

**A NEW INSTITUTIONAL ECONOMIC ANALYSIS OF MIGRATION LAW: CAN REFORM OF THE
KAFALA SYSTEM INCREASE FOREIGN DIRECT INVESTMENT IN SAUDI ARABIA?**

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Dedicated to:
My Mother: Hassah
My Father: Abdullah
My Wife: Wejdan
My Sister: Latefah

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Abstract:

Labour migration to the Gulf Cooperation Council (GCC) countries has been occurring for several decades. Most of the GCC countries regulate this process through the Kafala System, a legal regime through which individuals and companies can sponsor foreigners with whom they have concluded an employment contract. But why do these countries bring millions of foreigners to their lands and what rights does the Kafala System guarantee them? Are there any negative economic and political consequences that result from the way that the Kafala System has been conceived in the GCC countries? If so, how can this system be reformed so that it produces more desirable economic and political outcomes? This thesis explores these questions in the context of the Kafala System in Saudi Arabia. It uses a New Institutional Economics (NIE) approach to understand the political, economic, and historical context within which the Kafala System arose, positing that the design of the system reflects a desire to promote economic growth and improve political stability while remaining rooted in the Islamic identity of Saudi Arabia. It further shows that for a long time, the Kafala System was successful in furthering these objectives. However, it has lately become prone to producing suboptimal outcomes. Foreign direct investment in Saudi Arabia has gone down, remittance outflows as a percentage of GDP have increased, skilled and highly skilled workers are leaving the kingdom, and even Saudi Arabia's political stability has been reduced. Given all of these problems, the thesis uses Path Dependence (PD) theory to argue that the only reason that the Kafala System continues to be in place is that it has become a path-dependent institution that is resistant to change. This took place in three steps: (1) the initial set of choices that created the Kafala System were informed by important economic and political considerations as well as an affirmation of the Kingdom's commitment to tie all legal institutions to an Islamic source, (2) the Kafala System successfully helped Saudi Arabia achieve rapid economic growth and increased political stability, outcomes which served as a positive feedback effect, and (3) the continued use of the Kafala System has increased switching costs because of learning effects, coordination effects, and adaptive expectations. The thesis then argues that in order to successfully reform this system, it is important in the first instance to justify proposed changes in light of Islamic teachings, since this will improve how receptive Saudi society is to them. At the same time, it is also necessary to show that changes in the international investment climate and the transition to a global information economy constitute a 'critical juncture' during which the problem of switching costs can be overcome and far-reaching reforms can be successful. Of course, it goes without saying that reforms that increase protections for the rights of workers would also align Saudi Arabia's domestic law with its international treaty obligations.

Keywords: Saudi Arabia, Kafala System, Labour migration, Migrant Workers, New Institutional Economics, Path Dependence, Human Rights, Foreign Direct Investment.

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Table of Abbreviations

FDI	Foreign Direct Investment
NIE	New Institutional Economics
PD	Path Dependence
GCC	Gulf Cooperation Council
ILO	International Labour Organization
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
UIDHR	Universal Islamic Declaration of Human Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
MNC	Multinational Corporation
CSR	Corporate Social Responsibility
WTO	World Trade Organization
OECD	Organization for Economic Co-operation and Development
FET	Fair and Equitable Treatment
TWAIL	Third World Approaches to International Law
CRC	Right of the Child
OIC	Organization of Islamic Cooperation
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Chapter One: Introduction

Labour migration has become increasingly common over the last century. This not only has significant economic and political implications for both sending and receiving countries, but also raises important questions about the rights of migrant workers. In response to this, the UN and the International Labour Organization (ILO) have established international norms on the treatment of migrant workers through the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* as well as various ILO conventions. However, state practices continue to vary drastically when it comes to treatment of migrant workers.

This thesis is a study of the legal regime for regulating migrant workers in Saudi Arabia. Known as the Kafala System, this regime has existed in Saudi Arabia since the oil boom of the 1930s and enables individuals and companies to privately sponsor foreigners with whom they have concluded an employment contract. The Kafala System has, however, been the subject of significant criticism because of the violation of workers' rights that have occurred under it.

This thesis explores the kinds of human rights violations migrant workers in Saudi Arabia experience, the obligations Saudi Arabia has towards migrant workers under both domestic and international law, and suggestions for reforms to the Kafala System. This portion of the thesis will use a traditional human rights methodology to analyze the Kafala System and identify Saudi Arabia's international obligations. In order to increase the likelihood that these reforms will be implemented, the thesis will also explore how they can be made congruent with the economic and political benefits that I propose will result from bolstering human rights protections in the Kafala System. This portion of the thesis will adopt the path dependency analysis from New Institutional Economics, which posits that successful legal reform is premised on understanding the incentives that exist for maintaining existing laws and, using this knowledge, identifying ways to reduce the cost of legal reform, thereby creating incentives for local actors to accept it.

Roadmap

In this introductory chapter, I provide an outline of the thesis and set the context for the study of the Kafala System. This will involve introducing the notion that human rights are based on the inherent dignity of human beings, and then explaining how labour rights as a category of human rights promote this important value. This introduction will provide the motivation for undertaking a study of the Kafala System.

The second chapter outlines the theoretical framework within which this thesis proposes to study the Kafala System. In particular, it discusses how a multidisciplinary human rights methodology, New Institutional Economics (NIE), and Path Dependence (PD) analysis will be used to analyze the Kafala System. A human rights methodology employing tools from both legal and social science research will be used to identify Saudi Arabia's obligations under international and Islamic law and to assess the extent to which they are being respected. This assessment will rely on UN documents, official governmental and non-governmental reports, the works of NGOs and commissions, journalistic accounts, and academic research. NIE will be used to help contextualize the Kafala System. By focusing on the institutional context in which the system exists, NIE will help to identify the origins, development, and function of the Kafala System within the social, economic and political landscape of Saudi Arabia over the last ninety years. Finally, PD will facilitate an in-depth study of the features of the Kafala System that make it resistant to change and help identify avenues that exist for reforming it effectively.

In the third chapter, the problems which arise because of the Kafala System will be detailed. The chapter will begin with an overview of the laws and regulations applicable to migrant workers in Saudi Arabia. This will be followed by a brief history and description of the Kafala System (KS) and a discussion of its role in the Saudi economy. Next, the chapter will detail the various problems that the Kafala System creates for migrant workers. In particular, it will show on the basis of reports by international NGOs that many of their fundamental rights are not respected. For one, they are not dealt with in good faith during the recruitment process, including being deceived about compensation, working and living conditions, and the extent of their financial obligation to their sponsor. In addition, once in Saudi Arabia, they endure physical and verbal abuse, unsafe working

conditions, low wages, long working hours, delayed payment, restrictions on movement, and ineligibility for Saudi citizenship. These infringements of workers' rights are not only inconsistent with international human rights law, but also with the teachings of the Islamic faith. The chapter furthermore shows that the effects of these problems are not limited to migrant workers; they also have a significant effect on Saudi Arabia's economic performance and political strength.

Chapter four presents an analysis of the origins, development, and functioning of the Kafala System, in addition to providing a detailed map of the legal framework governing the rights and duties of migrant workers. Using an NIE lens, it makes the case that the Kafala System's design was a response to Saudi Arabia's need for large amounts of labour following the oil boom. Because Saudi Arabia is an Islamic society, this system for sponsoring migrant workers had to be associated with a legal concept that was familiar to Islam, namely, Kafala. The changes that the Kafala System underwent after being introduced, including the introduction of ever more stringent conditions of naturalization for migrant workers, ending in elimination of this possibility, reflected a desire to ensure political stability by excluding Arab migrants from full enfranchisement. By limiting and then eliminating the possibility of naturalization, the Kafala System was less appealing to Arab migrants who might mount a challenge to the rulers of Saudi Arabia. Given these political and economic considerations, the rules of the Kafala System made sense and were successful in furthering Saudi Arabia's goals. However, as Saudi Arabia now faces serious economic and political difficulties, the Kafala System is no longer able to respond to the needs of the country. Furthermore, the treatment of migrant workers under the Kafala System runs afoul of the rules for the treatment of migrant workers under Islamic law, which is the cornerstone of the Saudi legal system. This chapter uses PD to analyze why the Kafala System is still in place despite the fact that it has become prone to producing suboptimal outcomes. It argues that self-reinforcing mechanisms, high switching costs, and institutional interdependencies have made the Kafala System a path-dependent institution. In particular, as more and more time, money, skills and expectations have been invested into the Kafala System, it has become correspondingly more costly to explore alternatives. The affluence that so many segments of Saudi society enjoy is in large part dependent on the Kafala System, thus creating a 'network effect' that makes it extremely cumbersome to change the structure of the Kafala System without disrupting every other member of society's way of doing things. These factors have resulted in the Kafala System becoming

deeply entrenched and have rendered piecemeal changes largely ineffective. However, given that there is a push to carry out a social and economic transformation of Saudi Arabia to reduce its dependence on oil, improve the skill level of its workforce, and makes its economy globally competitive, this thesis argues that this situation is what is known in PD theory as a critical juncture, a time period during which radical reforms to an institution can be effective. Furthermore, since reforms to bolster human rights protections for migrant workers are entirely consistent with Islamic law, they respect the institutional environment of the Kafala System and would therefore be more easily accepted.

The next chapter explores the link between respect for human rights and levels of foreign direct investment (FDI). It shows that as the global economy becomes more and more an information economy, there is a positive correlation between strong protections for human rights and FDI. This is because doing business in a country that has strong protections for human rights protects a company from damage to its reputation, which is ultimately good for its bottom line. In addition, adherence to high human rights standards is an indication that a country is politically stable and possesses a highly-skilled workforce. Based on these findings, the chapter argues that it is in Saudi Arabia's best interest to bolster human rights protections in the Kafala System, especially since it is a stated aim of its Vision 2030 to increase the skill level of its labour force and to attract high quality FDI. Vision 2030 also declares that Saudi Arabia wishes to remain true to its Islamic heritage. Strong protections for workers' rights is consistent with this as well.

Chapter six addresses Saudi Arabia's human rights obligations towards migrant workers both under its own domestic law as well as under international law. It begins by making the case that an instrumentalist line of reasoning is the best way to justify the application of international human rights standards to Saudi Arabia since the entire system of international human rights is arguably rooted in an instrumentalist motive. An instrumentalist approach involves first asking whether the interest underlying a given right is objectively important from the point of view of the claimant, and then assessing whether protecting this interest can be beneficial for the state that is asked to do so. In the case of migrant workers' rights in Saudi Arabia, not only can Saudi Arabia appreciate that the rights it is called on to protect are objectively important from the point of view of migrant workers (since it already grants these rights to Saudis and GCC citizens), but there are

also many economic and political benefits that Saudi Arabia will be able to enjoy by protecting them. Therefore, it should not hesitate to take steps to bolster human rights protections for migrant workers. In particular, the chapter shows that in addition to its obligations under domestic law, Saudi Arabia has several obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the various International Labour Organization (ILO) conventions that it has ratified, and the Arab Charter on Human Rights. Together, these documents protect the right to equality, movement, nationality, choice of employment, just wages, and safe and sanitary working conditions of workers. With respect to its obligations under Islamic law, the need to ensure that workers' rights are fully upheld is a central goal of the Islamic tradition and should further motivate Saudi Arabia to reform the Kafala System.

The thesis then proceeds to a chapter on suggestions for reforms to the Kafala System, taking into account Saudi Arabia's Islamic heritage, its human rights obligations under International law, and the positive economic and political effects of strengthening human rights protections. In addition, it is particularly careful not to forget the Kafala System's path dependence in formulating proposals for reform. It argues that although there are high switching costs, unyielding adaptive expectations, and institutional interdependencies, Saudi Arabia is presently at a critical juncture during which sweeping reforms could prove to be effective. Namely, in response to a stagnating economy, it has itself initiated a program by the name of Vision 2030 which aims to diversify Saudi Arabia's economy, increase the skill level of its workforce, and attract leading technological firms to its shores. By strengthening human rights protections for migrant workers, Saudi Arabia can improve its international reputation, thereby attracting more FDI and increasing its political clout. Furthermore, respect for human rights can also create the necessary incentives to encourage individuals to acquire skills and to be more productive. Most importantly, strengthening the rights of migrant workers can bring the Kafala System more in line with the teachings of the Islamic faith, thereby ensuring that Saudi Arabia does not lose its heritage in undertaking initiatives for reform. Therefore, this chapter proposes that employment contracts should be written in a language that a potential employee understands and the potential employee should have the power to negotiate the terms of the contract. In addition, individual sponsorship should be abolished and replaced by a government agency responsible for sponsoring migrant

workers. There should furthermore be a new ministry to handle all matters related to migrant workers instead of spreading the tasks among various ministries as it is presently the case. Meaningful punishments, including fines and prison terms, should also be imposed on employers for violations of workers' right to physical integrity and to be treated with dignity. It would be desirable, in this connection, to have an insurance system in place for workers who are injured because of the willful or negligent misconduct of their employer. Restrictions on workers' movement both within Saudi Arabia and in and out of Saudi Arabia should be eliminated. Workers should not have to get the approval of their employer to obtain or renew a work visa, nor should they be prevented from changing employers. Compensation levels should be increased so that workers are at least able to earn a living wage. There should also be a regime in place to allow workers to bring their families to Saudi Arabia and to be naturalized as Saudi citizens. Lastly, access to justice must be improved and the rule of law strengthened to ensure that these protections are not just symbolic but have meaningful substance.

Following the chapter on suggestions for reform, there is a concluding chapter that summarizes the arguments advanced by the thesis.

This chapter now turns to a discussion of the notion that human rights are based on the inherent dignity of human beings.

Dignity and Human Rights

According to the Universal Declaration of Human Rights (UDHR), all human beings have an inherent dignity and are therefore entitled to certain inalienable rights. Paragraphs 1-3 of the preamble of the UDHR read:

Whereas 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 and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, Whereas it is essential, if man is not to be compelled to have

recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.¹

The notion that human beings have an inherent dignity is the stated basis of all modern human rights documents, and in particular of the ICCPR and the ICESCR.² It should nevertheless be clarified that this is a concept that only gained prominence in the mid-20th century and one which is not easy to define.³

One definition of dignity is “an attribute inherent in every human being [which] has to be recognised and respected by the state and fellow men alike.”⁴ One author makes a distinction between status-dignity and condition-dignity. He defines status dignity as “a normative status that people have in virtue of some relatively general and constant valuable features.”⁵ That is, status dignity is the dignity that all human beings have because they are human. When the ICCPR and the ICESCR state that human rights “derive from the inherent dignity of the human person,”⁶ it is status dignity that is being spoken of. On the other hand, condition-dignity refers to the actual realization of the rights that are protected in various human rights documents.⁷ Since these rights are sometimes violated, it is possible for an individual not to have condition-dignity at a given point in time. Status-dignity, however, cannot be gained or lost as a result of a change in the material state of affairs of an individual because it refers to the status to which an individual is entitled by virtue of being human. Both status-dignity and condition-dignity are promoted by the International Bill of Rights because it both declares the rights that individuals ought to have and obliges States to materially uphold and protect them. Finally, the concept of dignity is also linked to the idea that the rights that each person is likely to want to be applied to himself or herself ought

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) preamble [UDHR].

² David Luban, “Human Dignity, Humiliation, and Torture” (2009) 19:3 Kennedy Inst of Ethics J 211; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 preamble (entered into force 23 March 1976) [ICCPR]; *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3 preamble (entered into force 3 January 1976) [ICESCR].

³ Michael Zuckert, “Human Dignity and the Basis of Justice: Freedom, Rights, and the Self,” (2007) 9:3 Hedgehog R 32.

⁴ Rinie Steinmann, “The Core Meaning of Human Dignity” (2016) 19:1 PER 1.

⁵ Pablo Gilabert, “Labor Human Rights and Human Dignity” (2016) 42:2 Philosophy & Social Criticism 171 at 180 [Labor Human Rights and Human Dignity].

⁶ ICCPR, *supra* note 2 at preamble; ICESCR, *supra* note 2 at preamble.

⁷ Labor Human Rights and Human Dignity, *supra* note 5 at 180.

to be applied to others, as well as to the idea that all people have a responsibility to respect the rights of others.⁸ According to Wolfgang Benedek,

The aspiration to protect the human dignity of all human beings is at the core of the human rights concept. It puts the human person in the center of concern. It is based on a common universal value system devoted to the sanctity of life and provides a framework for building a human rights system protected by internationally accepted norms and standards. During the 20th century, human rights have evolved as a moral, political and legal framework and as a guideline for developing a world free from fear and free from want. In the 21st century, it is more imperative than ever to make human rights known and understood and to make them count.⁹

According to this conception, human rights are inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or other status: all are equally entitled to the protection of human rights without discrimination.¹⁰ These rights are interrelated, interdependent and indivisible,¹¹ “Yet they are the world of the individual person: The neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination.”¹² Although human rights are inherent, they are not innate or natural; they need protection precisely because they are susceptible to being violated or abused. Human rights form the basis of our expectation that we should be able to live free from harm, as well as of our responsibility to refrain from infringing on the freedoms of others. Thus, human rights make a moral claim and represent a moral obligation: we are entitled to have our rights protected, but we must also ensure the protection of the rights of others. In other words, human rights are both an entitlement and a responsibility.

Internationally-recognized human rights are set out in treaties, customary international law, general principles of international law, as well as in other secondary sources of international law

⁸UDHR, *supra* note 1 at preamble, arts 7, 11, 26 and 29.

⁹ Wolfgang Benedek, *Understanding Human Rights Manual on Human Rights Education* 3rd ed. (Graz: Intersentia, 2012) at 28.

¹⁰ Kathryn Elvey, “Developing a Compromise: The Case for Universal Human Rights from a Cultural Perspective” (2012) 34:3 Human Rights Quarterly 919.

¹¹ OHCHR, *What are Human Rights?* <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>

¹² “What is the Universal Declaration of Human Rights” (citing Eleanor Roosevelt), (online) Amnesty International UK <<https://www.amnesty.org.uk/universal-declaration-human-rights-UDHR>>

and domestic law.¹³ All members of the international community should aspire to respect all relevant international laws and international human rights principles.¹⁴ In addition, since some of the most grave violations of human rights have acquired the status of *jus cogens* norms, all states are obliged to refrain from engaging in these acts irrespective of whether it is a treaty obligation for them or not.¹⁵ This is because these norms are binding on all states and no derogation is permitted from them.¹⁶ In the next section, the idea of labour rights as a category of human rights is explored in order to shed light on their importance and to describe the instruments in place to protect them.

Labour Rights as Human Rights

Because this thesis makes several assertions about the effect of strong protections of labour rights on FDI, it is important to understand what exactly is meant by this term and to relate it to the notion of human rights generally.¹⁷ This section situates labour rights within the international human rights framework and argues that labour rights are an important subset of human rights. Every country has certain human rights obligations with respect to its labour force. Saudi Arabia is no exception in this regard. As it will be shown, fulfilling its obligations in this area may require reforming the Kafala System. Such reform could in turn improve Saudi Arabia's reputation globally, thereby resulting in an increase in foreign investment.

Although there is a strong consensus that there exists a close connection between labour rights and human rights, there remains some disagreement about whether labour rights are a part of human rights or are analogous to human rights. While some view labour rights as human rights without qualification, which is the view adopted in this thesis, others believe that there is a clear

¹³ John Currie, *Public International Law* 2nd ed. (Toronto: Irwin Law, 2008) at 84 [Public International Law].

¹⁴ *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 53/144, UNGA (9 December 1998).

¹⁵ Steven R. Ratner, Jason Abrams, & James Bischoff, *Accountability for Human Rights Atrocities in International Law* 2nd ed. (Oxford: Oxford University Press, 2001) at 13; Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law* (London: Kluwer Law International, 2003).

¹⁶ Janelle M. Diller, *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) at 217-218 and 295-324.

¹⁷ David Kucera, *The Effects of Core Workers Rights on Labor Costs and Foreign Direct Investment: Evaluating the 'Conventional Wisdom'* (Geneva: International Institute for Labour Studies, 2001) [The Effects of Core Workers' Rights on Labor Costs and FDI].

distinction between these two concepts.¹⁸ Those who see a distinction justify their position in part by referring to the different status, scope and importance of labour rights within the sphere of international human rights law more generally. Human rights have a connection with all spheres of human activity while labour rights are more narrowly focused on the relationship between employers and employees. Thus, whereas human rights deal with a broad spectrum of human interaction, including the individual's relationship with the state (through, for instance, the criminal law), labour rights are narrower in scope and are more oriented towards the private sector.¹⁹ Others argue that labour rights are simply a subset of human rights. For example, the right to freedom of association in the workplace is a well-established norm of international human rights law, and the right to freedom of association at work is a subset of this broader right.

This thesis takes the view that labour rights are a subset of human rights and the two are therefore intricately linked with each other. In recent years, a number of leading industrial-relations scholars, including Roy Adams and Lee Swepston, have endeavoured to link labour rights and human rights in an attempt to shift the debate about the nature of labour relations in the North American context. Specifically, Adams and others have argued that workers should not be viewed as economic players, but rather as bearers of fundamental human rights.²⁰ Swepston similarly asserts that the international human rights system encompasses the standards for the protection of workers rights established by the ILO.²¹ Viewed through this lens, International Labour Law is a part of international human rights law.²² However, despite the normative linkages that exist between international labour and human rights law, human rights and labour rights movements have not worked well together: "Many scholars have described these two movements as being largely similar yet isolated from one another."²³ This is notwithstanding the fact that, on a practical

¹⁸ Virginia Mantouvalou, "Are Labour Rights Human Rights?" (2012) 3:2 European Labour LJ 151.

¹⁹ Morteza Shirzad & Sedighe Soltani, "Should a Human Right Discourse be Applied to Labour Standards?" (2005) 4:1 European J of Social Sciences 75.

²⁰ Larry Savage, "Labour Rights as Human Rights? A Respond to Roy Adams" (2008) 12 A Canadian J of Work and Society 68.

²¹ Lee Swepston, "United States Labour Law in the Context of International Labour Law", online: <<http://www.leeswepston.net/Cornell.htm>>.

²² *Ibid.*

²³ Franz Christian Ebert & Martin Oelz, *Bridging the Gap: The Role of ILO Law in Regional Human Rights Courts* (Geneva: International Institute for Labour Studies, 2012).

level, there is interaction between the ILO and human rights organizations in many areas. As Virginia Leary writes,

Worker's rights are human rights, yet the international human rights movement devotes little attention to the rights of workers. At the same time, trade unions and labour leaders rarely enlist the support of human rights groups for the defense of workers' rights. A regrettable paradox: the human rights movement and the labour movement run on tracks that are sometimes parallel and rarely meet.²⁴

However, it is worth mentioning that initiatives have been undertaken by the UN to promote labour rights as human rights, which is indicative of its understanding that labour rights and human rights have shared roots. Article 25 of the UDHR, which states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family” implicitly affirms this position by making the right to an adequate standard of living a human right. Similarly, Articles 23 and 24 characterize safe and reasonable conditions of work as fundamental human rights.²⁵ The UDHR is furthermore unequivocal in linking the concept of human dignity with that of safe working conditions. Additionally, in the 1993 *Vienna Declaration*,²⁶ the UN insists that “[a]ll human rights [including the right to work] are universal, indivisible and interdependent and interrelated.”²⁷

International human rights standards include many provisions specifically concerning the rights of workers. Indeed, there is a great deal of interaction between the content of various ILO conventions and the principles declared in documents like the UDHR. Article 23 of the UDHR, for example, presents a concentrated vision of workers' rights based on earlier ILO principles. Paragraph 1 of article 23 proclaims “the right to work, to free choice of employment, to just and favourable conditions of work and to protection from unemployment.” In 1964, the ILO adopted

²⁴ Virginia A. Leary, “The Paradox of Workers' Rights as Human Rights,” in Lance Compa and Stephen Diamond (eds.), *Human Rights, Labor Rights and International Trade* 1st ed (Philadelphia: University of Pennsylvania Press, 1996) at 22.

²⁵ Marisa Anne Pagnattaro, *Labour Rights are Human Rights: Direct Action is Critical in Supply Chains and Trade Policy* (2014) 10:1 South Carolina J of Int'l Law and Business at 3

²⁶ *Vienna Declaration and Programme of Action*, 25 June 1993, World Conference on Human Rights. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

²⁷ Mathias Risse, *A Right to Work? A Right to Leisure? Labour Rights as Human Rights* (2008) 3:1 Law & Ethics as Human Rights 40.

one of its most important conventions dealing with employment policy²⁸; it made “full, productive and freely-chosen employment”²⁹ a fundamental objective of national policy.³⁰ Even a cursory glance at Article 23 of the UDHR and this convention makes clear the complementarity of the two. A similar interplay can be observed with regards to Paragraph 2 of Article 23, UDHR, which states that “Everyone, without any discrimination, has the right to equal pay for equal work,” thus building on an idea from the ILO’s constitution regarding the need to recognize “the principle of equal remuneration for work of equal value.”³¹ To strengthen this principle, the ILO also adopted the Equal Remuneration Convention,³² thus making equal remuneration for work of equal value for both men and women the basis of a binding convention. The right to non-discrimination at work was generalized with the Discrimination (Employment and Occupation) Convention.³³ Paragraph 3 of Article 23, UDHR speaks of the right to “just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, supplemented, if necessary, by other means of social protection.” This was based on earlier ILO standards establishing systems of minimum wages and protection of wages, basic social policy and other instruments based on the concept of social justice. Paragraph 4, Article 23, UDHR embodies a right that has had profound implications for human rights and for political freedom as a whole: “Everyone has the right to form and to join trade unions for the protection of his interests.” In 1944, the ILO’s Philadelphia Declaration crystallized the commitment set out in the Constitution through the “recognition of the principle of freedom of association.” In 1998, the ILO identified four “core rights” as the most fundamental labour rights. These are the right to freely associate in trade unions and bargain collectively; freedom from child labour; freedom from slavery or enforced labour; and freedom from discrimination in employment. Every ILO member country is responsible for integrating these standards into their national laws. The ILO monitors how countries adopt labour laws and reports on whether countries are upholding these international standards, especially the core rights. The

²⁸ *C122 - Employment Policy Convention, 1964 (No. 122) Convention concerning Employment Policy* (Entry into force: 15 Jul 1966) Adoption: Geneva, 48th ILC session (09 Jul 1964)

²⁹ *Ibid*, article 1.

³⁰ *R169 - Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169) Recommendation concerning Employment Policy* Adoption: Geneva, 70th ILC session (26 Jun 1984).

³¹ *Constitution of the International Labour Organization* (29 October, 1919), preamble.

³² *C100 - Equal Remuneration Convention, 1951 (No. 100)* (Entry into force: 23 May 1953) Adoption: Geneva, 34th ILC session (29 Jun 1951).

³³ *C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Convention concerning Discrimination in Respect of Employment and Occupation* (Entry into force: 15 Jun 1960) Adoption: Geneva, 42nd ILC session (25 Jun 1958).

fact that the various rights set out in the ILO Conventions largely complement the rights guaranteed in the UDHR lends credibility to its objective to protect these rights as basic human rights.

Another factor that weighs in favour of this position is that the many human rights documents tie the protection of labour rights to the need to protect human dignity, which is also often considered the basis for human rights generally.³⁴ Many labour rights can be classified as social, economic, and cultural rights, which article 22 of the UDHR considers to be “indispensable for [an individual’s] dignity and the free development of [his/her] personality.”³⁵ The substantial number of national constitutions that refer to notions of human or personal dignity in general, as well as to more specific notions of dignity at work, as the normative basis for statutory norms aimed at protecting labour rights including the right not to be discriminated against and the right to health and safety, also confirm the link between labour rights and human dignity.³⁶ The ability to freely choose one’s work and to have access to work without being discriminated against, as well as the right to decent working conditions, all exist to protect the dignity of workers. According to Mark Freedland & Nicola Kountouris, “The concept of dignity goes hand in hand with the idea of personality in work.”³⁷ Labour laws must thus ensure that work relationships do not arise or develop in ways that harm the inherent dignity of the worker.³⁸ When people are forced to work in unsatisfactory conditions – such as in sweatshops – this undermines their human dignity.³⁹ Similarly, if they are subject to verbal or physical abuse, paid low wages, made to work unreasonably long hours, and prohibited from moving freely or from leaving a job, this compromises their dignity.

The rest of this thesis looks the labour rights of particular category of workers in Saudi Arabia, namely migrant workers. Because it takes the view that labour rights are fundamental human rights that are rooted in the inherent dignity of human beings, it advocates for the

³⁴ L Valentini, *Dignity and Human Rights: A Reconceptualisation* (2017) 37:4 Oxford Journal of Legal Studies 862; Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* (2008) 19:4 The European Journal of International Law 655.

³⁵ UDHR, *supra* note 1 at art 22.

³⁶ Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011) at 373.

³⁷ *Ibid.*

³⁸ *Ibid*; Labor Human Rights and Human Dignity, *supra* note 5.

³⁹ Labor Human Rights and Human Dignity, *supra* note 5 at 181.

strengthening of the rights of migrant workers in Saudi Arabia. It furthermore shows that this approach is consistent with the teachings of the Islamic faith which is the inspiration for the Saudi legal system. Finally, drawing on the literature on the relationship between human rights standards and foreign direct investment, it asserts that Saudi Arabia stands to benefit from having more robust protections for the rights of migrant workers.

The next chapter discusses the theoretical framework that this thesis employs to analyze the Kafala System.

Chapter Two: Theoretical Framework and Methodology

This chapter will set out the theoretical framework that will be used to examine the Kafala system, Saudi Arabia's system for regulating migrant workers, and the methodology that this framework entails. The overall approach involves using an interdisciplinary human rights analysis to identify reforms. The human rights approach will be applied through the lens of New Institutional Economics, which focuses on analyzing institutions in order to bring about effective legal reform. In particular, it will use insights from Path Dependence theory – an offshoot of NIE – to show that legal reforms that promote human rights are likely to be more effective when they respect the context of the society that they are intended for. Since Saudi Arabia is a country governed by Islamic law, a PD analysis supports the conclusion that reforms to the Kafala System have to be consistent with and even inspired by sacred Islamic texts. The chapter will also discuss the connection between enhanced human rights protection and economic development.

The legal institutional environment in Saudi Arabia is one which aspires to reflect Islamic sacred law. The *Basic Law of Governance* states that the Qur'an (the holy scripture in which Muslims believe) and the Sunnah (the actions and sayings of the Prophet of Islam) are the Constitution of Saudi Arabia.⁴⁰ Much of Saudi law, including contract law and commercial law, therefore remains uncoded to this day.⁴¹ Judicial decisions do not have binding authority for the same reason. In principle, each dispute is decided by referring directly to Islamic source texts (i.e., the Qur'an and reliable compilations of the actions and sayings of the Prophet). Furthermore, various interpretive schools of Islamic law have governed most of the region now comprising Saudi Arabia for more than a millennium. Local customary law – 'urf' – was also applied among nomadic tribes in central Arabia,⁴² but its influence is now minimal given the Basic Law's explicit declaration that the Qur'an and Sunnah have constitutional authority.

⁴⁰ *Basic Law of Governance*, March 1, 1992 Royal Order No. (A/91) at art 1. [Basic Law of Governance]

⁴¹ Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010) at 167 [Sharia Incorporated].

⁴² James Wynbrandt & Fawaz A. Gerges, *A Brief History of Saudi Arabia* (Checkmark Books, 2010) at 183.

By its very design, Islamic law is intended to permeate every aspect of society, including the economy. It contains rules on contracts, property, criminal matters, marriage, inheritance, as well as principles that serve as foundations in every area of law. As a result, a great deal of Saudi law does not exist in statutory form. However, the rules governing Kafala have been the subject of legislation. The *Labour Law*,⁴³ along with its implementing regulation,⁴⁴ and the *Residence Regulation*⁴⁵ provide the legal framework of Kafala in Saudi Arabia. It should be noted, nevertheless, that the Labour Law states that its provisions must be implemented in a manner that is consistent with the Shari'a.⁴⁶

To bring about reforms in the Kafala System, it is therefore necessary to demonstrate that the present structure of the Kafala System in fact does not respect the Islamic rules of Kafala. Since respect for sacred law trumps all other considerations, an appeal to the principles of Kafala in Islamic law would be the most effective way of giving more legitimacy to calls for reforming the Saudi Kafala System. This is not to detract in the least from the importance of bringing the Kafala System in line with international human rights standards and remedying the inefficiencies that it is currently prone to creating. Indeed, Islamic sacred law gives the utmost importance to protecting human life, property, and dignity,⁴⁷ and it aims to create an economic system that is not plagued by inefficiencies.⁴⁸ Thus, insofar as the values of respect for human rights and promoting economic efficiency can be shown to be native to the institutional environment found in Saudi Arabia, there is an even greater likelihood that calls for reforming the Kafala System will be heeded.

As this thesis will demonstrate, an analysis of the Kafala System from an international human rights perspective shows that many of the human rights guaranteed in international human rights instruments are not protected under the Kafala System. The role of a human rights analysis will be to identify specific ways in which the current system is inadequate. And while this is reason

⁴³ *The Labor Law*, 27 September 2005, Royal Decree No. M/51 [Labor Law].

⁴⁴ *Executive Regulations of the Labor Law*, April 7, 2016, Ministerial Resolution No. (1982) [Regulations of the Labor Law].

⁴⁵ *The Residence Regulations*, June 4, 1952, Order No.17/2/25/1337 [Residence Regulations].

⁴⁶ Labor Law, *supra* note 43 at art 4.

⁴⁷ Abdullah Yusuf Ali (Translator), *The Holy Qur'an – English Translation 5th ed* (Wordsworth Editions Ltd, 2001) at 17:70 [The Holy Qur'an].

⁴⁸ *Ibid* at ch 17:35.

for concern, I argue that the best way of bringing the Kafala System into line with human rights norms is to recommend changes that respect Saudi Arabia's history, culture, religion, and values. Any proposed legal reform must take into account the institutional environment within which the law exists. This is where New Institutional Economics ("NIE") and Path Dependence ("PD") are relevant. NIE attempts to understand the emergence and evolution of institutions and the effect that this process has on economic development. Path Dependence, drawing on NIE, posits that the law – as well as other institutions – tends to develop along a certain path depending on the religion, culture, values, and history of a society. Its design also reflects certain economic and political goals that are considered to be important for the preservation and growth of a society. PD is relevant for understanding the development of the Kafala System because it brings to the fore the importance of understanding the historical and cultural context surrounding the Kafala System. Only with such an understanding can appropriate reforms to the Kafala System be proposed that are consistent with the institutional environment in Saudi Arabia. The chapter now turns to a consideration of the methods that will be used to study the state of human rights under the Kafala System. Following this, it will describe the theoretical framework that will be used to understand how best to reform the Kafala system.

Human Rights Research Methods

Analyzing the Kafala System from the perspective of human rights is useful in the context of this thesis for several reasons. For one, such an analysis can reveal the extent to which the Kafala System is falling short in protecting the human rights of migrant workers. Based on these findings, it is then possible to use Path Dependence theory to suggest appropriate reforms to the Kafala System.

This thesis will use the 'Single-Country study' as the primary method for studying the state of human rights under the Kafala System. This is a method drawn from the social sciences that uses official governmental and non-governmental reports, the works of NGOs and commissions, "journalistic and descriptive accounts,"⁴⁹ and academic research to shed light on the human rights situation in a given country. The end result of this method tends to be a descriptive account of

⁴⁹ Todd Landman, "Social Science Methods and Human Rights" in Fons Coomans, Fred Grunfeld & Menno T. Kamminga Eds, "Methods of Human Rights Research" (Intersentia, 2009) at 36.

human rights violations that is not rooted in any one discipline. How reflective these accounts are of the reality on the ground is a different question because human rights research relies on different methods to evaluate if rights are being effectively protected.

A human rights analysis of the Kafala system is important because by revealing which rights are not being effectively protected in the current system, it can serve as a very effective tool for a critical study of the Kafala system. In addition, combining what is learned from a human rights analysis with the insights gleaned from a PD study of the Kafala system can help in creating appropriate proposals for reform. The chapter now turns to a description of the methods that are used in human rights analysis.

The question of methods in human rights research has long been neglected. This is due to several factors. One is that human rights researchers emphasize the inherently valuable nature of their work to justify its existence, thus making any issue of method of lesser importance.⁵⁰ Furthermore, the emphasis on the sources of human rights norms (i.e., international treaties, customary international law, etc.) has often obscured the question of how human rights are studied.⁵¹ As with any discipline, however, it is important to articulate not just what is being studied, but the manner in which it is being studied.

Given the dominance of legal scholarship in human rights research, it might be asked if human rights methodology is entirely an off-shoot of legal methodology. This question must be answered in the negative because human rights research draws on various disciplines and ought to draw on a methodology that goes beyond that of legal research. Legal methodology uses authoritative texts of law to enumerate human rights obligations, but human rights methodology uses various social science methods to assess the extent to which these obligations are respected in practice.

Methods in the Study of the History of Human Rights

⁵⁰ Bård A. Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford, "Human Rights Research Method" in Bård A. Andreassen, Hans-Otto Sano & Siobhán McInerney-Lankford Eds, *Research Methods in Human Rights* (Edward Elgar Publishing, 2017) at 39 [Human Rights Research Method].

⁵¹ *Ibid* at 39.

The history of human rights is one of the many areas of human rights research in which the question of methods is relevant. Some significant works on human rights history published in the 1980s tended to construct intricate genealogies that explained the development of human rights globally over a time period spanning centuries. These histories of course relied on certain unsubstantiated assumptions about the definition of human rights. In addition, because they were written partly to justify the creation of an international human rights system, “they sought to produce a grand synthesis account of human rights over a vast expanse of time and inevitably traded precision in the process.”⁵² More recent scholarship has changed this trend and recognized that human rights are not defined identically across different places and time periods.⁵³ As a result, it is now possible to speak of a “constellation of human rights histories”⁵⁴ as opposed to one monolithic account of the emergence of human rights. This change in how human rights history is written about has important implications for the international human rights system, for it brings into question the presumption that human rights norms are universal.⁵⁵

History’s role in understanding human rights can be considered to be both retrospective and forward-looking.⁵⁶ That is, it attempts to understand how human rights emerged and developed over time, but it is also used by leaders and reformers to justify their future course of action. These individuals experience “a productive tension between drawing upon, and placing themselves within, a long tradition of preceding emancipation struggles, while simultaneously claiming the authority of principles that are notionally ahistorical and transcendent.”⁵⁷

Interdisciplinary Approaches to Human Rights Research

⁵² Steven L. B. Jensen and Roland Burke, “From the Normative to the Transnational: Methods in the Study of Human Rights History” in Bård A. Andreassen, Hans-Otto Sano & Siobhán McInerney-Lankford Eds, *Research Methods in Human Rights* (Edward Elgar Publishing, 2017) at 119.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at 120.

⁵⁶ *Ibid* at 121.

⁵⁷ *Ibid.*

Besides the important methodological developments in the study of the history of human rights, it is also worth speaking to the potential that interdisciplinary and multimethod approaches have in human rights research. Human rights research is a much broader field than legal research and can draw on the social sciences and humanities in important ways. The social sciences, comprising sociology, economics, political science, geography, social psychology, and anthropology, all try to explain phenomena in the language of causes and effects. They also attempt to foresee what the future holds and “seek to influence public policy and socio-economic relations.”⁵⁸ Finally, the social sciences at once rely on empirical evidence and overarching theories for understanding and explaining phenomena.⁵⁹ Empiricism nevertheless has precedence over theory-driven approaches. This makes the social sciences useful in understanding the “discourse, institutions, politics, norms, trade-offs, cultures, effects, and origins of human rights.”⁶⁰ This thesis draws substantially on social science approaches to assess the extent to which the rights of migrant workers are infringed upon under the Kafala System, as well as to suggest reforms to it. It also uses NIE and PD to illustrate why the Kafala system is the way it is and explore the most appropriate avenues for change.

Besides the social sciences, the humanities also have an important place in human rights research, although they place a greater emphasis on normative frameworks and narrative. As a result, in a discipline like philosophy, empirical methods find little application or relevance.⁶¹ On the other hand, law, history, theology, and linguistics “combine an emphasis on text with either empiricism and/or normativism.” The implication of these divergent tendencies within the humanities is that there exists a great deal of debate on the role of normativism in human rights research.⁶²

Philosophy allows for a clearer understanding of human rights concepts, the logical fallacies and implicit biases that might be lurking within them, and the ways of deconstructing

⁵⁸ Malcolm Langford, “Interdisciplinarity and Multimethod Research” in Bård A. Andreassen, Hans-Otto Sano & Siobhán McNerney-Lankford Eds, *Research Methods in Human Rights* (Edward Elgar Publishing, 2017) at 168 [Interdisciplinarity and Multimethod Research].

⁵⁹ *Ibid* at 168.

⁶⁰ *Ibid*.

⁶¹ *Ibid* at 169.

⁶² *Ibid*.

established normative frameworks.⁶³ In comparison, law, history, theology, and linguistics, through their empirical approach, foster a better understanding of the functioning of human rights. Furthermore, because a discipline like law has an “explicitly normative drive,”⁶⁴ it can both enable and hinder the progress of human rights. Law’s focus on empiricism, to be clear, does have certain drawbacks. Because it is concerned almost exclusively with legal texts, it may ignore the surrounding political, economic, and cultural context.⁶⁵ Furthermore, “the normative enterprise makes some recommendations for action blind to the world of unintended consequences and the riddles of human and institutional behavior.”⁶⁶ The political feasibility, economic cost, and public receptiveness of recommendations for reform are often not given due regard in the reports of fact-finding missions and other works produced by legal professionals. It is hence important to incorporate other disciplines in human rights research. It is by combining the approaches of various disciplines in the social sciences and humanities that human rights research can be most fruitful.

Hans-Otto Sano and Hatla Thella argue that in order to better measure effective protection, there is a need to make human rights research more evidence-based.⁶⁷ At present, such research is focused too heavily on “normative, legal, and philosophical interpretation.”⁶⁸ As a result, court-rulings, treaties, and other legal documents serve as the primary sources for human rights research. In addition, “philosophical texts are often employed to back up arguments about the legitimacy of human rights law and about its normative function.”⁶⁹ The problem with this approach, according to Sano and Thella is that it does not place enough emphasis on individuals and groups, instead focusing on explaining what political and social ramifications legal norms will have.

Conducting Human Rights Research

⁶³ *Ibid.*

⁶⁴ *Ibid* at 170.

⁶⁵ *Ibid* at 170.

⁶⁶ *Ibid.*

⁶⁷ Hans-Otto Sano & Hatla Thella, “The need for Evidence-Based Human Rights Research” in Fons Coomans Fred Grunfeld & Menno T. Kamminga, *Methods of Human Rights Research* (Intersentia, 2009) at 91.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

Human rights research naturally begins by looking at the legal texts in place guaranteeing human rights to individuals. International standards are looked to as a measuring stick to determine if the human rights of individuals in a particular country are being respected. However, the question of whether a right is being effectively protected can often go unaddressed because of a failure to go beyond a simple description of the kinds of legal and institutional measures in place for protecting human rights.⁷⁰ It is at this stage that social science analysis becomes relevant as it is concerned with the investigation of “material conditions and the context around individual and group protection including social perceptions of protection.”⁷¹ To be clear, this is not to say that social science analysis can pave the way for a conclusive legal judgment about whether a certain right is being violated, but only that it can suggest possible areas in which violations may be occurring.⁷² As a result, it can be easier to determine where to investigate further to uncover human rights violations.

Sano and Thella look at research published in two academic journals – the Human Rights Quarterly and the Netherlands Quarterly of Human Rights – to illustrate their point. In 2007, 53.8 percent of the references in the research in these journals were secondary sources (i.e., books and periodicals).⁷³ In comparison, 17.4% were organizational reports (such as reports produced by the UN, other international organizations, NGOs, and research institutions), 11.3% were legal documents – including core conventions, other international conventions, national laws, domestic courts, and international courts – 4.9% were administrative documents, and 5.7% were quasi-legal sources (i.e., treaty-bodies, ombudsman, and national institutions).⁷⁴ Internet sources made up 5.1% of references and quantitative data (i.e., surveys, perception surveys, and expert-based quantitative organizational data) made up only 0.1% of references.⁷⁵ Averaged over the 2005-2007 time-period, 46% of “the sources for scholarly articles in the quoted journals during these three years were respectively organizational reports, administrative or legal documents, while on average 45% of the references quoted were secondary literature.”⁷⁶ Importantly, there was an

⁷⁰ *Ibid* at 93.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid* at 96.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at 97.

almost negligible number of references to qualitative or quantitative data. Sano and Thella note the extensive reliance on secondary sources, core conventions, UN and other organizational reports, and administrative documents. They also point out the almost complete neglect of qualitative and quantitative data in human rights research. Finally, they observe that court cases were quoted relatively modestly.

Sano and Thella argue that given that human rights research is primarily motivated by a desire to see human rights standards implemented and to measure compliance with human rights obligations, there is perhaps a need to focus more on statistical research, as well as on social science research “which can examine institutional and social actors operating in diverse contexts, especially the performance of institutions.”⁷⁷ With respect to quantitative research, they point out that data on human rights indicators, event-based data, and counts of gross human rights violations and atrocities can be very useful in determining if certain rights have been violated.⁷⁸

In order to accurately assess if rights are being effectively protected, it is necessary to go beyond a knowledge of the applicable legal framework. Instead, one must use “knowledge obtained by methods belonging to different social sciences.”⁷⁹ Using the example of access to justice for poor Chinese citizens, Sano and Thella argue that as a starting point, it is important to analyze legislation in order to understand the purpose of the accompanying regulations and prevent them from being interpreted in a manner that is contrary to their purpose.⁸⁰ They also assert that statistics are important for determining areas that merit further research, although it is at the same time necessary to break down statistics into smaller elements.⁸¹ Finally, “it is imperative to find a way to judge the ‘quality’ of legislation and policies,”⁸² which requires the use of qualitative data.

