

# USING ISLAM TO PROTECT THE RIGHTS OF MIGRANT WORKERS: Bringing *Kafala* into *Sharia* Compliance in Saudi Arabia

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## ABSTRACT

Saudi Arabia is home to thousands of migrant domestic workers who cook, clean, and provide child-care in private homes. These individuals are not only subject to the *kafala* system, where their visa is strictly tied to their employer, but they are excluded from the protections accorded to other workers (both Saudi and non-Saudi) under Saudi Labor Law. Although Saudi Arabia has promulgated a set of regulations to govern the treatment of migrant domestic workers, these regulations guarantee only the most basic rights and are often not enforced. As a result, the mistreatment of migrant domestic workers in Saudi Arabia has become a topic of concern for both human rights organizations and the International Labour Organization. In this Comment, I provide a history of *kafala* in Saudi Arabia, an overview of the role of Islamic law (*sharia*) in Saudi governance, and an analysis of *sharia*-compliant labor protections to argue that Saudi Arabia can and should reform its laws around migrant domestic workers to protect their fundamental human rights. In doing so, Saudi Arabia would not only uphold its obligations under international human rights law, but would increase its compliance with *sharia* as well.

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## INTRODUCTION

Saudi Arabia is home to around ten million migrant workers, the majority of whom are from Africa and Asia.<sup>1</sup> Among these workers, most are men who work low-income jobs in the construction industry, but about one million are women who are hired to cook, clean, and provide in-home childcare for Saudi families.<sup>2</sup> These women work an average of 63.7 hours per week and are often subject to psychological, physical, and sexual abuse.<sup>3</sup> Regardless of gender or job type, all migrant workers are subject to the *kafala* system, which connects their legal status in Saudi Arabia directly to their contractual relationship with their employer.<sup>4</sup> Though most countries around the world have some type of

1. FAIRSQUARE, *MIGRANT WORKERS IN SAUDI ARABIA* 4 (2020), <https://fairsq.org/wp-content/uploads/2020/11/FS-Policy-Brief-1-Saudi-Arabia-1020.pdf>.

2. *Id.* at 11.

3. *Domestic Workers in the Gulf*, MIGRANT-RIGHTS.ORG, <https://www.migrant-rights.org/statistic/domesticworkers/#> (last visited May 5, 2021). *See also*, HUM. RTS. WATCH, “AS IF I AM NOT HUMAN: ABUSES AGAINST ASIAN DOMESTIC WORKERS IN SAUDI ARABIA” (2008), HRW Index 1–56432–351-X, [https://www.hrw.org/sites/default/files/reports/saudiArabia0708\\_1.pdf](https://www.hrw.org/sites/default/files/reports/saudiArabia0708_1.pdf) [hereinafter “*As If I Am Not Human*”]; Caroline Kimeu, “*Modern-day Slavery*”: *Kenyan Domestic Workers Tell of Abuse in Saudi Arabia*, GUARDIAN (Sept. 27, 2022), <https://www.theguardian.com/global-development/2022/sep/27/modern-day-slavery-kenyan-domestic-workers-tell-of-abuse-in-saudi-arabia>.

4. *See* EMPLOYER-MIGRANT WORKER RELATIONSHIPS IN THE MIDDLE EAST: EXPLORING SCOPE FOR INTERNAL LABOUR MARKET MOBILITY AND FAIR MIGRATION, INT’L LAB. ORG. (ILO),

employment-based visa system, the *kafala* system is uniquely oppressive, as it provides sponsors with far-reaching control over the lives of migrant workers, while simultaneously effectively denying these workers most of the protections of Saudi's labor laws.<sup>5</sup> Domestic workers are particularly vulnerable to exploitation under the *kafala* system, as they are specifically excluded from the protection of Saudi labor laws (even those that apply to other types of migrant workers).<sup>6</sup> Instead, their treatment is governed by separate regulations that offer fewer protections. This toxic combination of lack of legal protection, legally constructed vulnerability, and high levels of abuse and exploitation has led many scholars and activists to refer to the *kafala* system as a form of modern-day slavery.<sup>7</sup>

