipulates that the costs incurred in repatriating workers fall upon the sponsor unless the worker wants to return to the country of origin during the first three months after arrival (probation period), or if the worker is incapable of performing the work stipulated in the contract.⁶⁰

The private recruitment agencies have the responsibility of ensuring their recruitment partners in the sending countries are competent and authorised to recruit workers from their country. These regulations obligate the agencies to ensure that the workers are aware of the working conditions, customs, culture and regulations related to their temporary work and residency permits in the country.⁶¹ Article 14, paragraph 22 identifies the role of recruitment companies as offering the employment services of its own TFWs to other employers who cannot recruit their own workers. This agreement between the labourer and the employer should be under the supervision of the recruitment agency, as they are the original employer and are responsible for paying the workers’ salary and ensuring their rights.⁶² In addition to these regulations, recruitment companies are responsible for the following:

- Providing suitable accommodation.
- Including in the employment agreement made between the foreign labourer and the recruitment agency the recruitment agency’s right to offer the worker’s services to other employers under the recruitment agency’s supervision.

⁵⁷ See Saudi Labour Law (n 38): Chapter Three, Private Offices for Recruitment of Citizens and Private Offices for Recruitment from Abroad, art 30.

⁵⁸ Art 243 from the Labour Law (n 38) stipulated that “the MoL shall issue the decisions and regulations necessary for implementing the provisions of the Labour Law”. See the MoL, ‘Law and Regulations’ (*Portal Mol*, 2015) <<https://portal.mol.gov.sa/ar>> accessed 15 May 2015.

⁵⁹ Labour Law (n 38) art 40, para 1.

⁶⁰ Labour Law (n 38) art 40, para 2.

⁶¹ See the Executive Regulation of the Labour Law, art 14, paras 14, 17, & 18.

⁶² *ibid* art 14, para 1.

- Meeting all legal responsibilities of social security and labour law, and relevant executive bodies.
- Making the fees for subcontracting workers to other employers reasonable.

The penalties for breaching these regulations are set out in SLL Articles 33, 41 and 81. The penalties applied to violators (whether original sponsors, employers or TFWs) who break recruitment laws include punishments such as imprisonment, revocation of the agency's operating license, a ban on recruiting TFWs, minimum fines of SR10,000 (multiplied by the number of labourers) and deportation if the violator is a FN.⁶³

These official systems are different from the unofficial networks of brokers and sub-agents who support the chain of the migration of newcomers to the receiving countries.⁶⁴ TFWs are often unprotected against misinformation from unofficial agencies. The use of brokers and sub-agents leads to many conflicts over the most basic working conditions, such as wages, weekly days off, transaction costs, hours worked per day and tasks.⁶⁵ The issues with this type of unofficial recruitment channel are generally not covered adequately in studies of labour migration in either the sending countries or KSA, showing that exploitation of TFWs happens even before deployment.⁶⁶

As stated in Chapter 2, regulations to prevent malpractice in formal recruitment procedures have been defined in accordance with ILO Conventions. The ILO Convention on Private Employment Agencies (No. 181), Article 7 states that “private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers”. In theory, ILO Article 7 is in line with SLL Article 40, paragraph 1, which states that employers shall incur the fees pertaining to the recruitment of non-Saudi workers. However, the above law expects recruitment agencies/companies and sponsors to adhere to the provisions that regulate TFWs' recruitment and employment in the country. The common observation is that private recruitment agencies/companies are often poorly monitored, and few regulations exist to ban illegal recruitment practices such as visa trading and recruitment fees charged to TFWs. A

⁶³ See Saudi Labour Law (n 38). These regulations were issued by the MoI to reduce the number of employment violations. See also the Residency Law (*Iqama* System Violations & Penalties), which imposed penalties on violators of employment and residency laws.

⁶⁴ Melissa Curley and Siu-lun Wong, *Security and Migration in Asia: The Dynamics of Securitisation* (Routledge 2008) 128.

⁶⁵ Antoinette Vlieger, *Domestic Workers in KSA and the Emirates* (Quid Pro Books 2011) 136.

⁶⁶ Jureidini R, 'Arab Gulf States: Recruitment of Asian Workers' (2014) Gulf Labour Markets and Migration, Explanatory Note No 3, 3< http://cadmus.eui.eu/bitstream/handle/1814/32149/GLMM%20ExpNote_03-2014.pdf?sequence=1> 05 November 2016

significant number of studies conducted by various human rights organisations such as Amnesty International and Human Rights Watch (hereinafter referred to as HRW) in labour-sending countries confirm that many workers are charged recruitment fees, heavily indebting them before they even leave their home countries. Moreover, during the recruitment process and employment, the workers probably do not get the chance to see their employment contracts before departure, or if they do see them, to have the terms and conditions explained appropriately. Furthermore, it is common for the original employment contract to be replaced by another upon arrival at their destination.⁶⁷

Crépeau, the UN Special Rapporteur on the Human Rights of Migrants, affirms that TFWs are at increased risk of abuse and mistreatment in the workplace due to several factors, including deceptive recruitment practices, by both employers and brokers. He suggests that governments must play an effective role in regulating all the recruitment sectors in order to combat deceptive recruitment practices.⁶⁸ As stated in Chapter 2, the ILO's Multilateral Framework on Labour Migration offers valuable guidance in this respect. The ILO Committee suggests that "in light of fraudulent practices taking place in the country of employment, such as contract substitution, migrant-receiving countries should take a more active role in supervising the issuance and execution of contracts of employment".⁶⁹ From this, it can be understood that these types of deception during the recruitment and employment process make TFWs vulnerable to abuse.⁷⁰

4.6. Labour-sending responsibilities

While the emphasis of this study is on employment and recruitment processes and measures taken by the Saudi Government to protect TFWs, an analysis of the recruitment process would not be complete without highlighting the roles and responsibilities of sending countries to protect TFWs internationally. While this subject is outside the scope of this study, highlighting the sending countries' roles in facilitating and encouraging labour movement

⁶⁷ See HRW (n 46). See also Amnesty International 'India: Exploited Dreams: Dispatches from Indian Migrant Workers in KSA' (*Amnesty*, 2014) <<https://www.amnesty.org/en/documents/ASA20/025/2014/en/>> accessed 17 May 2016.

⁶⁸ François Crépeau, 'A Rights-Based Approach to Labour Migration' (*Oppenheimer McGill*, 2014) 5426 <<http://oppenheimer.mcgill.ca/A-Rights-Based-Approach-to-Labour>> accessed 21 May 2016.

⁶⁹ See ILO, 'Migrant Workers' (International Labour Conference 87th Session, Report III (1B))' (*ILO*, 1996) <<http://www.ilo.org/public/english/standards/re/m/ilc/ilc87/r3-1b3.htm>> accessed 19 May 2015.

⁷⁰ GM Arif, 'Recruitment of Pakistani Workers for Overseas Employment: Mechanisms, Exploitation and Vulnerabilities' (2009) International Labour Office, Geneva, Working Paper No. 64, 33-36 <http://www.ilo.org/global/topics/forced-labour/publications/WCM_041928/lang--en/index.htm> accessed 20 May 2016

through their relevant ministries is vital to discovering measures to prevent and eliminate exploitative recruitment practices. What is obvious from the preceding analysis of the recruitment process between sending and receiving countries is the need, at least in the researcher's opinion,⁷¹ to improve the effectiveness of existing measures to protect the rights of TFWs in order to prevent and eliminate exploitation, which is also suggested by the ILO measures (see Chapter 2).⁷²

Sending countries have created designated bureaus within their relevant ministries to manage recruitment agents, revise and approve the employment agreements received from receiving countries, record migrants, offer advice on minimum wage rates and the living and working conditions, and confirm migrants' protection and welfare.⁷³ Some of the recruiting services provided by labour-exporting countries include recruitment, training, finding employment abroad, handling employment contracts, arranging for medical checks, dealing with repatriation, and submitting work applications and passports to the embassy to issue work visas.⁷⁴ Clear instructions and guidelines are provided to prevent illegal practices, and sentences are stated in cases where migrants or the mediators are involved in such practices. Concern with unregulated movement has been an essential part of the management mechanisms of sending countries. At the same time, instructions and regulations to confirm the arranged entry and work participation of TFWs were established by the Saudi Government.⁷⁵ The current situation in both labour-sending and labour-receiving countries highlights the need to improve cooperation between these countries and enhance transparency in the recruitment process.⁷⁶

4.7. Role of the memoranda of understanding

As discussed in previous chapters, the growing complexity of international labour migration arrangements emphasises the significance of international collaboration in the control of migration processes and the safeguarding of TFWs. Today, bilateral labour arrangements

⁷¹ The results from the fieldwork suggest that there is a need to improve measures protecting the rights of TFWs (see Chapter 6).

⁷² Convention concerning Private Employment Agencies (No. 181) (adopted 19 June 1997, entered into force 10 May 2000).

⁷³ Shah (n 55) 2.

⁷⁴ Curley and Wong (n 64) 128.

⁷⁵ Shah (n 55) 2.

⁷⁶ For more details, see Nasra M Shah and Indu Menon, 'Chain Migration through the Social Network: Experience of Labour Migrants in Kuwait' (1999) 37(2) *International Migration* 361.

(hereinafter referred to as BLAs) and memoranda of understanding (hereinafter referred to as MoUs) have become increasingly popular between sending and receiving countries.⁷⁷

The ILO Conventions acknowledge that the bilateral agreement is a method of good practice in governing the inflow of labour migration, which has led to increased protection for migrant workers. For instance, ILO Convention No. 97 mentions in Article 10 that “whenever necessary or desirable, conclusion of agreements to regulate migration for employment in cases where numbers of migrants are sufficiently large”.⁷⁸ In order to provide practical results, the supplementary ILO Recommendation No. 86 offers in its annex a Model Agreement on Temporary and Permanent Employment, which has led to greater ease in developing bilateral labour arrangements between labour-sending and labour-receiving countries.⁷⁹

An interesting development in KSA is that a number of MoUs have been signed, including with the Philippines⁸⁰ and India.⁸¹ These refer to the protection of the rights of both workers and employers in relation to domestic worker agreements.⁸² In accordance with these memoranda, supervising all recruitment processes and fostering a harmonious relationship between workers and employers that is grounded on mutual recognition that the right to work with dignity should be protected are enforced.⁸³ The ratification of these MoUs is vital to improve cooperation between countries by systematising the process of employment and protecting the rights of workers. Although these MoUs are limited to domestic workers,

⁷⁷ ILO, ‘Bilateral Agreements and Memoranda of Understanding on Migration of Low-skilled Workers: A Review’ (ILO, 2015) 7 <http://www.ilo.org/global/topics/labour-migration/publications/WCMS_385582/lang-en/index.htm> accessed 16 April 2016.

⁷⁸ Convention Concerning Migration for Employment (Revised 1949) (ILO No. 97) (adopted 1 July 1949, entered into force 22 January 1952).

⁷⁹ Recommendation Concerning Migration for Employment (Revised 1949) (ILO No. 86) (adopted 1 July 1949).

⁸⁰ GLMM, ‘Agreement on Domestic Worker Recruitment between the Kingdom of KSA and the Republic of the Philippines’ (GLMM, 2014) <<http://gulfmigration.eu/agreement-on-domestic-worker-recruitment-between-saudi-arabia-and-the-philippines/>> accessed 16 April 2016.

⁸¹ GLMM, ‘KSA: Agreement on Labour Cooperation for Domestic Service Workers’ Recruitment between the Ministry of Overseas Indian Affairs of the Republic of India and the Ministry of Labour of the Kingdom of KSA’ (GLMM, 2014) <<http://gulfmigration.eu/saudi-arabia-agreement-on-labour-cooperation-for-domestic-service-workers-recruitment-between-the-ministry-of-overseas-indian-affairs-of-the-republic-of-india-and-the-ministry-of-labour-of-the-kingdo/>> accessed 16 April 2016.

⁸² *ibid* art 2.

⁸³ *ibid* art 3.

agreements covering all labour categories, including low-skilled workers, may help to enhance the employment conditions for low-skilled workers in KSA.⁸⁴

4.8. Assessing the admission of TFWs and its impact on the rights of low-skilled workers

4.8.1. A dehumanising employment admission?

Human rights criteria are often meaningless for low-skilled TFWs in KSA who have little experience of human rights in their home country, and violations can occur before and after departure.⁸⁵ Therefore, it is often argued that the current admission structure of TFW employment presents a major challenge to providing equal treatment of workers due to the interests of foreign labourers being of negligible importance compared to employers and local workers. The latter are invariably favoured by the government,⁸⁶ as is manifest in egregious infringements, such as no granting of residency unless the worker has a work contract, no right to family reunion and no guarantees of health and social benefits available to citizens.⁸⁷ TFWs cannot freely change employer or leave the country without permission from their sponsor.⁸⁸ The ILO highlights the vulnerability of foreign low-skilled workers, stating:

“Despite the positive experiences of migrant workers, a significant number face undue hardships and abuse in the form of low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers’ rights, discrimination and xenophobia, as well as social exclusion. Gaps in working conditions, wages and treatment exist among migrant workers and between migrant and national workers. In a significant number of cases unemployment rates, job security and wages differ between regular migrant workers and national workers.”⁸⁹

Current thinking, applying RBAs to TFWs, draws on one fundamental principle of human rights stated in the UDHR: “All human beings are born free and equal in dignity and rights.”⁹⁰ This is manifested not merely in the principle of non-discrimination stipulated in

⁸⁴ Due to the lack of official resources regarding labour agreements with sending countries, the researcher decided to present the available labour agreements to show the importance of such cooperation in reducing possible violations that may occur before and after a worker’s departure to the destination country.

⁸⁵ This is evident from the data collected from the fieldwork, mainly from interviews with TFWs (Chapter 8). The scope of this study is limited to the country of employment (KSA).

⁸⁶ Hamid S Atiyyah, ‘The Sponsorship System and Infringements of the Rights of foreign workers in the Gulf Countries’ (1990) 3 (4) *Employee Responsibilities and Rights Journal* 267, 269-270.

⁸⁷ Sawan Abdulrahim and Ynesse Abdul Malak, ‘The Well-Being of Migrant Women: Between Agency and Restraint’ in Samer Jabbour and Rouham Yamout (eds), *Public Health in the Arab World* (CUP 2012) 279.

⁸⁸ Martin Ruhs and Philip Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ (2008) 42(1) *International Migration Review* 249, 250.

⁸⁹ ILO, ‘International Labour Conference, Provisional Record, Ninety-second Session, Geneva, 2004’ 3 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_178658.pdf> accessed 21 May 2015.

⁹⁰ Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217 A(III), art 1.

Article 7 of the ICMW, but is inherent in the concept of human rights. As mentioned in Chapter 3, at a global level, there is a growing effort to stress the RBA to understanding TFWs' rights issues.⁹¹ However, the RBA does not suggest a unique human rights protection agenda; instead, it examines procedures and policies based on criteria laid out in human rights law and instruments adopted by a state.⁹² As stated in the previous chapter, ILO⁹³ and UN conventions outline a comprehensive set of rights for migrants, including the right to equal protection under the law, although "there is a large gap between the rights that international human rights law guarantees to non-citizens and the realities they must face".⁹⁴ The RBA is a valuable tool for migration policy-makers because it offers a particular emphasis on disempowerment and marginalised groups such as low-skilled TFWs. The RBA makes special efforts to reach the most excluded and marginalised populations.⁹⁵

It is often argued that the RBA to labour migration can serve as a model for national migration policies and employment guidelines to enforce the rights of TFWs in KSA.⁹⁶ This approach to labour migration is expected to place the fair treatment of TFWs, especially low-skilled labour, at the top of the agenda of all dialogue on labour migration.⁹⁷

4.8.1.1. Discrimination and non-equality of employment

Discrimination against TFWs is a serious problem and takes various forms.⁹⁸ Discrimination begins from the method used to recruit workers, and continues into the employment and work conditions. It includes paying different wages for the same work and the allocation of the

⁹¹ Crépeau (n 68).

⁹² Gatenio Gabel (n 1) 10.

⁹³ The ILO Multilateral Framework on Labour Migration (2005) was based on international instruments (discussed in previous chapters) and best practices to offer guidelines for successful labour migration policies. The Multilateral Framework emphasises collaboration and dialogue on a number of different levels, i.e. between sending and receiving countries, between government representatives and trade unions within countries, and between TFWs abroad and their origin countries. For more discussion, see ILO, 'ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration' (ILO, 2006) <http://www.ilo.org/asia/whatwedo/publications/WCMS_146243/lang--en/index.htm> accessed 27 May 2015.

⁹⁴ Brad K Blitz and Maureen Lynch, 'Statelessness and the Deprivation of Nationality' in Brad K Blitz and Maureen Lynch (eds), *Statelessness and Citizenship* (Edward Elgar 2011) 3.

⁹⁵ Pia A Oberoi, *Empowering Migrants: Human Security, Human Rights and Policy* (CUP 2010) 246.

⁹⁶ Vincent Chetail and Céline Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar 2014) 345.

⁹⁷ OHCHR, 'Migration and Human Rights Improving Human Rights-Based Governance of International Migration' (OHCHR, 2013) <http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf> 22 accessed 20 March 2016.

⁹⁸ It is generally difficult to track discriminatory approaches in the SLM due to the lack of official statistics.

worst tasks to specific workers due to their socio-economic background.⁹⁹ KSA is a signatory to the CERD Article 5, paragraph (i), so it has an obligation to guarantee all residents “the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration”.¹⁰⁰ Despite this, there are still no anti-discrimination provisions related to the workplace in KSA; however, the SLL generally covers situations of TFW employment related to employment issues.¹⁰¹

Low-skilled TFWs remain at greater risk of poor employment conditions and abusive treatment. This indicates that the existence of legislation intended to eliminate discrimination and to provide reparations against violations is not adequate to provide equal opportunity and treatment in practice.¹⁰² By assessing the current admission structure of employment of TFWs, it can be seen that the residency regulation itself is considered the main source of discrimination and inequality between nationals and non-nationals.¹⁰³ The historical and policy context in which the admission structure of employment of TFWs was implemented, as well as the negative consequences of employment of FNs under the *kafala* system, all combine to expose a double standard in the protection and promotion of the rights of workers in KSA. This is because *kafala* regulations give the employer full power over all matters related to the residency of TFWs in the country. The system does not permit TFWs to transfer from one employer to another without the agreement of the employer. Since the SLL does not offer appropriate protection against arbitrary dismissal and labour laws do not always apply to TFWs, these regulations give employers immense power, as they can deport workers whenever they want or deny permission to leave (see Chapter 5).¹⁰⁴

⁹⁹ Roger Zegers de Beijl, *Documenting Discrimination Against Migrant Workers in the SLM* (International Labour Office 2000) 21.

¹⁰⁰ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

¹⁰¹ L&E Global, ‘Memorandum General Overview Employment Law/Kingdom of KSA’ (2013) 7 <http://knowledge.leglobal.org/wp-content/uploads/LEGlobal_Memo_Saudi_Arabia.pdf> accessed 27 May 2015.

¹⁰² Shauna Olney and Ryszard Cholewinski, ‘Migrant Workers and the Right to Non-Discrimination and Equality’ in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 259.

¹⁰³ See Riccardo Pisillo Mazzeschi, ‘The Relationship Between Human Rights and the Rights of Aliens and Immigrants’ in Ulrich Fastenrath and Bruno Simma (eds), *From Bilateralism to Community Interest* (OUP 2011).

¹⁰⁴ Vlioger (n 65) 170, 234. See also HRW (n 67) 20.

Discrimination based on nationality is a complex concept.¹⁰⁵ According to the ILO Global Report, *Time for Equality at Work*, “discrimination in employment and occupation takes many forms, and occurs in all kinds of work settings”.¹⁰⁶ Consequently, the prohibition of discrimination on the grounds of nationality is emerging in international human rights norms and standards that underpin the general principles of the RBA.¹⁰⁷ In the workplace, the discrimination that frequently occurs is direct discrimination in which the nationality of workers is used as part of the criteria for a job. There is also indirect discrimination, in which a law or requirement is applicable to both national and non-national workers,¹⁰⁸ but it is difficult for non-national workers to understand the law.¹⁰⁹

Discriminatory and wrongful dismissals make up the bulk of the case files of the Commission for the Settlement of Labour Disputes. In many cases, the key impediment for TFWs’ rights is the overlap between the *kafala* system and the labour laws. Vlieger argues that the legal impediment for TFWs are the laws and regulations that link the termination of labour contracts (for whatever reason) to the work visa, which causes the default invalidation of the work visas and residency status upon termination of contract.¹¹⁰ These issues will be discussed in more depth in Chapters 5 and 8.

As stated in Chapter 2, the ICMW is a comprehensive instrument that uses the term ‘nationality’ explicitly as one of the prohibited grounds for discrimination: “sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”.¹¹¹ Moreover, the SLM structure is categorised based on qualifications, race, religion, gender and region, whereby foreigners from the Indian subcontinent and Arab countries are recruited to 3D jobs in the secondary (private) sector, while various work privileges are allocated to native workers, GCC nationals and Western expatriates. The vulnerable categories of semi-

¹⁰⁵ Anne CL Davies, *EU Labour Law* (Edward Elgar 2012) 82.

¹⁰⁶ ILO, ‘Time for Equality at Work - Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work’ (International Labour Conference, Report I (B) 91st Session, 2003).

¹⁰⁷ See Elisa Fornalé, *The Protection of Human Rights of Irregular Migrants* (Peter Lang 2012) 106; see also Crépeau (n 68).

¹⁰⁸ See Lucy Vickers, ‘Migration, Labour Law, and Religious Discrimination’ in Cathryn Costello and Mark Freedland (eds) *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2017) 328.

¹⁰⁹ Davies (n 105) 88.

¹¹⁰ Vlieger (n 65) 234. It could be said that a refusal to hire or to renew employment contracts is not generally considered discrimination.

¹¹¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS, art 1. See also Fornalé (n107) 106.

skilled and unskilled workers from South and South East Asia and (non-GCC) Arabs are found in the secondary SLM, where workers are forced to endure terrible and dehumanising working conditions, including low or withheld wages and physical and psychological abuse. One of the most common forms of exploitation experienced by migrant workers is confiscated passports, poor working conditions and no free choice of employment, which can make them vulnerable to forced labour after arriving in KSA.¹¹²

TFWs are excluded from the minimum wage provisions of the labour regulations.¹¹³ Saudi workers are entitled to a minimum wage of not less than SR3,000 per month (almost USD800) under the *nitaqat* system, but TFWs in the same role are unlikely to receive the same salary as nationals.¹¹⁴ Government policies entrench this situation by aggressively defending the rights of native workers while recruiting cheap foreign labour to fill the gap in the secondary SLM.¹¹⁵ Naithani points out that the ‘duality’ of wages is not only manifest between nationals and expatriates, but within these groups. With similar educational qualifications, work experience and job responsibilities, Western expatriates are paid higher salaries in KSA than those from developing countries.¹¹⁶ In addition, there are differentials in regularity of pay, paid holidays and overtime reimbursement. Article 25 (1) (a) and (b) of the ICMW protects

“the right to equal treatment with nationals at work for all migrant workers and members of their families in terms of conditions of work including overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of employment, and minimum age of employment”.¹¹⁷

¹¹² Salah Mahdi, ‘Labour Shortages, Migration, and Segmentation: The Case of Saudi Labour Market’ (Paper presented at the Workshop ‘The Interdependence of Migration Politics and Demography’ (*irmgard-coninx stiftung*, 2009) <http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/Population_Politics/PopPolitics/Mahdi.pdf> accessed 28 November 2015.

¹¹³ Katie Paul, Marwa Rashad and Karen Lema, ‘Foreign Governments Press KSA on Workers’ Delayed Wages’ (*Mail Online*, 2016) <<http://www.dailymail.co.uk/wires/reuters/article-3480548/Foreign-governments-press-Saudi-Arabia-workers-delayed-wages.html>> accessed 19 May 2016; Arab News, ‘Top Construction Firm Punished for Delaying Salaries’ (*Arab News*, 2016) <<http://www.arabnews.com/featured/news/891996>> accessed 15 April 2016.

¹¹⁴ Steffen Hertog, ‘Back to the Seventies? Saudi Youth and the Kingdom’s Political Economy after the Arab Uprisings’ in Kjetil Selvik and Bjorn Olav Utvik (eds), *Oil States in the New Middle East: Uprisings and Stability* (Routledge 2016); see also Jennifer R Pecky, ‘Can Hiring Quotas Work? The Effect of the *Nitaqat* Program on the Saudi Private Sector’ (*Economics Mit*, 2014) 3, 7 <<http://economics.mit.edu/files/9417>> accessed 15 April 2016.

¹¹⁵ Pranav Naithani and AN Jha, ‘Challenges Faced by Expatriate Workers in Gulf Cooperation Council Countries’ (2009) 5(1) *IJBM* 99.

¹¹⁶ *ibid* 99 and see Mohamed Ramady, ‘Gulf Unemployment and Government Policies: Prospects for the Saudi Labour Quota or *Nitaqat* System’ (2013) 5 *International Journal of Economics and Business Research* 1, 7-8.

¹¹⁷ Art 25.

Similar provisions are included in ILO Conventions Nos. 97 and 143, referring specifically to equality of treatment.¹¹⁸ Overall, FNs are entitled to freedom from discrimination on the basis of their legal status as foreigners.¹¹⁹ With a few exceptions that do not apply to labour protections, the non-discrimination assurances of the ICCPR forbid discrimination on the grounds of nationality.¹²⁰ The UN Human Rights Committee, General Comment 15, declares that

“the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant as provided for in Article 2 thereof. This guarantee applies to aliens and citizen alike.”¹²¹

4.8.1.2. Discrimination between low-skilled and skilled workers and its impact on their families

The additional admission requirements that are imposed on TFWs who are low-skilled workers (mainly from the Indian subcontinent and Arab countries) in KSA are not imposed on other categories of TFWs (such as highly skilled employees).¹²² The UN Committee on the Elimination of Racial Discrimination (CERD) reviewed the Saudi Government’s report in March 2003 and was “concerned about allegations of substantial prejudice against migrant workers, in particular those coming from Asia and Africa”.¹²³ The example of the prejudicial treatment that low-skilled TFWs experience under the current admission structure of employment of TFWs concerns permitting workers to bring their family members to KSA. These regulations and laws have limited low-skilled workers’ fundamental rights to family reunification. While skilled workers are entitled to privileges according to their nationality, level of education or position, low-skilled TFWs only have the right to bring their families for a visit for a certain period of time, usually three months, with the possibility to extend this to six months after their arrival in KSA.¹²⁴

¹¹⁸ See Chapter 2 for more discussion.

¹¹⁹ Jennifer Turner and Nisha Varia, *Exported and Exposed* (HRW 2007) 134-135.

¹²⁰ See the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. For more discussion see Chapter 2.

¹²¹ UNHRC, ‘General Comment 15, the Position of Aliens under the Covenant’ (adopted 11 April 1986, Twenty-Seventh session).

¹²² Naithani and Jha (n 115) 99.

¹²³ CERD, ‘UN Committee on the Elimination of Racial Discrimination: Concluding Observations, KSA’ (2 June 2003) CERD/C/62/CO/8.

¹²⁴ See GDP, ‘Expatriates Procedures’ (GDP, 2012) <<http://www.gdp.gov.sa/sites/pgd/ar-SA/Procedures/ForeignProcedures/Pages/default.aspx>> accessed 15 May 2015.

Another example is that the Saudi authorities refuse to grant initial permanent resident status to low-skilled workers (regardless of their length of stay). According to the Executive Regulation of the Saudi Citizenship System, FNs on temporary work permits applying for Saudi nationality must have a valid resident permit (*iqama*) that is valid at the time of application for a continuous period of 10 years, as stipulated in Article 8, paragraph 3. The same article states that “the applicant must acquire an occupation that is required in the Kingdom” and the minimum educational requirement is a bachelor’s degree. However, the final decision remains at the discretion of the Saudi Government and is based on certain reasons and criteria.¹²⁵ The ongoing criticism of the current admission structure of employment of TFWs results from its objective of refusing to grant initial permanent resident status (regardless of the length of stay) and relying on cheap sources of disposable foreign labour.¹²⁶

This generates stratification between TFWs within different sectors, and demonstrates that the laws and regulations relating to TFWs are applied according to qualifications and skills.¹²⁷

4.8.1.3. Current restrictions and limitations

Restrictions imposed by the Saudi Government on the rights of TFWs in recent years include visa controls, work permit systems under the *kafala* system, the quota system (*nitaqat*), the levy system and the absence of a social integration programme in the SLM, which has created widespread exploitation of TFWs.¹²⁸ Due to these restrictions, the vast majority of low-skilled TFWs are not allowed to benefit from matching their skills with SLM demand to enhance their income and get better work conditions.¹²⁹

Another limitation by which the current admissions structure violates the human rights of TFWs is that it summarily deports TFWs found to have HIV/AIDS or hepatitis C without

¹²⁵ It is worth mentioning here that the Saudi Citizenship System and the Residence Regulations state a different law regarding granting FNs permanent residency.

¹²⁶ Vicki Crinis, ‘Vietnamese Migrant Clothing Workers in Malaysia: Global Production, Transnational Labour Migration and Social Reproduction’ in Juanita Elias and Samanthi J Gunawardana (eds), *The Global Political Economy of the Household in Asia* (Springer 2013) 176.

¹²⁷ Regional Mixed Migration Secretariat (RMMS), ‘The Letter of the Law: regular and irregular migration in Saudi Arabia in a context of rapid change’ (RMMS, No. 4/2014) 47 <http://www.regionalmms.org/images/ResearchInitiatives/RMMS_Letter_of_the_Law_-_Saudi_Arabia_report.pdf> accessed 20 September 2016. See also Mahdi (n 112).

¹²⁸ Naithani and Jha (n115) 98; Françoise de Bel-Air, ‘Demography, Migration and Labour Market in Saudi Arabia’ (2014) Gulf Labour Markets and Migration, Explanatory Notes No 01, 3-5<http://gulfmigration.eu/media/pubs/exno/GLMM_EN_2014_01.pdf> accessed 20 September 2016

¹²⁹ See the next chapter for further discussion.

providing appropriate health care,¹³⁰ under MoI policies;¹³¹ citizens infected with HIV/AIDS are eligible for free health care and safeguarded from discrimination by law.¹³² However, the measures taken by the Saudi Government toward TFWs who test positive for HIV/AIDS demonstrate a conflict with the principle of HR. The ILO specifies appropriate responses to workers diagnosed with HIV.¹³³ This was addressed by the ILO in June 2010 with a new international labour standard on HIV/AIDS, which was approved by delegates to the International Labour Conference. The HIV and AIDS Recommendation (No. 200) is the first standard, globally authorised, legal instrument aiming to guarantee workers universal access to HIV prevention, cure and care, and it supports the provision of possibly life-saving prevention programmes and anti-discrimination action at the level of the workplace. It furthermore stresses the significance of income-generating activities for people with HIV, mainly when there is a need for ongoing medication.¹³⁴

Another form of restriction on TFWs during their employment is a lack religious freedom, since the only official religion of the country is Islam. In addition to prohibiting public displays of non-Muslim religious activities and affiliations, many traditional Islamic practices are proscribed as innovations (e.g. celebrating the *Mawlid* festival). Non-Muslims are expected to adhere to Muslim principles, especially during the holy month of Ramadan, when all eating, drinking or smoking in public is forbidden.¹³⁵ These restrictions, which lead to discrimination between Muslim and non-Muslim TFWs, extend to the SLL. This is evident from Article 98 of the SLL, which reduces the working hours from eight hours to six hours per day for Muslim workers during Ramadan. The article states: “During the month of

¹³⁰ MoFA, ‘Department of Visa- Foreign Ministry’ (*MoFa*, 2010) <<http://www.mofa.gov.sa/ABOUTMINISTRY/MINISTRYDEPARTMENTS/CONSULARSERVICES/Pages/VisaAdministration246.aspx>> accessed 15 May 2015.

¹³¹ Vlieger (n 65) 161. There is no accessible data about the number of expelled TFWs with HIV/AIDS. The government rules (MoI) require TFWs to have medical examinations once they arrive, and any TFW testing positive for HIV/AIDS will be deported from the country. See also US Department of State, ‘Human Rights Reports: KSA’ (*US Department of State*, 2011) <<http://www.state.gov/j/drl/rls/hrrpt/2011/nea/186447.htm>> accessed 15 May 2015.

¹³² Equal Rights Trust, ‘The Equal Rights Trust’s Country Overview on KSA’ (*Equal Rights Trust*, 2008) 4 <<http://www.equalrightstrust.org/content/equal-rights-trusts-saudi-arabia-country-overview>> accessed 20 May 2015.

¹³³ ILO, ‘International Labour Standards on HIV/AIDS’ (*ILO*, 2015) <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/hiv-aids/lang-en/index.htm>> accessed 15 May 2015.

¹³⁴ *ibid.*

¹³⁵ Equal Rights Trust (n 132) 3.

Ramadan, the actual working hours for Muslims shall be reduced to a maximum of six hours a day or thirty-six hours a week.”¹³⁶

However, one may argue that these restrictions against TFWs¹³⁷ are not necessarily a result of their origin or nationality, but rather their legal status as TFWs. This is evident from specific rules and procedures regarding the current admission structure of employment of TFWs that have led to problematic human rights issues.

4.8.2. Challenges of providing effective management of the employment of TFWs

The main difficulty encountered during the research process is identifying the challenges of and impediments to providing effective management of the current admission structure of employment of TFWs in concert with applying human rights standards in both law and practice. Generally, one of the major challenges for the Saudi Government in managing TFWs is violation of the terms and conditions of their visas.¹³⁸ However, labour shortages led the government to undertake regularisation programmes to legalise the status of contract labour in order to gain control over the management of temporary contractual labour through the amnesty programme for a limited period.¹³⁹

Ruhs argues that several of the past and present temporary migration programmes have not been successful in assisting receiving countries to protect TFW rights,¹⁴⁰ despite many attempts.¹⁴¹ The GCIM strongly supports temporary labour programmes even though it highlights the drawbacks that may lead to the creation of a “second-class category of worker”, and suggests that this may be avoided through appropriate programmes that endorse and enforce the rules and regulations intended to protect labour rights.¹⁴²

¹³⁶ Labour Law, Royal Decree No. M/51 (27 September 2005) art 98.

¹³⁷ See Chapter 7 for more discussion.

¹³⁸ Shah (n 55) 4. There is a strong drive for the regularization of illegal TFWs in KSA. Since the mid-1990s, the Saudi Government has sought to reduce the number of TFWs in the SLM, with serious efforts being made to arrest and deport overstays.

¹³⁹ Abella (n 9) 2; see also United Nations, Department of Economic and Social Affairs, Population Division, ‘International Migration Report 2006: A Global Assessment’ ESA/P/WP.209 (2009) 9. These government measures and policies will be discussed in more detail in the next chapter.

¹⁴⁰ Martin Ruhs, *The Price of Rights* (Princeton University Press 2013) 15. Many of these studies deal with temporary migration programmes in Canada and Europe.

¹⁴¹ Ricard Zapata-Barrero, Rocío Faúndez García and Elena Sánchez-Montijano, ‘Circular Temporary Labour Migration: Reassessing Established Public Policies’ (2012) 2012 International Journal of Population Research 1.

¹⁴² Castles (n 23) 32.

Overall, the employment of TFWs can only be beneficial for KSA, TFWs and their countries of origin if KSA takes an active supervisory role. Thus, the road map for effectively managing the admission of TFWs, as Ruhs suggests, requires certain measures and policies: (i) the strict enforcement of employment and immigration laws, especially against employers who violate employment contracts and rules; (ii) the regulation of the cost at which TFWs are made available to employers through, for instance increasing the work permit fees for each TFW employed; (iii) implementing more effective mechanisms to incentivise employers to recruit local workers before requesting the recruitment TFWs; (iv) regulating and observing recruitment firms to control the recruitment costs of migration; (v) protecting TFWs' rights by making work permits changeable from one employer to another within certain occupations/sectors and after a certain period of time; and (vi) applying mixed-incentive enforcement measures to simplify the return of TFWs who have invalid temporary work permits.¹⁴³

Besides the abovementioned issues, this study identifies several particular governance issues that have led to a failure in managing this programme and enforcing the law with regard to the rights of workers in the SLM, as discussed in the following sections.

4.8.2.1. Difficulty of understanding employment laws and regulations

The difficulty of fully understanding the laws and regulations issued by government authorities (such as the MoL, MoI and so on) creates problems among those trying to deal with the Saudi authorities, and TFWs are not entitled to legal aid.¹⁴⁴ The RBA holds power-holders and institutions accountable to groups and individuals with less power to enable them to claim their rights in the case of violations. In September 2014, in a promising move, the MoL launched a new site, 'Labour Education', aiming to increase awareness of the rights and duties of both parties (workers and employers). The site offers a detailed explanation of the rights of workers, such as rights for persons with disabilities.¹⁴⁵ Publication of each authority's laws and regulations is necessary and should be done by every institution and sector (both governmental and semi-governmental organisations) to reduce the possibility of a conflict between the employment parties.

¹⁴³ Ruhs (n 140) 32.

¹⁴⁴ Megan Berthold, *Human Rights-Based Approaches to Clinical Social Work* (Springer International 2015) x.

¹⁴⁵ MoL, 'Home Labor Education' (*Labor Education*, 2016) <<https://www.laboreducation.gov.sa/en/>> accessed 15 April 2016.

In January 2016, the MoL launched a new online information service called ‘Legal Adviser’, which deals directly with workers’ problems and provides guidance regarding complaint procedures. However, the MoL admits that the initiative was “launched initially in Arabic and English, but other languages spoken widely by workers in the Kingdom will be added later”.¹⁴⁶ This promising attempt by the Saudi authorities is consistent with the aims of the RBA, which are to promote the empowerment principle and make TFWs able to claim their human rights.

4.8.2.2. Corruption and maladministration in the SLM: trade visas

In its 2014 *Global Corruption Report*, Anti-Corruption Transparency International’s Corruption Perception Index ranked KSA as the 55th most corrupt of the 175 states surveyed in terms of public sector corruption.¹⁴⁷ The private sector (especially construction) employs over 60% of TFWs in KSA, and employers and recruitment firms contribute prominently to abuses of the TFW recruitment system and make insufficient efforts to safeguard workers’ rights.¹⁴⁸ Visa trading is the most prominent case, with a particular scandal in 2011 highlighting a total of 1,083 work visas issued to workers from Pakistan to work in companies belonging to three businessmen that were issued with an allegedly forged signature of the Minister of Labour.¹⁴⁹ There is a lack of accountability as the government makes appointments based on nepotism, and thus it is obliged to protect favourites from prosecution or penalties.¹⁵⁰ This entrenches corruption and maladministration in the private and public sectors.¹⁵¹

4.8.2.3. Nepotism (*wasta*)

One of the indirect forms of corruption that negatively affects the current admission structure of employment of TFWs is nepotism (*wasta*). This phenomenon exists across all Arab states and is widespread in the GCC, with more than 90% expecting to use it in their official dealings. All social classes can benefit from *wasta*, with the exception of those people who

¹⁴⁶ Arab News, ‘Online Labor Info Service Launched’ (*Arab News*, 2016) <<http://www.arabnews.com/featured/news/867361>> accessed 16 April 2016.

¹⁴⁷ See Transparency International, ‘Transparency International - Country Profiles’ (*Transparency*, 2016) <https://www.transparency.org/country/#SAU_Chapter> accessed 17 April 2016.

¹⁴⁸ Zakir Hussain, *Saudi Arabia in a Multipolar World* (Routledge 2016) 189.

¹⁴⁹ Sabq, ‘The Issue of Falsifying Signature and Labour Minister’ (*Sabq*, 2014) <<http://sabq.org/8Bngde>> accessed 15 April 2016.

¹⁵⁰ See Mohamed Ramady, *The Political Economy of Wasta* (Springer 2015).

¹⁵¹ See, for more details, Transparency.org (n 147). It could be said that government agencies such as the Labour Department cannot function effectively because of their lack of independence and their corrupt practices.

do not have connections or influence in the public and private sectors,¹⁵² as is the case with TFWs in KSA, which increases the precariousness of their position in society.¹⁵³

Wasta is described as a “social network of interpersonal connections rooted in family and kinship ties and implicating the exercise of power, influence, and information-sharing through social and politico-business networks”.¹⁵⁴ *Wasta* operates in both official and unofficial sectors, but the official sector is responsible for all administrative decisions that restrict the fair application of the law, which leads to the misuse of laws by those who are working in public employment. *Wasta* advances individual interests and benefits members of *wasta* groups. This intersects with the concept of justice and threatens equal access to government services and resources, and even equality under the law, particularly for FNs.¹⁵⁵

Although *wasta* is deeply rooted in Arab-Islamic society, it is antithetical to Islamic values and civil law, which stress the importance of justice and fair treatment. Nevertheless, its use is common practice in the Saudi business realm, as a result of which the National Anti-Corruption Commission (*Nazaha*)¹⁵⁶ published a *fatwa* from the Council of Senior Scholars regarding the differences between nepotism and intercession.¹⁵⁷ This focused on raising awareness among employers of the negative impact of widespread *wasta* in public offices related to issuing fake company licences and work visas for the purpose of visa trading.¹⁵⁸ Promoting a national strategy to combat corruption is essential in KSA. It can be accomplished through controlling and monitoring the functions of governmental and non-governmental institutions by implementing certain strategies.¹⁵⁹ More governmental efforts

¹⁵² M-Said Oukil, ‘Wasta and Development in Arab and Muslim Countries’ in Mohamed A Ramady (ed), *The Political Economy of Wasta: Use and Abuse of Social Capital Networking* (Springer 2016) 131.

¹⁵³ *Wasta* is not a phenomenon specific to Muslim and Arab countries. The fundamental trouble with *wasta* in Muslim, Arab and MENA states concerns its contradiction with Sharia. See Oukil (n 152).

¹⁵⁴ Kate Hutchings and Kavoo Mohannak, *Knowledge Management in Developing Economies* (Edward Elgar 2007) 160.

¹⁵⁵ See Oukil (n 152) 133, 139, 142 and 143.

¹⁵⁶ *Nazaha* was established by Royal Order A/65, on 18 March 2011, issued by King Abdullah bin Abdulaziz Al Saud as an independent authority.

¹⁵⁷ The *fatwa* sent from the presidents of the National Anti-Corruption Commission (*Nazaha*) to the Council of Senior Scholars No 42/3775, Date 17/11/1433 H.

¹⁵⁸ *Nazaha*, ‘Differentiating Between Nepotism and Intercession (Fatwa)’ (*Nazaha*, 2011) <<http://www.nazaha.gov.sa/Media/News/Pages/news193.aspx>> accessed 16 April 2016.

¹⁵⁹ Azyumardi Azra, ‘Koneksi, Kolusi, and Nepotisme (KKN): Culturally Embedded? The Indonesian Experience of Combating Negative *Wasta*’ in Mohamed A Ramady (ed), *The Political Economy of Wasta: Use and Abuse of Social Capital Networking* (Springer 2016) 165.

and transparency could combat *wasta* and its undesirable influence on the public and private sectors, including the abuse of TFW rights.¹⁶⁰

Conclusion

While conscious of its responsibility to uphold international human rights standards, KSA is evidently unable to guarantee adequate protection for all, as exemplified by the experience of TFWs (see Chapter 8). This chapter has reviewed many of the issues related to the current admission structure of employment that create problems for TFWs working and living in KSA. As stated, recent literature on TFWs in KSA is rather inadequate in explaining the mismanagement of the admission structure of employment of TFWs by various institutions in KSA. This chapter contributes to the understanding of how the laws and regulations of various government institutions impact on managing the employment of TFWs before and after recruitment.

In the context of the segmented SLM, the current admission structure of employment of TFWs is found to meet the demands of the SLM for low-skilled, semi-skilled and professional workers to fill the workforce shortage. However, this study argues that the criticisms of the current admission structure of employment of TFWs result from KSA's treatment of workers as disposable labour rather than human beings with basic rights.¹⁶¹ Hence, applying the RBA to labour reveals how temporary immigration status and the SLM structure "in the context of SLM segmentation" establish structural barriers which lead to rights violations for TFWs and their families in KSA. Despite the high demand for low-skilled labourers in KSA, the nature of their temporary employment makes workers vulnerable to violations of their rights and increases discrimination and inequality. To achieve the objective of this study, an examination of the human rights situation of TFWs should take both legal and administrative factors into consideration. However, the legal provisions in international human rights conventions or national laws appear to be inadequate due to the generally low level of application of international standards and the inherent bias in Saudi law, along with problematic enforcement in the complex socio-political and economic conditions in KSA.¹⁶² However, one may argue that labour agreements and mutual

¹⁶⁰ *ibid* 165.