To summarize, human rights research is a much broader field than legal research, drawing on the social sciences and humanities, and particularly on qualitative and quantitative data, in order to understand its object of study. While legal texts serve as a doctrinal foundation for human rights,

⁷⁷ *Ibid* at 99.

⁷⁸ *Ibid* at 100.

⁷⁹ *Ibid* at 104.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² *Ibid*.

it is important to turn to the social sciences when measuring if rights are being protected effectively. UN and organizational reports, research produced by NGOs and human rights scholars, as well as quantitative and qualitative data gathered through surveys all serve an important purpose in human rights research. Similarly, social science theories, such as NIE and PD, help increase the understanding of why human rights standards are not uniform across different societies and how reforms can be successfully made.

Normative, Empirical, and Evaluative Human Rights Research

Thus far, the methods of various disciplines that can be useful in human rights research have been discussed. It is also important to speak to the forms that human rights research can take. Human rights research can be normative, empirical, or evaluative.⁸³ Normative human rights research deals with questions about the definition, content, and interpretation of human rights, as well as with how they can be implemented and enforced. It is therefore concerned primarily with the way things ought to be. Philosophy, law, as well as various social sciences all engage in normative human rights research, usually using a primarily empirical method.⁸⁴

Empirical human rights research concerns itself with the “origins, functioning, construction and effects of rights and associated movements, institutions, [and] backlash.”⁸⁵ For empirical research, human rights are a social phenomenon that must be explained within the historical and cultural background in which they have emerged. Depending on the discipline, empirical research can be primarily descriptive and explanatory, such as in law and the social sciences, or it can be predictive, such as in economics.⁸⁶ Predictive research attempts to foresee developments in human and institutional behavior based on what is currently known.

⁸³ Interdisciplinarity and Multimethod Research, *supra* note 58 at 172-173.

⁸⁴ C. Taylor, “Conditions of an Unforced Consensus on Human Rights” in J. Bauer & D.A. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

⁸⁵ Interdisciplinarity and Multimethod Research, *supra* note 58 at 173.

⁸⁶ Bård A. Andreassen & Gordon Crawford, *Human Rights, Power, and Non-Governmental Action: Comparative Analysis of Rights-based Approaches and Civic Struggles in Development Contexts* (Routledge, 2013).

Evaluative research, for its part, deals with “the degree of compliance or conformity of actor behavior with a human rights norm (legal or non-legal).”⁸⁷ In many ways, evaluative research is a combination of normative and empirical research. Because of the need to select a standard, determine facts, and assess whether the factual reality adheres to the chosen standard, evaluative research is also interdisciplinary.⁸⁸ Much of the work done by lawyers in the area of human rights is evaluative in nature. For instance, organizations like Human Rights Watch and Amnesty International are essentially engaged in evaluative research when they make determinations about violations of human rights in a given country or region. Of late, evaluative human rights research has taken on even more importance, as evidenced by the rapid multiplication of indicators of human rights compliance.⁸⁹

The Usefulness of a Hybrid Method for Studying the Kafala System

This thesis uses an approach that combines legal and social science methods to study the Kafala system. In the first instance, it looks at the laws and constitution of Saudi Arabia and assesses their adherence to international human rights standards (as expressed in the international conventions to which Saudi Arabia is a party). Subsequently, it attempts to determine if, in practice, the rights guaranteed in either Saudi law or international human rights law are being violated. To make this assessment, it relies on reports by UN agencies and human rights organizations, academic journals, reputable newspapers, as well as quantitative and qualitative survey data compiled by social scientists.

In addition to using qualitative and quantitative social science methods, this thesis also relies on certain overarching social science theories about the functioning of institutions. In particular, NIE and PD are employed to explain the origins of the Kafala system and understand why it exhibits the institutional features that it does. Armed with a contextually sensitive understanding, reforms that would be appropriate for the institutional environment of the Kafala system are proposed.

⁸⁷ Interdisciplinarity and Multimethod Research, *supra* note 58 at 173.

⁸⁸ *Ibid.*

⁸⁹ M. Langford & S. Fukuda-Parr, “The Turn to Metrics” (2012) 30:3 Nordic Journal of Human Rights 222.

A combination of normative, empirical, and evaluative research is used in this thesis. The various justifications for an international human rights system are discussed and the universalist approach is set aside in favour of an approach that gives precedence to instrumentalist justifications for expecting States to respect international human rights standards. This aspect of the thesis is normative in nature. In addition, the origins of the Kafala system are explored and an attempt is made to understand this system as a social fact and a historical phenomenon. The reform proposals that are made are grounded in large part in this understanding. This involves a great deal of empirical research drawing on the social sciences. Finally, there is inevitably an evaluative element to this thesis as it analyzes the degree to which the Kafala System respects international human rights standards.

The next section of this chapter looks at the theoretical approaches that will be used to understand the origins and development of the Kafala system.

New Institutional Economics

The Kafala System as an institution must be understood in all its complexity in order to be able to propose reforms to it that are both appropriate and effective. Rather than looking only at how the Kafala System affects and interacts with quantifiable indicators of economic performance and human rights, this thesis proposes to use New Institutional Economics (“NIE”) to conduct a more in-depth and comprehensive analysis of the Kafala System. In particular, the study will use the path-dependency analysis that is based on NIE. NIE posits that the functioning of economies is in part dependent on existing institutions, including formal and informal laws and social and cultural values. The path dependency analysis takes up this insight and provides a methodology for understanding how elements of the Kafala System in Saudi Arabia are dependent on existing institutions in the country, such as Islamic law, and identifying how to bring about changes to the Kafala System – i.e., to influence the path of future development in regard to the regulation of migrant workers.

NIE is “an interdisciplinary enterprise combining economics, law, organization theory, political science, sociology and anthropology to understand the institutions of social, political and commercial life.”⁹⁰ Questions about what the definition of an institution is, how institutions emerge, what purposes they serve, how they undergo changes, and the ways in which they should be reformed are all at the heart of NIE.⁹¹

Institutional Environment - Laws

According to Douglass North, “Institutions are rules, enforcement characteristics of rules, and norms of behavior that structure repeated human interaction.”⁹² These rules and norms can vary in the degree to which they are formalized, as well as their scope of applicability. Peter Klein proposes the distinction between “the institutional environment” and “institutional arrangements” as a good starting point for understanding the NIE approach to analyzing institutions.⁹³ The institutional environment, which can be shaped both by explicit rules of a normative character such as laws, as well as by implicit rules that reflect the values and morals of a society, refers to “background constraints, or ‘rules of the game’, that guide individuals’ behavior.”⁹⁴ A notable feature of implicit rules is that they arise spontaneously rather than by design, even though they “are the product of – and can be explained in terms of – the goals, beliefs and choices of individual actors.”⁹⁵ In contrast to the concept of the ‘institutional environment’, institutional arrangements refer to such things as business firms, public bureaucracies, and non-profit organizations, all entities which are designed by various stakeholders to “mediate particular economic relationships.”⁹⁶ For the purposes of this thesis, the institutional environment is of greater importance, and the chapter therefore now turns to a detailed discussion of this concept.

⁹⁰ Peter G. Klein, “New Institutional Economics” in *Encyclopedia of Law and Economics* (1998) at 456 [New Institutional Economics].

⁹¹ *Ibid.*

⁹² Douglass North, “Institutions and Economic Growth: An Historical Introduction” (1989) 17:9 *World Development* 1319 [Institutions and Economic Growth].

⁹³ New Institutional Economics, *supra* note 90 at 458.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

One of the central features of the institutional environment of a society is its legal system. Laws are the explicit rules that constrain human behavior⁹⁷ and their study is very important in NIE in order to understand how institutions change. Contract law and property law are the two areas that have been the subject of the most extensive study by NIE scholars.⁹⁸ From an NIE perspective, the resolution of a dispute between two parties by a court – acting in its capacity as a representative of the State – may not be as effective as the resolution of that same dispute by the parties themselves.⁹⁹ This is because the parties can sometimes negotiate in a manner that subverts the application of legal norms. In turn, the legal rules used by courts may not always be effective in changing the behavior of parties in a dispute.¹⁰⁰

The considerations which weigh on decisions in the market are not the same as those which guide the reasoning of courts. The goal of all market transactions is maximizing value.¹⁰¹ Thus, when two parties are in a dispute, they are not as concerned about who has the right to do what, but how each can maximize the value of their economic activity.¹⁰² They are also in a position to change the “legal delimitation of rights”¹⁰³ through their market transactions. That is, by transacting in a way that changes who has a claim to what, parties can influence how the law applies to them. Of course, they will only do this if the transaction costs are lower than the increase in value that will be achieved.¹⁰⁴ Nevertheless, the fact remains that parties have the ability to bargain around legal rules if it leads to a more economically desirable outcome.

As a central component of the formal institutional environment, the law changes very slowly.¹⁰⁵ This is the case even when reforming the law can bring about noticeable increases in economic productivity.¹⁰⁶ There are certain limited situations in which laws may change more

⁹⁷ *Ibid* at 459.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*; Ronald Coase, “The Problem of Social Cost” (1960) 3 *The Journal of Law & Economics* 1 [The Problem of Social Cost].

¹⁰⁰ *Ibid*

¹⁰¹ The Problem of Social Cost, *supra* note 99 at 15.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* at 15-16.

¹⁰⁵ Oliver E. Williamson, “The New Institutional Economics: Taking Stock, Looking Ahead” (2000) 38:3 *Journal of Economic Literature* 595 at 598 [The New Institutional Economics: Taking Stock].

¹⁰⁶ *Ibid*.

rapidly such as civil wars, occupations, and financial crises, which can result in sweeping changes to the legal structure of a country, but these “defining moments are [...] the exception rather than the rule.”¹⁰⁷ Law emerges in large part from social norms and conventions and evolves gradually overtime, so it cannot be expected that it will easily change because of economic incentives. This observation about the law is important in considering the question of how a particular legal system should be reformed.

Effectiveness of Legal Reforms

The transformation of the legal systems in states that were colonized during the 18th and 19th centuries or that were formerly part of the Soviet Union constitute an important case study for understanding the factors that contribute to effective institutional reform. The transplantation of mostly European and American legal frameworks into these countries is the subject of an extensive academic literature which attempts to understand why these reforms were effective in some states but not in others.¹⁰⁸ This is measured by assessing the degree of effective legality – the extent to which rules of the new legal system are respected as governing relations between legal actors and consequently observed and implemented – of the imported legal system. Effective legality, in turn, has implications for economic development. A significant academic current takes the position that greater effective legality can assist economic development.¹⁰⁹ One view is that countries which adapted the foreign legal framework to the local context saw a greater degree of effective legality than those which did not.¹¹⁰ While adaptation to the specific situation of a country can take the form of significant changes to the foreign law, it does not necessarily have to be so. If alternative rules are extensively researched before transplanting a foreign legal system, this can be considered

¹⁰⁷ *Ibid.*

¹⁰⁸ Daniel Berkowitz, Katharina Pistor, & Jean-Francois Richard, “Economic Development, Legality, and the Transplant Effect” (2003) 47:1 *European Economic Review* 165 [Economic Development, Legality, and the Transplant Effect]; Dani Rodrik, “Institutions for High-Quality Growth: What They are and How to Acquire Them” (2000) 35:3 *Studies in Comparative International Development* 3 [Institutions for High Quality Growth]; Bernard Black, Reinier Kraakman, & Anna Tarassova, “Russian Privatization and Corporate Governance: What Went Wrong?” (2000) 52:6 *Stanford Law Review* 1731; Joseph E. Stiglitz, “Whither Reform? Ten Years of the Transition in The World Bank” in Boris Pleskovic and Joseph E. Stiglitz (Eds.), *Annual World Bank Conference on Development Economics 1999* (Washington: the International Bank for Reconstruction and Development, 2000) 27.

¹⁰⁹ Economic Development, Legality, and the Transplant Effect, *Ibid* at 167.

¹¹⁰ *Ibid* at 174.

to be, in effect, adaptation of the foreign legal system to the circumstances in the recipient state.¹¹¹ For example, when the adoption of a comprehensive legal code was being considered in Japan in the late 19th century, the initial drafts of the code borrowed heavily from French law, while the code that was ultimately adopted was modeled largely on the German civil code. This is because the latter's rules were much more consistent with local Japanese custom.¹¹²

The legal reform that took place in Colombia, on the other hand, offers an example of the transplantation of a legal system without adaptation, a decision that was met with complete failure. Near the middle of the 19th century, the Spanish commercial code of 1829 was transplanted in Colombia with very few modifications.¹¹³ And even the modifications that were made did not take into consideration how business practices would be affected by the new rules.¹¹⁴ The rules concerning the conditions for forming a corporation offer a useful example. Initially, the Spanish rule requiring state approval for creating a corporation was abolished from the transplanted Spanish code, even though most countries in Europe continued to impose this condition on anyone desiring to form a corporation.¹¹⁵ At the end of the 19th century, when most countries had abolished this as a condition for forming a corporation, Colombia reformed its commercial code on the basis of Chilean law and ended up making state approval mandatory for forming a corporation.¹¹⁶ One explanation that has been offered for this arbitrary change of rules is that the legal profession in Colombia was underdeveloped at the time, contributing to a lack of capacity to understand what the ramifications of rules would be.¹¹⁷ Had the Spanish commercial code been adapted to the needs of businesses and merchants in Colombia, this might have promoted greater efficiency and contributed to Colombia's economic development.

Another factor which has been considered to bring about effective transplantation of foreign law is a greater degree of familiarity on the part of the population with the basic principles

¹¹¹ *Ibid* at 180.

¹¹² *Ibid*; Daniel H. Foote, "Law in Japan – A Turning Point" (University of Washington Press, 2008); Wilhelm Röhl, "History of Law in Japan Since 1868" (Leiden Brill, 2005).

¹¹³ Economic Development, Legality, and the Transplant Effect, *supra* note 108 at 174.

¹¹⁴ *Ibid* at 175.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* at 180.

¹¹⁷ *Ibid*.

of the imported legal system.¹¹⁸ Where one country shares common legal roots with another country, for example, borrowing legal rules from that country will be more effective than borrowing them from another without shared roots.¹¹⁹ To be clear, common legal roots implies more than just having a common legal ancestor in the distant past, such as is the case with most European countries, which are all inheritors in some sense of Roman law.¹²⁰ Common legal roots means a shared history of legal development in the immediate or recent past, as well as an overlap in culture, language, and values.¹²¹

Other research on the factors which are conducive to the development of strong institutions suggests that it is important not to rely entirely on the “best practice blueprints used in developed countries.”¹²² Best practices are only effective if the society in which they are implemented does not resist or ignore them.¹²³ Therefore, taking local knowledge into account can result in institutions that are better adapted to the context of a given country.¹²⁴ In other words, if they are to be effective, formal legal norms should as much as possible mirror already existing non-legal forms of regulating relationships.¹²⁵

Institutional Environment – Values, Norms, and Ideology

In addition to laws, the institutional environment with which NIE is concerned is also made up of “informal and often tacit, rules that structure social conduct.”¹²⁶ These unwritten rules have the intriguing quality of having the ability to constrain human behavior without being imposed on individuals by a central authority. How is it that most individuals in a society agree on these norms when they are not set out anywhere explicitly? One explanation is that as individuals in a society

¹¹⁸ *Ibid* at 167.

¹¹⁹ *Ibid* at 180.

¹²⁰ *Ibid*.

¹²¹ *Ibid*.

¹²² *Ibid* at 167.

¹²³ Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institute Press, 2006) [The Law-Growth Nexus].

¹²⁴ Institutions for High Quality Growth, *supra* note 108.

¹²⁵ Robert Cooter, “The Rule of State Law and the Rule of Law State: Economic Analysis of the Legal Foundations of Development” in Michael Bruno & Boris Pleskovic (eds.), *Annual World Bank Conference on Development Economics* (Berkeley Law, 1999) at 212.

¹²⁶ New Institutional Economics, *supra* note 90 at 459.

interact with each other repeatedly, certain regularities in social behavior arise which determine what constitutes acceptable behavior in any given situation.¹²⁷ Importantly, some proponents of NIE argue that social norms and conventions can be more effective in resolving disputes between individuals than judicial mechanisms.¹²⁸ According to R.C. Ellickson, “members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.”¹²⁹

Oliver Williamson, a prominent authority on NIE, divides the analysis of institutions into four levels.¹³⁰ The first level of analysis is made up of the informal social norms and conventions of a society.¹³¹ Williamson considers these norms and conventions to be the most embedded features of a society: “Institutions at this level change very slowly—on the order of centuries or millennia.”¹³² Nevertheless, these institutions have a lasting impact on the way in which a country’s economy develops.¹³³ It is therefore important to understand why they change slowly. One possible explanation is that they become functional, as in the case of social conventions.¹³⁴ That is, adherence to these conventions is much more than just a formality, since these conventions establish the unwritten rules for how certain situations are to be handled. Social norms and conventions can also become embedded by acquiring symbolic value and becoming linked with other formal and informal institutions.¹³⁵ They can be considered to be so central to the worldview and identity of a society that abandoning them becomes a matter of threatening the existence of the society itself.

Another aspect of the informal institutional environment is the ideology that guides decision-making in a context of uncertainty. In particular, according to some proponents of NIE, when individuals are making complex decisions, they rely on both institutions and ideology to

¹²⁷ *Ibid* at 460.

¹²⁸ *Ibid*.

¹²⁹ Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991) at 167.

¹³⁰ The New Institutional Economics: Taking Stock, *supra* note 105 at 596.

¹³¹ *Ibid*.

¹³² *Ibid*.

¹³³ *Ibid*.

¹³⁴ *Ibid* at 597.

¹³⁵ *Ibid*.

rationalize what they are doing.¹³⁶ While institutions are external mechanisms that order the environment, ideology is comprised of “the internal representations that individual cognitive systems create to interpret the environment.”¹³⁷

It is generally assumed that all social norms and conventions in Saudi Arabia are rooted entirely in the Islamic religious tradition, the fact of the matter is that they are also partly influenced by tribal customs that have existed in the Arabian Peninsula for more than a millennium.¹³⁸ It should be pointed out that reforming the Kafala System involves taking this aspect of the institutional environment of Saudi Arabia into account. In particular, an NIE analysis requires reforms to the Kafala System respect the beliefs and values of Saudi society. It cannot be asked of a people to simply abandon their values and traditions in the name of universal human rights, or in order to promote a more streamlined economic system. It would instead be wiser to place the emphasis on the fact that the Islamic faith to which the Saudi people adhere demands that workers’ rights should be respected.¹³⁹

It should be recalled here that the values and norms of a society change very gradually given that they not only have a functional role, but also have symbolic importance to individual members of society.¹⁴⁰ The relationship between tribal customs and the teachings of the Islamic faith that they adopted is complex to say the least. Which one takes precedence in a given context is not always clear. This is particularly the case when it comes to the rules governing foreign workers in Saudi Arabia. There are furthermore ideological justifications that individuals use to explain away the shortcomings of the Kafala System. One widely held belief is that migrant workers benefit from working in Saudi Arabia even when they are paid low wages or otherwise subjected to unequal and inhumane treatment. It is assumed that these individuals would not be able to earn as much money in their home country as they do in Saudi Arabia. Hence, giving them employment benefits them as much as it benefits employers and corporations. This belief forms part of the “internal representations” that employers in Saudi Arabia rely on to justify their

¹³⁶ Arthur Denzau & Douglass C. North, “Shared Mental Models: Ideologies and Institutions” (1994) 47:1 *Kyklos* 3.

¹³⁷ New Institutional Economics, *supra* note 90 at 462.

¹³⁸ James Wynbrandt & Fawaz A. Gerges, *A Brief History of Saudi Arabia* (Checkmark Books, 2010) at 183 [A Brief History of Saudi Arabia].

¹³⁹ The Holy Qur’an, *supra* note 47 at ch. 49:13

¹⁴⁰ The New Institutional Economics: Taking Stock, *supra* note 105 at 597.

continued support for the Kafala System. Instituting reforms in the Kafala System requires a thorough understanding of the norms and beliefs that underpin it and a willingness to put forward suggestions for change that steer the Kafala System in a more optimal path in its natural process of evolution rather than turn it on its head.

In undertaking this project of reform, it is advisable to examine other societies which have been governed by a deeply rooted indigenous legal system and which have attempted to reform or modernize this system. The example of Papua New Guinea offers many lessons. It is a country that is home to some of the oldest human settlements known to history and that attempted to introduce fairly drastic legal reforms without much success.¹⁴¹ Before being colonized by Germany and Britain (and subsequently by Australia) between 1884 and 1975, it was governed by local customary law.¹⁴² Its economy was primarily agricultural, something which remains true even to this day. In 1904, control of Papua New Guinea was transferred to the Australians, who showed little interest in developing the country economically and socially for most of the time that they were present.¹⁴³ However, after WWII, there was considerable pressure from the United Nations to encourage the development of countries that were colonized or being governed as protectorates.¹⁴⁴ Australia therefore started to focus on developing indigenous agriculture and infrastructure, and providing health and educational facilities.¹⁴⁵ In 1980, 5 years after gaining independence, exports had grown substantially, although agriculture accounted for 35% of the country's GDP.¹⁴⁶ Importantly, a majority of agricultural exports in this year were accounted for by smallholder production.¹⁴⁷ This is no surprise given that 85% of the country's population lived in rural areas at this time and 87% had smallholder agriculture or subsistence food production as its primary economic activity.¹⁴⁸ Land was therefore a resource that was of the utmost importance to the people of Papua New Guinea. In order to speed up development, some advocated for an increase in commercial agricultural production. Estimates suggested that "about eight times the

¹⁴¹ Michael J. Trebilcock, "Communal Property Rights: The Papua New Guinean Experience" (1984) 34:4 The University of Toronto Law Journal 377 [Communal Property Rights].

¹⁴² *Ibid* at 378-379.

¹⁴³ *Ibid* at 379.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*.

land presently being utilized for any form of agriculture production (including subsistence) could be utilized for commercial agricultural production.”¹⁴⁹

Tackling this problem required Papua New Guinea to deal with local customary law according to which common or communal ownership of property, not private ownership by individuals, was the norm. In the words of the World Bank, “land legislation and/or administration are serious constraints on development of large-scale reforestation, agriculture and livestock projects... Disputes over land ownership in a nation with neither the machinery nor the political will to deal with them have been a major constraint on development.”¹⁵⁰ One example of the countless land disputes that occurred involved 700 squatters that would refuse to vacate land that the government had leased to a ready-mix concrete company for the development of a cement bulk-handling facility.¹⁵¹ The squatters defied all legal efforts to convince them to move and instead built traditional houses on it.¹⁵² Besides disputes between locals and the government, there were also many inter-clan disputes. Razed villages and uprooted coffee trees could be seen in rural regions, a consequence of clans raiding other clans over land disputes.¹⁵³ These constant disputes were a result of the fact that both under Australian colonial rule, as well as after obtaining independence, attempts to institute a stable regime of property rights that adequately defined and protected title in customary land had been completely unsuccessful.¹⁵⁴

Customary land owning practices – which provided for the creation of land-owning groups based on descent, area of residence/locality, and participation in certain activities – came into conflict with modern systems of registration of title.¹⁵⁵ The government attempted twice to introduce a land registration regime but with little success. In 1952, a Native Land Commission was established and tasked with “systematically recording the ownership of all customary land in the country and determining the ownership of particular plots when claimants applied to the

¹⁴⁹ *Ibid* at 380.

¹⁵⁰ World Bank, *Report on Papua New Guinea* (1981) at 34, 61.

¹⁵¹ Communal Property Rights, *supra* note 141 at 381.

¹⁵² *Ibid*.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid* at 382.

¹⁵⁵ *Ibid* at 382-383.

commission.”¹⁵⁶ The Commission became so preoccupied with individual applications that it did not ever get around to recording the ownership of the 183,000 square miles of land which it was responsible for.¹⁵⁷

The successor to the Native Land Commission was the Land Titles Commission, which was tasked again with recording the ownership of all customary land in Papua New Guinea.¹⁵⁸ Demarcation committees, including among them local land owners, were to be established to assist the commission in its task. However, “the functions of these committees were never clearly defined, many never actively operated at all, and others attempted to resolve disputes and rationalize the varied claims to scattered parcels by different groups, a process that often prompted further conflict.”¹⁵⁹ In short, the many government efforts to transform something resembling a “Hobbesian state of nature [...] to a modern economic environment” were largely unsuccessful.

The New Guinean experience has many lessons for any country that is attempting to reform an institution that is deeply rooted in its religion, culture, and way of life. Given the difficulty that was faced in Papua New Guinea in reforming the governance and administration of land, it is of the greatest importance for any proposed reform to the Saudi Kafala System to be grounded in a deep understanding of the society in which it is operating.

How the Institutional Environment affects Economic Development

Before proceeding further, it is also worth mentioning that there is a lack of consensus in the scholarly literature on how legal reforms impact economic development. In particular, the presence in developing countries of informal methods of social control – which can have a significant impact on social and economic outcomes – has been pointed out as a factor that makes the link between legal reforms and development much more tenuous than it first appears.¹⁶⁰

¹⁵⁶ *Ibid* at 384.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid* at 384-385.

¹⁵⁹ *Ibid* at 385.

¹⁶⁰ Kevin E. Davis & Michael J. Trebilcock, “The Relationship between Law and Development: Optimists versus Skeptic.” (2008) 56:4 *The American Journal of Comparative Law* 895 at 895 [The Relationship between Law and Development].

Furthermore, the formidable challenge that economic, political, and cultural obstacles present to any proposed legal reform have been highlighted to emphasize the difficulty of making such reforms a reality.¹⁶¹ Finally, there is the question of exactly what kind of reforms can promote development. There is a diverse array of academic perspectives on the sorts of legal reforms that might successfully promote development.

Many NIE scholars adopt the view that legal reforms can have positive effects on economic development.¹⁶² A great deal of academic literature has analyzed how the institutional environment affects the development of an economy over time.¹⁶³ Contrary to the traditional view that economies evolve from small-scale, self-sufficient systems to highly specialized and complex structures characterized by an extensive division of labour, NIE proposes that economic development is “a response to the evolution of institutions that support social and commercial relationships.”¹⁶⁴ Curbing the various hazards associated with trade, for instance, can facilitate economic development by “reduc[ing] information costs, encourag[ing] capital formation and capital mobility, allow[ing] risks to be priced and shared and otherwise facilitat[ing] cooperation.”¹⁶⁵ In short, economic development is largely dependent on the development of institutions. “The evolution of political and economic institutions that create an economic environment that induces increasing productivity”¹⁶⁶ is what economic history is really about, more than proposing models for the evolution of an economy from one characterized by a low degree of division of labour to a high one.

Can Improving Governance have Positive Effects on Development?

Saudi Arabia was founded as a monarchy and thus does not have a democratic system of governance. How much of a role quality of governance can have on economic development is an important question in the academic literature. NIE focuses greatly on the analysis of political

¹⁶¹ *Ibid.*

¹⁶² Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (Harpercollins, 1989); The Law-Growth Nexus, *supra* note 123.

¹⁶³ New Institutional Economics, *supra* note 90 at 461.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid* at 462.

institutions. One important question that it asks is why political institutions take the form that they do. A possible answer to this question is that there is no incentive for the individuals who can implement changes in political institutions to do so.¹⁶⁷ In this sense, certain political institutions are self-perpetuating. Another explanation focuses on the ability of “bureaucrats to make their policy choices last beyond their own tenures.”¹⁶⁸

An influential study that was first done in 1999 sheds light on the importance of improving structures of governance in order to promote development.¹⁶⁹ The study looked at six different indicators of the quality of political institutions – voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption – and compared these with three indicators of development – per capita GDP, infant mortality, and adult literacy – to test for a relationship between quality of governance and development.¹⁷⁰ It found that there was indeed a correlation – and, according to the authors, a causal relationship – between the indices of institutional quality and indicators of development.¹⁷¹

In another work by one of the authors of the above study, it was shown that “an improvement in the rule of law by one standard deviation from the current levels in Ukraine to those “middling” levels prevailing in South Africa would lead to a fourfold increase in per capita income in the long run.”¹⁷² Dani Rodrik, Arvind Subramanian and Francesco Trebbi similarly place a great deal of emphasis on the role of high quality institutions of governance in promoting economic development, going as far as to argue that geography, climate, and availability of natural resources are secondary to the presence of factors like respect for the rule of law and strong

¹⁶⁷ Peter C. Ordeshook, “Constitutional Stability” (1993) 3:2 Constitutional Political Economy 137.

¹⁶⁸ New Institutional Economics, *supra* note 90 at 462.

¹⁶⁹ Daniel Kaufmann, Aart Kraay, & Pablo Zoido-Lobaton, “Governance Matters” (1999) World Bank Policy Research Working Papers No. 2196; Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, “Governance Matters IV: Governance Indicators for 1996-2004” (2005) World Bank Policy Research Working Paper, No. 3630; Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, “Governance Matters VI: Governance Indicators for 1996-2006” (2007) World Bank Policy Research Working Papers No. 4280.

¹⁷⁰ Michael Trebilcock, “Between Institutions and Culture: The YNDP's Arab Human Development Reports” (2009) *Journal of Middle East Law and Governance* 210 at 231 [Between Institutions and Culture].

¹⁷¹ *Ibid.*

¹⁷² Daniel Kaufmann, “Governance Redux: The Empirical Challenge” (2004) The World Bank; *Where Is the Wealth of Nations? Measuring Capital for the 21st Century* (Washington D.C.: World Bank, 2007).

protections for property rights.¹⁷³ Comparing the cases of Bolivia and South Korea, they demonstrate that “an increase in institutional difference measured in institutional quality between Bolivia and South Korea produces a two log point rise in per capita incomes, or a 6.4-fold difference—which, not coincidentally, is also roughly the income difference between the two countries.”¹⁷⁴ This literature clearly demonstrates the effect that governance structures can have on economic development. While governance structures may be slow to change because of being path dependent, it is crucial to reform them in order to facilitate economic development.

Path Dependence

NIE holds that the development of social, political, and legal institutions is much more complex than traditional economic models suggest. To take this view to a deeper level of analysis, this paper proposes to use the Path Dependence (PD) approach to assess the evolution of the Kafala System.

PD posits that the development of institutions is largely shaped by past practices and decisions.¹⁷⁵ Institutions tend to develop in ways that are consistent with the path on which they have been travelling, and are interconnected and interdependent.¹⁷⁶ This causes institutions to become resistant to change since continuously relying on one approach to doing things increases the cost of exploring alternative arrangements. The development of institutions is influenced by the religious, cultural, historical, political, and economic context in which they exist. Reforming institutions can be desirable since it can help solve a new problem more effectively or remove inefficiencies from the existing process, but it should be undertaken carefully, taking into consideration the path-dependent nature of institutions. Introducing a drastic change into an institution that does not respect the cultural, political, economic, and historical setting within which that institution operates is likely to be met with failure. On the other hand, adapting reform

¹⁷³ Dani Rodrik, Arvind Subramanian & Francesco Trebbi, “Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development” (2004) 9 *Journal of Economic Growth* 131 at 141.

¹⁷⁴ Between Institutions and Culture, *supra* note 170 at 232.

¹⁷⁵ Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (Ann Arbor: University of Michigan Press, 1994) [Increasing Returns and Path Dependence in the Economy].

¹⁷⁶ *Ibid.*

proposals to the local environment of a society and articulating ideas for change in a language that a target society can relate to can enable institutions to improve and progress.

PD holds that when a problem arises in a given legal system, the “established legal approaches to the solution of issues [in that legal system] will determine the way in which” the problem is handled.¹⁷⁷ The development of the law is therefore not simply a function of the external social and economic pressures bearing on legal institutions.¹⁷⁸ Legal institutions have their own internal dynamic which affects how they respond to a particular problem. As a result, two legal systems facing a very similar new problem may respond differently because of the “paths on which [these] legal systems have been travelling.”¹⁷⁹

An important question that arises in PD analysis is how malleable a legal system is to change. PD considers that the more a given legal approach (for instance, the common law or civil law tradition) is embedded within a legal system, the less responsive it will be to drastic change. The study of “legal origins” is considered to offer an insight into the development of legal systems.¹⁸⁰ According to this approach, the underlying rules of the mechanisms that a legal system provides for addressing social concerns are slow to change.¹⁸¹ To be clear, this is not to suggest that legal rules do not change, but that the change that they undergo is consistent with, and even a function of, the legal tradition which gave birth to them.¹⁸²

“[T]he reason for persistence [of legal approaches] is that the beliefs and ideologies become incorporated in legal rules, institutions, and education and, as such, are transmitted from one generation to the next. It is this incorporation of beliefs and ideologies into the legal and political infrastructure that enables legal origins to have such persistent consequences for rules, regulations, and economic outcomes.”¹⁸³

¹⁷⁷ John Bell, “Path Dependence and Legal Development” (2013) 87:4 Tul. L. Rev. 787 at 787 [Path Dependence and Legal Development].

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* at 788.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, “The Economic Consequences of Legal Origins” (2008) 46:2 J. ECON. Literature 285 at 308.

PD is built on the premise that when faced with a new problem, individuals and institutional actors have a tendency to act in a way that is familiar to them and that they know to work.¹⁸⁴ This is because in complex situations, it is difficult to assess what the best course of action is or what the likely consequences of a particular decision will be.¹⁸⁵ Individuals thus decide to play it safe by turning to a tried and tested approach: “The poorer the capacity of people to predict the consequences of an innovation, the more likely they are to (rationally) prefer what they already have, whose consequences they can predict from their experience.”¹⁸⁶ With respect to the development of the law, the idea that individuals have a tendency to solve problems by turning to established and familiar processes has important implications. First and foremost, it means that there are various factors that affect the ‘style’ that a given legal system adopts.¹⁸⁷ The historical development of a society and its legal system is one of the primary factors that affects the national style of a legal system.¹⁸⁸ Related to this is tradition and its influence on legal thinking.¹⁸⁹

John Bell uses the example of the different ways for recording title to land in the US and Germany to illustrate this point. In Germany, a land register was developed to allow potential purchasers of property to verify title.¹⁹⁰ On the other hand, in the US, it was the purchaser’s attorney who was responsible for checking the title deeds.¹⁹¹ In the event that there was a defect in the purchaser’s title, there was a system of title insurance that served as a backup.¹⁹² The roles of lawyers in the two systems thus differed substantially, as did the procedure for the purchase of land. New problems that arise within these countries are addressed using the framework that exists in each of them because of the historical practice of each legal system of responding to legal problems in a certain way. The same problem thus produces two different solutions depending on the legal system which is addressing it.

¹⁸⁴ Path Dependence and Legal Development, *supra* note 177 at 791.

¹⁸⁵ *Ibid.*

¹⁸⁶ Arthur L. Stinchcombe, *Constructing Social Theories* (University of Chicago Press, 1968) at 123.

¹⁸⁷ Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law 3d rev. ed. (Tony Weir translation)* (Oxford University Press, 1998) at 63-74.

¹⁸⁸ *Ibid* at 68-70.

¹⁸⁹ *Ibid.*

¹⁹⁰ Path Dependence and Legal Development, *supra* note 177 at 791.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

Institutional Responses to New Problems and Persistence of Sub-Optimal Outcomes

Two questions of particular concern in PD theory are the manner in which a given legal system addresses a new problem and the persistence of the use of ‘suboptimal’ solutions in legal systems.¹⁹³

When a new problem arises, the natural response of the law is to try to fit it within an already existing set of conceptual categories in attempting to resolve it: “The natural reaction is for the law to meet the new problem by adaptation, rather than by radical change.”¹⁹⁴ In a 1979 case in the UK, the question arose as to how a microfilm was to be classified under the *Bankers’ Book Evidence Act, 1879*.¹⁹⁵ Despite the fact that microfilms did not exist at the time this law was passed, the court decided that a microfilm fell into the category of “bankers’ books”.¹⁹⁶ As is very often the case, reasoning by analogy with existing concepts was used to characterize and address a new problem.¹⁹⁷

Another example is that of liability for automobile accidents or damage otherwise caused by an automobile. As cars came into common use, the problem of when a driver could be held liable in the event of damage caused by his vehicle arose. The courts in England were of the view that it was necessary to prove fault in order for the driver to be liable.¹⁹⁸ This was based on an analogy with the rule for liability for an individual’s personal act.¹⁹⁹ In Germany, however, the solution that was adopted was markedly distinct. Analogizing with the rule in the German Civil Code on liability for damage caused by an animal under an individual’s possession, a driver was liable for damage caused by his vehicle without it being necessary to prove fault.²⁰⁰ The distinct approaches adopted in these two countries have informed the law on automobile accidents to this

¹⁹³ *Ibid* at 792.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Barker v. Wilson*, [1980] 2 All E.R. 81 (Q.B.) at 82.

¹⁹⁷ Path Dependence and Legal Development, *supra* note 177 at 792.

¹⁹⁸ *Ibid* at 793.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid*.

day.²⁰¹ In other words, the legal systems have followed a distinct path each of which reflects the legal origins and the historical development of each country.

The persistence of inefficient ways of carrying out tasks is the other problem that PD analysis tries to understand. It holds that habits develop overtime that influence individuals to continue to do things a certain way, even when more efficient solutions exist.²⁰² And as individuals continue to prefer one way of performing a task, it becomes more and more embedded in the institutional framework.²⁰³ The cost of change is also therefore higher.²⁰⁴ One well-known example is that of the QWERTY keyboard, which was initially developed to prevent keys on typewriters from jamming.²⁰⁵ This configuration became unnecessary with the advent of the modern keyboard but is used almost universally because of the extent to which people have become used to it.²⁰⁶

Reforming Path-Dependent Institutions

Since this thesis argues that the Kafala System is in many ways path dependent, it must be asked how this system can be reformed effectively.

The Path Dependence literature offers important insights into how institutions become dysfunctional and the ways in which they can be effectively reformed. Three concepts in particular are relevant for analyzing the workings of institutions: self-reinforcing mechanisms, switching costs, and critical junctures.²⁰⁷ Self-reinforcing mechanisms and switching costs help explain why institutions are resistant to change.²⁰⁸ Conversely, the concept of critical junctures suggests that

²⁰¹ *Ibid.*

²⁰² *Ibid* at 794.

²⁰³ *Ibid.*

²⁰⁴ Stan J. Liebowitz & Stephen E. Margolis, "Path Dependence" in Peter Lewin, *The Economics Of Qwerty: History, Theory, And Policy* (Palgrave Macmillan, 2002).

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Michael Trebilcock & Mariana Mota Prado, "Path Dependence, Development, and the Dynamics of Institutional Reform" (2009) 59:3 University of Toronto Law Journal 341 at 350 [Path Dependence, Development, and the Dynamics of Institutional Reform].

²⁰⁸ *Ibid.*

there are in fact “key moments when there may be room for more radical reforms.”²⁰⁹ While institutions are normally faced with serious constraints that prevent all but the most minimal surface-level changes, a critical juncture offers an opportunity to make drastic changes.

Institutions and networks of institutions emerge through mechanisms that reinforce their own mode of operation.²¹⁰ The cost of changing institutions in turn increases as a given set of arrangements becomes entrenched.²¹¹ Economic activities yield increasing returns “as more and more people invest in a given way of doing things.”²¹² And “as these investments – of time, money, skills, and expectations – add up, the relative cost of exploring alternatives steadily rises.”²¹³ Looked at from a path dependence approach, any institutional arrangement thus has three primary features. First, there is its starting position, which is determined by an initial set of choices or random events.²¹⁴ These choices or events are then reinforced through feedback effects.²¹⁵ And finally, switching costs come into play, which make the use of alternatives increasingly difficult in the long run.²¹⁶ Feedback effects and switching costs are at the root of self-reinforcement and increasing returns.

The reinforcement of a particular institutional arrangement occurs through four mechanisms. First, large set-up or fixed costs can mean that persisting in a given activity over the long-term will prove to be profitable.²¹⁷ Second, as individuals become more and more familiar with an activity, there can be an increase in productivity due to ‘learning effects’.²¹⁸ Third, ‘coordination and network effects’ can mean that people benefit more from the participation of others in a given activity.²¹⁹ Finally, adaptive expectations can reduce the appeal of alternatives.²²⁰

²⁰⁹ *Ibid.*

²¹⁰ Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics” (2000) 94:2 Am.Pol.Sci.Rev. 251 at 252–7.

²¹¹ *Ibid.*

²¹² Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 351.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ Increasing Returns and Path Dependence in the Economy, *supra* note 175.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

Self-reinforcement or increasing returns has several consequences. One, small, chance events become part of the institutional memory and build on each other rather than being filtered out.²²¹ As a result, insignificant occurrences can have meaningful long-term consequences. Two, given that the cost of change is greater, one specific path can become locked-in in a very inflexible manner.²²² In turn, the production of sub-optimal outcomes can result due to the locking-in of a given approach or ‘path inefficiency’. Lastly, self-reinforcement can also lead, perhaps rather surprisingly, to unpredictability “in that we cannot determine in advance which activities will be adopted in the long run.”²²³

The emergence of extremely divergent institutions and policies in different places in the world is also considered by some authors to be explainable through a path dependence lens.²²⁴ The way that different legal rules in a given system interact with each other reveals that self-reinforcing mechanisms are at work.²²⁵ In the words of Dani Rodrik, “Different elements of a society’s institutional configuration tend to be mutually reinforcing.”²²⁶ Rodrik uses the example of the link between the social insurance system in Japan and corporate governance and the anti-trust system to illustrate this point.²²⁷ Unlike in Europe and North America, Japan does not depend on taxpayer dollars to maintain an extensive welfare state. It is instead things like life-time employment in large companies, “protection of agriculture and small-scale services (‘mom-and-pop’ stores), government-organized cartels, and regulation of product markets”²²⁸ that serve as a social security net for its people. These things, which are unique to Japan’s version of capitalism, also have implications for other Japanese institutions.²²⁹ They affect the corporate governance model by prioritizing managers and employees over shareholders.²³⁰ Shareholders do not have the power to

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 178 at 352.

²²⁴ Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton, NJ: Princeton University Press, 2007) [One Economics, Many Recipes].

²²⁵ Dani Rodrik, *Feasible Globalizations* (2002) KSG Working Paper No. RWP02-029 at 7 [Feasible Globalizations]

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

monitor and discipline managers and employees as they do in the US.²³¹ Instead, it is banks that oversee the conduct of managers and employees. In contrast, the US allows for a system of corporate governance in which the maximization of profits by the owners of the company is put ahead of the interests of managers and employees.²³² However, in order to prevent this arrangement from malfunctioning, the US has a strict anti-trust system in place that constrains profit-seeking behavior.²³³

This example illustrates very well the manner in which self-reinforcing mechanisms cause institutions to become more entrenched, in turn increasing the cost of exploring alternatives or introducing change. However, one should bear in mind that this explanation is largely “backward looking,”²³⁴ a criticism that is often made with regards to path dependence. That is, it helps explain why things are a certain way but offers very little in the way of predicting what may occur in the future or suggesting options for reform. It cannot be known in advance which self-reinforcing mechanisms will come into play, even when a given intervention is deliberate and aimed at achieving a particular goal. Unpredictability is a defining characteristic of self-reinforcing mechanisms.²³⁵ The question therefore arises if a path dependence analysis is of much use.

Michael Trebilcock and Mariana Prado argue that despite the fact that path dependence focuses mostly on explaining past events, it does have “important positive implications that can be fruitfully used to inform the feasibility of normatively motivated institutional reforms.”²³⁶ They also assert that the failures of previous reform initiatives can also be better understood from a path dependence perspective.²³⁷ This is relevant since changes have been made to the Kafala System in recent years but with little success.

In addition to reforming the specific rules governing the Kafala System, it may also be advisable to introduce general rule of law reforms in Saudi Arabia. As the discussion below will

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 352.

²³⁵ Increasing Returns and Path Dependence in the Economy, *supra* note 175.

²³⁶ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 353.

²³⁷ *Ibid* at 354.

demonstrate, targeted reforms of a particular institution can often fail to produce the desired results if they are not accompanied by correlative reforms of a more general character.

Rule of Law Reforms in Developing Countries

The question of whether institutional reforms should be isolated or generalized is an important one as it goes to the heart of just what kinds of changes are needed in order to produce the desired results. The example of rule of law reforms in developing countries is useful for illustrating this point.

In many developing countries, growing court backlogs can result in a failure to deliver justice to individuals in a timely manner.²³⁸ Many initiatives have been undertaken to minimize this problem, including using modern technology and proactive case management techniques to improve court record-keeping, as well as externally supported judicial training.²³⁹ And while court backlogs have been reduced in some of the countries in which such reforms have been made, this may very well have come at the expense of high-quality judicial decision-making: “Judicial corruption and incompetence are endemic in many developing countries, particularly at lower levels of the court systems and outside major urban centres. Reform efforts have barely penetrated these courts and are thus largely ineffective, since most citizens’ only contact with courts is at the lowest level of the system.”²⁴⁰

One reason that rule of law reforms have failed is that the concept of self-reinforcing mechanisms, which explains how institutions become entrenched, was not given due consideration. At the individual level, it is difficult to make institutional actors adapt to a new way of doing things when they have already adjusted their belief systems and patterns of behavior to a given institutional arrangement. The switching costs for these individuals are very high and they therefore resist change.

²³⁸ Erik G. Jensen & Thomas C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford, CA: Stanford University Press, 2003).