As Saudi Arabia embarks on its ambitious "Vision 2030" plan to diversify its economy, it is engaging in a variety of labor law reforms, including increased protections for some migrant workers.<sup>8</sup> Many of these reforms are focused on raising the country's competitiveness and encouraging Saudi nationals to enter the workforce.<sup>9</sup> Despite this recent political opening, none of the reforms have addressed the precarious situation of migrant domestic workers.<sup>10</sup> As a result, the topic of this Comment is extremely salient—there is currently a political opening for Saudi Arabia to create a much more humane system of labor laws for its migrant domestic workers, and this Comment aims to explore how it might do so in a *sharia*-compliant way.

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REGIONAL OFFICE FOR ARAB STATES, at viii (2017), [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms\\_552697.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_552697.pdf) [hereinafter "ILO WHITE PAPER"].

5. *Id.* at 1. See, e.g. ILO, REGULATORY FRAMEWORK GOVERNING MIGRANT WORKERS IN SAUDI ARABIA (updated Nov. 2019), [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms\\_728262.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms_728262.pdf) [hereinafter ILO REGULATORY FRAMEWORK].

6. See generally, *id.* at 5; see also, "As If I Am Not Human," *supra* note 3.

7. See, e.g., Cole McCann-Phillips, *Domestic Worker Abduction Shows Urgency of Kafala Slavery Case*, PULITZER CTR., <https://pulitzercenter.org/stories/domestic-worker-abduction-shows-urgency-kafala-slavery-case> (last visited May 12, 2022); see also Antoinette Vlioger, *Domestic Workers in Saudi Arabia and the Emirates: Trafficking Victims?*, 50 INT'L MIGRATION 180 (2012) (arguing that forced confinement and exploitation are "standard labor conditions" for migrant workers in Saudi Arabia and the UAE).

8. *Saudi Arabia Eases 'Kafala' System Restrictions on Migrant Workers*, BBC (Nov. 4, 2020), <https://www.bbc.com/news/world-middle-east-54813515>.

9. *Saudi Arabia Announces Labour Reforms for Private-Sector Workers*, MIGRANT-RIGHTS.ORG (Nov. 5, 2020), <https://www.migrant-rights.org/2020/11/saudi-arabia-announces-labour-reforms-for-private-sector-workers/>.

10. See, e.g. *Saudi Arabia: Labor Reforms Insufficient*, HUM. RTS. WATCH (Mar. 25, 2021), <https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient> (noting that the reforms introduced in March 2021 to allow certain migrant workers to switch jobs without employer consent only applied to workers already protected by the labor law, explicitly excluding domestic migrant workers).

Because Saudi Arabia defines itself as an Islamic state, with a judicial system based on *sharia* (Islamic law),<sup>11</sup> this Comment provides an Islamic legal analysis of its use of the *kafala* system with migrant domestic workers, and proposes *sharia*-compliant reforms. This Comment is divided into four major Parts: first, a brief history of *kafala* and its connections to *sharia*; second, a description of the role of *sharia* in Saudi legislation; third, an analysis of laws and *fatawa* (Islamic legal opinions) on *kafala* in Saudi Arabia; and fourth, proposals for Islamic reforms to the *kafala* system. As it stands, Saudi Arabia's implementation of the *kafala* system is so abusive as to be inherently un-Islamic, and the State must enact comprehensive *kafala* reform in order to comply with its obligations to migrant domestic workers under both international human right law and *sharia*.

## I. UNDERSTANDING THE *KAFALA* SYSTEM

The *kafala* system is a legal framework by which Gulf states, Jordan, and Lebanon regulate migrant workers.<sup>12</sup> Though there are similar problems with *kafala* in all countries that practice it, it differs slightly in the way it is treated by the laws of each country.<sup>13</sup> This Comment focuses on the *kafala* system as it is applied to migrant domestic workers in Saudi Arabia. This section will introduce the *kafala* system through an analysis of its contemporary practice and a summary of its disputed origins.