¹⁶¹ There is similar argument highlighted in the existing literature. See for more discussion Vicki Crinis, 'Vietnamese Migrant Clothing Workers in Malaysia: Global Production, Transnational Labour Migration and Social Reproduction' in Juanita Elias and Samantha J Gunawardana (eds), *The Global Political Economy of the Household in Asia* (Springer 2013) 176.

¹⁶² See the next chapter for more discussion.

cooperation between KSA and labour-sending countries would enhance the administrative procedures for recruitment, protection and repatriation and would prevent the illegal use of TFWs.¹⁶³

¹⁶³ Pracha Vasuprasat, 'Inter-state Cooperation on Labour Migration: Lessons learned from MoUs between Thailand and neighbouring countries'(2008) ILO Asian Regional Programme on Governance of Labour Migration, Working Paper No.16, 3< http://www.ilo.org/asia/whatwedo/publications/WCMS_106181/lang--en/index.htm> accessed 21 May 2016

Chapter 5: The Legal Framework Governing the Legal Status of Temporary Low-Skilled TFWs in the SLM: Policies and Regulations

Introduction

This chapter examines the framework governing the legal status of low-skilled TFWs in the SLM. The first section examines the labour and employment law in relation to employment of TFWs, health and safety issues, and the dangers of the SCS. The second section gives a general overview of the sponsorship, or *kafala*, system.¹ Since the Saudi Government is still developing new policies under its various authorities to regulate the employment of TFWs, especially low and semi-skilled workers, it is essential to examine the impact of these policies on workers' rights and legal status.

This chapter also evaluates the sponsorship system in light of international law and examines the Saudi *kafala* system and its commitment to its international obligations. A number of issues related to such a system are examined, such as forced labour practices and human trafficking. This research identifies four major potential obstacles, which include political, security-related, social and economic obstacles, that collectively prevent TFWs from being treated in the same way as Saudi workers. These obstacles also potentially prevent the promotion and protection of human rights in the country.

5.1. Laws and regulations governing the employment of TFWs in the SLM

Since becoming dependent on TFWs in the 1970s, the Saudi Government has controlled and monitored recruitment, including many laws and regulations enacted with the aim of protecting temporary contract labourers' rights. Labourers' rights are covered by the Labour Law (1969, amended in 2005), which defines the rights and responsibilities of labourers and employers; the Social Insurance Law (1969, amended in 2000),² which holds employers liable for labourers' safety in the workplace through rules and procedures for the application of the Occupational Hazards Branch (1982); the Labour Dispute Settlement (1969), which deals with adjudicating disputes between workers and employers; the Private Recruitment Agency (1969, amended in 2005); and the Residence (*iqama*) Regulations (1952), which aim

¹ The terms 'sponsorship' and '*kafala*' (system) will be used interchangeably, as will 'sponsor' and '*kafeel*'.

² Social Insurance Law, Royal Decree No. M/33 (29 November 2000).

to provide better management of the influx of temporary contract labour. This chapter examines the employment law and its regulations related to employment policies in the private sector.

5.1.1. Labour law: selected provisions

The principle legislation governing the terms and conditions of employment is the Labour Law of 2005, effective from 26 April 2006.³ The SLL applies to all employees in commercial government organisations and the private sector. It establishes minimum entitlements for employees, including provisions related to limiting work hours to 48 hours per week (if above 48 hours, overtime is applied), annual leave, paid sick leave, prohibition of wrongful dismissal, payment of a severance on termination of employment and recruitment.⁴ Given that the SLL was issued in 2005 and is considered to some extent new, the Saudi authorities have continued to propose amendments to the Labour Law with the aim of bridging the gap between the public and private sectors in order to encourage Saudi citizens to work in the private sector.⁵

The key amendments to the SLL from 2015 mainly concern Articles 12 and 13 pertaining to internal work regulations and organisational rules developed by employers.⁶ The requirement of these regulations is to comply with the model issued by the MoL; however, an employer can add supplementary terms and conditions as long as these do not contradict the provisions of the labour laws. Another amendment concerns the probationary period. The new amendment (Article 54) extends the probationary period from three to six months (nominally subject to employees' consent), allowing companies and employers to decide whether an employee is suited to the job; throughout this period, the employment contract can be ended without notice and without any service award.

With respect to labour contracts, Article 55 states that if the worker is a Saudi national, the contract automatically converts from a fixed-term contract (four years of continuous employment) to an unlimited-term contract. For non-Saudis, Article 37, which has not been

³ Labour Law, Royal Decree No. M/51 (27 September 2005). The new labour law superseded the Labour and Workmen Regulation, Royal Decree No. M/21 (15 November 1969). The new regulation introduced only changes in details, leaving the main framework of the old legislation in place.

⁴ *ibid.*

⁵ Sara Khoja and Rebecca Ford, 'Approved Amendments to KSA Labour Law' (*Clyde & Co*, 2015) <<http://www.clydeco.com/insight/updates/view/approved-amendments-to-ksa-labour-law>> accessed 31 May 2016.

⁶ MoL, 'The Labor Law (Brief Labor Amendments)' (*Portal MOL*, 2015) <<https://portal.mol.gov.sa/en/LaborLaw>> accessed 31 April 2016.

changed, stipulates that “if the employment contract makes no mention of the term, the duration of the work permit shall be deemed the contract term”. In practice, this is one of the deficiencies of the SLL, because it enables the creation of distinct work relations and work conditions that are various for different employees in the same company and the same job.

Article 58 requires the employee’s consent to change the work location from the original workplace. However, the employers can temporarily allocate staff to another worksite for a maximum of 30 days each year without gaining their consent.⁷

Article 64 asserts that the employer must provide a service certificate without charging any fees and provide basic employment information (date of joining and leaving the job or profession). The law prohibits the employer from including anything in the certificate that could harm the worker’s reputation and reduce his or her chance of applying for another job.⁸ For employment termination, the notice period has increased from 30 days to 60 days for monthly paid employees on unlimited contracts.⁹ If the employment contract does not include compensation for invalid terminations of the employment contract, the party damaged by this termination is owed compensation.¹⁰

With respect to the employment of non-Saudis, the SLL (Chapter III) sets out conditions on TFWs and employers. Article 33 stipulates that “a non-Saudi may not engage in or be allowed to engage in any work except after obtaining a work permit from the Ministry, according to the form prepared by it for this purpose”. Article 36 stipulates that “the Minister shall issue a decision identifying the professions and jobs that non-Saudis are prohibited from engaging in”.¹¹

Under the SLL, employers are responsible for workers’ safety at the workplace. Provisions in the Health and Safety at Work (Articles 122 and 123) require employers to inform all workers, prior to conducting their work, about the possible risks of the job. Employees must follow the rules and instructions provided by their employers, including the use of preventative measures.¹² Employer responsibility may also be extended to cover work-related injuries. The employer is obligated to treat the workers and bear all expenses necessary to do

⁷ Labour Law (n 3) art 58.

⁸ *ibid* art 64.

⁹ *ibid* art 75.

¹⁰ *ibid* art 77.

¹¹ *ibid* art 36.

¹² See *ibid* arts 124, 125 and 126.

so, direct or indirect, including hospital stays, medical examinations and tests, and travel expenses to places of treatment.¹³

According to Ministerial Decision No. 2833 of 2006/1427 on Work Injuries,¹⁴ the employer is responsible for reporting any work-related injuries to the Labour Department within one week. If there is a police investigation, the Labour Department looks at the police report and witness statements. If there is no medical report specifying the level of injury or one of the parties questions the reliability of the medical report, then the Labour Department refers the injured worker to a government hospital so that a new report can be issued. The Labour Department determines the compensation for the injured worker based on the medical report.¹⁵ If there is an objection to the Labour Department's decision, the case is referred to the Preliminary Commission for Settlement, which falls under the jurisdiction of the MoL.¹⁶

If there is a conflict with an employer, the only way a worker can complain about an employer's decision is to take the grievance to the Labour Settlement Dispute Committee (Articles 210–227), as there are no specific labour courts in the country.¹⁷ The issue of labour settlement disputes will be examined in depth in the next chapter. In July 2004, a royal decree addressed some workers' rights issues for non-Saudis, and the MoL began taking employers to the Board of Grievances. Some of these penalties include banning these employers from recruiting foreign and/or domestic workers for a minimum of five years (see Chapter 6 for more discussion of the Saudi Commission for Settlement of Labour Disputes).¹⁸

5.1.2. Lack of enforcement mechanisms

Despite the fact that the SLL is applied equally (at least in theory) to both Saudis and TFWs in the private sector, TFWs are not granted the same basic labour rights as native workers,

¹³ *ibid* art 133.

¹⁴ This decision was issued in accordance with art 141 of the Labour Law (n 3).

¹⁵ There is no clear mechanism for the role of the Labour Department in such cases, particularly whether it is administrative or legal in determining compensation for injured workers, a manifest deficiency in work issues such as injury compensation. The Ministerial Decision caused a conflict with the role of the GOSI, as it is responsible for providing compensation for work injuries if the workers contribute to its schema.

¹⁶ See MoL, 'Ministerial Decision No. 2833 of 2006/1427' (*Portal MOL*, 2006) <<https://portal.mol.gov.sa/ar/Documents/12833.pdf>> accessed 31 May 2016.

¹⁷ Salah Mahdi, 'Labour Shortages, Migration, and Segmentation: The Case of SLM' (Paper presented at the Interdependence of Migration Politics and Demography Workshop, 2007) <http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/Population_Politics/PopPolitics/Mahdi.pdf> accessed 28 November 2013.

¹⁸ USA International Business Publications, *KSA Investment and Business Guide* (Intl Business Pubns USA 2009) 48.

with a few exceptions.¹⁹ Many categories of TFW, especially low-skilled workers, do not have the right to change jobs or change employers to improve their employment conditions; these restrictions also apply and are bounded by the sponsorship system.²⁰

Following the recent SLL amendments (2015), the law governs the rights and duties of employees and employers, which unfortunately tend to favour Saudi employees over FNs as a result of segmentation in the SLM (Chapter 1). None of the amendments in the SLL have made any changes to Chapter III of the SLL governing the employment of non-Saudis, which indicates that these amendments were made in the interest of Saudi employees. This is evident from the MoL's mission statement, which says part of its mission is to "increase Saudization quotas by providing productive and fulfilling employment in the private sector", and "manage structural abnormalities between nationals and TFWs".²¹

Generally, these rules are formed to ensure that workers are treated fairly and to make the workplace safer, to encourage Saudi citizens to work in the private sector.²² There are many strong protections for workers endorsed by the SLL, but there are also significant gaps and weaknesses, including the prohibition of trade unions, the lack of a minimum wage, no provisions for unpaid salaries, and workplace health and safety concerns.

While trade unions are absolutely prohibited in KSA (along with political parties), workers in companies with over 100 workers can participate in committees, and the MoL and employers have rights to participate and report on the minutes. However, TFWs are barred from participating in such committees. In every eligible workplace there is only one committee and its membership must be approved by the government. The role of these committees is limited to health and safety, working conditions and productivity. The MoL has the right to dissolve a workers' committee for violating general laws and regulations or threatening public

¹⁹ Hamid S Atiyyah, 'The Sponsorship System and Infringements of the Rights of foreign workers in the Gulf Countries' (1990) 3 (4) *Employee Responsibilities and Rights Journal* 267, 269.

²⁰ *ibid.*

²¹ MoL (n 6).

²² Khoja and Ford (n 5).

security.²³ The law does not afford the rights of collective bargaining or striking, and prohibits public demonstrations.²⁴

Another deficiency of the SLL is that it does not provide adequate measures to determine the pay rate, such as salary scale or any procedure of personal or productivity appraisal, such as experience or qualification tests. These features are considered in the Saudi public sector, which creates wage differentials between workers in the same workplace or even in the same occupation. However, the MoL has introduced the *nitaqat* system with the aim of compelling companies to nationalise jobs,²⁵ attracting them to the private sector by enforcing favourable remuneration for Saudis (minimum of SR3,000 in order to count as a ‘full’ Saudi employee in the *nitaqat* system).²⁶ This is often considered as discriminatory against the TFW, especially when the TFW receives a lower wage than a local worker doing the same job.²⁷ Although the SLL allows the Council of Ministers or the Labour Minister to specify minimum wages, this has not been implemented.²⁸

Delayed payment of salaries, especially in the SCS, is a problem in the SLM. To overcome this issue, in 2013 the MoL implemented the Wage Protection System (hereinafter referred to as WPS), which became compulsory for all Saudi companies. It is being implemented gradually (for large companies with more than 3,000 employees in 2013, and all companies by September 2017), and requires the transfer of workers’ salaries to the local bank and the submission of wage data electronically to the MoL.²⁹ However, in 2016 over 1,000 employees from a major construction company in Jeddah went on strike because of a six-month delay in payment of their salaries.³⁰ The construction company, Saudi Oger, claimed the salaries were delayed because the company had not received a payment from a completed

²³ The International Trade Union Confederation (ITUC), ‘Internationally Recognised Core Labour Standards in KSA’ (Report for the WTO General Council Review of the Trade Policies of KSA, Geneva, 25 and 27 January 2012).

²⁴ KSA is not a party to the Convention on Freedom of Association and Protection of the Right to Organise (ILO No. 87) (adopted 9 July 1948, entered into force 4 July 1950) or the Convention on Right to Organise and Collective Bargaining (ILO No. 98) (adopted 1 July 1949, entered into force 4 July 1950).

²⁵ Ministerial Decision No. 4040 (10 September 2011) on adopting the *Nitaqat* Program.

²⁶ Amre Massoud, ‘The *Nitaqat* Program’ (ITU, 2011) <<http://www.itu.int/net4/wsis/stocktaking/projects/FileManager/DownloadProjectFile?fileId=f0b530fb-d5f9-4916-832a-f2bfcff381ad>> accessed 31 May 2016.

²⁷ Mahdi (n 17).

²⁸ Atiyah (n 19) 270.

²⁹ MoL, ‘Wages Protection System’ (Portal MOL, 2013) <<https://portal.mol.gov.sa/en/ProgramsAndInitiatives/Pages/wps.aspx>> accessed 31 May 2016.

³⁰ Arab News, ‘1,000 Workers Protest as Company Delays Salaries by 6 Months’ (Arab News, 2016) <<http://www.arabnews.com/saudi-arabia/news/881831>> accessed 31 May 2016.

project.³¹ Around 2,000 engineers, management staff and workers in the Saudi BinLadin Construction Group reportedly did not receive salaries for four months.³² According to the report, the MoL reached a settlement to resolve the problem with employees.³³

These cases raise the question of the extent to which the WPS is capable of protecting workers' rights regarding delayed and unpaid salaries in the Saudi private sector. The MoL applies several punitive measures to resolve such problems, including barring offending companies from using MoL services such as issuing and renewing work permits, but this is not an effective mechanism to resolve the issue due to the negative impact it has on the legal status of TFWs.³⁴

Ministerial Decree No. 4786, dated 28/12/1436 (12/10/2015), imposes penalties on SLL violations. The amendments concerning the inspection system and penalties may have a positive effect on improving the work conditions of low-skilled workers, especially in the SCS, but remain an inadequate punitive measure against violators, rather than a protection initiative.³⁵ The most important violations and penalties are:³⁶

- Employers can be fined up to SR50,000 if they are involved in selling visas to TFWs.
- If an employer puts workers into a forced labour situation, the worker will be fined SR15,000, which will be multiplied by the number of workers.
- Non-payment of wages within specific dates can bring a fine of SR3,000, and confiscating a labourer's passport leads to a fine of SR2,000.
- If the employer violates occupational health and safety procedures and guidelines, the worker will be fined SR25,000 and the company will be closed for one day.
- Forcing workers to work during certain hours of the day in the sun or in bad weather leads to a fine of SR3,000, and fines are multiplied by the number of workers on the

³¹ Arabian Business, 'Saudi Oger in Spotlight as Ministry Investigates Delayed Salaries' (*Arabian Business*, 2016) <<http://www.arabianbusiness.com/saudi-oger-in-spotlight-as-ministry-investigates-delayed-salaries-624084.html#.V0NLTP5OVaR>> accessed 31 May 2016.

³² *ibid.* Due to decreases in oil prices in 2016, the government reduced the transport and infrastructure budget by 63%, putting exceptional pressure on the entire SCS.

³³ Arab News, 'BinLadin Workers' Salary Issue Resolved' (*Arab News*, 2016) <<http://www.arabnews.com/featured/news/887091>> accessed 31 May 2016.

³⁴ Arab News, 'Violations: Saudi BinLadin Denied Labor Services' (*Arab News*, 2014) <<http://www.arabnews.com/saudi-arabia/news/662686>> accessed 31 May 2016.

³⁵ Migrant-Rights, 'New Fines in KSA for Employers' Violations' (*Migrant-Rights*, 2016) <<http://www.migrant-rights.org/2016/01/new-fines-in-saudi-arabia-for-employers-violations/>> accessed 31 May 2016.

³⁶ MoL, 'Violations & Penalties' (*Portal MOL*, 2015) <<https://portal.mol.gov.sa/en/LaborLaw>> accessed 31 May 2016.

worksite. This MoL directive bans outdoor work ‘under the sun’ between 12.00 p.m. and 3.00 p.m. from 1 July to 31 August.

Despite such efforts, TFWs are commonly exposed to unpaid wages, poor and dangerous working conditions, unhygienic living conditions and forced labour.³⁷ Furthermore, the lack of enforcement of Ministerial Decree No. 4786 exemplifies the wider pattern of the ineffectuality of the SLL that is caused by poor enforcement mechanisms, a lack of clear remedies for exploited workers and not giving any guarantee of receiving compensation when they make a claim. It could be said that the MoL, by imposing these penalties, generates new income for government agencies and partners but not for labourers.³⁸ The reluctance of the MoL to prosecute employers or maintain basic workers’ rights, especially those of low-skilled workers, fundamentally precludes legal protection of TFWs.³⁹

5.2. Construction injuries

There is a direct relationship between the employment sector and the risk of workplace accidents, particularly in SCS.⁴⁰ TFWs are usually recruited to work in 3Ds roles, with long hours, overtime, shift work, hard physical labour and inadequate safety measures, all of which can result in fatigue and exacerbate the risk of occupational accidents.⁴¹ In practice, due to the construction boom in KSA, there are cases of serious injury and death among low-skilled workers, who are subject to manipulation by employers because of the poor inspection procedures implemented by the Labour Department and the large size of the SCS.⁴²

In addition to MoL regulations, the General Organization for Social Insurance (hereinafter referred to as GOSI) provides a compensation plan for work injuries for both Saudi and non-

³⁷ Organisation for Economic Development and Cooperation and ILO, ‘Promoting Better Saudi Labour Market Outcomes for Youth’ (Report for the G20 Labour and Employment Ministerial Meeting, Melbourne, Australia, 10–11 September 2014) 7.

³⁸ Generally speaking, these penalties and fees are paid into the Human Resources Development Fund (HRDF) in order to support the local workforce and employment and training in the private sector. HRDF was founded as a result of Resolution No. 107 (July 2000) and Royal Decree No. M/18 (August 2000). See HRDF, ‘Human Resources Development Fund (HRDF)’ (*HRDF*, 2016) <<http://www.hrdf.org.sa/>> accessed 11 May 2016.

³⁹ Migrant-Rights (n 35).

⁴⁰ The recent tragic incident of a crane falling in Makkah at the Holy Mosque before the Hajj season has brought worker health and safety issues to the forefront. See The Guardian, ‘Mecca: Saudi King Vows to Find Cause of Hajj Crane Tragedy’ (*The Guardian*, 2015) <<http://www.theguardian.com/world/2015/sep/13/mecca-saudi-king-salman-hajj-crane-tragedy>> accessed 1 May 2016.

⁴¹ International Organization for Migration, ‘International Migration, Health and Human Rights’ (International Organization for Migration, 2013) 38.

⁴² There are some studies on migrant workers in Gulf States indicating that there are contradictory reports on information about the real figures of injuries and deaths. See Sevil Sönmez and others, ‘Human Rights and Health Disparities for Migrant Workers in the UAE’ (2013) 13(2) Health and Human Rights Journal 17.

Saudi workers. The GOSI stipulates rules and regulations making the employers, in accordance with Article 18, contribute 2% of the worker’s salary every month to the Occupational Hazards Branch.⁴³ The GOSI reported the most common employer-reported causes of work-related injuries in 2015, as shown in the following table.⁴⁴

Type of Accident	Number of Injuries	Percentage
Hit by equipment	19,401	28.92%
Falls (from heights)	19,257	28.70%
Falling objects	11,377	16.96%
Other	6,582	9.81%

Table 5.1: Most common causes of work-related injuries
Source: GOSI (2015)

The GOSI (2015) report shows that most injuries are caused by ‘falls (from heights)’ and ‘getting hit by equipment’, representing 57.62% of total injuries. Table 5.2 shows the type and number of injuries and deaths in the workplace.

Description of Injury	Number of Injuries	Percentage
Death	495	0.7%
Recovery with disability	2,950	4.4%
Recovery without disability	39,456	58.8%
Under treatment	24,186	36.1%
Total	67,087	100%

Table 5.2: The type and number of injuries and deaths in the workplace
Source: GOSI (2015)

This report reveals only the cases reported to the GOSI. The table above shows that workers in the private sector consistently work in hazardous conditions that expose them to serious injury and sometimes death. The table below breaks down work-related injuries by workers’ sector and nationality.

⁴³ Social Insurance Law (n 2) art 18.

⁴⁴ The report is available at GOSI, ‘GOSI: Open Data’ (GOSI, 2016) <<http://www.gosi.gov.sa/portal/web/guest/190>> accessed 1 May 2016.

Sector	Nationality		Total Workers	
	Saudi	Non-Saudi	Number	Percentage
Construction	403	35,184	35,587	51.40%
Trade	440	12,040	12,480	18.02%
Transformative industries	974	8,989	9,963	14.39%

Table 5.3: Work-related injuries by sector and nationality of the workers⁴⁵
Source: GOSI (2015)

According to the GOSI table, most workplace injuries are concentrated in construction, which has the highest rate of accidents (51.40%). The report reveals that 35,184 foreign labourers in KSA were affected by accidents in the workplace in the construction industry, compared with only 403 Saudi labourers in the same sector in 2014 and 2015. Makkah had the highest rate, with 19.5% (6,953 labourers), and Riyadh the next highest, at 18.2% (6,469 labourers). This is due to the large number of workers in the construction industry, and also the nature of the SCS. The report shows that the total number of registrations with the GOSI in the construction industry was high compared to other sectors. Thus, the official report shows evidence that foreign labourers are more vulnerable to site accidents, and that the true extent of this vulnerability is greater than indicated because most incidents go unreported.⁴⁶ Although employers are responsible for reporting all incidents in the workplace to the MoL, it is not in the employers' interest to report accidents, because the employer may thus become liable for subsequent medical expenses.

5.3. Overview of the sponsorship system (*kafala*)

The *kafala* system emerged after the oil boom in Saudi and other GCC states, and developed a distinct regulatory framework for the residency and employment of FNs. The roots of the *kafala* concept are based on ancient tribal values of generosity that govern the treatment and protection of foreign guests. However, over time this system has developed and been formalised into numerous national legal structures that regulate the terms of residence and

⁴⁵ The data provided by the GOSI does not reveal the nationalities of the non-Saudis. The report just breaks down the nationality of employees registered with GOSI into two main categories: Saudi and non-Saudi.

⁴⁶ GOSI (n 44).

employment for foreign labourers, and at present the *kafala* system rules the lives of most TFWs in KSA and other GCC states. Through the *kafala* system, employers are considered sponsors who decide on their requirements for foreign labour and then employ the workers through brokers, direct recruitment or intermediaries such as private employment agencies (PEAs).⁴⁷

The rapid development of KSA after the oil boom necessitated importing experienced skilled and unskilled labour. From this economic perspective, this system was created with the clear objective of providing temporary, rotating labour that could allow the recruitment of workers during rapid economic growth and return them to their country during periods of economic recession.⁴⁸

The key legal source of the sponsorship system is the Residence Regulations, issued by Royal Order No.17/2/25/1337, dated 11/09/1371 (4/6/1952), which organises the entry and exit conditions of FNs.⁴⁹ The residency permit regulations do not stress the authority of the sponsor over TFWs, but confirm the necessity of a sponsor for every foreign national, especially workers, who enters the country under Articles 5 (paragraph 4), 11 and 39. The regulations highlight the role of sponsors when they want to employ TFWs, and Article 26 states that the sponsor is responsible for ensuring that the foreign worker has a valid residency card and work permit; if not, the sponsor must notify the Foreigner Control Office or its substitute authorities about any foreigners leaving their work or being absent for two days without reason. Article 25 stresses the importance of official documents, such as workers' passports and residency permits. The article stipulates that "each foreigner who loses his passport, his residence permit, his entry form or any paper given to him by the Foreigner Control Office shall report to this office or its substitute authorities within a period of not more than 24 hours".⁵⁰

The sponsorship system contains of a number of employment and residence regulations in order to control how FNs accept employment in the SLM. Through the sponsorship system,

⁴⁷ Hélène Harroff-Tavel and Alix Nasri, 'Tricked and Trapped: Human Trafficking in the Middle East' (ILO, 2013) 26; see also Economic and Social Commission for Western Asia (ESCWA), 'Inter-Regional Report on Labour Migration and Social Protection–United Nations ESCAP' (UNESCAP, 2014) <<http://www.unescap.org/resources/inter-regional-report-labour-migration-and-social-protection>> accessed 1 May 2016.

⁴⁸ Martin Baldwin-Edwards, 'Labour Immigration and labour markets in the GCC countries: National Patterns and Trends'(2011) Kuwait Programme on Development, Governance and Globalisation in the Gulf States, Research Paper 15, 37-38< <http://eprints.lse.ac.uk/55239/>> accessed 1 September 2015

⁴⁹ Saudi Residence Regulations, Royal Decree No. 17/2/25/1337 (4 June 1952).

⁵⁰ *ibid*, art 25.

the government implemented several pieces of legislation tying a foreign labourer's legal residence to his or her 'sponsor', who takes full legal responsibility for him or her during his or her employment, including issuing work and residence permits, giving consent to leave the country and other such obligations.⁵¹ This *kafala* system has become the central institution defining the rights and obligations of the foreign labourer and the state, and the sponsor and the labourer.⁵² The system requires the foreign labourer to work only for his sponsor (*kafeel*) because the latter is the principal representative of the former in Saudi ministries and inter-agency committees that regulate the foreign population.⁵³

5.4. *Kafala* and the governance of migration

The sponsorship system did not emerge as a single legal format, but rather as a set of laws, policies, practices and customs that characterise the governance and admission of non-national labour personnel in KSA and other GCC states. *Kafala* occurs at the junction between custom and law and is reinforced by employment contracts signed by TFWs and sponsors, usually for two years.⁵⁴ The system has been updated over the course of many years, stemming from a series of royal and ministerial decrees in combination with common practice in favour of the sponsor, and more recently in favour of local workers to reduce the number of unemployed Saudis.

The governance of migration in KSA is therefore characterised by dividing the roles of managing the contractual workers between the government and the *kafeel*. The government is regarded as the regulator of the control and conditions of entry and the stay of contract workers, but the sponsor is responsible for guaranteeing TFWs' conduct within the country.⁵⁵

⁵¹ Priyanka Motaparthy, 'Understanding *Kafala*: An Archaic Law at Cross Purposes with Modern Development' (*Migrant-Rights*, 2015) <<http://www.migrant-rights.org/2015/03/understanding-Kafala-an-archaic-law-at-cross-purposes-with-modern-development/>> accessed 1 May 2016.

⁵² *ibid.* Generally speaking, the sponsorship system regulates immigration matters in the GCC countries (Bahrain, Kuwait, Oman, Qatar, KSA and the UAE) and other countries outside the Gulf, such as Jordan and Lebanon. Countries such as Qatar have specific sponsorship acts, while other countries, such as Kuwait, have several pieces of legislation under general residence and immigration laws. The sponsorship system in the other regions does not include all migrants, such as in Lebanon, where Syrian workers are allowed to stay and work, and Jordan exempts certain business areas (free-zones) from sponsorship restrictions.

⁵³ Andrew Gardner and others, 'A Portrait of Low-Income Migrants in Contemporary Qatar' (2013) 3 (1) *Journal of Arabian Studies* 1, 7.

⁵⁴ *ibid.* 10.

⁵⁵ Andrew Gardner, 'Ethnography, Anthropology and Migration to the Arabian Peninsula: Themes from an Ethnographic Research Trajectory' (2014) *Gulf Labour Markets and Migration*, Explanatory Note No. 10, 4<http://gulfmigration.eu/media/pubs/exno/GLMM_EN_2014_10.pdf> accessed 27 June 2015.

This system provides the government with a means to regulate migrant labourers' movements and to oversee their activities during their stay.⁵⁶ Silvey points out that the Saudi Government has instituted particularly restrictive immigration policies and exclusionary practices through its sponsorship system. As mentioned, the main institution which regulates recruitment of TFWs in the country is the MoL,⁵⁷ but other governmental entities regulating their legal status in the country include the MoI and the MoFA.⁵⁸

Most regulation for this system emphasises the orderly management of the entry and stay of contract workers and their dependants, if they are eligible to live in the country.⁵⁹ The responsibility is placed by the government on the *kafeel* for the conduct of the worker, and the powers the former enjoys over the entry and exit of the latter confers, in practice, a *carte blanche* on the *kafeel* and leaves the worker vulnerable to abuse that can, in the worst cases, amount to a form of indentured servitude. In countries where less obligation is placed on the employer as the guarantor of the worker, the temporary worker is mainly under the auspices of the host state (rather than the individual employer), and thus essentially has the same protections and rights as citizens (e.g. in terms of freedom of movement).⁶⁰

5.5. Policies responding to the low-skilled labourers under *Kafala*

Since KSA depends upon TFWs for its labour force, *iqama* regulations (the Residency Act) exist as a set of laws referring to the status of foreign labourers and their rights in the country.⁶¹ The government's visa policy is designed to grant entry visas and work permits to

⁵⁶ Steven D Roper and Lilian A Barria, 'Understanding Variations in Gulf Migration and Labor Practices' (2014) 6 Middle East Law and Governance 34.

⁵⁷ Rachel Silvey, 'In the Margins of Riyadh: Indonesian Domestic Workers in KSA' in Marie Price and Lisa Benton-Short (eds), *Migrants to the Metropolis: The Rise of Immigrant Gateway Cities* (Syracuse University Press 2008) 284; Silvey states that "[d]espite KSA's significance as an immigrant destination, the Kingdom's immigration policies and dynamics remain relatively understudied, particularly in English-language immigration literature. The main reason for the relative dearth of literature on immigration in KSA is the Saudi Government's refusal to allow foreign researchers to examine the topic. However, scholars have published several important exceptions."

⁵⁸ USA International Business Publications (n 18) 213.

⁵⁹ Nasra M Shah, 'The Management of Irregular Migration and its Consequences for Development: Gulf Cooperation Council' (2009) ILO Asian Regional Programme on Governance of Labour Migration, Working Paper No. 19, 6 <http://www.ilo.org/asia/whatwedo/publications/WCMS_105105/lang--en/index.htm> accessed 21 May 2016; see also Nora Ann Colton, 'The International Political Economy of Gulf Migration' (*Middle East Institute*, 2010) <<http://www.mei.edu/content/international-political-economy-gulf-migration>> accessed 1 May 2016.

⁶⁰ Andrew Gardner, 'Labour Migrants and Access to Justice in Contemporary Qatar' (Middle East Centre, LSE 2014) 10.

⁶¹ Regional Mixed Migration Secretariat (RMMS), 'The Letter of the Law: regular and irregular migration in Saudi Arabia in a context of rapid change' (RMMS, No. 4/2014) 47 <http://www.regionalmms.org/images/ResearchInitiatives/RMMS_Letter_of_the_Law_-_Saudi_Arabia_report.pdf> accessed 20 September 2016.

FNs through the *kafala* system. The Passport Office and Labour Department are both effectively made responsible for the country's labour residency policy, and have the authority to assess the scale of foreign labour force admissions, determine the sector and type of employment of the foreign workforce and determine their length of stay depending on the general national strategy and conditions of the economy.⁶²

From looking at the inter-ministerial procedures, the employment policies for TFWs in the private sector can be explained in the context of three issues: employment and residency regulations and practices, restrictions on employment of foreign employees and the deportation system.

5.5.1. Employment and residency regulations and practices

As stated, the employment and residency of FNs is structured and governed by the *kafala* system, by which the government informally enlists employers as agents of immigration and labour control: "Substantial portions of the responsibility for governing the population of temporary TFWs are distributed by law and custom to citizens, sponsors, and their proxies".⁶³ Thus, the experience of any TFW is extremely reliant on the sponsor, not the sponsorship system (i.e. the government) itself.

This policy is specified in Article 33, paragraph 3 of the Labour Law in the section governing the 'employment of non-Saudis', as follows: "A non-Saudi may not engage in or be allowed to engage in any work ... [unless he/she] has a contract with the employer and is under his responsibility."⁶⁴ Thus, TFWs rely on employment by their sponsors to maintain their legal status in the country. The labourers (as per the *iqama* regulations and labour laws) are banned from working for any employer other than their sponsor or from working on their own account. A labourer who defects from his original sponsor is considered a runaway (*huroob*) who can be arrested and deported. Article 39 of the SLL was amended in early 2013 and now stipulates as follows:

"It is not allowed for an employer, without following the statutory rules and regulations, to let his (foreign) worker go out and work for others. It is also not

⁶² For more details, see MoL, 'Information About the Ministry' (*Portal MOL*, 2016) <<https://portal.mol.gov.sa/en/AboutMinistry/aboutus>> accessed 11 May 2016. See also MoI, 'Procedures and Regulations' (*GDP*, 2016) <<http://www.gdp.gov.sa/sites/pgd/ar-SA/Procedures/ForeignProcedures/Pages/default.aspx>> accessed 11 May 2016.

⁶³ Gardner (n 60) 4, 5.

⁶⁴ Labour Law (n 3) art 33, para 3.

allowed for a worker to engage in work for another employer. The employer is not allowed to employ workers who are under the sponsorship of others. The Ministry of Labour shall inspect the firms and investigate the violations discovered by its inspectors, and then forward them to the Ministry of the Interior to take penal actions against them. The employer is not allowed to let his worker engage in work for his own benefit. The worker is also not permitted to work on his own account. The Ministry of the Interior shall arrest, deport and take punitive measures against those violators who are working for their own benefit in the streets and public squares and against those who run away (from their sponsors) as well as the employers, benefactors of such violators, those covering for them and transporting them in addition to any person having a role in such violations.”⁶⁵

These regulations essentially prohibit foreign labourers from finding new employment or leaving the country without the authorisation of their employer. Thus, labourers under the sponsorship system are exploited and have no legal recourse due to the restrictive policies of employment and residency.⁶⁶

Despite KSA’s restrictive admission policies, the number of TFWs in KSA is over 10 million, according to the Central Department of Statistics and Information, constituting more than 31% of the total population in 2015.⁶⁷ However, in addition to its various restrictive policies for controlling the number of foreign labourers, KSA also has a policy of reducing the number of dependants of foreign labourers. One of the ways in which the country applies this policy is by setting requirements, such as qualifications, type of job as per the *iqama* and the worker’s salary, to be eligible for family reunification (i.e. importing their families to join them).⁶⁸ Furthermore, KSA and other GCC states have not created an integration programme for FNs since their residency policies view them as temporary workers.⁶⁹

⁶⁵ *ibid* art 39.

⁶⁶ Katherine Scully, ‘Blocking Exit, Stopping Voice: How Exclusion from Labor Law Protection Puts Domestic Workers at Risk in KSA and around the World’ (2010) 41 *Columbia HRL Review* 825, 852.

⁶⁷ The number of FNs noted on the official Saudi Central Department of Statistics and Information (CDSI) website is unclear; the Arabic version shows the number of FNs as 10,067,839, but the English version shows the number as 9,723,214. The CDSI is the only government authority responsible for revealing reports regarding FNs’ lives in KSA. This shows that obtaining accurate data is difficult. CDSI, ‘Key Indicators: Kingdom of KSA’ (CDSI, 2014) <<http://www.cdsi.gov.sa/english/index.php>; Arabic website <http://www.cdsi.gov.sa/index.php>> accessed 1 March 2015.

⁶⁸ This is discussed in Chapter 3.

⁶⁹ Nasra Shah, ‘Recent Labor Immigration Policies in the Oil-Rich Gulf: How Effective Are They Likely to Be?’ (2008), ILO Asian Regional Programme on Governance of Labor Migration Working Paper No. 3 <http://www.ilo.org/asia/whatwedo/publications/WCMS_099165/lang--en/index.htm> accessed 10 May 2015

As the *kafala* system recognises FNs as temporary workers, the Saudi Government is not obliged to endorse their rights (at least not equal employment rights with Saudi nationals) or to include foreign labourers in any national benefits scheme. As stated in Chapter 3, this system considers foreign labourers to be ‘temporary’, which creates a situation of temporality and instability for workers and their families. This system prevents them from integrating into society because of the absence of any integration programme in the sponsorship system (Chapter 3).⁷⁰

One of the major reasons for the restrictive migration policies in the SLM is the growing level of unemployment among the indigenous Saudi population, which poses increasing financial and political dilemmas for the government, particularly since the Arab Spring in 2011.⁷¹ Policy objectives have aimed to educate, train and employ nationals from the Second Development Plan (1979–1980) until the present one (e.g. the Ninth Development Plan, 2009–2014), while tightening employment and residency regulations to ensure the temporary status of TFWs so they cannot challenge Saudi workers in the SLM.⁷² The table below shows immigration policies related to FNs’ rights of residency in KSA and exemption from deportation.⁷³

Policy	Conditions
Permanent settlement	<i>Restricted to:</i> GCC nationals Foreign wives of Saudi nationals get Permanent Residence status Displaced tribes (e.g. Bedouins) who are holders of 5-year ID cards Sons of the Empty Quarter tribes (those holding a Saudi passport

⁷⁰ Noora Lori, ‘Temporary Workers or Permanent Migrants: The *Kafala* System and Contestations Over Residency in the Arab Gulf States’ (Center for Migrations and Citizenship, Institut Français des Relations Internationales, 2012) 5 <<https://www.ifri.org/fr/publications/enotes/notes-de-lifri/temporary-workers-or-permanent-migrants-kafala-system-and>> accessed 23 May 2015; see also Martin Ruhs, ‘Migrant Rights, Immigration Policy and Human Development’ (2010) *Journal of Human Development and Capabilities* 11.

⁷¹ Shah (n 69) 3.

⁷² Ministry of Economy and Planning, ‘The Second Development Plan 1979–1980’ (*Ministry of Economy and Planning*, 1980) <<http://www.mep.gov.sa/en/>> accessed 1 May 2016.

⁷³ Several of the items listed under Column 1 were adapted from Shah (n 69). Also, the Minister of Labour issued a Ministerial Decision regarding the employment of FNs who are exempt from deportation in the *Nitaqat* system; see for more information the Saudi MoL, ‘Ministerial Decisions’ <<https://www.mol.gov.sa/>> accessed 18 May 2015; see also Al-Riyadh newspaper, ‘Categories Exempted from Deportation Calculated to “a quarter point” in the *Nitaqat* system’ (*alriyadh*, 2013) <<http://www.alriyadh.com/815169>> accessed 8 May 2015.

	ONLY)
Temporary workers	Allowed under the sponsorship system
Highly skilled workers ⁷⁴	Allowed under the sponsorship system or foreign investment programme
Family reunification	Allowed for highly skilled workers with a few exceptions for low-skilled labourers (visiting visas of up to 3 months)
Integration of non-nationals	Limited to specific categories exempted from deportation, such as: Turkestan community members holding residency cards Palestinian community members holding travel documents Albramawih (Burmese) community members

Table 5.4: Immigration policies allowing FNs residency in KSA and exemption from deportation

The systemic control imposed on the legal status of TFWs in KSA may be considered a form of structural violence. The abusive *kafala* system systematically helps create a population of undocumented (or illegal) workers in the SLM. The issues of TFWs usually concern non-payment, bad working conditions, exploitation and abuse from the employer; some labourers prefer the vulnerabilities of illegal employment in return for the freedom that is gained when leaving unprincipled sponsors.⁷⁵

5.5.2. Restrictions on employment of foreign employees

KSA is committed to promoting indigenisation of the workforce and decreasing its reliance on FNs and workers, as reflected in the Saudi Development Plans.⁷⁶ In recent years, policies to improve the mechanisms of indigenisation to reduce the numbers of foreign labourers in the SLM have begun to be implemented. Vigorous efforts have been made in KSA to impose more restrictions on the employment of TFWs, which leads to violations of their rights.⁷⁷ Before proceeding with a discussion of the policies intended to affect workers in the private

⁷⁴ *ibid*; It should be noted that currently there are many regulations enacted to organise the work of non-nationals, such as the Regulation of Ownership and Investment in Real Estate by Non-Saudis, Royal Decree No. M/15 (19 July 2000); KSA General Investment Authority Statute, Royal Decree No. 1 (10 April 2000); and the National Industries Law, Royal Decree No. M/50 (28 May 1962).

⁷⁵ Gardner (n 60) 5.

⁷⁶ For more details about the Saudi Development Plans see Ministry of Economy and Planning, 'Knowledge Resources - Plan Documents' (*Ministry of Economy and Planning*, 2017) <<http://www.mep.gov.sa/en/knowledge-resources/>> accessed 12 February 2017.

⁷⁷ Shah (n 69) 3.

sector, it must be understood that most policies related to the SLM are created to regulate the recruitment of foreign labourers and to reduce their numbers.

One of the strategies used by KSA in 2011 was the *nitaqat* system, introduced by the MoL to increase the number of Saudi workers in the private sector by limiting the number of work visas for TFWs. Since the first Saudisation policies in 1994, *nitaqat* is the most important programme in the promotion of employment of indigenous workers, and, as Shah points out, the *nitaqat* system is more comprehensive in its implementation than former methods.⁷⁸

The *nitaqat* system classifies local companies in the private sector into colour-coded zones based on the extent of their compliance with the policies regarding hiring Saudi nationals, with fines enforced for non-fulfilment:⁷⁹ red (companies that cannot renew work permits for foreigners), yellow (companies that may not be able to renew the work visas of their foreign employees beyond six years) and green (companies in compliance that may employ foreign labour).⁸⁰ Smaller companies with fewer than ten employees are excused altogether, and companies with ten to 19 TFWs are subject to the imposition of a requirement for 20% Saudisation.⁸¹ In addition to the three zones, the MoL also presents what is called a 'premium' zone, where Saudisation percentages reach more than 27%.⁸²

Despite foreign labour (unskilled and semi-skilled) accounting for more than 95% of the workforce of small and medium enterprises (SMEs), the new system affects all businesses equally, regardless of whether they employ skilled professionals or manual labourers.⁸³ However, the *nitaqat* system is considered aggressive and negative by TFWs working for companies in the red or yellow zones for the following reasons:

1. The work permit system prevents a TFW from switching jobs more than four times.

⁷⁸ MoL, 'KSA SLM Report for the G20' (September 2014) <<http://saudilabormarketreport.org/Saudi%20Arabia%20Labor%20Market%20Report%20G20.pdf>> accessed 1 April 2015.

⁷⁹ Mohamed Ramady, 'Gulf Unemployment and Government Policies: Prospects for the Saudi Labour Quota or Nitaqat System' (2013) *International Journal of Economics and Business Research* 1, 5.

⁸⁰ Oxford Business Group, *The Report: KSA 2013* (Oxford Business Group 2013) 36.

⁸¹ Ramady (n 79) 10-12.

⁸² Dima Jamali and Yusuf Sidani, *CSR in the Middle East: Fresh Perspectives* (Palgrave Macmillan 2012) 96.

⁸³ Oxford Business Group (n 80) 36.

2. The free choice of employment and right of entry into the SLM are restricted because the system of work permits allows Saudi authorities to limit the access of non-nationals to certain categories of jobs.⁸⁴
3. Foreigners are not able to extend their work permits if they are still working for a red-coded company, and their legal status may become illegal.
4. The *nitaqat* system imposes a quota for foreign nationalities wherein any single nationality must not surpass 10% of total foreign labour.⁸⁵ This provision mainly hits unskilled Asian workers from Bangladesh, India, Pakistan and the Philippines, in addition to Arabs from Syria, Sudan and Egypt, all of whose numbers surpass the required 10%.⁸⁶
5. As per residency laws, all permits must be extended before they expire; if not, there are financial penalties and possible deportation for repeat offenders. A worker's permit usually covers his partner and children under the age of 18.⁸⁷

As a result of this system, workers may be compelled to accept any job offer available under any conditions, just to correct their legal status with green companies.⁸⁸ Hertog rightly points out that these sanctions have been applied progressively in recent years; however, their impact on companies and the legal status of their TFWs is not always clear, given that a large majority of companies, especially in construction, are not fulfilling *nitaqat* quotas and fall into the red category.⁸⁹

The second policy is the levy system, introduced in 2013, whereby the government charges firms a levy of SR2,400 to issue work permits in order to increase the cost of hiring TFWs for employers that are not complying with the *nitaqat* programme.⁹⁰ These fees make recruiting TFWs very expensive for employers, which can have the impact of reducing reliance on the foreign workforce. Another example of the restrictive strategy is indirect fees, such as health

⁸⁴ ILO, *Equality at Work: Tackling the Challenges: Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* (ILO 2007) 32.