²³⁹ *Ibid.*

²⁴⁰ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 359.

Legal education in much of the developing world reinforces precisely those beliefs and patterns of behavior that judicial reforms aim to modify. First and foremost, rote learning and regurgitation are emphasized, instead of analysis and critical thinking.²⁴¹ Many public law schools in Latin American are overpopulated, while private law schools vary drastically in the quality of legal education that they offer. In Africa, the situation is similar, with considerable variation among law schools in “institutional support, funding, and curriculum development.”²⁴² As in Latin America, there is also an emphasis on rote learning.²⁴³ This kind of legal education produces legal professionals who only have certain skillsets. So long as the legal system continues to work the same way, their skillsets continue to be relevant.

Making sweeping changes to legal institutions in developing countries can have the effect of reducing the value of the human capital of the current class of lawyers, judges, and professors, and is therefore resisted by these individuals.²⁴⁴ Changes would mean investing in new human capital, which would run counter to their interest: “Lawyers who were trained in and who practice or teach in a socially dysfunctional legal system, and who have made substantial investments in human capital in learning how to function in such a system, are often not a progressive force for legal reform.”²⁴⁵

In addition to the self-reinforcing mechanisms and high switching costs described above, institutional interdependencies can also affect the efficacy of institutional reform. In the case of judicial reform in developing countries, the external processes and institutions that are linked with proceedings in a courtroom are often not addressed.²⁴⁶ The police – the most important law-enforcement agency – is seldom the target of reforms, although it has such an important role in giving substance to the rule of law.²⁴⁷ In developing countries, corruption within the police is one

²⁴¹ Joseph Tome, “Heading South but Looking North: Globalization and Law Reform in Latin America” (2000) 2000:3 Wisc.L.Rev. 691.

²⁴² Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 360.

²⁴³ *Ibid* at 361.

²⁴⁴ Ronald J. Daniels & Michael J. Trebilcock, “The Political Economy of Rule of Law Reform in Developing Countries” (2004) 26:1 Mich.J.Int’l L. 99 [The Political Economy of Rule of Law Reform].

²⁴⁵ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 361.

²⁴⁶ The Political Economy of Rule of Law Reform, *supra* note 244.

²⁴⁷ *Ibid*.

of the main reasons for the failure to deliver justice.²⁴⁸ When legal reforms only target what happens within the courtroom while ignoring other, interconnected institutions that are complicit in undermining the rule of law, reform efforts evidently do not produce the desired results.

Strengthening the rule of law is crucial in the context of the Saudi Kafala System in order to ensure that migrant workers are able to exercise their rights. At present, the Kafala System not only suffers from an absence of human rights protections, but also from an inability to give effect to the rights that it does protect. Thus, when employers behave in a manner that is in violation of the current rules of Kafala, they are by and large not held accountable. Even as protections for the rights of workers have been strengthened in recent years, these increased protections have changed the reality on the ground very little. This problem is at its core one of rule of law. PD analysis offers many insights for how to introduce rule of law reforms in an effective manner. As mentioned earlier, improving respect for the rule of law can have a significant effect on economic development.²⁴⁹ Approaching the lack of effective legality observed in the Kafala System from a path dependence lens can shed light on why this problem persists and how it can be remedied.

Developing Reform Strategies using Path Dependence

As the above discussion on rule of law reforms demonstrates, the primary reason that institutional reform efforts fail, according to PD theory, is that self-reinforcing mechanisms, switching costs, and institutional interdependencies are not taken into account.

According to Trebilcock and Prado, these institutional features can be better addressed by

“(1) abandoning assumptions that institutional changes are being made on a blank slate by accounting for switching costs; (2) abandoning the focus on micro processes and acknowledging and accounting for complex interactions within the broader institutional matrix; and (3) acknowledging that outcomes are influenced by informal rules and norms.”²⁵⁰

²⁴⁸ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 361.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid* at 367.

In accordance with PD theory, institutional change should usually be incremental. Just how drastic change can be is affected by whether changes are made during normal times or at a critical juncture in a nation's history.²⁵¹ During normal times (periods free of economic collapses, civil wars, military invasions, and political crises²⁵²) drastic changes cannot be made because of high switching costs for institutional actors.²⁵³ The problem, however, is that making small reforms that target micro-processes is not very helpful either, since it ignores self-reinforcing mechanisms and institutional interdependencies.²⁵⁴ Small change on the margins therefore appears to at once be both the problem and the antidote.

An important question to consider is if there are possibilities during normal times for successfully introducing meaningful institutional reforms. Research looking at societies that have recently emerged from a conflict shows that even in these societies – which are assumed to be yearning for a complete break with the past – sweeping reforms do not produce the desired results.²⁵⁵ What kind of possibilities are there then to make meaningful reforms to institutions during normal times?

One approach is to “identify some institutions that can be more easily detached from a broader mutually reinforcing institutional matrix or can be created *de novo*.”²⁵⁶ Once identified, an institution that fits this criterion can be the subject of extensive reforms that it might be hoped will have a spillover effect onto other institutions. However, past experience shows that even these kinds of reforms have to be followed up by reforms to the “surrounding institutional matrix” if they are to be effective.²⁵⁷

A different approach is to “reform existing interconnected and mutually reinforcing institutions in a time-sensitive manner by prioritizing a sequence of reforms, beginning with

²⁵¹ *Ibid.*

²⁵² *Ibid* at 369.

²⁵³ *Ibid* at 367.

²⁵⁴ *Ibid.*

²⁵⁵ Marina Ottaway, “The Post-War “Democratic Reconstruction Model”: Why It Can’t Work” (2002) Paper presented at the US Institute of Peace.

²⁵⁶ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 367-368.

²⁵⁷ *Ibid* at 368.

certain core reforms but recognizing that further complementary reforms will be necessary in the future to reinforce initial reforms.”²⁵⁸ The essential point of this approach is make sure reforms are neither one-time standalone measures nor system-wide overhauls, but are instead incremental.²⁵⁹ What should be prioritized might vary from one state to another. The example of corruption in post-conflict societies can serve as an illustration once again. In some of these societies, providing basic public order might be a more pressing need than addressing corruption, while in others corruption might be so rampant that it can undermine the society’s transition itself if it is not dealt with.²⁶⁰ If reforms are made incrementally, it is crucial to make sure that they are sequenced appropriately, since self-reinforcing mechanisms will create paths that institutions will resist deviating from.²⁶¹

These guidelines apply to reforms that are made during normal times, but during times of economic collapse, civil war, political crises, military invasions, and other similar events which have the potential to upend an entire society, there is a possibility to make much more far-reaching reforms since the credibility and legitimacy of existing institutions is greatly reduced.²⁶² This is not to say, however, that all reforms made during such a time will be effective. It is very possible for governments to make the wrong kinds of reforms when faced with a crisis. One way to increase the possibility that the right kinds of reforms are made is for governments to involve multiple stakeholders, and particularly those individuals who were marginalized by previous institutional frameworks.²⁶³

Conclusion

The theoretical approach that this thesis will use combines an interdisciplinary human rights approach with an analysis of the Kafala System from an NIE and PD lens. While the human rights approach will help to identify the obligations of Saudi Arabia under domestic and

²⁵⁸ *Ibid.*

²⁵⁹ Madalene O’Donnell, “Corruption: A Rule of Law Agenda?” in Agnes Hurwitz (ed.), *Civil War and the Rule of Law: Security, Development, Human Rights* (Boulder, CO: Lynne Rienner, 2014) at 225.

²⁶⁰ Susan Rose-Ackerman, “Corruption and Post-conflict Peace-Building” (2008) 15 Ohio N.U.L.Rev. at 328.

²⁶¹ *Ibid.*

²⁶² Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 369.

²⁶³ *Ibid.*

international law and the violations of the rights of migrant workers, the NIE analysis will foster an understanding of the political, economic, and religious factors that make the Kafala System the way that it is. The PD approach will deepen this understanding and highlight the features of the Kafala System that make it resistant to change. In so doing, it will help chart an avenue for reform that respects the Islamic identity of Saudi Arabia and that is suitable for the changing political and economic circumstances.

In the next chapter, the various problems – economic, political, and human rights related – to which the Kafala System gives rise will be discussed.

Chapter Three: The Nature of the Problem

This chapter will begin with an overview of the laws and regulations pertaining to migrant workers in Saudi Arabia. It will include a history and description of the Kafala System and its position within Saudi Arabian law, as well as a discussion of the role of the Kafala System in the economy. In addition, this chapter will detail the problems created by the Kafala System for both migrant workers and for Saudi Arabia. As regards migrant workers, it will show that many of their rights are not respected by employers through acts such as physical and verbal abuse, unsafe working conditions, extremely low wages, non-payment of wages, unreasonably long working hours, and restrictions on their movement. The chapter will then turn to a discussion of the negative effects of the Kafala System on Saudi Arabia as a whole, arguing that the absence of workers' rights protections damages Saudi Arabia's reputation and makes it less attractive for foreign investors, limits Saudi Arabia's ability to attract highly skilled foreign professionals, and reduces the productivity of its labour force.

To begin with, an overview of the Kafala System is in order.

The Kafala System

The Kafala System is a system for regulating migration in which individual migrants are sponsored for the purposes of employment by citizens or companies (or, if a government agency is the employer, by the state).²⁶⁴ It was set up by the Gulf Cooperation Council (GCC) in the 1950s and only operates in these states. Sponsorship is the only means for migrant workers to obtain an employment visa and residence permit.²⁶⁵ The sponsor assumes legal and financial responsibility

²⁶⁴ Neha Vora & Natalie Koch, "Everyday Inclusions: Rethinking Ethnocracy, Kafala, And Belonging in The Arabian Peninsula, *Studies In Ethnicity And Nationalism*" (2015) 15:3 *Stud Ethn Nation* 540.

²⁶⁵ Martin Baldwin-Edwards, *Labour Immigration and Labour Markets in The GCC Countries: National Patterns and Trends* (London: London School of Economics and Political Science, 2011) at 37 [Labour Immigration and Labour Markets in the GCC Countries].

for the migrant worker during a specific contract period – typically two years – and signs a document from the Ministry of Labor to that effect.²⁶⁶

Saudi Arabia is dependent on roughly 9 million migrant workers, who comprise over 30% of the country's total population.²⁶⁷ These migrant workers are important contributors to Saudi Arabia's economic expansion.²⁶⁸ Between 2003 and 2013, for example, their contribution to Saudi Arabia's GDP was no lower than 59% and as high as 92% (in 2009). Migrant workers are brought primarily from India, Pakistan, Sri Lanka, the Philippines, Nepal, and Bangladesh through the Kafala system.²⁶⁹

Under the Kafala System, an employee is only allowed to work for his sponsor. As a result, many sponsors take away their migrant workers' passports and identification cards once they arrive so as to prevent them from seeking employment with another company.²⁷⁰ As explained later in this chapter, many workers consider returning home or seeking other employment when they experience the harsh conditions that they must work and live in.²⁷¹ If workers decide to leave their sponsors, harsh monetary penalties immediately await them: the workers must leave the country immediately and at their own expense instead of having their employers cover their return airfare at the end of their contract as it is usually the case.²⁷²

Migrant workers receive an entry visa and a residence permit only if a Saudi citizen or company employs them. Sponsorship (kafala) requires the sponsor-employer (kafeel) to assume

²⁶⁶ Nora Ann Colton, "The International Political Economy Of Gulf Migration" in *Viewpoints: Migration And The Gulf* (The Middle East Institute, 2010) [The International Political Economy of Gulf Migration]; Michele Ruth Gamburd, "Sri Lankan migration To The Gulf: Female Breadwinners— Domestic Workers" in *Viewpoints: Migration And The Gulf* (The Middle East Institute, 2010).

²⁶⁷ Human Rights Watch, "Saudi Arabia 2014 Human Rights Report" (2014) Online.

²⁶⁸ Ministry Of Labour And Social Development, *Saudi Arabia Today And Tomorrow: Challenges And Vision, Labour Market Report 3rd* ed (2016) at 10.

²⁶⁹ *Demography, Migration, and Labour Market in Saudi Arabia* (2014) Gulf Research Centre. GLMM - EN - No. 1/2014 [Demography, Migration, and Labour Market in Saudi Arabia].

²⁷⁰ The International Political Economy of Gulf Migration, *supra* note 266.

²⁷¹ *Exploited Dreams: Dispatches from Indian Migrant Workers In Saudi Arabia* (Bangalore: Amnesty International India, 2014) [Exploited Dreams].

²⁷² Labor Law, *supra* note 43 at art 40(2); Labour Immigration and Labour Markets in the GCC Countries, *supra* note 265 at 37.

full economic and legal responsibility for the employee during the contract period.²⁷³ The kafeel signs a form issued by the Ministry of Labour whereby he (or she) declares that the foreigner works for him (or her), and informs the Immigration Department of any change in the labour contract (expiry, renewal or cancellation), or in the worker's address and civil status.²⁷⁴ The kafeel also pledges to send the employee back to their country at the employer's expense upon termination of the contract.²⁷⁵

This sponsorship system of course serves some purpose, and this is the focus of the next section.

The Role of the Kafala System in the Economy

The Kafala System serves several important economic functions for Saudi Arabia. For one, it has allowed Saudi Arabia to meet the rapidly increasing demand for labour that followed the oil boom.²⁷⁶ And it has done this while keeping labour costs low.²⁷⁷ In addition, by imposing responsibility for the employee on the sponsor, it has ensured that migrant workers do not become a burden on the Saudi economy.

The Kafala System's primary economic objective was to provide temporary, rotating labour that could be rapidly brought into the country in times of economic growth and expelled during an economic downturn.²⁷⁸ While the migrant worker is referred to as a 'guest worker' under the Kafala System, he/she is little more than a disposable economic commodity for his/her sponsor,²⁷⁹ because the main goal of the system is to supply labour that is critical to the delivery of essential goods and services. It is a demand-driven model because it leaves it to employers to

²⁷³ Labor Law, *supra* note 43 at art 33(3).

²⁷⁴ Regulations of the Labor Law, *supra* note 44.

²⁷⁵ Labor Law, *supra* note 43 at art 40(1).

²⁷⁶ Omar Al-Ubaydli, *The Economics of Migrant Workers in the GCC* (The Arab Gulf States Institute in Washington, 2015) at 1 [The Economics of Migrant Workers in the GCC].

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

hire foreigners as and when the need arises. When an individual's services are no longer required, his employer can simply decide not to renew his contract and repatriate him.²⁸⁰

Thus, while making labour available in every industry, the Kafala System ensures that there is a balance between demand and supply of labour in Saudi Arabia. Essentially, when there is an increase in demand for labour, employers can hire foreign workers to satisfy it. On the other hand, when the need for labour goes down, especially during times of economic hardship, employers repatriate the migrant workers to ensure that there is not a surplus of workers. The system ensures that there is a healthy relationship between the need for labour and its availability on the market, a balance that is critical to a healthy and well-performing economy.²⁸¹

The Kafala System also has an important role in keeping the cost of labour at a minimum. It goes without saying that labour costs are a matter of concern not only for employers in the Gulf Countries but across the world as well. A majority of migrant workers in Saudi Arabia, especially unskilled ones, are willing to accept much lower wages than what would have to be paid to a Saudi national because they come from countries whose economies are weak.²⁸² According to a report by the Saudi Ministry of Labor and Social Development, the average salary of non-Saudis in the private sector (which is where the overwhelming majority of foreign workers are employed) between 2004-2015 was a little under 2000 SAR, while that of Saudis was a little under 6000 SAR.²⁸³ There was a similar disparity in the public sector, with non-Saudis earning a little over 8000 SAR in 2015 in comparison to a little over 10000 SAR for their Saudi counterparts.²⁸⁴ Individual examples of extremely low wages are also numerous. According to a Human Rights Watch survey, one Philippine restaurant worker reported being paid just \$267 per month, while a maintenance worker reported that he earned only 270 riyals a month.²⁸⁵ Through the Kafala System, employers in Saudi Arabia are able to access a virtually limitless supply of such workers.

²⁸⁰ Labor Law, *supra* note 43 at art 37.

²⁸¹ Martin Hvdit, *Highly Skilled Migrants. How and How Much do They Contribute to The Economic Development of The Arab Gulf countries?* (Center for Mellemstudier, 2016) [Highly Skilled Migrants].

²⁸² Tanja Bastia (Ed.), *Migration and Inequality* (London: Routledge, 2013) [Migration and Inequality].

²⁸³ *Saudi Arabia Today and Tomorrow: Challenges and Vision, Labour Market Report, 3rd ed* (Ministry Of Labour And Social Development of Saudi Arabia, 2016) at 13

²⁸⁴ *Ibid.*

²⁸⁵ *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia.* (2004) 16:5(E) Human Rights Watch.

To these individuals, employment in Saudi Arabia, even when it pays very little, is a lifeline that keeps them and their families back home afloat.²⁸⁶ For employers, a seemingly limitless supply of cheap labour is the best thing they could hope for. The availability of cheap labour allows businesses to produce goods and services at extremely low costs, which have a spillover effect on the pricing of products in the market, making them more competitive and much cheaper.²⁸⁷ This is a tremendously positive effect of the Kafala system from an economic perspective.²⁸⁸ Indeed, since the implementation in 2011 of the Nitaqat program, whose aim was to increase the number of Saudi workers in the private sector, nearly 11000 firms were forced to shut down because of an increase in costs.²⁸⁹ Furthermore, total employment in the private sector decreased by 418,000 workers.²⁹⁰ Unable to pass on costs to consumers, businesses downsized or simply shut down, thus negatively affecting the economy of Saudi Arabia.

To be clear, the Kafala System is not used only to recruit masses of low-skilled workers. Foreign labour of all skill-levels and from all industries is brought to Saudi Arabia through the Kafala System, including highly skilled foreign professionals such as researchers, accountants, engineers, lawyers, doctors and professional administrators. Between 2005 and 2011, skilled and highly skilled workers made up 11-12.8% of all foreign workers in Saudi Arabia.²⁹¹ Such professionals are vital to the Saudi economy, allowing it to grow and compete internationally.²⁹² The Kafala system is therefore not only a regulatory mechanism that everyone is forced to comply with, but also an engine for bringing foreign talent into Saudi Arabia.²⁹³ The integration of highly skilled migrants into the economies of the Gulf countries through the Kafala system makes them more competitive because of the services they offer.²⁹⁴ The competitive edge of these countries subsequently helps attract investment as well. The extremely high labour participation rate of

²⁸⁶ Migration and Inequality, *supra* note 282 at 5.

²⁸⁷ The Economics of Migrant Workers in the GCC, *supra* note 276 at 5.

²⁸⁸ Highly Skilled Migrants, *supra* note 281.

²⁸⁹ Jennifer R. Peck, "Can Hiring Quotas Work? The Effect of the Nitaqat Program on the Saudi Private Sector" (2014) 9:2 American Economic Journal 316.

²⁹⁰ *Ibid.*

²⁹¹ Françoise De Bel-Air, *Demography, Migration and Labour Market in Saudi Arabia* (GLMM, 2014) at 9.

²⁹² Highly Skilled Migrants, *supra* note 281.

²⁹³ *Ibid.*

²⁹⁴ The Economics of Migrant Workers in the GCC, *supra* note 276 at 5.

migrant workers in Saudi Arabia (e.g., 93% in 2016),²⁹⁵ as well as their contribution to its GDP are ample proof of how significant their contribution is to Saudi Arabia economy.²⁹⁶

Finally, the Kafala System ensures that foreigners coming into Saudi Arabia do not become a burden on the Saudi economy. Before an employee leaves their home country, they have already signed an employment contract and have a job reserved for them for a specific period of time in Saudi Arabia.²⁹⁷ As a result, individuals who are unemployable are largely prevented from coming to Saudi Arabia. Moreover, the kafeel has full responsibility for a worker while he is in Saudi Arabia, including covering his health insurance expenses and his return trip to his home country.²⁹⁸ Thus, any foreign worker in Saudi Arabia does not become a burden on the Saudi system. All in all, the Kafala System ensures that only employable individuals come to Saudi Arabia and that their time in Saudi Arabia does not impose too many costs on the Saudi government.²⁹⁹

Although the Kafala System serves some important functions, it also creates many problems, which are explored in detail in the next section.

The Problems created by the Kafala System in Saudi Arabia

The Saudi Basic Law of Governance enacted in 1992 was the first legislative act to grant certain rights and protections to foreign residents of the Kingdom, the most important of which is the right to file a lawsuit.³⁰⁰ The Kafala System, however, does not offer migrant workers the same rights. At the moment, one of the major criticisms leveled against the Kafala System by many human rights experts is that it allows many of the fundamental rights of migrant workers to be

²⁹⁵ *Economic Activity Rate 2016* (General Authority for Statistics, Kingdom of Saudi Arabia) [Economic Activity Rate 2016].

²⁹⁶ Fayq Al Akayleh, "Do Foreign Workers' Positive Contributions to GDP Outweigh the Negative Effect of Their Outward Remittances on GDP? A Case Study of Saudi Arabia" (2016) 4:12 *Advances in Economics and Business* 657 at 665 [Do Foreign Workers' Positive Contributions to GDP Outweigh the Negative Effect of Their Outward Remittances].

²⁹⁷ Labor Law, *supra* note 43 at art 33.

²⁹⁸ Labor Law, *supra* note 43 at art 40(1).

²⁹⁹ The Economics of Migrant Workers in the GCC, *supra* note 276.

³⁰⁰ Basic Law of Governance, *supra* note 40 at art 36, 47.

violated.³⁰¹ For instance, a citizen of a GCC country who is working in Saudi Arabia can enter and exit the kingdom as he wishes, whereas an individual who is under a kafeel must obtain permission from him/her as well as a visa to exit and subsequently re-enter Saudi Arabia.³⁰² Likewise, a GCC national is free to change employers within Saudi Arabia as often as he chooses, while an individual who falls under the Kafala system can only work for the employer who sponsored him.³⁰³

The following are most serious problems which continue to persist under the current Kafala System and which should be taken into account when considering possible reforms of the system: (1) cruel or undignified treatment of workers, (2) unsafe working conditions, (3) extremely low wages and non-payment of wages, (4) unreasonably long working hours, (5) restrictions on the movement of workers, (6) unavailability of Saudi Arabia citizenship to workers, (7) the limited ability of Saudi Arabia to bring skilled professionals from abroad and to nurture highly developed human capital at home, and (8) the damage to Saudi Arabia's international reputation.³⁰⁴ It should be noted that some of these problems affect only migrant workers, while others affect Saudi Arabia as a whole. The problems which affect migrant workers are discussed next.

Consequences of the Kafala System for Migrant Workers

Under the Kafala System, a lot of migrant workers endure many infringements of their rights. Some of the abuses which occur before a migrant worker even sets foot in Saudi Arabia. Various intermediaries, often referred to as visa brokers or recruiting agents and responsible for setting into motion the chain of events that bring hundreds of thousands of migrant workers from developing countries to Saudi Arabia, often deceive future migrant workers to convince them to come to Saudi Arabia.³⁰⁵ In particular, when it comes to important questions of the legality of their

³⁰¹ Do Foreign Workers' Positive Contributions to GDP Outweigh the Negative Effect of Their Outward Remittances, *supra* note 296 at 665.

³⁰² Residence Regulations, *supra* note 45 at art 16.

³⁰³ Labor Law, *supra* note 43 at art 39(1)

³⁰⁴ Heather E. Murray, "Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries" (2012) 45:2 Cornell International Law Journal 461 at 467 [Hope for Reform Springs Eternal].

³⁰⁵ Exploited Dreams, *supra* note 271 at 40.

employment agreement, the tasks they will be performing, working and living conditions, working hours, and how much they will have to pay to their sponsor for their residency permit, recruiting agents grossly misrepresent the future that awaits them.³⁰⁶ An Amnesty International survey of former migrant workers in Saudi Arabia found that 19 out of 51 migrant workers reported that they had been deceived with regards to compensation, working and living conditions, working hours, or how much they owed their sponsor in monthly installments.³⁰⁷

There are also many cases of cruel and undignified treatment of workers and the violation of their right to physical integrity, despite the fact that the Kafala System requires employers to treat workers with dignity.³⁰⁸ To begin with, a lot of migrant workers are made to live in collective households, which lack basic facilities, are overcrowded, unclean, and generally unsuitable to live in.³⁰⁹ Some types of migrant workers, such as domestic workers, are also vulnerable to physical and verbal abuse by their kafeel (sponsor). Although such abuse is rare, in some cases it can be quite severe. In one particularly extreme case, an Indonesian domestic worker reported that “from 12 midnight to 2:30 a.m. my employer beat me with an electric cable.”³¹⁰ Besides domestic workers, individuals employed in other jobs also face physical and verbal abuse, although less frequently. A 48 year old Indian man who had been hired as a driver but was put to work in a lodge for two years (between 2011 and 2013) was intimidated and beaten by his employer and denied payment of wages.³¹¹ To escape this situation, he sought an exit permit from his employer, which the latter granted on the condition that he sign a declaration that the wages owed to him had been paid.³¹² There are also cases of violence inflicted by the employee on the sponsor, but a discussion of this problem is beyond the scope of this thesis.

In addition to humiliating treatment and a lack of respect for their right to physical integrity, unreasonable terms of employment and unsafe working conditions continue to be a problem faced

³⁰⁶ *Ibid* at 42-43.

³⁰⁷ *Ibid*.

³⁰⁸ Labor Law, *supra* note 43 at art 61(1).

³⁰⁹ Rita Afsar, *Unravelling the Vicious Cycle of Labor Recruitment: Migration from Bangladesh to Gulf Countries* (International Labour Organization, 2009).

³¹⁰ *As if I Am not Human: Abuses against Asian Domestic Workers in Saudi Arabia* (Human Rights Watch, 2008) [As if I am not Human].

³¹¹ *Exploited Dreams*, *supra* note 271 at 45.

³¹² *Ibid*.

by many migrant workers. This is not, it should be clarified, a consequence of a lack of legal provisions in either domestic or international law on just and favourable conditions of work and occupational health and safety standards.³¹³ Rather, it is due to an absence of enforcement. One of the more commonly reported problems is having to work extremely long hours. In one case, a Sri Lankan national was often made to work 14 or 15 hours a day, 7 days a week.³¹⁴ This is contrary to the requirement of Saudi law that a worker cannot be made to work more than 8 hours a day.³¹⁵ It is also a violation of the requirement to give at least one rest day per week.³¹⁶ In this particular case, the individual was not paid overtime despite it being stipulated in his contract.³¹⁷ Similarly, a survey of 51 Indian migrant workers found that 21 of them had been made to work well in excess of the 8-hour limit, in some cases 15-18 hours per day.³¹⁸ One of these individuals, a cook, reported that while he had been informed at the time of hiring that he would have to work 12 hours a day, he actually worked close to 18 hours a day.³¹⁹ Another, a mechanic, reported that while he had been told that he would be working 8 hour days, he often worked from 6:30am to 11pm.³²⁰ Sometimes, he worked as late as 2am.³²¹ What made matters worse is that some of these individuals were underpaid for the extra hours they had worked and sometimes not paid at all.³²² In addition to working long hours, some migrant workers also face the problem of having to take up jobs that have no connection to their occupation. For instance, in 2011, a 53 year old Indian man who had been hired as a carpenter was made to work as a construction labourer performing tasks such as mixing cement, carrying bricks, and plastering.³²³

Unreasonably low wages and delays in the payment of wages are yet another problem that migrant workers in Saudi Arabia face. Paying extremely low wages reduces migrant workers'

³¹³ Labor Law, *supra* note 43 at art 121-122; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 at art 5(e)(i) (entered into force 4 January 1969) [ICERD].

³¹⁴ *Migrant Workers in Saudi Arabia* (International Federation of Human Rights, 2003) at 4 [Migrant Workers in Saudi Arabia].

³¹⁵ Labor Law, *supra* note 43 at art 98.

³¹⁶ *Ibid* at art 104(1).

³¹⁷ *Migrant Workers in Saudi Arabia*, *supra* note 314 at 4.

³¹⁸ *Exploited Dreams*, *supra* note 271 at 46.

³¹⁹ *Ibid*.

³²⁰ *Ibid* at 47.

³²¹ *Ibid*.

³²² *Ibid* at 46.

³²³ *Ibid* at 45.

ability to afford a reasonably high quality of life, support their families back home, and offer their children the chance to attain higher levels of education.³²⁴ As for withholding of wages, this is done for different reasons. Sometimes, it is to intimidate foreign workers and prevent them from leaving (as in the case of domestic workers who are likely to consider fleeing exploitative employment relationships).³²⁵ Sometimes, it is simply because the company does not have the money to pay its employees. For example, in 2016, nearly 150,000 workers in the Saudi construction industry had not been paid by their employers, in some cases for up to 10 months of work.³²⁶ This delay was largely a result of the economic downturn that was triggered by falling oil prices, and that caused many construction companies to shut down.³²⁷ In addition, Amnesty International India conducted a survey in which 17 out of 51 migrant workers (of Indian origin) reported that they had experienced arbitrary pay deduction, underpayment, late payment, and outright nonpayment.³²⁸ One of these individuals, Ali Akbar, who came from India to work as a carpenter in Saudi Arabia in 2012, described the events that transpired with his employer.³²⁹ When he first arrived in Saudi Arabia, his sponsor allowed him to work for other employers for several months.³³⁰ After this, he found a job at an oil rig but was asked by his sponsor to work in a construction agency that he was planning to start and promised 2000 riyals/month with overtime.³³¹ He waited two months for work to begin, after which he worked 12 hours a day for 3 months without being paid for any of it.³³² When he demanded payment of his wages, he was threatened with arrest.³³³ Faced with no other options, Ali eventually fled from his employer and managed to return to India.³³⁴ Another case involved an electric networks instructor who had come to work in Saudi Arabia from Egypt and who lost his eyesight due to an electric fire. Although he

³²⁴ The Economics of Migrant Workers in the GCC, *supra* note 276 at 4.

³²⁵ Antoinette Vlieger, "Domestic Workers in Saudi Arabia and the Emirates. A Socio-legal Study on Conflicts" (2011) Amsterdam Law School Legal Studies Research Paper No. 2011-49 at 235.

³²⁶ James Lynch, "Migrant Workers Bear the Brunt of Saudi's Archaic Kafala System" (October 10, 2016) Middle East Eye [Migrant Workers Bear the Brunt of Saudi's Archaic Kafala System].

³²⁷ *Ibid.*

³²⁸ Exploited Dreams, *supra* note 271 at 44.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid* at 45.

was treated for his injuries, he was never paid the 543,000 riyals in wages that were owed to him; instead, he was sent back to Egypt.³³⁵

This problem is compounded by the fact that the movement of migrant workers, both within Saudi Arabia as well as outside it, is largely in control of their employer-sponsor. For example, while employees wait for wages to be paid, they do not have the option of seeking employment with another employer, since they must seek the permission of their current employer before doing so.³³⁶ Thus, they can either wait in Saudi Arabia at their own expense in the hope that they will receive at least some compensation for work done, during which time they must tolerate living in squalid conditions with barely enough food to survive, or return home in order to find other work. Whichever option they choose, they are faced with a whole host of new problems. They can only wait as long as the term of their employment contract has not come to an end. At the end of this duration, their employer must renew their visa in order for them to remain legally in Saudi Arabia.³³⁷ If the sponsor does not renew their visa and the migrant remains in Saudi Arabia to await the payment of their wages, they are considered to be illegal migrants who can face arrest and deportation by the Saudi authorities.³³⁸ This was exactly the ordeal that some of the construction workers in the example discussed earlier went through.³³⁹

Even more troubling is the fact that even if workers forego the wages that they are owed and decide to leave Saudi Arabia, the situation remains in the control of their employer. In order to leave Saudi Arabia, workers must ask their employer to grant them an exit visa, return their passport if it is in the employer's possession, and provide airfare for their trip home. If the employer is insolvent, as in the case of the construction companies who were unable to pay the wages that they owed to their workers, the worker finds himself in an even more perilous situation.

Such restrictions on the freedom of movement of migrant workers are the source of a great deal of difficulty for these individuals. The freedom of movement, it should be remembered, is

³³⁵ Migrant Workers in Saudi Arabia, *supra* note 314 at 4.

³³⁶ Labor Law, *supra* note 43 at art 39(1).

³³⁷ *Ibid* at art 40(1).

³³⁸ *Ibid* at arts 32-33.

³³⁹ Migrant Workers Bear the Brunt of Saudi's Archaic Kafala System, *supra* note 326.

something that is recognized as a fundamental human right by all major human rights instruments.³⁴⁰ Article 13 of the Universal Declaration of Human Rights requires countries to guarantee the right of movement to individuals: “(1) Everyone has the right to freedom of movement and residence within the borders of each state.” The Arab Charter contains a similar provision, stating that “Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force.” The Universal Islamic Declaration of Human Rights (UIDHR), for its part, also affirms this right in article XXIII: “In view of the fact that the World of Islam is veritably Ummah Islamia, every Muslim shall have the right to freely move in and out of any Muslim country.”³⁴¹ Under the current structure of the Kafala system, a foreign worker has his movement severely restricted by the prohibition on exiting and entering Saudi Arabia at will or even moving from one city to another, as well as the prohibition on changing employers.³⁴² The fact that employers often confiscate the passports of migrant workers despite the fact that this has been prohibited since 2000³⁴³ only makes the situation of migrant workers even more deplorable.³⁴⁴ As a result, a migrant worker in Saudi Arabia becomes wholly dependent on his kafeel and cannot live freely or avail himself of opportunities that may be open to others. His movement become severely restricted for the duration of his contract, for he can neither move freely within Saudi Arabia, nor seek opportunities outside it. Tying the hands of a foreign worker in this manner likely also reduces their desire to stay in Saudi Arabia.³⁴⁵

A final feature of the Kafala System that is worth highlighting for the purposes of the current discussion is that a path for citizenship is not offered to foreign workers in Saudi Arabia. This is contrary to the UDHR, as well as to the Arab Charter on Human Rights, which establishes in Article 29 that anyone who satisfies the criteria for nationality of a given country is entitled to be a national of that country. In Saudi Arabia, the criteria automatically exclude migrant workers.

³⁴⁰ UDHR, *supra* note 1; ICERD, *supra* note 313 at art 5(d)(i); *Arab Charter on Human Rights*, 22 May 2004, 12 IHRR 893 (entered into force 15 March 2008) [Arab Charter on Human Rights].

³⁴¹ *Universal Islamic Declaration of Human Rights*, adopted by Islamic Council of Europe on 19 September 1981/21 Dhul Qaidah 1401 [UIDHR].

³⁴² Residence Regulations, *supra* note 45 at arts 14, 16; Labor Law, *supra* note 43 at art 39(1).

³⁴³ Council of Ministers Decision No. 166 of 12/7/1421 AH Regulating Relations between Migrant Workers and Their Employers, Kingdom of Saudi Arabia, October 11, 2000 [Council of Ministers Decision No. 166].

³⁴⁴ Exploited Dreams, *supra* note 271 at 48;

³⁴⁵ The Economics of Migrant Workers in the GCC, *supra* note 276 at 4.

Access to citizenship is extremely limited, so much so that even an individual who is born in Saudi Arabia to non-Saudi parents is not eligible for it.³⁴⁶ This thesis adopts the view that migrant workers who obtain employment in Saudi Arabia through legal means should have an avenue for settling permanently in Saudi Arabia. It is a violation of their rights under international law to make their presence in Saudi Arabia perpetually dependent on having employment there, and to send them back home if their job is terminated.

The foregoing discussion clearly demonstrates that migrant workers in Saudi Arabia are wronged in many ways. However, one thing which is often forgotten is that the Kafala System also produces certain negative outcomes for Saudi Arabia as a whole.

Consequences of the Kafala System for Saudi Arabia

Saudi Arabia suffers various economic, political, and social consequences because of the way the Kafala System is designed. For one, the fact that migrant workers are not offered a path to be naturalized or otherwise to have some sort of permanent status in Saudi Arabia means that they never fully invest themselves in the country, for they know very well that they cannot stay there forever.³⁴⁷ As a result, they do not keep their money and their investments in Saudi Arabia.³⁴⁸ Instead, they end up sending a large part of the money they earn to their home countries. This takes the form not only of monthly remittances to support family members in other countries, but also that of large amounts of savings accumulated over decades.³⁴⁹ In 1990, remittances from “foreign workers accounted for 20-66% of the total import bills of the Gulf countries.”³⁵⁰

With respect specifically to Saudi Arabia, one study found that between 1970 and 2010, there was a statistically significant negative relationship between workers’ remittances and

³⁴⁶ Saudi Arabian Citizenship System, October 20, 1954, Royal Order No. 5604/20/8

³⁴⁷ Khalid A. Alkhatlan, “The Nexus Between Remittance Outflows and Growth: A Study of Saudi Arabia” (2013) 33 *Economic Modelling* 695 [The Nexus Between Remittance Outflows and Growth].

³⁴⁸ Samia Mohamed Nour, *Technological Change and Skill Development in Arab Gulf Countries, Contributions to Economics* (Switzerland: Springer International Publishing, 2013) at 25 [Technological Change and Skill Development].

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

economic growth in the short term.³⁵¹ That is, the remittances sent by migrant workers to their home countries negatively impacted the economic growth of Saudi Arabia in the short term. This can be explained by the fact that instead of being spent on consumption or investment within Saudi Arabia, a substantial portion of migrant workers' earnings were regularly sent home to support dependent family members.³⁵² What's even more troubling is that between 2005 and 2010, remittance outflows as a percentage of Saudi Arabia's GDP increased from 4.5% to 6%,³⁵³ suggesting that migrant workers are less and less interested in spending their earnings in Saudi Arabia. Irrespective of how long someone has worked in Saudi Arabia, he/she can have their job terminated and thus be forced to return to their home country. This possibility means that they must always keep the avenue for returning home open in the event that they lose their job. When these individuals leave, they also take the skills and experience they have acquired with them. And while this benefits their home country,³⁵⁴ it in effect results in a downgrading of the skill level of the Saudi workforce.

Saudi Arabia's competitiveness in the global economy and its Vision 2030 goals are also imperiled by the Kafala System. Cognizant of the changing demands of the global economy, Saudi Arabia is aiming through Vision 2030 to reduce its dependence on oil, develop a highly skilled domestic labour force, attract FDI from companies that are leaders in the information economy, and bring the best and brightest professionals to Saudi Arabia. The ability of Saudi Arabia to achieve these goals is severely restricted by the fact that there are significant shortcomings in the protection of migrant workers' rights, which can make Saudi Arabia a less attractive destination for multinational corporations (MNCs) that require highly skilled workers.³⁵⁵ This is due to the link that has been observed between respect for human rights and the development of a highly-skilled labour force.³⁵⁶ The absence of robust protections for human rights is similarly a disincentive for highly skilled foreign professionals to come to Saudi Arabia. The inability of being able to plan long-term because of the rule that foreigners must leave Saudi Arabia if their

³⁵¹ The Nexus Between Remittance Outflows and Growth, *supra* note 347.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ Migration and Inequality, *supra* note 282 at 48.

³⁵⁵ Shannon Lindsey Blanton and Robert G. Blanton, "What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment," (2007) 69:1 The Journal of Politics 143 [What Attracts Foreign Investors].

³⁵⁶ *Ibid.*

employment has come to an end is sure to drive away individuals who want to build a life for themselves in the country over a long period of time.³⁵⁷ Furthermore, the prohibition against changing employers within Saudi Arabia, which effectively prevents individuals from availing themselves of better employment opportunities, might also cause Saudi Arabia to lose its appeal in the sight of skilled professionals.³⁵⁸ Finally, the fact that migrant workers must work in the occupation for which they were hired and are not offered opportunities to pursue further education or training might be viewed as a factor that devalues the acquisition of new skills. This too is likely to deter ambitious professionals who seek challenges and growth, and who might want to change from one kind of work to another because they find it more fulfilling.³⁵⁹

How the Kafala System affects the international image of Saudi Arabia is also relevant to discuss here. The human rights abuses that occur in the context of the Saudi Kafala System can blemish Saudi Arabia's reputation on the world stage, which can in turn have negative political and economic consequences for the country. For one, it can reduce its influence in global politics. Due to the criticism to which it is subjected by human rights organizations, Saudi Arabia already has very little soft power, that is, an ability to persuade others in the international community through diplomatic and cultural influence. For example, when it became chair of the UN Human Rights Council in 2015, widespread criticism by leading newspapers and media outlets followed.³⁶⁰ Similarly, in 2017, journalists and human rights organizations derided Saudi Arabia's election to the UN Commission on the Status of Women.³⁶¹ Such a bruised international image makes it difficult for Saudi Arabia to wield the kind of influence in matters of international governance that it would like to have. Instead of being able to lead initiatives for improving the global economy and solve various problems that the world faces, Saudi Arabia is often on the receiving end of criticism about its domestic practices.

³⁵⁷ Sabah Anbareen Khadri, *High Skilled Professionals in the GCC: Migration Policies and Government Outlook* (Hamad Bin Khalifa University Press, 2018) [Highly Skilled Professionals in the GCC].

³⁵⁸ Highly Skilled Migrants, *supra* note 281 at 5.

³⁵⁹ Highly Skilled Professionals in the GCC, *supra* note 357.

³⁶⁰ Christopher Ingraham, "Why one of the World's Worst Human Rights Offenders is Leading a U.N. Human Rights Panel." September 28, 2015, *The Washington Post*; Tom Batchelor, "Saudi Arabia should be Dropped from UN Human Rights Council, say British Lawyers." February 1, 2018, *The Independent*.

³⁶¹ Adam Coogle, "How was Saudi Arabia Voted onto a UN Women's Panel?" April 28, 2017, Human Rights Watch.

This problem is compounded by the fact that Saudi Arabia's negative reputation when it comes to respect for human rights also drives away foreign direct investment (FDI). As the discussion in chapter five will demonstrate, reputational effects have increasingly greater importance in the investment decisions of MNCs,³⁶² so much so that MNCs often voluntarily conduct pre- and post-investment human rights impact assessments.³⁶³

Conclusion

The Kafala System is a legal regime for regulating migrant workers in Saudi Arabia that allows individuals and companies to sponsor individuals for the purposes of employment in Saudi Arabia. This system has, however, given rise to many problems, including allowing the violation of the rights of migrant workers and producing economic inefficiencies for the Saudi economy. In particular, it enables opportunistic visa brokers to persuade desperate individuals to sign employment contracts for work in Saudi Arabia by deceiving them about wages, working conditions, living standards, and the sponsorship fee. Furthermore, once migrant workers arrive in Saudi Arabia, a lot of them endure cruel and undignified treatment, unsafe working conditions, extremely low wages, non-payment of wages, unreasonably long working hours, and restrictions on their movement. They are also ineligible for Saudi citizenship, meaning that they will one day have to leave Saudi Arabia irrespective of how much they have contributed to the country.

Migrant workers are not, however, the only ones who lose under the current Kafala System. Saudi Arabia's economy also suffers because of remittance outflows, the departure of foreigners who acquired new skills and experience in Saudi Arabia, and the loss of FDI due to reputational concerns and a limited supply of highly developed human capital. Likewise, Saudi Arabia's political influence is reduced by the damage to its international reputation.

As it will be shown in the subsequent chapters, it is important to reform the Kafala System if Saudi Arabia wants to accelerate its economic growth, attract highly skilled workers, and

³⁶² Ana Carolina Garriga, "Human Rights Regimes, Reputation, and Foreign Direct Investment" (2016) 60:1 *International Studies Quarterly* 160 [Human Rights Regimes, Reputation, and Foreign Direct Investment].

³⁶³ Kirsten Korosec, "Gap Between Firms' Sustainability Talk, Actions" September 5, 2013, *Environmental Leader* [Gap Between Firms' Sustainability Talk, Actions].

improve its global image. The next chapter analyzes the origins, development, and functioning of the Kafala System from an NIE and PD lens.

Chapter Four: Analysis of the Kafala System

The Kafala system, which is also referred to as a sponsorship system, regulates migrant workers in various countries in the Middle East. In Saudi Arabia, the Kafala system is designed according to economic as well as political considerations. While it has been key in the management of migrant workers in Saudi Arabia, the Kafala system has also been misused in several instances. Given the likelihood of abuse of migrant workers in the Kafala system, the protection of human rights must inform how the system works to a much greater extent than they presently do. As a member of the United Nations and a signatory of various human rights conventions, Saudi Arabia is responsible for ensuring that migrant workers and their rights are protected. Recently, many changes have been made to Saudi labour law which makes it more beneficial for Saudi nationals; however, similar benefits have not been extended to foreign nationals.³⁶⁴

This chapter begins by providing an overview of the laws and regulations that apply to migrant workers in Saudi Arabia. It then proceeds to explain the causes of the misuse of the system. Subsequently, it analyzes the Kafala System from an NIE lens, demonstrating that its design reflects the desire to advance economic and political goals while remaining rooted in the teachings of the Islamic faith. Questions of the protection of universal human rights were not therefore central at the time at which the Kafala System was conceived. The chapter furthermore shows that although the Kafala System was successful in advancing Saudi Arabia's political and economic goals, it has since become a path-dependent institution. As a result, it continues to operate without substantial changes despite the fact that it leads to suboptimal outcomes, such as making Saudi Arabia a less attractive option for foreign investors in the technology sector and causing economic loss to Saudi Arabia through remittance outflows, as well as a loss of human capital in the form of the repatriation of workers who acquired new skills in Saudi Arabia. The path-dependence of the Kafala System is due primarily to self-reinforcing mechanisms like coordination and network effects that result in high switching costs, as well as the build-up of adaptive expectations. In particular, so much benefit flows to other segments of Saudi society from the Kafala System that

³⁶⁴ Asma Azhari, "The Kafāla 'Sponsorship' System In Saudi Arabia: A Critical Analysis From The Perspective Of International Human Rights And Islamic Law." (2017) 10 The SOAS Journal of Postgraduate Research 61.

it would impose significant costs in the short term to change. The modernization of Saudi Arabia's infrastructure, the low cost of various goods and services which Saudis enjoy, and the ample supply of well-paying public-sector jobs for Saudis are all tied to the importation and use of large amounts of cheap migrant labour. Given the high quality of life that this labour facilitates for many segments of Saudi society, it is difficult to change the adaptive expectations of these individuals.