### A. *The Contemporary Abusive Practice of Kafala*

Under the *kafala* system, individuals apply for sponsorship permits to employ migrant domestic workers.<sup>14</sup> Often, migrant domestic workers lack full protection under the host State's labor laws.<sup>15</sup> In addition, only the sponsors can renew or terminate the workers' permits, meaning that private citizens exercise sole control over the migrant workers' legal statuses.<sup>16</sup> In Saudi Arabia, migrant domestic workers are brought to the country on two-year contracts, and must seek their employer's consent to transfer employment or leave the country.<sup>17</sup> Although reforms introduced in March 2021 allegedly gave migrant workers the right to leave Saudi Arabia or change jobs without their employer's permission, these reforms only applied to those already protected by Saudi labor

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11. *Legal and Judicial Structure*, EMBASSY OF SAUDI ARABIA, <https://www.saudiembassy.net/legal-and-judicial-structure-0> (last visited May 5, 2021).

12. See Kali Robinson, *What Is the Kafala System?*, COUNCIL ON FOREIGN REL. (Mar. 23, 2021), <https://www.cfr.org/background/what-kafala-system>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. See *Legal Framework for Migrant Domestic Workers*, HUM. RTS. WATCH (July 2008), <https://www.hrw.org/reports/2008/saudi-arabia0708/4.htm>.

laws, specifically excluding domestic workers.<sup>18</sup> As a result, migrant domestic workers who flee abusive employers in Saudi Arabia have remained subject to arbitrary detention, even during the COVID-19 pandemic.<sup>19</sup>

Because of the power discrepancy between the citizen employer and the migrant worker, the *kafala* system is rife with abuse and exploitation everywhere it is practiced.<sup>20</sup> Saudi Arabia is no exception—according to the National Society for Human Rights in Saudi Arabia, 67.8% of its complaints come from migrant workers whose passports have been confiscated, who are forced to do more than what they bargained for, who are physically or verbally abused, or who are denied their salaries.<sup>21</sup> These human rights violations occur despite the existence of official regulations meant to protect migrant domestic workers, illustrating both a legislative and an enforcement gap.<sup>22</sup> In addition, many migrant domestic workers are forced into debt bondage when they arrive, in order to “reimburse” their employer’s payment to labor recruiters, and many are subject to forced labor through deceptive contracts.<sup>23</sup> As a result of this power imbalance, individuals working under the *kafala* system are particularly susceptible to labor trafficking.<sup>24</sup> Regardless of this fact, in Saudi Arabia, migrant domestic workers attempting to escape their employers are often mis-classified as violators of the immigration law, or as illegal runaways (i.e. *huroob*), and are therefore detained and/or deported without being adequately screened for trafficking indicators.<sup>25</sup>

In addition to fostering abuse, the *kafala* system also makes it difficult for migrant domestic workers to seek protection from the courts. Even if the abuses they experience are illegal, the power dynamic created by the *kafala*

18. See *Saudi Arabia: Labor Reforms Insufficient*, *supra* note 10.

19. See, e.g., *Saudi Arabia: Dozens of Sri Lankan Women Wrongfully Detained for Months Due to Abusive Kafala System*, AMNESTY INT’L (Apr. 15, 2021), <https://www.amnesty.org/en/latest/news/2021/04/saudi-arabia-dozens-of-sri-lankan-women-wrongfully-detained-for-months-due-to-abusive-kafala-system/>.