⁸⁵ Robert Looney, 'Saudization and Sound Economic Reforms: Are the Two Compatible?' (2004) 3(2) Strategic Insights 5.

⁸⁶ Currently, 34 areas of work are closed to expatriate workers, including training managers, public relations officers, administrative assistants, purchase managers, secretaries, operators, warehouse supervisors, debt collectors, customer service accountants, bank tellers, postmen, data handlers, librarians, book sellers, ticket kiosk keepers, taxi drivers, auto salesman, janitors, internal mail handlers and tour guides; see *ibid* 5; see also Mohamed A Ramady, *The Saudi Economy* (Springer 2010) 270.

⁸⁷ MoI, 'Iqama System Violations & Penalties' (MOI, 2015) <<http://bit.ly/1XPG55b>> accessed 4 June 2016.

⁸⁸ ILO (n 84) 32.

⁸⁹ *ibid* 24.

⁹⁰ In KSA, a direct fee (SR100 or USD26.6) is collected for issuing work permits for each TFW per year by the MoL to fund the establishment of training programmes for indigenous workers.

insurance fees introduced in 2002, whereby employers are responsible for providing medical insurance for all employees, including foreign labourers.⁹¹

Other strategies implemented to decrease the number of visa overstays and illegals include an amnesty programme, alterations in the administration of the penalty system (including deportation) and attempting to limit the practice of visa selling that emerged because of the *kafala* system and malpractice by *kafeels*. These were evident from the SLL amendment, including Article 39, and the abolition of Article 233, which included penalties for those who violated Article 39. Such penalties are now included in a draft law that was approved by the Shura Council, The Rules for Dealing with Expatriates in Violation of the Laws (hereafter ‘the Rules’). The Rules include 14 articles entrusting the MoI and its security agencies with enforcing penalties, including fines and jail time, and deportation if the violator is a foreign national.⁹² The MoL report on the 2014–2015 labour correctional campaign revealed the number of TFWs who were affected by this campaign in the SLM.⁹³ The following table summarises the results.

Action taken	Number of TFWs
Transfer services (changing sponsors)	251,2041
Absent from work	103,34265
Changing professions	241,7273
Issued final exit visas	437,314

Table 5.5: Action taken by TFWs during the labour correctional campaign in the private sector
Source: MoL (2013–2014)

The negative consequences of these measures and sanctions on TFWs have led to widespread exploitation. According to HRW reports, in many cases the *kafeel* continues to illegally charge workers for the cost of residency and work permits in order that they can maintain their legal status.⁹⁴ According to the MoL, more than 74,500 establishments were issued penalties in 2014 for violating labour laws. Makkah registered the highest rate of violations, with 25% of the total, followed by Riyadh with 21%. Being employed by a non-sponsor was the most prevalent offence, with 2,034 cases. Diverse penalties were issued depending on the violations, including termination of Labour Department services, fines and banning of

⁹¹ Mohamed Ramady, *The Saudi Economy: Policies, Achievements, and Challenges* (Springer 2010) 139.

⁹² Arab News, ‘Visa Violators Face Punitive Action’ (*Arab News*, 2012) <<http://www.arabnews.com/visa-violators-face-punitive-action>> accessed 1 April 2016.

⁹³ MoL, ‘Data & Statistics’ (*Portal MOL*, 2014) <<https://portal.mol.gov.sa/ar/statistics>> accessed 1 June 2016.

⁹⁴ HRW, ‘Bad Dreams: Exploitation and Abuse of Migrant Workers in KSA’ (*HRW*, 2004) 27-29 <<http://hrw.org/reports/2004/saudi0704/index.htm>> accessed 1 March 2016.

renewal or issuance of work permits. Officials state that the MoL, in cooperation with the police, is conducting a special campaign with commercial establishments to make sure they abide by Article 39, as well as implementing penalties against violators. The highest numbers of visits are conducted at the premises of wholesalers, retailers, construction companies, maintenance workshops and food services.⁹⁵

5.5.3. Deportation system

The judicial and administrative deportation procedures for any non-national living in the country fall within the discretion of the Executive Authority, namely the MoI. The purpose of these procedures is to enable the MoI to limit the numbers of TFWs who place a burden on national security and the economy.⁹⁶ Therefore, the Saudi Government has legislated tough laws involving the deportation of foreign offenders, sometimes with fines and sentences of at least one month in jail and a ban from re-entering the country for at least three years. Article 33 of the Residence Regulations stipulates that the MoI “is entitled to withdraw the right of residence and its permit from any foreigner and instruct him to leave the country at any time and without mentioning any reasons”.⁹⁷ Hence, if the authorities believe that the deportation of a foreign national is necessary for public order, public interest or public morality, the MoI can expel that person. It should be noted that these conditions are broad and quite general; in fact, the term ‘public interest’ is broad enough to include the other imperatives of public security and public morals.⁹⁸

Furthermore, the same law stresses the role of sponsorship in granting the rights of FNs to enter and stay in the country; otherwise, the TFW must leave the country. Article 11 states:

“The sponsorship of the sponsors in this Regulation is final, and may not be released except in case another sponsor offers the same obligations and has the same satisfactory characteristics of the sponsor who is requesting release. In case no other new sponsor offer was submitted, and insistence of the current sponsor on cancelling

⁹⁵ Arab News, ‘Working for Other Sponsors Tops Labor Law Violation List’ (*Arab News*, 2014) <<http://www.arabnews.com/news/528876>> accessed 1 May 2016; see also MoL, ‘Inspection Guidelines’ (*Labor Education*, 2015) <<http://www.laboreducation.gov.sa/en/>> accessed 1 June 2016.

⁹⁶ There are strong economic arguments favouring immigration, and free movement of capital and labour is the basis of the neoliberal economic doctrine (to which KSA is committed by WTO membership). However, these macro-economic considerations are beyond the scope of this thesis.

⁹⁷ Residence regulations (n 49) art 33.

⁹⁸ Georges Dib, ‘International Trends in Migrant Rights: The Arab Countries’ in Center for Migration Studies of New York, *In Defense of the Alien* (CMS 1979) 159.

his sponsorship due to legitimate reasons, the foreigner will be detained if found, and shall be instructed to leave within one week maximum.”⁹⁹

According to Article 39 of the SLL and the Rules, the MoL and the MoI can take punitive measures against violators accepting a job and working for their own benefit in the streets and public squares, and against those who run away (from their sponsors), as well as their employers. According to these regulations, the authorities can “arrest, deport, and take punitive measures against those violators who are working for their own benefit in the streets and public squares and against those who run away”.¹⁰⁰ These measures terrify TFWs, and the laws are disproportionately applied. There are several authorities applying security measures through police checkpoints in all cities, showing that there are no clear mechanisms for arresting and deporting labourers.

In April 2014, the MoI issued a ministerial decision regarding the sanctions applied to violators of the Rules.¹⁰¹ According to the resolution, any violators of the Rules will be punished with sanctions specified in the decision which can include the following:

- Fines for multiple offences.
- Deportation of TFWs after applying the sentence, and barring them from re-entering the Kingdom.
- No release on bail for those who are stopped for committing one of these offences.

Article 2 of the Ministerial Decision states that an “Administrative Committee formed from the Directorate General of Passports and its divisions shall issue final decisions on these violations”. Therefore, TFWs may be detained and deported or have to pay fines if they are deemed to be in breach of public security.¹⁰² According to the *Saudi Gazette*, a spokesman for the MoI stated:

⁹⁹ Residence regulations (n 49) art 11.

¹⁰⁰ Labour Law (n 3) art 39.

¹⁰¹ The Rules for Dealing with Expatriates in Violation of the Laws Issued by the Royal Decree No. M/24 (10 October 2013).

¹⁰² Examples from the *Iqama System Violations & Penalties* (n 87) that may lead to deportation of a foreign national include: “(1) Resident who fails to prove his holding of an *Iqama* and all information he was asked to present during his residency in the Kingdom; (2) Resident working for another employer or working on his own account; (3) Overstaying in the Kingdom upon visa expiry; (4) Expatriate working for an employer other than the one that recruited him and whose name is noted down in his work permit, prior to his release by the latter and the approval of the concerned authority on the services transfer; (5) Runaway resident who was captured by security authorities or by his employer.” For more details, see MoI, ‘*Iqama System Violations & Penalties*’ (MOI, 2015) <<http://bit.ly/1XPG55b>> accessed 4 June 2015.

“All the branches of the Public Security have the responsibility of arresting the violators and handing them over to detention centres, which will be under the supervision of the General Prisons Directors. A force for apprehending violators has been set up under the Public Security to carry out the mission.”¹⁰³

However, according to Article 4 of the same Ministerial Decision, a TFW who is given a deportation order may appeal to the MoI within 30 days from the date of receipt of their notification. Article 5 states that in these circumstances, the MoI will

“constitute a permanent committee at the MoI, headed by the General Manager of Legal Affairs, and representatives from Public Security, the General Directorate of Passports, and public administration for expatriates at the Ministry, to examine those grievances and inform us (Minister of the Interior) about them”.¹⁰⁴

According to the above regulations, the deportation decision is issued by and subject to appeal by the same executive authority (the MoI), which shows one of the legal deficiencies in dealing with the grievances of FNs, especially in the absence of legal aid. It appears that the rights of foreign labourers are denied, and that they have restricted access to the legal system, with the Rules being designed to enable the swift and strict use of deportation. In such cases, TFWs often do not have any rights or opportunity for legal complaint, as they are immediately expelled. Therefore, appeals in such cases must be dealt with by an independent body, such as the Board of Grievances (administrative court).¹⁰⁵

The Statute for the Treatment of Persons Arriving in the Kingdom on Hajj, Umrah, or Other Visas¹⁰⁶ states in Article 6 that, where sanctions are issued by the Minister of the Interior, the accused may “appeal the penalty decision to the Board of Grievances within 30 days from the date of receipt of their notification”. Thus, comparing both regulations, we can clearly see the contradiction and ambiguity of the legal system regarding FNs.

¹⁰³ Saudi Gazette, ‘Amnesty Ends; All-Out Raid Begins’ (*Saudi Gazette*, 2015) <<http://www.saudigazette.com.sa/index.cfm?method=home.PrintContent&fa=regcon&action=Print&contentid=20131104185678>> accessed 11 May 2015.

¹⁰⁴ Ministerial Decision issued in April 2014 with the Rules for Dealing with Expatriates in Violation of the Laws, Royal Decree No. M/24 (April 2014). For full details, see Al-Riyadh newspaper, ‘Formation of a Permanent Committee at the Ministry of the Interior to Study Grievances’ (*Alriyadh*, 2014) <<http://www.alriyadh.com/927076>> accessed 1 May 2016.

¹⁰⁵ See Chapter 5 for more discussion of the Saudi legal system related to workers’ issues.

¹⁰⁶ The Statute for the Treatment of Persons Arriving in the Kingdom on Hajj, Umrah, or Other Visas, Royal Decree No. M/42 (1984).

5.6. International criticism of sponsorship and working conditions

The *kafala* system is commonly described as modern-day slavery, leaving foreign labourers vulnerable to forced labour practices and human trafficking.¹⁰⁷ While the majority of contracts are fulfilled to mutual satisfaction, the expectations and consequent satisfaction of low-skilled TFWs does not generally reflect their basic human rights entitlements. In the case of KSA, the country faces severe international criticism over immigration and failure to protect the basic human rights of vulnerable workers.

A report published by the UN Human Rights Council Special Rapporteur on the Human Rights of Migrants covers withheld or unfair remuneration, sponsorship policy and confiscation of documents and highlights deceptive recruitment practices, such as contract substitution and workers paying high recruitment fees. The report also indicates that recruitment agents are sometimes involved in trafficking migrants for forced labour.¹⁰⁸ The majority of its observations are generally acknowledged problems covered in this thesis (Chapter 8).¹⁰⁹ Due to such abuses, the US State Department 7th Annual Trafficking in Persons (hereinafter referred to as TIP) Report (2007) placed KSA in the Tier 3 category for three years in a row, exposing the country to possible economic sanctions “if it doesn’t take serious anti-slavery action in the next 90 days”.¹¹⁰

The 2005 and 2006 TIP Reports concentrated attention on the conditions confronted by many migrant workers legally hired to carry out low-skilled jobs in destination countries, but who were later exposed to intentionally falsified misrepresentation of working conditions, debt peonage or forced labour conditions by employers in host countries.¹¹¹ Major labour-receiving countries are commonly rated in the Tier 2 Watch List or Tier 3. This highlights the need to take adequate measures to protect TFWs from modern-day forms of slavery.¹¹² Additionally, NGOs such as HRW and Amnesty International document individual cases

¹⁰⁷ Sönmez (n 42) 19.

¹⁰⁸ UNHRC, ‘Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau’ (3 April 2014) UN Doc A/HRC/26/35.

¹⁰⁹ *ibid.* According to this report, the Special Rapporteur stated that he was not able to secure an invitation to visit more countries, such as KSA. The Special Rapporteur was able only to visit Qatar in 2013.

¹¹⁰ US Department of State, ‘Trafficking in Persons Report 2007’ (Office to Monitor and Combat Trafficking in Persons, 2007) <<http://www.state.gov/j/tip/rls/tiprpt/2014/>> accessed 15 May 2015; according to this report, KSA is still in Tier 3.

¹¹¹ *ibid* 16, 42.

¹¹² *ibid* 16.

related to the sponsorship system and its abuses. HRW notes that TFWs are unaware of their rights or are fearful of complaining and losing their contracts:¹¹³

“If Saudi authorities do not take serious steps to address the patterns of abuse of migrant workers, the issue will continue to be a subject of investigation and scrutiny, on the agendas of international human rights organizations, nongovernmental migrant rights groups in countries of origin, and coalitions of women’s rights and human rights organizations in the Muslim world and elsewhere.”¹¹⁴

Nevertheless, it must be acknowledged that the international reports condemning the TFW situation in KSA have been widely criticised within the country, including by the NSHR.¹¹⁵ The NSHR Chairman, Mufleh al-Qahtani, warned of “inaccurate information”¹¹⁶ and political or economic motivation for such efforts. He also noted recent progress in human rights in the country.¹¹⁷ The SHRC criticised the 7th TIP Report, claiming that SLL protects TFWs’ rights and does not discriminate between foreign and national workers regarding rights and duties. Aside from such debate, the SHRC did cite some aspects of the SLL that protect labourers from exploitation, including Article 78 (filing grievances against employers for dismissal from work); Article 84 (outlining the end-of-service award); Articles 90 and 91 (requiring employers to pay wages to workers according to the contract); Articles 142 and 146 (medical and social services); and Articles 147 and 148 (providing accommodation and transportation).¹¹⁸

5.7. Saudi response to the issues of TFWs and the *kafala* system

Even though KSA is not a party to the ICMW, the Saudi Government has, on numerous occasions, acknowledged that the *kafala* system is unfair and biased in favour of the *kafeel*; for instance, Dr Abd al-Muhsin Al-Akkas, Minister of Social Affairs, stated in December 2006 that “contracts are not clear, agents in KSA are lousy and dishonest ... some employers treat domestic [foreign] workers like slaves, some treat them like members of their families.

¹¹³ HRW (n 94); this has also been highlighted by Scully (n 31).

¹¹⁴ HRW (n 94) 16.

¹¹⁵ The National Society for Human Rights is an independent national organization approved by the Saudi Government in 2004.

¹¹⁶ See NSHR, ‘National Society for Human Rights’ (NSHR, 2015) <<http://nshr.org.sa/en/>> accessed 1 May 2016; see also The Embassy of the Kingdom of KSA in the United Kingdom, ‘Statement by The Royal Embassy of KSA - Amnesty International’s Report on KSA’ (Embassies MOFA, 2011) <<http://embassies.mofa.gov.sa/sites/uk/EN/AboutDiplomaticMission/MissionNews/Pages/NewsarticleID125016.aspx>> accessed 1 June 2016.

¹¹⁷ *ibid.*

¹¹⁸ Arab News, ‘Human Rights Commission Criticizes US Report’ (Arab News, 2007) <<http://www.arabnews.com/node/295655>> accessed 4 May 2016.

We have to face it.” In addition, Dr Ghazi al-Qusaibi, the former Minister of Labour, stated, “I will admit that a lot of violations and inhumane treatment takes place. If I told you I know the figure I would be lying. The only thing I know is that those cases that come to our attention are punished.”¹¹⁹

Furthermore, there is growing public sympathy within the country towards the plight of TFWs. KSA’s highest Muslim religious authority, the Grand Mufti Sheikh Abdul Aziz Al Sheikh, has already opined that TFWs suffer “exploitation and oppression”.¹²⁰ He also criticises the intimidation of TFWs, and says that it is “illegal and a form of dishonesty” to withhold their salaries or delay payment of wages under threat of deportation. He says that Islam prohibits “blackmailing and threatening [foreign] labourers with deportation if they refuse employers’ terms that breach the contract”.¹²¹

The MoL still stresses that there is “no intention of cancelling the sponsorship system”, due to the belief that “abolishing the *kafeel* system for foreign manpower will create chaos in the SLM”.¹²² However, Ahmed Humaidan, Undersecretary of the MoL for Labour Affairs, stated that, according to Minister Council Decision No. 166 in 2000, the Ministry no longer recognises the sponsorship system in its documents. He added, “[W]e do not recognize anything called ‘*kafala*’ in legal terms.” He pointed out that, in the event of a review of all the MoL systems and documents used today, references to the *kafala* system cannot be found.¹²³ The Ministry has replaced some of the terminology associated with the *kafala* system, including changing the name of a regulation from ‘transferring the sponsorship’ to ‘transfer services’ and changing the word ‘*kafeel*’ to ‘employer’ in all Labour Department documents. It has also granted labourers freedom of movement within the country and ensured that

¹¹⁹ Cited in HRW, ‘As If I Am Not Human’ (HRW, 2008) 21 <<http://www.hrw.org/reports/2008/07/07/if-i-am-not-human>> accessed 2 December 2016.

¹²⁰ Cited in Arab News, ‘Grand Mufti Warns Employers against Flouting Job Contracts’ (Arab News, 2002) <<http://www.arabnews.com/node/223905>> accessed 1 April 2016; also see HRW (n 94) 12.

¹²¹ *ibid.*

¹²² Saudi Gazette, ‘Sponsorship System Stays’ (Saudi Gazette, 2013) <<http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20130122150135>> accessed 4 May 2016.

¹²³ As mentioned, KSA does not have a specific ‘Sponsorship Act’ like Qatar’s, but it has a set of laws and regulations for residency that stress the need for a *kafeel* to grant a work visa; this is one of the ambiguities and contradictions in the Saudi legal and regulatory perspective on TFWs. During the research fieldwork, there was much evidence that the labour inspector has a lack of knowledge of labour and residency regulations. The definition provided in this thesis is important to clarify the type of labour migration system and to distinguish it from other labour migration systems.

official travel documents cannot be confiscated.¹²⁴ He added that the MoL aimed to improve the contractual relationship between employers and TFWs.¹²⁵

5.8. Debate on the current proposed reforms

There was a positive initiative suggested by the NSHR to endorse the rights of TFWs in response to the rising number of complaints related to the sponsorship system, internally and internationally.¹²⁶ The NSHR provided a draft study in 2008 entitled *The Abolition of the Provisions of Sponsorship and the Correct Relationship between the Employer and the TFW*. The study criticised the sponsorship system for violations of human rights that are recognised and guaranteed internationally, as well as in Sharia.¹²⁷ It argued that to keep the sponsorship system in its present form was contrary to the rules of Islamic law, which is the constitution of the country, and that it puts KSA in the position of violating international obligations contained in international conventions.¹²⁸ The NSHR admitted that the main disadvantages of the sponsorship system are the complexity of its regulations and administrative procedures and the lack of effectiveness in enforcing these provisions to achieve the desired objectives of the system, which leads to increased numbers of illegal TFWs and associated national socio-economic problems.¹²⁹

The NSHR points out that the current sponsorship system contains some provisions that are simply exploited by individual sponsors. The sponsor can deport a TFW if there is any dispute. Also, the sponsorship system has no provisions to prevent sponsor malpractice, such as blackmailing the labourer to take money for transferring the *kafala* or renewing the

¹²⁴ Even though the law gives labourers freedom of movement within the country, it can still go against the TFW if the sponsor reports him to the Passport Department.

¹²⁵ Al-Arabiya, 'Ministry of Labour: KSA is Taking Steps to Abandon the Sponsorship System' (*Al-Arabiya*, 2012) <<http://www.alarabiya.net/articles/2012/05/14/213950.html>> accessed 1 June 2015.

¹²⁶ Since domestic workers are excluded from the Labour Law, the Saudi Consultative Council (*Majlis Al-Shura*) approved the first regulation relating to the employment relationship between domestic workers and employers. This was considered a promising step made by *Majlis Al-Shura* to improve employment conditions for domestic workers. It provided regulations to improve the working conditions of this category of worker and to organise the employment relationship between domestic workers and employers. These regulations contained 22 articles and provided workers with one day off per week and forbade normal work between 10 p.m. and 5 a.m. Although it failed to limit domestic workers' hours to nine hours per day (as provided in the Labour Law), these regulations imposed fines and a ban on employers recruiting domestic workers if the employer violated any regulations. See KSA Decision No. 310 (2013) on Domestic Workers.

¹²⁷ Arabian Business, 'Saudi: The Sponsor System Is Contrary to Islam' (*Arabian Business*, 2008) <<http://arabic.arabianbusiness.com/politics-economics/society/2008/jun/30/7550/#.VXYMvHdBE7g>> accessed 1 June 2015.

¹²⁸ *ibid.*

¹²⁹ These objectives of the sponsorship system have been discussed in the above sections. For more discussion, see Amrita Pande, 'The Paper that You Have in Your Hand Is My Freedom: Migrant Domestic Work and the Sponsorship (*Kafala*) System in Lebanon' (2013) (2) *International Migration Review* 417.

iqama.¹³⁰ Due to such practices, the NSHR has sought to abolish the current sponsorship system, which contributes to deprive many TFWs of their rights. The aim of these recommendations is to redefine the relationship between the employer and labourer and support foreign labourers in exercising their rights. The recommendations also include the method of paying workers' salaries; the study suggests that they should be paid through labourers' bank accounts in order to ensure that employers meet their obligations. Although this recommendation is already implemented under the WPS, TFWs still face issues related to receiving their salary.¹³¹ Specific initiatives introduced to reform SLM issues associated with the *kafala* system include those discussed in the following four subsections.

5.8.1. Substitute individual sponsors with government sponsorship

The NSHR suggests having alternative sponsors for foreign labourers. The NSHR study calls for the cancellation of the role of the individual sponsor and replacing it with the government in order to limit and alleviate the effects of the sponsorship system on TFWs. The NSHR study includes a mechanism for organising and redefining the relationship between employers and labourers. Furthermore, the NSHR recommends establishing a legal person (authority) under the MoL to oversee the conditions of TFWs and abolish the traditional role of the *kafeel*.¹³² However, due to many legal and administrative obstacles, this suggestion has not been applied.¹³³

5.8.2. Private recruitment companies to replace the sponsorship system

The MoL proposes that private recruitment companies should replace individual sponsors. These recruitment companies would take over all legal responsibility for foreign labourers that previously belonged to individual sponsors. The role of these companies would be to manage all TFW affairs during their employment in the country. It is expected that this step

¹³⁰ Gulf News, 'Alternatives to Saudi Sponsorship System Under Scrutiny' (*Gulf News*, 2008) <<http://gulfnews.com/news/gulf/saudi-arabia/alternatives-to-saudi-sponsorship-system-under-scrutiny-1.111923>> accessed 5 June 2015.

¹³¹ MoL, 'Wages Protection Scheme' (*MoL*, 2013) <<http://portal.mol.gov.sa/ar/Pages/wps.aspx?m=2>> accessed 22 May 2015.

¹³² Alyaum, 'Human Rights Society Calling for the Abolition of the Sponsorship System' (*Alyaum*, 2013) <<http://www.alyaum.com/article/3067247>> accessed 1 July 2015.

¹³³ See Pranav Naithani and AN Jha, 'Challenges Faced by Expatriate Workers in Gulf Cooperation Council Countries' (2009) 5(1) *IJBM* 98.

would endorse and protect workers' human rights and prevent any exploitative labour admissions, as well as prevent all forms of labour abuses.¹³⁴

In February 2012, the MoL launched the Regulations on Recruitment Companies. The Ministry issued a press release announcing the regulations and organising workforce to provide labour services and govern the activity of mediation in recruiting TFWs for the public and private sectors.¹³⁵ Under this new system, recruitment companies would provide employment opportunities for workers by hiring them out to households and employers. These companies would be responsible for paying the workers' wages (rather than the employer), the wages would be collected from the employer in advance, and they would govern workers' change of jobs, grant their rights of movement in the country, ease their repatriation once their contract ends and facilitate their access to justice.¹³⁶ However, the MoL would still issue work visas to individual sponsors.

5.8.3. Green card plan: 'Permanent Residency'

In April 2016, the 'green card' plan was revealed by Deputy Crown Prince Muhammad Bin Salman in an interview with Bloomberg. The plan would assist TFWs in escaping restrictive sponsor control.¹³⁷ However, the Minister of Labour stated that his Ministry was waiting for more details of the plan.¹³⁸

The President of the Federation of Labour Committees in KSA, Mr. Nidal Radwan, revealed that there would be a new independent government agency monitoring the permanent residence card (akin to the US Green Card) and that the new residency programme could bring the State Treasury about SR37 billion. It would reduce TFWs' remittances by 30%, maintaining tens of billions of Saudi riyals in the national economy (discussed later in this

¹³⁴ Aleqtisadiyah, 'The Ministry of Labour Ends the Study of the Regulation of Recruitment Companies to Cancel the Individual Sponsorship System' (*Aleqt*, 2009) <http://www.aleqt.com/2009/05/06/article_225266.html> accessed 28 June 2015.

¹³⁵ MoL, 'Regulations and Codes of Practice Recruitment Activity and Providing Labor Services' (*MoL*, 2015) <<https://portal.mol.gov.sa/ar/Regulations/الوائح>> accessed 1 May 2016.

¹³⁶ Arabian Business, 'Saudi to Replace Sponsorship with Recruitment Firms' (*Arabian Business* 2009) <<http://www.arabianbusiness.com/saudi-replace-sponsorship-with-recruitment-firms-18434.html>> accessed 10 June 2015.

¹³⁷ Khaled Almaeena, "'Green Card' for Expatriates in KSA Is a Strategic Plan' (*Al-Arabiya*, 2016) <<http://english.alarabiya.net/en/views/news/middle-east/2016/04/11/-Green-Card-for-expatriates-in-Saudi-Arabia-is-a-strategic-plan.html>> accessed 1 May 2016.

¹³⁸ Arab News, 'Details of "Green Card" For Expats Coming' (*Arab News*, 2016) <<http://www.arabnews.com/saudi-arabia/news/914001>> accessed 1 June 2016.

chapter).¹³⁹ The new plan would abolish the sponsorship system for FNs who pay *zakat* and other taxes, and they would have the privileges of owning property and undertaking industrial, commercial and other economic activity.¹⁴⁰

5.8.4. Establishment of labour attaché

In recognition of the importance of the role of the labour attaché, the Cabinet chaired by King Salman approved the establishment of labour attaché offices at seven Saudi embassies, in the following countries: Pakistan, Bangladesh, Egypt, India, the Philippines, Sri Lanka and Indonesia, as these countries are considered the key labour-sending countries. The Cabinet came to the decision after reviewing the recommendation of the Standing Committee of the Council of Economic Affairs and Development.¹⁴¹ A labour attaché will be appointed to ensure that recruitment processes and contractual provisions are applied in accordance with Saudi Government procedures. This new decision should help to increase the awareness of recruitment agencies and foreign workers of the laws and regulations in KSA.¹⁴² Furthermore, it will put in place mechanisms for recruiting foreign workers in the private sector in KSA. Moreover, it is expected to restrict the role of unofficial sub-agents and brokers and regulate recruitment through official channels. These measures should help newcomers to avoid employment deception and exploitation during the recruitment process, and this will reduce the cost of recruitment. Even though this new decision is still not fully implemented, it has been greatly appreciated by official bodies from some of the labour-sending countries.¹⁴³

5.9. Evaluation of attempted solutions

Clearly, many people in KSA recognise the significance of reducing the presence of TFWs to avoid the undesirable consequences related to their existence in the country. The above discussion suggests that Saudis (both officially and unofficially) show their willingness and intention to enhance TFWs' situations, but these suggestions and initiatives show negligible

¹³⁹ Okaz, 'Green Card Plan' (Okaz, 2016) <<http://www.okaz.com.sa/new/issues/20160406/Con20160406832972.htm>> accessed 1 May 2016.

¹⁴⁰ Arab News, 'KSA's Green Card Plan for Expats Welcomed' (Arab News, 2016) <<http://www.arabnews.com/featured/news/906866>> accessed 1 June 2016.

¹⁴¹ Recommendation No (9-26 / 37 / d) and the date of 08/08/1437 AH (2016/11/07) as reported by the Saudi Press Agency, 'Cabinet's Session 6' (Spa.gov.sa, 2016) <<http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1556488>> accessed 29 January 2017.

¹⁴² Saudi Gazette, 'KSA To Have Labor Attaches In 7 Worker Exporting Countries' (Saudi Gazette, 2016) <<http://saudigazette.com.sa/saudi-arabia/ksa-labor-attaches-7-worker-exporting-countries/>> accessed 29 January 2017.

¹⁴³ ArabNews, 'Appointment Of Saudi Labor Attaches Welcomed' (Arab News, 2016) <<http://www.arabnews.com/node/1008846/saudi-arabia>> accessed 29 January 2017.

progress when it comes to actual implementation. The major shortcomings of these suggested solutions are attributable to the lack of cooperation between branches of the Saudi Government. This is evident from the absence of a role for the MoI in these suggested solutions. Apparently, these initiatives and suggested solutions (at least in the researcher's opinion) are devised *ad hoc* to appease international criticism, and are not based on comprehensive scientific research.

The solutions proposed by the MoL and the NSHR attempt to replace the current sponsorship system with government sponsorship. They generally pay less attention to the interests of foreign labourers, and, more recently, have shown favour towards local workers. Recent restrictive migration policies affecting the employment of TFWs, such as *nitaqat* quotas and imposing extra fees on renewing work and residency permits, indicate the general structural antipathy of the Saudi Government to expatriates. Another major drawback observed is the absence of any integration programmes. In big companies, there are huge numbers of foreigners who live isolated from the Saudi indigenous population. This situation is entrenched by the Saudi Government implementing several industrial zones in which major economic projects are concentrated far away from populated areas. Companies are responsible for keeping foreign labourers in private accommodation isolated from any form of integration with local people.

5.10. The *kafala* system and Saudi commitments to international obligations

In an effort to provide a comprehensive evaluation of the *kafala* system, it is vital to focus on the general principles of the RBA and a set of human rights instruments (discussed in Chapters 2 and 3), such as the UDHR and its subsequent conventions,¹⁴⁴ the ICMW,¹⁴⁵ the ICERD¹⁴⁶ and the ACHR.¹⁴⁷ Such principles emphasise that “all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, are all equally entitled to human rights without discrimination”.¹⁴⁸

¹⁴⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

¹⁴⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS.

¹⁴⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

¹⁴⁷ Arab Charter on Human Rights, May 22, 2004, *reprinted* in 12 International Human Rights Reports. Rep. 893 (2005), *entered into force* March 15, 2008.

¹⁴⁸ OHCHR, ‘What Are Human Rights’ (OHCHR, 2016) <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 1 June 2016.

However, these conventions make no distinction between citizens and foreign (migrant) workers, and are not designed with complex systems such as the *kafala* system in mind.

One of the aspects of *kafala* that specifically goes against the general principles of human rights is the freedom of movement. The imbalance of power between employer and TFW enables the former to ban the latter from travelling to their home country or within the country. These practices are very common, implemented by withholding official documents such as passports or residency permits and refusing to give consent for exit visas. Clearly this is against Article 13 of the UDHR, which states that “everyone has the right to freedom of movement and residence within the borders of each State” and “everyone has the right to leave any country, including his own, and to return to his country”.¹⁴⁹

The malpractices of the *kafala* system also go against the TFW rights enshrined in Article 12 ICCPR,¹⁵⁰ which states that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence” and that “everyone shall be free to leave any country, including his own”.¹⁵¹ They also go against the rights in Article 8 of the ICMW,¹⁵² which states that “migrant workers and members of their families shall be free to leave any State, including their State of origin”, and Article 39, which describes how “migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there”.¹⁵³

The second major aspect is the employment conditions under the *kafala* system, which permit TFWs to work only for their original sponsors.¹⁵⁴ Workers are not allowed to change employment without their employer’s consent, and sometimes resigning from their job eliminates any freedom of choosing future employment. These common practices result in many cases of forced labour in KSA, such as being forced to work in very harsh conditions,

¹⁴⁹ UDHR (n 144) art 13.

¹⁵⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 49.

¹⁵¹ *ibid* art 12.

¹⁵² ICMW (n 145).

¹⁵³ *ibid* art 39.

¹⁵⁴ See Residence regulations (n 49) art 11 and Labour Law (n 3) art 39.

earning lower salary than contractually agreed upon and extending a labour contract after finishing the two years without worker's consent.¹⁵⁵

Therefore, the *kafala* system contradicts human rights norms, including Article 23, paragraph 1 of the UDHR, which states that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”.¹⁵⁶ Article 5, paragraph 1 of the ICERD¹⁵⁷ makes a similar provision,¹⁵⁸ and the ICESCR Article 6, paragraph 1 recognises “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”. Moreover, the right to work appears in Article 31 of the ACHR, which provides for free choice of work and prohibits forced labour.¹⁵⁹ The article states that “free choice of work is guaranteed and forced labour is prohibited. Compelling a person to perform work under the terms of a court judgment shall not be deemed to constitute forced labour”.¹⁶⁰

A further aspect is that the *kafala* system requires TFWs' families to acquire initial permission to enter the country from their employer. This type of practice shows that in many cases the employer abuses his *kafala* power by not allowing labourers to reunify with their families, which essentially enables the employer to impose marital separation. This issue was highlighted by a study carried out by the NSHR, which suggested (appealing to Saudi cultural notions) that these types of restrictions related to family reunification should be eliminated, as they result in problems related to extramarital relationships and negative social impacts on Saudi society.¹⁶¹ The issue of the refusal of the right to family reunification has also been addressed in international agreements, confirming the rights of foreign (migrant) workers to family reunification. Article 44, paragraph 2 of the ICMW states:

“Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or

¹⁵⁵ S Irudaya Rajan and Jolin Joseph, ‘Migrant Women at the Discourse-Policy Nexus: Indian Domestic Workers in KSA’ in S Irudaya Rajan, *India Migration Report 2015: Gender and Migration* (Routledge 2015) 16.

¹⁵⁶ UDHR (n 144) art 23, para 1.

¹⁵⁷ ICERD (n 146), art 19.

¹⁵⁸ *ibid* art 5.

¹⁵⁹ ACHR (n 147) art 31.

¹⁶⁰ *ibid*.

¹⁶¹ Anwar al-Khatib, ‘The Sponsorship System in the Gulf: Adjustments and Pressures’ *Al-Araby Al-Jadeed* (London, 2015) <<http://www.alaraby.co.uk/portal>> accessed 15 June 2015; see also Al-Arabiya, ‘KSA Stresses the Penalties for Misuse of Sponsorship System’ (*al-Arabiya*, 13 July 2008) <<http://www.alarabiya.net/articles/2008/07/13/53034.html>> accessed 12 July 2015.

persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.”¹⁶²

Article 5 of the ICERD asserts that there should be no discrimination regarding “the right to marriage and choice of spouse”.¹⁶³

The *kafala* system gives sponsors the right to terminate the labour contract and deport the foreign labourer whenever they decide to, thus making foreign labourers unable to decide whether to stay in their jobs, change their employment or return to their home countries. Conversely, the employer can eject the worker from the country in less than a week under the residency regulations (Article 11): “In case no other new sponsor offer was submitted, and insistence of the current sponsor on cancelling his sponsorship due to legitimate reasons, the foreigner will be detained if found, and shall be instructed to leave within one week maximum.”¹⁶⁴ This clearly goes against human rights principles. Article 20, paragraph 2 of the ICMW states that a “migrant worker or member of his or her family shall not be deprived of his or her authorization of residence or work permit or expelled merely on the grounds of failure to fulfil an obligation arising out of a work contract”.¹⁶⁵

With the latest amendment of the SLL, particularly Article 39, TFWs who leave their sponsor and find another employer (usually seeking better employment conditions such as salary, weekly rest or paid holidays) without the *kafeel's* permission can be charged with attempting to commit an offence such as running away; thus, the TFW could be lawfully penalised and labelled a criminal (usually leading to payment of a fine, jail or deportation with a ban on re-entering the country for at least three years).¹⁶⁶ These restrictive policies under the *kafala* system and the malpractices of the *kafeel* contradict Article 23 of the UDHR,¹⁶⁷ Article 25 of the ICMW¹⁶⁸ and Article 34 of the ACHR.¹⁶⁹

Given these blatant violations of human rights legal norms, what allows the Saudi Government to legislate in contradiction to these international treaties is the caveat in the articles that the rights may not be restricted by any other laws except those considered

¹⁶² ICMW (n 145) art 44, para (2).

¹⁶³ ICERD (n 146) art 5.

¹⁶⁴ Residence regulations (n 49) art 11.

¹⁶⁵ ICMW (n 145) art 20, para 2.

¹⁶⁶ *Iqama* Regulations (n 87) arts 21, 22, 23, 28 and 31; Labour Law (n 3) art 39.

¹⁶⁷ UDHR (n 146) art 23, para 1.

¹⁶⁸ ICMW (n 145) art 25, para 1.

¹⁶⁹ ACHR (n 147) art 34, para 1.

“necessary to protect national security, public order, public health or morals, or the rights and freedoms of others”, as stated in Article 8, paragraph 1 and Article 39, paragraph 2 in the ICMW;¹⁷⁰ ICCPR Article 12, paragraph 3 highlights the same statement.¹⁷¹

Despite the slow progress that has been witnessed in terms of allowing TFWs to move freely within the country without permission from the employer (which does not mean they can work with other employers), some sponsors still prevent labourers from travelling by confiscating their passports, even though this is specifically against the Council of Ministers’ Decision No. 166 Dated 2000 (12/7/1421 H) regulating relations between employers and TFWs. This stipulates *inter alia* that “employers shall not retain the passports of migrant workers or the passports of members of their families” and provides for “the establishment of a special committee to resolve any problems arising from its application”.¹⁷² It is notable that this is considered the most significant effort made by the Saudi Government to address the issues of the sponsorship system.

Other important progress is the Anti-Trafficking in Persons Law, adopted by the Saudi Government in 2009. This law criminalises forced labour practices and human trafficking for the first time.¹⁷³ Hence, any person committing these crimes is subject to prosecution. The MoL recently introduced a private department concerned with combating human trafficking (TIP). According to the MoL, the TIP department coordinates with other authorities in cases related to human trafficking in order to protect workers from abuse or exploitation, deception or violation of their rights.¹⁷⁴ The Anti-Trafficking in Persons Law, in Article 2, stipulates the following:

“It is prohibited to commit any act of trafficking in person, including coercion, threat, fraud, deceit or abduction of a person, abuse of position or power or any authority thereon, taking advantage of the person’s vulnerability, giving or receiving payments or benefits to achieve the consent of a person, having control over another person for the purpose of sexual assault, forced labour, or services.”¹⁷⁵

¹⁷⁰ ICMW (n 145) art 8, para 1.

¹⁷¹ ICCPR (n 150) art 12, para 3.

¹⁷² See The Council of Ministers Decision No. 166 (2000); see also ILO, ‘Observation (CEACR)’ (adopted 2009, published in the 99th ILC session, 2010) <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2309889> accessed 15 May 2015.

¹⁷³ Anti-Trafficking in Persons Law, Royal Decree No. M/40 (13 June 2009).

¹⁷⁴ Saudi press agency (spa), ‘Anti-Trafficking in Persons Department’ (SPA, 2016)

<<http://www.spa.gov.sa/viewstory.php?newsid=1427699>> accessed 1 May 2016.

¹⁷⁵ Anti-Trafficking in Persons Law (n 170) art 2.

However, although the law puts rules into place to prevent all forms of abuse in the workplace, it still allows the employer, through the *kafala* system, to control TFWs and put pressure on them to prevent them from asking for their rights.¹⁷⁶

5.11. Major obstacles to endorsing TFW rights under *kafala*

Having discussed some perspectives on the issues of working conditions, the sponsorship system and regulations related to TFWs' employment, and after examining their possible effects on the employment relationship between the worker and sponsor, this research identifies four potential major obstacles that play a key role in determining the types of reform that should be undertaken by the Saudi Government to improve TFWs' rights. These are political, security-related, social and economic obstacles. It is helpful to examine each obstacle that provides a justification for the *kafala* system remaining in use. Prior to this examination, it is appropriate to assess the various effects of the presence of TFWs in KSA and their rights in light of these obstacles.

5.11.1. Political and security-related obstacles

Political and security obstacles have become key challenges to recognising foreign labourers' rights in KSA. Controlling TFWs and immigration via the *kafala* system has become an important factor in Saudi labour policies, and a number of changes have been implemented in recent years. Labour migration is commonly understood, from a security perspective, as a 'problem' by the Saudi regime (and other countries), and thus it believes there is a need to safeguard against this 'threat'.¹⁷⁷

One of these political and security concerns pertains to the size of the TFW population (32% of the total population of KSA).¹⁷⁸ The government therefore emphasises the need to distinguish between the "temporary workforce needs of economic growth" and a permanent migrant component with political, security, social and economic implications in the long term.¹⁷⁹ From a historical perspective, political ideas 'imported' from migrants in the 1950s

¹⁷⁶ Maysa Zahra, 'KSA's Legal Framework of Migration' (2013) Gulf Labour Markets and Migration, Explanatory Note No. 4, 3 <<http://gulfmigration.eu/>> accessed 20 May 2016.

¹⁷⁷ Antoine Pécoud and Paul de Guchteneire, 'International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility' (2006) 21 *Journal of Borderlands Studies* 21, 69.

¹⁷⁸ Since the Saudi Government does not usually issue an accurate breakdown of the foreign resident population beyond the basic division of nationals and non-nationals, no actual numbers are available on its current ethnic or national mix. Today, the SLM is dominated by Asian TFWs from the Indian subcontinent.

¹⁷⁹ Ingo Forstenlechner and Emilie Jane Rutledge, 'The GCC's "Demographic Imbalance": Perceptions, Realities and Policy Options' (2011) 18(4) *Middle East Policy* 25, 30.

and 1960s, such as Nasserism, pan-Arab nationalism, socialism and communism (mainly associated with Egyptian, Palestinian and Yemeni migrants) form the most significant domestic threat to the governments of the GCC.¹⁸⁰ KSA attributes political ideations according to nationality, and thus expelled thousands of Yemeni workers in response to the Gulf War (1990–1991) because the Yemeni government sympathised with the Ba’athist pan-Arabism of Saddam Hussein. Before 1990, Yemeni workers did not need to obtain a work visa to work or live in KSA and could open their business without a sponsor (*kafeel*). KSA decided to revoke these privileges and expelled Yemeni workers from the country.¹⁸¹

Thus, there are suggestions that the presence of such a large number of TFWs has led to several critical shifts in the social structure of KSA and other GCC countries, which ultimately motivate the reduction of dependence on foreign labour in KSA. The inner political stability of the GCC states, including KSA, Qatar, Bahrain and Kuwait was shaken by labour strikes led by TFWs, something never experienced by the indigenous population.¹⁸² However, despite the fact that foreign labourers have sometimes organised strikes to demand improvements in their working conditions or payment of their salaries, such actions have never induced any structured political movement because they are not considered a threat to national security.¹⁸³

There is an underlying assumption that non-Arab expatriate workers are less of a threat to the indigenous population of the GCC, which has been a factor in the de-Arabisation of the foreign labour force in favour of Asians, who are considered to be less likely to be involved in internal politics.¹⁸⁴ Asian workers are perceived as more individualistic and economic in their motivation and as passive observers of political processes; they pose no risk of engaging in socialism, Arab nationalism or Islamism.¹⁸⁵ Accordingly, the Saudi decision to shift to Asian workers defused political threats and challenges from non-local Arabs.¹⁸⁶ However, it is often argued that the growing international pressure for the enfranchisement of all TFWs

¹⁸⁰ *ibid* 30-31.