Reforming such a system requires paying attention to institutional interdependencies and capitalizing on any critical junctures. This thesis argues that the current circumstances are indeed a critical juncture for Saudi Arabia as the country is keenly aware of the need to reduce its dependence on oil. Furthermore, it asserts that it is necessary to show that economic growth and political stability can be further enhanced through reforming the Kafala System. Finally, it is important to show that increasing human rights protections for migrant workers is strongly supported by the teachings of the Islamic faith.

Before proceeding to an in-depth analysis of the Kafala System, it is first instructive to summarize the laws and regulations that apply to migrant workers in Saudi Arabia.

Laws and Regulations Governing Migrant Workers in Saudi Arabia

There is a broad range of laws and policies that apply to migrant workers in Saudi Arabia. While only Saudi labour law applies to Saudi workers, migrant workers are governed by both labour law as well as the specific rules of the Kafala system. What can and cannot be done under the Kafala system, as well as questions pertaining to working hours, wages, the termination of an employment contract, and the nature of an employment contract are all addressed in either Saudi labour law, which is set out primarily in Regulation M/51,³⁶⁵ or the Residence Regulations,³⁶⁶ the two primary legislative instruments that govern the regime of Kafala. In addition to these documents, the employment contract between an employer and a migrant worker also governs certain matters which are left to the discretion of the contracting parties.³⁶⁷ Finally, there exist a

³⁶⁵ Labor Law, *supra* note 43.

³⁶⁶ Residence Regulations, *supra* note 45.

³⁶⁷ Labor Law, *supra* note 43 at art 8.

few royal decrees that apply to matters that are not addressed by the aforementioned laws. Some of the important features of these laws will be summarized in the paragraphs that follow.

According to Saudi labour law, migrant workers must have an employment contract which regulates the terms of their employment.³⁶⁸ Just as for Saudi nationals, this contract must be in writing.³⁶⁹ It is furthermore necessary for the contract to be written in Arabic (since Arabic is the official language of Saudi Arabia).³⁷⁰ Saudi Labor law also establishes the minimum entitlements, such as salary and employment benefits,³⁷¹ that must be guaranteed to migrant workers in their employment contracts.³⁷² In particular, it sets out requirements for the payment of wages in a timely manner, stating that workers who are paid a daily wage must be paid at least once a week, while those who are salaried must be paid at least once a month.³⁷³ The duties and tasks that workers are expected to complete during their period of employment must likewise be set out in the employment contract.³⁷⁴ Furthermore, workers and employees cannot make any changes to a contract once it has been signed; their only option is to terminate it. The cost of repatriation of an employee whose contract has been terminated is the responsibility of the employer.³⁷⁵

As a general requirement, employers must “treat workers with due respect and refrain from any action or utterances that may infringe upon their dignity and religion.”³⁷⁶ Saudi labour law also requires employers to provide safe and humane conditions of work. In particular, article 121 of the Labour Regulation states that “an employer shall maintain the firm in a clean and hygienic condition. He shall provide lighting, supply potable and washing water and comply with other rules, measures and standards of occupational protection, health and safety.”³⁷⁷ An employer is also required to take “the necessary precautions to protect the workers against hazards,

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid* at art 37; The Holy Qur’an, *supra* note 47 at ch. 2: 282

³⁷⁰ Basic Law of Governance, *supra* note 40 at art 1; Labor Law, *supra* note 43 at art 9.

³⁷¹ Labor Law, *supra* note 43 at arts 90, 98, 101, 109.

³⁷² Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1964) at 147 [An Introduction to Islamic Law].

³⁷³ Labor Law, *supra* note 43 at art 90.

³⁷⁴ Antoinette Vlieger, “Sharia on Domestic Workers: Legal Pluralism and Strategic Maneuvering in Saudi Arabia and the Emirates.” (2010) 12:2 *Journal of Islamic Law and Culture* 168 [Sharia on Domestic Workers].

³⁷⁵ Labor Law, *supra* note 43 at art 40(1).

³⁷⁶ *Ibid* at art 61(1).

³⁷⁷ *Ibid* at art 121.

occupational diseases, the machinery in use, and shall ensure work safety and protection,” and to “post in a prominent place in the firm the instructions related to work and workers safety.”³⁷⁸

Migrant workers need approval from the Labor and Interior Ministries to work in the country, and their entry into the country must be through a sponsor.³⁷⁹ Entry onto Saudi Arabian soil, employment within its boundaries, and departure from the jurisdiction must all be done under the supervision of a Saudi Arabian citizen or company. The term of the employment contract of a migrant worker is capped at a maximum of two years, with the possibility of renewal by the sponsor.³⁸⁰

Under the policies and laws regulating migrant workers, female migrant workers are only allowed to work in jobs and industries that do not qualify as hazardous.³⁸¹ In particular, a list of jobs and industries which expose workers to poisoning by lead, accompanied by directions for preventative measures that employers must take, have been established by ministerial decree.³⁸² Since Saudi Arabia has ratified the *Underground Work (Women) Convention*,³⁸³ women also cannot be made to work underground in mines.³⁸⁴ In addition, according to Article 150 of the Labour Regulation, night shifts that last for 11 hours or longer cannot be assigned to women.³⁸⁵ There is also a recent royal decree prohibiting the use and manufacturing of tobacco in Saudi Arabia, meaning workers – including women – cannot be asked to perform tasks that involve such manufacturing.³⁸⁶ On the other hand, there are some contexts in which only women are allowed to work, such as women’s accessories shops.³⁸⁷ On a related note, it should be clarified that female workers must work in a separate office or section from their male counterparts.³⁸⁸ Similarly, they

³⁷⁸ *Ibid* at art 122.

³⁷⁹ *Ibid* at arts 32, 33(3).

³⁸⁰ Labor Law, *supra* note 43; Sara Khoja, “Employment & Labour Law in Saudi Arabia” (2016) *Clyde & Co LLP*.

³⁸¹ Labor Law, *supra* note 43 at art 149.

³⁸² Ministerial Decree No. 435 of 1983 to Establish Industries in which Workers are Exposed to Poison by Lead and Procedures Taken by Employers to Protect Workers, November 4, 1983, Kingdom of Saudi Arabia.

³⁸³ *Underground Work Convention, 1935 (No.45)*, 21 Jun 1935 ILO (entered into force: 30 May 1937) [ratified by Saudi Arabia in 1978].

³⁸⁴ *Ibid* at art 2.

³⁸⁵ Labor Law, *supra* note 43.

³⁸⁶ Royal Decree No. (M/56), May 17, 2015, Kingdom of Saudi Arabia at art 3-2.

³⁸⁷ Regulations of the Labor Law, *supra* note 44 at art 12.

³⁸⁸ *Ibid* at art 37(2)(3).

must dress in clothes that are “decent, loose, and non-transparent.”³⁸⁹ Finally, the 2016 implementing regulations of the labour law explicitly state that compliance with the requirements of the Shari’a is mandatory for all workers in an establishment.³⁹⁰ It is therefore fair to say that while some areas of the law have been liberalized, this area has not seen substantial changes.

Saudi labour law also establishes various rules concerning the medical screenings that employers can and, in some cases, must conduct on the individuals they are planning to hire.³⁹¹ The medical history of the migrant workers must be assessed at an accredited expatriate examination center in their home country before they can be hired.³⁹² Migrants must then undergo a second examination upon arrival in Saudi Arabia to determine if they are indeed medically fit for employment.³⁹³ Potential employees must not have suffered from any neurological or nervous diseases, such as epilepsy and melancholia, during their lifetime.³⁹⁴ Likewise, they must be free from any allergies. They must have eyesight that is suitable for the job for which they are being hired, and they must not be suffering from any contagious eye diseases.³⁹⁵ They must have normal hearing power, their blood pressure must be within normal limits, and their heartbeat should be regular, consistent, and free from “congenital defects and organic diseases.”³⁹⁶ The potential migrant must not suffer from bronchial asthma, tuberculosis, or other lung diseases.³⁹⁷ In addition, they must not have any of the following infectious diseases: HIV AIDS, Hepatitis (B) Surface Antigen Positive and Anti HCV, Microfilaria Positive & Malaria Blood Film Positive, Leprosy Patient, Venereal Diseases, VDRL Positive and TPHA Positive.³⁹⁸ The following non-infectious diseases must similarly not be found: Chronic Renal Failure, Chronic Hepatic Failure, Congestive Heart Failure, Uncontrolled Hypertension, Uncontrolled Diabetes Mellitus, known case of cancer, Psychiatric Diseases and Neurological Disorders, physical disability (e.g., colour blindness for

³⁸⁹ *Ibid* at art 37 (1).

³⁹⁰ *Ibid* at 37 (2).

³⁹¹ *Rules & Regulations for Medical Examination of Expatriates Coming to GCC States for Residence* 4th ed, (Gulf Health Council for Cooperation Council States, 2016) [Rules & Regulations for Medical Examination of Expatriates].

³⁹² Labor Law, *supra* note 43 at art 65(5).

³⁹³ *Ibid*.

³⁹⁴ Rules & Regulations for Medical Examination of Expatriates, *supra* note 391 at 35

³⁹⁵ *Ibid*.

³⁹⁶ *Ibid* at 35-36

³⁹⁷ *Ibid* at 36

³⁹⁸ *Ibid* at 38

drivers, deafness), any major operation, hemoglobin below 10 mg/dl.³⁹⁹ Besides these conditions, screening for other medical conditions is optional. The medical screening of expatriates who want to work in Saudi Arabia has not been the subject of much discussion in the literature critiquing the Kafala system. Overall, it is a regime that is necessary and that achieves its objectives. Some authors have, however, pointed out that the rate of workers that are deemed to be medically unfit after their assessment in Saudi Arabia is lower than the comparable rate found in other GCC countries, which suggests that test standards and quality assurance processes should be reassessed and perhaps made more stringent.⁴⁰⁰ More importantly, “The lower than expected numbers of registered expatriate workers in this worker fitness-screening programme suggest that reporting system for data from all authorized centres to the MOH [Ministry of Health] must be improved.”⁴⁰¹

Besides compulsory health assessments, employers in Saudi Arabia are also allowed to screen their potential employees for drug use. Alcohol is strictly prohibited, as are other drugs, and their possession is harshly punished under Saudi criminal law.⁴⁰²

With respect to the question of wages and working hours, the laws and policies concerning migrant workers do not stipulate a minimum wage.⁴⁰³ However, where a wage is not specified in the employment contract, the employer must pay the worker the wage that is paid to a migrant worker who does the same type of work in the employer’s firm, or the wage that is normally paid to someone of that profession.⁴⁰⁴ Typically, the employment contract specifies the wage that the worker will receive. Upon termination of the employment contract, a migrant worker is entitled to the payment of their salary. With respect to working hours, labour law forbids migrant workers from working more than 8 hours a day (or 9 hours a day in certain industries).⁴⁰⁵ In addition, all migrant workers are exempt from work on Fridays (as are Saudi nationals). While at work, the migrant workers are entitled to a break after not more than five hours of work, the length of which

³⁹⁹ *Ibid.*

⁴⁰⁰ F.M. Alswaidi, Z.A. Memish, R.F. Al-Hakeem & S.A. Atlam, “Saudi Arabian Expatriate Worker Fitness-Screening Programme: a Review of 14 Years of Data.” (2013) 19:7 Eastern Mediterranean Health Journal at 670.

⁴⁰¹ *Ibid.*

⁴⁰² K. Azfar, & H Hélène, “Reforming the Kafala: Challenges and Opportunities in Moving Forward” (2011) 20:3-4 ILO Regional Office for the Arab States, Asian & Pacific Migration Journal 293.

⁴⁰³ Labor Law, *supra* note 43 at art 95.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid* at art 98.

should be a minimum of 30 minutes.⁴⁰⁶ They are additionally entitled to payment for overtime services that they have rendered.

Islamic law forms a central part of the law of Saudi Arabia. According to the Islamic law, migrant workers should not be mistreated or punished. This is because in the Shari'a, every human being has a right to be treated in a dignified manner.⁴⁰⁷ Human safety and security are also guaranteed under the Qur'an which is considered to be the constitution of Saudi Arabia.⁴⁰⁸ The Labour Regulation moreover explicitly requires employers and workers to adhere to the Shari'a in implementing its provisions,⁴⁰⁹ and it also establishes a Commission for the Settlement of Labour Disputes to handle matters arising from rights and duties that are set out in it.⁴¹⁰ Furthermore, its section dealing with the duties of employers codifies some of the requirements of the Shari'a that deal with the treatment of workers.⁴¹¹ As for the procedure for filing complaints with the Commission for the Settlement of Labour Disputes, this can be found in articles 220 through 228 of the Labour Regulation.⁴¹²

In the next section, some of the reasons for the deplorable condition of migrant workers under the Kafala System are explored.

Causes of Misuse of the Kafala System

The Kafala system has been misused on several occasions, as manifested in the accounts of the abuses suffered by migrant workers.⁴¹³ Many cases have been documented, while others

⁴⁰⁶ *Ibid* at art 101.

⁴⁰⁷ The Holy Qur'an, *supra* note 47 at ch. 17:70 "Verily we have honoured the Children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a marked preferment."

⁴⁰⁸ The Holy Qur'an, *supra* note 47 at ch. 5:32 "We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely."

⁴⁰⁹ Labor Law, *supra* note 43 at art 4.

⁴¹⁰ *Ibid* at arts 210-214.

⁴¹¹ *Ibid* at arts 61-64.

⁴¹² Labor Law, *supra* note 43.

⁴¹³ Exploited Dreams, *supra* note 271.

remain unknown despite the abuse that many migrant workers encounter.⁴¹⁴ It is important to analyze the just why migrant workers' rights are not respected.

To begin with, until 2000, employers had the power to confiscate the passports of the workers that they sponsored.⁴¹⁵ Even after it was forbidden, many employers continued to engage in the practice. This created a substantial power imbalance between employer and worker, and contributed in large part to the misuse of the Kafala system. Upon arrival in Saudi Arabia, many employers immediately took away the passports of their workers. This made workers completely dependent on their employer and took away their power to negotiate in the event of disputes or disagreements, particularly when they were asked to perform duties that were over and above what was stipulated in the employment contract. Migrant workers do not have the option to quit while their passports are in the possession of their employers. And despite the introduction of a regulation in 2015 which increases the fines for taking an employee's passport without his consent,⁴¹⁶ many employers continue to confiscate their employees' passports, either because of the limited chances of actually being penalized or because the fine is a meaningless amount for them. An employer who keeps the passport of a worker against his wishes faces a fine of 2000 Saudi Riyals.⁴¹⁷ This is a meaningless amount for most large companies that import low-skilled labour into Saudi Arabia, and the toothless character of the new regulation has done nothing to discourage the confiscation of the passports of migrant workers.

Another factor that allows employers to misuse the Kafala system is the power to force the worker, in the event that he/she quits, to reimburse them for the initial recruitment fee paid by them. This mechanism encourages misconduct on the part of large corporations.⁴¹⁸ These corporations subject migrant workers to inhumane working conditions, provide them with inadequate and unsanitary accommodations, and exploit them in countless other ways.⁴¹⁹ In one

⁴¹⁴ *Bad Dreams – Exploitation and Abuse of Migrant Workers in Saudi Arabia*, (Human Rights Watch, 2004) [Bad Dreams – Exploitation and Abuse].

⁴¹⁵ Council of Ministers Decision No. 166, *supra* note 343.

⁴¹⁶ *Ibid.*

⁴¹⁷ Ministerial Order No. 4786 Dated 28/12/1436H, Kingdom of Saudi Arabia, October 16, 2015 [Ministerial Order No.4786].

⁴¹⁸ *Bad Dreams – Exploitation and Abuse*, *supra* note 414; Harriet Salem, "'Dogs Are Better Than You': Saudi Arabia Accused of Mass Abuses During Migrant Worker Crackdown" May 11, 2015, Vice News.

⁴¹⁹ *Bad Dreams – Exploitation and Abuse*, *supra* note 414.

case, Bangladeshi plumbers were forced to “work 10 to 12 hours a day, and sometimes throughout the night without overtime pay”⁴²⁰ as they repaired underground water pipes in a Saudi municipality. These workers had to borrow money from their compatriots just in order to be able to buy food because they were not paid for the first two months of employment.⁴²¹ Another case involved an Indian migrant who was only paid \$133 US per month for working 16 hours a day.⁴²² Yet another story is that of a Bengali butcher who was forced to leave Saudi Arabia without being paid for 6 months of work.⁴²³ The egregious conduct of corporations towards the migrant workers they hire reflects the huge power imbalance that exists between the two sides in this contractual relationship. This imbalance allows corporations to exploit and abuse workers without being held accountable in many cases.

The abuses of the Kafala system can also be attributed to the lack of understanding by the migrant workers of the terms and conditions of their employment contracts. Employment contracts are written and signed in Arabic even though many of the workers are from countries where Arabic is not spoken. Essentially, migrant workers sign an agreement the terms of which they do not understand. In Islamic law, a contract is valid and has binding force only if both parties have a full understanding of its terms and conditions.⁴²⁴ The lack of knowledge by the migrant workers of their contracts is an enormous loophole that facilitates the misuse of the Kafala system,⁵ and that should be remedied. It goes without saying that it exposes workers to an increased likelihood of being subjected to abuse and overwork. It is also worth mentioning that most potential migrant workers are in dire need of a source of income, while their future employers have significantly more economic power than them. The signing of the work contract in these circumstances can be best described as having been arrived at under duress.⁴²⁵ Under Islamic law, duress is one of the factors for which a contract can be vitiated.⁴²⁶ Islamic law of contracts moreover places an enormous emphasis on the fairness of the exchange between two parties, so much so that it

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ Carol Lee Childress, "Saudi-Arabian Contract Law: A Comparative Perspective" (1990) 2 St. Thomas L Forum 69.

⁴²⁵ Kourides, P. Nicholas, "Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts" (1970) 9 Columbia Journal of Transnational Law 384.

⁴²⁶ *Ibid.*

considers it to be more fundamental to the valid formation of a contract than the expression of an offer and acceptance.⁴²⁷ According to one author,

“It is the subjective approach of seeking a genuine accord of wills which dominates the Islamic notion of mutual agreement rather than the more objective criteria of Western law [...] Islamic law stresses more on the subjective aspect than other legal systems. In other words, the attitude of Islamic jurists endeavors to understand the total context or the real situation by examining the real intention of the individual. That is to say that it seeks for substance, and is not overly concerned with formalism. Concerning contracts, it attempts to find not a formal consent but a substantial and real one.”⁴²⁸

As a result, the mere fact that there is an extreme disequilibrium in the values exchanged can be the basis for vitiating consent in Islamic law.⁴²⁹

There are formal procedures and institutions under the Kafala system to address grievances that employers and employees have,⁴³⁰ but few migrant workers actually avail themselves of them.⁴³¹ Saudi labour law gives workers the right to file a complaint with the Commission for the Settlement of Labour Disputes for things such as wrongful termination,⁴³² insufficient compensation for injuries,⁴³³ the imposition of penalties by the employer pursuant to the Labour Regulation,⁴³⁴ as well as any other labour dispute that arises out of rights guaranteed in the Labour Regulation.⁴³⁵ Employers are furthermore obliged to give workers a sufficient amount of time to exercise their rights under the Labour Regulation without any deductions from their wages.⁴³⁶ Why then do workers not seek redress before the Commission for the Settlement of Labour Disputes? For one, they do not understand how these systems work and what sort of remedies are available to them.⁴³⁷ On top of this, they fear reprisals on the part of their employers if they file a formal

⁴²⁷ Hideyuki Shimizu, *Philosophy of the Islamic Law of Contract – A Comparative Study of Contractual Justice* (The Institute of Middle Eastern Studies, International University of Japan, 1989).

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ Labor Law, *supra* note 43 at arts 8, 77, 78, 91, 93, 214; Noel J. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Springer Netherlands, 1984) at 65-69.

⁴³¹ As if I Am not Human, *supra* note 310.

⁴³² Labor Law, *supra* note 43 at art 214 (2.3).

⁴³³ *Ibid* at art 214(2.2).

⁴³⁴ *Ibid* at art 214(1.3, 2.4).

⁴³⁵ *Ibid* at art 214(1.1, 2.1)

⁴³⁶ *Ibid* at art 61(2)(3).

⁴³⁷ As if I Am not Human, *supra* note 310.

complaint.⁴³⁸ The simple termination of their contract by their employer can result in the workers having no means of supporting themselves and their families back home, who are entirely dependent on the remittances that the workers send.⁴³⁹ As a result, migrant workers choose to tolerate the treatment they are subjected to and remain silent even in the face of extremely inhumane working and living conditions.⁴⁴⁰ It is also important to mention that migrant workers do not have a right to go on strike to protest unfair wages or unsanitary working conditions.⁴⁴¹

All in all, migrant workers have limited rights in Saudi Arabia while their much more financially powerful employers wield a great deal of control over them and are unlikely to be penalized for acts such as cruelty, overwork, denial of fundamental rights, or administering harsh punishments. This, combined with a culture of asymmetrical legal protections for Saudi Arabian nationals vis-a-vis foreign workers, has allowed for the abuse of the Kafala system. Legal reforms of the Kafala System are the first necessary step for both enhancing the rights protections afforded to migrant workers and streamlining the process to make it economically efficient.⁴⁴²

Having explained how employers and corporations misuse the Kafala System, it is now appropriate to assess why it is designed the way that it is. To do this, this thesis uses the approach of New Institutional Economics.

A Look at the Kafala System from an NIE Lens

New Institutional Economics (NIE) defines institutions as “rules [...] and norms of behaviour that structure repeated human interaction”⁴⁴³ and holds that it is important to understand the institutional environment of a society in order to understand its political and economic

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ Elissa Jobson, “Saudi Arabia migrant expulsions: ‘They beat us. I want to warn others not to go’” December 11, 2013, *The Guardian*.

⁴⁴¹ Decision on Application of Rules Regarding the Establishment of Works Councils (No. 12 of 2001) Approved by Ministerial Decree No. 1691, Kingdom of Saudi Arabia, April 2, 2001; Code of Criminal Procedure, Kingdom of Saudi Arabia, 2002.

⁴⁴² Safa Peera, “Beyond Purely Legal or Economic Analyses of Migrant Laborer Abuses” (2015) Rapoport Center for Human Rights and Justice.

⁴⁴³ Institutions and Economic Growth, *supra* note 92.

situation.⁴⁴⁴ The institutional environment is made up of both formal laws and informal rules, culture, religion, and values.⁴⁴⁵ It is crucial to take these features into account in order to understand a society's economic development.⁴⁴⁶ This section explains the emergence of the Kafala System in the context of the institutional environment of Saudi Arabia, demonstrating that its design reflects various economic and political objectives alongside a desire to ensure that all legal institutions are based on the Islamic tradition. However, since the specific features of the framework governing migrant workers that the Saudi Kafala System establishes are quite distinct from the Islamic rules of Kafala, it is clear that its main purpose is increasing Saudi Arabia's economic growth.

A sponsorship system for migrant workers, like any legal framework aimed at addressing a new situation, had to be given an Islamic justification in order to be considered legitimate in Saudi Arabia. Muslims have been in the Arabian peninsula since the founding of Islam, and Islam's two holiest sites are also in modern-day Saudi Arabia. It comes as no surprise then that the Saudi state was established as an Islamic state. In addition, the Saudis were preceded by a series of dynasties who were also followers of the Islamic faith and who were guided by Islamic principles in their manner of governance. Thus, the Islamic religious tradition on which the Saudi state is based is one which has been, in one form or another, the basis of the law in the region for more than a millennium.⁴⁴⁷ Beginning with the Abbasid caliphate in the 8th century, the Shari'a became the primary source of law for the Arabian Peninsula.⁴⁴⁸ The Ottomans, the immediate predecessors of the Saudis who ruled the Arabian Peninsula between 1517 and 1918, used the four traditional schools of Islamic law as the primary sources of law for the region.⁴⁴⁹ In the Hejaz region – which includes the holy cities of Mecca and Medina – the Hanafi and Shafii schools were followed, while in the Nejd – modern day Riyadh – the Hanbali school was preferred.⁴⁵⁰ Nevertheless, it is worth noting that pre-Islamic local customary law – known as 'urf' – continued to serve as the main

⁴⁴⁴ New Institutional Economics, *supra* note 90.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Sharia Incorporated, *supra* note 41 at 144-145.

⁴⁴⁸ Albert Hourani, *A History of the Arab Peoples* (UK: Faber and Faber, 2005) at 113.

⁴⁴⁹ Wayne H. Bowen, *The History of Saudi Arabia. Greenwood Histories of the Modern Nations*. (Westport, CT: Greenwood Publishing Group, 2007) at 168 [The History of Saudi Arabia].

⁴⁵⁰ Sharia Incorporated, *supra* note 41 at 144-145.

source of law among the Bedouin tribes of Nejd (central Arabia) until the early 20th century.⁴⁵¹ The Saudis emerged from the Nejd and gradually conquered more and more territory from the Ottomans.⁴⁵² As they did so, they also promoted adherence to their strict interpretation of Islam throughout Arabia.⁴⁵³ When the Saudis conquered the Hejaz in 1925, the Hanbali school of law, which was the strictest of the four traditional schools of Sunni law, was made its official law.⁴⁵⁴ In 1932, the Kingdom of Saudi Arabia was established under the rule of the Al-Saud family.⁴⁵⁵ There is no official constitution for Saudi Arabia, but the Basic Law of Governance, which in effect serves a constitutional purpose, states in its first article that the Constitution of Saudi Arabia shall be the Qur'an and the Sunnah – the actions and sayings of the Prophet of Islam.⁴⁵⁶ Despite the challenges that were presented by the transformation of a nomadic people into inhabitants of a sovereign nation-state⁴⁵⁷ and the transition from an agrarian society into a highly industrialized urban one demanding new legal structures to govern a plethora of novel situations,⁴⁵⁸ the rulers of the new Saudi state made a commitment to basing the legal institutions of their state on a source that was both familiar and accepted – the Islamic Shari'a.⁴⁵⁹

However, at the same time as they were committed to ensuring that all legal institutions were inspired from the Islamic tradition, they also had to be responsive to the economic opportunities and political circumstances of that time. The discovery of oil around the time of the founding of Saudi Arabia presented many new economic opportunities and challenges. It held the promise of rapid economic development and prosperity, but it also required an enormous amount of labour to bring this promise to fruition. The native population of Saudi Arabia at this time was very small⁴⁶⁰ and incapable of taking up many of the jobs that needed to be performed to realize

⁴⁵¹ A Brief History of Saudi Arabia, *supra* note 138 at 183.

⁴⁵² The History of Saudi Arabia, *supra* note 449.

⁴⁵³ Sharia Incorporated, *supra* note 41 at 144–145.

⁴⁵⁴ The History of Saudi Arabia, *supra* note 449 at 135.

⁴⁵⁵ *About Saudi Arabia: Facts and Figures*, The Royal Embassy of Saudi Arabia, Washington, D.C., United States.

⁴⁵⁶ Basic Law of Governance, *supra* note 40 at art 1.

⁴⁵⁷ The History of Saudi Arabia, *supra* note 449.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Majed M Alzahrani, "The System of Kafala and the Rights of Migrant Workers in GCC Countries - With Specific Reference to Saudi Arabia" (2014) 16:2 European J of L Reform 377 at 378 [The System of Kafala and the Rights of Migrant Workers in GCC Countries]. The total population of all six states which comprise the GCC was only around four million in the mid-20th century.

the potential of the discovery of oil.⁴⁶¹ As a result, it was necessary to hire foreign workers in large numbers to come and take on these roles.⁴⁶² The introduction of the Kafala System can in large part be explained by this economic need, for it was both based on the Islamic faith (at least nominally) and responded to the requirements of the country and economy at that time.⁴⁶³ Thus, a system of sponsorship inspired by the Islamic System of Kafala was established. It is important to note that initially, foreign workers were able to acquire citizenship and thereby become entitled to the same socioeconomic rights as native Saudis.⁴⁶⁴ The rules of the Kafala System have, however, changed substantially since its inception.

Initially, most migrant workers came from other Arab countries like Yemen, Egypt, Jordan, Syria, and Iraq. They were given an avenue to acquire Saudi citizenship because of the insatiable demand for labour in Saudi Arabia during these years.⁴⁶⁵ These migrants worked for both public and private companies and performed all kinds of jobs from construction to blue and white collar work.⁴⁶⁶ Yet, demand for migrant workers grew even further as the oil-producing countries, including Saudi Arabia, gradually acquired greater control over the pricing of crude oil thanks to privately or semi-privately owned companies like ARAMCO and BP.⁴⁶⁷ The increasing demand for oil throughout the 70s and 80s, combined with the oil embargo of 1973-1974, generated enormous wealth for the oil producing countries and further fueled the demand for foreign labour.⁴⁶⁸ Between 1973 and 1987, continuously rising oil prices generated large revenues for Saudi Arabia⁴⁶⁹ and saw “massive inflows of Arab immigrants.”⁴⁷⁰ Saudi Arabia, like its neighbours in the region, was able to use the wealth generated from oil to finance socio-economic development projects in many sectors, including agriculture, education, industry, infrastructure and service delivery.⁴⁷¹ The impressive levels of economic development that were achieved by the

⁴⁶¹ The Economics of Migrant Workers in the GCC, *supra* note 276 at 1.

⁴⁶² The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 379.

⁴⁶³ *Ibid.*

⁴⁶⁴ Kapiszewski Andrzej, “Arab Labour Migration to the GCC States” in *Arab Migration in a Globalized World* (Geneva: International Organization for Migration, 2004) at 115–133 [Arab Labour Migration to the GCC States].

⁴⁶⁵ The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 379.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

oil-producing countries during this time were only made possible through the importation of foreign labour.⁴⁷² According to some estimates, the 1970s saw a 72% increase in the foreign labour force in the GCC countries.⁴⁷³

In late the 1980s, with the onset of a recession in the GCC countries, migration trends changed in an unexpected manner. Not only did the large numbers of foreign nationals that had come to Saudi Arabia during the 70s and 80s stay in Saudi Arabia,⁴⁷⁴ a greater number of foreign workers from Southeast Asia began to arrive.⁴⁷⁵ As a result, whereas foreign workers from other Arab states comprised 68% of the total foreign labour force of two million in the GCC countries in 1975, this figure was just 55% (of a total foreign labour force of 5 million) in 1983.⁴⁷⁶ In Saudi Arabia, the shift was even more dramatic, with the labour force being transformed from 90% Arab in 1975 to only 30% in 1985.⁴⁷⁷

The recession was not, however, the main cause of the decline in the number of Arab migrants in GCC countries, since this decline began well before the recession and was only accelerated by it. Indeed, as early as the 1960s, “Arab immigrants began to be considered as a source of political activism and potential threats to oil producing states.”⁴⁷⁸ As a result, throughout the 1960s and 70s, oil-producing states made the criteria for naturalization gradually stricter and stricter.⁴⁷⁹ This was achieved by requiring individuals to prove their Saudi lineage.⁴⁸⁰ By 1975, it was almost impossible for an immigrant to be naturalized.⁴⁸¹ As non-citizens did not enjoy the same socio-economic and political rights as Saudi nationals, many Arab immigrants lost interest in working in Saudi Arabia.⁴⁸² Asian immigrants, on the other hand, were willing to settle for much less and came to be preferred as migrant workers. In particular, they had lower wage expectations

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 380.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

⁴⁸² The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 381.

and did not make claims to Saudi citizenship.⁴⁸³ They also did not participate actively in political life or draw on the resources of the welfare system that was meant to exclusively serve citizens.⁴⁸⁴ Their attitudes were thus much more in line with the “anti-integration policies that were aimed at [...] excluding non-nationals from both the welfare system and the polity.”⁴⁸⁵ It made more sense from the Saudi point of view to facilitate the migration of these individuals rather than that of Arabs from neighbouring countries. By bringing migrant workers from South Asia and South East Asia, labour costs and the likelihood of political upheaval could be minimized,⁴⁸⁶ all the while ensuring that the economic growth of Saudi Arabia was not impeded.

Over and above purely economic motives, there were also regional political imperatives that influenced the choice of countries from which the GCC countries accepted migrant workers, and that vindicated reforms to the Kafala System that excluded migrant workers from Saudi citizenship and the extensive socioeconomic rights that accompany it. The 1991 Gulf War, in which the Palestinian Liberation Organization expressed its disapproval of the use of force against Iraq, had significant repercussions for the Palestinian diaspora in the GCC countries.⁴⁸⁷ According to some estimates, 350 000 Palestinians were forced from Kuwait and 100,000 from Saudi Arabia in the aftermath of the war. The nationals of other Arab countries who had supported Iraq during the Gulf War were similarly sent back. In total, the war led to the exodus of around 2 million workers of Arab origin from the Gulf, accelerating “the replacement of Arabs by Asian and Southeast Asian workers.”⁴⁸⁸

As more and more workers from Asia were brought as migrant workers to the GCC countries, these countries developed policies to make sure that the wealth created by the oil boom stayed in their territory as much as possible.⁴⁸⁹ Thus, migrant workers were never offered

⁴⁸³ *Ibid.*

⁴⁸⁴ Nazli Choucri, “Asians in the Arab World: Labor Migration and Public Policy” (1986) 22:2 Middle Eastern Studies 252 at 253.

⁴⁸⁵ The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 381.

⁴⁸⁶ Andrzej Kapiszewski, “Arab Versus Asian Migrant Workers in the GCC Countries” United Nations Expert Group Meeting on International Migration and Development in the Arab Region, Population Division, Beirut, United Nations Secretariat, 22 May, 2006.

⁴⁸⁷ Sharon S. Russell, “International Migration and Political Turmoil in the Middle East” (1992) 18:4 Population and Development Review 719 at 719.

⁴⁸⁸ The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 382.

⁴⁸⁹ *Ibid.*

permanent residence or citizenship, and those among them who were in low-skilled jobs were paid menial wages. While this was no doubt unfair towards them, it nevertheless ensured that Saudi Arabia experienced rapid economic growth. It was instrumental in driving Saudi Arabia's economic growth and enabling it to benefit fully from oil.⁴⁹⁰ The modified Kafala System thus provided a framework within which hundreds of thousands of foreign workers could be brought to Saudi Arabia to serve its economic needs without having to share much of the oil wealth of the country with them.⁴⁹¹ The breakneck speed at which the Saudi economy grew was thus made possible in large part by the Kafala system.⁴⁹² The history of the economic development of Saudi Arabia is unintelligible without speaking about the essential role played in it by this system.

Today, the Kafala System is in need of reform as it is no longer as efficient in furthering the goals of economic growth and political stability. However, it is crucial that any reforms are justified not just by demonstrating their economic relevance, but by reference to the teachings of Islam, since the Kafala System, like every other legal institution in Saudi Arabia, aspires to reflect these teachings. The theory of Path Dependence, which is the topic of the next section of this chapter, can be particularly helpful in designing a reform strategy for the Kafala System that is responsive to the unique trajectory of development of Saudi Arabia's legal and political institutions.

Understanding the Kafala System as a Path Dependent Institution

As demonstrated in the chapter on human rights and FDI, the changing relationship between human rights and FDI means that the Saudi Kafala System is no longer appropriate for achieving Saudi Arabia's economic and political goals. Nevertheless, it remains the primary means for hiring migrant workers in Saudi Arabia. While the last few years have seen a few minor changes to the Kafala System,⁴⁹³ the fact remains that it continues to create political and economic inefficiencies and fails to respect many of the rights of migrant workers. The economic

⁴⁹⁰ *Ibid.*

⁴⁹¹ The Economics of Migrant Workers in the GCC, *supra* note 276 at 2.

⁴⁹² *Ibid.*

⁴⁹³ For example, Ministerial Order No.4786, *supra* note 417, which increased fines for violations to the Labour Regulation. In particular, fines for keeping a foreign worker's passport without his/her consent, forcing him/her to work, and withholding his/her wages without a judgment allowing the employer to do so were all increased.

consequences range from remittance outflows and a shortage of loss of developed human capital to a reduced ability to attract FDI. It is therefore important to explore why it is that the Kafala System continues to operate according to a framework that produces suboptimal outcomes.

This thesis argues that the primary reason that the Kafala System continues to operate without change is that it has become a path-dependent institution. Path Dependence theory posits that institutions and networks of institutions develop in ways that reinforce their own mode of operation, thus entrenching them deeper into society.⁴⁹⁴ When faced with inefficiencies or new situations, they tend to use already existing knowledge and ways of doing things to address them. Furthermore, institutions gradually become resistant to change through self-reinforcing mechanisms, high switching costs arising from learning effects and coordination effects, and negative adaptive expectations.⁴⁹⁵

In PD theory, there are three primary features of every institutional arrangement. First, there is the starting position, which can be a result of a set of initial choices or random events.⁴⁹⁶ In the case of the Kafala System, it was the result of certain choices that were made in light of political, economic, and social considerations. The question of how to regulate the hiring of foreign workers was a novel question for the Saudi legal system since there was not a large number of migrant workers in Saudi Arabia before the oil boom.⁴⁹⁷ The legal system in what is today Saudi Arabia has been based on Islamic law for more than a millennium. While the particular interpretive schools (from within the Islamic tradition) that have been applied have varied, there has generally been a commitment to following the commandments of sacred Islamic law. Given Saudi Arabia's Islamic roots, the Saudi government turned to the Islamic System of Kafala to develop a sponsorship system for bringing migrant workers into the country.⁴⁹⁸ From the point of view of Path Dependence theory, the decision to turn to the Islamic legal tradition to develop a system for sponsorship was a natural step for a country that considers the Qur'an and Sunnah to be its constitution, since institutional actors are wary of the unknown. As John Bell argues, when a legal

⁴⁹⁴ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207.

⁴⁹⁵ *Ibid* at 350.

⁴⁹⁶ *Ibid* at 351.

⁴⁹⁷ The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 379.

⁴⁹⁸ *Ibid*.

system faces a new problem, it relies on already known and familiar legal concepts and categories to resolve it.⁴⁹⁹ However, when a society uses an accepted and familiar legal system to address a new problem, it is effectively cultivating path dependency.⁵⁰⁰ It might be asked at this point if the framework of the Kafala system is entirely a reflection of Islamic principles. Indeed, it would be facile to characterize the modern Kafala systems found in Saudi Arabia and other GCC states as emulating the Islamic concept of Kafala. This view is strengthened by the fact that the legal framework of Kafala in Saudi Arabia has been codified in the Labor Law,⁵⁰¹ its implementing regulation,⁵⁰² and the Residence Regulations.⁵⁰³ This is unlike most of the aspects of commercial and contract law, which are not codified since they are based directly on sacred Islamic law.⁵⁰⁴ As explained earlier in this chapter, many of the rules of the Kafala system reflect economic and political considerations. Therefore, the initial choices which established the structure of the Kafala System were not just a reflection of a desire to use Islamic teachings as the basis of all legal institutions, but also of political and economic considerations.

PD scholars theorize that initial choices can be reinforced by ‘feedback effects’.⁵⁰⁵ This is the second main feature of an institutional arrangement and according to this thesis is what occurred in the course of development of the Kafala System. The Kafala System achieved exactly what it had been designed for, namely, facilitating the economic growth of Saudi Arabia and improving its political stability. This feedback effect (i.e., positive outcome that an institutional arrangement produces, thereby strengthening the legitimacy of that arrangement) further entrenched the Kafala System. The Kafala System satisfied a very important need of the Saudi economy, powering economic growth at an unprecedented scale. All the while, it was also an institution whose rules could be traced to Islamic law, thus giving it necessary political and social legitimacy.

⁴⁹⁹ Path Dependence and Legal Development, *supra* note 177 at 787.

⁵⁰⁰ *Ibid.*

⁵⁰¹ Labor Law, *supra* note 43.

⁵⁰² Regulations of the Labor Law, *supra* note 44.

⁵⁰³ Residence Regulations, *supra* note 45.

⁵⁰⁴ Sharia Incorporated, *supra* note 41 at 167.

⁵⁰⁵ Path Dependence and Legal Development, *supra* note 177 at 351.

Yet another positive feedback effect of the Kafala System was that it allowed Saudi Arabia to increase political stability. In particular, the changes that were made to the Kafala System between the 1970s and 1990s, which effectively excluded Arab migrant workers from acquiring Saudi citizenship, helped reduce the threat of political turmoil. By putting a stop to the naturalization of Arabs from neighboring countries who were considered capable of politically organizing themselves and challenging the legitimacy of the government, the government was able to keep political unrest at bay. Against this backdrop, it is understandable why many within the Saudi government view the Kafala System as indispensable. In the language of Path Dependence theory, this is the feedback effect of an institutional arrangement.⁵⁰⁶

As mentioned earlier, institutional arrangements have three aspects to them, (1) the initial choices that lead to the selection and implementation of a certain institutional arrangement, (2) the feedback effects that reinforce the initial choices, and (3) the switching costs that reduce the appeal of alternative arrangements.⁵⁰⁷ In the case of the Kafala System, the initial choice of this institutional arrangement was driven primarily by an economic objective that needed to be pursued while respecting the Islamic identity of the country. Because the Kafala System was effective in achieving these economic objectives, this served as an indication to Saudi Arabia that this institutional arrangement worked. Furthermore, after it was reformed to exclude migrant workers from obtaining Saudi citizenship, it was again successful in increasing political stability (by limiting the number of non-Saudi Arabs in Saudi Arabia), while allowing Saudi Arabia to continue to enjoy rapid growth. This served as further positive feedback that as an institutional arrangement, the Kafala System was effective in furthering Saudi Arabia's economic and political goals. Why then would anyone want to change it? This question becomes all the more unavoidable when considering that making dramatic changes to the Kafala System would entail significant 'switching costs' (the third aspect of an institutional arrangement). An important observation of PD theory is that as individuals become more and more familiar with an activity, there can be an increase in productivity due to 'learning effects'.⁵⁰⁸ Furthermore, 'coordination and network effects' can mean that people benefit more from the participation of others in a given activity.⁵⁰⁹ These learning

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Increasing Returns and Path Dependence in the Economy, *supra* note 175.

⁵⁰⁹ *Ibid.*

effects and coordination and network effects increase switching costs and are evident in the context of the Kafala System in Saudi Arabia. They are discussed in detail in the next two sections.

Why the Government has not changed the Kafala System

The Kafala system has been criticized by human rights organizations, which have consistently made calls to reform it.⁵¹⁰ It is considered to be the cause of the challenges encountered by migrant workers in Gulf countries, and it has been associated with the oppression and exploitation of poor migrants and the denial of protections vis-à-vis their employers. Nevertheless, the Governments of the Gulf countries still use the Kafala system as the primary means of importing foreign labour and their citizens continue to support it. The government of Saudi Arabia, for its part, also supports the Kafala system, as is evident from the fact that it has been slow to reform it⁵¹¹ despite its deficiencies. There are a whole host of ‘feedback effects’ and ‘coordination effects’ that can be referred to explain this support.

The Kafala system has been efficient in the control of foreigners entering into Saudi Arabia. The system primarily ensures that foreigners coming into Saudi Arabia for the purposes of employment have employment before being admitted. As a result, there is no influx of people who do not have a means of sustaining themselves. Political instability in the Middle East has resulted in many countries seeing an influx of refugees. For example, the ongoing civil war in Syria has produced millions of refugees, most of whom have turned to neighboring countries for help.⁵¹² At the political level, the entry of large numbers of refugees is an issue for governments. And while Saudi Arabia has contributed large sums of money to help refugees from the Syrian civil war, its sponsorship system nevertheless ensures that large numbers of people who have no means of subsistence do not come into its territory and become a potential burden on the economy. A migration system which requires foreigners to have employment in Saudi Arabia before arrival no doubt limits abuses of the system by opportunistic migrants. Given that it has been successful in

⁵¹⁰ Bad Dreams – Exploitation and Abuse, *supra* note 414, Human Rights Watch called on Saudi Arabia to introduce measures that would enable workers to ensure that foreign workers understand the contracts that they sign and that they are offered minimum protections when it comes to wages, working conditions, and accommodations.

⁵¹¹ *Slow Reform – Protection of Migrant Domestic Workers in Asia and the Middle East* (Human Rights Watch, 2010).