20. See, e.g., Amnesty Int’l, *Lebanon: ‘Their House is My Prison’: Exploitation of Migrant Domestic Workers in Lebanon*, AI Index MDE 18/0022/2019 (Apr. 24, 2019); Jennifer Gordon, *The Obstacles to Decent Work for Migrants in Jordan*, CIV. SOC’Y KNOWLEDGE CTR. (June 1, 2020), <https://civilsociety-centre.org/paper/obstacles-decent-work-migrants-jordan-discussion-alia-hindawi>.

21. *Sponsorship System Violates Human Rights, Asserts NSHR*, SAUDI GAZETTE (May 17, 2015), <https://saudigazette.com.sa/article/123250>.

22. See *Regulation of Domestic Workers and the like* (Feb. 17, 2013), <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://hrs.gov.sa/sites/default/files/Regulation%20of%20Domestic%20workers.pdf>

23. *Id.*

24. See U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT 42* (2021), <https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf> [hereinafter “TIP REPORT”].

25. *Id.* at 483; see also *Huroob Cases on the Rise as Saudi’s Kafala Reforms Off to a Shaky Start*, MIGRANT-RIGHTS.ORG (Apr. 25, 2022), <https://www.migrant-rights.org/2022/04/huroob-cases-on-the-rise-as-saudis-kafala-reforms-off-to-a-shaky-start/>.

system can cause them not to file a legal complaint. Filing a complaint could put their job (and their visa) at risk, could cost too much in legal fees, or could be physically impossible when they are confined to their sponsor's domestic compound.<sup>26</sup> Even those who want to file a complaint will often be challenged by poor public transportation systems (inhibiting their ability to physically access labor complaint departments and courts) and their lack of Arabic fluency (many Gulf countries only offer labor services in Arabic).<sup>27</sup> Additionally, the lack of collective bargaining protections in Gulf labor laws means that workers who go on strike will be penalized and deported (often without the money they are owed).<sup>28</sup> Because many migrant domestic workers pay exorbitant recruitment fees to private employment agencies prior to leaving their home countries, they are often under extreme pressure to repay their debts and therefore are unwilling to do anything that could lead to lost income.<sup>29</sup> The hopelessness created by simultaneous exploitation and lack of legal protection has created a mental health crisis amongst migrant domestic workers, with more than half of all suicides in Saudi Arabia attributed to this group in 2013.<sup>30</sup>

The situation for migrant domestic workers in Saudi Arabia has only worsened during the COVID-19 pandemic. According to the U.S. State Department, "regional and national curfews created obstacles to reach assistance from police stations, hospitals, or NGOs," and labor source countries "reported increased work hours and complaints of abuse among domestic workers" in Saudi Arabia.<sup>31</sup> Workers with expired *iqamas* (residency permits) have been unable to access the public health system and were worried to walk outside without proper documentation, while discrimination against non-Saudis at Saudi hospitals has undermined Saudi Arabia's stated policies of guaranteeing COVID-19 treatment to all.<sup>32</sup> Finally, both female and male migrant domestic workers have been neg-

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26. Priyanka Motaparthi, *Understanding Kafala: An Archaic Law at Cross Purposes with Modern Development*, MIGRANT-RIGHTS.ORG (Mar. 11, 2015), <https://www.migrant-rights.org/2015/03/understanding-kafala-an-archaic-law-at-cross-purposes-with-modern-development/>; see also *Where to Go For Help: Pakistani Migrant Workers' Access to Justice at Home and in Gulf Cooperation Council Countries*, ILO (2016), [HTTPS://ILO.USERSERVICES.EXLIBRISGROUP.COM/DISCOVERY/DELIVERY/41ILO\\_INST:41ILO\\_V2/1243418820002676?LANG=EN&VIEWERSERVICECODE=ALMAVIEWER](https://ilo.userservices.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1243418820002676?LANG=EN&VIEWERSERVICECODE=ALMAVIEWER).

27. Motaparthi, *supra* note 26.

28. *Id.*

29. *Id.*

30. *Suicide*, MIGRANT-RIGHTS.ORG, <https://www.migrant-rights.org/statistic/suicide/> (last visited May 5, 2021).