¹⁸¹ Douglas S Massey, *Worlds in Motion* (Clarendon Press 1998) 156.

¹⁸² *ibid* 6-7.

¹⁸³ Laurence Louër, ‘The Political Impact of Labor Migration in Bahrain’ (2008) 20(1) *City & Society* 32, 33.

¹⁸⁴ *ibid* 33-34.

¹⁸⁵ Forstenlechner and Rutledge (n 179) 31.

¹⁸⁶ *ibid* 30.

has been identified as a threat from identities imported from abroad which may assert their political and economic force in the country.¹⁸⁷

5.11.2. Social obstacles

The issue of social and cultural harmony is critically important to KSA, with the social and political structure of KSA being notably reliant on both its cultural and its traditional heritage. The underlying divisions of Saudi society (e.g. between the Najdi and the Hejazi, urban and rural) are covered by the homogeneity of normative Arab-Islamic tribal and cultural traditions.¹⁸⁸ TFWs are generally seen as an intrinsically negative threat to local morals and Islamic principles. It is often argued that this negative perception of FNs leads to continuing the temporary status of TFWs and controlling their presence in the country under the *kafala* system in its current form.

Furthermore, some TFWs from Arab communities have resided in KSA for generations, showing little interest in returning to their countries of origin. The chance of naturalisation is significantly unlikely for most of them.¹⁸⁹ Even though there are several factors such as religious, cultural and linguistic compatibility with the native inhabitants that have made them more welcome in KSA than other immigrants, the Saudi Government, as stated, changed its policies to prefer the recruitment of Asian workers for political, social, historical and economic reasons.¹⁹⁰ Moreover, the clear social separation between Saudi nationals and TFWs may be considered an obstacle to the recognition of TFWs' rights in KSA.

5.11.3. Economic obstacles

The economic obstacles to TFWs being accorded their rights include the perceived monetary cost of TFWs' remittances to their home countries (capital outflows). The Saudi Monetary Agency (SAMA) states in its report that personal remittances from TFWs increased in 2014 by 5.7% to SR135 billion (USD35.7 billion), compared to SR127 billion in the same month in 2013.¹⁹¹ It predicts labour remittances at the end of 2015 to have been approximately

¹⁸⁷ This interview was published by Al-Khaleej affairs on 1 June 2015 <<http://bit.ly/25Cy8GD>> accessed 15 June 2015.

¹⁸⁸ For more discussion, see Stig Stenslie, *Regime Stability in KSA: The Challenge of Succession* (Routledge 2012).

¹⁸⁹ Louër (n 183) 33.

¹⁹⁰ Andrzej Kapiszewski, 'Arab Versus Asian Migrant Worker in the GCC Countries' in Prakash Jain and Ginu Zacharia Oommen (eds), *South Asian Migration To Gulf Countries* (1st edn, Routledge 2016) 48-69.

¹⁹¹ Saudi Monetary Agency, 'Fifty First Annual Report 1436 (2015)' (SAMA, 2015) <<http://www.sama.gov.sa/en-us/pages/default.aspx>> accessed 11 June 2015. There are many reports

SR160 billion, with this monetary outflow accounting for an estimated 19% of the country's budget. As economic analyst Munir Bubshait points out,

“We are paying today the price for the reliance of the Saudi labour market on cheap and low-skilled foreign labour, and if we are not raising the cost of recruitment and hiring foreign labour and limiting the employment for Saudi national workers only, otherwise the problem will continue and temporary foreign workers will transfer our national income until we reach two hundred billion riyals.”¹⁹²

Another reason cited is that the reliance on TFWs in the long term puts the whole country in an unsustainable situation.¹⁹³ This dependence on TFWs prevents any development of an independent national economic structure, which consequently allows TFWs to control the country's economic (and potentially political) decisions in the future. This could play a significant role against the country in critical times (e.g. during war).¹⁹⁴ It is evident that these opinions are reflected in much public policy and the political aspects of the country related to TFWs. These factors affect (directly or indirectly) TFWs' rights and entrench the continuance of the *kafala* system in its current form. Therefore, the economic rationale is a major obstacle facing the endorsement of labour rights in KSA.

Conclusion

This chapter has examined the legal structure governing the status of low-skilled TFWs, with special reference to the SCS. Workers with temporary residence status are viewed as temporary labour, and are often recruited and employed for specific jobs, after which they return to their home country when they are no longer necessary. For this reason, the laws are skewed in favour of sponsors, and more recently in favour of local workers. This is evident from the last amendment to the SLL, which updated laws that focused on increasing the number of Saudi citizens in the private sector. Given the large number of TFWs in the private sector (approximately 10 million) and the dangerous working conditions in the SCS (shown in the data presented) that make it the sector with the highest number of injuries and fatalities

highlighting the reason for the rise in remittances, especially in the first quarter of 2015, which was workers' fear of the war in Yemen.

¹⁹² Al-Araby Al-Jadeed, 'Foreign Remittances Drain Cash Resources from KSA' (*Al-Araby*, 2015) <<http://www.alaraby.co.uk/portal>> accessed 12 June 2015.

¹⁹³ See Mustapha Ajbaili, 'Saudi: Muslim Brotherhood a Terrorist Group' (*Al-Arabiya*, 2014) <<http://english.alarabiya.net/en/News/middle-east/2014/03/07/Saudi-Arabia-declares-Muslim-Brotherhood-terrorist-group.html>> accessed 1 April 2015.

¹⁹⁴ *ibid.*

in the workplace, the vast majority of victims in this sector are low-skilled TFWs. This proves that the enforcement mechanisms of the updated Labour Law (e.g. Inspection in the Workplace, Article 196) fail to enforce the laws and regulations, or at least fail to provide proper remedies.

In theory, employment regulation sets out workplace rights of TFWs; however, it has been conceived through restrictive measures and policies (as discussed above), and the particularly vulnerable situation of TFWs is not always taken into consideration by policy-makers. The SLL and *iqama* policies are considered biased as they favour national workers. Examination of the current employment laws and residency regulations shows two main issues facing TFWs. The first set of employment problems is related to poor living and working conditions, especially for low-skilled labourers in the SCS. The problems associated with the sector are that many low-skilled workers (mainly from the Indian subcontinent or Arab states) routinely face delayed or unpaid wages, physically harsh living conditions and unsafe working conditions (see Chapter 8 for further discussion).

Secondly, while most abuse and discrimination against TFWs is committed by employers due to the *kafala* system, the government is culpable for the widespread and systematic abuse suffered by TFWs, particularly in terms of residency policies and basic human rights.¹⁹⁵ Even though KSA is not a party to the ICMW, it is unlawful for employers to abuse workers. The sponsorship system is considered the main obstacle faced by TFWs to claiming their rights due to a number of violations, including restrictive regulations and policies regarding changing an unprincipled employer, confiscation of official documents by sponsors (e.g. workers' passports and *iqama* permits), banning workers from family reunification and the right of sponsors to refuse to provide consent to obtaining exit and entry visas.

As discussed above, some of these issues are highlighted in the international community's agenda for the promotion and protection of TFW rights. Some have been examined in this study. More importantly, the treaty bodies of UN instruments and the ACHR have, to some extent, addressed compliance with Saudi regulations and policies concerned with human

¹⁹⁵ In June 2004, the International Labour Conference, 92nd Session (Geneva) of the ILO adopted a resolution that "called for increasing opportunities for regular migration based on the SLM requirements and the sovereign right of all countries to regulate their own migration policies". See ILC, 'Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy' (92nd session, 2004) <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_178658.pdf> accessed 20 May 2015; see also Manolo Abella, 'Policies and Best Practices for Management of Temporary Migration' (Proceedings of the International Symposium on International Migration and Development, United Nations, Turin, Italy, 2006).

rights in general and TFWs in particular. From the point of view of international conventions, these labour residency policies and practices within the *kafala* system go against the general principles of human rights. This is confirmed by official and unofficial Saudi bodies who attempt, as discussed, to raise awareness of the plight of TFWs under the sponsorship system. However, not one of the initiatives of the MoL and the NSHR has made any progress in terms of actual implementation. This leads to the assumption that the major shortcoming of these suggested solutions is the lack of collaboration between all authorities in KSA, which shows that these suggestions are difficult to implement; or rather, they are thrown together on an *ad hoc* basis to appease international condemnation. The Saudi Government has shown itself amenable only to changing in line with international standards at its own pace and on its own terms.

It is clear from reviewing these policies and regulations that all parties concerned in the Saudi Government recognise the significance of reducing the country's dependence on TFWs to avoid undesirable consequences in the future. This is made obvious by recent restrictive migration policies applied by the government to the recruitment of TFWs, such as *nitaqat* quotas and imposing extra fees on renewing work and residency permits for TFWs.

It can be concluded that the reasons behind states' preference for constraints on the entry of non-nationals include economic, legal, social and cultural factors. It is often argued that the Saudi Government developed these policies to deal with the rapid economic growth in the whole country as an outcome of the discovery of oil, while at the same time taking various steps to protect what it conceives to be its right to protect its social fabric (traditions and cultures), its economy and its political and national security from the effects of the presence of TFWs in the country. Finally, it is often argued that the four obstacles discussed play key roles in determining the sort of reforms that should be advocated and pursued by the Saudi Government to improve TFW rights in the country.

Chapter 6: Labour Dispute Resolution Process and its Impact on the Rights of TFWs in the Absence of a Labour Court in KSA: A Critique

Introduction

The aim of this chapter is to provide an insight into the legal protection of TFWs within and across the legal system in KSA. In doing so, the chapter intends to provide an overview of the development of the legal system in KSA in an effort to provide a critical review of the main authorities influencing the legal structure and highlight the current reforms of the judicial system. The aim of this discussion is to guide the understanding of issues linked to the process of resolving labour disputes and their impact on the rights of TFWs. Due to the absence of a labour court from the existing judicial structure, this study suggests tracing the impact of *modernist* (legal professionals) and *traditionalist* (religious scholars) approaches to the legislative process, judicial system and enacted law such as the SLL. Negative (traditionalist) approaches to the SLL and other rules and regulations related to the settlement of labour disputes caused the government to transfer such cases to administrative committees under the executive authority of the MoL, which are not recognised by the Basic Law as a part of judicial authority.¹

Such committees have quasi-judicial functions, and their decisions have legal implications, which are questionable due to the absence of independence and impartiality as they fall under the jurisdiction of executive authority (MoL). Thus, examining the effectiveness of these administrative committees shows several important legal deficiencies that could have a negative impact on the settlement of labour disputes, especially for TFWs. It is essential to consider the regulations for litigation before the commissions for the settlement of labour disputes (hereinafter referred to as the commissions) issued by the Council of Ministers. As discussed in previous chapters, despite a number of regulations and laws governing employment relationships and protecting the TFWs, many human rights violations that TFWs experience in the SCS are interrelated with employment contracts and residency regulations in such a way that the existing legal structure fails to address TFW issues sufficiently. In this

¹. See Ayoub Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) 21 Arab Law Quarterly 191, 224; and Basic Law of Governance, Royal Order No. A/91 27 (1 March 1992) Article 46: "The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia." See also Usa International Business Publications, *Saudi Arabia Company Laws and Regulations Handbook* (Int'l Business Pubns USA 2008) 59

regard, this chapter highlights the key labour cases related to residency regulations (e.g. confiscating labour passports, runaway *huroob* workers and transfer under the *kafala*) in order to review the jurisdiction of the commissions. Finally, this chapter provides a suggestion to resolve and override the outcomes of these approaches in order to eliminate the confusion in the Saudi legal system.

6.1. The development of the legal system in KSA

KSA is recognised as one of the most conventional Islamic legal systems in the world.² KSA interprets the Sharia narrowly, with every Muslim being required to adhere to the binding power and influence of the Sharia. Importantly, the Sharia is not only concerned with governing religious devotion and reasoning, but is applicable across all domains of life, providing a foundation for all Muslims' lives.³ Accordingly, the country has all of its economic, political and social development efforts centred on Islamic principles, with adherence to Sharia as its governing code. Notably, the Sharia has long been recognised as the key source of legal requirements, and hence is recognised as the national law and the public policy of KSA.⁴

Since the establishment of KSA in 1932, the Saudi legal system's development has been influenced by both modernist and traditionalist approaches.⁵ The Islamic scholars and jurists (*ulama*)⁶ predominantly represent the traditionalist approach. The traditionalist is deeply embedded in KSA's history, with its origins in the 18th century Wahhabi movement, established by Shaikh Muhammad Ibn Abd al-Wahhab in 1745. Since that time, all Saudi rulers have derived the legitimacy of their rule and their conquests from the purification of Islamic creed that has derived from innovations and perversions of the original message of Islam.⁷

In contrast, a modernist approach is recognised as predominantly endorsed by members of educated elites, legal professionals and technocrats, such as law professors and lawyers.⁸ The majority of such intellectuals complete their education in Western countries and play a

² Frank E Vogel, *Islamic Law and Legal System* (Brill 2000) xv.

³ Janet AW Dray, 'International Conflicts in Child Custody: United States v. Saudi Arabia' (1987) 9(2) *International and Comparative Law Journal* 413, 414.

⁴ Fahad Mohammed Al-Majed, *A Conceptual Legal Framework for Reforming Saudi Corporate Governance* (Lap Lambert Academic Publishing 2014) 201.

⁵ Al-Jarbou (n 1) 191, 192.

⁶ The word *ulama* is the plural of the word *alim*.

⁷ Al-Jarbou (n 1) 192.

⁸ *ibid* 197.

pivotal role in the country's development and growth, including attempting to develop the legal system. The perspective adopted by a modernist approach is centred on seeking to gain advantage from Western development, including in the domain of the legal system. Modernists support the idea of the codification of all elements of the legal structure, which spans all domains of everyday life.⁹

In fact, the tension between modernist and traditionalist approaches has impacted the legal structure of KSA. It is often argued that the legal system in the country, as well as the nature and the role of the law in KSA society, are sound examples of the interaction between Saudi tribal structure, traditional Islam and modern law.¹⁰ The general principles upon which KSA was built are recognised as clearly stemming from the Basic Law of Governance, 1992.¹¹ For example, Article 1 clearly recognises the central tenets of the Kingdom, and has not shifted away from the original principles detailed by King Abdul Aziz upon the formation of the united Saudi Arabia in 1932. As stated in Article 1: "The Kingdom of Saudi Arabia is an Arab and Islamic Sovereign State ... and its constitution is the Qur'an and the Sunnah."¹² Article two declares: "The citizens shall acknowledge the rule of the King according to the Book of God and the Sunnah of His Apostle."¹³

KSA directs its efforts towards harmonising the teachings of Islam, along with industrialisation and economic growth, through developing a form of government and a legal system that are able to meet and fulfil modern societal requirements, while also ensuring consistency with the key underpinnings of Islamic law.¹⁴ As such, a number of laws have been enacted, including administrative and commercial laws, and laws in the criminal and labour domains. Such laws are in line with the in-depth development plans experienced by the country.¹⁵

With this noted, the traditional subjects of law, namely family law, inheritance, trusts, contracts and criminal law, are all seen to be exclusively defined by the Sharia. Business, labour and broadcasting law, however, are mainly regulated by royal decrees and form part of

⁹ *ibid* 198.

¹⁰ Hossein Esmacili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System' (2009) 26 (1) *Arizona Journal of International and Comparative Law* 1, 6. See also Jennifer Reed and Arthur M Schlesinger, *The Saudi Royal Family* (Chelsea House 2003).

¹¹ Basic Law of Governance, Royal Order No. A/91 27 (1 March 1992).

¹² *ibid* art 1.

¹³ *ibid* art 2.

¹⁴ Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1979) 18 *Columbia Journal of Transnational Law* 413, 414.

¹⁵ Al-Jarbou (n 1) 201.

civil law.¹⁶ Royal decrees are recognised as one approach to supplementing the Sharia that is in line with modern requirements. Royal decrees adopt the principles of Western legal thought.¹⁷

Sfeir rightly points out that such statutory enactments have proven successful in supplementing a significant degree of the traditional legal structure without revoking or compromising any of the Sharia's rules. The result is the emergence of a temporal legal sub-system, which is seen to be autonomous but is not entirely independent of the Sharia.¹⁸ It may be stated that this was an attempt to ease the tension between modernists and traditionalists regarding enacted laws (the impact of traditionalists' approach to enacted law is discussed in the section below).¹⁹

6.2. Components of the system of government

Despite the fact that the Basic Law of Governance adopts the form of a constitution, KSA is essentially a non-constitutional monarchy.²⁰ Throughout the system, the government is broken down into three branches, executive, legislative and judicial. The executive branch comprises the King, the Council of Ministers and local governments, as well as ministry affiliates and other civic agencies (independent and quasi-independent). The highest executive authority in the state is the Council of Ministers, which is recognised as the main authority over all executive powers.²¹ The King also has legislative power; he is identified as the head of the executive authority with absolute power over it. Notably, all state authorities report to him and view him as the point of reference for all authorities within the state. Accordingly, a supplementary clarification of the executive authority role is detailed and described in the Basic Law.²²

¹⁶ Hossein Esmaili and Jeremy Gans 'Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder trials' (1999) 28 (2) *Denver Journal of International Law and Policy* 145, 147.

¹⁷ Joshua White, 'Mohammed and Madison: A Comparison of the Qur'an and the US Constitution' (2001) 11 (2) *Journal of Transnational Law & Policy* 309, 318.

¹⁸ George N Sfeir, 'The Saudi Approach to Law Reform' (1988) 36(4) *American Journal of Comparative Law* 729.

¹⁹ Al-Jarbou (n 1) 201.

²⁰ The definition of non-constitutional monarchy may be inferred from art 1 of the Basic Law of Governance, which states that the constitution is 'the Book of God'. See for more discussion Tareq Y Ismael and Jacqueline S Ismael, *Government And Politics Of The Contemporary Middle East* (1st edn, Routledge 2011) 386.

²¹ Usa International Business Publications (n 1) 44.

²² Law of the Council of Ministers, Royal Order No. A/13 (27 August 1993), see arts 12 'The Council of Ministers shall be composed of the following: (a) The President of the Council of Ministers.(b) Deputies of the President of the Council of Ministers. (c) Ministers with Portfolios. (d) Ministers of State appointed as members of the Council of Ministers by Royal Order. (e) Counselors of the King, who are appointed as members of the Council of Ministers by Royal Order.'" Art 19 (Powers of the Council of Ministers) "Subject

The authority of legislation in KSA is, to some degree, vague and problematic for outside observers to understand. In contrast to situations in other countries, which are commonly seen to have well-established legislative institutions, KSA has had no legislative body since its founding. The legislative authorities are shared by several governmental institutions. This is due to various political and ideological factors, including the fact that KSA was established based on an alliance between the Al-Saud royal family as the governing party and the *ulama* religious establishment, which legitimises all the government activities consistent with (or at least not counter to) Sharia.²³ The Basic Law recognises the ways in which legislative authority handles the preparation of new rules and regulations according to Sharia legislation.²⁴ Nonetheless, there are various Saudi legislative bodies, including the King, the Council of Ministers, the Consultative Council ‘*Majlis Ash-Shura*’ and the Board of the Senior Council of *Ulama*.²⁵

Finally, the judiciary is considered a key pillar of modern society, with the key purpose of safeguarding the rule of law to guarantee the law is upheld and applied to all people equally. In KSA, the details of the present judicial system are identified in the Judicature Act of 1975 (amended in 2007), with the Act providing for the independence of the judiciary, the structure of the courts and their various jurisdictions and the nomination of judges, their qualifications and immunities.²⁶

Article 46 of the Basic Law states that the Judiciary Authority is independent and judges should not be subject to any authority except that afforded by the Sharia. The right of litigation before the courts is, in exactly the same vein, guaranteed to all nationals and residents.²⁷ Therefore, the capability for the settlement of disputes is commonly divided in KSA, specifically between various judicial and quasi-judicial bodies. Such bodies are supervised by a number of ministries in line with the disputed subject matter:

to provisions of the Basic Law of Governance and the Shura Council Law, the Council of Ministers shall draw up the internal, external, financial, economic, educational and defense policies as well as the general affairs of the State and shall supervise their implementation. It shall also review the resolutions of the Shura Council. It shall have the executive authority and be the final authority in financial and administrative affairs of all ministries and other government agencies.”

²³ Al-Majed (n 4) 216 and 217.

²⁴ Basic Law of Governance art 67.

²⁵ The Board of Senior *ulama* was established by Royal Decree No. AI 137 (1971). It is often said that religious scholars (*ulama*) are well-known in Islamic studies, especially the Board of the Senior Council of *Ulama* members, usually considered as an advisory body within the Saudi legislative authority. See Sfeir (n 25) 734.

²⁶ Judicature Act was promulgated by Royal Decree No. M/64 (23 July 1975) and amended on 1 October 2007 by Royal Decree No. M/78.

²⁷ Basic Law of Governance arts 46 and 47.

- i. The judicial bodies: the Sharia court system, under the Ministry of Justice, the High Court, Courts of Appeal and courts of first instance;
- ii. The independent judicial authorities: the administrative court system, known as the Board of Grievances (*Diwan Almadhalim*);²⁸
- iii. The quasi-judicial committees that work under the supervision of the competent ministry. The major judicial committees are the Committee for the Settlement of Labour Disputes, which run by the Ministry of Labour, and the Customs Committee, which run by the Ministry of Finance.²⁹

For the purpose of this paper, the following sections examine the judicial and quasi-judicial body to understand the issue linked to the process of resolving labour disputes and its impact on the rights of TFWs in the absence of a labour court in KSA.

6.3. The judicial system: Current reforms

In October 2007, the late King Abdullah issued a royal decree to reform and modernise the judicial system.³⁰ In line with Article 9 of the 2007 judiciary law, the Supreme Court (*Almahkama Al'olia*) is responsible for taking over the functions of the Supreme Judiciary Council as the highest judicial authority in the Kingdom.³¹

The new Act eliminates the existing Courts of Appeal and founds new Courts of Appeal (*Mahkamat Alisti'naaf*) in the Kingdom's provinces, which exercise jurisdiction through labour court hearings, criminal circuits, commercial and civil circuits and personal status. Furthermore, Courts of First-Degree (*Mahakim Aldaraja Al'oula*) are established in areas, regions and centres according to the needs of the system and implement their jurisdiction by specialised criminal, commercial, labour, personal status and general courts.

²⁸ The Board of Grievances was established in 1955 by Royal Decree No. 2113/8759 and amended on 1 October 2007 by Royal Decree No. M/78.

²⁹ Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration* (Ashgate 2010) 19.

³⁰ Al-Majed (n 4) 232.

³¹ Judicature Act (n 26).

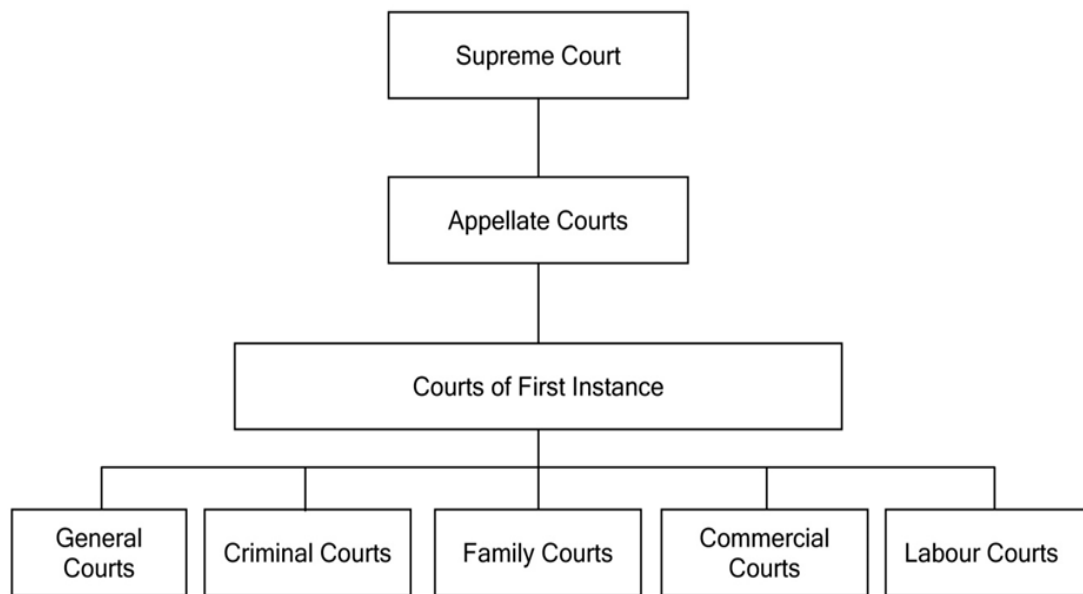


Figure 2: Court hierarchy.³²

Banadar Al-Aiban,³³ in consideration of the court system specifically, states that all the judicial institutions implement wide-ranging structural and organisational developments, including the establishment of a Supreme Court, appellate courts and specialised criminal, commercial, labour, personal status and other courts.³⁴

The Sharia courts have general jurisdiction in almost all judicial disputes, but mostly deal with criminal and civil cases. The Supreme Court, Appellate Courts and Courts of First Instance vary in regard to their hierarchal structure and the disputes they preside over. Without doubt, the Supreme Judicial Council is responsible for directing Sharia courts and examining urgent legal cases, as requested by the King or the Minister of Justice.³⁵

It is worth emphasising that the labour courts have not yet been established. Until they are, the Primary Commission for the Settlement of Labour Disputes (of the MoL) continues to resolve employment disputes. As detailed by the MoL spokesman, Tayseer Al-Mufrij, the

³² While some of the new reforms in the judicial system have still not been introduced, the new judicial structure is presented here. This figure is cited in Altamimi Company, 'The New Court System in Saudi Arabia' (*Tamimi*, 2015) <<http://www.tamimi.com/en/magazine/law-update/section-8/may-7/the-new-court-system-in-Saudi-arabia.html#sthash.YD5m2RoZ.dpuf>> accessed 4 April 2016.

³³ Banadar Al-Aiban is a president of the Saudi Human rights Commission (SHRC).

³⁴ cited in Thomas W Lippman, *Saudi Arabia on the Edge* (Potomac Books 2012) 29.

³⁵ Judiciary Act (n 26) arts 6 and 11.

labour court plan has been postponed until 2017, owing to the fact that the legal labour committees and commissions for the court are not yet completely formed. He adds that another reason for postponing the completion of the plan concerns identifying suitable locations for the courts. Once established, the labour courts will be responsible for employers' and employees' complaints such as those related to employment agreement disputes, disagreements about salary, compensation and workplace injuries claims, and disciplinary fines and appeals.³⁶

6.4. The Board of Grievances (*Diwan Almadhalim*)

The second type of court, which is recognised as being entirely independent from the first one, is the administrative court system, known as the Board of Grievances (*Diwan Almadhalim*), which was established in 1955 and subsequently reconstructed in 1982.³⁷ The Board is directly affiliated with the King and is acknowledged as contrasting with the ordinary courts or Sharia court, which has general jurisdiction all over disputes.³⁸

In other words, the Board of Grievances comprises a number of civil tribunals, the jurisdictions of which fall outside the system of Sharia courts and its obligations.³⁹ The Board of Grievances Law regulates the Board in line with the subsequent hierarchical structure, namely "high administrative court, administrative courts and administrative Courts of Appeal".⁴⁰ Moreover, the missions of the Board of Grievances are centred on analysing administrative decisions, whereby the government and its individual institutions are involved in completing evaluations for the executive of foreign judgments. These evaluations are made to assess the circumstances surrounding the decisions made by bodies that are concerned with government and independent public corporate institutions that follow the government's activities. This facilitates the analysis of cases associated with their rights, as provided for by the pension laws and civil service for government staff and independent public institutes.⁴¹

³⁶Adnan Al-Shabrawi, 'Labor Court Project Postponed to 2017' (*Saudi Gazette*, 2015) <<http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20150412240052>> accessed 9 May 2016.

³⁷ The Board of Grievances (n 28).

³⁸ Al-Majed (n 4) 228. See also David J. Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know', (1991) 25(1) *George Washington Journal of International Law and Economics*, 131, 147.

³⁹ The Commercial Courts have not yet been established. Until they are, the Board of Grievances will continue to exercise first instance jurisdiction over commercial matters.

⁴⁰ Board of Grievances Law Art. 8.

⁴¹ Board of Grievances Law Art. 11, 12 and 13.

6.5. The Quasi-Judicial Committees

The quasi-judicial committees are characterised as the third phase of the judicial authority in the country, despite the fact that the Basic Law does not acknowledge such committees as part of the judicial authority owing to the fact that they introduce measures of adjudication via the executive branch.⁴² As mentioned earlier, the Ministry of Justice supervises the Sharia-based judicial system; however, the majority of ministries interpret the rules and laws on matters under their jurisdiction.⁴³

These committees are divided into two distinct groups, as discussed, as follows:

- 1- Committees whose regulations provide for a possible appeal against their decisions to the Board of Grievances. These committees are linked to the Board of Grievances, and examples of such committees are the Committee for Implementing the Sea Ports Code,⁴⁴ the Committee for Controlling Commercial Deception⁴⁵ (formed by the Minister of Commerce) and the Committee for Implementing the Press and Publication Code⁴⁶ (formed by Ministry of Culture and Information) (these committees are outside the scope of this research).
- 2- Committees whose regulations provide that their decisions are final. These are independent judicial committees, such as the Commissions for the Settlement of Labour Disputes⁴⁷ (formed by the MoL) and Customs Committees⁴⁸ run by the Ministry of Finance. These committees are introduced by royal decrees, which do not provide that their judgments can be appealed against to the Board of Grievances or to any other judicial body.⁴⁹

⁴² See Al-Majed (n 04) 230; Al-Jarbou (n 1) 224.

⁴³ Meshal Faraj, *Toward New Corporate Governance Standards in the Kingdom of Saudi Arabia* (SABIC Chair for IFMS 2014) 40, 41.

⁴⁴ Committee for Implementing the Sea Ports Code, Royal Decree No. 27/M dated 24/6/1394H.

⁴⁵ Committee for Controlling Commercial Deception, Royal Decree No. 11/9 dated 29/5/1404H.

⁴⁶ Committee for Implementing the Press and Publication Code, Royal Decree No. 17/M dated 13/4/1402H.

⁴⁷ Commissions for the Settlement of Labour Disputes established in accordance to Art 212 of Labour Law, issued by Royal Decree No. M/51 (27 September 2005), and amended by Royal Decree No. M/24 date 12/05/1434H (24 March 2013) and amended by Royal Decree No. M/64 05/06/1436H (24 October 2015).

⁴⁸ Customs Committees, Royal Decree No. 425 dated 5/3/1372H (23/11/1952)

⁴⁹ Ahmed Al-Ghadyan, 'The Judiciary in Saudi Arabia' (1998) 13 Arab Law Quarterly 235, 246, 248, 249;

Besides such major committees, there are other committees that handle the trials of ministers, and special committees handle military and security personnel within the relevant ministry (e.g. Ministry of Defence). However, all these above committees have appeared mainly with the objective of filling a gap caused by the attitude of the Sharia court on secular legislation and laws originating from the Council of Ministers.⁵⁰ The following section examines the role of the quasi-judicial committees, with specific reference to the Commission for the Settlement of Labour Disputes, to highlight their range of function and to assess its overall effectiveness to solve TFW disputes.

6.5.1. Commission for the Settlement of Labour Disputes

The SLL created special bodies with the aim of adjudicating disputes between workers (foreign or national workers) and employers in the private sector.⁵¹ The law identified the authority in charge of issuing the regulations for litigation prior to the commissions. Article 228 of the SLL stipulates that the Council of Ministers is responsible for issuing regulations for litigation before the Commissions for the Settlement of Labour Disputes.⁵²

In the absence of labour courts, the SLL refers to these bodies as “Commissions”, of which there are two types, the Preliminary Commissions for Settlement of Disputes and the High Commission for Settlement of Disputes.⁵³ The law stipulates that

“each of these Commissions shall solely have exclusive right to consider all disputes relating to this Law and the disputes arising from work contracts. the Commission shall also have the right of access to any premises of the firm for the purpose of conducting the investigation and reviewing all books, records and documents it deems necessary.”⁵⁴

Such committees are appointed by the Council of Ministers and administered by the MoL. Pursuant to the SLL, the Preliminary Commissions have been established in offices of the MoL throughout the Kingdom, with the members of the Preliminary Commissions being named from among holders of degrees in Law or Sharia study.⁵⁵

⁵⁰ Mohammed h Al-qahtani, ‘The Role and Jurisdiction of the Board of Grievances in Saudi Arabia’ (PhD Thesis, Newcastle University 2008) 35.

⁵¹ It is worth highlighting that employee matters in the case of the private sector (national and foreign workers) are controlled by the Ministry of Labour, whereas the Ministry of Civil Services deals with all cases in the public sector, the employees’ Civil Services, which are outside the scope of this research.

⁵² Labour Law, art 228.

⁵³ *ibid* arts 210.

⁵⁴ *ibid* arts 219.

⁵⁵ *ibid* art 211.

The second commission is the High Commission for Settlement of Disputes, which comprises several circuits, each comprising no less than three members. The law stipulates that “the chairman and members of the commission shall be holders of degrees in Sharia and law, with expertise in labour disputes, and named by a decision of the Council of Ministers, based on nomination by the Minister”.⁵⁶

The Preliminary Commission is empowered under law to issue final decisions in labour disputes, irrespective of their type, the value of which should not exceed SR10,000 or approximately USD 2,500.⁵⁷ Such cases should be filed through the competent labour office of the Preliminary Commission in whose locality or under whose jurisdiction the place of work falls. Prior to referring the dispute to the Commission, the labour office must take the necessary measures to settle the dispute through an amicable approach.⁵⁸ Should it fail to solve the problem, the office then assists the individual to bring his/her grievance to the Commission.

The Commissions, as tribunals of first instance, also hear cases of disputes over compensation for employment-related injuries, irrespective of the amount of compensation, disputes over termination of service and the imposition of the punishments provided for in law for a violation whose punishment exceeds SR5,000, or violations with a combined punishment exceeding SR5,000.⁵⁹ For labour contract disputes, the law states that no case shall be accepted by the Commissions arising from a work contract after twelve months following termination of the work relation.⁶⁰

Such cases may be taken on appeal to the High Commission, which has the jurisdiction to decide finally and definitively on all appeals brought before it against decisions of the circuits of Preliminary Commissions.⁶¹

In theory, Saudi Arabia’s Labour Commission provides foreign and native workers with an impartial agency to adjudicate and arbitrate labour disputes. However, a large segment of the working residents, domestic or household foreign workers, are excluded from the

⁵⁶ *ibid* art 215.

⁵⁷ *ibid* art 214.

⁵⁸ *ibid* art 220.

⁵⁹ *ibid* art 214.

⁶⁰ *ibid* art 222.

⁶¹ *ibid* art 216.

Commission's jurisdiction.⁶² Furthermore, the Commission's offices are often hard to reach, and such a complaint might need several visits, an expensive and risky proposition for foreign labourers without official documents (passport and *iqama*), particularly if travelling to another city.⁶³ However, the general method for the grievance process is as follows:

1. Filing a grievance together with supporting evidence at the disputes department in the Labour Department;
2. The Labour Department usually conducts initial investigations and tries to resolve employment issues with the two parties amiably,⁶⁴ then;
3. If the issue cannot be resolved at this stage, the case is referred to judgment by a Primary Commission;
4. If either party wishes to appeal against the decision of the Primary Commission, then a submission must be completed to the High Commission within 30 days of the hearing;
5. The decision of the High Commission is final, obligatory and binding on all parties;
6. If 30 days lapse and no one from the parties appeals against the Primary Commission's decision, this is standing and enforceable.⁶⁵

6.5.2. Justification of the formation of Labour Dispute Committees

The current justification behind the formation of administrative committees in general and labour dispute committees in particular consists of two parts: the first is to fill the gap in the specialised judicial functions for specific matters; the second is to speed up and accordingly advance the trials of such cases. However, these justifications might not be deemed adequate deal with the issues caused by the committees concerned. In addition, the earlier analysis of

⁶² This type of foreign worker (male or female) is explicitly excluded from the protection of labour laws. In 2013, Saudi government has issued decision No.310 dated 07/09/1434H (15 July 2013) concerning the position of domestic workers. This is out the scope of this study.

⁶³ Human Rights Watch (HRW), 'Bad Dreams: Exploitation and Abuse of Migrant Workers in KSA' (*HRW*, 2004) 73 - 77 <<https://www.hrw.org/reports/2004/saudi0704/>> accessed 15 May 2016.

⁶⁴ Ministerial Resolution No. 321 (27 November 2013) issued the Executive regulations and rules for an amicable dispute resolution between the two employment parties.

⁶⁵ Abdulmonem Alzalabani, 'Workers' Committees and Employee Voice in Kingdom of Saudi Arabia' (*Ilera*, 2009)<http://www.ileradirectory.org/15thworldcongress/files/papers/Track_2/Poster/CS1W_4_ALZALABANI.pdf> accessed 7 March 2016.

the background circumstances emphasised that the creation of the committees may be attributed to various contradictory reasons.⁶⁶

Many endorse the role of such committees, asserting that they provide a suitable solution for particular needs. Many suggest that these committees have been created on a short-term basis in an effort to deal with new legal issues.⁶⁷ However, given this argument, the term ‘temporary nature’ does not provide for an exact duration for the work of such committees. Since 2007 there have been serious efforts to reform the judicial authority and specialist courts have been introduced, such as labour courts, to deal with various offences under the King Abdullah Scheme. The effort to reform the judicial system set aside nearly \$2 billion to build courthouses and train judges in several specialisations outside the Hanbali school of Sharia, as interpreted in the Saudi context, as well as in some specialisations outside the scope of Sharia altogether.⁶⁸

Another justification is that these labour committees are a response to the need for a broad expansion of the social and economic sphere of the country. Also, the Sharia courts are considered incapable of functioning due to their lack of experience of dealing with enacted law. However, some reject this notion, because cases that are adjudicated by these committees can be adjudicated in the Sharia court if the judges are trained and have the appropriate experience.⁶⁹

Another explanation for these committees is that the aim of their creation was to reduce the number of cases coming before Sharia courts. However, one may suggest that this argument is contradicted by the fact that assigning more judges and expanding and establishing more courts under the supervision of the judicial authority might have resolved this issue.⁷⁰

⁶⁶ Hesham Al-Eshaikh, ‘Human Rights and the Trial of the Accused: A Legal Comparative Study Between the Judicial System in Saudi Arabia and the Standards Required by the European Convention on Human Rights’ (PhD thesis, Newcastle University 2005) 139.

⁶⁷ Ibid 140. Al-Eshaikh highlights that the Royal Decree No. 63 (22 July 1987) orders the President of the Board of Grievances and Minister of Commerce to investigate the status of the present committees under the Ministry of Commerce, to make a decision to transfer their jurisdiction to be under the Board of Grievances, and to give their suggestions to the Council of Ministers.

⁶⁸ Lippman (n 34) 27, 28 and 29.

⁶⁹ Ayoub M Al-Jarbou, ‘Judicial Independence: Case Study of Saudi Arabia’ (2004) 19 (1/4) Arab Law Quarterly 5, 30.

⁷⁰ *ibid* 30, 31.

6.5.3. Reviewing the Jurisdiction of Labour Dispute Committee: Legal Inadequacies

Ruthven argues that foreign workers, especially low-skilled workers, are particularly vulnerable to abuse owing to the fact that employers can use the judicial system against them.⁷¹ According to a 1996 US Department of State report on Saudi Arabia:

“There have been many reports of workers whose employers have refused to pay several months, or even years, of accumulated salary or other promised benefits. The labour system abets the exploitation of foreign workers because enforcement of work contracts is difficult and generally favours Saudi employers. Labour cases can take many months to reach a final appellate ruling, during which time the employer can prevent foreign labour from leaving the country; alternatively, an employer can delay a case until a worker’s funds are exhausted and the worker is forced to return to his home country.”⁷²

That said, assessment of the effectiveness of KSA’s Labour Commissions shows that there are several areas of difficulty to be identified. First, in spite of a number of regulations and laws governing the employment relationship and protecting the TFW, these regulations and provisions remain vague and do not provide precise answers to the specific situation of TFWs where there is a conflict with employers under the sponsorship system. It could be said that any employment conflict occurring between the employer and the TFW is expected to affect the TFW’s legal status in light of the current *kafala* system. As a result, many violations are interrelated with employment contract and *iqama* regulations in such a way that the existing legal structure fails to address TFW issues sufficiently.

The SHRC has criticised the process of resolving labour disputes by the Labour Dispute Commission, which constitutes a violation of human rights in KSA.⁷³ As a result of the absence of labour courts, the SHRC identifies the ineffective system of addressing labour disputes as a serious problem facing TFWs. The SHRC highlights key issues faced by TFWs when they submit a case to the commission, including the lengthy process (up to 3 years), a ban on the TFW working with other employers in accordance with SLL Article 39, and the non-appearance of employers at the labour dispute committee.⁷⁴ The labour office seeks the amiable resolution of disputes between parties, which can take up to seven months prior to

⁷¹ Malise Ruthven, *A Fury for God: The Islamist Attack on America* (Granta 2002) 145.

⁷² cited in Malise Ruthven, *A Fury for God: The Islamist Attack on America* (Granta 2002) 145.

⁷³ Saudi Human Rights Commission Regulation (SHRC) (adopted by Council of Ministers Resolution No. 207 of 12 September 2005).

⁷⁴ *ibid.*

referring the dispute to the Commission.⁷⁵ Even when the Labour Dispute Commission has issued decisions in TFWs' favour, execution of the judgments has lacked adequate enforcement, such as when employers claim financial difficulties.⁷⁶

The SHRC finds that, in the case of a conflict between a TFW and an employer, the latter can use the power granted by the sponsorship system to report the TFW to the Passport Department as a work runaway, even though the case submitted to the Labour Dispute Commission has not been resolved.⁷⁷ Thus, the grievance procedure has been criticised for not being able to take account of the vulnerability of TFWs and making them vulnerable to economic exploitation because of the lack of implementation of the SLL that would protect their interests, such as transferring the *kafala* to another employer so that TFWs could earn money and protect the dignity of their labour.⁷⁸

Importantly, the SHRC has also identified the limited jurisdiction of the Labour Dispute Commission in labour cases related to the confiscating of labour passports,⁷⁹ runaway *huroob* workers,⁸⁰ transfer of the *kafala* and deportation.⁸¹ Many TFW cases with their employers are interrelated with employment contract and *iqama* regulations which affect the status of TFWs during the dispute resolution process. The Labour Dispute Committees have decided that issues related to confiscating labour passports, runaway *huroob* workers and transfer of the *kafala* do not fall under their jurisdiction, and limit their decisions to employment contract issues such as non-payment of wages.⁸²

⁷⁵ See Ministerial Resolution No. 321 (n 64).

⁷⁶ This report is highlighted by Alwatan, 'Human Rights Commission Observations on Labour Department' (*Alwatan*,2012) <http://alwatan.com.sa/Economy/News_Detail.aspx?ArticleID=125837&CategoryID=2> accessed 19 November 2016.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ The High Commission for Settlement of Labour Disputes, Decision (No 658/2/432) Date 28/06/1432 H.

⁸⁰ The High Commission for Settlement of Labour Disputes, Decision (No 1461/1/432) Date 28/06/1432 H; the High Commission for Settlement of Labour Disputes, Decision (No 431/1/60) Date 11/01/1431 H.

⁸¹ The High Commission for Settlement of Labour Disputes, Decision (No 1452/1/432) date 17/11/1432 H; Decision (No 1173/1/432) Date 24/08/1432 H; Decision (No 993/2/432) Date 24/12/1432 H and Decision (No 1317/1/432) Date 07/10/1432 H.

⁸² These labour cases have been obtained from the Labour Department without indicating the name of parties, plaintiff (TFW) and defendant (employer). These cases were related to the TFWs from different sectors and different professions. The aim of indicating these cases is to show the impact of the residency regulations on

However, the new Law of the Board of Grievances 2007 has jurisdiction over these committees' decisions. Article 13(b) allows the Board to review decisions issued by quasi-judicial committees⁸³ in "cases for revoke of final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, or abuse of power".⁸⁴ Generally, it is evident that labour dispute mechanisms remain vague in both law and practice, especially in the light of interrelated employment contract and *iqama* regulations and the lack of jurisdiction.