⁵¹² “Syrian Refugee Crisis – Facts, FAQs, and How to Help” World Vision, April 16, 2018.

achieving this goal, this can be viewed as a positive feedback effect that reinforces the Kafala System. It is therefore understandable that this system is kept in place by the Saudi government and supported by its citizens.⁵¹³

The continued support for the Kafala system by the government despite its inadequacies can also be attributed to the fact that it allows the government to download certain responsibilities to private employers.⁵¹⁴ Private companies are the most frequent users of the Kafala system because of their preference for hiring foreign labour. In fact, 89% of the private workforce in Saudi Arabia is made up of foreign workers.⁵¹⁵ The public sector's use of the Kafala system is much less in comparison.⁵¹⁶ The individuals that companies hire are under their authority and, correspondingly, they have the task of taking care of them. The government is not in any way involved in the relationship between migrant workers and their sponsors (except where it hires someone itself, in which case it is the sponsor). A private employer who needs to fill a certain role hires a migrant worker in conformity with the conditions of the kafala system, and the worker returns back to his/her home country upon the expiry of his contract. The fact that the government does not bear any cost or responsibility in relation to migrant workers who are hired by private individuals or companies makes the system favorable to it. This is yet another feedback effect of the Kafala System that makes it resistant to change and because of which the government is naturally inclined to keep it in place.⁵¹⁷ It should nevertheless be pointed out that the human rights abuses that are committed by private companies become a source of embarrassment for Saudi Arabia in the international community. They may also be a disincentive for large corporations that are sensitive to maintaining a positive corporate image from investing in Saudi Arabia.⁵¹⁸ Finally,

⁵¹³ "Kafala: Dependency and Exclusion in the Gulf Arab Communities [translated from Arabic]," in *Al-Thabit wa al-Mutahawwil: al-Khalij Bayn al-Shiqaq al-Mujtam'i wa Tarabut al-Mal wa al-Sulta* (Gulf Centre for Development Policies, 2014) at 277.

⁵¹⁴ Labor Law, *supra* note 43 at art 40 (1), which states "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."

⁵¹⁵ Demography, Migration, and Labour Market in Saudi Arabia, *supra* note 269.

⁵¹⁶ *Ibid*

⁵¹⁷ Martin Hvidt, *Economic Diversification in GCC Countries: Past Record and Future Trends* (London, UK, London School of Economics and Political Science, 2013).

⁵¹⁸ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362.

the persistence of human rights abuses means that Saudi Arabia is not able to take on the role of a leader in matters of international governance.

Besides allowing the government to be free of responsibility for migrant workers, the Kafala system also allows employers to fill positions that are not sought after by the local population. The government often has large-scale projects that require an enormous amount of manual labour. Locals are not attracted by such jobs because they are tedious, involve working in a dirty environment, and are risky. It is therefore necessary to hire foreign workers to take up such roles. It is at this point that the Kafala system comes into play. Migrant workers are hired on a contract basis for the number of years necessary to complete a certain project. Once the project is completed, the migrant workers are repatriated to their home countries. The Kafala system therefore ensures that there is adequate labor to perform tasks that locals are not willing to perform. It has played a central role in building and construction projects in Saudi Arabia, hence its great importance for the government.¹⁴

The changes that resulted from the oil boom in Saudi Arabia have similarly had the consequence of minimizing the political will to reform the Kafala system. Over the past several decades, the government of Saudi Arabia, as well as those of other Gulf nations, amassed enormous wealth through the export of oil. The boom ensured that Saudi Arabian nationals were offered employment in public entities as well as bureaucratic institutions. The government could furthermore afford to pay good wages to its citizens to work in the public sector. Nevertheless, the private sector also had demands for labour, for which it turned to the Kafala system. Among Saudi citizens, working in the private sector has never been viewed as desirable compared to employment in the public sector, and the existence of the Kafala system was therefore essential to find workers to fill jobs that could not otherwise be filled. Thus, the cost of the government assuring its citizens employment was the creation of the Kafala system to fulfil the demand for cheap labour in the private sector.¹²

Finally, Saudi Arabia has little incentive to change the Kafala system given that there is not a significant push by its citizens to reform it.⁵¹⁹ While the international community has criticized the system,⁵²⁰ it is clear that locals are by and large unconcerned by how the Kafala system currently works.⁵²¹ Pressure from the international community has resulted in piecemeal changes over the last decade or so,⁵²² but the comprehensive restructuring desired by human rights activists has so far not been introduced. Indeed, many Saudis are very satisfied with the Kafala system because of the benefits it provides them.⁵²³ As a result, Saudi Arabia is inclined to maintain the system in its current structure. The next section elaborates on why the Saudi people support the Kafala System.

Explaining the Saudi Arabian People's Support for the Kafala System

Not only is the Kafala system supported by the Saudi government, it is also viewed favorably by the Saudi people. The various reasons for the popular support that the Kafala system enjoys will be discussed here, keeping in mind the premise of PD theory that one of the things that makes switching costs greater are coordination and network effects that allow some individuals to benefit from the participation of others in a given institutional arrangement.

A majority of Saudi Arabian nationals are employed in well-paying jobs in the public sector. They often need workers in their homes for cooking, cleaning, and other household chores. Most Saudis are not attracted to these jobs because they consider them to be unworthy of their social status. Furthermore, these jobs do not pay well. The only individuals willing to take these jobs are migrant workers from developing countries. The ability to pay low wages to these workers while still enjoying the full benefit of their services is no doubt hugely beneficial to Saudis, which

⁵¹⁹ Imad Anan, "Why Saudi Arabia Refuses to Reform the Kafala System" [translation] Raseef, December 27, 2016 [Why Saudi Arabia Refuses to Reform the Kafala System].

⁵²⁰ Loveday Morris, "Saudi Arabia Executes Sri Lankan Maid" The Independent, January 9, 2013.

⁵²¹ Hope for Reform Springs Eternal, *supra* note 304 at 467.

⁵²² Ministerial Order No.4786, *supra* note 417, which increased fines for violations to the Labor Law. In particular, fines for keeping a foreign worker's passport without his/her consent, forcing him/her to work, and withholding his/her wages without a judgment allowing the employer to do so were all increased.

⁵²³ *Ibid.*

explains their support for the Kafala system.⁵²⁴ Relegating most migrant workers to low-skilled jobs also means that well-paid jobs can be reserved primarily for Saudis, something which is consistent with the government's Saudization policy.⁵²⁵ According to a prominent Saudi academic, the Kafala system ensures in this way a certain balance within the labour force that benefits Saudi nationals.⁵²⁶ The Kafala system is also supported and liked by Saudi Arabian nationals because they incur very few expenses in the employment process or repatriation of migrant workers. Essentially, migrant workers interested in job opportunities pay for the cost of airfare to come to Saudi Arabia, and they also cover the cost of all their needs while they are in the country. In addition, some sponsors require their employee to pay them a part of their monthly earnings as repayment for the fees incurred to obtain their work visa.⁵²⁷ The combination of the fact that employers incur very few costs with low labor costs makes the Kafala System extremely beneficial for Saudi nationals.

On a macroeconomic level, the Kafala system has substantial economic value to Saudi Arabia and other GCC countries in which it exists.⁵²⁸ From 2010 to 2013, the contribution of foreign labour to Saudi Arabia's GDP was no less than 59% and as high as 74%.⁵²⁹ Furthermore, in 2016, the economic activity rate of Saudi citizens was around 64%, while that of non-Saudis employed in Saudi Arabia was upwards of 93%.⁵³⁰ Importantly, the contribution of migrant workers to Saudi Arabia's GDP outweighs the negative effects of outward remittances.⁵³¹ Its primary function is economic in that it regulates the importation of foreign labour into the country and facilitates the management of foreigners who work in Saudi Arabia. It allows employers in Saudi Arabia to hire more workers when the economy is performing well and the demand for labour cannot be met locally. Eventually, employers can repatriate some of the employees as the

⁵²⁴ Nasra M. Shah, "Labour Migration from Asian to GCC Countries: Trends, Patterns and Policies," (2013) 5:1 Middle East Law & Governance 36.

⁵²⁵ Why Saudi Arabia Refuses to Reform the Kafala System, *supra* note 519.

⁵²⁶ *ibid*

⁵²⁷ Exploited Dreams, *supra* note 271 at 42-43.

⁵²⁸ The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460.

⁵²⁹ Do Foreign Workers' Positive Contributions to GDP Outweigh the Negative Effect of Their Outward Remittances, *supra* note 296 at 665.

⁵³⁰ Economic Activity Rate 2016, *supra* note 295.

⁵³¹ Do Foreign Workers' Positive Contributions to GDP Outweigh the Negative Effect of Their Outward Remittances, *supra* note 296 at 663.

demand for labour goes down.⁵³² Ensuring that the workforce matches the demand for labor helps ensure that productivity is high at all times, especially during peak seasons when workloads are high.

A majority of the migrant workers come from countries and economies that are relatively underdeveloped. It is well known, for example, that most manual labourers in Saudi Arabia come from Pakistan, India, and Bangladesh.⁵³³ According to a 2014 report by the Gulf Research Centre, there were upwards of 2 million Indians working in Saudi Arabia.⁵³⁴ Nationals of Pakistan and Bangladesh were estimated to number around 1.5 million each.⁵³⁵ The Kafala system provides a platform and opportunity for people from less developed nations to earn a living. There are high levels of unemployment and economic inequality in the countries where the migrants come from, a problem whose scope is somewhat reduced by providing incomes to migrant workers that they use to support their families back home.⁵³⁶ The Kafala system has therefore helped in the reduction of levels of poverty in the countries where the migrant workers come from,⁵³⁷ an outcome that is a positive despite the fact that many reforms are still needed to improve the lot of migrant workers in Saudi Arabia.⁵³⁸ Studies on the effects of remittances furthermore show that they reduce the consumption volatility – the extent to which consumption patterns vary – of their recipients.⁵³⁹ Nevertheless, remittances can also have some negative repercussions for receiving countries. According to one study, they can reduce the quality of governance in these countries by making “government corruption less costly for domestic households [that receive remittances from a family member abroad] to bear.”⁵⁴⁰ From the point of view of a host country like Saudi Arabia, the large amounts of money that leaves in the form of remittances has been shown to have a

⁵³² Highly Skilled Migrants, *supra* note 281.

⁵³³ Demography, Migration, and Labour Market in Saudi Arabia, *supra* note 269.

⁵³⁴ *Ibid* at 7.

⁵³⁵ *Ibid*.

⁵³⁶ *Ibid*.

⁵³⁷ *International Migrant Remittances and their Role in Development* (OECD, 2006) at 154; *Global Economic Prospects: Economic Implications of Remittances and Migration* (Washington: The World Bank, 2006).

⁵³⁸ Orn B. Bodvarsson, & Hendrik Van den Berg, *The Economics of Immigration: Theory and Policy* (Berlin: Springer, 2009).

⁵³⁹ Ralph Chami, Connel Fullenkamp, & Samir Jahjah, *Are Immigrant Remittance Flows a Source of Capital for Development?* IMF Working Papers (03/189) (Washington: International Monetary Fund, 2003).

⁵⁴⁰ Yasser Abdi, Ralph Chami, Jihad Dagher and Peter Montiel, “Remittances and Institutions: Are Remittances a Curse?” (2012) 40:4 World Development 657 at 658.

negative impact on its economic growth in the short-term.⁵⁴¹ As it will be shown later in this chapter, this fact points to the path dependent state of the Kafala System, since an arrangement that produces a suboptimal outcome continues to be tolerated.

In addition to allowing for the hiring of large numbers of low-skilled labourers, the Kafala system has been instrumental in bringing highly-skilled workers to Saudi Arabia, since these individuals can earn more in Saudi Arabia than in their home country.⁵⁴² Some of the skilled workers that hold employment in Saudi Arabia through the Kafala system include engineers, accountants, doctors, and similar professionals.⁵⁴³ The settling of skilled workers in Saudi Arabia has a tremendously positive impact on the Saudi economy since such individuals are a source of innovation in areas like technology and entrepreneurship, which are critical indicators of economic growth and development in Saudi Arabia.⁵⁴⁴ This is yet another positive feedback effect of the Kafala System. The full potential of highly skilled migrant workers is, however, yet to be realized since they are denied residency or a path to citizenship, something which discourages them from investing in Saudi Arabia or establishing business ventures.⁷ It is encouraging though that the Crown prince has recently announced the possibility that Saudi Arabia might begin offering green cards to foreign workers who want to settle there.⁵⁴⁵

Businesses also benefit hugely from the Kafala System through ‘network effects’. The Kafala System does not establish a minimum wage and therefore allows companies to pay low wages to migrant workers.⁵⁴⁶ This increases the profit margins of private businesses. If these businesses were to employ Saudi nationals, they would necessarily have to be paid higher wages, which would eat into their profit margins. Moreover, the Kafala system allows private sector employers to meet workforce demands whenever necessary by hiring foreign migrant workers. Similarly, when the demand for labour declines, they can easily lay off large numbers of workers

⁵⁴¹ The Nexus Between Remittance Outflows and Growth, *supra* note 347.

⁵⁴² Marko Valenta, “A Comparative Analysis of Migration Systems and Migration Policies in The European Union and in The Gulf Cooperation Council Countries.” (2017) 6:3 *Migration and Development* 428 at 435; The Economics of Migrant Workers in the GCC, *supra* note 276 at 7.

⁵⁴³ Technological Change and Skill Development, *supra* note 348.

⁵⁴⁴ *Ibid* at 25.

⁵⁴⁵ “Full Transcript of Prince Mohammed Bin Salman’s Al Arabiya Interview” Al Arabiya, April 25, 2016.

⁵⁴⁶ Labor Law, *supra* note 43 at art 89, which states that the Council of Ministers may establish a minimum wage. No minimum wage has been established pursuant to this provision.

and send them back to their home countries. The Kafala system is thus efficient and flexible from the point of view of businesses operating in Saudi Arabia, allowing them to access cheap labour whenever they need it. It is relevant to mention here that the policy of Saudization requires companies to ensure that a certain percentage of their employees are Saudis.⁵⁴⁷ This requires them to let foreign workers go from time to time to reach their quota, something which they are able to do easily because of the Kafala system. For example, one Saudi businessman who employed foreign medical staff in his clinics was easily able to replace several of them with Saudis in order to adhere to the new policy of Saudization.⁵⁴⁸ Private companies therefore naturally view the Kafala system favourably despite the criticisms that are levelled against it by human rights organizations.⁵⁴⁹ As discussed in other chapters, however, doing business in a country where labour rights are not respected is increasingly considered undesirable for companies that seek a politically stable climate and a highly skilled labour force, in addition to having significant negative reputational effects.⁵⁵⁰ Many MNCs are so sensitive to human rights protections in a country that they voluntarily conduct pre- and post-investment human rights impact assessments to gain a better understanding of whether investing in that country is advisable.⁵⁵¹

The amount of authority that employers are given over migrant workers under the Kafala system is yet another feature that makes it attractive to them. Employers have the power to prevent a migrant worker from working for a different company or individual.⁵⁵² This power is based directly on the rules of the Kafala System. The movement, terms of employment, and conditions of living of a migrant worker are controlled by their employers. Bringing a family to Saudi Arabia also requires the approval of the sponsor.⁵⁵³ An employer furthermore has the power to deport a migrant worker, something that many workers have been subjected to.⁵⁵⁴ In short, the Kafala system grants a lot of power and control to the employers over the migrant workers. As well, the

⁵⁴⁷ Labor Law, *supra* note 43 at art 26(2), which requires employers to ensure that Saudis comprise at least 75% of their total workforce.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Andrew Gardner et al., "A Portrait of Low-Income Migrants in Contemporary Qatar," (2013) 3:1 Journal of Arabian Studies 1.

⁵⁵⁰ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362.

⁵⁵¹ Gap Between Firms' Sustainability Talk, Actions, *supra* note 363.

⁵⁵² Labor Law, *supra* note 43 at art 39.

⁵⁵³ Regulations of the Labor Law, *supra* note 44 at art 15.

⁵⁵⁴ Residence Regulations, *supra* note 45 at art 50.

low rate of enforcement within the system means that even where it prohibits a certain act such as the confiscation of passports, employers are likely to continue to engage in the prohibited practice because of the limited chance of being held accountable. Given that the employer-employee relationship would be entirely different without such asymmetrical power and control, employers are very supportive of the current Kafala system.

As more and more time, money, skills, and expectations are invested by individuals in one way of doing things, the costs of using an alternative method increase.⁵⁵⁵ PD theorists refer to this as switching costs and consider it to be one of the central self-reinforcing mechanisms of an institutional arrangement.⁵⁵⁶ In the Saudi Arabian context, the link between the presence of cheap labour and the affluence of Saudi society causes the Kafala System to become deeply entrenched. This occurs because of switching costs that result from “coordination effects,”⁵⁵⁷ that is, the increased benefits that some individuals enjoy because of the participation of others in a certain activity. In particular, the limited state resources that are spent on migrant labour free up funds to provide gainful employment to Saudi nationals in the public sector.⁵⁵⁸ Similarly, the extensive modernizing of Saudi Arabia’s infrastructure is facilitated by the availability of cheap manual labour.⁵⁵⁹ These infrastructural improvements improve the quality of life of Saudi citizens. It is worth noting here that expenditures on infrastructure related projects do not rely on taxpayer dollars, since there is no income tax in Saudi Arabia and a VAT was only recently introduced. Rather, Saudi Arabia uses oil revenues along with large numbers of insufficiently remunerated migrant workers to ensure that its ambitious infrastructure projects continue to progress. Finally, because of the availability of a large amount of cheap foreign labour, many goods, services, and even luxuries, are made available at extremely affordable prices to the Saudi middle class.⁵⁶⁰ For example, even average Saudi households can afford maids, while some can even afford drivers and nannies. This is made possible by a system of sponsorship in which migrant workers are paid

⁵⁵⁵ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 351.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ Increasing Returns and Path Dependence in the Economy, *supra* note 175.

⁵⁵⁸ M Kirk, J Seznec, & Jean-Francois Seznec, *Industrialization in the Gulf: A Socioeconomic Revolution* (New York: NY: Routledge, 2011).

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

little and have very few rights. In short, Saudis benefit greatly from the labour of foreigners that come to Saudi Arabia through the Kafala System.

The availability of cheap foreign labour in Saudi Arabia is thus linked in numerous ways to the affluence of Saudi society, in turn making it difficult to garner support for the idea that there should be greater protections for the rights of migrant workers. Saudis have developed certain “adaptive expectations”⁵⁶¹ as a result of the existence of this system for a long period of time. Reforming the Kafala System might eventually lead to the introduction of an income tax, the inability of the average household to domestic workers, a less ample supply of public sector jobs for Saudi nationals, and less ambitious infrastructural projects. All of these would challenge the expectations of Saudis and require them to accept a substantially lower quality of life, at least in the short term. The above analysis also points to the “institutional interdependence”⁵⁶² between the Kafala System and other institutions of Saudi society, resulting in the entrenchment of the Kafala System. There are so many institutions that would be affected if the Kafala System were changed that it becomes extremely burdensome to make drastic changes.

As the foregoing discussion has shown, changing the Kafala System entails significant switching costs for Saudi society. The Kafala System produces enormous benefits for companies, for the Saudi people, and for the Saudi government. This is why despite the requirement of Saudi labor law that a qualified Saudi national should be prioritized over a foreign national for any given position,⁵⁶³ companies still incline towards hiring migrant workers. Migrant workers are much more efficient than their Saudi counterparts and are also more likely to be obedient and easier to control compared to Saudis.⁵⁶⁴ Moreover, laying off migrant workers is far easier than terminating

⁵⁶¹ Increasing Returns and Path Dependence in the Economy, *supra* note 175.

⁵⁶² The Political Economy of Rule of Law Reform, *supra* note 244.

⁵⁶³ Labor Law, *supra* note 43 at arts 26, 35. Article 26 states: “(1) All firms in all fields, and regardless of number of workers, shall work to attract and employ Saudis, provide conditions to keep them on the job and avail them of an adequate opportunity to prove their suitability for the job by guiding, training and qualifying them for their assigned jobs. (2) The percentage of Saudi workers employed by the employer shall not be less than 75% of the total number of his workers. The Minister may temporarily reduce this percentage in case of non-availability of adequate technically or academically qualified workers or if it is not possible to fill the vacant jobs with nationals.”

⁵⁶⁴ A.S. Al Dosary, “HRM on Manpower Policy? Options for Government Intervention in The Local Labour Market that Depends upon a Foreign Labor Force: The Saudi Arabian Perspective” (2006) 7:1 Human Resource Development International 123; Neelofer Mashood, Helen Verhoeven and Bal Chansarkar, “Emiratisation,

the employment of a Saudi national. All of this makes migrant workers much more manageable and a preferred option over the local population. The ability of employers to better manage the migrant workers can be attributed to the Kafala system, which essentially places an employee under the complete control of his employer. The employee has to be cooperative and manageable, given the very real possibility that their wages can be withheld, or that they can be deported or accused of a crime.⁵⁶⁵ Reforming the Kafala System in a manner that curbs these practices would mean that companies would not be able to take advantage of migrant workers in the way that they currently do.

Given the fact that the Kafala System is deeply entrenched in Saudi society, it is worth asking what can make it more responsive to change. In Saudi Arabia, the law is based in principle on the Islamic Shari'a.⁵⁶⁶ The basic rules of Kafala are also purportedly rooted in the Qur'an. It goes without saying that these rules have an enormous impact on the economic relationships that are formed between millions of employers and workers in Saudi Arabia. And while they may be seen as unjust from a human rights perspective, and inefficient from an economic one, it must be asked if these reservations can alone influence Saudi Arabia to reform a system that it considers to be based on sacred law. The restructuring of the Kafala System cannot be achieved simply by demonstrating that it does not respect universal human rights or that it creates economic inefficiencies. Instead, it is crucial to look at the extent to which the current rules of Kafala are actually consistent with the sacred texts which they are said to be based on. This follows logically from an analysis of the Kafala System from an NIE perspective, for this perspective demands an analysis of the functioning of an economic system that takes into account the institutional environment.

Seeing the development of the Saudi economy in this way makes it possible to understand the notion put forth by proponents of NIE that the emergence of certain political and economic institutions is often what spurs economic development. It also explains why some might see the

Omanisation and Saudisation - Common Causes: Common Solutions?" 2009 Proceedings of the 10th International Business Research Conference at 6.

⁵⁶⁵ Sara Khoja & Sarit Thomas, "New rights for domestic workers in the GCC" (November 15, 2017) Clyde & Co [New Rights for Domestic Workers].

⁵⁶⁶ Basic Law of Governance, *supra* note 40 at art 1.

Kafala system as indispensable, since it has allowed the Saudi economy to flourish for so long. In addition, the political considerations which underpin the policy of limiting the socioeconomic and political rights of migrant workers must be addressed in justifying any reform of the Kafala system. The GCC countries replaced Arab migrants with non-Arab ones precisely because they sensed that the former were capable of organizing political action and of setting themselves up as equals in socioeconomic entitlements with the local population: “Arabs in the diaspora were considered to be a transnational network through which issues could travel and political actions could be organized.” Non-Arabs made no claims to having the same socio-economic rights as locals and displayed little interest in political activism. Looked at through a PD lens, it becomes very difficult to use a human rights-based criticism to justify reforming a system that is in large part the result of political and economic considerations. There is a reasonable case to be made that there is little incentive for the Saudi government, which is entitled to preserve its rule and give priority to political stability over human rights, to change the system. Likewise, there are no incentives for the Saudi people to advocate for change, since they benefit from the limited protection of migrant workers who come to Saudi Arabia under the Kafala system.

Given the political context in which the Kafala system emerged, it will be important not only to demonstrate that the demands of an information driven globalized economy require reforms to the system, but that protecting the fundamental human rights of migrant workers will not pave the way to political uprisings. At the same time, attention will need to be drawn to the fact that economic development in the information age can no longer be driven by an institution that is at best useful for importing large amounts of unskilled labour.⁵⁶⁷ Moreover, any proposed reforms will have to be justified on the basis of the teachings of Islam.

Despite the high switching costs that changing the Kafala System is likely to entail, this is also a critical juncture for Saudi Arabia since it has itself introduced a plan to diversify its economy and attract top technological firms to set up business there. Given the changing priorities of such MNCs when it comes to deciding where to invest, Saudi Arabia could benefit enormously by strengthening the protections for the rights of workers under the Kafala System.

⁵⁶⁷ The Economics of Migrant Workers in the GCC, *supra* note 276 at 15-16.

Conclusion

Many of the features of the current Kafala System in Saudi Arabia allow for migrant workers' rights to be violated. Furthermore, they produce suboptimal economic and political outcomes for Saudi Arabia. This is troubling since evidence of the need for upgrading the system have failed to spur significant change. This chapter argues that this is due to the fact that the Kafala System was implemented at a time when it was able to advance important economic and political objectives.

However, it has since become a path dependent institution. After its initial introduction, positive feedback effects were experienced by the Saudi government and people that encouraged them to keep it in place. Eventually, the continued use of the system began to generate increasing returns for the Saudi citizenry. There are therefore significant switching costs to reforming the system. These arise from the coordination effects that exist between the Kafala System and other institutions of Saudi society. That is, various segments of Saudi society benefit greatly from the participation of underpaid migrant workers in the Kafala System. There is little incentive for the government to reform the Kafala System given that it benefits the local population by giving them preferential treatment over foreigners.⁵⁶⁸ And so long as the Saudi population is satisfied with the way they are being governed, it matters very little that migrant workers are not treated equally. The GCC countries have often viewed Arab immigrants as part of a transnational network of politically engaged individuals capable of organizing against the policies and practices of a government.⁵⁶⁹ This is part of the reason that they have preferred non-Arab foreign workers over Arab foreign workers. Reforming the Kafala System necessarily requires allaying this concern of the Saudi state. This is not to say that the political structure of Saudi Arabia is an insurmountable obstacle to reforming the Kafala System. Rather, it is simply to point out some of the challenges that are present and that should be taken into account in examining options for reform. The better the institutional environment and political structure of Saudi Arabia can be understood, the greater the probability that effective reform proposals can be put forward.

⁵⁶⁸ The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460 at 380.

⁵⁶⁹ *Ibid.*

It would not be advisable to simply ask Saudi Arabia to measure itself against a vision of so-called ‘universal’ human rights because this approach disregards the emergence and evolution of the legal institutions of Saudi Arabia. It must be borne in mind that economic and political considerations were important factors that influenced the development of Saudi law. In particular, studying the Kafala System from an NIE lens reveals that its design was conceived to promote certain economic and political goals while also ensuring respect for Islamic law. It was necessary to give an Islamic justification to the migrant sponsorship system because the values and norms of Saudi society are based on Islamic teachings. Thus, new situations had to be managed in a way that respected the culture and worldview of Saudi society. NIE demands that the question of reforming legal institutions be studied with a profound degree of depth.

Changing the Kafala System requires tying reform proposals to Islamic teachings, as well as addressing questions of effects on economic growth and political stability. Only in this way can the resistance of the system to change be undone. Coordination effects that enable various segments of Saudi society to benefit from the presence of underpaid migrant workers and adaptive expectations that make the idea of reform difficult to swallow have made the Kafala System a path dependent institution. However, since circumstances are changing drastically, now might be a critical juncture during which drastic reforms to the Kafala System could prove successful.

In the next chapter, the link between respect for human rights and FDI is explored to shed light on the benefits that Saudi Arabia can enjoy by strengthening human rights protections for migrant workers.

Chapter Five: Global Development of Labour Rights and Human Rights and the Increasing Relationship with Investment

In order to create a healthy investment climate that is conducive to economic growth and the protection of human rights, appropriate social, political, and economic conditions need to be in place at both the national and international levels. Economic growth should not come at the expense of respect for fundamental human rights, since this causes grievous harm to the most vulnerable members of society. Indeed, there is increasing support for the view that investment decisions should be tied to respect for human rights. This view is supported by both a legal justification as well as an economic one. In addition to having the freedom to pursue economic motives, states and MNCs have a legal obligation to respect fundamental human rights. Moreover, better protecting migrant workers' rights can also increase foreign direct investment and create an environment that enables businesses to thrive and that is helpful for economic growth. Indeed, this was the case when the Saudi Arabia joined the WTO. Before joining, Saudi Arabia was required to make policy changes to meet the standards of the WTO. These included changing laws which imposed hiring and employment restrictions on foreign companies obliging them to ensure that a certain percentage of positions were filled by Saudi nationals.⁵⁷⁰ Non-Saudis were also given the right to acquire real estate through succession.⁵⁷¹ These and other changes that Saudi Arabia made to accede to the WTO resulted in an increase in foreign investment in Saudi Arabia.⁵⁷² Today, Saudi Arabia can go above and beyond the standards it had to satisfy to accede to the WTO in order to attract a larger number of investors.

Saudi Arabia is a safe place to invest in because of the fact that the economy is stable, the banking system is sound, buying power in the local market is high, and the infrastructure is developed.⁵⁷³ Despite all of this, however, the Kingdom has underachieved in terms of how much foreign direct investment it has attracted. Experts believe there are many reasons for this, among

⁵⁷⁰ *Report of the Working Party on The Accession of The Kingdom of Saudi Arabia To The World Trade Organization* WT/ACC/SAU/61 WTO 1 November 2005, WTO at para 69.

⁵⁷¹ *Report of The Working Party on The Accession of The Kingdom of Saudi Arabia, Part II – Schedule of Specific Commitments in Services List of Article II MFN Exemptions* WT/ACC/SAU/61/Add.2 WTO 1 November 2005 at 2.

⁵⁷² *Trade Policy Review, The Kingdom of Saudi Arabia*, WT/TPR/S/256 WTO 29 February 2016.

⁵⁷³ Zahraa Alkhalisi, "Saudi Arabia is The Hottest Emerging Market Right Now" March 15, 2018 CNN Money.

which is the unfavourable legal framework for resolving commercial issues and the lack of clarity in legislation related to intellectual property.⁵⁷⁴ As it will be demonstrated below, the research on human rights standards and FDI suggests that the quota of Saudi employees imposed by the government and the Kafala system are the biggest hurdles to attracting foreign direct investment. The Kafala System's path dependence has made it so resistant to change that despite producing suboptimal outcomes for the Saudi economy, it continues to operate without significant changes.

Although the Kingdom is attempting to address this issue through 'Vision 2030', at this point, it is not able to attract as much investment as a lot of other GCC countries. According to the latest figures, foreign direct investment inflow in July 2017 was much less as compared to what the Kingdom had in July 2016 and July 2015.⁵⁷⁵ These trends are clearly not positive and the Kafala system, among other factors, is to blame.⁵⁷⁶ The short-term benefits that are reaped by the local population because of the Kafala system may in the long run be negated by the harm done to the Kingdom's overall economy as a result of not being able to attract enough foreign direct investment.⁵⁷⁷

Human rights violations are a significant problem for the Kafala System in Saudi Arabia. It goes without saying that in order to satisfy its human rights obligations under both international and domestic law, Saudi Arabia must introduce significant changes to this system. These obligations will be discussed in greater detail in chapter six. In what follows, it will be argued that in addition to meeting its legal obligations, bolstering human rights protections for migrant workers can result in greater foreign direct investment in Saudi Arabia. There are various explanations for the positive correlation between human rights standards and foreign direct investment. Investors no longer view repressive states as favourable locations to invest in because the allure of low labour costs is outweighed by considerations of negative publicity, political instability, and an unskilled labour force. First, investors are increasingly sensitive to the human rights record of a country which they are considering investing in because the reputation of a

⁵⁷⁴ J Anyanwu & N Yameogo, "What drives foreign direct investments into West Africa? An empirical investigation" (2015) 27:3 African Development Review 199.

⁵⁷⁵ "Saudi Arabia Foreign Direct Investment - Net Inflows – Forecast" (2018) Trading Economics.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

business can suffer if it is complicit in or indifferent towards violations of workers' rights. Second, strong human rights protections are often an indication of political stability as well as of highly developed human capital, both of which are viewed as desirable by investors. These trends suggest that the international investment climate has changed drastically, thus giving Saudi Arabia a unique opportunity to introduce far-reaching reforms that can eventually overcome the high switching costs associated with changing a path-dependent institution. Furthermore, since bolstering human rights protections for migrant workers is entirely consistent with the teachings of the Islamic faith, such reforms would be more readily acceptable to Saudi society.

The next section summarizes the legal basis for Saudi Arabia's obligation to reform the Kafala System.

Obligations under International and Domestic Law:

There is a growing sense that countries and corporations cannot turn a blind eye to the exploitation and suffering of large segments of their labour force. This reflects the widespread acknowledgement that people in positions of power have a legal responsibility to protect the physical security and other vital interests of vulnerable groups and individuals that are subject to their authority or influence.⁵⁷⁸ At the root of states' obligation to respect human rights is the International Bill of Rights,⁵⁷⁹ which affirms the principle that all people are born free and equal in dignity and in rights. The International Bill of Rights not only declares the aspirations of the international community but also creates duties for states to protect human rights. It thus has the potential to affect a multitude of rights-related policy areas, such as environmental and labour regulation. Besides the strictly legal obligations which states are bound to respect under international law, "it has been firmly established that businesses [also] have a responsibility to respect human rights, including by identifying, avoiding, mitigating and remediating the human

⁵⁷⁸ Andrew Clapham (n.d.), *Human Rights Obligations of Non-State Actors* (Collected courses of the Academy of European Law) (Oxford: Oxford University Press, 2006); W. Dubbink & J. Smith, "A Political Account of Corporate Moral Responsibility" (2011) 14:2 *Ethical Theory and Moral Practice* 223; Florian Wettstein, "The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy" (2010) 96:1 *Journal of Business Ethics* 33 [The Duty to Protect].

⁵⁷⁹ The ICCPR, ICESCR and UDHR are collectively often referred to as the "International Bill of Rights".

rights impacts with which they are involved.”⁵⁸⁰ This responsibility has its source in the emergence of various “multistakeholder and intergovernmental self-regulatory initiatives.”⁵⁸¹ One very well-known self-regulatory initiative is the UN Guiding Principles on Human Rights.⁵⁸² The idea behind the UN Guiding Principles and similar initiatives is that in the absence of direct IHRL obligations on corporations, as well as an international law obligation on states to ensure that their corporate nationals respect human rights standards while operating abroad, corporations should voluntarily commit to taking measures to respect human rights in their business operations.⁵⁸³ Being self-regulatory, these initiatives do not create legal obligations. They are understood primarily as inciting corporations ‘to do no harm’, although they are not purely negative duties either.⁵⁸⁴ Corporations must undertake a process of human rights due diligence to make sure that their operations do not undermine respect for human rights.⁵⁸⁵ This should take into account the rights that are protected in the International Bill of Rights and “the International Labour Organisation’s eight core conventions outlined in the Declaration of Fundamental Principles and Rights at Work (addressing non-discrimination, bonded and forced labour, child labour and freedom of association).”⁵⁸⁶ It is hence clear that international law is increasingly cognizant of the need to place some measure of responsibility for the protection of human rights on the shoulders of non-state actors. Florian Wettstein has gone as far as asserting that in certain contexts, the obligation of corporations to respect human rights should include a positive obligation to uphold human rights.⁵⁸⁷ This proposed positive obligation would arise in contexts where corporations wield political authority and are thus more than simple economic actors.⁵⁸⁸

In order for international law to truly be effective, it is of course necessary for states to bring their domestic legal systems in line with the norms declared in the International Bill of Rights. Only

⁵⁸⁰ Nora Götzmann, Tulika Bansal, Elin Wrzoncki, Cathrine Poulsen-Hansen, Jacqueline Tedaldi and Roya Høvsgaard, *Human Rights Impact Assessment* (The Danish Institute for Human Rights, 2016) at 11 [Human Rights Impact Assessment]; *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31 United Nations Human Rights Council (2011) [UN Guiding Principles].

⁵⁸¹ P. Simons, A. Macklin, *The Governance Gap* (London: Routledge 2014) at 80 [The Governance Gap].

⁵⁸² UN Guiding Principles, *supra* note 580; Human Rights Impact Assessment, *supra* note 580 at 33.

⁵⁸³ The Governance Gap, *supra* note 581 at 79.

⁵⁸⁴ UN Guiding Principles, *supra* note 580

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Human Rights Impact Assessment, *supra* note 580 at 33; UN Guiding Principles, *supra* note 580 at principle 12.

⁵⁸⁷ The Duty to Protect, *supra* note 578.

⁵⁸⁸ *Ibid.*

then will it be possible for individuals to hold corporations to account if they violate their rights in the context of an employment relationship.⁵⁸⁹ In the Saudi context, the fact that international labour rights standards are largely complemented by the teachings of the Islamic tradition on which the Saudi legal system is based militates strongly in favour of the introduction of stronger human rights protections in the Kafala System. These similarities and the manner in which they can be harnessed to strengthen the rights of migrant workers are detailed in another chapter, as this chapter now turns to a detailed analysis of the link between human rights protections and foreign direct investment.

The Potential to Increase FDI through bolstering Human Rights

Apart from the legal obligations on states and corporations to respect human rights, it is also important to look at how labour rights standards affect foreign investment in order to strengthen the case for better human rights protections for migrant workers. Although the broader link between human rights and FDI is also discussed, the focus of this section is the relationship between respect for labour rights and FDI since the link between these rights and investment decisions is clearer.

Labour rights have a significant impact on international investment decisions.⁵⁹⁰ There is an extensive and admittedly divergent literature on the link between respect for labour rights and foreign direct investment. There is some research supporting the conclusion that increasing human rights protections has no effect on foreign direct investment.⁵⁹¹ This research, however, only looks at data from 1980-2007 and is also limited to American foreign direct investment. It is furthermore contested by other research that finds that factors like “increased public awareness of human rights abuse, greater effectiveness of activists via the internet, an increasing need for well-trained labor, and a desire for access to new markets”⁵⁹² all result in FDI being significantly affected by a country’s human rights standards. Thus, while there are examples from the 1970s of countries where limited safeguards for the rights of workers resulted in more FDI, the increasing demand

⁵⁸⁹ Human Rights Impact Assessment, *supra* note 580 at 33.

⁵⁹⁰ What Attracts Foreign Investors, *supra* note 355; Karl P. Sauvant, *Year Book on International Investment Law and Policy 2011-2012* (Oxford: Oxford University Press, 2013) at 569.

⁵⁹¹ Haider A. Khan, Krishna Chaitanya Vadlamannati, “FDI and Human Rights: Is there a connection? A Panel Analysis of US FDI in Africa” 4 *International Studies Quarterly* 1.

⁵⁹² What Attracts Foreign Investors, *supra* note 355 at 143.

for high skilled labour and the very real repercussions of negative publicity mean that MNCs are today more likely to invest in countries with stronger human rights standards than in ones with limited human rights protections.⁵⁹³ Argentina is a good case in point.⁵⁹⁴ This thesis advances the view that in the Saudi Arabian context, it will be necessary to improve protections for labour rights if Saudi Arabia is to remain competitive in the global information economy. The fact that increasing human rights protections, especially labour rights protections, can increase foreign investment in a country should be a strong incentive for the Saudi government to take steps in this direction.⁵⁹⁵

There is a growing trend among companies to verify a country's human rights record before making a decision to do business or invest there.⁵⁹⁶ While some argue that companies look to exploit cheap labour, according to David Kucera, there is no conclusive evidence in support of the "conventional wisdom" that foreign investors necessarily favour countries with weaker workers' rights.⁵⁹⁷ Instead, there are many factors other than labour costs that can affect a foreign investors' decision to choose a particular country. For instance, some foreign investors might be attracted to a country with a high level of equality, a low level of discrimination, a low level of corruption and a commitment to respect international laws, especially those pertaining to human rights. After all, operating in countries with poor human rights records can negatively affect the reputation of a business. In an increasingly connected world where information travels instantly from one part of the world to another, corporations are extremely sensitive to the need to maintain a human-rights friendly public image. In the words of Robert Blanton and Clair Apodaca, "the global marketplace functions as an 'audience' that rewards or punishes the policy choices of states."⁵⁹⁸

⁵⁹³ Ana Carolina Garriga, "Do Human Rights Regimes Affect FDI in Developing Countries?" (2013) American Political Science Association 1 at 9 [Do Human Rights Regimes Affect FDI in Developing Countries].

⁵⁹⁴ The Effects of Core Workers' Rights on Labor Costs and FDI, *supra* note 17; Shanon L Blanton and Robert Blanton, "Human Rights and Foreign Direct Investment: A Two-Stage Analysis" (2006) 45:4 Business and Society 464 at 477-478 [Human Rights and Foreign Direct Investment: A Two-Stage Analysis].

⁵⁹⁵ Human Rights and Foreign Direct Investment: A Two-Stage Analysis, *supra* note 594 at 477-478; Ana Carolina Garriga, "Other Forms of Punishment of Human Rights Violations: The Case of Foreign Direct Investment" (2014) 1 *International Law of Human Rights: Manifestations, Violations and Current Responses* [Derecho Internacional de los Derechos Humanos: Manifestaciones, Violaciones y Respuestas Actuales] 99.

⁵⁹⁶ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362; What Attracts Foreign Investors, *supra* note 355.

⁵⁹⁷ The Effects of Core Workers' Rights on Labor Costs and FDI, *supra* note 17.

⁵⁹⁸ Robert G. Blanton & Clair Apodaca, "Economic Globalization and Violent Civil Conflict: Is Openness a Pathway to Peace?" (2007) 44:4 The Social Science Journal 599 [Economic Globalization and Violent Civil Conflict].

The kind of treatment that workers receive has an effect on the international reputation of the country in terms of showing respect for human rights, which in turn has an impact on the willingness of new investors to establish business operations in the country.⁵⁹⁹ When human rights are respected, investment is more likely from companies and individuals that have made a public commitment to operating in a socially and environmentally responsible manner – a commitment that might be based on their own ethical standards and/or on a desire to protect their public reputation with key stakeholders including customers. This would seem to challenge the conventional assumption that lax protection of human rights can make a country more attractive to potential foreign investors.⁶⁰⁰ This latter view is based on two assumptions: (1) the dearth of labour right protections means companies can produce goods at a lower cost and (2) repressive regimes have greater political stability, which is desirable for corporations.⁶⁰¹ This view is faulty because it does not take into account the fact that stronger protections for human rights can actually contribute to economic efficiency by reducing risk (through the enhancement of social and political stability).⁶⁰² Furthermore, since stronger human rights protections are associated with more skilled human capital, they are increasingly a factor that attracts FDI rather than deterring it.⁶⁰³ It should also be pointed out that the conventional view ignores the effect that negative publicity can have on a firm's image and ultimately on its bottom line.⁶⁰⁴ According to Ana Carolina Garriga, a country which participates in an international or regional human rights regime is likely to see greater foreign direct investment because it “provides a “reputational umbrella” for investors.”⁶⁰⁵ Interestingly, this validation from foreign investors is even more pronounced in the case of the participation in a human rights regime of a country in which human rights violations are known to be common.⁶⁰⁶ This conclusion is supported by a study of US FDI in 135 countries between 1982 and 2011.⁶⁰⁷ Indeed, the very fact of being a party to multiple human rights regimes, even if human rights violations continue in practice

⁵⁹⁹ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362; Do Human Rights Regimes Affect FDI in Developing Countries, *supra* note 593 at 9.

⁶⁰⁰ What Attracts Foreign Investors, *supra* note 355.

⁶⁰¹ Human Rights and Foreign Direct Investment: A Two-Stage Analysis, *supra* note 594 at 477-478.

⁶⁰² The Effects of Core Workers' Rights on Labor Costs and FDI, *supra* note 17 at 45.

⁶⁰³ *Ibid.*

⁶⁰⁴ Human Rights and Foreign Direct Investment: A Two-Stage Analysis, *supra* note 594 at 477-478.

⁶⁰⁵ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362 at 160.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid* at 165.

to take place, can protect a state from divestment by foreign companies.⁶⁰⁸ By the same token, companies are wary of investing in or continuing business operations in countries where human rights violations are common. This tendency has been attributed to the “development of moral expertise in civil society”⁶⁰⁹ by Ariel Colonomos and Javier Santiso. That is, consumers are increasingly prepared to make judgments about the moral acceptability of the commercial operations of companies. Efforts by NGOs to name and shame companies for doing business in countries where there are rampant human rights abuses – known as the “spotlight effect” – has also been referred to in the academic literature as an explanation for the tendency of corporations to avoid countries with poor human rights records.⁶¹⁰

The academic literature has also looked at the link between protecting specific rights and FDI. In particular, several studies have shown that stronger protections for civil liberties and political rights is associated with higher FDI.⁶¹¹ It is certainly worth dwelling on what might explain this phenomenon, especially since there is evidence that the positive correlation between protection for civil and political liberties and FDI only emerged in the 1990s, and was in fact a negative one during the 70s and 80s.⁶¹² One explanation is that FDI shifted from the primary sector (i.e., agriculture and raw materials) in the 70s and 80s to manufacturing and services in the 1990s, which reduced the importance for corporations of maintaining close ties with foreign governments.⁶¹³ In the 70s and 80s, when corporations’ primary motive for investing in another country was resource extraction, it was crucial to develop good relations with the governments which had control of these resources. These governments also benefited from the “flow of foreign exchange from the TNC investment in their country. Since both sides thus had an interest in physically protecting the investment,

⁶⁰⁸ *Ibid* at 160.

⁶⁰⁹ Colonomos, Ariel & Javier Santiso, “Vive la France! French Multinationals and Human Rights” 2005 27 :4 Human Rights Quarterly 1307.

⁶¹⁰ Debora Spar, “Foreign Investment and Human Rights.” (1999) 42:1 Challenge 55 [Foreign Investment and Human Rights]; Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362.

⁶¹¹ Matthias Busse, “Transnational Corporations and Repression of Political Rights and Civil Liberties: An Empirical Analysis.” (2004) 57:1 Kyklos 45 [Transnational Corporations and Repression]; Philipp Harms & Heinrich W. Ursprung, “Do Civil and Political Repression Really Boost Foreign Direct Investments?” (2002) 40:4 Economic Inquiry 651 [Do Civil and Political Repression Really Boost Foreign Direct Investments]; Dani Rodrik, “Labor Standards in International Trade: Do They Matter and What Do We Do About Them?” in Dani Rodrik and John Whalley (eds.), *Emerging Agenda For Global Trade: High States for Developing Countries* (Baltimore, MD: Johns Hopkins University Press, 1996) 35 [Labor Standards in International Trade].