Second, it is doubtful whether such committees are truly independent; they are mainly administrative bodies, and this vast network effectively exercises regulation with executive authority, undermining judicial independence.⁸⁵ Committees essentially violate the Judiciary Statute, concerning the independence of the judiciary, as stated in Saudi Basic Law Article (46).⁸⁶ The Labour Dispute Settlement Commission is one of these committees that operates under the executive auspices of the MoL (and ultimately the Minister).⁸⁷ While these committees generally process common violations of workers' contracts, some deal with serious crimes and administer what amount to sentences of fines, imprisonment, deportation, removal and confiscation of business licenses, and bans on recruitment.⁸⁸ Thus, the committees' decisions can amount to extra-judicial sentences that have no legal transparency and only a token process of appeal.⁸⁹ Another hindrance is that the Council of Ministers authorises commissions' litigation regarding settling labour disputes and enabling the committees to usurp judicial (as well as individual) rights.⁹⁰ All judicial and quasi-judicial

the process of resolving labour disputes, which in turn shows the limited jurisdiction of these commissions in the light of the absence of a labour court in the Saudi judicial system.

⁸³ Faraj (n 43) 42.

⁸⁴ Board of Grievances (n 27) art 13(b).

⁸⁵ Joseph A Kechichian, *Legal and Political Reforms in Saudi Arabia* (Routledge 2013) 29.

⁸⁶ See Basic Law of Governance art 46: "The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia."

⁸⁷ It is vital to mention that the judiciary system's independence is a critical component in the Saudi Law of Judiciary. This notion proceeds from the Islamic inheritance. Accordingly, the Law of Judiciary (n 25) art 1 stresses that: "Judges are independent and in the administration of justice. They shall be subject to no authority other than the provisions of Sharia and laws in force. No one may interfere with the judiciary." See, for more details, Richard J Terrill, *World Criminal Justice Systems* (Lexis Nexis 2009) 586.

⁸⁸ Labour Law, chapter XIV.

⁸⁹ Rodney Wilson and others, *Economic Development in Saudi Arabia* (Routledge Curzon 2004) 132.

⁹⁰ USA Int'l Business Publications (n 1) 59.

institutions need to be unified under the auspices of a single central court, which would regulate the interpretation and application of law.⁹¹

In addition, one of the indirect legal deficiencies of these committees is that they are not established in all cities in Saudi Arabia. Thus, if a case arises in a city or area where the committee concerned does not operate, it might be tried in the conventional Sharia courts, where the judge bases his rulings on *fiqh*, in contrast to the specific labour laws espoused by the committees. This could lead to inconsistency in judicial rulings and violation of individuals' rights.⁹²

Moreover, with regard to the education requirement, Article (31) of the Law of the Judiciary states that the judge must hold a degree from one of the Sharia colleges within KSA. This design has been adopted in an effort to assure that the individual is capable of practising *ijtihad* (independent reasoning).⁹³ According to the interview with former Minister of Justice Dr Muhammad El-Issa, most members of Labour Commission committees are not qualified in the role of judge as per the Law of the Judiciary, simply because the judicial enrolment conditions do not apply to them; it is difficult to transfer them to the general judiciary until judicial cadres are qualified and well trained in labour cases.⁹⁴

Furthermore, another issue associated with dispute resolution includes legal procedures that take a long time to process. Saudi legal experts and economists have called for the establishment of labour courts under the Ministry of Justice to be fostered so that they can deal with urgent worker-related cases. Such calls came after MoL statistics highlighted that only 36 labour dispute cases were resolved on an annual basis, despite there being an overwhelming backlog amounting to 1,400 cases in Jeddah alone. Experts have also suggested stopping the role of the MoL and Labour Dispute Committees because of their failure to resolve disputes relating to employment issues, including unpaid wages, illegal dismissal or violations of workers' rights.⁹⁵ Finally, according to Labour Law, Article 215, the members of these committees must have Sharia or legal (law) qualifications. Article 223 stipulates that

⁹¹ Al-Eshaikh (n 66) 139.

⁹² *ibid* 139.

⁹³ See Judiciary Act (n 34) art 31.

⁹⁴ Sabq, 'Labour Courts Obstacles' (*Sabq*, 2011) <<http://sabq.org/FGafde>> accessed 4 August 2015.

⁹⁵ Arab News, 'Only 36 Labour Dispute Cases Settled a Year' (*Arab News*, 2014) <<http://www.arabnews.com/news/518801>> accessed 5 March 2015.

“none of the commissions provided for in this Part shall abstain from rendering its decision on the pretext of the absence of applicable provisions in this Law. In such case, the commissions shall resort to the principles of Shari’ah, established judicial precedents, norms and the principles of justice”.

Al-Jarbou argues that the committees should apply Sharia when their own statutes do not have relevant provisions to deal with certain cases. The Islamic Sharia, in such situations, becomes “the default law”.⁹⁶ However, this raises the question of whether members of these labour committees with conventional legal qualifications are competent to apply and interpret Sharia.⁹⁷

Therefore, it must be concluded that such complex regulation of Labour Dispute Committees under the supervision of MoL is ambiguous and confusing, especially when these administrative bodies are given substantial judicial power that could lead to violation of individuals’ rights.

6.5.4. The negative role of traditionalist in applying enacted (Labour) law

As mentioned, the tension between modernists and traditionalists has led the latter to reject all enacted law, including the SLL.⁹⁸ Although the SLL is an enacted law centred on resolving disputes between the employer and workers (national or foreign), any decisions of the tribunal must conform to Sharia in order to ensure their implementation in KSA.⁹⁹ Nevertheless, it could be stated that nothing regarding complex employment-related issues is identified in the Qur’an; therefore, as highlighted, it is for the relevant competent authority to set and apply these rules and regulations in a way that does not lead to a conflict with the main principles of Sharia.¹⁰⁰

The Sharia courts are concerned that such legislation may create a conflict with Sharia principles, and thus they refuse to judge cases according to the Labour Law provisions. This is evident from the Sharia courts’ passive opposition to the original Labour Law (1969); the Chief *Qadi* made the following declaration:¹⁰¹

⁹⁶ Ayoub Al-Jarbou (n 69) 31.

⁹⁷ Ibid 51; Al-Jarbou (n 1)197.

⁹⁸ Al-Jarbou (1) 205.

⁹⁹ Maren Hanson, ‘The Influence of French Law on the Legal Development of Saudi Arabia’ (1987) 2(3) Arab Law Quarterly 272, 289.

¹⁰⁰ It is often said that Sharia principles come from a 1,400-year-old religion which did not set detailed rules and regulations for future developments.

¹⁰¹ Al-Jarbou (n 1) 202 and 203. The term *Qadi* is referred to (the Chief Judge).

“We have been informed that some judges have been in the habit of returning certain cases to the Labour and other offices under the pretext that they fall under the jurisdiction of certain authorities. It is recognized that the Sharia... is completely equipped to solve disputes, to end litigation and to clarify every issue. The submitting of cases to those authorities implies recognition of the man-made laws and the laws repugnant to the provisions of the pure Sharia. It also makes the courts appear incapable. You must look into all cases you receive and make your decisions according to the sublime Sharia. Whenever you have difficulty in doing this, write to us about it.”¹⁰²

As a consequence of this circular, the Sharia court was denied the jurisdiction to apply and enforce such laws, which consequently induced the establishment of quasi-judicial committees. It is evident that the main reason for creating the quasi-judicial committees within the Saudi judicial authority is the refusal of several influential religious scholars to adopt and apply regulations within the Sharia court system.¹⁰³ Hence, it is assumed from their resistance and rejection of new laws adopted by the Saudi legislature [at least until the reforms introduced by King Abdullah in 2007 are implemented] that labour cases will continue to be referred to quasi-judicial committees; this compounds the problem of labour issues, already recognised as the most ineffectual aspect of the legislative division of Saudi Arabia.¹⁰⁴

Al-Jarbou points out that the main objections of the *ulama* centre on the tenet that God is the only legislator, and accepting man-made law can be considered contradictory to this belief (and the spiritual foundation of Saudi theocracy).¹⁰⁵ However, as mentioned, Islamic states are entitled to adopt new laws and regulations that do not contradict the principles of Sharia. Furthermore, it is often argued that the Saudi Government does not ‘legislate’, but ‘enacts’ administrative regulations under the term ‘regulatory authority’, in the Basic Law and other laws.¹⁰⁶

A senior consultant in the Ministry of Justice, Judge Abdulmuhssen Al-Obaikan, emphasises that various efforts have been made by the Ministry of Justice to regulate and restructure the judicial system through the enacting of new laws (i.e. the Law of Criminal Procedure, the

¹⁰² Cited in al-Jarbou (n 1), ‘Circular of the Presidency of the Judiciary 25 (the Chief Judge)’ numbered 1849/3/M, on AH 14/6/1385.

¹⁰³ Ayoub Al-Jarbou (n 69) P 24. See Circular 1849/3/M. Ministry of Justice. See also Al-qahtani (n 57) 36.

¹⁰⁴ Ibid, see more discussion Joseph Kechichian, ‘The Role of the *Ulama* in the Politics of an Islamic State: The Case of Saudi Arabia’ (1986) 18 (1) International Journal of Middle East Studies 53.

¹⁰⁵ Al-Jarbou (n 1) 201, 202.

¹⁰⁶ *ibid.*

Law of Civil Procedure before Sharia Courts and the Code of Law Practice), yet there was opposition from the religious scholars. He adds that “some Islamic religious scholars lack the capacity to be tolerant as they always opt for the extreme and cannot accept moderation”.¹⁰⁷

The *ulama* believe that labour regulations may be a preliminary step to codifying the Sharia,¹⁰⁸ which could ultimately replace the latter with positive law.¹⁰⁹ Thus, the codification would make Islamic laws provisions, amendable by the legislative power, as has occurred in many Islamic countries. However, Sheikh Al-Obaikan supports the idea of codifying Sharia and expresses his argument by saying:

“Why would this be religiously prohibited? What is the difference between the books of jurisprudence and the codification of the rules? We know that books of jurisprudence contain rules directly or indirectly taken from Qur’an and Sunnah to make it easier to teach students and to facilitate legislation. Codification and the books of jurisprudence are the same.”¹¹⁰

It is worth noting that since the establishment of the KSA in 1932, efforts have been made to codify the Sharia rules; however, these have proved unsuccessful. There was significant resistance from the senior Saudi religious scholars, which was so strong that policy-makers were unable to face the challenge.¹¹¹ However, it could be argued that the reason for the rejection of the application of such enacted laws by the Sharia courts is that Sharia court judges do not have legal training, as their qualifications are in Sharia.¹¹²

Al-Eshaikh points out the difference between judges on the Board of Grievances and those in the Sharia courts. Despite the fact that both types of judges have completed their study in Sharia, judges on the Board of Grievances adopt and apply enacted law because many of them have received intensive legal training at the Institute of Public Administration. In practical terms, traditionalist rejection of laws that do not essentially contradict Islamic law, such as the Labour Law, led to the abolishing of their jurisdiction (as a judicial authority)

¹⁰⁷ Sheikh Abdulmuhssen Obeikan, ‘The Codification of Islamic Sharia - Asharq Al-Awsat’ (*Asharq Al-Awsat*, 2006) <<http://www.aawsat.net/2006/04/article55266913/the-codification-of-islamic-sharia>> accessed 19 April 2016.

¹⁰⁸ Al-Jarbou (n 1) 206

¹⁰⁹ According to a leading scholar of Islamic law, “Abou el Fadl’s, ‘classical Islamic law’ has always resisted codification and encouraged interpretation through *ijtihad*. In fact, he argues that such uniformity through codification contradicts the very nature of Islamic law.” cited in Elyse Semerdjian, *Off the Straight Path* (Syracuse University Press 2008) 3.

¹¹⁰ Cited in Torki A Alshubaiki, ‘Developing the Legal Environment for Business in the Kingdom of Saudi Arabia: Comments and Suggestions’ (2013) 27(4) Arab Law Quarterly 371, 384-385.

¹¹¹ *ibid*

¹¹² Al-Majed (n 4) 195, 198; Al-Jarbou (n 1) 194.

from a substantial number of cases related to employment issues, which forced the government to transfer the cases to administrative committees that are under executive authority.¹¹³

6.6. Recommended resolution

Upon completion of a review of the current legal system of Saudi Arabia highlighting its key features and institutions, it is clear that there are overlaps between the state authorities, especially concerning the duality of its judicial system, which certainly creates conflict and ambiguity.¹¹⁴ This relates to various factors, which have collectively caused conditions of disorder and confusion in the current Saudi legal system, creating legal deficiency and vagueness not only for foreign workers but even for Saudi nationals.

Al-Majed tries to provide suggestions to override the legal deficiencies within the Saudi legal system by calling to unify the legislative body, because the legislative authorities are dispersed across institutions.¹¹⁵ A legislative body should have exclusive power to enact new laws and regulations and take responsibility for any conflicts that may occur between the bodies of legislative authority.¹¹⁶ Furthermore, it should implement wide-ranging reform, with the aim of reviewing the fundamentals of the legal structure.¹¹⁷ This has to include reforming the authorities and responsibilities related to the executive, legislative and judicial bodies in the country. Such reforms can be implemented by identifying the jurisdictional overlaps between the state's authorities, with special reference to the judicial authority, and providing more authority to the Consultative Council (*Majlis al-Shura*) to make it a fully legislative body.¹¹⁸ Al-Khanezan stresses that the quasi-judicial committees must form a

“unified regulatory body to enhance independence, and should be considered responsible for the general jurisdiction over all disputes that arise between individuals or legal persons. These suggestions come in line with current reforms of the Saudi

¹¹³ Al-Eshaikh (n 66) 145.

¹¹⁴ See above Al-Majed (n 4) 232.

¹¹⁵ Ibid 233-237.

¹¹⁶ As discussed, the legislative authorities are dispersed across institutions; the King, the Council of Ministers, the Supreme Judicial Council and the Consultative Council are all considered as adopting legislative jurisdiction.

¹¹⁷ The new Judicature Act promulgated in 2007 was certainly a remarkable step (even though it is still not completed) in the right direction; it would allow more in-depth alterations in the system.

¹¹⁸ Al-Majed (n 4) 233-237.

legal system issued by Royal Decree No. M/79 in 19/09/1428H, to reform the judicial branch by establishing new courts such as Labour Court and Commercial Court.”¹¹⁹

However, these reforms have still not been implemented. Al-Eshaikh suggests that if the existence of these committees (such as Labour Disputes Committees) continues, a single law should be devised to regulate the jurisdiction and procedures of all committees, with their rulings being subject to the Board of Grievances (and not the Scrutinizing Committee, which does not provide assurance of fair trial).¹²⁰ All decisions made by these committees should be reviewable; according to Article 8/B/2 of the Board’s Law of the Board of Grievances, because of the lack of jurisdiction of committees or the need for general appeals against decisions because of the inadequacy of the proceedings, verdicts of committees must be appealable; otherwise, the committees cannot be justified within the legal system.¹²¹

In consideration of the resistance of the traditional Islamic scholars, Al-Jarbou suggests that in order to achieve harmony between traditionalist approaches and contemporary demands, the first step towards ending the traditionalists’ reluctance to apply and enforce the enacted laws can be achieved by asking the Board of Senior *Ulema* to give opinions on such law.¹²² The Board’s opinions should clarify whether the enacted laws are in the interests of the country, allowing people’s affairs to be organised without contradicting Sharia. The second step related to ending traditionalists’ hesitancy is to agree that all drafted laws must be examined by the Board of Senior *Ulema* before they are enacted, to ensure that no law contains provisions contradicting the Sharia. As a consequence, the Board should be part of the legislative process, at least as an advisory body.¹²³ The third step is to provide compulsory legal training and seminars for all judges, especially those with Sharia qualifications.¹²⁴

¹¹⁹ Mansour Al-khnezan, ‘Quasi-judicial Committees: The Problem and Solutions’ (2011) <<http://www.alriyadh.com/639561>> accessed 3 March 2015.

¹²⁰ Al-Eshaikh (n 66) 145 and 146.

¹²¹ Al-Jarbou (n 1) 229.

¹²² *ibid* 226 and 229.

¹²³ *ibid*.

¹²⁴ It is worth mentioning that the King Abdullah scheme ‘Educational Branch’ has sent many Sharia jurists to study out of the country. This was assumed to be helpful to allow them to form a view on the new legal reforms adopted globally.

Finally, the issue of law has to be addressed from a different perspective than the religious one. Several *ulama* recognise the importance of codifying the Sharia.¹²⁵ For instance, Sheikh Al-Obaikan expresses his interest in codification by stating:

“The human mind is limited, which may cause conflict between opinions. It is for this reason that codification is necessary. It would contribute to establishing justice. It will facilitate a judge’s work and relieve him of conducting difficult research in the books of jurisprudence. We are living in times that require rapid verdicts in accumulating cases. This process will be speeded up by codification. Codification would also be useful to end the serious matter of conflicting verdicts that sometimes occur within the same case and in the same city, perhaps even in the same court or that are issued by the same judge.”¹²⁶

Conclusion

This chapter has examined the Saudi legal system in an effort to provide answers to the research question concerning the way in which the Saudi legal system is applied to protect TFWs in the case of employment conflicts and exploitation. Particular information regarding the Saudi legal system has been given, and the extraordinary influence of Sharia on the legal system has been mentioned. Specifically, the Basic Law and the executive, legislative and judicial authorities have been analysed in order to guide the understanding of issues linked to the Saudi judicial system.

Due to the absence of a labour court in the current judicial structure, the commissions for the settlement of labour disputes play a significant role in adjudicating and resolving disputes related to employment agreements. Even though the regulations for litigation before the Commissions for Settlement of Labour Disputes are issued by the executive authority, which is not recognised by the Basic Law as a part of the judicial authority, they still enjoy a major role in providing administrative justice to ensure that the bulk of citizens and TFWs access justice. However, the regulations for litigation before these committees show that there are legal deficiencies in the existing rules, which may affect the rights of both foreign and Saudi workers in the case of employment disputes.

For this reason, it is vital to review the commission’s jurisdiction and examine the decisions of the committees in TFW cases relating to employment contracts and residency regulations

¹²⁵ Alshubaiki (n 110) 384.

¹²⁶ Obeikan (n 107).

in light of the *kafala* system. As explained, many violations are interrelated with employment contract and residency regulations in such a way that the existing legal structure fails to address TFW issues sufficiently. This study has identified the limited jurisdiction of the Labour Dispute Commission in labour cases related to the issues such as confiscating of labour passports, runaway *huroob* workers and transferring the *kafala*. This indicates the overlapping jurisdiction between passport and labour regulations in such cases. These regulations do not prevent the employer from abusing the sponsorship system by using the power granted to him by such a *kafala* system.

Furthermore, it is evident from the discussion that labour dispute mechanisms remain vague in both law and practice, especially in the absence of free legal aid. The current mechanism fails to take into consideration the socio-economic backgrounds of TFWs. As explained, the majority of workers are recruited from the most vulnerable and marginalised groups in society from various countries and speak different languages (see Chapter 8). This study argues that the current restrictive legal framework governing the employment of TFWs (discussed in Chapters 4 and 5) simply does not treat TFWs as rights-holders. Thus, these factors undermine TFWs' capability to enjoy their rights or access justice when exploitation occurs. Therefore, this study argues that Saudi authorities are accountable for protecting and fulfilling TFW rights.

One may suggest that the commission's jurisdiction should be amended to cover issues related to residency regulations that interrelate with employment contracts, such as renewing work and residency permits and reporting runaway worker cases. Such major reforms need to be implemented by unifying the judicial structure rather than establishing quasi-judicial committees in order to enforce enacted laws as well as codify the rules of Sharia and to promote consistency in court decisions. This also requires the establishment of new secular courts constituted by and operating under the Ministry of Justice, such as labour courts, to eliminate all kinds of uncertainty and ambiguity in the structure and jurisdiction of the judicial system.

Chapter 7: Research Settings and Methodology

Introduction

This chapter discusses the research methodology used in this study. It is divided into three main parts. The first discusses the methodology and approach used for the study of low-skilled TFWs in KSA. The second covers the data collection and analysis. This part discusses data collection from participants (low-skilled TFWs, employers and policy stakeholders from government and non-government organisations) using a semi-structured interviewing method. This method is one of the key tools of qualitative research, used to find appropriate justifications for the questions addressed. A detailed description of sampling techniques, research respondents, contacting the respondents and gaining access, challenges and ethical issues, the site of the study, and the validity and reliability of the data are included. Finally, the third part discusses the role of the researcher in this study and provides a conclusion summarising the chapter.

7.1. Research methodology

Grounded theory methodology is applied in this research study to explore the employment and work conditions of low-skilled TFWs in the SCS. Grounded theory was first presented by Glaser and Strauss in 1967 and was developed later by Corbin and Strauss in 1994.¹ Corbin and Strauss (1998) describe theory as “a set of well-developed categories (e.g. themes, concepts) that are systematically interrelated through statements of relationship to form a theoretical framework that explains some relevant social phenomenon”.² Grounded theory denotes a theory derived and analysed systematically from data collected from participants who share a similar concern or problem.³ Thus, the key objective of applying grounded theory is to construct a theory grounded in the experiences and opinions of the participants. Charmaz provides a concise definition of the grounded theory approach, stating that “grounded theory methods consist of systematic yet flexible guidelines for collecting and analysing qualitative data to construct theories grounded in the data themselves”.⁴ This theory “aims for interpretive understanding of studied phenomenon” and sees “participants’ views and voices as integral to the analysis”.⁵ This method is introduced as the opposite to

¹ Karin Klenke, *Qualitative Research in the Study of Leadership* (Emerald Group 2008) 180 and 181.

² Anselm L. Strauss and Juliet M. Corbin, *Basics of Qualitative Research* (Sage 1998) 22.

³ *ibid* 12.

⁴ Kathy Charmaz, *Constructing Grounded Theory* (Sage 2006) 2.

⁵ Kathy Charmaz, ‘Constructionism and the Grounded Theory Method’ in James A. Holstein and others (ed), *Handbook of Constructionist Research* (Guilford 2008) 402. It is worth mentioning that there are differences

deductive methods, which begin with a hypothesis or theory. This inductive method uses “the data to inform the development of theory without any preconceived hypothesis”.⁶ Ezzy is of the view that “theory is built up from observation ... grounded in data”.⁷

Within grounded theory, consulting existing knowledge is considered a controversial issue.⁸ Many scholars, including Strauss and Corbin, point out that an initial review of the literature is vital to developing conceptual areas of early inquiry. In fact, they provide several reasons for reviewing the literature before conducting primary research. They are of the view that the initial review of the literature is significant for theoretical sensitivity and the stimulation of research questions, and provides a secondary source of data. It can direct the researcher’s clarity of thought and help the researcher give validation to the accuracy of his/her findings.⁹ Hence, it is significant that scholars have always suggested that the investigator “enters the field with an open mind, not an empty head”.¹⁰

The researcher’s awareness of preceding knowledge is required to understand the research phenomenon and provide an explanation for the initiation of the grounded theory study.¹¹ On the other hand, Wood and Haber warn that a full knowledge of the subject prior to data collection could increase the chance of researcher bias and that a preconceived idea might lead to inadequate interpretation of the data.¹²

Grounded theory has been used in various socio-legal studies dealing with human rights issues of workers. Currie conducted a socio-legal study using semi-structured, qualitative interview techniques that focused on labour migration and the experiences of Polish migrants in the United Kingdom (UK) in the post-accession environment between 2004 and 2005. The

between objectivists and constructionists. For example, the original idea of grounded theory has been criticised as its “pure induction” stresses the insufficiencies of “delaying literature review till the end of the analysis”. This is outside the scope of this study. See Deniz Ozalpman, ‘Grounded Theory and Transnational Audience Reception’ in Ibrahim Sirkeci, *Turkish Migration, Identity and Integration* (Transnational Press 2015) 131-132.

⁶ Corey W Johnson and Diana Parry, ‘Common Features of Qualitative Inquiry’ in Corey W Johnson and Diana C Parry, *Fostering Social Justice Through Qualitative Inquiry* (Routledge 2016) 48.

⁷ Douglas Ezzy, *Qualitative Analysis* (Routledge 2013) 12.

⁸ Ciarán Dunne, ‘The Place of the Literature Review in Grounded Theory Research’ (2011) 14 *International Journal of Social Research Methodology* 113.

⁹ Anselm L Strauss and Juliet M Corbin, *Basics of Qualitative Research* (Sage 1990) 52.

¹⁰ Paul S Gray and others, *The Research Imagination: An Introduction to Qualitative and Quantitative Methods* (CUP 2007) 184.

¹¹ Charmaz (n 5) 168.

¹² Geri LoBiondo-Wood and Judith Haber, *Nursing Research: Methods and Critical Appraisal for Evidence-Based Practice* (Mosby/Elsevier 2010) 116.

study adopted grounded theory.¹³ Vlieger, in her socio-legal study, adopted a similar research methodology and data analysis. Her study analyses the issue of women domestic workers in KSA and the United Arab Emirates, exploring employment situations and possible conflicts between domestic workers and their employers. A qualitative method of semi-structured interviews was used.¹⁴ Similar research methodology and data analysis to the work of Shahid is adopted in this study. Shahid used grounded theory in her socio-legal study on the subject of law, empowerment and access to justice for women domestic workers in Pakistan. The study applied semi-structured, qualitative interview techniques to the real-life work experiences of domestic workers.¹⁵

This study adopts grounded theory as a methodological tool for inductively developing data-driven theory. This methodology is considered useful as it enables the approach to be flexible and open to the discovery of previously unconsidered themes and ideas.¹⁶ Thus, the research field is a vital source of data for identifying the root of TFW problems. Through the application of grounded theory methodology, the present field research and interviews with respondents expose the problems of TFWs not only with their employers but also with Saudi institutions. The use of grounded theory methodology helps explain how the current implemented policies of Saudi institutions are not in favour of TFW rights, due to political, security-related, economic and social impediments.¹⁷

Prior to conducting the field research, the researcher had some partial theoretical knowledge and understanding of the segmented labour market, social network theory, the human rights-based approach and Islamic perspectives on workers' rights. However, these theoretical perspectives serve only as a preliminary guiding principle.

To understand in more depth the lived realities and experiences of vulnerable construction workers in KSA, grounded theory methodology is used in this study. Beyond the theoretical perspectives, my identity of being a Saudi national has helped me identify the issues of TFWs in the SCS, especially in Riyadh and Makkah.

¹³ Samantha Currie, *Migration, Work and Citizenship in the Enlarged European Union* (Ashgate 2008).

¹⁴ Antoinette R Vlieger, *Domestic Workers in Saudi Arabia and the Emirates* (Quid Pro Books 2011).

¹⁵ Ayesha Shahid, *Silent Voices, Untold Stories: Women Domestic Workers in Pakistan and Their Struggle for Empowerment* (OUP 2010).

¹⁶ Emily Namey and others, 'Data Reduction Techniques for Large Qualitative Data Sets' in Greg Guest and Kathleen M MacQueen, *Handbook for Team-Based Qualitative Research* (Altamira 2008) 139.

¹⁷ See Chapter 6.

It is worth mentioning that desk research alone is not sufficient to achieve the aims of this research, as there is scarcely any previous research into TFWs in the construction sector in KSA. Although research on this subject has been carried out in other GCC countries, there is a gap in the literature regarding TFW rights. Empirical data collected through semi-structured interviews is vital in order to gain a full understanding of the issues of TFWs through their eyes and experience. Grounded theory, thus, helps identify gaps in the Saudi legal system as well as in state policy for and practice in employment and work conditions in the construction sector. This study develops our understanding of how a temporary legal status can affect the socio-legal and economic position of foreign labourers in the country.

7.2. Data collection and semi-structured interviewing

The data was collected using semi-structured interviewing techniques. This method is one of the key tools of qualitative research. Curry explains that qualitative methods can be used to explore multifaceted social processes and gain an understanding of important aspects of a phenomenon from the perception of study respondents.¹⁸

Conducting individual interviews with respondents provides an opportunity to learn the views of insiders concerning the current situation of TFWs in the SCS.¹⁹ It is important in semi-structured interviews to take field notes and audio-record responses to enable subsequent data immersion and accurate rendering of the data. During the interviews, it is essential to establish and maintain a rapport and a sense of a friendly and mutually beneficial exchange by fully explaining the purpose and likely outcome of the study while guiding the interview in an amenable way. The sequence and type of questions are calibrated to elicit a smooth flow in the interview, covering relevant issues, without leading the respondent or introducing any preventable bias.²⁰ All interviews with respondents start with their employment history. They are asked to describe their current job, including their position and responsibilities. Starting the interview by encouraging respondents to narrate their general history of experience of the phenomena under investigation can function as an ice-breaking strategy, heralding a useful and rich interview.²¹

¹⁸ Lesley A Curry, Ingrid M Nembhard and Elizabeth H Bradley, 'Qualitative and Mixed Methods Provide Unique Contributions to Outcomes Research' (2009) 119 *Circulation* 1442.

¹⁹ Sam Wong, *Exploring 'Unseen' Social Capital in Community Participation* (Amsterdam University Press 2007) 63.

²⁰ Judith Green and John Browne, *Principles of Social Research* (Open University Press 2005) 70.

²¹ David Silverman, *Interpreting Qualitative Data* (Sage 2001) 110.

Following the initial phase, TFWs were asked questions that explore their particular reasons and motivations for migration and career selections. From there, respondents were engaged in a discussion regarding TFW issues in general, with particular regard to the construction sector. This phase helped me recognise issues that appeared in the various narratives. Before further exploring those issues, I attempted to recognise differences and similarities between respondents pertaining to their observation, perceptions, thoughts and experiences. According to Wong, “the interviewing is not a passive process, but an active one as respondents negotiate the ‘meanings’ of questions and ‘reframe’ their experiences in the act of retelling their stories to fit the immediate context”.²²

The interviews were conducted with respondents at the time they suggested. The individual interviews ranged from just one hour to an hour and a half. In the interviews with employers, the researcher discussed their experiences of recruiting TFWs, their legal responsibility under their sponsorship and labour issues. The interviews with TFWs, and some employers, were carried out in the evening when they were not working, and with other employers, at their offices, during evening shifts from 5 p.m. to 10 p.m. The interviews with policy stakeholders from government and non-government organisations were arranged during their working hours. The respondents were engaged in discussion regarding employment of TFWs, including human rights issues, legal admissions, the sponsorship system and other regulations related to the recruitment process, with special reference to the SCS.

The study used mobile recording devices; however, in some cases note taking was used for some respondents. The data includes field notes and written material, such as labour force surveys, reports on residency policies and other unpublished and published resources pertaining to the issue.

A pilot study was conducted to assess the clarity of the questions for the respondents. The pilot study was carried out with two TFWs and one employer.²³ During the pilot study I noted that a few questions were ambiguous and did not generate rich interview data from respondents. Therefore, these interview questions were modified to remove the ambiguity and inspire participants to give more details. The employer interview questions were piloted with one employer and a few of the questions were modified. Questions for the

²² Wong (n 19) 62.

²³ During this study, I found the TFWs from Pakistan could speak Arabic and understand my questions, the reason being that they had lived and worked for more than 14 years in KSA.

representatives from the governmental and semi-governmental authorities were not piloted, because it was difficult to arrange meetings with this group as they were very busy and the interviews were scheduled in advanced for one meeting only. I decided that if I asked the respondents during the interview if any of the questions were not clear, I would happily clarify or alter the relevant question. However, during the interview, very few questions needed to be made clearer or modified.²⁴

7.2.1. Data analysis

In qualitative research, there are various methods of analysing and coding data. For instance, open coding, selective coding and axial coding are types of coding practice used by scholars such as Corbin and Strauss in grounded theory.²⁵ According to Merriam, there is no standard method for analysing data and investigators may develop their own techniques for analysis in line with the research objectives and the nature of the data gained from the fieldwork.²⁶

Before carrying out the analysis, the data needs to be transformed into script. The analysing process starts with transcribing the data collected in the field. I transcribed all the interviews in Arabic and then translated them into English. After that, all the data was categorised and organised.²⁷ I started by separating the data according to the geographical sites where the interviews took place. The data was further categorised according to the nationality and professional backgrounds of the respondents. During the fieldwork, I took some field notes which helped me during this phase of analysis. The notes were beneficial in identifying the concepts that appeared in the data.²⁸ After the data was organised, I used the ‘open coding’ method to identify the concepts that emerged during data collection and I coded the data manually.²⁹ In the coding phase, key themes and sub-themes were derived from the data.³⁰

Once I had identified each key theme, the data was analysed again and under each key theme I identified appropriate sub-themes. Then a comparative analysis of the experiences of

²⁴ Lucienne TM Blessing and Amaresh Chakrabarti, *DRM: A Design Research Methodology* (Springer 2009) 114.

²⁵ Alan Bryman, *Social Research Methods* (OUP 2008) 575.

²⁶ Sharan B Merriam, *Qualitative Research* (Jossey-Bass 2009) 237; see also Agnete Weis Bentzon, Anne Hellum and Julie Stewart, *Pursuing Grounded Theory in Law* (Mond Books 1998) 237.

²⁷ See for more discussion, John W Creswell, *Research Design: Qualitative, Quantitative, And Mixed Methods Approaches* (Sage 2003) 183-199.

²⁸ Daniel Hammett, Chasca Twyman and Mark Graham, *Research and Fieldwork in Development* (Routledge 2015) 156.

²⁹ Philip Burnard, ‘A Method of Analysing Interview Transcripts in Qualitative Research’ (1991) 11 *Nurse Education Today* 462.

³⁰ In this study, I have adopted the same approach as Shahid to analyse the data collected from the fieldwork. Shahid (n 16).

participants was carried out according to their job position, nationality and geographical site. I analysed the data gathered from individual interviews with employers and representatives of governmental and semi-governmental authorities. This data addressed the main research question and made a connection with the theoretical framework applied in the study. In view of the data analysis, non-legal and legal approaches are recommended in this thesis as a way to endorse the protection of low-skilled TFWs in the SCS.

7.2.2. Main themes and sub-themes

The themes and sub-themes which emerged from the data collection include 1) the reason behind the labour migration and recruitment experiences, 2) the exploitation of TFWs pre-migration (illegal recruitment fees and deception regarding work locations and wages), 3) TFW employment conditions, 4) employer/employee relations (*kafala* system issues and class hierarchies between employer and employee), 5) work-related health issues, 6) policies and regulations related to the work permit and levy system, 7) policies and regulations organising the inflow of TFW, and 8) access to justice and its impact on legal status.

In the interviews with TFWs, sub-themes such as reasons for migration, family reunion, dispute settlement (formal and informal procedures), and whether and how they get support, were raised. In contrast, in the interviews with employers, I discussed their experiences of recruiting TFWs for the construction sector and their legal responsibility under their sponsorship.

Interviews with governmental and semi-governmental authorities were structured to focus on the legislative framework. In this regard, questions were raised about labourer issues in the construction sector, including the movement of labour, the sponsorship system and the role of employment agencies in sending and receiving countries. I also asked them if they thought that improved employment contract law and setting up a minimum wage mechanism for TFWs would minimise labour disputes between employees and employers. In this respect I asked them what measures they would recommend for improving work conditions in the Saudi labour market in general and the construction sector in particular.

7.2.3. Selection of the sample

The visit to SA for data collection was conducted in late July 2014 and continued until September 2014. The sample comprised 26 TFWs (regular labourers) from four countries, 14 employers and 20 policy stakeholders from government and non-government organisations

(six passport officers, one a senior member of the Legal Affairs Department of the MoI, eight labour inspectors, one labour legal advisor, one representative of human rights from a governmental agency, and three representatives of an independent human rights support group).

All worker respondents in the study were low-skilled TFWs working legally in the country.³¹ In order to avoid a one-sided view of the labour market regulations, TFWs working in the construction sector were selected, with various nationalities and a variety of socio-economic backgrounds. The majority of workers in the construction sector come from India, Egypt, Pakistan and Bangladesh, but this study is limited to a sample of these nationalities who reside and work in Riyadh and Makkah. The sample is thus diverse, offering access to the necessary data to answer the research question. However, it is worth mentioning that it is not claimed that the sample in this study is a representative sample of the complete experience of TFWs in KSA, but it does present rich qualitative insights into the actual experiences and lived reality of TFWs working in the SCS.

Representatives of policy stakeholders from government and non-government organisations involved in the Saudi labour market were interviewed, specifically representatives of the institutions and agencies described below.

The MoL and its concerned bodies are responsible for workforce planning and development, labour relations, including resolution of disputes, enforcement of labour laws, recruitment of TFWs and the general monitoring of all matters relating to employment in the private sector. The MoL has three main departments, namely the Committee for Settlement of Labour Disputes, the Department of Labour Inspection, the Department of Recruitment and the Department of Labour Relations. Therefore, it is necessary to investigate the role of the MoL as the body responsible for regulating and supervising the private sector. The interviews focused on regulatory practices and their effect on TFWs, in order to determine whether labour relation codes and employment standards in KSA are designed to take into account the special situation of TFWs. Special attention was given to assessing the sponsorship system and labour laws to cover all aspects of employment relations.

³¹ As explained in Chapter 1, undocumented or irregular workers are outside the scope of this research. There are various reasons to exclude this category of worker (the undocumented) from this study. First, Saudi authorities launched a crackdown campaign on illegal workers in 2013, which makes interviewing the undocumented labour difficult. Second, it is difficult to cover all the issues of TFWs in one study due to time and financial constraints.

The MoI is a governmental body responsible for residency regulations, naturalisation and national security. It is also responsible for issuing and renewing the residence permits of non-nationals and the passports and national identification of Saudi nationals. The interview focused on the role of the MoI in regulating the immigration flows in the country and the effectiveness of the *iqama* regulations as a set of laws relating to TFW status and rights in the country.

The NSHR is an independent national organisation founded in 2004. Its objectives are to defend the human rights of citizens, residents and visitors to the country through collaborating with governmental and non-governmental organisations within KSA and globally. The interview focused on the role played by society in addressing issues of human rights violations among foreign labourers, what the NSHR has specifically contributed towards the prevention of such violations, and its role in addressing human rights violations against foreign workers in the country.

The SHRC is a governmental agency that aims to uphold and protect human rights according to international human rights standards. The commission aims to raise awareness of the human rights concept and ensure its application in light of the provisions of the Sharia. The interview focused on government action in response to implementing international human rights norms and whether human rights legislation in KSA is designed to take into account the special situation of TFWs, given the previously mentioned widespread perception of routine abuse.

Employers were interviewed in order to gain a comprehensive understanding of the phenomenon. Employers are the front-line manifestation of Saudi legislation regarding TFWs, and have ultimate responsibility for TFWs during the period of their tenure. The interviews with employers focused on their experiences of the residency system and work-related legislation.

The interviews were limited to employers who had been working or investing in the private sector with at least three years' experience in the SCS in order to gain a better understanding of current practices in the Saudi labour market. The particular concerns raised during the employer interviews related to recruiting TFWs, especially recruitment practices, working conditions, wages, training and fair treatment, compared to recruiting Saudi workers. In light

of the employers' experiences, the researcher could identify the issues faced by TFWs and propose possible reforms to the current legal structure in order to protect TFWs in KSA.

7.4. Validity and reliability

Validity and reliability are key factors for assessing the credibility of any qualitative research.³² Golafshani argues that “validity and reliability are two factors which any qualitative researcher should be concerned about while designing a study, analysing results and judging the quality of the study”.³³ To ensure validity and reliability, individual interview questions should be clear and use simple words in order to avoid vagueness and to provide similar interpretations of the questions for all participants. For validation purposes, the foreign labourers were selected from various nationalities and various jobs in the construction sector. This technique gave the majority of foreign labour working in construction an equal chance of selection, and increases the credibility of the interpretation. This also addresses any bias that may accrue between the participants and researcher. The flexibility and interest of the researcher contributes to enriching the study and increases the reliability and trustworthiness of the qualitative research data.³⁴

7.5. Fieldwork difficulties and ethical issues

The researcher encountered some challenges and limitations during data collection. These challenges were to some extent expected, in that there was reluctance on the part of a number of interviewees to give their views or criticisms of the employment regulations and working conditions of TFWs in the construction sector. Such reluctance came from TFWs, because, prior to the fieldwork, in mid-2013, Saudi authorities started a nationwide crackdown on illegal immigrants and arrested all expatriates whose visas were invalid or who were working for employers other than their original employers. This challenge was identified after the meeting with senior construction personnel (gatekeepers); however, my experience and contacts in the construction sector helped me overcome this challenge, gain access to TFWs and carry out extended interviews with them, which would otherwise not have been possible.

³² Dorothy Valcarcel Craig, *Action Research Essentials* (Jossey-Bass 2009) 114.

³³ Nahid Golafshani, ‘Understanding Reliability and Validity in Qualitative Research’ (2003) 8 *The Qualitative Report* 601.

³⁴ William J Gibson and Andrew Brown, *Working With Qualitative Data* (Sage 2009) 182. See also Kobus Maree and Carol Noëla Van der Westhuizen, *Head Start in Designing Research Proposals in the Social Sciences* (Juta 2009).

In light of this challenge and the sensitivity of the issues of TFWs, I decided to limit the individual interviews to respondents who could speak and understand the Arabic language. I focused only on TFWs in the construction sector (most of whom had lived and worked in SA for more than five years) who could speak and understand Arabic. I conducted face-to-face interviews without the need for an interpreter. This technique helped encourage participants who were not willing to talk about their past experiences or current employment situation with another third party, such as an interpreter.³⁵

A similar reluctance came from government officials. Prior to carrying out the fieldwork, I was expecting reluctance from the respondents as a result of the bureaucracy and centralised system of the government. For instance, the MoL limited my interview to a few departments. Interviews were generally restricted to the Labour Inspection, Public Relations and Legal Affairs Departments. However, the Legal Affairs Department was not cooperative enough to allow me to carry out an interview with them, so I decided to not conduct this interview. This restriction was mainly the result of the research topic and the sensitivity of the issue of foreign labourers in the country.

Some respondents from government authorities (Labour and Passport Departments) were afraid of being interviewed, as they were not familiar with this method. They claimed they were used to dealing with survey questionnaires. Some of them asked that their interview not be recorded, without providing any explanation for their request. However, both human rights organisations were remarkably open and transparent in sharing their information and viewpoints.

During the fieldwork, the researcher became aware of a number of ethical issues, including obtaining consent from respondents, anonymity and confidentiality.³⁶ Vaus argues that the key aims of assuring confidentiality are enhancing the quality of responses regarding sensitive issues, encouraging respondents to participate in the study, accessing a

³⁵ Language proficiency is a crucial factor in any interview research. I originally intended to conduct face-to-face interviews with participants from different backgrounds. I do not speak most of the immigrant languages, and was therefore planning to appoint assistants from the targeted communities/nationalities to work with me as neutral interpreters, and build trust, an essential step in research. I was also planning to be present throughout all interviews to supervise and maintain the interview process, ensure constant communication with the interviewees and discuss any issues or concerns that arose. However, this plan changed due to the fear of some participants about the presence of the interpreter caused by the nationwide crackdown on illegal immigrants. See Steven J Gold and Stephanie J Nawyn, *Routledge International Handbook of Migration Studies* (Routledge 2013) 515.

³⁶ David A De Vaus, *Surveys in Social Research* (Routledge 2002) 62.

representative sample and protecting the privacy of respondents.³⁷ Therefore, respondents were informed that their involvement in the study was voluntary and that they had the right to withdraw their participation from the interview at any time and withdraw the data they had provided. The researcher ensured that information about the research was communicated in a meaningful way to the respondents and that their oral and written consent was obtained. Furthermore, a written and oral assurance of confidentiality was given to all participants. The researcher clearly informed the respondents, prior to the commencement of the research, of the procedures taken to ensure confidentiality. Confidentiality of respondents was maintained and no identifying information was disclosed at any stage of the research. For example, any information which might reveal the identity of the participant, such as a specific address or place of work, was not included in the conversation. The respondents are not identified in any part of the research as the responses are coded.

7.6. Access technique

One way to challenge the issue of inaccessibility is the use of the snowball sampling technique, which is a useful way to access a vulnerable social grouping, such as low-skilled TFWs in KSA. All the respondents were identified and contacted using the snowball sampling method, also known as chain referral sampling. Miller and Brewer point out that this method is applied for two primary purposes:

“Firstly, as an informal method to reach a target population. If the aim of a study is primarily explorative, qualitative and descriptive then snowball sampling offers practical advantages. Snowball sampling is used most frequently to conduct qualitative research, primarily through interviews. Secondly snowball sampling may be applied as a more formal methodology for making inferences with regard to a population of individuals who have been difficult to enumerate through the use of descending methodologies such as household surveys.”³⁸

According to Bernard, “snowball sampling is an effective way to build an exhaustive sampling frame from which you can select people at random to interview – or elect to interview all of them”.³⁹ Any research collecting primary data from a human community requires building credibility bridges in order to access the population targeted for study, and this is particularly necessary for snowball sampling. Thus, in order to access any community,

³⁷ *ibid* 62.