⁶¹² Transnational Corporations and Repression, *supra* note 611

⁶¹³ *Ibid* at 58.

connections between TNCs and the host government could have been expected to be close and the TNCs might have supported repressive regimes.”⁶¹⁴ The shift to manufacturing and services in the 1990s meant that multinational corporations were motivated more and more by access to cheap labour and proximity to export markets, thus giving them more options to choose from when deciding where to invest and in turn making them less dependent on good relations with specific states.⁶¹⁵

A different explanation for the emergence of a positive correlation between strong protections for civil and political rights and FDI is that investment decisions of multinational corporations are the subject of increasing criticism by international NGOs. In the past, these organizations were not as effective because of a lack of organization and a consequent inability to attract international attention. However, helped along by the instantaneous exchange of information facilitated by the internet, they are now able to reach a global audience: “Using e-mails and Internet homepages, activist groups can multiply the spread of the matter of concern at very low marginal costs. They can also build international electronic coalitions across similar activist groups, thereby increasing the influence of their combined effort.”⁶¹⁶ One of the direct consequence of this growing influence of NGOs has been that citizens of the West are much more concerned about where corporations do business.⁶¹⁷

It is worth pointing out that the two factors discussed above (the transition from resource extraction to manufacturing and services and the increasing effectiveness of NGOs in damaging the business of large corporations by publicizing their complicity in human rights violations) are even more relevant today than they were in the 1990s. Investment decisions today are heavily influenced by considerations of access to highly developed human capital,⁶¹⁸ meaning companies are even less dependent on governments than before. They will go wherever they find the most developed human capital, which tends more and more to be countries with strong protections for civil and political

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid* at 59.

⁶¹⁶ *Ibid* at 60.

⁶¹⁷ *Ibid.*

⁶¹⁸ Human Rights and Foreign Direct Investment: A Two-Stage Analysis, *supra* note 594; Farhad Noorbakhsh, Alberto Paloni, & Ali Youssef, “Human Capital and FDI Inflows to Developing Countries: New Empirical Evidence” (2001) 29:9 World Development 1593 [Human Capital and FDI Inflows to Developing Countries]; The Effects of Core Workers’ Rights on Labor Costs and FDI, *supra* note 17.

rights.⁶¹⁹ Furthermore, the ability of NGOs to spread information and mobilize has only improved with the advent of new technologies. Therefore, corporations are under more pressure than ever before not to invest in countries where human rights violations are commonplace. Saudi Arabia should take note of this fact as it tries to build an economy that is competitive in the 21st century. Its ‘Vision 2030’ project, which will roll out various reforms over the next decade or so and aims to diversify Saudi Arabia’s economy and attract more foreign investment (among other things),⁶²⁰ should also incorporate civil and political rights as an area of reform. Besides being important for attracting foreign investment, respect for these rights is consistent with the Islamic teachings to which Saudi Arabia aspires to adhere and that Vision 2030 reaffirms as forming the foundation of Saudi society.⁶²¹

Having discussed the correlation between civil and political rights and FDI, it is also important to speak about the link between labour rights and FDI. The understanding that foreign investors are more inclined to invest in countries with lax labour rights standards is increasingly considered passé. Two studies by the OECD,⁶²² conducted in 1996 and 2000, respectively, both found little evidence to support this view. The second of these studies looked at whether FDI inflows between 1995 and 1998 in 75 developed and less-developed countries were linked with freedom of association and collective bargaining rights. It found that countries that scored higher on how well they protected these labour rights saw greater FDI inflows.⁶²³ Similarly, William Cooke and Deborah Noble have shown that FDI inflows are positively correlated with the number of ILO conventions a country has ratified.⁶²⁴ Dani Rodrik’s research does not support this conclusion, but nevertheless finds that stronger worker rights, as measured by the extent to which freedom of association and collective bargaining rights are protected, are tied to greater FDI inflows.⁶²⁵ This is the case even

⁶¹⁹ Human Capital and FDI Inflows to Developing Countries, *supra* note 618.

⁶²⁰ “Thriving Economy Open for Business,” Vision 2030 (online), Kingdom of Saudi Arabia
<<http://vision2030.gov.sa/en/node/7>>

⁶²¹ “Vibrant Society with Strong Roots,” Vision 2030 (online), Kingdom of Saudi Arabia
<<http://vision2030.gov.sa/en/node/11>>

⁶²² *Trade, Employment and Labour Standards: A Study of Core Workers Rights and International Trade* (Paris: OECD, 1996); OECD. *International Trade and Core Labour Standards* (Paris: OECD, 2000) [International Trade and Core Labour Standards].

⁶²³ *International Trade and Core Labour Standards*, *supra* note 622.

⁶²⁴ William Cooke & Deborah Noble, “An Industrial Relations Systems and US Foreign Direct Investment Abroad” (1998) 34:4 *British Journal of Industrial Relations* 581 [Industrial Relations Systems and US FDI].

⁶²⁵ *Labor Standards in International Trade*, *supra* note 611.

though labour costs are higher in countries where these rights are strongly protected. As several authors have explained, this is probably because the higher labour costs are easily offset by the development of human capital and political and social stability that the protection of workers' rights facilitates.⁶²⁶ The presence of more skilled human capital that typically accompanies higher labour costs can probably also explain the positive correlation that Cooke and Noble found between higher wages and FDI.⁶²⁷ Indeed, investors place far greater importance on the quality of labour that a country can offer and how much political and social stability it has when making investment decisions than on cost of labour.⁶²⁸ Kucera's survey of several hundred managers of MNCs and international experts, for instance, found that political and social stability and quality of labour were ranked 4th and 5th, respectively, in the list of factors that have the greatest importance in investment decisions.⁶²⁹ In comparison, the cost of labour was ranked 9th.⁶³⁰ More recently, Egan has shown that MNCs who want to be assured of the stability of their operations and the availability of "high skilled workers, who are likely to have more exit options and/or be aware of their rights"⁶³¹ are likely to be deterred from countries where labour rights are not respected. When Intel decided to build a semiconductor test and assembly plant in Costa Rica, for example, its primary motivation for doing so was that the country could provide the skilled human capital that it required.⁶³² Importantly, Intel made this assessment based in part on the human rights conditions in Costa Rica.⁶³³

In sum, the change in the priorities of multinational corporations over the last few decades has meant that finding an inexpensive and submissive workforce is no longer as important as it used to be. Instead, "corporations seek out societies with a skilled, educated, and productive workforce," which, while not being synonymous with respect for human rights, has certainly been observed to be

⁶²⁶ The Effects of Core Workers' Rights on Labor Costs and FDI, *supra* note 17 at 15; Human Capital and FDI Inflows to Developing Countries, *supra* note 618.

⁶²⁷ Industrial Relations Systems and US FDI, *supra* note 624.

⁶²⁸ Friedrich Schneider & Bruno Frey, "A Economic and Political Determinants of Foreign Direct Investment" (1985) 13:2 World Development 161; Theodore Moran, *Beyond Sweatshops* (Washington, DC: Brookings Institution Press, 2002).

⁶²⁹ The Effects of Core Workers' Rights on Labor Costs and FDI, *supra* note 17 at 35-36.

⁶³⁰ *Ibid.*

⁶³¹ Patrick J. W. Egan, "Is Worker Repression Risky? Foreign Direct Investment, Labour Rights and Assessments of Risk in Developing Countries" (2012) 19:3 Review of International Political Economy 415 at 416.

⁶³² What Attracts Foreign Investors, *supra* note 355 at 146.

⁶³³ *Ibid.*

present in countries that respect human rights more often than in those that do not.⁶³⁴ In addition, the increasingly active role that international NGOs and civil society have played in ensuring that investors protect and promote human rights means that operating in a country that violates human rights can have significant repercussions for a company's reputation as well as for its business. Finally, corporations place a great deal of importance on political and economic stability in making their investment decisions. This too is present to a much greater extent in countries where human rights are respected.

Looked at from the lens of NIE, the rules of the Kafala System in Saudi Arabia are relics of an era in which economic growth in developing countries was tied to lax protections for human rights and labour rights. Because Saudi Arabia's rapid economic growth was largely fueled by oil during much of the 20th century, low human rights and labour rights standards made sense for both the Saudi government and for the corporations that had an interest in extracting, refining, and selling Saudi oil. Saudi Arabia needed the expertise of these corporations to be able to benefit from the vast amounts of oil it had. The availability of cheap labour thus served as an incentive to convince corporations to invest in Saudi Arabia. As discussed earlier, one of the reasons for the positive correlation in developing countries between lax labour rights and FDI during the 1970s and 80s was that corporations needed the full cooperation of host-states because their primary economic activity was resource extraction. Any natural resource was necessarily tied to the territory of a certain state and a corporation would not be able to access that resource if it did not maintain good relations with that state. Thus, corporations were willing to support regimes that did not respect human rights. At the same time, governments in developing countries were dependent on foreign corporations to sustain economic activity in their countries. They thus acquiesced to the demands of these corporations to keep lax labour laws in place. Given that corporations' priorities are very different today, the Kafala System must adapt accordingly. Today, increasing protections for the rights of workers can actually increase FDI in Saudi Arabia.

The fact that the Kafala System continues to operate without strong protections for labour rights can be attributed to the fact that it has become a path-dependent institution. Self-reinforcing

⁶³⁴ Jonathan Isham, Daniel Kaufmann, & Lant Pritchett, "Civil Liberties, Democracy, and the Performance of Government Projects" (1997) 11:2 The World Bank Economic Review 219.

mechanisms, high switching costs, and institutional interdependences mean that it is highly resistant to change despite the need for change. There is no question that if the current system stays in place, it will continue to produce suboptimal outcomes (by failing to create the political and social conditions necessary to attract the best foreign investors). That is, it will not be able to create greater political and economic stability, provide corporations protection from negative reputational effects, and contribute to the development of a highly skilled labour-force. This will drive away companies that are leading the global information economy.

There is perhaps a silver lining, however, since Saudi Arabia is itself seeking to diversify its economy and attract more foreign direct investment through Vision 2030. It is acutely aware of the importance of reducing its dependence on oil since it will inevitably exhaust this resource one day and because of the growing global push towards renewable energies. These circumstances may be described, in the language of PD theory, as a critical juncture which can minimize the effects that self-reinforcing mechanisms and switching costs have on making an institution resistant to change.⁶³⁵ As Saudi Arabia tries to move its economy away from dependence on oil, this is perhaps an ideal time to take steps to protect the rights of migrant workers. In order to attract the best companies to its shores, Saudi Arabia must be able to provide a stable political and social environment as well as a highly skilled labour force. Even in the case of MNCs that use large amounts of low-skilled labour, it is possible that the low labour costs that accompany lax labour rights standards might fail to persuade these companies to invest more in Saudi Arabia. One reason for this is that human rights violations in a country cause significant reputational damage to companies that do business there.⁶³⁶ Garriga argues that most investors' decisions are affected by reputational concerns because companies generally expect that they will be held partly accountable if they are linked with a country that violates human rights.⁶³⁷ As a result, MNCs have voluntarily begun to conduct pre- and post-investment human rights impact assessments, taking into account

⁶³⁵ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 350.

⁶³⁶ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362.

⁶³⁷ *Ibid*; Thomas Risse, Stephen Ropp, & Kathryn Sikkink (eds), *Persistent Power of Human Rights. From Commitment to Compliance* (Cambridge, MA: Cambridge University Press, 2013); Debora Spar & Lane La Mure, "The Power of Activism: Assessing the Impact of NGOs on Global Business" (2003) 45:3 California Management Review 78 [The Power of Activism]; Michael Yaziji & Jonathan Doh, *NGOs and Corporations: Conflict and Collaboration, Business, Value Creation, and Society* (Cambridge, MA: Cambridge University Press, 2009); Simon Zadek, "The Path to Corporate Responsibility" (2004) 82:12 Harvard Business Review 125.

the number of ratifications of international human rights treaties, respect for civil and political rights, respect for economic, social, and cultural rights, and respect for women's rights.⁶³⁸ Even MNCs operating in extractive industries, such as Goldcorp, which commissioned a human-rights impact assessment after purchasing a mine in Guatemala, have begun to follow suite. Socially responsible investment funds have become necessary because of the need to defend investment choices in front of beneficiaries and shareholders.⁶³⁹ Investors believe the risk to their reputation extends beyond the 'spotlight phenomenon' – the shaming of countries and corporations by NGOs for the violation of human rights.⁶⁴⁰ This means that even a company that only requires low-skilled labour may choose not to invest, or to invest less heavily, in a country that has a reputation for having very few protections for workers' rights.⁶⁴¹ In addition to the potential damage to reputation, there is also the likelihood that a country with low human rights standards is more prone to political instability and the use of violence by competing political factions, which in turn is likely to disrupt business.⁶⁴²

Thus, even a company such as McDonalds, which mostly requires low-skilled labour, might not increase FDI in Saudi Arabia despite the availability of cheap labour imported from developing countries. Considerations of reputational effects and political instability could very well cancel out the effects of low cost. The matter is even clearer when it comes to companies that rely on highly developed human capital. Companies like Google, Space X, and Tesla that are revolutionizing every aspect of life through automation and the development of artificial intelligence, and that require the best and brightest minds in order to do well cannot for a moment consider setting up operations in a place where there are not extensive guarantees for political, civil, economic, and social rights. As discussed above, there is significant research showing a positive relationship between extensive human rights protections and FDI.⁶⁴³ The protection of

⁶³⁸ Gap Between Firms' Sustainability Talk, Actions, *supra* note 363.

⁶³⁹ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362 at 164.

⁶⁴⁰ Foreign Investment and Human Rights, *supra* note 610; The Power of Activism, *supra* note 637.

⁶⁴¹ Economic Globalization and Violent Civil Conflict, *supra* note 598.

⁶⁴² Jason Sorens & William Ruger, "Does Foreign Investment Really Reduce Repression?" (2012) 56:2 International Studies Quarterly 427 at 428.

⁶⁴³ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362.

political and civil liberties, for example, has been found to have a positive correlation with FDI.⁶⁴⁴ Other studies have observed a similar correlation between protection of the right to physical integrity and FDI.⁶⁴⁵ US FDI in high skilled industries, for example, has been found to be linked to the degree to which a country protects the right to physical integrity.⁶⁴⁶ This thesis further hypothesizes that because they must attract the finest talent from across the globe, MNCs in high skilled industries must also strategically choose locations to operate which would offer the most in return to their employees.⁶⁴⁷ This understandably goes beyond financial compensation into the protection of fundamental political and civil liberties and the guarantee of social, economic, and cultural rights. It also concerns the protection of the physical integrity of a person under all circumstances, because companies which employ high-skilled labour are more likely to invest in a place where this right is fully respected.⁶⁴⁸ The extent of human rights protections in a country can affect its ability to develop human capital, something which is crucial for any company that employs highly specialized labour.⁶⁴⁹ Furthermore, it is only in an environment with robust human rights standards that these companies can retain globally sought after talent.⁶⁵⁰ If Saudi Arabia is to attract foreign investment from companies that are leading technological innovation and redesigning the way humans live, it must significantly increase the human rights protections that it offers to foreign workers.⁶⁵¹

It should also be pointed out that stronger labour rights protections are perfectly consistent with Islamic teachings. Fair wages, safe working conditions, and humane and dignified treatment are all cornerstones of Islamic teachings on the treatment of workers. As suggested above, the creation of a regime that restricted workers' rights was more a response to the need to create an institutional

⁶⁴⁴ Transnational Corporations and Repression, *supra* note 611;
Do Civil and Political Repression Really Boost Foreign Direct Investments, *supra* note 611; Labor Standards in International Trade, *supra* note 611.

⁶⁴⁵ Human Rights Regimes, Reputation, and Foreign Direct Investment, *supra* note 362.

⁶⁴⁶ Shannon L. Blanton & Robert G. Blanton, "A Sectoral Analysis of Human Rights and FDI: Does Industry Type Matter?" (2009) 53:2 International Studies Quarterly 469 [A Sectoral Analysis of Human Rights and FDI].

⁶⁴⁷ James Lynch, "Migrant workers bear the brunt of Saudi's archaic kafala system" 10 October, 2016
<<http://www.middleeasteye.net/columns/migrant-workers-bear-brunt-saudis-archaic-kafala-system-817327584>>

⁶⁴⁸ A Sectoral Analysis of Human Rights and FDI, *supra* note 646.

⁶⁴⁹ What Attracts Foreign Investors, *supra* note 355.

⁶⁵⁰ *Ibid.*

⁶⁵¹ John C. Anyanwu, & Nadege D. Yameogo, "What drives foreign direct investments into West Africa? An empirical investigation" (2015) 27:3 African Development Review 199.

environment that was conducive to attracting FDI in an era in which resource extraction the primary means of achieving growth than it was a reflection of religious teachings. Strengthening workers' rights can not only increase FDI by responding to the demand for highly developed human capital but can also bring Saudi labour law more in line with the teachings of Islam. Therefore, it can limit the switching costs associated with reforming a path-dependent institution such as the Kafala System.

Conclusion:

In light of the foregoing, several reasons can be advanced to explain the need to bolster protections for workers' rights in the Kafala system and to integrate human rights into investment treaties. First, Saudi Arabia has obligations under both international and domestic law to make sure that migrant workers are guaranteed certain rights. Second, the promotion of labour rights can attract more investment from foreign investors, and this in turn may lead to greater economic development.

While it is true that the literature on the relationship between human rights and FDI is complex and at times divergent, qualities like political stability, predictability, preservation of a good public image and the minimizing of "audience costs posed by public sensitivity to human rights abuse,"⁶⁵² and the availability of highly developed human capital, all of which are tied to robust protections for human rights, lend weight to the position that FDI is positively linked with human rights standards.

When foreign investors are considering an investment, robust protections for labour rights are one of the key indicators that they look to as a signal that an investment they are considering is sound. Being indifferent to or complicit in labour rights violations can expose MNCs to negative publicity, which can seriously harm their business. In addition, respect for labour rights is increasingly considered an indicator that a country has highly developed human capital and is politically and economically stable. These are factors that have a great deal of importance for foreign investors.

⁶⁵² What Attracts Foreign Investors, *supra* note 355 at 144.

Using an NIE lens, the absence of strong labour rights protections for migrant workers can be tied to the fact that Saudi Arabia's economy has been and continues to be largely dependent on oil. Corporations that invested in Saudi Arabia during and after the oil boom had a huge demand for a cheap and submissive labour force. A legal regime that could satisfy this demand was duly put in place. For a long time, this approach was effective in attracting FDI to Saudi Arabia. However, Saudi Arabia can no longer depend on oil to sustain its economic growth. With Vision 2030, there is now a push to diversify the Saudi economy, upgrade the skill-level of the labour force, and attract the best companies to Saudi Arabia. This change in priorities and in circumstances will also require stronger protections for labour rights, since these contribute to the development of sophisticated human capital and to political and economic stability.⁶⁵³ The current structure of the Kafala System is prone to producing sub-optimal outcomes that continue to be tolerated because of the high-switching costs of reforming the System. However, as the international investment climate has dramatically changed, these switching costs will be offset by the substantially greater economic prosperity that Saudi Arabia will enjoy.

Better protecting the rights of migrant workers in Saudi Arabia is also a way to adhere more closely to the teachings of Islam, which Saudi Arabia considers to be the source of its laws. Greater respect for human rights will thus not only facilitate the development of a highly sophisticated labour force, increase political stability, and allay corporations' concerns about maintaining a human-rights friendly public image, it will also give full effect to the values of the Islamic faith. This will make reforms more acceptable to all members of Saudi society and further reduce switching costs.

In the next chapter, the obligations that Saudi Arabia has towards migrant workers under both International and domestic law are detailed.

⁶⁵³ The Effects of Core Workers' Rights on Labor Costs and FDI, *supra* note 17 at 15.

Chapter Six:

International and Domestic Human Rights Obligations of Saudi Arabia

Upon arrival in Saudi Arabia, migrant workers come within the purview of the Kafala System. Kafala, stemming from the Arabic word “sponsorship”, is a law which establishes a process by means of which individuals and companies can sponsor migrant workers for the purposes of employment in Saudi Arabia. It also sets out some of rights and duties that employers and migrant workers owe each other. Some of its features have, however, been deemed to violate international human rights standards.⁶⁵⁴ Despite this, the Kafala System has existed in Saudi Arabia for 66 years and continues to this day.⁶⁵⁵

This chapter is a single-country study of the state of the human rights of migrant workers in Saudi Arabia. It begins by addressing a normative question, namely, the basis on which a sovereign state like Saudi Arabia should respect international human rights standards. This endeavor involves looking at the universalism vs. cultural relativism debate and comparing the position that human rights standards apply uniformly to all societies with the contrasting view that human rights standards vary from one society to another. This chapter endorses neither position, but it does recognize the legitimacy of many criticisms levelled by relativists against rights universalists. Instead of adopting a purely relativist view, however, we argue that an instrumentalist justification for Saudi Arabia’s obligation to protect and promote the human rights of migrant workers is most likely to be effective and is most in line with the analysis of new institutional economics and path dependency theory. According to this instrumentalist approach, Saudi Arabia should respect migrant workers’ rights if (1) the importance of the underlying interests that these rights protect is clear (from the point of view of the claimants) and (2) if Saudi Arabia would benefit from protecting them. Following this, the chapter defines Saudi Arabia’s domestic and international human rights obligations and clarifies how international obligations interact with Saudi Arabia’s domestic law. This aspect of the chapter relies on a traditional approach that is used in legal research, namely, analyzing the text of the laws of Saudi Arabia and the international conventions that it has ratified.

⁶⁵⁴ Exploited Dreams, *supra* note 271.

⁶⁵⁵ Residence Regulations, *supra* note 45.

Saudi Arabia's domestic law guarantees certain labour rights to migrant workers (although, as discussed in chapter three, many of these are not protected effectively). In addition to these, however, Saudi Arabia is also party to various international conventions that impose additional obligations on it in this domain. This chapter explores why Saudi Arabia should respect international treaty obligations, arguing that rather than imposing human rights universalism on Saudi Arabia, its participation in international conventions should be based on an instrumentalist line of reasoning. That is, if Saudi Arabia views the interests protected by the rights in international human rights documents as objectively important from the point of view of the claimants and recognizes that protecting these interests can procure many benefits to it, it should protect these rights. Some of the benefits that it can consider when deciding whether to protect a right include improving its international reputation (which can help attract more FDI), increasing labour force productivity, attracting highly skilled foreign professionals, and developing human capital in Saudi Arabia. After discussing the appropriateness of the instrumentalist justification for respecting international human rights standards, the chapter then proceeds to enumerating Saudi Arabia's specific obligations under international and domestic law. Specifically, it refers to provisions from the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the various ILO conventions that Saudi Arabia has ratified, and the *Arab Charter on Human Rights* to construct a list of workers' rights that Saudi Arabia should respect. It demonstrates that these documents protect the right of workers to equality, nationality, choice of employment, just wages, freedom of movement, and safe and sanitary working conditions.

The chapter also touches on the compatibility between international human rights and Islamic law, showing that there is a strong case that the two share many more similarities than differences.⁶⁵⁶ Yet, there are many challenges to the application of international human rights standards because the Islamic basis of these standards is seldom highlighted. Since the Saudi government has legally bound itself to protect the religion and culture through article 29 of the

⁶⁵⁶ Anver M. Emon, Mark Ellis & Benjamin Glahn, *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press, 2012) at 90-102 [Islamic Law and International Human Rights Law].

Basic Law,⁶⁵⁷ it would be advisable to emphasize the fact that many of the rights in international human rights documents are also protected by Islamic sacred texts. This would be a more effective method than asking Saudi Arabia to implement changes based on global, so called ‘universal’, norms. The primary concern of conservatives in Saudi Arabia is the potential impact of foreign influences.⁶⁵⁸ By showing the compatibility between international human rights and Islamic teachings, this concern can be put to rest. Saudi Arabia is indeed changing fast, but change need not be synonymous with abandonment of its identity and culture. Saudi Arabia can continue to reform its policies while remaining true to Islamic principles and culture.

The argument in this thesis is that Saudi Arabia should reform the Kafala System in order to bring it into line with human rights standards that apply to migrant workers. To understand why such reform has not taken place to date, I will begin with some background on the position that Saudi Arabia has traditionally taken in regard to the application of international human rights law in its territory, which takes as its starting point the importance of respecting the Kingdom’s sovereignty.

The Right of Saudi Arabia to Regulate Human Rights within its Jurisdiction

Saudi Arabia is a sovereign state just like every other nation-state in the world. In practical terms, this means that it has exclusive jurisdiction to legislate within its territories. The sovereignty of Saudi Arabia also carries with it the ability to implement and enforce laws against its subjects. When it comes to human rights standards, it is no different, as Saudi Arabia has the exclusive authority to pass laws concerning this subject-matter. International human rights watchdogs have a right to raise issues, critique, and criticize the country, but any form of regulation on human rights in Saudi territory is the prerogative of the government of Saudi Arabia, as it is the prerogative of every nation state within its respective territory.⁶⁵⁹

⁶⁵⁷ Basic Law of Governance, *supra* note 40 at art 29, which states, “The State shall patronize sciences, letters and culture. It shall encourage scientific research, protect the Islamic and Arab heritage, and contribute towards Arab, Islamic and human civilization.”

⁶⁵⁸ Sultan AlDossari, “*Overcoming Resistance to Change in Saudi Arabian Organizations: A Correlation Study between Resistance to Change and Organizational Justice*” (2016) ProQuest Dissertations and Theses, Pepperdine University.

⁶⁵⁹ Basic Law of Governance, *supra* note 40 at art 26.

This can raise issues if there is a conflict on a matter pertaining to human rights between international law and Islamic law. According to Saudi Arabia's *Basic Law of Governance*, the Saudi government has the duty to integrate both legal regimes into Saudi domestic law to ensure adherence to its international obligations.⁶⁶⁰ International treaty obligations are integrated into domestic law by a royal decree to this effect.⁶⁶¹ However, Saudi Arabia always makes a reservation when signing a treaty that its provisions are applicable only insofar as they are consistent with Islamic principles.⁶⁶² The Islamic laws thus form the foundation of Saudi Arabia's domestic legal regime.⁶⁶³ Despite the binding force of international treaty obligations, they are in practice only applicable insofar as they are consistent with Islamic Law.

The Human Rights Commission in Saudi Arabia has the overall responsibility of protecting and ensuring the enforcement of human rights.⁶⁶⁴ The Commission is also charged with ensuring that international human rights are implemented in line with the principles of Shari'a.⁶⁶⁵ According to the Statute of the Saudi Human Rights Commission, the government of Saudi Arabia must not only protect but also promote human rights.⁶⁶⁶ In most cases, it is able to apply the international standard which Saudi Arabia has made a commitment to respect. However, when a particular standard conflicts with Shari'a law, it must give preference to the Islamic standard. As mentioned above, this is enabled by the fact that when Saudi Arabia signs an international human rights treaty, it always submits a reservation that the treaty will apply only insofar as it is consistent with Islamic Law. Furthermore, the role of the Human Rights Commission when it comes to migrant workers is fairly limited since migrant workers are not protected by Saudi Arabia's domestic human rights

⁶⁶⁰ Basic Law of Governance, *supra* note 40 at art 81: "The enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organizations and agencies to which the Kingdom of Saudi Arabia is committed."

⁶⁶¹ Basic Law of Governance, *supra* note 40 at art 70.

⁶⁶² For example, see Saudi Arabia's reservation to CEDAW: *Declarations, Reservations and Objections to CEDAW*, CEDAW/SP/2000/2 20 July 2000, United Nations.

⁶⁶³ Sam McFarland, "The Universal Declaration of Human Rights: A Tribute to Its Architects" (2017) 19:2 Public Integrity 108 [The Universal Declaration of Human Rights].

⁶⁶⁴ Statute of Human Rights Commission, Council of Ministers Resolution No. 207, 8 Sha'ban 1426H / 12 September 2005 at art 1.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*

legislation. The rights of migrant workers are set out in the *Labour Regulation*⁶⁶⁷ and it is the Commission for the Settlement of Labour Disputes that deals with allegations of the violation of rights under this law.

Human rights are influenced and shaped by a wide variety of factors, and ensuring that they are aligned with other institutions of a society is an important consideration. According to an application made by Saudi Arabia to the United Nations in the year 1997, the various provisions and principles relating to human rights must be aligned with the cultural as well as religious paradigms of a country. These are different from one country to another. To ensure that human rights principles are congruent with its religion and culture, Saudi Arabia must be given some room to figure out how they interact with each other.⁶⁶⁸ This is why Saudi Arabia always makes a reservation that any treaty obligations are applicable only insofar as they are consistent with Islamic law. In the next section, the various justifications that exist for imposing international human rights obligations on states are discussed.

Justifications for an International Human Rights Regime

In International Law, states are considered to be sovereign, meaning that they have the legitimate authority to govern within their territory as they see fit.⁶⁶⁹ Nevertheless, there exists today a plethora of international conventions which states can sign and ratify, thereby obliging them to respect certain international standards. Furthermore, some human rights violations are considered to be so egregious that they have been elevated to the status of *jus cogens* norms that apply *erga omnes*. That is, they are binding norms that apply to all states and whose enforcement all states must ensure. Given the principle of state sovereignty, it is appropriate to ask what justification there is for an international human rights legal order. Answering this question is particularly pressing because states such as Saudi Arabia have argued that the protection of its

⁶⁶⁷ Labor Law, *supra* note 43.

⁶⁶⁸ D. L. Johnston, "Islam and Human Rights: A Growing Rapprochement?" (2015) 74:1 American Journal of Economics & Sociology 113.

⁶⁶⁹ *United Nations Charter*, 14 August 1941, art 2(7) (Entered into force 24 October 1945) [UN Charter]; J. Watson, "Autointerpretation, competence, and the continuing validity of Article 2(7) of the UN Charter" (1977) 71:1 American Journal of International Law 60; N. Tsagourias, "Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity" (2011) 24:3 Leiden Journal of International Law 539;

sovereignty must take precedence over respect for international human rights standards that in the past were not of its own making.

Two traditional justifications for promoting international human rights are that the system prevents abuse of civilians by the powerful state and promotes global political stability. Historically, because the state was the sole authority within its domestic sphere, it was possible for a state to mistreat its civilians without being held accountable. The creation of an international human rights system was thought to be a solution to this.⁶⁷⁰ In addition, early advocates of the human rights system believed that the very institutional and cultural features that enabled states to commit egregious human rights violations within their borders also led them to adhere to aggressive foreign policies that undermined international stability.⁶⁷¹ Thus, introducing some measure of accountability for domestic human rights violations would, it was hoped, promote international peace. One problem that arises from this justification for the need for an international human rights system is that the goal of encouraging respect for individual rights and that of promoting international order can result in two distinct visions of which rights should be respected.⁶⁷²

The first justification for human rights – namely, that the international human rights regime protects vulnerable individuals against abuse by the state – immediately comes into conflict with respect for state sovereignty, which is at the heart of international law. Charles Beitz argues that the international human rights system is centered around states in the sense that its standards apply primarily to states, and it is states that are responsible for ensuring that it is respected.⁶⁷³ Therefore, the primary justification for the human rights system must be “compatible with the fact that the state constitutes the basic unit of the world’s political organization.”⁶⁷⁴ The purpose that human rights serve must be located within the global political structure as it exists, not within an imagined ideal system of global governance.⁶⁷⁵ In Beitz’s view, the legitimacy of this model is not up for

⁶⁷⁰ Charles R. Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009) at 129 [The Idea of Human Rights].

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid* at 131.

⁶⁷³ *Ibid* at 128.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

debate since it is a given that this is the way that the world order is structured.⁶⁷⁶ Given our acceptance of the global political structure, it is necessary to explain how human rights apply to the nation-state model of global politics.

One of the key features of the current world political order is that states are political units that are territorially defined.⁶⁷⁷ Within its territory, each state has the exclusive authority to make and enforce law – in short, to govern.⁶⁷⁸ For their part, the rules that govern relations between states are meant to facilitate interaction between states and increase cooperation to “supply collective goods.”⁶⁷⁹ One of the most important aspect of these rules is the notion that within its sphere of domestic authority, each state is free from coercion on the part of other states.⁶⁸⁰

The second justification for human rights – namely, that it promotes global political stability – lacks empirical support. Can the link between domestic respect for human rights and international peace really be substantiated? Beitz points out that “[t]o date, there is very little systematic evidence that governments that abuse their people’s human rights pose a greater threat than other governments to international order, and it is not at all clear what causal mechanism could explain such a regularity, if it were found to exist.”⁶⁸¹ The academic literature is divided on the topic, with one study showing that pairs of states that both respect human rights tend to also have peaceful relations with each other.⁶⁸² Others point out that it is difficult to explain the decisions that embroiled Japan and Germany in war with reference to the same institutional features as those which influenced their domestic practices.⁶⁸³ In short, the link between promoting respect for human rights and ensuring international stability is a tenuous one that cannot taken as a given. Therefore, the creation of an international human rights regime cannot be justified with reference to the need to promote international stability. Can the establishment of such a regime instead be justified on the basis of human rights universalism? This is explored next.

⁶⁷⁶ *Ibid* at 129.

⁶⁷⁷ *Ibid*.

⁶⁷⁸ *Ibid*.

⁶⁷⁹ *Ibid*.

⁶⁸⁰ UN Charter, *supra* note 669 at art 2, para 1.

⁶⁸¹ The Idea of Human Rights, *supra* note 670 at 132.

⁶⁸² David Sobek, M. Rodwan Abouhard, & Christopher G. Ingram, “The Human Rights Peace: How the Respect for Human Rights at Home Leads to Peace Abroad,” (2006) 68:3 *Journal of Politics* 519.

⁶⁸³ The Idea of Human Rights, *supra* note 670 at 132.

Given the difficulties encountered by the two traditional justifications for the protection of international human rights, this chapter argues that instead of justifying the application of international human rights standards to Saudi Arabia on the basis of human rights universalism, it is better to use an instrumentalist approach derived from the work of human rights theorist Charles Beitz that involves first assessing whether the interest underlying a given right is an objectively important one from the point of view of the claimant. If so, it can then be asked if protecting this right would benefit the state and the broader society such that it provides an incentive for the government to protect it. Using this approach enables a better understanding of why Saudi Arabia has taken on various international treaty obligations and why it ought to respect them. The rights protected in these treaties are important when viewed reasonably from the point of view of the claimants and their protection can contribute in many ways to Saudi Arabia's economic growth, political stability, and international reputation.

But what about normative arguments? In addition to the prudential justifications for the protection of international human rights based on the protection of vulnerable individuals and the promotion of political stability, some have argued that protecting human rights is simply the right thing to do. In the next section, we will address this issue from the point of view of the debate between human rights universalism and cultural relativism.

Human Rights Universalism vs. Cultural Relativism

Broadly speaking, there are two views about how human rights standards, which establish norms concerning the fundamental entitlements of individuals, should be applied to states. Some advance the view that there are certain human rights that are inherent to human beings and are therefore universal.⁶⁸⁴ They should be guaranteed to all human beings irrespective of nationality, race, gender, ethnicity or political affiliation.⁶⁸⁵ Others argue that any human rights standard is

⁶⁸⁴ M Perry, "Are Human Rights Universal? The Relativist Challenge and Related Matters" (1997) 19:3 Human Rights Quarterly 461; Gordon Brown, Monisha Bajaj, Beniamino Cislighi & Gerry Mackie, *The Universal Declaration of Human Rights in the 21st Century - A Living Document in a Changing World* (Open Book Publishers, 2016); UDHR, *supra* note 1 at art 2.

⁶⁸⁵ *Ibid.*

necessarily culturally relative and therefore cannot be imposed on all nations without regard for their unique culture, religion, values, and history.⁶⁸⁶ This debate highlights another fundamental concern about the international human rights system – its claim to espousing universal values. This is a question that is the subject of endless debate⁶⁸⁷ and one that cannot be resolved here. However, it is useful to summarize the criticisms of the universalist conception of international human rights since New Institutional Economics (NIE) places so much emphasis on the institutional environment in attempting to understand the development of institutions. Path Dependency (PD) analysis similarly considers it to be essential to consider the social, cultural, political, and historical context of a given society before imposing a certain institutional arrangement on it. Only the relativist view of human rights is truly compatible with the two frameworks of analysis adopted in this thesis.

Is there any common ground between the universalist and relativist conceptions of human rights? For proponents of universalism, there are certain rights which must be guaranteed to everyone irrespective of considerations of cultural and historical differences. Proponents of the moral universality of human rights defend this idea using a line of reasoning that is summed up quite well by Jack Donnelly:

If human rights are the rights one has simply because one is a human being, as they are usually thought to be, then they are held “universally,” by all human beings.... As the highest moral rights, they regulate the fundamental structures and practices of political life, and in ordinary circumstances they take priority over other moral, legal, and political claims.⁶⁸⁸

According to this view, the basic human rights held by all human beings are the same irrespective of their religious, cultural, linguistic, or other identity.⁶⁸⁹ They are inherent to the condition of being human rather than social constructions which might vary from one society to

⁶⁸⁶ Torben Spaak, “Moral Relativism and Human Rights” (2007) 13 Buffalo Human Rights Law Review.

⁶⁸⁷ R Boco & G Bulanikian, “Human Rights: Universalism vs Cultural Relativism” (2010) 20:40 *Alteridades* 9; Rainer Arnold, *The Universalism of Human Rights* (Dordrecht, Netherlands: Springer Netherlands, 2003); Declan O’Sullivan, “The history of human rights across the regions: Universalism vs cultural relativism” (1998) 2:3 *The International Journal of Human Rights* 22; Jack Donnelly, “Cultural Relativism and Universal Human Rights” (1984) 6(4) *Human Rights Quarterly* 400 [Cultural Relativism and Universal Human Rights].

⁶⁸⁸ Cultural Relativism and Universal Human Rights, *supra* note 687 at 404.

⁶⁸⁹ *Ibid.*

another.⁶⁹⁰ These rights include the rights to equal protection of the law, physical integrity, a fair trial, freedom of speech, freedom of religion, and freedom of association.⁶⁹¹

In response to the universalist position, proponents of cultural relativism argue that this catalogue of rights is necessarily a reflection of Western values and it would be shortsighted to characterize it as post-ideological. Western society has a historical tendency to make efforts to universalize its political ideology of liberalism and its belief in Christianity. The imposition of Western values and the Christian faith by the British and the French on the indigenous peoples of Canada is a prime example. The reality is that each society has its own morality, and cultural context affects how a society understands the rights that individuals are entitled to. The world is comprised of an enormous variety of cultures which give birth to as many unique moralities and worldviews. Therefore, it is inappropriate to impose one society's supposedly transcendent vision of human rights onto other societies and cultures.

Javaid Rehman, for instance, argues that the content of some rights vary depending on the cultural, religious, and political context of a society. He asserts that the view that human rights advocates typically emphasize – the need for broad application, including the idea that these rights apply to every human being regardless of gender, colour, race, ethnicity, religion, or regional and geographic location – must be tempered by reasonable accommodation of cultural and religious diversity.⁶⁹² In other words, Rehman advocates a form of cultural relativism.

Cultural relativists strengthen their case by pleading the sovereign autonomy of states to govern freely within their borders.⁶⁹³ While it is undeniable that there are certain human rights obligations that have obtained the status of *jus cogens* norms and that therefore apply to all states,⁶⁹⁴ apart from these, states are free to decide which human rights they commit to respecting.

⁶⁹⁰ *Ibid.*

⁶⁹¹ Philip Alston & Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) at 531 [International Human Rights].

⁶⁹² Javaid Rehman, *International Human Rights Law*, (UK: Longman, 2010) at 8 [International Human Rights Law].

⁶⁹³ International Human Rights, *supra* note 691 at 531.

⁶⁹⁴ A peremptory norm (also called *jus cogens* or *ius cogens*/Latin for "compelling law") is a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted. See Public International Law, *supra* note 13.

Saudi Arabia is not a signatory of the ICCPR or the ICSECR and has therefore not bound itself to respect the rights that are set out in these documents. It has, however, ratified the *Arab Charter on Human Rights*, which mirrors in many ways the rights that are contained in the these two international conventions.

This thesis adopts the view of those international law scholars who are critical of universal human rights and argues that human rights norms must be allowed to fluctuate to some extent from one country to another. It is incorrect to argue that there is such a thing as an ahistorical and post-ideological formulation of human rights that applies universally to all societies.⁶⁹⁵ The human rights norms contained in the ICCPR and ICSECR necessarily reflect the values of Western civilization, which through its imperial projects over the last several centuries has imposed its hegemony on the world.

Recognizing the relativity of so-called ‘universal’ conceptions of human rights, this thesis uses NIE to analyze how human rights fit into Saudi law. An NIE analysis of Saudi law clearly shows the Islamic origins of the Saudi legal system and therefore points to the advisability of respecting this fact in designing possible reform strategies. To make sure reforms are effective, an Islamic justification should be provided for upholding human rights.⁶⁹⁶ According to PD theory, this would increase the likelihood that reforms will be effective. It is at the same time important to demonstrate the link between human rights and economic development as this can further strengthen the political will to align human rights standards in Saudi Arabia with international norms.

Universal Human Rights Principles versus Islamic⁶⁹⁷ Principles

In Saudi Arabia, the debate between universalism and relativism is most evident in relation to questions of religion and gender. There are several rights that apply unequally to men and

⁶⁹⁵ International Human Rights Law, *supra* note 692 at 8.

⁶⁹⁶ See Abdullahi Ahmed An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives - A Preliminary Inquiry" (1990) 3 Harvard Human Rights J 13.

⁶⁹⁷ Islamic Law is known in Arabic as Shari'a. The concept of Shari'a is not confined to legal norms, but conveys a more holistic picture; the Arabic translation of Shari'a is the road to the watering place.

women in Saudi Arabia. For instance, an adult male is allowed to travel by himself, while an adult female must be accompanied by her son, brother, father, or husband. There are other points of divergence between relativists and universalists, such as punishment by amputation under Shari'a for theft (which is in conflict with the UDHR).⁶⁹⁸ Cultural relativists assert that the UDHR does not incorporate the values of non-Western political cultures,⁶⁹⁹ a position that is closely related to claims that the international human rights regime is used to strengthen Western cultural dominance.⁷⁰⁰ Indeed, Princess Hassah Al-Saud, the daughter of the current king, recently acknowledged that the Saudi Arabia declined to accept the UDHR for many reasons, including concerns about religion and culture.⁷⁰¹ This is not to say that there is not criticism from within Saudi Arabia of its refusal to adhere to certain international conventions. Some Saudi journalists argue that cultural relativism (i.e., the position that the Saudi Arabia should fully reflect its distinctive religious and cultural norms in its laws) undermines the Saudi Arabia's development and causes it to become isolated.⁷⁰² That is, Saudi Arabia is limiting its own potential by delaying the reform of its human rights system.⁷⁰³

The debate between relativists and universalists is made more complicated by the fact that these terms often take on very different meanings depending on an individual's context and worldview, with the people who believe in universal human rights being seen as relativists by the people who believe in universal religious principles and the people who believe in universal religious principles being seen as relativists by the people who believe in universal human rights.⁷⁰⁴

⁶⁹⁸ Elizabeth More, "The Universal Declaration of Human Rights in Today's World" (2005) 11:2 The Journal of International Communication 27.

⁶⁹⁹ Islamic Law and International Human Rights Law, *supra* note 656 at 278.

⁷⁰⁰ Amy Eckert, "Universality by Consensus: The Evolution of Universality in the Drafting of the UDHR" (2001) 1:2 Human Rights and Human Welfare 21.

⁷⁰¹ Princess Hassah Al-Saud, "Issues and Views" (2004) Al-Ahram

<<http://www.ahram.org.eg/Archive/2004/1/10/OPIN11.HTM>>

⁷⁰² Shaia Aluogian, "Cultural Relativism" (2013) Okaz Newspaper

<<http://www.okaz.com.sa/new/Issues/20131029/Con20131029650376.htm>>

⁷⁰³ Islamic Law and International Human Rights Law, *supra* note 656 at 90-102.

⁷⁰⁴ There was a strong willingness on the part of the previous king (King Abdullah) to show deference to international human rights standards. In 2008, King Abdullah made a call for "inter-faith dialogue" at a meeting held in Madrid. Muslims, Christians, Jews, Buddhists, Hindus, and Sikhs were greeted in Madrid by King Abdullah of Saudi Arabia. The aim of the meeting was to bridge ever-widening religious chasms that breed violence. The agenda was relevant because religion remains one of the main sources of conflict around the world. Furthermore, using his personal budget, the king ordered the opening of an organization called the King Abdullah Center for the

Some scholars⁷⁰⁵ assert that that there is no contradiction between the apparent distinctiveness of the Saudi Arabia and universality based on the premise that Islam is a universal religion that acknowledges the supremacy of God over the entire world and based on the premise that Islam's eventual expansion to all countries at some point will reduce the Kingdom's distinctiveness. This position might seem to be reinforced by the principle of equality among racial and tribal groups that accept Islam: "O people! We created you from a male and a female, and made you races and tribes.... The best among you in the sight of God is the most righteous. God is All-Knowing, Well-Experienced."⁷⁰⁶

It is nevertheless important to avoid filtering the controversy surrounding the consistency of Saudi laws with international human rights standards through the debate between universalists and relativists. Many of Saudi Arabia's laws reflect economic considerations more than a commitment to a particular moral worldview. Recent reforms and projects – such as the proposed construction of an ultra-modern city by the name of NEOM that will be governed by a separate set of laws – are an indication of just how important a role economic considerations have in matters of law and policy in Saudi Arabia. Thus, Saudi Arabia's legal system is more than a reflection of a religious worldview. At the same time that it is committed to respecting Islamic norms, it also takes into consideration the steps that must be taken to remain economically viable in the 21st century. Perhaps a justification for respecting international human rights standards can be grounded in the fact that it will help advance Saudi Arabia's economic goals. Scholars like Charles Beitz seem to be in favour of this position, arguing that the importance of the underlying interest that a right protects and the advantages that protecting this interest can procure to a state should be looked at when justifying a given human right.