³⁸ Robert L Miller and John D Brewer, *The A-Z of Social Research: A Dictionary of Key Social Science Research Concepts* (Sage 2003) 275.

³⁹ H Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (Sage 1994) 149.

the researcher should have some form of feasible connection with the community or at least some individuals within it, in order to trigger snowballing. Such connections could include work experience or personal contacts.⁴⁰

One barrier to access identified by Liempt relates to particularly inaccessible groups (e.g. geographically remote or culturally marginalised), as people in such groups are prone to view outsiders with suspicion. This can be overcome through gaining access to a collaborating ‘insider’, who functions as a gatekeeper to give the researcher initial access to the target population, facilitating access to the group. The insider should ideally be a member of the target population, or at least have strong links with it. Personal (as well as professional/contextual) attributes can facilitate this, such as being a co-national or someone from the same ethnic or linguistic background, as such factors help to build trust and rapport generally, including between researchers and those researched.⁴¹

The snowball sampling method has been used successfully in various studies of vulnerable migrants in the United States.⁴² Respondents are found by referral among individuals who have the same characteristics, and ‘trust’ may be established as referrals are made by colleagues or peers instead of other more formal approaches of identification. Therefore, the researcher used this technique to identify participants, who then referred the researcher to subsequent participants. By using this sampling method, participants were accessed on a much more extensive basis.⁴³ Polit and Beck elaborate on the fundamental importance of trust when researching sensitive groups, saying that “the establishment of trust is a central issue; gaining entrée requires strong interpersonal skills, as well as familiarity with customs and language of the site. Researchers’ ability to gain the gatekeepers’ trust can only occur if the researchers are congenial, persuasive, forthright about research requirements, and – perhaps most important - express genuine interest in and concern for the situations of the people in the site”.⁴⁴

Study participants were selected in a range of ways, including purposive sampling of key informants and snowball sampling in Riyadh and Makkah. In order to gain access to the

⁴⁰ *ibid* 149.

⁴¹ Ilse Van Liempt and Veronika Bilger, *The Ethics of Migration Research Methodology* (Sussex Academic Press 2009) 121-123.

⁴² Van Liempt (n 41) 124.

⁴³ *ibid*.

⁴⁴ Denise F Polit and Cheryl T Beck, *Nursing Research Generating and Assessing Evidence For Nursing Practice* (Wolters Kluwer Health/Lippincott Williams & Wilkins 2012) 206.

target participants, appropriate gatekeepers at managerial level were identified based on the researcher's previous personal experience. The appropriateness of the organisations and gatekeepers approached was determined based on the likelihood that they could facilitate access to the target population, a decision that was based on the company's profile/features and the researcher's own informed judgment.

7.7. Contacting the respondents and gaining access

Participants were contacted at various sites and companies in the SCS. The researcher identified that the most suitable way to approach the participants was through the senior construction managers. Therefore, senior construction managers functioned as the gatekeepers in this study, and were asked to approach and make initial contact with potential participants. A gatekeeper is the initial point of contact between the researcher and the target group. This individual is defined as follows:

“A person with official or unofficial roles who manages access to people and places at the site. Gatekeepers can assist researchers by identifying people or places for study that best fit the goals of the research. The detailed everyday knowledge of some gatekeepers is a valuable resource in getting to know who, what and where to focus one's initial observations.”⁴⁵

It is worth mentioning that the researcher's friendship with senior construction personnel (gatekeepers) facilitated access to TFWs and carrying out longer interviews with them than would otherwise have been possible. The difficulty of managing construction projects and the lack of experience among Saudi nationals have produced a situation in which some construction companies are run by foreign nationals (senior construction personnel) who are given relative freedom to oversee operations by the Saudi company owners, while the firm operates under the umbrella of the owner. Thus, business operations are run as a kind of subcontracting enterprise by the foreign manager. Consequently, the senior construction personnel typically function in the manner of business owner-managers in more traditional organisational structures, which is reflected throughout the organisation. For example, the nationality of the manager often determines the nationality of the other employees in the company; thus, if the manager is Egyptian, the majority of labourers will be from Egypt. The managers rely on their native patronage networks in the recruitment process and to facilitate communication with lower-level employees. This enhances the role of the gatekeeper in

⁴⁵ Marguerite G Lodico, Dean T Spaulding and Katherine H Voegtler, *Methods in Educational Research* (Jossey-Bass 2006) 117.

facilitating access to the labourers in the context of this study; if the manager agrees, it is easy to approach workers.

It should be mentioned that the researcher decided that if the senior construction managers (gatekeepers) were not amenable to the study (i.e. they did not agree to help the researcher access the intended participants), workers in those organisations would not be approached or included in the study. The researcher did not approach potential participants without the authorisation of the management of the construction firms due to the potential for negative outcomes for participants if they were involved in the study against the wishes of their managers.⁴⁶

After senior construction managers agreed to facilitate the study, contact was made with the target respondents. The initial contact with the potential respondent was made by inviting them to attend a social event organised by the researcher; this event took place in the evening, between 7 p.m. and 8 p.m., and refreshments were provided.

During the event, the researcher thanked all the respondents for their time and for accepting the invitation, and then comprehensively explained the research in terms of its purpose, methods and likely outcomes and benefits. The anonymity and data security aspects of the study were explained in full (the identity of respondents would not be disclosed in any part of the thesis as the responses would be coded). The research information sheet and participant reply form (pre-interview form, see appendix 6) was given to the potential respondents and they were invited to ask questions. The potential respondents were invited to participate in the study and asked to return the forms they were given in a sealed envelope with their contact information if they wished to be included.

All potential respondents were requested to submit their forms even if they did not wish to participate, to prevent identification of those individuals who did participate. They were informed that they retained the right to withdraw from the study at any time without giving a reason and without incurring any penalty or negative outcome. These assurances were particularly important in this research context due to the latent suspicion that construction workers feel about any kind of monitoring or regulation (they could perceive the research in such terms), as they are in many ways a vulnerable group.

⁴⁶ In this case, another site and company were sought.

The researcher collected all the pre-interview forms and made a list of the potential respondents who gave their initial consent at this stage. Confidential interviews were arranged on an individual basis with each respondent at a time and place chosen by them, to reduce any risk, and for their convenience. During the interviews, the purpose of the study was reiterated, along with the guarantee of anonymity and the right to withdraw at any time or to terminate the interview if they felt uncomfortable, or for any other reason (see appendix 5).

Generally speaking, access to the workplace of these groups was not expected to be difficult as I am a citizen of KSA. Additionally, I did not anticipate that contacting the participants in their various locations would be difficult as I am familiar with the culture and procedures of the country. I have also had some previous contact with representatives of these groups during my previous work experience.

7.8. Site of study

The field research was conducted in two cities, Riyadh and Makkah. These two cities were chosen because Riyadh is the capital and largest metropolitan city in the Kingdom and a major destination for foreign workers, and Makkah, where large-scale construction projects are now underway, is a city that employs a large number of TFWs. The current major construction projects include the grand expansion of the Holy Mosque Makkah and the King Abdullah Financial District in Riyadh. Therefore, the vast majority of construction projects that employ the majority of TFWs are located in these two cities.

7.9. Researcher's role

The purpose of conducting this research is rooted in my experiences of dealing with workers from various countries over many years in the SCS, which afforded me a rich experience of the pertinent issues. I approached this study as an investigator to find out the current employment conditions of TFWs in KSA, specifically in relation to how well or badly their human rights are upheld or protected, as well as to investigate the deployment and success of government regulations in this regard. However, regarding any potential conflict of interest, I do not hold any position which would affect the neutrality of the research findings.

It is worth mentioning that the semi-social nature of business in the Middle East, in general, including the SCS, means that recommendations from community members known to the researcher can encourage people to participate in a study. As I have previous experience of

working in the SCS as an employer and have spent many years dealing with TFWs of various nationalities, I have an extensive network of acquaintances in the industry that could assist in connecting me with senior construction managers and subsequently with TFWs, enabling me to conduct long and comprehensive interviews with the latter.

Conclusion

To sum up, this chapter has explained the research methodology and outlined the tools used to carry out this study. Due to the nature of the study, grounded theory methodology is used to address the main research question regarding the efficacy of Saudi laws in providing adequate protection for low-skilled TFWs in the construction sector. The chapter has discussed grounded theory and its significance in helping researchers build knowledge and make the situation of the respondents' lives and experiences understandable. This chapter linked the theoretical framework developed in the first chapter with the research methodology to provide the foundation for conducting empirical research. Thus, applying the grounded theory methodology is useful in recognising concepts developed from the data collected in the field. These concepts have been further revised in the form of key themes and sub-themes. The researcher has explained the nature of the qualitative method and outlined the methods applied to collect the data, specifically semi-structured interviews. Conducting individual interviews with participants (low-skilled TFWs, employers and policy stakeholders from government and non-government organisations), provides an opportunity to understand the views of insiders concerning the current situation in the SCS. This method is one of the key tools of qualitative research that aims to find appropriate justifications for the questions addressed. Finally, the chapter concluded with a discussion of validity and reliability, challenges and ethical issues, limitations and the researcher's role. The next chapter will provide an analysis of the data collected from the interviews conducted in KSA.

Chapter 8: Voices from the Fieldwork: Data Analysis

Introduction

This chapter analyses the key themes and sub-themes that emerged from the data collected in the form of interviews with low-skilled TFWs, employers and policy stakeholders in Makkah and Riyadh. The theoretical framework presented in Chapter 1 is applied to analyse various experiences of TFWs in this chapter. As outlined in Chapter 1, labour migration theories such as dual labour market theory and social network theory are used to explain the TFWs' perceptions of their current employment situation in the construction sector.

The largest challenges faced by many TFWs (pre- and post-migration) generally relate to illegal recruitment practices. Many TFWs in low-skilled employment in the SCS face unfavourable policies enacted by the Saudi authorities that affect their rights in the country. These include institutionalised discrimination in the *nitaqat* and *kafala* systems, poor working and living conditions, withheld wages, confiscation of *iqama* permits and passports, and other human rights challenges. Problems also relate to accessing the justice system when there is a conflict.

This chapter is divided into two sections. The first examines the experiences of TFWs in the process of recruitment and the reason for choosing KSA as an employment destination. The discussion highlights the exploitation of TFWs pre- and post-migration; issues related to recruitment; deception regarding work locations and wages; TFW employment contracts; the nature of work; working hours; wage structure; accommodation; and transport. Samples of working contracts are analysed in order to identify whether the clauses comply with Saudi labour law. The relationships of TFWs and employers and official bodies and managers are discussed in the light of the *kafala* system. Other subjects discussed are vulnerability to discrimination and abuse; legal barriers to equality; occupational hazards and work-related health issues in the SCS; and respondents' experiences of accessing justice and its impact on their legal status.

The second section addresses the views of the employers and policy stakeholders regarding the current recruitment and employment practices in the SCS, the role of employment agencies in sending and receiving countries, illegal recruitment practices such as 'visa trading' and the role of *fatwa* in reducing or fighting illegal recruitment practices. It also addresses contractual agreements, implications of the *kafala* system, the negative role of

individual sponsorship; issues related to managing the admission of TFWs, policies and regulations affecting the rights and legal status of TFWs and the obligations of diverse stakeholders to uphold and protect the human rights of TFWs during their employment in KSA.

During the fieldwork, some terms were identified that are used in the Saudi labour market by both sponsors and TFWs. For empirical purposes, these terms are employed in this study as taxonomy to identify current employment and recruitment practices.

8.1. Section one: Interviews with low-skilled TFWs

8.2. The process of recruitment: Choosing KSA as an employment destination

Respondents consistently identified factors such as better employment opportunities and religious and social factors as being their motivation to seek work in KSA.¹ Many interviewees noted their perception that the Saudi labour market had many employment opportunities and high wages; this was given a fillip (somewhat surprisingly) by their desire to live and work close to the Holy Sanctuaries. Some TFWs mentioned that social relationships or kinship in KSA were instrumental in attracting them to work there.

With regard to recruitment procedures, many TFWs reported that they sought assistance from brokers, sub-agents or recruitment agents in their home country as well as friends and relatives working in KSA as a means to migrate and learn about the recruitment procedures, work and living conditions.

Analysis of the role of recruitment agencies confirmed that two main factors play an important role in the recruiting of TFWs to the SCS:

- Formal recruitment procedures (by licensed agencies), which include access to labour market information and the recruitment process in the sending and receiving labour countries, employers in the receiving country, job description and worker qualifications and experience. This factor can influence both parties (the company in KSA and the TFW in the sending country)² to make the decision to arrange a work

¹ These factors are usually categorised as pull factors of the country of employment, such as KSA (see Chapter 1).

² For the purposes of this study, this company is categorised as a structured company and the TFWs are categorised as authorised labour.

visa through recruitment agencies (usually through recruiting agencies in both sending and receiving countries).³

- Informal personal contacts (friends and relatives) or informal recruitment (brokers and sub-agents) accessed through the authorised recruitment channels (licensed agencies) in both sending and receiving countries.⁴

Many respondents were able to distinguish between formal and informal recruitment procedures and some of them (especially unauthorised labourers) were aware of the working conditions in KSA before they were formally recruited because they used their friendships to secure their job in advance. This indicates the importance of social network theory, as explained in Chapter 1, to explaining the migratory process in the context of KSA. Social networks play an active role in securing employment, accommodation and security for TFWs.

Most respondents raised issues associated with the recruitment process. They reported that there are excessive and illegal fees extracted by private recruitment agencies, brokers and sub-agents in their home countries and employers in KSA. Work visas and other services provided by recruitment agencies in the home country are extremely expensive for low-skilled labourers.⁵ A respondent from Egypt (authorised labourer) explained the recruitment agency fees paid after an initial agreement on a job offer:

“The workers should pay local recruitment agents for services they provide to you which are legal, as far as I know ... But the amount they charge you is different from one to another ... they charged me one-and-a-half month’s salary, as per the contract ... But the hidden charges include local transport and accommodation, medical check-up, pre-departure workshop and ticket price you should pay to them ... otherwise you will not get a job in Saudi ... The recruitment agency informs me before registering your passport with the Overseas Employment Bureau ... you have to pay around SR2,000 ... as the first instalment ... The second instalment SR2,000 will be paid before submitting the passport and work visa application to the Saudi embassy in order to obtain a work visa.”

Another respondent from Egypt (authorised labourer) stated that there are greater shortages in low-skilled labour in the SCS than in other sectors, so these major construction (structured company) companies provide their work visas for free on condition that the worker never

³ See Chapter 4 and 5.

⁴ For the purposes of this study, this company is categorised as an unstructured company and the TFWs are categorised as unauthorised labourers.

⁵ According to Saudi regulations, “charging fees or selling the work visa to potential TFWs in order to place workers in jobs in KSA by the employers in KSA is an offence under the Ministerial Decree No. 738/1 dated 16.05.1425”.

applies to transfer their visa to another company, even if their contract has expired. Several respondents reported that sponsors are usually not involved in visa trading as they want to encourage TFWs to work in the construction sector because of the huge labour shortage. Furthermore, labourers admitted that this sector is less attractive to Saudi nationals due to the nature of work (difficult and risky) and the work environment (outdoors in intense heat) and this contributes to the motivation of many low-skilled TFWs to seek work in the SCS.

A number of TFWs stated that the cost of the work visa was cheaper than the so-called free visa. Many authorised labourers said they paid their local agent around SR3,000 to SR5,000 compared to SR8,000 to SR10,000 for a free visa bought through brokers or sub-agents. A respondent from India (unauthorised labourer) paid the visa broker SR8,000 (USD2,000) for his visa to be a construction worker in Riyadh.⁶

Some agencies have requirements for specific skills and educational qualifications when recruiting labourers. Several respondents admitted that they got their work visa through brokers to secure their job, even though it cost a huge amount, because they felt they would be unable to fulfil official recruitment requirements.⁷ They said that labourers had to pay the recruitment agencies for each document issued, such as educational certificates or vocational qualifications, and sometime fake documentation, otherwise they would be unable to obtain a work visa.⁸

8.3. Recruitment deception regarding work location and wages

One aspect that emerged from interviews with TFWs regarding their experience with recruitment agencies and brokers was deception regarding work location and wages. Many respondents mentioned that they were recruited to work in big cities such as Riyadh, Jeddah, Makkah and Madinah, but when they arrived in KSA they were shifted to small and remote worksites. According to an Indian interviewee (unauthorised labourer), the recruitment agency and his broker promised him a job in Jeddah, but he found himself in a small village in Arar in the north of the country (where his sponsor lives). He refused to work because

⁶ The TFWs in this study gave the estimated costs they paid to secure jobs in KSA through private recruiters, brokers and sub-agents. The cost varied from one labourer to another because the participants in this study were from different countries, rendering it difficult to give a comprehensive breakdown of migration costs. Thus, the above average cost was seen as a reliable amount.

⁷ The researcher observed that the illegal recruitment practices vary between sending countries, although the Saudi requirements to issue work visa are identical for all nationalities.

⁸ Labourers in some occupational categories in the Saudi labour market (such as semi-skilled labourers) must provide evidence that they have the required skills mandated by their occupation; otherwise, the Saudi authorities do not issue the labourers a work visa.

there was no job for him. He insisted moving to work in Jeddah and then settled in Makkah, where there were many freelance jobs available. Another respondent, from Pakistan (unauthorised labourer), who was recruited to be a welder (skilled labourer), ended up as a construction labourer in Riyadh. He explained:

“The sub-agent in my country informed me it was a free visa with a Saudi *kafeel*. The broker told me, ‘This visa allows you to work freely without permission from your *kafeel*, and you will get more income, and your monthly income will be around SR4,000 instead of SR1,000 salary if you work with this employer.’ Later I realised that there was no job and my *kafeel* sold the work visa to the visa broker employed in KSA, and I had to find a job by myself. When I arrived, the sponsor asked me to pay SR850 for a residence permit and SR250 monthly when I found the job.”

Such experiences are more common among unauthorised labourers as part of their illegal free visa conditions. On the other hand, authorised labourers admitted that they have to work with their employer according to the contract, wherever the job is and under any conditions, or they face losing their job and deportation.

Another significant issue raised was deception regarding wages. It should be noted that the researcher did not generally discuss with TFWs the proportion of income they were earning or remitting to their home countries, but they were asked about their experiences and the practices of recruitment agencies and brokers regarding remuneration. Almost all workers interviewed were promised by the recruitment agent, sub-agent and brokers higher wages than they actually received in KSA. As an authorised labourer from India reported:

“My agent gave me a paper showing my salary and other allowances, but the sponsor denies allowances such as food and air tickets. The sponsor said, ‘I only provide free transport and housing to encourage you to work more in the site, and it is not part of your contract.’ As per the contract signed with the recruitment agency, transport, housing, food and the air ticket are part of our job offer. I spoke with the sponsor several times. He told me, ‘This is not my problem. This is your problem with your recruitment agency.’”

Many construction workers (unauthorised labourers) interviewed in Riyadh and Makkah said that their brokers promised that they would receive about SR4000 (USD1100) net pay per month if they worked with a free visa. An Egyptian interviewee (unauthorised labourer) remarked:

“If we work as freelance in KSA every day we might get this amount monthly. But actually we are working on the demand of the contractor (who is not our employer)

and we get our wages per day. This means that we work on to three days per week, and the other days we stay in our room.”

However, a few TFWs discussed the approximate income of low-skilled labour in the construction sector and stated that their real gross income was about SR1,000 to SR1,500 (USD300) per month, including overtime. Many unauthorised labourers cited numerous deductions, such as a fixed premium of SR250 (USD60) payable to their sponsor per month, sometimes with an additional SR200 (USD55) per month to cover the *iqama* cost, and about SR150 (USD45) monthly rent for sharing a room.

During interviews, the exploitation of TFWs before migration was obvious because of illegal recruitment practices (by private recruitment agencies and other illegal mediators) reported by interviewees, such as visa trading, falsifying documents and illegally charging fees. As mentioned, several participants reported that private recruitment agents and sub-agents, as well as brokers, made false promises about the work conditions and wages to convince TFWs to work in KSA in order to maximise their profit. They had no interest in or responsibility for TFWs losing their residency and work rights due to illegality.⁹

8.4. Employment contract

Almost all TFWs in Riyadh and Makkah stated that they signed a document related to their employment upon arrival in KSA and before they were issued a work and *iqama* permit. However, only a few authorised labourers working with structured companies said that they were provided with a copy of the contracts in Arabic and English. In contrast, unauthorised labourers reported that they were asked to sign with their thumbprint on a blank piece of paper, which included details of their pay for the next twelve months.

An Egyptian authorised labourer recruited by a structured company mentioned that the contracts they received from their employers covered most of the terms and conditions of work. However, few of them (in practice, only Egyptian workers) could read or understand the contracts because they were written in Arabic. Even workers from India, Pakistan and Bangladesh who received contracts in Arabic and English generally could not read or

⁹ During the interviews, the researcher asked subsequent questions about the pre-departure orientation in the interviewees' home country to assess their awareness of their rights. The majority of respondents did not give a clear answer about the pre-departure workshop. However, some of them stated the pre-departure workshop gave them information about culture, religion, *kafeel* and language in KSA.

understand the provisions, and all participants stated that their employers did not explain or translate the terms and conditions of their contracts before they were signed.

A respondent from India (authorised labourer) reported that the terms and conditions of the contract were clarified orally to him and included information on salaries. Also, the employer asked him to sign another paper as part of his contract regarding the location and site of employment, to which he could not object. Several respondents reported that the terms of employment workers agreed and signed in their home countries with the recruitment agencies were superseded and abrogated by the new contracts they were compelled to sign upon arrival in KSA.

During the fieldwork, the researcher obtained five sample work contracts. Three contracts were provided by workers who were working with their original employer (authorised labourers) and two were provided by the employers the researcher interviewed. The researcher identified from these samples of employment contracts that they were for structured companies and were reviewed and approved solely by the company (i.e. employer). They bore no relation to the employment contracts that TFWs signed with the recruitment agency in their home country.¹⁰ In addition, they were written in Arabic, with TFWs signing to acknowledge that they had been informed of the provisions (participants' comments confirm that their employers explained their contracts verbally to them). All the information was contained on one page in very basic language, essentially stating demographic and official residency information and basic salary provisions, without stipulating common allowances such as accommodation, food, transport, end-of-service awards or medical insurance.

The general impression seems to be that employers want to give these allowances to labourers as privileges but they do not want to be obliged to provide them in written contracts, despite many respondents stating that their original contracts signed with recruitment agencies in their home countries included such allowances. Air tickets for returning were cited to be provided after two years or when the contract was finished. Two contracts stated that the employer is responsible for issuing and renewing the *iqama* and works' permit and the exit visa (without indicating SLL, Article 40). Only two contracts

¹⁰ The recruitment agency is considered a third party in this employment relationship between TFW and employer, but the researcher did not mean that the third party should sign the employment contract along with the employers and labourers.

mentioned dispute resolution (“refer to authorities in KSA”), and did not reference any pertinent legislation (e.g. the SLL).

The place of employment was often vague (e.g. “working in any branch of the company in the KSA”), and two contracts held labourers responsible for all equipment provided by the employer (according to SLL, Article 91), which can be a disincentive to using safety equipment. The employment contracts stated that labourers were not allowed to work, directly or indirectly (whether paid wages or not), in any occupation other than that determined by the employers (according to SLL, Article 39). Contracts stated that 30 days advance notice was required for termination. Clearly the MoL was not involved in approving these contracts and the SLL was used selectively and always in the interests of the employer. None of the unauthorised labourers were able to provide their employment contract; they merely signed a blank piece of paper and a final settlement before obtaining their *iqama* from the employer.

8.4.1. Wages structure

One of the main reasons TFWs go to KSA is the prospect of higher wages than they earn in their home country; however, the majority of workers interviewed indicated that actual wages and benefits did not match the ones described to them originally in their home countries. Many participants said that wages were generally set low, but small differences existed relative to their nationality.

As mentioned, respondents (authorised and unauthorised labourer) were generally from the lowest status occupational groups and were the lowest paid personnel in the SCS. However, the interviews with the TFWs gave some idea of the wage structure for semi- and low-skilled workers from Egypt, Pakistan, India and Bangladesh. The wages were determined on the basis of labour nationality and thus Egyptian workers received SR1500 per month; Pakistanis SR1300; Indians SR900; and Bangladeshis SR850.¹¹

The researcher observed that respondents who earned higher incomes had the longest stay and work contracts (5–15 years with the same employer). Also, labour skills and physical fitness played a significant role in the labourers’ income, rather than their level of education, due to the huge demand for low-skilled labourers in the SCS.

¹¹ It is important to mention that wages were estimated by the researcher based on the interviews with low-skilled TFWs in the SCI in 2014; these average salaries give some idea of the wage structure for semi- and low-skilled workers. Not all labourers who participated in this study declared their real income.

It is worth distinguishing between the income of the unauthorised and authorised labours. The unauthorised labourers' income depended on the demands of the employer and subcontractor so there was no fixed income, whereas the authorised labourer generally had a fixed income from his employer.

During the interviews, it was apparent that the majority of the respondents who had the longest stays in KSA were unauthorised labourers with strong social networks in KSA, which had an indirect positive influence on wages. Prolonged stay in the country of employment allows workers to acquire language and establish and enhance social networks with local people (see Chapter 1).

Despite the risk of working as freelancers and illegal practices by employers, many TFWs recruited through social networks and brokers preferred freelancing, and several TFWs stipulated this freedom as a condition before they bought work visas from brokers or employers. Such labourers usually know exactly how much they will earn monthly before they go to KSA, because they already have a strong social network in the Saudi labour market. The most notable practice of those labourers is that they form a collective, not necessarily all under the same employer, and usually work with other labourers (friends or relatives) for various employers.

Due to the short work contracts, they generally prefer daily engagements and payment, and there is no trust relationship between contractor and unauthorised TFW. Thus, the latter demands the first instalment in advance (at the end of the first working day) in order to verify whether the contractor is a trusted person or not. However, many labourers mentioned that they were still exploited by fraudulent contractors.¹² A participant from Pakistan (unauthorised labourer) described the payment method in this type of job:

“We are a group of Pakistanis working together installing ceramics; we usually do not make a contract directly with clients but through contractors who are responsible for the project. Once we start the job at the end of the first day's work, the contractor gives us a small proportion as a first instalment; once the project is finished, he gives us the rest of the money. Then we divide the money between us; there is no fixed income, depending on how many days you are working per month. Labourers like us usually get wages per day, not less than SR1,00 for 12 hours' work.”

¹² The practice of a contractor is very important to TFW issues in the construction sector. Many TFWs take a risk and work as contractors, which is illegal. These contractors work with a few labourers under the sponsorship of the original employers. The contractors tackle the shortage of low-skilled labourers by offering illegal employment for unauthorised and overstay labourers.

Many respondents (authorised labourers) reported that they did not receive their salaries on time. They experienced delays in the payment of wages, varying from 45 to 60 days, and sometimes three months. They were generally working six days a week, 12 hours a day, with overtime. Overtime pay was usually received at the end of the project, usually after 12 months.

However, the general opinion of all the interviewees in Riyadh and Makkah reveals that contract violations regarding wages were common among low-skilled TFWs. Many respondents stated that employers withhold one month of the labourers' salary to compel workers to complete the contract period. Any TFW that leaves during the contract period will lose this salary. This usually happens when employers issue or renew the residency permit and labour permit of the TFW.

8.4.2. Working hours and holidays

Due to the nature of construction work, working hours emerged as one of the major issues of working conditions in this study. All respondents stated that they experienced long and irregular working hours in their workplace. Although it was a problem for both unauthorised and authorised labourers, it was more obviously so among the former.

Many unauthorised labourers reported that there were no limits on working hours because they did not have fixed employment contracts. They usually started work at 6 a.m. and ended at 7 p.m., with a one-hour break and prayers. Muslim labourers stated that during the month of Ramadan normal working hours were reduced from 5 a.m. to 11 a.m. because they fasted; however, sometimes they were required to work at night after *iftar* (breaking the fast) from 8 p.m. to 11 p.m. These unauthorised labourers usually arranged their own working times based on the work demands of contractors and took their holidays when there was no job available. Moreover, external factors such as the weather play an important role, putting the workers under pressure to finalise the construction projects on time. During the hot summers (from June to August) they worked up to 12 hours a day and six days a week, sometimes with no day off.

Conversely, interviews with authorised labourers revealed that their situation was slightly different; the maximum normal working hours were set at nine hours per day or 48 hours a week, with one day off (usually Friday). The nature of construction jobs shows that most TFWs had three hours of daily overtime, which may increase depending on the type of

project. Workers were entitled by law to one hour breaks for lunch and prayer. The majority of authorised labourers mentioned that they had 30 days' paid holiday per year and three days' holiday each Eid (i.e. twice a year), but their companies generally forbade them from taking holidays during the first year of employment. Furthermore, a few labourers mentioned that their companies gave them one week's holiday during the Hajj season so they could conduct the pilgrimage (once only).

8.4.3. Accommodation and transport

During the interviews, the researcher discussed the general standards of accommodation and transport services provided by employers. A participant from Egypt (authorised labourer) described the accommodation provided by his employer:

“Many labourers are living in very old houses of poor quality and the local council never checks these houses to see whether they are good to rent or not. In the winter, water comes inside from the roof. Also, the housing is located in unsafe areas.”¹³

During interviews, it was apparent that the authorised TFWs had better living arrangements than the unauthorised TFWs, but housing was generally in poor condition and ubiquitously overcrowded. It was clear that the living conditions of the TFWs were not considered acceptable by all interviewees, and their concerns regarding the quality of accommodation included poor conditions, unsafe areas (in remote locations) and issues related to basic hygiene. In addition, for those labourers who had to pay for their own housing, housing costs were on the rise in KSA, which created a key challenge for low-paid labourers in securing accommodation. Furthermore, the economic imperative of most TFWs (i.e. saving money for remittance) means they avoid any extraneous spending on housing or other perceived luxuries.

Regarding transport, several respondents reported that they used a company lorry to travel between the worksite and their housing every day. They complained that this lorry, carrying scaffolding and workers at the same time, was very dangerous as there were no seats. Some participants raised the issue of road accidents that TFWs face on their way to work. A participant from Pakistan in Riyadh (unauthorised labourer) used to have a motorbike and had a dangerous accident on the main road, and thus he reported that “because of this accident ... I started using a private taxi, which is expensive to go to my work”.

¹³ Employers cannot house their single workers in residential areas where families live, and thus they rent housing in low-cost areas outside the city, normally in dilapidated buildings.

8.5. Employers', official bodies' and supervisors' relationships with TFWs

TFWs face a massive power imbalance with employers and other contractors (in the case of unauthorised labour). While most TFWs arrive legally, there is a high attrition level in the unauthorised labour sector, leading to overstay or runaway situations. One of the objectives of this research study is to find out what the basis is of contractual relationships between TFWs and employers is, and thus it is vital to determine the views of TFWs about their relations with sponsors, contractors and official bodies.

Some authorised labourers stated that they were satisfied with their job, but sometimes not with their employers. As the latter could end their employment and residence in KSA, though, workers were powerless. Although on-site project managers were generally foreign workers themselves, many TFWs reported nationalist and linguistic discrimination. An Indian authorised labourer explained his experience with Arab project managers:

“My project manager was good when I talked with him in his office. But when he visits us in the project location he’s always shouting at everyone. We are not happy with this behaviour. I usually keep silent. I did not answer him because he makes me nervous and stressful.”

This study reveals that fear and stress were tremendously predominant sub-themes in deliberations regarding relations between employees and employers. The stress was associated with the fear (or reality) of losing their income, not being paid on time, delays in receiving their residency permits, dismissal or being reported to the passport office (and thus being banned from working in KSA again, or being prevented from changing their sponsor or job).

An Egyptian unauthorised labourer stated that the *kafeel* refused to provide necessary documents or sign an agreement with clients because they did not want any official obligation or responsibility; and because many unstructured companies were in reality fake, they are involved in issuing work visas and selling them on the black market (visa trading). A respondent from Pakistan reported:

“There is no employment relationship between an employer (*kafeel*) and labourer when any TFWs buy the work visa from his *kafeel* by using informal recruitment such as brokers and sub-agents. Labourers have a responsibility to find the job and also to pay his *kafeel* a fixed amount at the end of month as per the previous agreement in order to renew his iqama.”

The lack of official documentation rendered unauthorised labourers dependent on the whim of other parties. Several respondents mentioned:

“Payment from employers will be uncertain and TFWs became the weakest link in this situation because they are reliant on the trustworthiness of all other parties involved in this illegal agreement.”

The general opinion of most interviewees in both Riyadh and Makkah was that falsification regarding working conditions and wages had increased in recent years and that the restrictive policies of the *kafala* system condemned TFWs to work only for a particular employer under any conditions, even if the employer was wholly unscrupulous, which was a further incentive to join the unauthorised labour market.

Another concern mentioned by several respondents was their fear of the labour inspector and passport officer. Their fear was associated with their legal status as TFWs and the type of job they were performing.¹⁴ The respondents also highlighted the disrespect they received from the passport office and the labour inspector visiting their workplaces.

During interviews, the role of foreign ‘worker’ subcontractors in supervising and managing this large industry became clear. The huge demand for labour in the SCS encouraged many TFWs who had a rich experience in construction to work as subcontractors. It appeared that the number of foreign ‘worker’ subcontractors in the SCS was more obvious and considerable due to the general lack of experience of Saudi nationals in the industry. The subcontractors worked under the auspices of a Saudi sponsor (sometimes a proxy for a foreign investor).¹⁵ Despite the illegality of their jobs as subcontractors and hiring unauthorised workers, usually they had basic documents that enabled them to conduct their work without any major trouble with the government. However, this study revealed that the triangular relationship between TFWs, subcontractors and principle employers meant that there was no obvious contractual relationship between TFWs and their *kafeel*, subcontractors or principle employer.

¹⁴ Saudis commonly address foreign workers as *Ajnabi*, which means ‘foreigner’, or *Sadeeq* (friend) rather than calling them by their names. Even in the media, police stations and Saudi Immigration Departments, these nicknames are habitually used, especially for low- and semi-skilled labourers.

¹⁵ It should be noted that none of the TFWs in this study were working with foreign investors. Also, as mentioned, subcontractors are beyond the remit of this study.

8.6. Exposure to occupational hazards in the SCS

TFWs are specifically recruited to work in high-risk and hazardous sectors, with long hours, overtime, shift work, hard physical labour and inadequate safety measures that make them highly vulnerable to poor health and occupational accidents.¹⁶ The respondents reported that they were engaged in unsafe work and at greater risk of falls and death on construction sites. Several respondents mentioned that they relied only on their experience in the construction sector to avoid site accidents.¹⁷

Almost all of the TFWs interviewed had experienced a work-related injury at their workplace during their employment in the construction sector.¹⁸ The majority suffered more than one type of accident due to the nature of their work, such as cuts on their hands or fingers or falling from scaffolding. Several participants reported that working outdoors caused illness related to the weather conditions, which included cold, rain, humidity and extreme heat. Many reported inadequate safety measures, with the subcontractor and employer not supplying the necessary protective equipment, as an unauthorised Pakistani labourer reported:

“Sometimes the labourers use their experience to perform the task despite the risk and provide a dangerous solution by using empty barrels to go up there. Many fall down; accidents happen because of this job.”

Many respondents raised the issue of the responsibility of employers to provide the necessary protective equipment. The respondents stated that employers and subcontractors were pushing them to work under pressure to finish the work as soon as possible. There was a consensus among labourers that no one (i.e. employer or subcontractor) talked about safety at work or cared about the hazards to which construction workers were exposed, and they were powerless to defend themselves. An unauthorised Indian TFW working for three months on a building site with subcontractors reported that he fell from scaffolding due to exhaustion and broke his left hand, whereupon his employer threatened him regarding raising safety concerns in the workplace or the hospital, or with police officers if they came to investigate the accident (naturally, he would have lost his job if he had complained).

¹⁶ IOM, *International Migration, Health and Human Rights* (IOM 2013) 38 <http://publications.iom.int/bookstore/index.php?main_page=product_info&cPath=41_7&products_id=976> accessed 3 December 2014.

¹⁷ During the fieldwork, a few (unauthorised) labourers said they believed that safety equipment was a waste of money.

¹⁸ The researcher took the initiative to raise awareness among TFWs interviewed in this study regarding occupational hazards on construction sites and informed them about the procedures for applying for compensation for work-related injuries.

Respondents generally stated that they never received safety training throughout their experience of the SCS. The researcher asked the participants if they raised any concerns with regard to the health and safety with their employer or labour inspectors from the MoL. The interviewees responded that health and safety issues were never taken seriously by the employers or subcontractors. The response of employers had been that such risks were part of the construction work and labourers should adjust themselves to working under such conditions.

All TFWs working legally are insured in case of accidents at the workplace under the GOSI and the SLL. Respondents were asked whether their employers reported accidents to claim work injury compensation from the GOSI. An Indian authorised labourer noted that he knew nothing about compensation, and that after an incapacitating injury he was offered “six months’ unpaid holiday to go back to visit his family back home as he was not able to work”.

Only one respondent in the study, an authorised Egyptian labourer, said that he was admitted to hospital after his left hand was injured with a cutting tool. The project manager sent him to fill in an accident form and told him he would report the accident to the GOSI, but the labourer never heard anything further on the matter.

8.7. Accessing health services

Most TFWs received information about health services from their employers and friends. The majority of participants did not expressly recognise difficulties in accessing health care if they had a valid *iqama*. All the participants mentioned that they had to obtain health insurance in order to be issued a residence permit or renew it. Many respondents stated that medical support was provided to workers who entered legally, but those who overstayed their visas were not eligible to receive medical support from private or public hospitals as the MoI forbade hospitals from receiving any patients without valid residency permits.¹⁹ Authorised labourers reported that their sponsors paid their health insurance as part of *iqama* requirements, while unauthorised labourers had to pay their health insurance to the *Mo-aqab* office, which insured them with an insurance company for a service fee of about SR50. An Egyptian authorised labourer reported that medical insurance had varying levels of cover, typically covered the minimum cost of treatment, but they had to pay 20% of the cost of treatment, which was very expensive.

¹⁹ During the fieldwork in Riyadh, the researcher found that one hospital declared that it would not receive foreign patients without a valid residency permit; saying this was as per the instructions of the MoI.

8.8. Violence, exploitation and abuse in the construction sector

The majority of respondents in this study reported that they had experienced discrimination, racist verbal abuse, violence, inhumane or degrading treatment and xenophobic behaviour from sponsors, project managers, subcontractors, government bodies and sometimes from the general public (Saudi citizens).

During the interviews, it was apparent that participants (unauthorised labourers) complained more than those recruited by structured companies (authorised labourers) regarding violence, exploitation and abuse. The most common form of abuse mentioned by TFWs was verbal humiliation, such as abusive words, shouting and insults. An Indian unauthorised labourer reported his experience with his *kafeel* and his son:

“I had a problem with my previous *kafeel*. He always shouted at me and insulted me. I also fought with his son regarding my iqama.”

Several respondents, mainly unauthorised labourers, reported that they faced humiliation and degrading treatment from their employers and subcontractors for many reasons. They accused labourers of damaging, stealing or losing equipment, or forced them to live in a poor environment or work in risky conditions. Other punitive measures included withholding their wages, confiscating residency permits and passports, extorting money in order to renew their residency permits and barring labourers from leaving the compound or house. Other examples given were threatening to report them to the passport office for no reason, forcing them to pay any fines or tickets received from the government and sometimes reporting them to the passport office as runaways or refusing to provide consent in order to receive the necessary clearance (exit visa) to leave the country. All of these were common techniques of abusive exercise against low-skilled foreign workers. An Egyptian authorised labourer reported,

“After the last amnesty programme in 2013 ended, a policeman held me at the random check point. After that he asked me to go to the police station. When I asked him what the reason was he did not reply, and just kicked me and pushed me to jump into the police bus without any reason. Later, they released me after they checked my iqama.”

Most interviewees (authorised and unauthorised labourers) were of the view that the legal dependency of TFWs under the *kafala* system prevented them from reporting the violence of their sponsors to the labour office or police. Moreover, the restrictive nature of the work permit under the *kafala* system that ties TFWs' legal status to a particular job and employer

contributed to abuse and violations of basic labour and human rights.²⁰ As an Egyptian unauthorised labourer stated: “[T]he Saudi *kafeel* knows that the TFW will never be able to report these actions and abuse; so they continue to take advantage of the vulnerability of TFWs.”

8.9. Vulnerability to forced labour

It became clear from the interviews with TFWs that the use of forced labour in the construction sector had been increasing massively over recent years due to the *kafala* system and other regulations such as *nitaqat* and the Saudisation policy in the secondary labour market,²¹ which also potentially affects legal and authorised workers.²² The ILO categorises forced labour into six circumstances: “(1) physical violence; (2) restriction of movement of workers; (3) debt bondage; (4) withholding of wages; (5) retention of passports or identity documents; and (6) the threat of denunciation to the authorities”.²³

The study findings clearly indicate various forms of compulsion under the *kafala* system that are a result of informal recruitment, low educational levels, visa trading, poor language ability, low status as foreigners, long working hours, low wages, delayed payment or non-payment, incomplete payment, poor quality accommodation, poor working conditions, lack of full medical benefits, confiscated documents, and restrictions and limitations on practising rights under the *kafala* system, such as freedom of movement, changing job or employer, and employers suspending approval for exit visas needed to leave the country (see Chapter 5).

Despite the widespread prevalence of exploitive working and living conditions, many labourers did not recognise the concept of forced labour, and few of them knew how to complain regarding issues related to it raised during the interviews. However, some TFWs in the study were willing to work in forced labour conditions, as narrated by an Egyptian labourer:

²⁰ See, for a similar discussion, A Pande, ‘The Paper that You Have in Your Hand is My Freedom: Migrant Domestic Work and the Sponsorship (*kafala*) System in Lebanon’ (2013) *International Migration Review* 414, 441.

²¹ As mentioned in Chapter 5, the Saudi Government introduced the *Nitaqat* and *Saudization* policy in the secondary labour market to reduce the number of TFWs and reduce the number of unemployed Saudi nationals.

²² Bridget Anderson and Ben Rogaly, ‘Forced Labour and Migration to the UK’ (*Compas* 2005) 44 <<https://www.compas.ox.ac.uk/publications/reports-and-other-publications/forced-labour-and-migration-uk/>> accessed 23 December 2015.

²³ ILO, *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law. Special Action Programme to Combat Forced Labour* (ILO 2005).

“These are common issues faced by foreign labourers in KSA. We have to manage ourselves with these issues otherwise we will lose our job. Sometimes a labourer does not receive his wages for more than three months and if we did not continue work, the employer would use his power to refuse to renew our iqama and deport us to our country. Many of us are suffering from debt and must pay this money on time.”

During the fieldwork, few cases of forced labour were identified. There are both pre- and post-migration factors that lead to forced labour. The pre-migration factors include informal recruitment using brokers and sub-agents and a lack of access to labour information regarding the country of employment.²⁴ The post-migration factors include illegal recruitment practices such as visa trading between numerous intermediaries in the home country and KSA, the lack of implementation of existing labour protection laws and the absence of free legal aid, all of which entrench coercion in KSA.²⁵

8.10. Legal barriers to equality under the current employment and *kafala* system

Most participants felt they were essentially slaves of their *kafeel*, as noted by an Egyptian authorised labourer:

“The *kafala* system makes me feel that I am a slave working for this *kafeel* ... I don't have rights to do anything in this country without my *kafeel's* permission ... and I should blindly follow the instructions without asking him ... my legal status in KSA is under his decision.”

Clearly this is embedded in the nature of the *kafala* system, which institutionalises the power imbalance between the *kafeel* and the labourer. Many participants suggested that TFWs should have rights after their contract is finished with their original employer (usually two years) to find another sponsor if they are not happy with their employer, without seeking his consent, as well as more rights to renew their *iqama* independently and to seek family unification.

While the general view of most respondents was that they faced violations and exploitation under the *kafala* system, they could not end the abusive employment contract. It should be noted that two participants (authorised labourers) stated that they did not have a problem with

²⁴ This highlights the importance of the role of bilateral treaties between sending and receiving countries to reduce the risk of exploitation of TFWs.

²⁵ See the similar study, Carolyn Kagan and others, ‘Experiences of Forced Labour among Chinese Migrant Workers’ (*JRF*, 2011) <www.jrf.org.uk/sites/files/jrf/Chinese-migrants-forced-labour-full.pdf> accessed 3 December 2014; see also HRW, ‘As If I Am Not Human’ (*HRW*, 2008) <<http://www.hrw.org/reports/2008/07/07/if-i-am-not-human>> accessed 2 December 2016.

the *kafala* system as long as they received a good salary on time. The issue, they stated, was not with the *kafala* system itself but with their employers and the project managers responsible for their salary.