An Instrumentalist Approach to Human Rights

Convergence of Religions and Civilizations (KAICIID) in Vienna. Surely, the message has been sent to the people, especially in Saudi Arabia, that there are no borders among religions.

⁷⁰⁵ Salam Alshrabi, "Human Rights between International Law and Islamic Law" (2003) Laha Online <<http://wepmail.lahaonline.com/articles/view/الدولي-القانون-بين-الإنسان-حقوق/1097.htm>>

⁷⁰⁶ The Holy Qur'an, *supra* note 47 at ch. 49:13.

The framework that will be used in this chapter to assess the Kafala System's compliance with international human rights standards is one that recognizes that identifying human rights and how to protect them depends on context. It is in contrast with a universalist approach to human rights, which applies one standard to all societies irrespective of cultural, religious, historical, social, and economic differences. Such a universalist approach is to be avoided because it imposes a Western conception of human rights on the entire world. Furthermore, it raises issues with respect to the exercise of sovereignty. What would the members of an international community that adheres to a universalist conception of human rights do if a state does not respect, either through its laws or through its actions, international human rights standards? Would this be a cause for intervention in that state? If so, does this not compromise "a society's exercise of collective self-determination?"⁷⁰⁷ Whatever one defines as the appropriate boundaries of state sovereignty, it is undeniable that this tension arises directly from a conception of human rights that assigns to these rights the qualities of being universal and infallible. To avoid this tension, it is appropriate to use the instrumentalist approach proposed by Charles Beitz.

Beitz argues that to identify a human right that is worthy of protection, one must first evaluate the importance of the underlying interest which a given right protects for the potential beneficiaries of that right.⁷⁰⁸ One does this by asking whether a reasonable individual would recognize the value of protecting the interest which a given right protects if he/she placed himself in the position of those claiming this right. If the answer is in the affirmative, the next question is whether it would be advantageous for the state to use legal measures to protect this interest, that is, to elevate it to the status of a right.⁷⁰⁹ It should be clarified that even if an interest is only important for a small segment of society, it may still be beneficial for the state to protect it: "the importance of the interest may be derivative; for example, it may be that under contingent but currently prevalent historical circumstances, the satisfaction of the interest would be instrumental to the satisfaction of other interests already identified as important."⁷¹⁰ The last step in identifying human rights that should be protected involves asking if the failure to protect this interest would

⁷⁰⁷ The Idea of Human Rights, *supra* note 670 at 135.

⁷⁰⁸ *Ibid* at 137.

⁷⁰⁹ *Ibid*.

⁷¹⁰ *Ibid* at 138.

likely be a cause for international concern.⁷¹¹ If the response to this question is in the affirmative, it strengthens the importance for the state of protecting the right since international criticism or foreign intervention would be harmful to it.

In the case of the Kafala System, an assessment grounded in this approach would begin by asking if the interests protected by the rights which migrant workers claim are sufficiently important that they warrant legal protection when “reasonably regarded from [their] perspective.”⁷¹² In practice, this means identifying whether a reasonable individual would be able to recognize the importance of protecting interests such as fair wages and safe working conditions for migrant workers if he placed himself in their shoes? If the answer is ‘yes’, the second question is whether it would be advantageous to Saudi Arabia to give legal protection to these interests?

The fact that the immediate interests of migrant workers do not *prima facie* affect the broader Saudi society might suggest that Saudi Arabia would not benefit from protecting them. However, given the fact that improving the condition of migrant workers can improve labour force productivity and attract greater FDI, Saudi Arabia can benefit enormously from increasing human rights protections for migrant workers. Thus, when one accepts the possibility that protecting the interests of migrant workers can produce many benefits for Saudi society, it is possible to see why protecting migrant workers’ rights is important for Saudi Arabia. The last step in Beitz’ approach involves analyzing if failure to protect the interests of migrant workers would be a justifiable reason for international concern.

Amartya Sen employs a similar line of reasoning to underscore the importance for states of protecting human rights. Although he uses the example of famine to illustrate the interdependence between social and economic rights on the one hand, and civil and political rights on the other, his position implies that governments can advance their self-interest by respecting human rights. The existence of strong protections for civil and political rights, he argues, can be linked to the nonoccurrence of famines. In a system that has fair elections on a regular basis, opposition parties to criticize the ruling party, and a free press to bring the governments misdeeds

⁷¹¹ *Ibid* at 137.

⁷¹² *Ibid*.

to the public's attention, it is difficult for a ruling party to avoid the political consequences for failing to prevent a crisis such as a famine.⁷¹³ Thus, governments are more likely to respect socioeconomic rights in a democratic society. By doing so, they can also improve their reputation and extend their stay in power. On the other hand, if a ruler's authority cannot be challenged and he is entirely above all accountability, he will remain in power despite his failure to prevent millions of his own people from starving to death.⁷¹⁴ Thus, the lack of systems to address the economic needs of people will continue to persist.

This approach is useful because it avoids the use of the language of universal human rights that asks states to adhere to what many consider to be a Western conception of human rights.⁷¹⁵ Instead, it ties the question of whether a certain right should be protected to the importance it objectively has for those who claim it and the advantages that it would have for the state who is asked to protect it. International human rights standards are therefore not imposed on Saudi Arabia as universally accepted norms, but are justified on the basis that their protection can be objectively appreciated and can benefit Saudi Arabia economically and politically.

The views of Beitz and Sen are of course not without criticism. One of the main critiques levelled against their position is that it reduces the importance of categorical duties by allowing governments to protect those rights which they view as important and which can advance their self-interest.⁷¹⁶ Put differently, it would be self-contradictory for an instrumentalist approach to human rights to support the idea that states have categorical duties to respect certain rights when it begins with the premise that states should respect rights that they appreciate as being objectively important and that procure political and economic benefits to them.⁷¹⁷ This thesis rejects this critique on the basis that the entire system of international human rights is based on an instrumentalist approach, as argued by various Third World Approaches to International Law

⁷¹³ Amartya Sen, "Freedoms and Needs. The New Republic" (1994) in Philip Alston & Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) at 311 [Freedoms and Needs].

⁷¹⁴ *Ibid.*

⁷¹⁵ Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 Human Rights Quarterly 547 at 551 [Standard Setting in Human Rights]; Anthony Anghie, "The Evolution of International Law: Colonial and Post-Colonial Realities" (2006) 27:5 Third World Q. 739 [The Evolution of International Law].

⁷¹⁶ A Zylberman, "Human Rights, Categorical Duties: A Dilemma for Instrumentalism" (2016) 28:4 Utilitas 368.

⁷¹⁷ *Ibid.*

(TWAIL) scholars.⁷¹⁸ States always have a self-interested motive for advocating for the protection of human rights. Therefore, there is no harm in advocating for a similar approach in the case of Saudi Arabia. Furthermore, given that respect for human rights is becoming an ever-more important consideration in economic policy and political decisions, it can probably go much farther in persuading a country to respect human rights than an appeal to the moral authority of certain self-proclaimed universal conceptions of human rights. Relatedly, it is also important to assess whether a state can protect economic, social, and cultural rights independently of civil and political rights, or whether the two are interdependent.

The Relationship between Civil and Political Rights and Economic, Social, and Cultural Rights

While concerns about the Kafala system center mostly around a lack of protection of economic and social rights, it is important to understand that the academic literature is divided on whether these exist entirely independently of civil and political rights. According to some scholars, enhancing economic and social rights requires improving respect for civil and political rights.⁷¹⁹ These two sets of rights are interdependent and interconnected such that “political rights can have a major role in providing incentives and information toward the solution of economic privation.”⁷²⁰ To be clear, the relationship between the two sets of rights runs even deeper than their capacity to strengthen each other. This relationship can be characterized as “constitutive” in the sense that protections for political rights enable discussions and debates, which are necessary to conceptualize the economic needs that should be addressed.⁷²¹

Recall the argument of Amartya Sen, who uses the example of famine to illustrate the interdependence between social and economic rights on the one hand, and civil and political rights on the other. The existence of strong protections for civil and political rights, he argues, can be linked to the nonoccurrence of famines. In a system that has fair elections on a regular basis,

⁷¹⁸ Standard Setting in Human Rights, *supra* note 715 at 551; The Evolution of International Law, *supra* note 715 at 739.

⁷¹⁹ Freedoms and Needs, *supra* note 713 at 311.

⁷²⁰ *Ibid.*

⁷²¹ *Ibid.*

opposition parties to criticize the ruling party, and a free press to bring the governments misdeeds to the public's attention, it is difficult for a ruling party to avoid the political consequences for failing to prevent a crisis such as a famine.⁷²² Conversely, a ruler who governs with an iron fist can hold onto power indefinitely even if millions of people starve to death, for all dissent can be silenced and all opposition repressed.⁷²³ In such a situation, reforms to satisfy the socioeconomic needs of people will never see the day of light.

This position is not without critique, Sen himself conceding that “in making such arguments [...] there is the danger of exaggerating the effectiveness of democracy.”⁷²⁴ That is, strong democratic institutions do not causally bring about respect for socioeconomic rights. There are countries where there are fairly strong democratic institutions but which nevertheless fall short in improving the state of economic, social, and cultural rights. Jean Dreze refers to the problem of chronic hunger in India as an example. India's democratic institutions are fairly well developed, in some respects – namely, voter turnout, the influence of big money, and the political representation of socially disadvantaged groups – even surpassing the US.⁷²⁵ Similarly, the Indian press is independent and better in many ways than its American counterpart.⁷²⁶ Nevertheless, the problem of chronic hunger, like many other social issues that do not attract the same attention as a famine, continue to persist. What might explain “this neglect of social issues in general, and of chronic hunger in particular”?⁷²⁷ According to Dreze, it is the fact that economic insecurity, lack of education, and social discrimination prevent most people from participating in Indian democracy.⁷²⁸ High voter turnout rates gloss over the fact that there is a lack of informed political participation.⁷²⁹ Most people vote without clearly understanding the differences between the platforms of the various candidates.

⁷²² *Ibid.*

⁷²³ *Ibid.*

⁷²⁴ *Ibid* at 312.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.*

⁷²⁹ *Ibid.*

Dreze argues that this creates a self-perpetuating cycle of disenfranchisement. The powerful elite marginalize the masses and prevent them from meaningfully participating in democracy.⁷³⁰ In turn, policy-making reflects the concerns of the political elite, which reinforces the very structures that lead to economic deprivation.⁷³¹ In the Saudi context, something similar is arguably occurring. Migrants cannot participate in political life and there is thus no one to advocate for their interests. Thus, policymaking reflects the interests of other groups, which then further sidelines the interests of migrant workers.

The debate about the link between democratic institutions and respect for economic and social rights will be important in considering how to effectively reform the Kafala system, for depending on the view that one adopts, it might be argued that democratizing Saudi Arabia is an important step in effectively reforming the Kafala system. This thesis does not support this position and instead argues that workers' rights can be fully protected without it being necessary to have a democratic system of governance in place.

As we have seen, the justification for expecting Saudi Arabia to respect international human rights standards should be located in an objective analysis of the importance of the interest that a right protects and a demonstration of how giving legal protection to this right can benefit Saudi Arabia. The next section discusses the specific human rights obligations that Saudi Arabia has under International and Islamic Law.

Saudi Arabia's Responsibilities under International law and Islamic Law

Saudi Arabia is expected to ensure that human rights are protected in a manner that is at once consistent with domestic law as well as international law. Saudi Arabia's constitution states that Saudi law is based on Islamic Shari'a law.⁷³² Shari'a law unquestionably provides protections for fundamental civil, political, social, economic, and cultural rights. In addition, article 27 of Saudi Arabia's constitution mentions welfare rights,⁷³³ while article 26 states that the government

⁷³⁰ *Ibid.*

⁷³¹ *Ibid.*

⁷³² Basic Law of Governance, *supra* note 40 at art 1.

⁷³³ New Rights for Domestic Workers, *supra* note 565.

is responsible for the protection of human rights. The fact that Saudi Arabia has endorsed the *Universal Islamic Declaration of Human Rights* is further confirmation that Saudi law must reflect the human rights protections that are provided for in Islamic law.

In addition to the general provisions in the Saudi constitution, Saudi labour law also contains a considerable number of protections for the rights of migrant workers. In particular, there are provisions stipulating the right of a worker to fair compensation, safe and sanitary working conditions, reasonable working hours, not to be terminated without cause, and to initiate proceedings against the employer when any of his/her rights under labour law are violated.⁷³⁴

As a general matter, employers are required to “treat workers with due respect and refrain from any action or utterances that may infringe upon their dignity and religion.”⁷³⁵ For their part, migrant workers must have an employment contract which regulates their terms of employment.⁷³⁶ Just as for Saudi nationals, this contract must be in writing.⁷³⁷ Saudi Labor law also establishes the minimum entitlements, such as salary and employment benefits,⁷³⁸ that must be guaranteed to migrant workers in their employment contracts.⁷³⁹ In particular, it sets out requirements for the payment of wages in a timely manner, stating that workers who are paid on a daily basis must be paid at least once a week, while those who are salaried must be paid at least once a month.⁷⁴⁰ The duties and tasks that workers are expected to complete during their period of employment must likewise be set out in these contracts.⁷⁴¹ Furthermore, workers and employees cannot make any changes to a contract once it has been signed; their only option is to terminate it. The cost of repatriation of an employee whose contract has been terminated is the responsibility of the employer.⁷⁴² With respect to working conditions, Saudi labour law requires employers to provide safe and humane conditions of work. In particular, article 121 of the Labour Law states that “an employer shall maintain the firm in a clean and hygienic condition. He shall provide lighting,

⁷³⁴ Labor Law, *supra* note 43.

⁷³⁵ *Ibid* at art 61(1).

⁷³⁶ *Ibid* at art 43.

⁷³⁷ *Ibid* at art 37; The Holy Qur’an, *supra* note 47 at ch. 2: 282.

⁷³⁸ Labor Law, *supra* note 43 at arts 90, 98, 101, 109.

⁷³⁹ An Introduction to Islamic Law, *supra* note 372 at 147.

⁷⁴⁰ Labor Law, *supra* note 43 at art 90.

⁷⁴¹ Sharia on Domestic Workers, *supra* note 374.

⁷⁴² Labor Law, *supra* note 43 at art 40 (1).

supply potable and washing water and comply with other rules, measures and standards of occupational protection, health and safety.”⁷⁴³ An employer is also required to take “the necessary precautions to protect the workers against hazards, occupational diseases, the machinery in use, and shall ensure work safety and protection,” and to “post in a prominent place in the firm the instructions related to work and workers’ safety.”⁷⁴⁴

With respect to the question of wages and working hours, the laws and policies concerning migrant workers do not stipulate a minimum wage that must be paid.⁷⁴⁵ However, where a wage is not specified in the employment contract, the employer must pay the worker the wage that is paid to the same type of worker in his/her firm, or the wage that is normally paid to someone of that profession.⁷⁴⁶ Furthermore, upon termination of the employment contract of a migrant worker, he/she is entitled to the payment of his or her salary. Labour law forbids migrant workers from working more than 8 hours a day. On Fridays, all migrant workers are exempt from work as is the case for Saudi nationals. While at work, the migrant workers are entitled to a break after not more than five hours of work, the length of which should be a minimum of 30 minutes.⁷⁴⁷ They are additionally entitled to payment for overtime services that they have rendered. Any dispute arising out of a provision in the Labour Regulation can be brought before the Commission for the Settlement of Labour Disputes.

Since the Saudi Labour Law affirms that the Shari’a must be respected in implementing its provisions, it is important to speak to the protections for workers’ rights contained in Islamic law. Islamic law is the foundation of all of the laws of Saudi Arabia and contains very strong protections for the rights of migrant workers, in particular stipulating that migrant workers should be paid fair wages in a timely manner and not be subjected to any mistreatment or arbitrary punishment. In the

⁷⁴³ *Ibid* at art 121.

⁷⁴⁴ *Ibid* at art 122.

⁷⁴⁵ *Ibid* at art 95.

⁷⁴⁶ *Ibid*.

⁷⁴⁷ *Ibid* at art 101.

Shari'a, every human being should be treated in a dignified manner.⁷⁴⁸ Human safety, as well as security, are also guaranteed by the Qur'an.⁷⁴⁹

How Islamic principles about the treatment of workers can be appropriately transposed to migrant workers in modern-day Saudi Arabia is a complex question. There has been longstanding disagreement between liberals and conservatives concerning questions of law, religion and culture and there is by no means a consensus on what the application of Shari'a law in the 21st century should look like. Saudi Arabia's laws are the subject of discussion among Islamic jurists themselves, who all have different conceptions of an 'Islamic' society.⁷⁵⁰ Given the above provisions of Saudi law, however, there is no question that workers are entitled to humane working conditions, appropriate levels of remuneration, and safety and security.⁷⁵¹

Having summarized Saudi Arabia's obligations under its own domestic law, it is also important to look at the obligations that it has under international law. This is the focus of the next section.

Saudi Arabia's Human Rights Obligations under International Law

The question of whether Saudi Arabia's domestic law must respect international human rights standards is a difficult and complex one. This is due mainly to the fact that there are very few binding international human rights instruments that Saudi Arabia has ratified. In particular, Saudi Arabia is not party to the two most comprehensive human rights conventions, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR). Nor has Saudi Arabia ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

⁷⁴⁸ The Holy Qur'an, *supra* note 47 at ch. 17:70 "Verily we have honoured the Children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a marked preferment."

⁷⁴⁹ *Ibid* at ch. 5:32 "We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely."

⁷⁵⁰ A Black, Hossein Esmaeili, Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Cheltenham: Edward Elgar Publishing, 2013).

⁷⁵¹ UIDHR, *supra* note 341 at art 17.

Nevertheless, Saudi Arabia has ratified a number of other important international conventions, including the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) (ratified 1997), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) (ratified 2000), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (ratified 1997), the *Convention on the Rights of the Child* (CRC) (ratified 1996) with its *Optional Protocol on the involvement of children in armed conflict* (ratified 2011) and *Optional Protocol on the sale of children, child prostitution and child pornography* (ratified 2010), and the *Convention on the Rights of Persons with Disabilities with its Optional Protocol* (ratified 2008). Besides international conventions, one of the regional conventions that Saudi Arabia has ratified is the *Arab Charter on Human Rights*. As it will be shown below, this Charter is largely a reflection of the UDHR, the ICCPR, and the ICESCR. Moreover, its adoption was followed up in 2014 by the adoption of the *Statute of the Arab Court of Human Rights*, with the aim of allowing inter-state litigation in cases involving alleged violations of human rights. In 2016, Saudi Arabia became the first member-state of the Arab League to ratify the *Statute of the Arab Court of Human Rights*. Although the 7 ratifications that are needed in order for the statute to enter into force have not yet been achieved, Saudi Arabia's decision to ratify it reflects its increasing seriousness when it comes to respecting international human rights standards.

Saudi Arabia has furthermore signed the *United Nations Charter*, which mentions in Article 55(c) that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” The subsequent article declares the commitment of all member-states to taking measures to fulfill these objectives. This, admittedly, is not enough to conclude that Saudi Arabia must respect the specific human rights standards that are set out in the ICCPR and the ICESCR.

Nevertheless, as a member of the United Nations, Saudi Arabia is expected to take into consideration the *Universal Declaration of Human Rights*, as well as abide by the conventions that it has ratified.⁷⁵² The UN General Assembly adopted the UDHR in 1948. It is important to clarify

⁷⁵² *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 26 (entered into force 21 January 1980) [Vienna Convention on the Law of Treaties].

that the UDHR is not an international treaty, as a treaty depends for its binding force upon states' express agreement through a formalized procedure.⁷⁵³ The Saudi Arabia's relationship with the UDHR is rather delicate, especially given the fact that the Kingdom continues to withhold formal acceptance of this document.⁷⁵⁴

Another point that is worth noting is that the Saudi Arabia has been consistent in its position since the UDHR's inception that, even if it were to eventually accept this document, the Kingdom would not be legally bound by its principles as it is not, in fact, a treaty. This position is consistent with domestic Saudi law, as article 70 of the *Basic Law of Governance* states that the Kingdom's courts of law and judicial authorities will only base their decisions on "laws, international agreements, treaties and concessions [...] issued and amended by Royal Decrees." In this connection, it is important to mention that some international law scholars are of the view that the entire UDHR has the status of customary international law,⁷⁵⁵ while others believe that only some parts of the UDHR have the status of customary international law, specifically articles 2, 3, 4, 5, 9, 10 and 11.⁷⁵⁶ A contrary view is that the UDHR acts only as a recommendation, with no legal authority over UN member states⁷⁵⁷; on the other hand, some national and international tribunals have relied upon it and treated it as a binding document.⁷⁵⁸

Why was the UDHR not made into a binding document? Gudmundur Alfredsson & Asbjørn Eide argue that "the role of human rights as a political weapon was one of the motivations

⁷⁵³ Public International Law, *supra* note 13 at 84.

⁷⁵⁴ UDHR, *supra* note 1.

⁷⁵⁵ Von Bernstorff, "The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law" (2008) 19:5 *European Journal of International Law* 903 [The Changing Fortunes of the Universal Declaration of Human Rights]; Oscar Schachter, *International Law in Theory and Practice* (Springer, 1991) at 336; John Humphrey, *No Distant Millennium: The International Law Of Human Rights* (Paris: UNESCO, 1989) at 155; *Montreal Statement of the [Nongovernmental] Assembly for Human Rights* (1968) reprinted in 9:94 *J. Int'l Comm. Jurists Review*; *Declaration Of Tehran, Final Act Of The International Conference On Human Rights*, (1968) U.N. Doc. A/Conf.32/41, reprinted in *United Nations, Human Rights, A Compilation of International Instruments* (1988) U.N. Sales No. E.88. Xiv. 1 at para 2; *Resolution adopted by the International Law Association*, 1994 reprinted in *International Law Association, Report of The Sixty-Sixth Conference*, Buenos Aires, Argentina.

⁷⁵⁶ The Changing Fortunes of the Universal Declaration of Human Rights, *supra* note 755.

⁷⁵⁷ *Ibid*; Karol Wolfke, *Custom in Present International Law* (Dordrecht; Martinus Nijhoff, 1993) at 41-42; The Changing Fortunes of the Universal Declaration of Human Rights, *supra* note 755.

⁷⁵⁸ International Human Rights Law, *supra* note 692 at 81.

for not giving the human rights text binding status.”⁷⁵⁹ That is, some states deliberately use the failure of a given state to respect human rights as a justification for isolating that state within the international community and subjecting it to various sanctions. Because the UDHR embodies values that may not be shared by all countries and all peoples, giving it binding force is somewhat shortsighted since it gives legitimacy to those state-level legal regimes that adhere more closely to it while delegitimizing others. Nevertheless, the fact that the UDHR is not binding provides many countries an effective loop-hole against progressive and empowering legislation and policies.⁷⁶⁰ These considerations aside, there is a broad consensus that the UDHR has been of great importance in terms of guiding states to develop their own human rights codes, and that it has significant moral and political influence.

Saudi Arabia has also implicitly accepted an extensive range of human rights principles by signing the *UN Charter*. These principles are largely contained in articles 1(3) and 55 of the *UN Charter*⁷⁶¹ as well as indirectly in article 38, which establishes the International Court of Justice and which mandates that the court apply international conventions (among other sources of law and legal principles), many of which deal with human rights.⁷⁶² Given the fact that Saudi Arabia is a member of the UN, it follows that the UN Charter is binding on the Kingdom both internationally and domestically. According to article 70 of the Basic Law,⁷⁶³ once a royal decree

⁷⁵⁹ Gudmundur Alfredsson & Asbjørn Eide, *The Universal Declaration of Human Rights: a Common Standard Of Achievement* (Boston: Kluwer Law International, 1999).

⁷⁶⁰ *Ibid.*

⁷⁶¹ The UN Charter, *supra* note 669, mentions human rights in some articles, including in article 1, which states, “The Purposes of the United Nations are: [...] (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Also, in article 55, it states, “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [...] (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Articles 56, 62(2), and 76 also speak of human rights, with article 76 stating, “The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: [...] (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world.”

⁷⁶² UN Charter, *supra* note 669 at art 38, “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations.”

⁷⁶³ Basic Law of Governance, *supra* note 40 at art 70, “Laws, international agreements, treaties and concessions shall be approved and amended by Royal Decrees.”

is issued to integrate an international convention into Saudi law, it becomes a part of the Kingdom's domestic legislation and its provisions can be invoked before any of the authorities in the country. Therefore, articles 1(3) and 55 of the UN Charter form part of the law of Saudi Arabia. Arguably, the Saudi Arabia might try to dispute possible attempts to use these articles to apply some human rights principles by making reference to article 26 of the Basic Law: "The state shall protect human rights in accordance with the Shari'a." Yet article 27 of *Vienna Convention on the Law of Treaties*, which Saudi Arabia has ratified, stipulates "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."⁷⁶⁴ This article refers to international treaties that are legally binding on the contracting parties.⁷⁶⁵ It rests on the reasoning that since the very purpose of many treaties is to require states to change their domestic legal standards, allowing a state to avoid respecting its treaty obligations on the basis of a provision of its internal law would make a large number of treaty obligations futile.⁷⁶⁶ The term 'internal law' is interpreted broadly as encompassing all internal law, be it a statute, a regulation, an order, a decree, or a judicial decision.⁷⁶⁷ Furthermore, article 80 of the Saudi constitution itself provides that its provisions cannot hinder the implementation of international treaties that Saudi Arabia has signed.⁷⁶⁸

Another Saudi commitment to the UN is its current membership of the Human Rights Council.⁷⁶⁹ In 2012, a Memorandum of Understanding was signed between the OHCHR and the

⁷⁶⁴ Vienna Convention on the Law of Treaties, *supra* note 752 at art 27.

⁷⁶⁵ O Dörr & K Schmalenbach, "Internal law and Observance of Treaties" in O Dörr & K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Berlin: Springer, 2012).

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*

⁷⁶⁸ Basic Law of Governance, *supra* note 40 at art 80.

⁷⁶⁹ Current Membership of the Human Rights Council, 1 January - 31 December 2016, United Nations High Commissioner for Human Rights (OHCHR) <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>>; Established in 2006, the OHCHR is a body responsible for human rights. One of its main purposes is to review the human rights record of every UN member state once every four years and to make recommendations for improvement. According to the General Assembly Resolution establishing the OHCHR, the Council is responsible for "promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner." The Council's role includes addressing "situations of violations of human rights, including gross and systematic violations, and making recommendations thereon." Resolution adopted by the General Assembly, [without reference to a Main Committee (A/60/L.48)] 60/251. Human Rights Council. <<http://www.un-documents.net/a60r251.htm>>

Saudi Arabia, which was represented by the Saudi Human Rights Commission.⁷⁷⁰ This was an initiative on the part of the Kingdom to make clear its intent to take steps to strengthen human rights protections. Indeed, after the signing of the Memorandum of Understanding, Saudi Arabia passed a law entitled “Saudi Human Rights Law.”

The UDHR aside, Saudi Arabia has ratified various human-rights-related international conventions that contain multiple articles that closely resemble those within the UDHR. For example, it is a member of the Geneva Conventions, which are international treaties that are binding on all states that are party to them; since the addition of article 27 in 2001,⁷⁷¹ Saudi Arabia has accepted key principles that are modeled on those contained in article 6 of the UDHR.⁷⁷² Another example is article 2 of the UDHR, which contains the general protection against discrimination; the key principles of this article are incorporated into the *Discrimination (Employment and Occupation) Convention*, to which Saudi Arabia is party.⁷⁷³ Moreover, Saudi Arabia is a member of the *International Convention on the Elimination of All Forms of Racial Discrimination*, another human rights document that bears many similarities to the UDHR.⁷⁷⁴ In short, notwithstanding Saudi Arabia’s non-acceptance of the UDHR, some key elements of the UDHR have been mirrored in treaties to which Saudi Arabia is party.

Yet another source of international obligations for Saudi Arabia is the various ILO conventions that it has ratified. In particular, it has ratified all of the following ILO conventions: *the Abolition of Forced Labour Convention*, 1957 (No. 105) (ratified 15 June 1978); *the Discrimination (Employment and Occupation) Convention*, 1958 (No. 111) (ratified 15 June 1978); *the Minimum Age Convention*, 1973 (No. 138) (2 April 2014); *the Worst Forms of Child Labour Convention*, 1999 (No. 182) (ratified 8 October 2001); *the Forced Labour Convention*, 1930 (No. 29) (ratified 15 June 1978); *the Equal Remuneration Convention*, 1951 (No. 100)

⁷⁷⁰ “Technical cooperation in Saudi Arabia” OHCHR

<<http://www.ohchr.org/EN/Countries/MENARegion/Pages/TechnicalCooperationSaudiaArabia.aspx>>

⁷⁷¹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, arts 27, 80 (entered into force 21 October 1950).

⁷⁷² UDHR, *supra* note 1 at art 6: “everyone has the right to recognition everywhere as a person before the law.”

⁷⁷³ *C111 - Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), 25 June 1958, (entered into force 15 Jun 1960) [Saudi Arabia is a member since 1978].

⁷⁷⁴ ICERD, *supra* note 313 [Saudi Arabia is a member of the ICERD since Sep 23, 1997].

(ratified 15 June 1978); and *the Labour Inspection Convention*, 1947 (No. 81) (ratified 15 June 1978). It is important to note though that Saudi Arabia has not ratified the *Migration for Employment Convention* (Revised), 1949 (No. 97) and the *Migrant Workers (Supplementary Provisions) Convention*, 1975 (No. 143). In the next section, the specific rights which Saudi Arabia must respect as a signatory of the aforementioned conventions are detailed.

Specific State Obligations flowing from International and Regional Conventions

As a member of the United Nations and various other international organizations, Saudi Arabia must respect certain obligations concerning human rights. In the context of the Kafala system, Saudi Arabia has the responsibility of ensuring that its citizens and migrant workers are afforded equal human rights protections. The *Universal Declaration of Human Rights*, which forms part of customary international law according some legal scholars, provides important guidance on the fundamental human rights that Saudi Arabia should strive to protect. Granted that it is not a binding treaty, its provisions are largely mirrored in regional treaties that Saudi Arabia to which Saudi Arabia is party, such as the *Arab Charter on Human Rights*. In fact, the *Arab Charter* states in its preamble that it affirms “the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam.”⁷⁷⁵ It is therefore pertinent to look at the specific rights enumerated by the *Universal Declaration of Human Rights*, as well as their counterparts in the *Arab Charter on Human Rights*.

Per Article I of the *Universal Declaration of Human Rights*, “All human beings are born free and equal in dignity and rights.” Article 2 further elaborates on this by stipulating that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.” This article very clearly establishes the principle of non-discrimination on the basis of race, sex, national or ethnic origin, as well as several other grounds in the enjoyment and exercise of rights and freedoms by individuals. The *Arab Charter*, for its part, reiterates this provision in its article 3, stating that all individuals have “the right to enjoy the rights and freedoms

⁷⁷⁵ Arab Charter on Human Rights, *supra* note 340 at preamble.

set forth herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin...” As it was demonstrated in chapter three, in Saudi Arabia, not all rights are enjoyed equally by citizens and migrant workers.

In addition to establishing the principle of non-discrimination, the UDHR also prohibits slavery and servitude in Article 4. This provision is mirrored by Article 10(1) of the *Arab Charter*, which states that “all forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances.” It is known that in Saudi Arabia, opportunists have abused the Kafala System and engaged in practices that have been described as some as amounting to enslavement of workers. Saudi Arabia is required to halt and prosecute anyone that subjects another person, whether a citizen or a migrant worker, to slavery or servitude. The country is also expected to ensure that slavery and servitude are prevented through the creation and enforcement of laws to help curb these practices. Currently, Saudi law requires the nature of an employee’s work and the duties that he is assigned to be specified clearly in the employment contract. Employees are furthermore granted certain rights vis-à-vis their employers, including the right to just remuneration paid on a monthly or weekly basis.⁷⁷⁶ In principle, therefore, the Kafala system is wholly opposed to the idea that someone can be made to work without remuneration, which is a defining feature of slavery. While it is true that in practice certain individuals and companies abuse the Kafala system by withholding wages, this is neither facilitated nor permitted by the Kafala system.

It is also relevant to mention Article 5 of the *Universal Declaration of Human Rights*, according to which torture and cruel, inhuman, or degrading treatment or punishment are prohibited. Once again, the *Arab Charter* reproduces the essential content of this provision in article 8(1): “No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.” The treatment of migrant workers – especially domestic workers – in Saudi Arabia has, on several occasions, involved cases of brutal and inhumane treatment.⁷⁷⁷ Saudi Arabia should protect these workers from any form of mistreatment and put in place laws to facilitate the prosecution of those that infringe this provision of the *Arab Charter*.

⁷⁷⁶ Labor Law, *supra* note 43 at arts 90, 95.

⁷⁷⁷ Exploited Dreams, *supra* note 271.

The protection of migrant workers, especially individuals in domestic settings, requires swift action on the part of the Saudi Arabian government since they are the most likely targets of abuse.⁷⁷⁸

The freedom of movement is also protected by the UDHR in Article 13. The *Arab Charter*, for its part, contains a provision to the same effect at article 26(1): “Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force.” While it is true that the Kafala system has facilitated the movement of many migrants to Saudi Arabia, their movement within the country is subject to significant limits, as described in chapter three. In contrast, Saudi citizens have a right to move freely within Saudi Arabia. According to the *Arab Charter*, migrant workers should enjoy this right too. In addition, migrants should be allowed to move freely in and out of Saudi Arabia just as citizens are.

Yet another right that is worth discussing here is the right to nationality. Nationality is acquired in various ways including through birth and naturalization. According to Article 15 of the *Universal Declaration of Human Rights*, everyone furthermore has a right to nationality.⁷⁷⁹ This article is mirrored by article 29 of the *Arab Charter*. In principle, anyone who satisfies the established requirements and criteria of nationality in a given country is entitled to be a national of that country. Saudi Arabia must therefore remove limits to nationality that require an individual to be born in Saudi Arabia from Saudi parents. There should instead be a system in place which grants nationality to anyone that works in Saudi Arabia and satisfies certain criteria reflecting his intention to settle there permanently. Moreover, under international law, no one can be denied nationality arbitrarily, meaning that Saudi Arabia cannot deny individuals citizenship without just cause. Finally, people have a right to change their nationality, and Saudi Arabia is obliged to facilitate this as much as possible.

The *Universal Declaration of Human Rights* also contains provisions on the right to work. In Article 23, it guarantees every individual a right to work, just and favourable conditions of work,

⁷⁷⁸ As if I am not Human, *supra* note 310.

⁷⁷⁹ UDHR, *supra* note 1 at art 15.

as well as fair remuneration. Free choice of employment, humane working conditions, and just wages are all emphasized in this article. The *Arab Charter* reiterates these rights in its article 34. As a party to the *Arab Charter on Human Rights*, Saudi Arabia has the responsibility to grant all individuals access to employment, the ability to freely choose what kind of work they do, and to put in place policies and regulations to ensure that employers pay fair wages and offer humane working conditions to their workers. The government of Saudi Arabia is furthermore obliged to ensure that all individuals can form trade unions to ensure that the interests they have concerning remuneration and working conditions are protected.⁷⁸⁰ Individuals also have a right, per Article 24 of the UDHR, to a limit on the number of hours they are required to work and to paid holidays. This is especially important for domestic workers under the Kafala system who are at risk of being subjected to unreasonably long working hours. The *Islamic Declaration of Human Rights*, for its part, requires Saudi Arabia to ensure that every individual in the country is granted an opportunity to make a living in a manner consistent with the law of the land.⁷⁸¹ Moreover, every activity that is critical to earning a living should be permitted unless it is considered to have an adverse impact on the interests of the community.⁷⁸² Concerning the right to dignity, just remuneration, and favourable working conditions, the *Islamic Declaration of Human Rights* requires Saudi Arabia to ensure that workers receive payment promptly and are granted an adequate amount of time for rest and leisure.⁷⁸³ It is also incumbent upon Saudi Arabia to ensure that the workers are treated in a dignified manner.⁷⁸⁴

Given all of the above obligations under international law, it is crucial to understand how these obligations interact with Saudi Arabia's domestic law. To clarify this question, the next section comments briefly on the law of state responsibility.

The International Law of State Responsibility

⁷⁸⁰ The Universal Declaration of Human Rights, *supra* note 663.

⁷⁸¹ UDHR, *supra* note 341 at arts 3(c), 15(b).

⁷⁸² *Ibid* at art 15(g).

⁷⁸³ *Ibid* at art 27.

⁷⁸⁴ *Ibid*.

The law of state responsibility derives from the general legal personality of every State under international law, and also from the fact that States are the principle executors and protectors of international obligations.⁷⁸⁵ As a starting point, Saudi Arabia, like every other member of the international community, is expected to respect all the international conventions that it has ratified.⁷⁸⁶ Therefore, it must take steps through its legislation and policies to enforce human rights principles; this includes prosecuting individuals and groups that violate human rights within the Kingdom's territory. Here, it should be reiterated that many grave violations of human rights can be characterized as international crimes whose prohibition amounts to a *jus cogens* norm. These are mandatory norms of customary international law from which no derogation is permitted.⁷⁸⁷

More specifically, according to article 2 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, a State is internationally responsible where an act is both illegal under international law and where that act can be attributed to it.⁷⁸⁸ It is important to note that omissions also qualify as conduct attributable to a state.⁷⁸⁹ That is, where a state has an obligation to act that it fails to fulfill, it can be held responsible under international law.⁷⁹⁰ Therefore, states must make sure that they do not violate their treaty obligations, either by actions or by omissions.

Besides the question of liability for omissions, another important issue is whether domestic law can be a basis for failing to fulfill an international obligation. Saudi Arabia's constitution considers the Islamic Shari'a to be the primary source of its law.⁷⁹¹ It furthermore binds courts to apply the Qur'an and the Sunnah to the cases that are brought before them, as well as any other law promulgated by the State which does not conflict with these.⁷⁹² Similarly, article 26 states that human rights are to be protected in accordance with the Islamic Shari'a.⁷⁹³ The question naturally

⁷⁸⁵ JM Ruda, "States, Fundamental Rights and Duties" in Rudolf L. Bindschedler et al., *Encyclopedia of Disputes Installment 10* (Elsevier, 1987) 467.

⁷⁸⁶ Vienna Convention on the Law of Treaties, *supra* note 752 at art 26.

⁷⁸⁷ *Ibid*.

⁷⁸⁸ *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) International Law Commission, 53rd Session art 2 [Draft Articles on State Responsibility].

⁷⁸⁹ *Ibid* at 35.

⁷⁹⁰ *Ibid*, the commentary cites the *Corfu Channel* case and the *United States Diplomatic Staff in Tehran* case in support of this position.

⁷⁹¹ Basic Law of Governance, *supra* note 40 at art 1.

⁷⁹² Basic Law of Governance, *supra* note 40 at art 48.

⁷⁹³ Basic Law of Governance, *supra* note 40 at art 26.

arises as to what happens if the government passes a law to implement an international treaty that it has ratified, but that conflicts in one way or another with the Qur'an and the Sunnah. At first glance, the Saudi constitution seems to contradict article 27 of the *Vienna Convention on the Law of Treaties*, which prohibits states from pleading their domestic law to justify a failure to meet an international obligation.⁷⁹⁴ Article 81 of the Saudi constitution addresses this problem by stipulating that international obligations are to be implemented notwithstanding any constitutional provisions.⁷⁹⁵ The Saudi constitution's affirmation of the superiority of treaty obligations is consistent with article 3 of the Draft Articles on the Responsibility of States which states that "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."⁷⁹⁶ The priority given to international treaty obligations by the constitution might also explain why Saudi Arabia is party to a very limited number of international human rights conventions. Furthermore, the full effect of the constitutional provision recognizing the supremacy of international treaty obligations is never realized because in practice, Saudi Arabia always submits a reservation that any provision of a treaty that it has signed is inapplicable to the extent that it conflicts with Islamic Law.

Overseeing the implementation of internationally accepted human rights standards is the mandate of the Human Rights Council insofar as UN human rights instruments are concerned. The Human Rights Council requires Saudi Arabia to submit reports on the measures that it has taken to implement the international conventions which it has ratified, such as CEDAW, CERD, CAT, and CRC.⁷⁹⁷ It additionally bears the responsibility for human rights related measures taken by every state organ and state agent within its jurisdiction. This applies to agencies that are under the Saudi Arabian government, and any other independent institutions as recognized by the state. As stated above, domestic laws cannot be used as a defence by the state for the contravention of international human rights laws as this is a violation of Article 27 of the *Vienna Convention on the*

⁷⁹⁴ Vienna Convention on the Law of Treaties, *supra* note 752 at art 27.

⁷⁹⁵ Basic Law of Governance, *supra* note 40 at art 81.

⁷⁹⁶ Draft Articles on State Responsibility, *supra* note 788 at art 3.

⁷⁹⁷ *National Mechanisms for Reporting and Follow-up; A Practical Guide to Effective State Engagement with International Human Rights Mechanisms* (New York and Geneva: OHCHR, 2016).

Law of Treaties.⁷⁹⁸ Nevertheless, reservations submitted by Saudi Arabia to the conventions that it has ratified allow domestic courts to apply Saudi law where it contradicts with international law.

The above analysis applies only in the case of binding international obligations. As for non-binding texts, there are several documents of this nature that Saudi Arabia has signed. These are the subject of the next section.

Non-Binding Documents

As a member of various international organizations that have a role in promoting respect for human rights, Saudi Arabia has endorsed several non-binding declarations with respect to human rights.

The Universal Islamic Declaration of Human Rights (UIDHR): one of the non-binding documents that Saudi Arabia has signed is the UIDHR. This Islamic response to the UDHR is not necessarily a contradiction of the latter.⁷⁹⁹ Indeed, the UIDHR provides evidence for the position that Shari'a can in large part complement the UDHR. In particular, the UIDHR affirms article 13 of the UDHR: "(1) Everyone has the right to freedom of movement and residence within the borders of each state." In Article 23, the *Islamic Declaration* makes a similar statement about freedom of movement: "In view of the fact that the World of Islam is veritably Ummah Islamia, every Muslim shall have the right to freely move in and out of any Muslim country."⁸⁰⁰

Organisation of Islamic Cooperation (OIC): The OIC,⁸⁰¹ an organization of which Saudi Arabia is a key member, has also been active in promoting human rights values, as is mentioned in the Preamble of the *OIC Charter*.⁸⁰² The need to ensure respect for human rights is mentioned

⁷⁹⁸ New Rights for Domestic Workers, *supra* note 565.

⁷⁹⁹ UIDHR, *supra* note 341.

⁸⁰⁰ *Ibid.*

⁸⁰¹ *Charter of the Organization of Islamic Cooperation*, 14 March 2008, OIC [OIC Charter].

⁸⁰² *Ibid* at preamble, "To adhere our commitment to the principles of the UN Charter, the present Charter and International Law; to preserve and promote the lofty Islamic values of peace, compassion, tolerance, equality, justice and human dignity; to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems; to uphold the objectives and principles of the present Charter, the Charter of the UN and international law as well as

in the *Charter* in a number of articles, namely articles 1, 2, 5, and 15.⁸⁰³ Among the organs that comprise the OIC is the Independent Permanent Commission of Human Rights, which, according to article 15, “shall promote the civil, political, social and economic rights enshrined in the organization’s covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.”⁸⁰⁴

The Cairo Declaration of Human Rights in Islam: In 1990, the OIC adopted a declaration that is known as the Cairo Declaration. This is not supposed to be an alternative to the UDHR but a document that largely reaffirms it.⁸⁰⁵ The goal of this declaration is to contribute “to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari’a.”⁸⁰⁶ Human rights are notably mentioned in articles 1, 13, 24 and 25.⁸⁰⁷ The declaration affirms, among other things, its commitment to equality and non-discrimination in the most unambiguous language, prohibiting in article 1 any discrimination “on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.”⁸⁰⁸

international humanitarian law while strictly adhering to the principle of non-interference in matters which are essentially within the domestic jurisdiction of any State; to strive to achieve good governance at the international level and the democratization of the international relations based on the principles of equality and mutual respect among States and non-interference in matters which are within their domestic jurisdiction; Have resolved to cooperate in achieving these goals and agreed to the present amended Charter.”

⁸⁰³ *Ibid* at art 1, “The objectives of the Organisation of Islamic Cooperation shall be... (14) To promote and to protect human rights and fundamental freedoms including the rights of women, children, youth, elderly and people with special needs as well as the preservation of Islamic family values;...(19) To cooperate and coordinate in humanitarian emergencies such as natural disasters, art 2(7), “Member States shall uphold and promote, at the national and international levels, good governance, democracy, human rights and fundamental freedoms, and the rule of law,” art 5, “The Organs of the Organisation of Islamic Cooperation shall consist of: (6) Independent Permanent Commission of Human Rights,” and art 15, “The Independent Permanent Commission on Human Rights shall promote the civil, political, social and economic rights enshrined in the organisation’s covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.”

⁸⁰⁴ *Ibid* at art 15.

⁸⁰⁵ *Cairo Declaration on Human Rights in Islam*, 5 August 1990, OIC.

⁸⁰⁶ *Ibid* at preamble.

⁸⁰⁷ *Ibid* at art 1: “(a) All human beings form one family whose members are united by their subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity. (b) All human beings are Allah’s subjects, and the most loved by Him are those who are most beneficial to His subjects, and no one has superiority over another except on the basis of piety and good deeds,” and art 25: “The Islamic Shari’a is the only source of reference for the explanation or clarification of any of the articles of this Declaration.”

⁸⁰⁸ *Ibid* at art 1.

Gulf Cooperation Council (GCC): Yet another instrument for protecting human rights within Saudi Arabia is the *GCC Human Rights Declaration*. According to article (1) of the *GCC Charter*,⁸⁰⁹ “Every person has the right to life and must be protected from any assault thereon.... The bodies of the dead must be respected, buried and protected.”⁸¹⁰

Some people might argue that the approach of groups of countries belonging to particular regions and/or to particular ethnic and religious groups establishing their own human rights charters might lead to a lack of consistency from country to country.⁸¹¹ These concerns echo the debate between universalism and moral relativism. However, they are not necessarily well founded. Indeed, there is not necessarily any contradiction between the principles underlying the UDHR and Shari’a, especially given the fact that there is legitimate diversity of opinion in Islam regarding the most appropriate responses to some fact situations, as is reflected in the respect that is generally accorded to the various schools of Islamic jurisprudence.⁸¹² A look at the content of documents like the Cairo Declaration and the Arab Charter on Human Rights furthermore demonstrates the faithfulness with which these regional agreements have reproduced the rights protections in the UDHR, the ICCPR, and the ICESCR.

Conclusion

While it is true that it is Saudi Arabia’s prerogative as a sovereign state to legislate as it sees fit in the area of human rights, it has voluntarily committed itself to respecting various international and regional conventions and the human rights standards set out in them. This choice to take on international commitments is best justified using an instrumentalist line of reasoning.

⁸⁰⁹ *Human Rights Declaration for the Member States of the Cooperation Council for the Arab States of the Gulf (GCC)*, 9 December 2014, The Cooperation Council for the Arab States of the Gulf.

⁸¹⁰ *Ibid* at art (2): “People are equal in human dignity, in rights and in freedoms, and are equal before the regulation (law). There is no distinction between them for reasons of origin, gender, religion, language, color, or any other form of distinction,” art(3): “Slavery, servitude and human trafficking shall be prohibited in all their forms, particularly those involving women and children,” and art (10): “Freedom of movement, residence and departure is a right of every human being according to the regulations (law).”

⁸¹¹ International Human Rights Law, *supra* note 692 at 8.

⁸¹² Abdullah M. Almutairi, “The Domestic Application of International Human Rights Conventions in Saudi Arabia and the Need to Ratify Conventions on Migrant Workers” (2018) 54:1 Middle Eastern Studies 48.

That is, Saudi Arabia considers the interests that are protected by the rights in these conventions to be of great importance for the claimants and it stands to benefit from protecting them. This is why Saudi Arabia has ratified certain conventions but not others. Some of the sources of Saudi Arabia's human rights obligations under international law include the ICERD, CAT, the various ILO conventions that it has ratified, and the *Arab Charter on Human Rights*. Together, these documents protect the right of workers to equality, movement, nationality, choice of employment, just wages, and safe and sanitary working conditions. In the next chapter, certain reforms will be proposed that can better align the Kafala System with Saudi Arabia's international human rights obligations while also taking into consideration its path-dependent state and the institutional environment within which it exists.

Chapter Seven: Suggestions for reforming the Kafala System

Introduction

Rule of law reforms in developing countries tend to begin by introducing changes to the court system, an approach that has been criticized in the scholarly literature.⁸¹³ The criticism has usually been centered around the argument that most individuals rarely appear before courts, meaning they are not as likely to experience any direct benefits of court reform, in turn reducing the likelihood that they would actively support such reforms. Instead, it has been argued that focusing on institutions like the police, prosecutors, and specialized law-enforcement and administrative agencies (e.g., tax administration) can be more effective since individuals interact much more regularly with these bodies.⁸¹⁴ As a result, a larger percentage of citizens are likely to experience “more visible and immediate material benefits from successful institutional reform.”⁸¹⁵ This can in turn generate greater public support for rule of law reforms.⁸¹⁶ As a result, it might be easier to address self-reinforcing mechanisms, institutional interdependencies, and high switching costs.⁸¹⁷

Four UNDP Arab Human Development Reports published between 2002 and 2005 advance the position that building a knowledge society, providing greater protection for political freedoms, and empowering women will help the Arab world overcome many of its development challenges.⁸¹⁸ These reports have been heavily criticized because of their Eurocentric approach to development and disregard for the histories and cultures of Arab societies. They take for granted the idea that egalitarian liberal democracy is the “benchmark for formulating reform strategies in Arab societies.”⁸¹⁹ The current situation in the Middle East must instead be understood from a lens of path dependence. The role of colonization by imperialist European powers and misguided

⁸¹³ Madalene O'Donnell, “Corruption: A Rule of Law Agenda?” in Agnes Hurwitz (ed.), *Civil War and the Rule of Law: Security, Development, Human Rights* (Boulder: Lynne Rienner, 2008) at 225; Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 369.

⁸¹⁴ Path Dependence, Development, and the Dynamics of Institutional Reform, *supra* note 207 at 371.

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid* at 372.

⁸¹⁸ Between Institutions and Culture, *supra* note 170 at 210.

⁸¹⁹ *Ibid.*

Western foreign-policy interventions throughout the 20th century in bringing about the current situation in the Middle East cannot be ignored.⁸²⁰ Furthermore, the “historical, cultural, religious, and communitarian values in most Arabic countries”⁸²¹ cannot simply be uprooted in the name of a Western conception of liberal individualism. It is also worth noting that the Arab world is not a monolith; the enormous diversity that is observed in indicators of economic, social, and political performance from one country to another must not be overlooked.⁸²² Rather than sidelining the diversity of the Middle East, it should be looked to as a source for novel solutions to the developmental challenges faced by the region.⁸²³

A lot of the criticism of the Saudi Kafala System centers around its failure to ensure that international human rights standards are respected in the treatment of migrant workers. It would be more productive to look within the legal tradition from which Saudi Arabia is inspired to justify calls for greater human rights protections for migrant workers rather than to impose a foreign set of ideas on Saudi Arabia.

The Kafala System was introduced in the 1950’s and while it has helped manage the movement of workers in the GCC, the system has major shortcomings and there is no question that it is in need of reforms. In Saudi Arabia and other countries where the system exists, it has been abused and misused, mainly by employers. The question of how it should be reformed is the focus of this chapter. Drawing on the PD analysis of the Kafala System, this chapter proposes a series of reforms that respect the culture, values, religion, history and political and economic interests of Saudi Arabia, but that also align the Kafala System to a much greater degree with international human rights standards.

Employers are given a great deal of power under the Kafala System, in many ways controlling the fate of employees. They can confiscate employees’ passports and even prevent them from travelling to a city other than the one they are employed in. In addition, migrant workers

⁸²⁰ Asef Bayat, “Transforming the Arab World: The Arab Human Development Report and the Politics of Change,” (2005) 36:6 Development and Change 1225.

⁸²¹ Between Institutions and Culture, *supra* note 170 at 212.

⁸²² *Ibid* at 210.

⁸²³ *Ibid*.

are forbidden from changing employers, meaning that even in unfavorable working conditions, they are forced to continue working for the same employer. Some employers have been accused of poorly remunerating their workers and even withholding salaries. There has been little if any punishment for employers that have committed serious violations, and little justice for immigrant workers that have fallen victim to the faulty sponsorship system. The sponsors can essentially decide to have a worker arrested and deported, an extremely unjust and inhumane way to treat a fellow human being. Sadly, migrant workers seldom turn to the justice system to seek redress because of the possibility of being penalized by their employers. In short, while residing in Saudi Arabia, migrant workers are denied a wide range of basic rights. The reformation of the Kafala system is necessary to ensure that it has a new image, rather than the “modern slavery” perception that it has created over the past years.¹¹ The time to reform a system which allows migrant workers to be abused and exploited by their employers has undoubtedly come. It is the responsibility of the government of Saudi Arabia, as well as the citizens of the country, to seek reforms to a sponsorship system that has become a source of embarrassment for them in the international community.

Proposals for Reform

Some changes have been made to the Kafala System in recent years, but there is a pressing need to make further changes so that the system is fair to employers and employees. These changes would ensure that loopholes that facilitate the abuse of the system are sealed off completely. The fact that migrant workers often come from poor countries and backgrounds means that they ought to be protected, especially when working in a foreign nation. The condemnation of the sponsorship system by organizations internationally cannot be expected to stop without proper and necessary reforms to the system.⁸²⁴ The following reforms are critical in ensuring that the Kafala system gets a new image and ensures that migrant workers are protected from abuse under the system;

One of the fundamental changes that need to be implemented in the Kafala system should deal with the signing of an employment contract between the employer and employee. The language presently used in the contracts is Arabic, which cannot be understood by migrant workers

⁸²⁴ S. Naidu, Y. Nyarko, & W. Shing-Yi, “Worker mobility in a global labor market: Evidence from The United Arab Emirates” (2014) NBER Working Paper No. w20388.

who come for the most from Africa and Asia. Employment contracts should be translated to a language that the employee is fluent in. By enabling the employee to read the contract themselves, this would help ensure that the employee understands the terms and conditions of employment. Many migrant workers lack a basic understanding of what the contract stipulates since recruitment agencies only inform them of the favorable terms of the contract. A contract written in the worker's language would give him/her an opportunity to assess whether the offer being made to him is a fair one and make a fully informed decision about whether or not to enter into a commitment. In addition, the migrant worker should be accorded the power to negotiate the contract. The employer should not have all the power to dictate the terms and conditions of the contract because this contributes to the abuse of the system. The Saudi Arabian government thus needs to create a policy that requires employers to ensure that migrant workers sign employment contracts in their own language. It is inconsistent with Islamic principles of contract law for two parties to consent to a contract that is only understood by one of them, and as such, such a contract should be null and void. The issues that arise much later in the employment relationship due to misunderstanding the terms and conditions of an employment contract can be avoided through the simple act of ensuring that the language used in the contract is understood by both parties.⁸²⁵ It is, of course, important to reconcile this proposed change with the path-dependent state of the Kafala System. Ensuring that workers are able to understand their employment contracts and to negotiate its terms would not in fact increase switching costs. Instead, it would probably reduce the attrition rate of foreign workers since individuals would not be faced with surprises upon their arrival in Saudi Arabia.

Another particularly troubling feature of the Kafala system is that it allows individuals to be sponsors of migrant workers, especially in the domestic sector. This makes it a huge challenge to follow up on any cases and issues of abuse of such workers. A key change that should therefore be made to reform the system is putting an end to sponsorship at the individual level. A possible alternative could be the creation of vetted and government approved agencies in charge of sponsoring migrant workers. Any individual seeking to hire a migrant worker would have to make a request to such an agency. This could level the playing field to a great extent between employers and employees and correct the belief of some employers that they own the workers that work for

⁸²⁵ A. Allam, "Saudis to Ease Foreign Workers' Rules" (May 26, 2009) Financial Times
<<https://search.proquest.com/docview/250201040?accountid=45049>>

them. Furthermore, in the event of abuse or mistreatment by the individual employer, the migrant worker would be able to easily lodge a complaint with the agency. Moreover, the agency would be taken to task by the authorities in case of complaints that are not dealt with adequately. Agencies would also be empowered to bar employers who have been found to have abused migrant workers from recruiting more migrant workers in the future. As a result, there would be greater transparency and accountability in the handling of migrant workers in Saudi Arabia. On the other hand, it is probable that creating and operating such an agency would entail costs for the Saudi government. Similarly, responding to complaints of labour rights' violations would impose costs on employers both in terms of employing individuals to defend them and taking measures to rectify violations. This is a significant barrier to the implementation of the idea of a government agency for migrant workers. However, when the link between improved human rights standards and FDI is considered, it becomes clear that these costs would only be an issue in the short-term. The improved reputation of Saudi Arabia and the presence of a more skilled and a more productive work force would benefit companies in Saudi Arabia while also attracting greater FDI, thereby giving a boost to the Saudi economy. Government regulated agencies of the kind proposed here would thus not only go a long way in curtailing the abuse of migrant workers, but also provide economic benefits that would offset the costs that it would impose in the short term. The switching costs that arise due to coordination effects and learning effects would also be short-term since greater FDI would enable Saudis to continue to enjoy a high quality of life even with a system of robust protections for workers' rights.⁸²⁶

A related topic that should be discussed here is the various ministries that are involved in handling migrant workers in Saudi Arabia. Presently, the Ministry of the Interior, the Ministry of Labour, and the Ministry of Foreign Affairs all play a role in the management of migrant workers. It would be more efficient if a separate ministry was created and given responsibility for all matters pertaining to migrant workers in Saudi Arabia. This ministry would also have an oversight and review function over the bodies responsible for adjudicating disputes between employers and employees and ensuring respect for the rights of migrant workers. It is worth noting that migrant workers, who account for a third of Saudi Arabia's population, are in no way an insignificant

⁸²⁶ I. Omelaniuk & A.R. Al-Noaimi, *Labor Mobility: An Enabler for Sustainable Development* (Abu Dhabi: ECSSR, 2013).

segment of Saudi society. The creation of a separate ministry dedicated to matters concerning these individuals therefore makes all the more sense. This would probably streamline the system and reduce the bureaucratic costs associated with the Kafala System.

Respect for the dignity and physical integrity of an individual is a fundamental right that is protected in every international and regional human rights instrument, including those to which Saudi Arabia is party. The ICCPR, in article 7, prohibits torture or cruel, inhuman, or degrading treatment or punishment. The Arab Charter, which Saudi Arabia has ratified, reiterates this prohibition in Article 13. Sacred Islamic texts are, for their part, unequivocal in affirming the inherent dignity of all human beings and the prohibition of subjecting them to any kind of torture or cruel, inhuman, or degrading treatment.⁸²⁷ According to one prominent authority, the Qur'an prohibits cruelty on at least 99 different occasions.⁸²⁸ In addition, the authoritative compilations on the life of the Prophet contain a narration in which the Prophet said, "Beware, if anyone wrongs a contracting man, or diminishes his right, or forces him to work beyond his capacity, or takes from him anything without his consent, I shall plead for him on the Day of Judgment."⁸²⁹ This is significant because it establishes an Islamic basis for respecting the rights of migrant workers in Saudi Arabia. As a result, there should be less resistance to a reformed system in which the rights of migrant workers are better protected since the norms, values, and principles on which the reforms are based are indigenous to Saudi Arabia. This would in turn mean that there would be fewer transactions costs as well.

Under the Kafala System, however, many cases have been documented of the use of violence towards migrant workers. In the most extreme cases, there have even been fatalities due to abuse. Unfortunately, no compensation has been offered for the injuries or harm which often result from the irresponsible actions of employers. To address this problem, an important first step

⁸²⁷ Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003) [International Human Rights and Islamic Law]; Imam Abul-Husain Muslim (Author), Nasiruddin Al-Khattab (Translator), *Sahih Muslim* (Dar-us-Salam Publications, 2007) at book 30, hadith 5720: "Anas b. Malik reported: I served the Messenger of Allah (ﷺ) for ten years, and, by Allah, he never said to me any harsh word, and he never said to me about a thing as to why I had done that and as to why I had not done that."

⁸²⁸ M.C Bassiouni, "Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System", in *International Human Rights and Islamic Law*, *supra* note 827 at 76.

⁸²⁹ Imam Hafiz Abu Dawud Sulaiman bin Ash'ath (Author), Yasir Qadhi (Translator), *Sunan Abu Dawud* (Dar-us-Salam Publications, 2008) at Book 19, Hadith 3046.

would be to create an insurance program. The insurance would cover any type of loss that was incurred due to the negligence or willful misconduct of the sponsors. The insurance program would also cover unpaid wages, especially if an employee was dismissed or deported without just cause. In the event of wrongful deportation before the expiry of the employment contract, the airfare of the migrant worker should also be covered by the insurance. Upon the death of a migrant worker, their next of kin should be duly compensated in a timely manner. The amount of compensation should be determined based on the losses incurred by the migrant worker, especially if they are due to the reckless actions of the employer. Finally, it would be desirable to coordinate the insurance program with the agencies that are in charge of sponsoring migrant workers as this could increase its effectiveness.⁸³⁰ An insurance program would ensure that workers would receive compensation for injuries or violations of their rights irrespective of who was at fault. While this might increase costs, it would also change Saudi Arabia's image as a country that does not respect human rights. In turn, Saudi Arabia would be able to attract greater FDI. The economic benefits that would flow from increased FDI and a more skilled and more productive labour force would ensure that the financial costs of a system with strong workers' rights protections do not translate into a lower quality of life for Saudi Arabians. In the language of PD theory, the problem of switching costs and adaptive expectations would not be an insurmountable obstacle to reforms.

The perpetrators of abuse under the Kafala system tend to most often be employers while the victims are generally domestic workers. Despite the physical and psychological abuse that migrant workers suffer, the perpetrators are not punished in a meaningful way. Reforms to the Kafala system should include the creation of laws that stipulate tough penalties for sponsors that abuse migrant workers. This is the duty of the government of Saudi Arabia, and given that it is responsible for ensuring that basic human rights are respected, it should take decisive action. There should be jail terms for acts by employers which cause physical and psychological harm to workers. Fines should also be put in place to deter employers from abusing migrant workers. Thus far, punishment for abuse directed at migrant workers has been an important and missing part of action by the government to ensure the protection of migrants. As long as migrants are in Saudi Arabia, their protection is the responsibility of the government. Prison terms, fines and other forms

⁸³⁰ J. Berg, *Labor Markets, Institutions and Inequality: Building Just Societies in the 21st Century* (Geneva: ILO, 2015).

of punishment for abuse of migrant workers would work as a deterrent against the mistreatment of workers. The government should also penalize employers that “enslave” and exploit migrant workers. The tasks and responsibilities that are performed by the workers should only be those which are set out in the employment contract concluded between the migrant worker and the sponsor. Accountability on the part of sponsors is central to reforming the Kafala system and some of the measures discussed in this paragraph can go a long way in achieving it.⁸³¹ These measures would all help to better protect the international and Islamic human rights of migrant workers, while also contributing in significant ways to Saudi Arabia’s economic growth. Saudi Arabia’s reputation internationally would drastically improve, which would help attract high quality FDI to Saudi Arabia. Furthermore, protecting workers against violations of their personal integrity would contribute to greater productivity, better morale, and a lower attrition rate. These would help companies that are doing business in Saudi Arabia.

It will of course be necessary to make sure that these protections are properly enforced. Currently, there are many protections in the Labour Law, along with fines for their violation,⁸³² that do not have much impact on the condition of workers because they are not given full effect to. This is probably because thus far, human rights protections for migrant workers have a very limited purpose, namely, keeping human rights critics at bay. It will be necessary to ensure that new protections for the rights of workers are more than just symbolic. This thesis argues that it is possible for Saudi Arabia to achieve this as it is itself seeking to transform the social and economic landscape of the country through Vision 2030. Thus, the question of strengthening workers’ rights is important for a lot more than appeasing human rights organizations. It is crucial to advancing Saudi Arabia’s economic and political goals.

The free movement of an individual is a basic human right under the Universal Declaration Human Rights, as well as under the Arab Charter on Human Rights. There should not be any form of restrictions on the movement of people unless it is a threat to the safety and well-being of others. One of the most troubling aspects of the Kafala system has been the restriction of movement of

⁸³¹ A.S. Almutairi, *Protecting the Rights of Temporary Foreign 'Low-Skilled' Workers in the Saudi Construction Industry: A Case for Legal Reform* (London: Brunel University London, 2017).

⁸³² Ministerial Order No.4786, *supra* note 417.

migrant workers. Essentially, migrant workers in Saudi Arabia are prohibited from leaving the city in which they are employed. If they want to leave the city for any reason, they must seek approval from their employer. This means that they are confined to a specific location during their entire working life. It is even worse for migrant workers that work in domestic settings since they are confined almost entirely to the walls of the home in which they are employed. These kinds of limits on the movement of migrant workers should be lifted and they should be allowed to move freely throughout Saudi Arabia. As long as the movement does not have an adverse impact on the well-being of the citizens of the country, there is no reason to put migrant workers on a “leash” during their free time. In fact, allowing the free movement of workers could be beneficial to Saudi Arabia by promoting domestic tourism.⁸³³

Relatedly, both entry into Saudi Arabia and exiting from the country are entirely at the discretion of an employer under the current Kafala System. This constitutes yet another restriction on the movement of workers. Migrant workers should be allowed to move in and out of the country at their own will, as long as they are not doing so in contravention of the rights of their employer. Allowing employers to decide if a worker can leave Saudi Arabia for a specified period of time exacerbates the power imbalance between the two parties and facilitates the abuse of migrant workers.⁸³⁴ There should therefore be no requirement for the permission of an employer to travel outside Saudi Arabia. Ideally, even people who have not entered into an employment contract should be allowed to move to Saudi Arabia, seek employment, and if successful, be employed without necessarily being placed under the control of the employer. This may encourage individuals to acquire new skills in order to avail better opportunities. It would as a result increase the overall skill level of the workforce and bring talent from abroad to Saudi Arabia. The motive behind the restrictions on the movement of workers seem to be to prevent workers from fleeing from their employers, since this imposes additional costs on companies and on the government. However, if workers’ are treated in a dignified manner, properly compensated, offered safe working conditions, there would not be a risk of them fleeing. Thus, the possible cost associated with allowing free movement of workers would be avoided.

⁸³³ B. Garcia, “Go beyond Cancelling Kafala System: ILO ‘Protect Migrant Workers in GCC’” (2010, Dec 06) *Tribune Business News* <<https://search.proquest.com/docview/815929913?accountid=45049>>

⁸³⁴ J. King, “A Quiet Revolution” (2018) *The Banker*
<<https://search.proquest.com/docview/2034131410?accountid=45049>>

Another aspect of the employer-employee relationship that is problematic is the manner in which work visas are issued and renewed. Migrant workers essentially come to Saudi Arabia on a limited-term work visa which must be renewed after a certain period of time. Under the current rules of the Kafala system, it is necessary to seek the approval of the employer in order to renew a work visa. This once again increases the dependency of the migrant worker on his employer and makes him vulnerable to exploitation. Migrant workers should instead be able to personally renew their visas. This measure would not only help reduce the abuse of power by employers under the current system, it would also encourage migrant workers to seek employment in Saudi Arabia and thereby contribute to its economy. Thus, far from increasing transaction costs, it would facilitate economic activity in Saudi Arabia.

In addition to the extensive control that employers exercise over workers, there is also an absence of a proper compensation structure for migrant workers. It is a broadly accepted principle that compensation should be commensurate with the amount and value of work done. In addition to provisions to this effect in various international convention, the Qur'an itself states that remuneration should be based on the quantity and quality of work performed.⁸³⁵ Similarly, the Prophet is reported to have strongly affirmed the importance of paying someone who has been employed for a task his/her due wages.⁸³⁶ Nevertheless, a system allowing for extremely unfair compensation of migrant workers continues to persist in Saudi Arabia. A possible reform in this area could involve the use of a scale which all employers must respect, or alternatively, a minimum rate of pay for migrant workers. Ideally, there should be a minimum amount below which migrant workers should not be paid irrespective of the task performed. More importantly, there should be a system in place to ensure that migrant workers are in fact paid. There have been numerous cases of workers not being paid for months of their work. An employer should be able to provide proof that they have paid migrant workers for work done. The streamlining of the compensation of migrant workers to ensure fairness and justice are, it goes without saying, crucial steps in reforming

⁸³⁵ The Holy Qur'an, *supra* note 47 at ch. 83:1-17, 7:85-86; The System of Kafala and the Rights of Migrant Workers in GCC Countries, *supra* note 460.

⁸³⁶ Imam Muhammad al-Bukhari (Author), Dr. Muhammad Muhsin Khan (Translator), *The Translation of the Meanings of Sahih Al-Bukhari* (Dar-us-Salam Publications, 2014) at vol. 3, book 34: Abu Huraira narrated that the Prophet stated the following: "I will be against three persons on the Day of Resurrection: [...] 3. And one who employs a labourer and gets the full work done by him but does not pay him his wages."

the Kafala system.⁸³⁷ Naturally, the first concern that arises when the possibility of introducing a minimum wage is put forward is increasing costs. However, it must be borne in mind that there are also costs associated with lower productivity as a result of not being able to afford an adequate standard of life, higher attrition rates, and lower skill levels. Increasing wages would lower attrition rates, attract more skilled workers, and increase the productivity of workers. In addition, it would improve Saudi Arabia's global image and therefore make it a more attractive location for foreign investors. The impetus from within to transform Saudi Arabia's economic prowess and political influence presents a rare opportunity to implement far-reaching reforms.

Improving access to justice is also an essential aspect of any proposed reform to the Kafala system. Presently, financial, linguistic, and institutional barriers, as well as the threat of reprisals, mean that migrant workers are effectively incapable of taking their employers to account in the event that their rights are violated. This troubling reality ought to change. In particular, there should be resources available that assist migrant workers in lodging complaints and initiating legal proceedings against their sponsors. A great challenge to accessing the legal system in Saudi Arabia has often been the relatively high legal fees, which prevent migrant workers from being represented when they want to stand up for their rights. This problem is compounded by the fact that migrant workers who work in domestic settings have very little access to institutions outside the confines of the home in which they work. Thus, they are barred in every way from seeking redress for violations of their rights. To address this problem, there should be a government regulated system of oversight and review to make sure that the most precarious individuals do not slip under the radar. In addition, the subsidization of legal services for low-income migrant workers or the creation of a government department that offers free legal representation to migrant workers would go a long way in deterring mistreatment on the part of employers.⁸³⁸ Here again, the problem of increased costs arises. However, it should be recalled that improving access to justice and strengthening the rule of law is tied in a significant way to development. In other words, the increased investment associated with strengthening the rule of law pays dividends in the form of improved political stability and greater economic growth. And since Saudi Arabia is pursuing

⁸³⁷ H. Alrasheed & I. Karamdeen, *Improving the Psychological Health of Foreign Workers in Developing Countries: A Socio-ecological Analysis of the Saudi Construction Industry* (Hauppauge, N.Y.: Nova Science Publishers, 2017).

⁸³⁸ Rakkee Timothy et al., *Labor Migration Structures and Financing in Asia* (Bangkok: ILO, 2016).

an ambitious plan of development and growth, it would do well to ensure that a lack of access to justice does not hamper its goals.

As alluded to earlier, allowing workers to seek other employment opportunities and change employers within Saudi Arabia is another step that could improve the treatment of migrant workers. It could also stimulate economic growth by encouraging workers to acquire new skill sets in the hope of better job opportunities. Under the current system, a migrant worker cannot change an employer unless he/she is permitted to do so by the sponsor. As a result, even if a better opportunity arises, a migrant worker does not have the option of taking it. Moreover, irrespective of how a migrant worker is treated, he/she must stay with the employer for the length of the contract because of the prohibition on changing employers. This state of affairs must change. Migrant workers should be allowed to change employers and not be limited to working specifically for their sponsor. This would in turn create an incentive for employers to treat their employees well since they would always have the option of seeking work elsewhere.⁸³⁹

On a related note, it should be mentioned that Saudi Arabia should integrate mechanisms for family reunification into the Kafala System because this is not only a fundamental right under many international conventions but it would also advance the economic objectives discussed above. In particular, it would give workers an incentive to consider settling permanently in Saudi Arabia, thereby investing their human capital in its growth and development. Islamic sacred texts also place great emphasis on facilitating the staying together of a family unit.⁸⁴⁰

The suggestions for reform outlined above cover some of the important changes that can be made specifically to the Kafala System in order to improve the condition of migrant workers in Saudi Arabia. However, it is important to make sure that new protections are given effect to. Similarly, it may also be advisable to consider broader reforms to legal and political institutions that complement the proposed changes to the Kafala system.

⁸³⁹ M. Hlatshwayo & A. A. Choudry, *Just Work? : Migrant Workers' Struggles Today* (London: Pluto Press, 2016).

⁸⁴⁰ Hafiz Abu Eisa At-Tirmidhi (Author), Abu Khaliyl (Translator), *English Translation of Jami' Al-Tirmidhi* (Dar-us-Salam Publications, 2007) at hadith 1566: Abu Ayyub reported: The Messenger of Allah, peace and blessings be upon him, said, "Whoever separates a mother from her child, then Allah will separate him from his loved ones on the Day of Resurrection."

One condition for making rights effective is that the holders of rights should be informed of them and understand the steps that they can take to enforce them. This will require an initiative on the part of the government to make information guides readily available to workers in a language that they can easily understand. At present, workers are either unable to easily get their hands on information guides or are unable to understand them because they are only available in Arabic. It is important to make sure that workers are told about the rights they have both at the time of signing an employment contract as well as when they arrive in Saudi Arabia. The Saudi government could consider giving a guidebook to each worker (in his/her language) upon their arrival in Saudi Arabia to make sure they are informed of their rights.

The recent Minister of Labour Resolution⁸⁴¹ which imposes fines on employers for various violations of employees' rights is unfortunately characterized by a severe lack of 'effective legality'. For example, it stipulates that an employer who takes an employee's passport without his/her consent is liable to pay a fine of SR 2000, but this is a rule that is seldom respected or enforced. It should be recalled that in addition to being an unjustifiable limit on a worker's right to movement, confiscating passports is also a violation of Islamic rules against the appropriation of a contracting individual's personal effects.⁸⁴² The same Minister of Labour Resolution also imposes a fine of SR 5000 on an employer who employs an individual without a written contract or without giving the employee a copy of the contract.⁸⁴³ The extent to which this rule is enforced is again questionable. Even more troublesome is the lack of enforcement of the prohibition against employing a person by force, which is punishable by a fine of SR 15000.⁸⁴⁴ There are thousands of workers in Saudi Arabia who are arguably employed by force but who do not benefit from the protection of the law. The same is true for the practice of withholding pay without justification. This is prohibited and punishable by a fine of SR 5000⁸⁴⁵ but nevertheless remains too common a

⁸⁴¹ Ministerial Order No.4786, *supra* note 417.

⁸⁴² Sunan Abu Dawud, *supra* note 829 at book 19, hadith 3046, The Prophet said, "Beware, if anyone wrongs a contracting man, or diminishes his right, or forces him to work beyond his capacity, or *takes from him anything without his consent*, I shall plead for him on the Day of Judgment." [emphasis added]

⁸⁴³ Ministerial Order No.4786, *supra* note 417.

⁸⁴⁴ *Ibid.*

⁸⁴⁵ *Ibid.*

practice among employers.⁸⁴⁶ It must be asked why mistreatment of migrant workers continues despite the fact that there are rules in place to protect them. Employers have developed certain attitudes and habits that have become entrenched. It is difficult to strengthen the rule of law in the face of deeply rooted institutional practices.

It goes without saying that implementing all of the changes above requires the participation of the Saudi government first and foremost. What interest might the Saudi government have in strengthening the protections of workers' rights under the Kafala System. To begin with, the violation of the rights of migrant workers in Saudi Arabia has done much to tarnish the country's image, which can in turn have myriad economic consequences. As discussed in an earlier chapter, the degree to which human rights are respected in a country is linked to a significant extent with foreign direct investment. Given that Saudi Arabia is trying to diversify its economy and reduce dependence on oil through its Vision 2030 program, it will need to attract individuals with diverse skills from all over the world to its shores. It must also attract high quality foreign investment, which is dependent on Saudi Arabia having a strong reputation when it comes to respect for human rights and being able to provide political stability and a highly skilled labour force. Saudi Arabia will be a more appealing destination to such individuals if they can be certain that they will be guaranteed a broad array of rights. Besides purely economic motivations, it is also important to mention that the mistreatment of migrant workers is a huge disservice to the Islamic tradition which Saudi Arabia aspires to follow. Making sure that workers' rights are respected would be a way of better emulating the values and principles of the Islamic faith. Finally, as an increasingly important geopolitical actor, it is important for Saudi Arabia to take steps to increase the soft power that it wields by making its laws and policies more consistent with those of its international allies. How much Saudi Arabia's voice is heard on the international stage is linked in no insignificant way to whether its domestic laws and policies are viewed favorably or not. Thus, Saudi Arabia can have a stronger voice in the international community if it takes steps to protect human rights at home.

⁸⁴⁶ *Ibid*, the Minister of Labour's Resolution 4786 also imposes penalties for such things as "Failure of the employer to abide by the rules, procedures, and levels of protection, safety, and occupational health at the business entity," "forcing of the employee to work under the heat of the sun or in inappropriate weather conditions, without taking appropriate precautions," and "Increasing the number of working hours in excess of the number of hours stipulated in Article (98)."

Conclusion

The Kafala system has given Saudi Arabia and other GCC countries a negative image because of the exploitation and abuse of workers that it has allowed to take place. There are many reforms that are needed in order to ensure that workers' rights are better protected. Being a signatory to various international human rights conventions, Saudi Arabia should take decisive action to protect the rights of migrant workers which continue to be violated under the Kafala System. One of the fundamental changes that must be introduced is ensuring that the contract signed by the migrant workers is in a language that they can easily understand. Another is the imposition of meaningful punishments for harm, abuse and mistreatment of migrant workers by their sponsors. In addition, the prohibition against the confiscation of the passports of migrant workers should be made effective since it is presently ineffective. Relatedly, restrictions on leaving Saudi Arabia without the permission of an employer should be lifted. The movement of migrant workers within Saudi Arabia should likewise not be subject to the approval of the employer. As for the extremely important issue of compensation, Saudi Arabia should put in place a minimum pay-rate to ensure that migrant workers are given fair and just remuneration. These reforms, taken together, can curb some of the aspects of the Kafala system that allow for the exploitation of workers and bring it more in line with Saudi and international human rights standards.⁸⁴⁷

Although a lot of these reforms go against adaptive expectations and would increase costs for employers and for the government in the short term, their effect of productivity, skill level, political stability, and Saudi Arabia's attractiveness in the eyes of foreign investors would more than compensate for the increased costs.

⁸⁴⁷ A. Khan & H. Harroff-Tavel, "Reforming the Kafala: Challenges and Opportunities in Moving Forward" (2011) 20:3-4 *Asian and Pacific Migration Journal* 293.

Chapter Eight: Conclusion

This thesis has set out to demonstrate that many of the features of Saudi Arabia's Kafala System and many of the practices of employers towards migrant workers are inconsistent with the country's obligations under international human rights law and Islamic Law. However, reforming the system may be difficult because, as the theory of path-dependency suggests, the Kafala System, like all regulatory systems, exists within a complex set of institutions that constitute the unique political, economic, and social environment of Saudi Arabia. However, there is hope for reform, and an analysis based on NIE can show the way: reform is possible if it is consistent with the institutional context and if the cost of reform is reduced as much as possible. In this regard, the thesis has demonstrated that reform can leverage the positive link between human rights standards and foreign direct investment: bolstering protections for human rights can increase FDI, one of the key goals of Saudi Arabia under Vision 2030. Furthermore, since the protection of migrant workers' rights is strongly endorsed by Islamic teachings, this can ensure the success of reforms of the Kafala System.

The first chapter introduced the notion that human rights are based on the inherent dignity of human beings and proposed that labour rights should be understood as a category of human rights. Within such an understanding, the various international conventions that Saudi Arabia has ratified can be understood as imposing obligations on Saudi Arabia vis-à-vis workers. That is, workers can be treated as bearers of fundamental human rights, thus increasing in importance their interests.

The second chapter outlined the theoretical framework that the thesis used to study the Kafala System. In particular, it discussed the use of a multidisciplinary human rights methodology, New Institutional Economics (NIE), and Path Dependence (PD) analysis to analyze the Kafala System. Pairing PD and NIE with a traditional human rights analysis helps to supplement the normative arguments for reforming the Kafala System with knowledge about how the Kafala System works and the interests that sustain it. This helps to identify reforms that are both normatively justifiable and likely to succeed because of their congruence with existing institutions. In particular, NIE and PD enables reform proposals to be more successful by highlighting the

importance of justifying them with reference to the Islamic legal tradition and relating them to the economic and political goals of Saudi Arabia.

In the third chapter, the problems which arise because of the Kafala System were detailed. The chapter first provided an overview of the laws and regulations applicable to migrant workers in Saudi Arabia. This was followed by a brief history and description of the Kafala System (KS) and a discussion of its role in the Saudi economy. Next, the chapter detailed the various problems that the Kafala System creates for migrant workers. In particular, it showed on the basis of reports by international NGOs that many of the fundamental rights of migrant workers were not respected. For one, they were not dealt with in good faith during the recruitment process, including being deceived about compensation, working and living conditions, and the extent of their financial obligation to their sponsor. In addition, once in Saudi Arabia, they endured physical and verbal abuse, unsafe working conditions, low wages, long working hours, delayed payment, restrictions on movement, and ineligibility for Saudi citizenship. The chapter shows that the effects of these problems are not limited migrant workers, instead having a significant influence on Saudi Arabia's economic performance and political strength. This chapter provides two particularly useful insights. One, it helps provide a fuller understanding of the economic role that the Kafala System plays in the Saudi economy. More importantly, it shows that insufficient protections for migrant workers' rights are not only harmful for them, but also for Saudi Arabia's economic and political growth. Too often, calls for reform focus exclusively on the perspective of workers, a strategy that is not very effective in persuading a country to make reforms. Highlighting the problems that the Kafala System creates for Saudi Arabia as a whole makes it much more likely that lawmakers and policymakers will lend an ear to calls for reform.

Chapter four presented an analysis of the origins, development, and functioning of the Kafala System, in addition to providing a detailed map of the legal framework governing the rights and duties of migrant workers. Using an NIE lens, it made the case that the Kafala System's design was a response to Saudi Arabia's need for large amounts of labour following the oil boom. Because Saudi Arabia is an Islamic society, this system for sponsoring migrant workers had to be associated with a legal concept that was familiar to Islam, namely, Kafala. The changes that the Kafala System underwent after being introduced, including the introduction of ever more stringent conditions of

naturalization until this option was eliminated altogether, reflected a desire to ensure political stability by excluding Arab migrants from full enfranchisement and mounting a challenge to the rulers. Given these political and economic considerations, the rules of the Kafala System made sense and were successful in furthering Saudi Arabia's goals. However, as Saudi Arabia now faces serious economic and political difficulties, the Kafala System is no longer able to respond to the needs of the country. PD was used to analyze why the Kafala System is still in place despite the fact that it has become prone to producing suboptimal outcomes. The chapter argued that self-reinforcing mechanisms, high switching costs, and institutional interdependencies have made the Kafala System a path-dependent institution. In particular, as more and more time, money, skills and expectations have been invested into the Kafala System, it has become correspondingly more costly to explore alternatives. The affluence that so many segments of Saudi society enjoy is in large part dependent on the Kafala System, thus creating a 'network effect' that makes it extremely cumbersome to change the structure of the Kafala System without disrupting every other member of society's way of doing things. These factors have resulted in the Kafala System becoming deeply entrenched and have rendered piecemeal changes largely ineffective. However, given that there is a push to carry out a social and economic transformation of Saudi Arabia to reduce its dependence on oil, improve the skill level of its workforce, and make its economy globally competitive, it was argued that this situation is what is known in PD theory as a critical juncture, a time period during which far reaching reforms to an institution can be effective. The analysis in this chapter is useful because it moves the discussion beyond just the need to respect international human rights standards to an analysis of the institutional features that make the Kafala System the way that it is. It reveals the economic and political considerations that have contributed to the current design of the Kafala System. It shows that any reforms to this system must be justified using the language of Islamic law because of the Islamic identity of Saudi Arabia. It then points to the changes in the broader political and economic environment that make human-rights related changes to the Kafala System a useful step to take right now.

Chapter five explored the link between respect for human rights and levels of foreign direct investment (FDI). It showed that as the global economy becomes more and more of an information economy, there is a positive correlation between strong protections for human rights and FDI. This is because doing business in a country that has strong protections for human rights protects a

company from damage to its reputation, which is ultimately good for its bottom line. In addition, adherence to high human rights standards is an indication that a country is politically stable and possesses a highly skilled labour force. Based on these findings, the chapter argued that it is in Saudi Arabia's best interest to bolster human rights protections in the Kafala System, especially since it is a stated aim of its Vision 2030 to increase the skill level of its labour force and to attract high quality FDI. Drawing on emerging literature that shows a positive link between FDI and human rights, this chapter makes an appeal to factors that have economic and political importance to strengthen the case for better protection of workers' rights under the Kafala System. This line of reasoning fits well with the NIE analysis showing the various economic and political motives that inform the design of the Kafala System and highlighting the opportunity for reform that is present because of the desire to transform the Saudi economy.

Chapter six summarized Saudi Arabia's human rights obligations towards migrant workers both under its own domestic law as well as under international law. It first made the case that an instrumentalist line of reasoning is the best way to justify the application of international human rights standards to Saudi Arabia since the entire system of international human rights is arguably rooted in an instrumentalist motive. An instrumentalist approach involves first asking whether the interest underlying a given right is objectively important from the point of view of the individual claiming it, and then assessing whether protecting this interest can be beneficial for the state that is asked to do so. In the case of migrant workers' rights in Saudi Arabia, not only can Saudi Arabia appreciate that the rights it is called on to protect are objectively important from the point of view of migrant workers (since it already grants these rights to Saudis and GCC citizens), but there are also many economic and political benefits that Saudi Arabia will be able to enjoy by protecting them. Therefore, it should not hesitate to take steps to bolster human rights protections for migrant workers. In particular, the chapter showed that in addition to its obligations under domestic law, Saudi Arabia has several obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the various International Labour Organization (ILO) conventions that it has ratified, and the Arab Charter on Human Rights. Together, these documents protect the right to equality, movement, nationality, choice of employment, just wages, and safe and sanitary working conditions of workers. This chapter puts

Beitz' theoretical approach, which aims at identifying the interests that support the identification and protection of human rights, into practice. This approach is largely consistent with the NIE account of how human rights reform can be effective since it emphasizes taking institutional factors into account in designing such reforms.

The thesis then proceeded to a chapter on suggestions for reforms to the Kafala System. In making proposals for reform, the path dependent state of the Kafala System was kept in mind as was the institutional environment of Saudi Arabia. As a result, the suggested reforms are all justifiable from an Islamic point of view, meaning that Saudi society is more likely to be receptive to them. Furthermore, they are tied to various economic and political benefits that Saudi Arabia would enjoy if it adopted them. Thus, while the suggested reforms would increase that Saudi Arabia's compliance with its international human rights obligations, they are also a product of the NIE and PD analysis of the Kafala System, hence increasing the likelihood that they will be effective. The chapter argued that although there are high switching costs, unyielding adaptive expectations, and institutional interdependencies, Saudi Arabia is presently at a critical juncture during which sweeping reforms could prove to be effective. Namely, in response to a stagnating economy, it has itself initiated a program by the name of Vision 2030 which aims to diversify its economy, increase the skill level of its workforce, and attract leading technological firms to its shores. By strengthening human rights protections for migrant workers, Saudi Arabia can improve its international reputation, thereby attracting more FDI and increasing its political clout. Furthermore, respect for human rights can also create the necessary incentives to encourage individuals to acquire skills and to be more productive. Respect for the human rights of workers is also strongly advocated for by the Islamic faith. Therefore, the chapter proposed that employment contracts should be written in a language that a potential employee understands and that the potential employee should have the power to negotiate the terms of the contract. In addition, individual sponsorship should be abolished and replaced by a government agency responsible for sponsoring migrant workers. There should furthermore be a new ministry to handle all matters related to migrant workers instead of spreading the tasks among various ministries as it is presently the case. Meaningful punishments, including fines and prison terms, should also be imposed on employers for violations of workers' right to physical integrity and to be treated with dignity. It would be desirable, in this connection, to have an insurance system in place for workers who are

injured because of the willful or negligent misconduct of their employer. Restrictions on workers' movement both within Saudi Arabia and in and out of Saudi Arabia should be eliminated. Workers should not have to get the approval of their employer to obtain or renew a work visa, nor should they be prevented from changing employers. Compensation levels should be increased so that workers are at least able to earn a living wage. There should also be a regime in place to allow workers to bring their families to Saudi Arabia and to be naturalized as Saudi citizens. Lastly, access to justice must be improved and the rule of law strengthened to ensure that these protections are not just symbolic but have meaningful substance.

Limits and Questions for Further Research

As with any research, there are certain limits to the current thesis. For one, because it has not assessed the unique situation of domestic workers (e.g., maids), its conclusions cannot be extended to that context without further study.

Another limit of this thesis is that it deals almost exclusively with how Saudi Arabia as a state can strengthen migrant workers' rights. It does not propose steps that can be taken to encourage corporations to voluntarily respect human rights standards. This is an important question to explore as it can possibly make the task of effectively protecting human rights much easier. If the institutional environment can be adjusted or if incentives can be offered in order to persuade corporations to include human rights into their business model, the need for government oversight and enforcement can be significantly reduced.

One question that should be researched further is why the human rights protections that already exist in the Kafala System are not properly implemented. That is, what are the barriers to the realization of the existing rights of workers under the Kafala System. This question will perhaps involve looking at institutions other than just the Kafala System, such as the police and courts, to understand the factors that weaken the rule of law in Saudi Arabia.

Another question that should be explored is whether there are certain features that are unique to the institutional environment of Saudi Arabia that would modify in some way the relationship between respect for human rights and FDI.

The economic consequences of bolstering human rights protections must also be carefully considered. For example, if Saudi Arabia still has a significant need for low-skilled labour, it will be important to assess how much costs would increase as a result of offering stronger labour rights protections to all migrant workers. Finding ways to address increased costs would make businesses in Saudi Arabia more open to reform of the Kafala System.

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