8.10.1. Confiscation of labourers' passports and restrictions on movement

Another common problem reported by workers interviewed for this study was the confiscation of their passports and restrictions on their movement. A participant from Egypt (authorised labourer) mentioned the following issues:

“The hazardous working conditions, long working hours, inadequate housing, unpaid wages (fully or partially), all kinds of mistreatment and abuses under the sponsorship system are due to the employer's perception that he has the right to control the life of the workers in KSA ... he owns them as slaves.”

This general view was shared by the majority of authorised and unauthorised labourers and linked to the ubiquitous practice whereby employers confiscate a labourer's passport, alleging that this document is not needed in KSA while they have an *iqama*, and the passport will be returned when the labourers return the residence and work permits or return to their countries.

A participant from Bangladesh (unauthorised labourer) reported that:

“The *kafeel* thinks he has the right to confiscate labourers' passports because he is the one responsible for TFWs in front of the Passport Office and MoL, while labourers are working in KSA. The TFW is not in the position to refuse to give their passport to their employer.”

However, a few respondents mentioned that they knew that confiscating labourers' passports was illegal, and that they could report this to the Saudi authorities. A surprising finding, though, was that they still rendered their passports to their employers voluntarily, because they did not have a safe place to store it (e.g. due to living in dormitories).

Several interviewees linked the confiscation of passports, and sometime their *iqama*, with struggling to assert their right of movement. Several authorised labourers reported that they were not allowed to go outside the housing of the company. Sometimes the project manager threatened that anyone going out of the compound would be punished by the police if they did not have permission from the company. Others were allowed to travel to other cities only if they had official permission, even if it was on their day off (e.g. to travel to Makkah to perform Umrah or visit friends and relatives in other cities).

8.10.2. Conditions attached to the recruitment contract signed in their home country

The study found that several respondents linked the employment contract they signed in their home country with the *kafala* system in KSA, binding them to the original sponsor and compelling them to work under the conditions specified by the same, at least for the initial three-month probationary period of their contract. A respondent in a similar study conducted among returnee migrant workers from Pakistan explained:

“If a foreign worker decides to return home within the first three months due to the non-fulfilment of their contract conditions, the Overseas Employment Promoter (OEP) is obliged by law to refund all the fees paid to the worker. Moreover, early return of migrants also damages an OEP’s reputation overseas. Therefore, the strict rules have been seen as one of sending countries obligation to the receiving countries to export their labourers on time.”²⁶

The majority of interviewees reported that their contractual rights were not protected, yet the contract was considered to be the main obstacle to terminating their contractual relationship with the employment agency in their home country. These restrictive measures imposed on the TFWs by their countries, and massive debts incurred in securing employment in KSA, effectively comprise a form of peonage.

8.10.3. Nitaqat policies for Saudisation

The general opinion of the majority of TFWs, both authorised and unauthorised labourers (in Riyadh and Makkah), was that the *nitaqat* system had both positive and negative impacts on their rights as low-skilled workers. Many unauthorised labourers highlighted the negative impact on their rights due to penalties imposed on their employer if they failed to meet *nitaqat* requirements. An unauthorised labourer from Pakistan stated:

“I am happy working with my *kafeel* but after the *nitaqat* system many problems happened to the TFWs with their *kafeel*. My *kafeel* asked me to pay the penalty for the delay in issuing the iqama. Even though I gave it to him 20 days before the expiry date. But, he told me when he went to renew the iqama the company was under the red category and I have to wait almost three months until the status becomes green. He told me I am not responsible for the delay. I waited almost three months to get my new iqama.”

²⁶ ‘Recruitment of Pakistani Workers for Overseas Employment: Mechanisms, Exploitation and Vulnerabilities’ (2009) International Labour Office, Geneva, Working Paper No. 64, 38<http://www.ilo.org/global/topics/forced-labour/publications/WCM_041928/lang--en/index.htm> accessed 20 May 2016.

Another concern mentioned by a few authorised labourers was that if they changed their original *kafeel* they would lose their severance rights and any pending payment, as an Egyptian authorised labourer reported:

“I have been working for nine years with a medium-sized construction company that abuses its workers by delaying payment of wages for more than three months and sometimes paying incomplete wages ... The *niqata* system was good because my company was under the red category, but when I wanted to change the company ... the project manager told me, ‘If you want to go to another company, we will not give you the delayed wages (almost SR7,000) and the ending service benefits’, which is one basic salary for each year ... That’s why I and my colleagues changed our mind about getting the advantages of the new system.”

Another concern mentioned during the interviews was the MoL decision on the levy on TFWs when their proportion violated the nationalisation quota, as an Egyptian authorised labourer mentioned:

“If my sponsor did not meet this requirement of Saudisation, the company will be fined SR2,400 for each TFW. Otherwise, my iqama will not be renewed. Legally speaking, I will become illegal and I cannot go to hospital for treatment or go to my work because if an immigration or labour inspector stopped me and found my iqama has expired, they will take me to the jail ... This is my *kafeel*’s responsibility to hire Saudi workers to meet the MoL requirements ... I am a foreign labourer ... I cannot force my sponsor to hire Saudi workers ... and I am just wondering why the MoL wants to put me and other foreign labourers at risk and force us to lose our rights to work. They can impose any kind of punishment on the *kafeel* without affecting our legal documents, such as renewing the iqama. There are many alternative ways to punish the *kafeel*.”

Generally, the study found both authorised and unauthorised labours were affected by the fees that they paid to maintain their legal status and other rights in KSA. Furthermore, the *nitaqat* programme created a substantial restriction on low-skilled TFWs in general and specifically on unauthorised TFWs. TFWs’ perceptions of the effect of the *nitaqat* system were limited to their experience with their *kafeel* and the government authorities (mainly the Passport and Labour Departments). The majority of interviewees emphasised that the major problem facing them was when they were rendered illegal due to their sponsors’ negligence. The labourers most affected by the *nitaqat* system in the construction sector were unauthorised labourers recruited through unstructured companies. As mentioned, individual unstructured companies were established mainly for visa trading, and foreign labourers used recruitment agencies or relatives to get free visas to work freelance. A further issue found in

this study was a lack of knowledge and understanding about the new regulations in the private labour market.

8.11. Labour dispute settlement: Formal and informal procedures

The respondents in the interviews mentioned that they preferred to solve their labour disputes, such as breach of contract, exploitation, deportation or other grievances, informally with their employers. The interviewees in Riyadh and Makkah had never successfully filed a complaint against their employers,²⁷ although commonly cited complaints would be grounds for filing a case with the MoL.²⁸ Therefore, it could be said that the temporary nature of such labour contracts rendered TFWs mostly uninformed about their rights in the country of employment.

Most respondents provided several reasons for not filing a complaint, such as lack of knowledge about their rights and the legal system, fear of their sponsor and the unavailability of legal aid. However, the response of unauthorised labourers in this study was slightly different from the authorised labourers' approach of appealing to official institutions to protect them.

A significant issue raised by the majority of respondents was the lack of knowledge of the Saudi legal system and the complaints procedure. Several participants reported that the pre-departure workshop did not brief them about the Saudi legal system. In this workshop, a few things about Saudi culture and language were mentioned and they were told to respect the employer and follow the structure and rules of the company. A number of TFWs (authorised labourers) stated that their recruitment agency in their home country advised them in the event of a breach of contract by their employer to report it to their embassy in KSA and that they would solve the dispute.

However, none of the participants in this study sought assistance from their embassies. The *kafala* system limits workers' ability to submit evidence to support their case, such as accurate work contracts. They were of the view that when a labourer had a conflict with his sponsor, the embassy staff members did not usually take it seriously and their advice was

²⁷ The study did not claim that all TFWs were unable to file a complaint to the MoL against their employers. Labourers who have not been paid for their work or who have any other grievance have the right to file a complaint and get their salary paid.

²⁸ As discussed in Chapter 6, the settlement method puts the Commission for the Settlement of Labourers Disputes in charge of all labour disputes in the Saudi private market; there is no dedicated court for labour disputes in KSA.

ineffective.²⁹ Secondly, the embassies were located in Riyadh, far away from their place of work, and thus it was logistically difficult and expensive to physically reach the embassy.

8.12. Access to justice and its impact on legal status

Many participants reported that the *kafala* system was a major barrier to accessing justice. Most respondents said that when a TFW made a complaint against his employer, during the time of the settlement of the dispute the labourer remained jobless because the *kafala* system banned TFWs from working other than for their original sponsor. If the employer knew that his labourer was working on another site, he would report both the TFW and the other employer to the labour and passport office, thus paving the way for the deportation of the labourer and ensuring collective discipline against the workers on the part of employers.

The study found that some unauthorised TFWs had slightly better knowledge than authorised labourers and were aware of how to access the official dispute resolution mechanisms, yet access to the relevant institutions was difficult as they faced deportation or punishment due to their violation of the employment and residency laws. Therefore, labourers in this study stated that obviously they did not rely on official dispute resolution mechanisms such as the police or labour office because they were foreigners. For instance, they understood that filing a grievance against an employer would have undesirable consequences for their chances of employment in the private labour market, and thus they would incur other financial burdens, such as the cost of transferring the *kafala* (SR2,000).

While TFWs have legal status in KSA during the settlement procedure period, the interviews with several labourers suggest that TFWs may be vulnerable to employer abuse, such as preventing them from having the right to work and restricting their movement. Many TFWs explicitly stated that the problem of dispute settlement procedure took too long. Labourers in this situation became disappointed after waiting for months without work or income, and thus they typically decided to return to their home country under such circumstances, without settling the conflict. The labourer was thus compelled to solicit an exit visa from the sponsor, usually subject to declaring in writing that he had received all his rights from the sponsor (see Chapters 5 and 6).

²⁹ The researcher observed that some of the labourers answered based on what they had heard from colleagues' or other friends' experiences; such answers do not necessarily reflect their own experiences, particularly as the respondents were still working in KSA.

Most of the TFWs did not know which documents were essential to support their case. Few participants (authorised labourers) mentioned that they kept a copy of their employment contract with them; employers generally did not provide copies of the contract after the probationary period. Few workers provided additional explanation for not asking for a copy of their contract; most labourers believed that they should not have asked their *kafeel* for a copy of their contract because they knew that the employer would not give it to them and it would make the employer suspicious and punitive.

Another significant problem for TFWs is the lack of free legal aid. The interviews showed that most of them did not know where to seek information about employment and residency rights. Such issues are very serious and problematic for many TFWs who are unable to access free legal aid. Thus, the interviews with TFWs highlight the importance of legal advisors providing legal aid to workers in order to reduce the risk of conflict between employers and workers.

Interestingly, many respondents highlighted the role of the Mu'aqb in advising them regarding employment and residency law in KSA. Despite not having formal legal training or experience, the Mu'aqb provided advice based on his experience and what he read and heard in the media. As a result of having no legal qualifications, the Mu'aqb could mislead the labourers and this could result in them losing their right to work and stay in KSA.

8.13. Section Two: Interviews with employers and policy stakeholders

8.13.1. Reasoning for recruiting TFWs in the SCS

Employers in Riyadh and Makkah stated that there were critical shortages of labour, especially in low- and semi-skilled jobs, in the private sector in general, and especially in the construction sector, which could only be filled by recruiting TFWs. Construction jobs were perceived as difficult and dirty jobs, requiring physical labour. Furthermore, the negative attitudes of Saudi nationals towards manual work created huge labour shortages in the SLM.

Several employers (structured companies) highlighted their commitment to their clients to finish construction projects on time, so they stated clearly that they could not rely on Saudi workers even if there were any. They preferred TFWs because they were easier to control (i.e. they had fewer rights and expected lower salaries and conditions) under the sponsorship system. Expatriate workers were generally easier to exploit and were given less

remuneration,³⁰ which fundamentally increased profitability. Furthermore, some sponsors (unstructured companies) admitted that they recruited TFWs merely to draw stipends, paid monthly by TFWs to maintain their legal status in KSA. Such employers stated that they did not interfere in the work of their labourers, allowing them to freelance.

8.13.2. Formal and informal recruitment channels

8.13.2.1 Flexibility of recruitment and the role of the local recruitment agencies

The recruitment companies in this qualitative study had to assume responsibility for the stable influx of a labour force by recruiting TFWs to match the demand in the SCS. It was apparent that the recruitment process usually reflected the type of construction company (unstructured or structured) and the type of employer (individual, company or placement agency).³¹ Therefore, the researcher asked the employers about the process of recruiting TFWs in the SCS in order to identify the general practice of recruitment in the private sector. The respondents identified the channels used to recruit foreign workers as follows:

- Local recruitment agencies in KSA;
- Contacting recruitment agencies in the sending country;
- Recruiting through foreign labourers working in the same company;
- Recruiting through foreign labourers working as brokers in KSA.

The above channels involve a mix of formal and informal recruitment procedures; however, the researcher divided the recruitment of TFWs into different categories depending on the factors associated with the type of construction company and *kafeel*.

The employers and labour inspectors confirmed that TFWs recruited by local recruitment agencies mostly worked in companies with fixed contracts and a fixed income. They recruited TFWs based on their skills and experience and the demand for their labour.

The study found that the majority of structured companies used formal channels for recruitment because the local recruitment agency was responsible for squaring the recruitment process with the Saudi authorities. However, it was obvious that the main role of

³⁰ Aris Ananta and Evi Nurvidya Arifin (eds), *International Migration in Southeast Asia* (Institute of Southeast Asian Studies 2005) 278; see also Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 65.

³¹ This study is limited to individual employers. The placement agency usually provides services to all sectors (agriculture, factory, construction, domestic workers, etc.) and so it is not included.

local recruitment agencies was to link employers with prospective labourers suitable for specific jobs in the construction sector.

Both employers (structured company) and labour inspectors highlighted the responsibility of the local recruitment agency regarding TFWs during the probationary period when the labourers did not pass the medical check, wished to leave the position, wished to return to their home country or lacked the necessary skills or experience in the construction sector. In this situation, the employers had the right to compel the recruitment agency to return the labourer to his country and provide a replacement or the recruitment agency could forfeit the recruitment fees paid by the employer.

The employers (structured company) reported that the common deceptions carried out by recruitment agencies in sending countries caused them to prefer local (Saudi) recruitment agencies. Deception on the part of recruitment agencies caused substantial, irredeemable losses for Saudi firms, whereas local recruitment firms were trusted and usually supplied the demand for workers on time, with little risk of delay.

In contrast, two employers interviewed in this study (unstructured company) mentioned that they recruited TFWs through brokers in KSA as well as through TFWs working in the same company. Three employers also mentioned that they contacted brokers who were TFWs working in KSA to help them sell work visas to labourers or sub-agents in the sending country (see Chapter 1).

One employer (unstructured company) reported that he had to use one of the local recruitment agencies to provide E-*Wakala* services,³² with fees of about SR300 to recruit labour. The employer stated that E-*Wakala* specified the name of the recruitment agency in the labour-sending country in order to delegate them to submit the work application to the Saudi embassy.

8.13.2.2. Illegal recruitment practices, ‘visa trading’ and the role of *fatwa*

As outlined in Chapter 2, the ILO prevents recruiters from charging TFWs recruitment fees. Both ILO standards and Saudi laws mandate that employers pay all TFW recruitment fees and costs; however, interviews with TFWs revealed that they were routinely charged

³² E-*Wakala* is an electronic visa authorisation system.

recruitment fees by local recruitment agencies in their home countries.³³ The labour inspectors and passport officers stated that Saudi law mandated that employers pay all TFWs' recruitment fees and costs, which were collected from employers prior to issuing the work visa subject to the employer meeting general requirements to recruit TFWs. Respondents in Riyadh and Makkah were asked about the responsibility of paying recruitment fees, such as fees needed to issue work visas, recruitment agency fees in the receiving and sending countries and other hidden fees.³⁴ The employers (structured company) explained that the employer normally got initial approval from the MoL after meeting the minimum requirements to recruit TFWs, such as commercial registration, after which they received the work visa approval, and the fees of the visa were paid to the Saudi Government, at a cost of SR2,000 each.

In the second phase, employers paid all recruitment fees for recruitment companies in KSA because the main reason for recruiting labour was to meet the huge demand for low-skilled labour in the SCS and finish construction projects on time. Labourers who received their work visas free of charge accepted low monthly wages, and it was considered easy to control them through the work permit system. Moreover, the sponsors expressed clearly that they were not involved in visa trading, which can cause a lot of trouble for labourers and can lead to delaying their work and losing clients.

In contrast, two employers (unstructured company) stated that they cared about the profit aspects, such as maximising the profit made from recruiting TFWs in advance by selling the work visa to brokers.³⁵ Thus, once the employers issued the work visa letter, there were many brokers of foreign workers in KSA ready to buy the work visa because their employer did not have a job for them or hold a work contract with clients. An employer (unstructured company) explained this situation:

“The common practice in the labour market is everyone, whether a Saudi employer or foreign worker, sells and buys the work visa on the black market. From the employer's perspective, if he gives the visa free (as per the regulations in KSA) to the labourer, and the labourer will not work with him ... What is the point of establishing the company if there is no money and no profit? ... The government charges me

³³ These findings are confirmed by many similar studies. See Hadi Ghaemi, *United Arab Emirates* (HRW 2006). Neha Wadhawan, 'From Rupees to Dirhams: Labour Migration from Nepal to the GCC Region' in Prakash C Jain and Ginu Zacharia Oommen, *South Asian Migration to Gulf Countries* (Routledge India 2015).

³⁴ There are many fees accrued in the recruitment process between the sending and receiving country.

³⁵ For more discussion, see Gwenann S Manseau, *The Contractual Solutions for Migrant Labourers: The Case of Domestic Workers in the Middle East* (Nottingham University Press 2006) 30.

SR2,000 to issue the work visa under my sponsorship ... if the labourer runs away ... the government will not return my money back again ... Also, the recruitment agency and broker and foreign workers, they take the work visa and sell it to someone in their country.”

A few respondents gave the estimated price of a work visa on the black market based on the labourer’s nationality, as shown in the following table.³⁶

Nationality	The price of a work visa on the black market (SR)
Pakistani	10,000 to 13,000
Bangladeshi	9,000 to 12,000
Indian	8,000 to 10,000
Egyptian	5,000 to 7,000

Table 8.1: The estimated price of a work visa on the black market based on nationality
Source: Data generated through interviews with TFWs and employers in 2014

It was evident from interviews with TFWs and employers that the recruitment procedures and corrupt practices by recruitment agencies, brokers and unprincipled employers put TFWs, especially low-skilled labourers, in extremely vulnerable positions, including peonage, before they even left their home countries, due to exorbitant recruitment fees.

These illegal recruitment practices by individual employers in the SCS were a common concern for the policy stakeholders. Both the labour inspectors and the passport officers reported that the current recruitment procedures had many legal and administrative shortcomings when the government allowed individual sponsors to recruit directly from the labour-sending country in order to avoid official recruitment procedures. They added that recruitment agencies in KSA knew that this type of individual employer was involved in visa trading and used their services to overcome government requirements for fixed fees, such as delegating to the recruitment agency in the labour-sending country.

The representatives of the Human Rights Commission stated that illegal recruitment practices and visa trading were considered the main issues in the SLM that are linked to the individual

³⁶ The employers conveyed the estimated black market prices of work visas in the construction sector by nationality. It was found that the price of visas for Pakistani, Bangladeshi and Indian workers was higher than for Egyptian workers, because the Saudi Government excludes Egyptian labourers from the labour quota. Thus, if the employer wants to recruit labourers from India, their numbers cannot exceed a certain quota under the terms of his *kafala*, and if the employer wants to recruit more, the MoL advises him to select another nationality in order to balance the nationalities in the Saudi labour market. However, the case of Bangladesh is quite different, because the Saudi Government banned the temporary recruitment of Bangladeshis, especially for individual employers.

sponsorship system. The researcher mentioned the statement of former Minister of Labour, Adel bin Mohammed Faqih, who claimed that visa trading was considered human trafficking (and thus a grave human rights violation), but the representative of the Human Rights Commission argued that visa trading was a conventional criminal offence because the employer did not follow the regulations for recruiting TFWs; it was not considered human trafficking.

These statements by human rights representatives and the MoL emphasise the ambiguity of regulations criminalising illegal recruitment in KSA. Interestingly, *fatwas* issued by Saudi religious scholars have played a role in reducing or mitigating illegal practices conducted by employers. Several respondents (labour and passport officials) considered visa trading to be prohibited (*haram*) in Islam, based on *fatwas* from many Saudi scholars regarding this issue.³⁷ The rationale for this position is that visa trading constitutes lying and fraud on the part of a sponsor who establishes a fake construction company for the purpose of visa trading, and thus it is strictly forbidden in Islam. Additionally, it is a form of generally unethical behaviour (*zulm*, oppression) as employers compel TFWs to find employment by illegal means, putting them at risk of deportation and losing their rights to work in KSA, and thus undermining their security and that of their dependants in their home countries.³⁸

However, almost all employers from unstructured companies argued that they were conducting legitimate business, citing other *fatwas* from other scholars saying visa trading is not *haram* but that employers should not take excessive amounts for themselves when they sell the work visa. The labourer usually agrees to buy the visa without compulsion, and he has the right to accept or reject the offer.

8.13.3. Contractual agreements under the *kafala* system

Respondents were asked to identify relationship challenges arising between the employer and TFWs under the *kafala* system concerning whether the sponsorship system was adequate to enhance the contractual relationship for both parties and whether it was possible to protect TFWs from being abused by the sponsor. The question focused on the relationship during and outside working hours, because the *kafala* system confers comprehensive financial and legal

³⁷ See The Permanent Committee for Scholarly Research and Ifta in KSA, 'Fatwas of the Permanent Committee: Fatwa No. 13263, Selling visas' (*Alifta*, 2015) <<http://www.alifta.net>> accessed 3 November 2015.

³⁸ For more discussion about visa trading, see IOM, *World Migration 2005 Costs and Benefits of International Migration* (IOM 2005) 60.

responsibility on the employer. As outlined in Chapters 5 and 6, employment contracts under the *kafala* system are based on temporary contractual relationships rather than long-term agreements. Despite the SLL being applied equally (at least in theory) to both Saudis and TFWs in the private sector, the employer has room to add any terms or conditions to the employment contract unless the terms or conditions are directly contrary to the SLL (see Chapter 5).

The general opinion of respondents (structured company) was that the employment contract was a standard contract prepared by employers. It listed the duties and responsibilities, the type of employment as per the residency card, salary, worksite, working hours and holiday conditions. During the interviews, it became apparent that the salary established by employers (structured company) depended on the nationality and experience of the TFWs. The majority of employers did not include benefits, the possibility of compensation or information about dispute resolution if there is a conflict. The majority of employers admitted that they used a template employment contract available from the Public Affairs Office (actually a private office) or found one on the internet.³⁹ As stated, one of the main observations during the fieldwork was that the employment contracts violated a number of TFWs' rights, such as their rights to freedom of movement, family reunion or changing job or employer, thus making low-skilled TFWs vulnerable to mistreatment.

However, the general opinion of the employers was that the major problem facing them in relation to TFWs was their high expectations of working overseas, especially in KSA. The interviewees stated that many TFWs wanted to become rich within a very short time, considering KSA as a place where they could make a fortune, despite being recruited on temporary contracts to do low-skilled jobs. Thus, it was very common for such workers to ask for extra wages for any job that the employer asked them to do in addition to their monthly wages, which fuelled mistrust in the employment relationship.

While labour inspectors, passport officers and legal advisors of the MoI emphasised the responsibility of sponsors to adhere to laws and employment regulations, they identified that the main issues relating to employment conditions were illegal employment (freelance) and lack of legal enforcement of labour laws. Both labour inspectors and passport officers reported that TFWs, after recruitment, frequently asked to change their jobs or wanted to

³⁹ It is worth mentioning that the employment contracts obtained from employers were similar to those obtained from the foreign workers in this study.

work as freelancers, which confirms the TFW interview findings. The respondents from the Human Rights Commission highlighted the issues of working conditions and implementing health and safety workplace regulations in the construction sector:

“We know that there are many work accidents in construction ... some of these issues appear also in the newspaper ... we highlight these issues when we visit the Ministry of Labour ... but we believe that there are laws available to protect labour ... but there is a lack enforcement of these regulations, which leads to an increase the number of work-related injuries in construction due to the negligence of the employer and poor inspection from the MoL.”

Another major issue identified by the majority of the respondents (employers, labour inspectors, passport officers) was that during the employment contract there was a high possibility that the TFWs would run away from the original employer. This could cause delays at the worksite and damage the employers’ business, in addition to affecting their immediate legal responsibilities. Both types of employers (structured and unstructured companies) considered this to be the basis for imposing illegal restrictions on TFWs, such as confiscating their passports and restricting their movement.

As outlined in Chapter 5, the system of official regulations confers a monitoring role (and responsibility) regarding TFWs on the sponsor. The surveillance and control of TFWs becomes a chief concern of the employer and underpins the employer’s relationship with the Saudi Passport Department,⁴⁰ which can impose penalties on the sponsor for ‘negligence’ if the labourers violate the law.

In relation to dispute resolution in the case of a conflict, the respondents from the Labour Department stated that the Labour Dispute Settlement Committee under the MoL was responsible for dealing with all employment conflicts for both Saudi and foreign workers. The respondents shared the opinion that when there was an employment conflict, the Labour Department usually tried to solve it amicably before escalating to formal legal proceedings (filing a lawsuit with the Labour Dispute Committee). The labour legal advisor stated:

“The SLL comprises provisions that deal with nonfulfillment ... the law aimed to ensure that all employees received their rights as provided on their employment contract ... otherwise the penalties will be imposed on the employers ... one of the common issues is the non-payment of salary.”

⁴⁰ The Saudi Passport Department is also known as Saudi *Jawazaat*.

However, the member of the Human Rights Commission claimed that personnel in the Labour Department were unaware of the principles of justice and did not have the skills to mediate labour issues. They had a tendency to discourage workers from seeking legal redress and access to justice, especially low-skilled labourers:

“The TFWs, as foreign nationals, do not know how to file a lawsuit against their employer ... there is the language barrier, unfamiliarity with the legal system ... being scared of the employer and deportation ... as I know there are many issues still pending in the Labour Dispute Settlement Committee ... so, if the labourer thinks of filing a lawsuit, they are usually unable to stay without work and earning money due to the *kafala* system, which ties them to their original sponsor ... Also they will not be able to afford the time required until they settle the dispute.”

This confirmed the practical reality articulated by TFWs themselves, with the implication that the absence of legal aid rendered TFWs defenceless in disputes. It was also noted during the interviews with employers that none of them had read the SLL, nor did they have a copy of it on their premises, manifesting a lack of awareness and concern about labour rights.

8.13.4. Implications of the *kafala* system

Almost all interviewees in Riyadh and Makkah mentioned that the *kafala* system linked sponsors with prospective TFWs through temporary work visas to match the demands of the labour market for low-skilled jobs in the SCS. The respondents from the Passport Department stated that under the residency regulations, the sponsorship system was considered a useful mechanism to organise the recruitment process and fill the labour shortage in secondary jobs. However, the representative of the Human Rights Commission, stated:

“Although the *kafala* system gives a chance for those people from different countries (especially poor countries) to enter the Saudi labour market legally and secure their job in advance before they migrate from their country, the system has a negative role due to the abuse of this *kafala* system by the individual employer. The *kafala* system in its current form must change as it has affected the reputation of KSA. Furthermore, the power of the *kafeel* granted by the *kafala* system is responsible for fuelling wide discrimination and exploitation, preventing workers from exercising their rights in the country.”

This statement was supported by the members of the Human Rights Commission, who considered the system antiquated and damaging to the international reputation of KSA. It was generally considered to impose a form of indentured servitude on TFWs, as well as being a legal liability for sponsors that was used to justify oppressive controls on TFWs. In contrast,

the general opinion of the employers was that the sponsor laid out significant investment in procuring TFWs, and thus the *kafala* system protected their investment.

Although some respondents complained about the system, it was apparent that the growing awareness of the possibility of abolishing the *kafala* system was profoundly unsettling for most. Several employers, passport officers and labour inspectors were concerned about the potential integration of TFWs into Saudi society, and interviewees generally stressed the importance of maintaining ethnic homogeneity within Saudi society. Passport officers in Riyadh stated that “even though TFWs in KSA are Muslim, there are many differences in terms of language, culture and ethnic homogeneity”. There was implicit concern that potential long-term naturalisation of TFWs would introduce competition for resources (see Chapter 5). Those who supported maintaining the *kafala* system insisted that it granted labourers rights and provided adequate protection during their employment contract, while other participants stated that the individual sponsorship system should be reformed as it was unjust to TFWs and damaging to the reputation of KSA.

8.13.5. The negative role of individual sponsors

During the course of the interview with the policy stakeholders, one of the sub-themes that emerged was the negative role played by individual sponsors engaged in illegal recruitment practices, particularly visa trading, frequently reported by passport and labour officials.⁴¹ The general opinion of all the policy stakeholders regarding the negative role of individual sponsors was based on the following contextual factors:

- The demand for low-skilled labourers had encouraged many young and unemployed Saudi nationals to establish fake construction companies as a lucrative source of income.⁴²
- The systems for issuing work visas and recruiting TFWs were not difficult, and usually took less than one month.
- There were fewer requirements from brokers when they bought visas because the low-skilled work visa is easy for brokers to sell.
- Young and unemployed Saudi nationals chose the construction sector because the number of work visas issued was high compared to other sectors (usually five work visas on the first request); for the second instance of recruitment the number issued

⁴¹ See Chapter 5 for more discussion regarding these illegal employment practices in the SLM.

⁴² The minimum age to recruit TFWs in KSA is 21 years old.

was based on the evidence provided by employers showing the number of foreign labourers needed.

From the interviews with the senior labour inspector, it appeared that the process of recruitment in KSA was subject to the illegal practice of buying residential blueprints on the black market and submitting them with a fake work contract to show the need to recruit more TFWs to meet the demands of business. Once the individual sponsor submitted the recruitment applications to the MoL, the Ministry reviewed the applications and issued the visas based on the residential blueprints and work contracts. The MoL required the blueprints as a condition of recruiting TFWs for the second instance of recruitment to make sure that individual sponsors had official contracts with clients. This study revealed that many sponsors, especially in unstructured companies, used the black market to provide evidence of the need to recruit more TFWs.

8.13.6. Issues related to managing the admission of TFWs

The participant from the Legal Affairs Department of the MoI explained, in detail, the legal framework of admission of TFWs in KSA, arguing that despite the common assumption to the contrary, policies for TFWs were not wholly encompassed by the sponsorship system, and labour market demand and the national economic situation could cause a change in policy. However, a disconnect between the policies of the various ministries, which have overlapping jurisdictions (particularly the MoL and MoI), was identified as problematic, particularly pertaining to the private sector. The Legal Affairs officer of the MoI explained:

“The current system links the *kafala* system with employment contracts, which in my opinion is a major issue ... the Saudi passport must not link the employment contract [work permit, issued by the MoL] when they renew the residency permit [*iqama* issued by the MoI] ... the Saudi passport should give the labourer enough time – three to six months after losing his job with his original sponsor – to find another sponsor without affecting their legal status in the country.”

These suggestions could reduce illegal practices in the construction sector, such as illegal employment of freelance and runaway labourers, while protecting TFWs from abuse by their employers and facilitating TFWs’ access to some of their existing rights, such as access to medical services.

The interviewees from the Labour and Passport Departments discussed the challenges of and administrative limitations to managing flows of TFWs, such as lack of experience of

government staff in determining the need for TFWs to distinguish between well-established companies and fake companies as a result of corruption and nepotism (*wasta*).

One participant working as a recruitment manager in the Labour Department highlighted the limitations that negatively affected the management of the flow of TFWs to KSA, stating:

“These limitations relate to government agencies in the MoL and the MoI that grant the individual sponsor the rights to recruit TFWs, instead of a local recruitment agency. Furthermore, there is an insufficient capacity in government agencies to provide support to the local placement agencies in order to assist the sponsor in the placement process.”

In addition, according to the same respondent, the key institutional limitation identified on the labour-sending counties’ side was as described in this excerpt:

“The inability of recruitment agencies to match the skills of labourers with the needs of employers, especially those skills related to skilled labours which may create a conflict between the labourers and sponsors after their arrival in KSA. Sometimes this has even led to putting the life of labourers at risk by using a fake certificate for vocational training, to prove that they are capable of doing a job such as an electrician’s job.”

The respondent from the Human Rights Commission pointed out that the sponsorship system and other employment regulations were considered impediments to curbing illegal practices, such as visa trading, which had eventually led to the failure of the current admission system for TFWs (as presented in Chapters 4 and 5).

The labour inspector mentioned that there were administrative challenges in the MoL, such as a shortage of staff, especially labour inspectors, compared to the number of TFWs in KSA (10 million), which made it difficult to ensure that employers and labourers were complying with labour regulations (see Chapters 4 and 5).

8.13.7. Policies and regulations affecting the rights and legal status of TFWs

Respondents were asked to identify possible challenges arising from the SLL or other policies or regulations that may affect the employment relationships between sponsors and TFWs. The most significant impediment cited by respondents was the *nitaqat* system. A high proportion of employers (structured and unstructured companies) in Riyadh and Makkah reported the drawbacks of the *nitaqat* system and the new levy system for work permits granted by the MoL. The general opinion of the sponsors was that the *nitaqat* and levy

systems often caused instability in business operations and income, creating irregularity in the employment and residency status of TFWs. The SCS is very labour-intensive, and thus the *nitaqat* quotas are unfeasible as Saudis cannot conceivably perform construction roles. Failure to meet these quotas results in being blacklisted, and TFWs become illegal by default when their *iqama* expires. The difficult situation of employers was explained by a participant:

“This system [*nitaqat*] puts the sponsor between two decisions or the sponsor will lose his business in the construction sector ... one is to hire the Saudi worker who has no experience and pay a high salary ... also, they are not interested in the construction sector ... The second decision is to keep the TFWs working without legal documents and take a risk and pay any fines received from the Saudi passport department [*jawazaat*] for allowing the TFWs to work with expired documents ... That’s why many employers prefer to keep the labourers’ passports with them to ensure that the labourer does not change his sponsor ... because of these regulations such as the *nitaqat* system, the MoL usually do not take into account the negative impacts on the labour market.”

The representatives of the Human Rights Commission reported that the issues relating to TFWs were not caused by the *nitaqat* system *per se*, but by its effect on the construction sector. The *nitaqat* does not consider socio-cultural factors and perceptions of low-skilled or menial jobs that preclude the employment of Saudis, rendering the punishments of construction firms ineffectual and causing employers to use draconian methods to control TFWs.

Conversely, the labour inspector argued that *nitaqat* had a positive effect on the SLL, causing the number of fake companies (unstructured) to decrease and helping the MoL differentiate between real and fake businesses when granting licenses. Both the MoI legal advisor and the passport officer agreed that the current regulations in the SLM had affected the rights of TFWs. They highlighted that the legal status of TFWs under non-compliant sponsors became illegal through no fault of their own, and therefore they had to work without legal documentation, putting themselves at risk of deportation or exploitation by unprincipled contractors who were willing to hire them illegally.

Conclusion

Data presented in individual interviews in this chapter provides a deep insight into the current situation of low-skilled TFWs in the SCS. The rich data generated from the fieldwork (from various key players) affirms that the research method applied in this study is appropriate.

Some information gained during the course of the interviews is of particular importance in highlighting the vulnerability of TFWs to occupational conditions and risks, poor health care and social security, and a lack of effective legal protection or remedy.

There is complexity in the recruitment regulations applied by KSA and labour-sending countries. Social network theory is used to analyse the role of the social network (friends, brokers and sub-agents) in securing jobs in advance in KSA while workers are still in their home country. This theory helps identify, from the interviews with respondents, the impact of the migratory process on the rights of TFWs after their arrival in KSA. Gardner highlights that TFWs are attracted to work in KSA and other GCC states for many reasons, including good earnings, but they regularly receive misleading information and are subject to recruitment deception regarding work location and wages by key players in the home country, such as sub-agents and labour brokers.⁴³

It is often argued that the general contribution of the TFWs to developing the economy of KSA should give them a loud voice in terms of protecting and promoting their rights and freedom.⁴⁴ This study reveals that the issues of the TFWs in the SCS have various aspects, such as recruitment deception, the *kafala* system, restrictive labour, *iqama* regulations, poor enforcement of health and safety regulations and the workers' socio-economic backgrounds.

For this reason, this study applies dual labour market theory to analyse the structure of the SLM and provide reasons why the SLM needs to recruit low-skilled TFWs in the SCS. As discussed in Chapter 1, this theory provides an explanation of the type and nature of jobs in the SLM filled by low-skilled TFWs. Such jobs are frequently associated with unequal opportunities and treatment, which is institutionalised in stricter residency laws and labour policies. There are several studies which indicate the relation between temporary employment in low-skilled jobs and human rights exploitation.⁴⁵ For example, HRW contends that low-skilled TFWs who are often employed in construction sectors face potential human rights violations, including dangerous and potentially fatal working conditions, unpaid salaries, and

⁴³ Andrew Gardner, 'Why Do They Keep Coming? Labor Migrants in the Gulf States' in Mehran Kamrava and Zahra Babar (eds), *Migrant Labour in the Persian Gulf* (Columbia University Press 2012).

⁴⁴ Zakir Hussain, *Saudi Arabia in a Multipolar World* (Routledge 2016) 188.

⁴⁵ Peter Kivisto and Thomas Faist, *Beyond a Border: The Causes and Consequences of Contemporary Immigration* (1st edn, Pine Forge Press 2010) 57-58; see also Sevil Sönmez and others, 'Human Rights and Health Disparities for Migrant Workers in the UAE' (2011) 13 *Journal of Health and Human Rights* 17.

long working hours and unhygienic housing, which lead to serious health and safety problems.⁴⁶

The findings of this study reflect TFWs' feelings that they are objects of exploitation and abuse at their workplace at the hands of their employers and contractors. The study finds that TFWs (unauthorised labour) are reluctant to report malpractice, as they feel that doing so would make them vulnerable to punitive action or deportation. The perceptions of TFWs (authorised labour) working with their original employer show no significant differences, particularly with regard to the disrespect they receive from the passport officers and official inspectors who visit their workplaces. Rahman contends that many TFWs are able to secure work in KSA and other GCC states due to the high demand for labour⁴⁷ however, the employment is not free from abuse, ill-treatment or deception.

The data indicates that the poor treatment of the TFWs is rooted in their legal status and position in the SCS as cheap and flexible low-skilled labour. In the same vein, McGeehan highlights the issue of poor treatment of the TFWs from a class perspective, arguing that the employment of low-skilled TFWs has created a servant class.⁴⁸ He states that this kind of treatment of TFWs is similar to slavery.⁴⁹ An analysis of the various experiences of TFWs reveals ill-treatment occurring even though legal protection exists. This malpractice leads to prevention of the mobility of labour and protection of TFWs and their families in the country.⁵⁰

Furthermore, the findings of the fieldwork show that residency regulations are often changed by the government depending on labour market demands. Their lack of knowledge of the Saudi legal system and the language barrier are major problems for TFWs in the SCS. Vlieger argues that due to the absence of legal aid there is a lack of adequate information on

⁴⁶ HRW, 'Gulf Countries: Bid to Protect Migrant Workers' (HRW, 2016) <<https://www.hrw.org/news/2015/12/22/gulf-countries-bid-protect-migrant-workers>> accessed 2 November 2016.

⁴⁷ Md Mizanur Rahman, 'Migrant Indebtedness: Bangladeshis in the GCC Countries' (2013) 53(6) *International Migration* 205, 209.

⁴⁸ Nicholas McGeehan, 'The Gulf's Servant Class' in Will Kymlicka and Eva Pfostl (eds), *Multiculturalism and Minority Rights in the Arab World* (OUP 2014) 174-180.

⁴⁹ *ibid.*

⁵⁰ Andrzej Kapiszewski, 'Arab Labor Migration to the GCC States' in IOM (ed), *Arab Migration in a Globalized World* (IOM 2004) 115. See also AI, 'India: Exploited Dreams: Dispatches from Indian Migrant Workers in KSA' (Amnesty, 2014) <<https://www.amnesty.org/en/documents/ASA20/025/2014/en/>> accessed 17 May 2016; Anh Nga Longva, 'Keeping Migrant Workers in Check: The Kafala System in the Gulf' (Middle East Research and Information Report 211, 1999)20-22.

the rules, policies and regulations in the SLM that could provide legal assistance to TFWs.⁵¹ As a result, this study finds that the main source of information about employment conditions is family members or friends already working in KSA. This social network of informal support plays a vital role in employment, including mediating employment issues with sponsors, searching for new employers and seeking legal advice.

It is apparent that the TFWs of various nationalities, working in various roles for various construction companies, all share common problems related to the regulations regarding residence and employment in KSA. The study confirms that restrictive labour regulations and the *kafala* system create inequalities which lead to increased abuse, mistreatment, discrimination and forced labour of low-skilled TFWs.

The findings of this study explain how the current recruitment procedure in light of the individual sponsorship system is misused by individual employers in the SCS. Most policy stakeholders confirm that the individual employer is responsible for most of the exploitation and illegal recruitment practices, such as visa trading. Sönmez et al. highlight that all TFWs, regardless of their nationality, secure their employment with local sponsors who can misuse the *kafala* system. Several human rights challenges result, such as the ban on TFWs changing jobs, limits on their movement, unpaid wages and other types of exploitation, such as physical and verbal harassment.⁵²

Despite these challenges, Abrar argues that the demand for TFWs in the GCC states is unlikely to change in the near future, especially in the construction sector.⁵³ This is evident from the general view of most employers and labour inspectors, who believe that the shortage of labour in the SCS will continue, especially low-skilled labour, even though the general policies state that TFWs are recruited on a short-term basis to meet labour market needs in the construction sector.

Both the Passport and the Labour Department indicate several issues related to managing the admission of TFWs, such as corruption, nepotism (*wasta*), lack of experience of government staff and shortage of staff, especially labour inspectors. The view of the Human Rights

⁵¹ Antoinette Vlieger, *Domestic Workers in Saudi Arabia and the Emirates* (Quid Pro Books 2011) 213.

⁵² Sevil Sönmez and others, 'Human Rights and Health Disparities for Migrant Workers in the UAE' (2013) 13 *Health and Human Rights* 17, 19-20.

⁵³ Chowdhury Abrar, 'Bangladeshi Labour Migrants in the Gulf: Coping with a Large Unmet Need for Social Protection' in Rachel Sabates-Wheeler and Rayah Feldman (eds), *Migration and Social Protection* (Palgrave-Macmillan 2011) 262.

Commission is that the current *kafala* system is to blame for the failure of the current admission system, the lack of access to justice for breach of contract, mistreatment, exile and other grievances. Devadason and Meng argue that there are failures in the existing migration policies because they have been established for the *ad hoc* management of migration, there is no human rights protection mechanism and ineffective labour inspection.⁵⁴

These issues clarify why the SLL and other regulations lack enforcement and do not effectively protect the basic rights of TFWs in the workplace. Sönmez et al. argue that the culture of human rights in society is still weak, and hence the abuse of TFWs and exploitation of their rights will remain.⁵⁵ This explains why most GCC states, including KSA, do not adopt the international human rights conventions related to migrant workers.⁵⁶

This study finds that labour market policies and regulations do not take into account the socio-cultural factors surrounding low-skilled or menial jobs that preclude the employment of Saudis, rendering the punishment of construction firms not meeting the *nitaqat* requirement ineffectual and causing employers to use tough methods to control TFWs. This is evident from the negative experiences of TFWs in the SCS regarding labour market policies and regulations such as the *nitaqat* and levy systems. The study finds that these policies create irregularity in the employment and residency statuses of TFWs and affect their rights as workers.

HRW states that access to judicial remedies in the country is limited in the case of employment conflicts between TFWs and employers and that there are no clear indications of employers being sued for their violations of employment law.⁵⁷ Finally, this study reveals that Saudi Government agencies and TFWs' embassies or consulates in KSA do not function as major sources of support for labourers' rights when there is a dispute.

⁵⁴ Evelyn Shyamala Devadason and Chan Wai Meng, 'Policies And Laws Regulating Migrant Workers In Malaysia: A Critical Appraisal' (2014) 44 *Journal of Contemporary Asia* 19. See also Ray Jureidini, 'Human Rights and Foreign Contract Labour: Some Implications for Management and Regulation in Arab Countries' in IOM, *Arab Migration in a Globalized World* (IOM 2004) 201.

⁵⁵ Sönmez (n 52).

⁵⁶ *ibid* 12.

⁵⁷ *ibid*.

Conclusions, Summary of Findings and Recommendations

This thesis has addressed the issues and challenges faced by low-skilled TFWs involved in international labour migration. In particular, the research examined the protection of TFWs in the SLM with special reference to the construction sector. Using migration theories, the RBA and Islamic perspectives on labour rights, this study questioned the efficacy of Saudi domestic law in providing protection to low-skilled TFWs in the SCS. To address this question, the study examined admission policies, recruitment and employment law, working conditions, occupational safety and access to the justice system. The thesis has exposed three main issues encountered by all TFWs, particularly low-skilled workers in the SCS. Firstly, the residency regulations and employment laws related to recruiting TFWs are uncertain, fragmented and subject to government discretion. Secondly, the lack of coordination between the supervisory institutions and their general policies' focus on taking restrictive measures to control foreign labour recruitment, instead of upholding TFW rights. This is evident from the current Saudi Government's strategy of nationalising jobs in the secondary labour market to reduce the number of unemployed Saudi citizens. Therefore, the rights of TFWs in general, and low-skilled workers in particular, are not a priority for these institutions. Thirdly, due to their legal status as temporary workers, TFWs still do not have specific legal protection, even though Saudi authorities emphasise that the SLL protects the employment rights of both national and foreign workers. This research has shown that Saudi employment law fails to recognise the special situation of low-skilled TFWs and their families as a vulnerable group. Thus, the general legal framework is insufficient to protect their rights during employment in the country. Similarly, the restrictive regulation of the *kafala* system that governs the legal status of foreign nationals does not comply with international labour standards.

The theoretical framework presented in Chapter 1 analysed the various experiences of TFWs in KSA. The decisions of TFWs to move to KSA for work are often linked to economic and social and sometimes religious factors.

This study emphasised that dual labour market theory and social network theory play a significant role in providing a better understanding of labour recruitment, especially for low-skilled workers, and in assessing the current employment situation of those workers in the SCS.

Dual labour market theory explains the segmentation of the SLM in the primary (state) and secondary (private) sectors; the employment of TFWs in the latter is frequently linked to issues of human rights and frequently associated with unequal opportunities and treatment, which is institutionalised in stricter residency laws and labour policies. Social network theory explores the role of the social network in securing jobs in KSA through formal or informal recruitment procedures. Therefore, applying this theory has been useful to the study in order to identify the impact of the migratory process on the rights of TFWs before and after labour deployment. For empirical purposes, these theories have been used to clarify the TFWs' perceptions of their current recruitment practices and employment situation in the SCS. The thesis argued that these issues are rooted in the labour policies, recruitment procedures (in both the sending and the receiving countries) and temporary nature of employment agreements, which create an environment of exploitation and abuse during the pre-deployment and post-deployment phases.

The study used the RBA as a framework for the recognition of temporary foreign workers' rights as supported by human rights standards, the main objective being to analyse the principles of accountability and the rule of law, participation and empowerment, non-discrimination and human dignity in order to understand the extent to which the rights-bearers (the Saudi authorities, in this case) protect, promote and fulfil the rights of TFWs (the rights-holders) during their employment in the country. As a result, applying the RBA emphasised the significance of the RBA to labour migration as a tool to evaluate Saudi domestic law and policies that affect TFW rights in the SLM in general and the construction sector in particular.¹ Thus, this study revealed that the temporary immigration status, the

¹ As stated in this thesis, the RBA to labour migration is advocated by various reports by François Crépeau, the Special Rapporteur on the human rights of migrants, in order to tackle issues surrounding the rights of migrant workers.

SLM structure ‘in the context of labour market segmentation’, *nitaqat*, the new levy system and the *kafala* system have all established structural barriers which lead to the violation of the rights of TFWs and their families in KSA. Furthermore, as Saudi Arabia’s constitution states that all laws have to be in accordance with the Qur’an and the Sunnah, Islamic perspectives on labour rights have been used to analyse the rights of TFWs in KSA. Sharia makes the state both legally and morally accountable for safeguarding the people and ensuring their social and economic well-being. Therefore, this thesis has emphasised that KSA has an obligation to safeguard human rights as per the Sharia and its Basic Law.

Chapter 2 examined in detail the international legal standards relevant to the protection of migrant workers. These international standards attempt to guarantee that labour migration occurs in humane conditions by imposing an obligation on states to respect and promote human rights and treat all labour migrants living under their jurisdiction with dignity. Through comprehensive analysis of the international legal standards, the chapter argued that the labour-receiving countries, such as KSA, have sovereign rights to formulate policies to regulate the admission of foreign nationals, including TFWs. However, they are obliged to adhere, as members of the international community, to extensive labour protection standards stipulated in international legal instruments even if they are not signatories of these conventions. The ICMW and ILO Conventions No. 97 and No. 143 are significant for this study. The ICMW deals specifically with migrant workers and their families and extends its protection to cover irregular migrants. It is argued that these international legal conventions related to labour migration could establish a legal foundation for guidelines that inspire policy-makers in KSA to develop and enhance national regulations and reform policies to meet international requirements.

The discussion in this chapter also addressed the development of the human rights instrument at the regional level. There are various Islamic instruments (such as the UIDHR, the CDHRI and the ACHR) that have made promising efforts towards endorsing and promoting human rights principles. However, these Islamic instruments are limited, particularly compared to international instruments. These instruments are, with the exception of the ACHR, declarations; they do not have binding authority on the signatory states.

Nevertheless, this thesis has highlighted some promising developments in the Arab region related to labour migration, even though they are mostly still at an early stage of development. The 2006 Arab Declaration on International Migration is acknowledged to

benefit labour migration for both states of origin and states of destination, whether workers are moving to, among, or out of the Arab region states. The declaration also emphasises the significance of easing labour movement between Arab states, and has the aim of enhancing competitiveness and achieving regional integration.² Even though the declaration calls for all labour-receiving states to improve “human rights and fundamental freedoms of all immigrants”,³ the provisions remain non-binding documents and so do not impose any legal obligations on the states. In practice, most countries in the Arab region, especially the GCC, still impose restrictive labour migration policies and consider labour migration to be a national threat. Thus, limiting the number of foreign nationals in the country is becoming a national strategy.⁴

Unfortunately, many states have not ratified or implemented the ILO or UN conventions related to migrant workers. Hence, this study expected many TFWs, especially low-skilled workers, to continue to face various forms of exploitation and human rights violations, which are supported by restrictive immigration laws and policies. KSA is a primary example of this practice, even though it is a major labour-receiving country. Chapter 3 examined the domestic application of international human rights conventions in KSA. KSA has not ratified any of the conventions related to migrant workers. Thus, the Saudi Government is not legally bound to implement the principles laid out in these conventions. As discussed in this study, in KSA, where the Sharia is considered the main source of legislation in accordance with Article 1 of the Saudi Basic Law, a question is raised regarding the domestic application of international human rights conventions. The discussion in Chapter 3 showed that KSA is incapable of expressing a coherent position on the relationship of its domestic law to international human rights law. Even though Sharia fully accepts the dignity of work, fairness and justice for workers as Islamic concepts, this study has argued that some countries (including KSA) use Sharia as a reason for non-fulfilment of international protection standards, usually without providing any convincing argument.⁵

² Arab Declaration on International Migration (adopted 17-18 July 2006). This Declaration was adopted by representatives and experts of Arab States, meeting at the General Secretariat of the League of Arab States.

³ *ibid.* para 6

⁴ There is no specific legal protection for migrant workers in these instruments, despite the fact that Arab and Muslim countries have from ancient times experienced migration, especially migration to holy places.

⁵ See for more discussion Kirsten Zaat, ‘The Protection of Forced Migrants in Islamic Law’(2007) UNHCR, New Issues in Refugee Research, Research Paper No. 146<<http://www.unhcr.org/research/RESEARCH/476652cb2.pdf>> accessed 20 May 2016 and Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003). Nadirsyah Hosen, *Shari'a & Constitutional Reform in Indonesia* (Institute of Southeast Asian Studies 2007).

As discussed, KSA has ratified a few ILO and UN conventions which may help to advance TFW protection in the country. It is often said that general human rights and labour rights can be extended to all marginalised groups in society, regardless of migration status and nationality. Thus, KSA has a moral obligation, as a member of these international organisations, to respect and promote human rights and labour rights.

Chapter 4 provided a brief overview and definition of TFWs, noting that the role and objective of temporary employment is different from that of any migration programme (e.g. guest programme) established in developed Western countries. The discussion in this chapter therefore centred on understanding the institutional structure for managing TFWs and the overlapping jurisdictions and policies for administering the employment of foreign nationals in the country. The aim of the discussion in this chapter was to determine whether the economic interests of the Saudi Government and employers, in the context of a segmented labour market, can be matched with international human rights law to protect and uphold the rights of TFWs. It was observed that the critique of the employment of foreign workers on a temporary basis results from KSA's treatment of people as cheap, flexible and easy to exploit labour. Therefore, this chapter revealed that low-skilled TFWs face both legal and administrative challenges to getting equal treatment.

Efficient institutional and regulatory frameworks are crucial for dealing with TFW issues. Therefore, Chapter 5 provided a general insight into the framework governing the legal status of TFWs, with special reference to the construction sector. This chapter was divided into two sections that examined the existing policies, regulations and institutional frameworks responsible for TFWs, namely the MoL and the MoI. The first section dealt with two main issues, labour laws and other labour market regulations, and the general conditions of work in the SCS. The section examined the legal provisions and practices regarding recruitment procedures, processes for gaining work permits, occupational mobility, the ability to change employer and the admission of family members. The discussion addressed issues related to health and safety conditions in the workplace and the dangers of the construction sector. In theory, as stated above, the SLL sets out the workplace rights of TFWs; however, this study has shown that, through restrictive measures and policies, and the particularly vulnerable situation of TFWs, TFW rights are not always considered by policy-makers. This thesis has argued that the SLL and residency policies act in favour of national workers. This is obvious

from the last amendment, which still has ineffective mechanisms to enforce its laws and regulations.

This study has shown that because of the segmented labour market, Saudi laws and regulations discriminate against TFWs and pay less attention to their interests; the laws are made to some extent in favour of employers and, latterly, in support of indigenous workers. This is obvious from the last amendment to the SLL (2015), which means that all updated laws focus on increasing the number of Saudi workers in the private sector.

This study has argued that, given the large number of TFWs in the private sector, the hazardous working conditions in construction result in the sector having the highest number of injuries and fatalities in the workplace. It is not surprising that the majority of victims are low-skilled TFWs. Thus, this study has demonstrated that the enforcement mechanisms of the updated SLL (e.g. related to Inspection in the Workplace Article 196) has again failed to implement regulation, or at least establish proper remedies.⁶

The second section discussed residency regulations and provided a general overview of the *kafala* system. While there is no comprehensive migration policy, *iqama* regulations exist as a set of laws referring to the status of TFWs and their rights in the country. With the support of empirical data, in Chapter 8 it was recognised that most abuses are committed by individual sponsors due to the *kafala* system; the government is responsible for the extensive and systematic abuse faced by TFWs, particularly in terms of residency policies and basic human rights. A similar study conducted by Pande has pointed out the lack of understanding of employment contracts and legal dependency under the *kafala* system that puts many low-skilled TFWs at the mercy of their employers.⁷

This study has revealed that TFW issues are inadequately addressed by various authorities which have overlapping roles and are sometimes contradictory. All parties concerned in the Saudi Government recognise the significance of reducing the country's dependence on TFWs to avoid undesirable consequences in the future. By reviewing these policies and regulations, this study has exposed the recent restrictive employment policies applied by the government to the recruitment of TFWs, such as *nitaqat* quotas and imposing extra fees on renewing work permits, which have a negative impact on the rights of TFWs. The findings of this study have

⁶ See the SLL.

⁷ Amrita Pande, 'The Paper that You Have in Your Hand is My Freedom: Migrant Domestic Work and the Sponsorship (*kafala*) System in Lebanon' (17 June 2013) *International Migration Review* 414, 441.

shown, for instance, that the *nitaqat* system has a generally negative impact on TFW rights, as it bans employers from renewing residency and work permits, putting TFWs in an illegal situation in the country and in increasing conflict with their employers. Regarding work conditions, the major observations of the fieldwork concern the terms and conditions of employment of TFWs, which depend on their legal status (authorised or unauthorised) and the type of employer (structured or unstructured company) they have. Thus, while authorised TFWs enjoy, to some extent, minimum employment rights, unauthorised TFWs are often exposed to poor working conditions because they violate their employment and residence status by working for themselves as freelancers.

This chapter argued that labour migration policies and practices within the *kafala* system go against the general principles of human rights. This has been confirmed by official and unofficial Saudi bodies that attempt to improve the plight of TFWs under the sponsorship system. However, this study has argued that all the initiatives of the MoL and the NSHR to abolish the *kafala* system have not made any progress in terms of actual implementation. This has led the study to the assumption that the key deficiency of these proposed solutions is the absence of collaboration between the authorities in KSA, which shows that these suggestions are not difficult to implement, but rather that they are thrown together on an *ad hoc* basis to appease international condemnation.

In this regard, the fieldwork findings have indicated two issues faced by all TFWs, particularly low-skilled workers in the SCS. Firstly, there is an absence of legal rights and protections regarding labour relations, e.g. freedom of association and collective bargaining, which are crucial for TFWs to express their needs and protect their rights, specifically through trade unions and labour organisations, employment and health and safety regulations and access to legal remedy. Secondly, even if some of their rights under Saudi legislation relating to the aforementioned are available to them, low-skilled TFWs often lack the capability to access them. Thus, TFWs are placed in a disadvantageous position, increasing their vulnerability to abuse and exploitation in the SCS. The research identifies four key obstacles that are preventing the Saudi Government from endorsing the rights of low-skilled TFWs, which are political, security-related, social and economic.

The discussions in Chapters 4 and 5 stressed the fact that existing Saudi employment laws severely minimise the employment rights and privileges of TFWs, while residency regulations further complicate the vulnerability of TFWs and make employment rights hard

to implement. This can be seen when TFWs breach the residency rules; the residency regulations usually take priority, which signifies that TFWs are deprived of protection under the SLL.

Chapter 6 provided an extensive analysis of the Saudi legal system. It addressed the research question regarding the way in which the Saudi legal system could be effectively applied to protect TFWs in the SLM. The information given concerning the Saudi legal system (Basic Law, the executive, legislative and judicial authorities) identified the extraordinary influence of Sharia in the system. It explained specific issues connected with the Saudi judicial system, such as the absence of a labour court in the current judicial structure, and the negative (traditionalist) approach to the enacted law, such as the SLL and other rules and regulations related to the settlement of labour disputes. The chapter also discussed the labour committees, which have quasi-judicial functions, and identified several important legal deficiencies of these committees that could have an impact on the settlement of labour disputes.

One of the main legal deficiencies highlighted in this study was the lack of independence of the judiciary. The thesis argued that while the regulations applying to litigation before the committees for the settlement of labour disputes are issued by the executive authority (MoL), these are not recognised by Basic Law as a part of judicial authority. Furthermore, these regulations for litigation before the committees essentially violate the Judiciary Statute concerning the independence of the judiciary, as stated in Saudi Basic Law Article 46.⁸

Many violations are interrelated with employment contract and *iqama* regulations in such a way that the existing legal structure fails to address TFW issues sufficiently. It could be said that any employment conflict between an employer and a TFW is expected to affect their legal status in light of the current *kafala* system. The SHRC has criticised the process of the Labour Dispute Commission regarding resolving labour disputes, which constitutes a violation of human rights in KSA. The SHRC has submitted a case to the Labour Dispute Commission which highlights key issues, including the delaying of lawsuits for long periods (up to 3 years), the banning of TFWs from working with other employers and the non-appearance of employers before the Labour Dispute Committee. The SHRC has also identified the overlapping jurisdiction between the Passport Department and the Labour

⁸ Basic Law of Governance, Royal Order No. A/91 27 (1 March 1992) art 46: “The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia.”

Department in cases of a conflict between TFWs and employers (such as runaway *huroob* workers' cases). The SHRC has also identified the limited jurisdiction of the Labour Dispute Commission in labour cases relating to the confiscating of labour passports, runaway *huroob* workers' cases, and the transfer of the *kafala*. Generally, it is evident from the above discussion that labour dispute mechanisms remain vague in both law and practice. However, these commissions play key roles in adjudication and solving disputes related to employment agreements.

Chapter 7 discussed using grounded theory methodology for conducting empirical data collection. The semi-structured interviewing technique was used to collect data in the field. Conducting individual interviews with participants (policy stakeholders, individual sponsors and low-skilled TFWs) was significant to this study as it provided a chance to get to know the views of insiders concerning the present condition within the SCS.

This thesis adopted grounded theory as a methodological tool for inductively developing data-driven theory. This methodology was considered useful as it enabled the approach to be flexible and open to the discovery of previously unconsidered themes and ideas.⁹ Thus, the field research was a vital source of data that identified the roots of TFW problems.

Consequently, the theories that emerged from the data confirmed that the main issues of low-skilled TFWs in the SLM generally and in the construction sector in particular are not just a result of exploitation in the sponsor–TFW relationship, but rather are a result of the Saudi Government limiting the ability of such workers to exercise their rights in the country through the adoption of unfavourable policies and restrictive legislation.

The empirical data presented in Chapter 8 clearly suggests that the issues of TFWs are rooted in the labour policies, recruitment procedures (in both the sending and the receiving countries) and temporary nature of employment agreements, which create an environment of exploitation and abuse during the pre-deployment and post-deployment phases.

Furthermore, the current labour admission practices and the structure of the regulatory framework, including the *kafala* system, are insufficient to protect the human rights of TFWs and their families. This is evident from the overlapping policies and lack of adherence to laws

⁹ Emily Namey and others, 'Data Reduction Techniques for Large Qualitative Data Sets' in Greg Guest and Kathleen M MacQueen, *Handbook For Team-Based Qualitative Research* (Altamira 2008) 139.

and regulations in the SLM which fuel the employment conflict between employers and TFWs. This study has supported the argument that the sponsorship system and other restrictive labour regulations are an impediment to accessing justice for breach of contract, exploitation, deportation and other grievances. The study identified a number of impediments to accessing justice related to an employment conflict, including a lack of knowledge of the Saudi legal system and complaints procedure, a lack of documentation (e.g. a copy of the contract), a lack of free legal assistance and all these factors' impacts on TFWs' legal status in light of the *kafala* system. Even though some measures have been taken by the MoL to help TFWs, such as launching its website, 'labour education', to help workers know and understand their rights, this study finds that the inability to communicate in Arabic with Saudi official authorities and the absence of legal aid further exacerbate the problem.

This study has also confirmed that TFWs, especially low-skilled labour, face both legal and administrative challenges to getting equal treatment, and there is a need to balance conflicts of interest, particularly the interests of foreign labourers, employers and local workers.¹⁰ Therefore, one may conclude that the legal provisions in international human rights conventions or in national law appear to be inadequate due to the intrinsic bias of Saudi law and problematic enforcement in the complex socio-political and economic conditions of Saudi Arabia.

Recommendations

The findings and conclusions derived from this study indicate the need for extensive amendment to the employment law in KSA to bring it into compliance with international labour standards. This study concludes by suggesting legal and administrative strategies as a way forward to providing an effective protection mechanism for TFWs working in the SLM in general and the SCS in particular.

Liberalisation and reform of the legal system governing the status of TFWs

The current SLM situation indicates that due to the labour shortage there will be a continuous need for both skilled and low-skilled workers in the construction sector. Therefore, it is recommended that the restrictive policies and measures relating to the employment of TFWs be amended and substituted with a more flexible employment admission regulatory

¹⁰ See Rupa Chanda and Sasidaran Gopalan, 'Managing Migration In Asia: The Role Of Interstate Cooperation' in Randall Hansen and others (eds), *Migration, Nation States, and International Cooperation* (Routledge, 2012) 182-183.

framework. This would be in accordance with the resolution adopted in June 2004 by the International Labour Conference, which called for increased opportunities for regular worker migration based on labour market requirements and the sovereign rights of all countries to regulate their own migration rules.¹¹

From the above discussion, it is evident that the current restrictive measures and policies concerning the employment of TFWs in light of the *kafala* system are being increasingly questioned by national and international organisations. These policies have increased illegal employment of semi- and low-skilled workers in the SCS, where they are abused and exposed to exploitation and mistreatment. The argument in Chapters 4 and 5 and the findings of the study uphold the view that recruitment procedures presently followed in KSA work as an incentive to unprincipled individual sponsors to be involved in illegal recruitment such as visa trading. To tackle this issue, it is suggested that the government reconsider its recruitment procedures by strengthening the recruitment system through bilateral agreement with labour-sending countries, and substitute the current individual sponsorship system with a government sponsorship system to liberalise the system and curb the malpractices of individual sponsors. This would include TFWs being able to change employer or job once their original contract expires, having freedom of movement within the country, the ability to issue and renew work and residency permits once a valid employment contract is in place without needing the presence of the employer, and freedom of entry and exit from the country if a valid residency permit is held.

Taking the sovereign right of the state to regulate admission to its territory and other political, social, economic and religious factors into account, this recommendation does not call for Saudi Arabia to become an open-border state. This recommendation calls on the Saudi Government to review its recruitment procedures, sponsorship system and residency and employment regulations in order to curb corruption and illegal practices in the Saudi labour market.

Furthermore, there is a need to establish special government agencies responsible for dealing with all legal affairs related to TFW residency and employment in the country without TFWs having to seek the consent of their employers. Therefore, once a TFW has entered the country legally, that TFW should be able to deal with this proposed government agency directly,

¹¹ Manolo Abella, 'Policies and Best Practices for Management of Temporary Migration' (Proceedings of the International Symposium on International Migration and Development, United Nations, Turin, Italy, 2006).

empowering them in all matters related to employment and residency rights stipulated in Saudi domestic law.

Finally, this study recommends that the Saudi Government review all laws and regulations that affect the legal status of TFWs. The review should include the current laws and policies, such as residency permit fees and *nitaqat*, as these laws affect the legal status of TFWs working with non-compliant sponsors.

Unify the role of institutional administration

With the increase in the scale and complexity of employment of TFWs, the Saudi Government has established several governmental institutions to legislate and administer their employment. This study identifies overlapping jurisdictions and policies for administering TFWs in the SLM. As discussed in Chapter 4, the admission of TFWs is subject to policies and regulations that overlap between the MoL, the MoI and the MoFA. It is recommended that the responsibilities executed by these ministries be harmonised. This could be done by establishing one main institution which should deal with all matters related to administration and legal admissions of TFWs.

Furthermore, it is noted that the overlapping roles played by the Labour and Passport Departments have created a twofold permit system. As covered in Chapter 5, work permits are issued by the Labour Department, and the residency *iqama* permit is issued by the Passport Department. This study recommends that the current permit systems be integrated into one system. This would ensure coherence and coordination, help these institutions handle all matters related to TFWs effectively and reduce the conflict between the policies of the MoL, such as *nitaqat*, and the MoI regulations related to residency permits.

The roles of the MoL and the MoI in supervising and monitoring the labour market also overlap. There is a lack of coordination of their different policies and objectives. Thus, they are ineffective and disorganised. This is shown by the crackdown campaign on illegal workers in 2013 that resulted in mass deportation; a considerable number of undocumented workers were expelled from the country. This study recommends adequate measures be taken to enhance coordination and provide acceptable protection services and facilities, such as legal advice, good quality accommodation and health-care provision.

Unify the legal system and establish the need for a labour court

While the SLL is very comprehensive, the findings of this study reveal that the application of Saudi legislation is ineffective. One of the main challenges for the MoL is guaranteeing that all TFWs and their families enjoy the rights guaranteed by the Saudi Basic Law and other employment legislation. This study notes two persistent challenges. Firstly, the study reveals a disparity between labour legislation that defines TFWs as ‘non-Saudi’ and the constitutional provisions which define TFWs as ‘residents’ in terms of the protection granted to foreign nationals. Therefore, it is suggested that the terms be unified in all official Saudi documents, especially the Basic Law. The Basic Law must use the term ‘everyone’s’ instead of ‘resident’s’ so that it will apply equally to all persons regardless of their nationality.

Secondly, while the constitutional provisions mostly empower people to seek a remedy from the courts, one of the legal deficiencies stressed in this study is the lack of independence of the judiciary. As explained in Chapter 7, the regulations for litigation before the commissions for the settlement of labour disputes essentially violate the Judiciary Statute concerning the independence of the judiciary, as stated in Saudi Basic Law Article 46.¹²

This study recommends that the Saudi Government implement reforms in its judicial system and establish a labour court, unifying the judicial structure, that would be constituted and operate under the Ministry of Justice, rather than establishing quasi-judicial committees under the jurisdiction of an executive authority. This would ensure that workers get access to an independent authority to resolve all labour disputes and provide justice and equal treatment to all workers, as supported by Sharia principles. The reform must apply to all residency issues and labour disputes relating to salaries, work conditions, reports of mistreatment, dismissal, deportation and other grievances. As discussed in Chapter 6, such major reforms need to be applied to enforce enacted laws as well as to codify the rules of Sharia in order to promote consistency in court decisions. It is expected that the reform would eliminate all types of uncertainty and vagueness in the structure and jurisdiction of the Saudi judicial system. It is worth mentioning that this recommendation is in line with King Abdullah’s 2007 Scheme to Reform the Judicial System, which has not yet been implemented.

¹² Saudi Basic Law (n 8) art 46: “The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia.”

Strengthening institutional coherence, transparency and accountability

The MoL and the MoI are both effectively responsible for overseeing the employment of TFWs, yet neither takes full responsibility for protecting their rights. Current legislation and policies contain uncertain and fragmented regulations and are subject to the government's discretion.

Given the lack of coherence in current legislation, policies and jurisprudence related to TFW employment (as explained in Chapters 4, 5, 6 and 7), it is essential that the Saudi authorities ensure consistency between government agencies and the decisions issued in particular cases. Through improving coherence and consistency, it is expected that the employment and residency regulations will become integrated into comprehensive policies. KSA should thus try to harmonise employment regulations with the general admission of TFWs, including the residency regulations, to realise the principles of human rights.

As a major labour-receiving country, KSA would benefit fully from international labour migration if it were to endorse transparent TFW admissions policies, which may lead to less criticism of these policies. The MoL website provides general information about its strategy and objectives related to the SLM. The legal framework for the admission of TFWs to KSA is not clearly defined, especially as it relates to their rights to attaining permanent residency if they live in KSA for a long period. It is recommended that the TFW admission framework be made transparent by defining the legal status of every TFW and the reasons for recruiting them into the country. As explained in Chapter 5, the lack of published government documents explaining the legal framework for admission of TFWs into KSA means that this study adopts a definition proposed by Martin Ruhs which correctly explains temporary labour employment in the context of KSA.

Transparency is vital for prospective TFWs and the labour-sending countries, as it provides a clear definition of their legal status in the country of employment. This would provide a cooperative approach to managing temporary labour mobility among government agencies in both the sending and the receiving countries. It would also help to protect and maximise the benefits of international labour migration. It is worth mentioning that this suggestion is in line with the Abu Dhabi Dialogue objectives (see Chapter 4). This study recommends that the Saudi labour attaché in the Saudi embassy play a significant role in endorsing TFW admission policy transparency in labour-sending countries.

Furthermore, in relation to institutional accountability, in order to provide effective protection of workers' rights, this study recommends that these institutions be established in every city in KSA with responsibility for enforcing workers' rights and adopting a proper systematic mechanism to support and address their residency and employment issues and that they should even provide free legal aid.

Moreover, this study recommends that, at international level, KSA as the major labour-receiving country in the region (with almost 10 million foreign workers) play a key role in the Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin and Destination in Asia, as discussed in Chapter 4. Formal dialogue between Saudi Arabia and labour-sending countries is essential in forming an international labour migration regime. This study suggests that such a dialogue would enhance the regulatory framework for labour migration between countries.

At the national level, this study recommends the Saudi Government carry out consultation and collaboration with non-governmental actors such as representatives of the private sector, as they have experience of labour market needs and can help propose a proper mechanism to tackle the issues. It is suggested here that the Saudi authorities allow both national and non-national workers, whether working in large or small companies, to form trade unions. The participation of key players in the labour market, such as national workers, foreign workers and employers, in a national discourse is considered an important step, as the policies discussed directly affect their employment. It is also suggested here that local human rights organisations be consulted regarding TFW-related employment policies, as these organisations are responsible for monitoring and observing human rights situations in the country, as discussed in Chapters 2 and 4. It is worth mentioning that both the findings of this study and the application of the RBA principles have helped the researcher propose these recommendations.

Strengthening labour inspection

The official data presented in Chapter 5 reveals that the monitoring mechanism of labour inspections is still ineffective and accounts for the high rate of workplace-related injuries in the SCS. It is noted that the scope of inspection of the Labour Department is not limited to matters of occupational health and safety but extends to all issues related to the labour market, including labour recruitment, checking work and residency permits and follow-up on

Saudisation commitments in the SLM. This fragmented role is one of the impediments to enforcing and monitoring labour regulations, as revealed by the findings of the fieldwork (even though the latest SLL amendment in 2015 gives the labour inspectors some incentives, as outlined in Chapter 5).

This study recommends that the labour inspectors be limited to their main role of ensuring decent working conditions and enforcing labour regulations in this regard.

The labour inspection department should be prepared to deal with working conditions, taking a comprehensive approach to guaranteeing the protection of TFWs in the workplace as per the SLL. To achieve this, labour inspectors should be empowered and given adequate training related to health and safety regulations in the construction sector. Furthermore, it is noted that the lack of human resources, especially technical staff, to monitor large numbers of companies over the entire country, makes the implementation of the requirements of health and safety in the workplace difficult to achieve.

The need to ratify and implement the regional and international conventions on migrant workers

The justification provided by this study for ratifying the conventions for migrants is that KSA is still the main destination for TFWs, especially low-skilled labour. Even though KSA has ratified a number of UN and ILO Conventions, these ratified conventions can be extended to protect non-national lives in its territory. It is therefore recommended here that the Saudi authorities ratify and implement the international labour migration conventions.

These international standards are vital in order to guarantee that all employment practices, labour regulations and admission policy frameworks are effectively protective. It could be beneficial to revive the proposal of the NSHR, as outlined in Chapter 4, in order to encourage policy-makers to ratify the conventions, including the ICMW, as these conventions are generally in agreement with Saudi national law. The ratification of these conventions needs to integrate their standards into domestic law. As discussed in Chapter 4, as KSA has a dualist legal system, international conventions need to be domesticated before they can be enforced, otherwise the ratification would be pointless.

As stated, the special situation of TFWs cannot be protected by general legislation only. This study stresses that the protection of labour rights and human rights is the responsibility of the state, as the duty-bearer. As François Crépeau states, “[A] human rights-based approach

focuses on the development of the capacity of duty bearers to meet their obligations and of rights-holders to claim their rights. Such capacities include ... resources, responsibilities, authority and motivation.”¹³ It is believed that applying a RBA could help meet the specific needs of labour protection.

Furthermore, the international conventions arising from the ILO or the UN, such as the ICERD, that KSA has ratified obligate the country to implement them in a way that guarantees equal treatment for non-citizens and citizens. However, it has been observed that KSA, as a party to the ICERD, still does not have any procedural or substantial law to deal with any discrimination against individuals. This could provide a better explanation of why human rights violations occur in KSA, which usually discriminates. This study recommends that Saudi law must have the capacity to deal with discrimination against individuals and other human rights violations.

The need for labour market data and information

One key challenge identified in this study is the lack of official data and poor academic research on the Saudi institutions related to the SLM. Although the latest data and current labour survey reports have basic information about workers in the SLM, such as occupation, qualifications, employment sector and gender, this data is collected by various ministries and agencies. This leads to unreliable data which is insufficient to determine the actual needs of the SLM for a workforce recruited from abroad, especially low-skilled workers.

This study recommends that the information collected be expanded to include annual assessments of market needs for labour, recruitment policies and TFW profiles, including nationality, education, skills, gender, age and sector of employment. The failure of Saudi institutions, including the MoL, in this regard has led to an increase in the number of unstructured companies, which creates illegal employment in the SLM. Therefore, this study suggests that these issues could be solved by establishing databases and making the recruitment of TFWs subject to the concept of supply and demand and not subject to the desire of the sponsor to recruit labour from abroad, usually for the purpose of trading visas. Saudi institutions fail to provide necessary information about TFW issues in the labour market. This extra information, and having reliable data, would assist both the Saudi

¹³ François Crépeau, ‘A Rights-Based Approach to Labour Migration’ (*Oppenheimer McGill*, 2014) 5426 <<http://oppenheimer.mcgill.ca/A-Rights-Based-Approach-to-Labour>> accessed 21 March 2016.

Government and the labour-sending countries to interact based on full knowledge and address the concerns of TFWs.

It is suggested that collecting accurate data would not only enhance the capacity of these institutions but would also improve the academic research environment in Saudi universities and other institutions in the Gulf interested in labour market issues. This could enhance government strategy regarding the legal admission of TFWs, both regionally and internationally.

Raise awareness and endorse corporate social responsibility

This study shows that there are many different perceptions of the SLM which affect labour rights, such as unawareness, or other socio-cultural perceptions, of low-skilled jobs. Some common practices, such as confiscating labour identification and the non-payment of wages, contain an element of forced labour and human trafficking (as explained in Chapters 2, 5, 6 and 8). The results of this study reveal that some participants (labourers, employers and Passport and Labour Department officials) are unaware of the concepts of forced labour and human trafficking or their responsibilities to claim or protect labour rights. This study therefore recommends that these human rights issues be addressed by establishing educational programmes and workshops to raise the awareness of all key players in the SLM, including local societies, of labour rights. Furthermore, it is important to carry out this programme in the languages of the foreign workers in the country. As mentioned, the engagement of local human rights organisations and other NGOs is critical to tackling the human rights situations of TFWs, especially in the SCS.

Finally, this study recommends the Saudi authorities, especially the MoL, adopt corporate social responsibility (CSR) as part of their regulations in order to promote and protect rights in the workplace. Gómez and Crowther emphasis that “the need for social responsibility is by no means universally accepted but evidence shows that ethical and socially responsible behaviour is being engaged in successfully by several large corporations – and this number is increasing all the time”.¹⁴ Thus, it is expected that if CSR is adopted as part of the companies’ strategies, whether on a voluntary basis or by way of incentives, it could help to raise the standard of labour efficiently in the workplace.

¹⁴ Ana Maria Davila Gómez and David Crowther, *Human Dignity and Managerial Responsibility* (Gower 2012) 2.

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Appendix 1: Temporary foreign labourers' interview guide

General information

- What is the main motivation for leaving your home country?
- What are your perceptions of Saudi Arabia?
- What is the reason for working in Riyadh/Makkah?
- How long have you been working in the construction industry? Is this the first time you have worked in the construction industry?

Recruitment procedure

- Did you get your current job through a recruiting agency, broker or family member?
- Have you paid any money to get a work visa, whether to the broker, recruitment agency or your employers?
- Are you working for a private company (investor) or family/individual company? What is the role of the extended family?
- Have you ever attended any workshops (pre- or post-arrival) to help you to understand the Saudi law, culture, language or lifestyle?
- Do you think that employment agencies in your home country are not likely to do their job professionally in terms of explaining terms and conditions of contracts before sending workers to their jobs?

Working and employment conditions

- How would you describe current working conditions in the construction sector in general, and specifically these points?
 - What type of job do you perform?
 - How many hours do you usually work?
 - Do you get any breaks in your workplace?
 - Do you and your family have health insurance?
 - Health and safety of the workplace.
 - Accommodation.
 - Transport.
 - Family reunification.
 - Differential wages between workers.
 - Are your wages paid daily, weekly or monthly? Cash or bank transfer?
 - Do you get any sick leave? Do employers deduct your salary when you are unable to work in case of sickness or emergency?
 - Termination.
- Working in the construction industry involves a lot of hard work. Is your employer using specific equipment in order to help you in your work, such as using heavy machinery?

Employers, official bodies and supervisors' relationships with TFWs

- Does your employer treat you with respect?
- Do you have to seek the permission of your employer to start or choose a job, travel within the country, or take rest and holidays?
- Do you think that foreign workers are treated fairly and without discrimination because of their background, nationality, religion etc. by employers, official bodies and supervisors at the workplace?
- What is the main reason for changing employer?

Foreign workers' views about Saudi law and other related factors

- Do you think that there is any possibility of abolishing the sponsor/*kafeel* system?
- Do you think the existing laws for resolving disputes between employers and foreign workers are reliable and realistic?
- Would it be possible for foreign labour to go to the courts? If yes, which court? Do they need assistance from any government office, non-governmental office or embassy to go to court?
- Do you think that many foreign workers lack knowledge of the labour and residency laws of Saudi Arabia?
- Do you think that foreign workers rarely know about the possibility of complaining against their company or sponsor?
- Do you think that conflicts could cause a breach of contract due to reasons relating to working hours, wages, nature of work, freedom to move to other jobs etc.?
- Do you think that the Saudi Government (Labour of Ministry) keeps the employers/companies/foreign workers informed about changes made to the labour law?
- Do you think that employers or companies educate foreign workers about their responsibilities and rights and current employment law during their probation period?
- Do you think that foreign workers switching from one employer to another without informing the government could affect their rights as foreign workers in Saudi Arabia or cause conflict?
- Do you face any problem in issuing or renewing your residency card? If yes, how?
- What is the main reason behind the confiscation of foreign labourers' passports by their employers? Do you think they have the right to do that?
- Do you think that Saudi labour laws, including the Saudization policy or *natiqat* law, has affected the rights of foreign labourers in the private sector?
- In case of employment conflict, are you familiar with labour dispute settlement?
- Do you think that the Ministry of Labour should be involved when there is a conflict between employers and employees, for example should they compel the employer and employee to abide by the terms and conditions of the contract?

- Do you think that there is a way to reduce or resolve labour disputes between foreign workers and employers (sponsors) or with other official bodies such as the Ministry of Labour or Ministry of the Interior?

Appendix 2: Employers (sponsors) and policy stakeholders interview guide

General information

- How long have you been working in the construction industry?(employer)
- Are you working in the construction industry as a sponsor/director of a company or as an employee? (employer)
- How long have you been dealing the private sector matters?(policy stakeholders)

Recruitment procedure

- Do you usually recruit foreign labourers through a recruitment regency or broker in their country, or do you contact the Saudi recruitment agency to recruit foreign labour on your behalf? (employer)
- Do you think that employment agencies in sending countries are not likely to do their job professionally in terms of explaining the terms and conditions of contracts before sending workers to their jobs in the country of employment? (employer) and (policy stakeholders)
- Does your department/ company coordinate any events with similar government agencies in order to supervise and regulate the private sector (construction industry) or the recruiting of foreign labour? (employer) and (policy stakeholders)

Labour conditions in the private sector

- How would you describe the current working conditions in the construction sector in general?
- In relation to employment contracts, who has the right to stipulate the terms and conditions in employment contracts, employers, the Ministry of Labour or lawyers? If employers, do you get the general framework of the employment contract from the Ministry of Labour or from a law firm?
- Do you think that many employers (sponsors) lack knowledge of the labour laws of Saudi Arabia?
- Do you think that conflicts could cause breaches of contract for reasons relating to working hours, wages, the nature of work, freedom to move to other jobs etc.?
- Do you think that foreign workers are treated fairly and without discrimination regarding their ethnic background, religion, nationality etc.?
- What is the main reason for the confiscation of foreign labourers' passports by their employers?
- Do you think that the residency laws and other labour regulations encourage discrimination against foreign labourers and the abuse of their rights by unprincipled employers?
- What is the main reason for changing employers (sponsors)?

Legislative framework

- Do you think that there is any possibility of abolishing the sponsor/*kafeel* system?
- Do you think that the residency laws and other labour regulations encourage discrimination against foreign labourers and abuse of their rights by unprincipled employers?
- Do you think that Saudi labour law, including the Saudization policy or *natiqat* law, has affected the rights of foreign labourers in the private sector?
- In the case of dispute with employers, do workers feel that the law is a source of protection for them?
- Do you think that improved contract law and setting up a minimum wage mechanism for foreign workers could minimize the amount of conflict and discrimination?
- Do you think that foreign workers rarely know about the possibility of complaining against their company or sponsor?
- Who has ultimate responsibility for protecting foreign labourers in Saudi Arabia (e.g. employers or government bodies)?

Labour issues

- What issues do foreign labourers usually face in Saudi Arabia?
- Why are foreign labourers excluded from participating effectively in the Saudi labour market, such as having freedom to change employment or employer, attending training courses or pursuing their education?
- Do you think that employment agencies in sending and receiving countries are not likely to do their job professionally in terms of explaining terms and conditions of contracts before sending workers to their jobs?
- What is the main reason for the confiscation of foreign labourers' passports by their employers? Do you think they have the right to do that?
- What effective measures can be adopted to provide protection to foreign labourers against all forms of exploitation?

Appendix 3: Table of individual interviews with TFWs

Research site	Total number of interviewees	Recruited by Structured company	Recruited by unstructured company	Nationality
Riyadh	12	5	7	Indian, Egyptian, Pakistani, Bangladeshi
Makkah	14	9	5	Indian, Egyptian, Pakistani, Bangladeshi

Appendix 4: Table of individual interviews with employers and policy stakeholders

Research site	Number of interviewees	Type of participant
Riyadh	7	Employers
	11	Passport officers Senior members of Legal Affairs Department of the MoI Labour inspectors Labour legal advisors Representatives of human rights from governmental agencies Representatives of independent human rights support group
Makkah	7	Employers
	9	Passport officers Labour inspectors

Appendix 5: Research Participant Information Sheet

Research Title: “Protecting the Rights of Temporary Foreign ‘Low-Skilled’ Workers in the Saudi Construction Industry: A Case for Legal Reform”

Purpose of the Research:

The main goal of the proposed research is to gain an insight into the actual experience and lived reality of foreign workers in the Saudi construction industry and whether labour relations codes, employment standards, and human rights legislation in Saudi Arabia are designed to take into account the special situation of foreign labour. The researchers will interview a set number of people dealing with construction industry. The researcher proposes to interview low skilled foreign labours, employer, government and semi-government authority. In the light of their experience, the researcher would be able to identify the gaps in the Saudi labour market and propose the legal structure to protect the foreign labour in Saudi Arabia.

If you agree to take part in this interview, I would be happy to conduct the interview face to face at any time convenient to you. You have the right to:

- 1- Withdraw from the interview at any time and withdraw the data you have provided and refuse to answer any question(s).
- 2- Ask any question about the research during the course of the project and check the information you have provided and amend any part.

Your participation in this research is voluntary and the information provided will be treated with confidentiality. Your identity will not be disclosed in any part of the thesis as the responses will be coded. All the research material will be stored in a secure place with the researcher and will not be revealed to anyone except the research supervisors.

The interview is designed in a way to reduce any risk that might touch the participant’s personal wellbeing. The study is limited to the temporary foreign labours who are working legally in country. You will have the option to refuse to reply to any question that you feel uncomfortable with. The researcher has no plan of paying participants for their involvement in this research project.

This study is funded by the Ministry of higher education in Saudi Arabia in the form of scholarship. The main benefit of this research is that it will identify reforms required to ensure that foreign labours in Saudi Arabia are protected during their employment in the country by evaluating the existing law. The information will be used merely for the purpose of this research. Findings from this study are subject to publication in the PhD thesis and other academic purpose such as journal articles and academic conferences.

Should you require further clarification, please do not hesitate to contact the investigator.

Investigators:

Abdullah Moied Almutairi (PhD Candidate)
Phone Number: 00966580400888 / or +447950408518
Brunel University, Brunel Law School, England

Appendix 6: Pre-interview form

Name of Researcher: Abdullah M. Almutairi

Title of Study: “Protecting the Rights of Temporary Foreign ‘Low-Skilled’ Workers in the Saudi Construction Industry: A Case for Legal Reform”

Participant reply form: please complete if you are happy for the research investigator to contact you.

Please tick the box

1. I confirm that I have attended the event and understand and read the research information sheet for the above study and have had the opportunity to ask questions.
2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.
3. I understand that the researcher is working on the research project as part of his PhD thesis.
4. I understand that I will not be identified in any report subsequently produced by the researcher as all the data will be anonymous.
5. I understand that all the research material will be stored in a secure place with the researcher and will not be revealed to anyone except the research supervisors.
6. I understand that if do not speak English or Arabic language I can have a neutral interpreter (if it necessary) in the interview.
7. **I agree to participate in a study being conducted by Abdullah Almutairi and to contact me on the below telephone number/email to arrange an interview at a time and location to suit me.**
8. **Or I do not agree to participate in a study above study.**

_____ Name of Participant	_____ Date	_____ Signature
_____ Contact telephone number:	_____ Email:	_____ Researcher's Signature
_____ Researcher Name	_____ Date	_____ Researcher's Signature