31. TIP REPORT, *supra* note 24, at 486.

32. See generally *The Cost of Contagion: The Human Rights Impacts of COVID-19 on Migrant Workers in the Gulf*, EQUIDEM (2021), <https://www.equidem.org/reports/the-cost-of-contagion>.

atively affected by the economic downturn caused by the pandemic, with some male drivers being asked to find other accommodations during this period.<sup>33</sup>

## B. *The Disputed Origins of Kafala*

There are generally two narratives in the literature on the origin of the *kafala* system. One narrative connects *kafala* to Bedouin culture and Islam, and the other narrative connects it to British imperialism and the oil boom. Though usually discussed separately, an analysis of both provides the best understanding of the way that *kafala* has (d)evolved since the time of the Prophet Muhammad. Understanding the changing meaning of *kafala* from its use in the Qur'an until today helps is foundational to analyze the contemporary practice of *kafala* under Islamic law in the next section.

### 1. Kafala as an Islamic Practice

The term *kafala* comes from the Arabic root kāf – fā' – lām, meaning “to feed, support, vouch for, or warrant.”<sup>34</sup> In a *kafala* relationship, there is always a *kafīl*, meaning “one who is responsible, answerable, amendable, or a sponsor or surety” and a *makfūl*, meaning “one who receives the benefit of the sponsorship or surety.”<sup>35</sup> In pre-Islamic times, *kafala* was used to describe a Bedouin tradition of hospitality that obligated members of the tribe to grant strangers temporary protection and affiliation with the tribe for their own security.<sup>36</sup> In this system, strangers were taken in by a tribe member who would then become legally and economically responsible for them.<sup>37</sup> This Bedouin tradition was incorporated into the society of the Prophet Muhammad.<sup>38</sup> Through *sharia*, *kafala* evolved into two different types of guarantees: one guaranteed a person's behavior (e.g. to behave well or to appear in court) and one guaranteed a person's payment (i.e. like a surety).<sup>39</sup> *Kafala* also developed into a concept in Islamic family law to describe an agreement to provide temporary support to an orphan child.<sup>40</sup> However, there is no evidence that *kafala* was ever used as an Islamic

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33. See, e.g., Rabiya Jaffery, *Driven to Despair: Male Domestic Workers in Saudi*, MIGRANT-RIGHTS.ORG (July 19, 2020), <https://www.migrant-rights.org/2020/07/driven-to-despair-male-domestic-workers-in-saudi>.

34. *Kafala*, HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC (4th ed. 1994).

35. *Kafala*, LANE'S ARABIC-ENGLISH LEXICON (1872).

36. See Gilbert Beaugé, *La kafala: un système de gestion transitoire de la main-d'œuvre et du capital dans les pays du Golfe*, 2 REVUE EUROPÉENNE DES MIGRATIONS INTERNATIONALES 109 (1986).

37. *Id.*

38. See Nicholas Foster, *The Islamic Law of Guarantees*, 16 ARAB L.Q. 133, 139 (2001).

39. See Omar AlShehabi, *Policing labour in empire: the modern origins of the Kafala sponsorship system in the Gulf Arab States*, BRITISH J. MIDDLE EASTERN STUD. 1, 2 (2019).

40. See Ray Jureidini & Said Fares Hassan, *The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform*, MIGRATION AND ISLAMIC ETHICS 92, 93 (Ray Jureidini & Said Fares Hassan, eds., 2020).

labor system, and it was not present in the labor sections of the Ottoman *majella* (the first civil code to attempt to codify the *sharia*).<sup>41</sup>

The concept of *kafala* in the Qur'an is used to mean "surety."<sup>42</sup> As a result, in *fiqh* (Islamic jurisprudence), *kafala* has been defined as a surety of four types: *kafala bil mal* (surety over property), *kafala bil nafs* (surety over a person to attend a tribunal), *kafala bil taslim* (surety over the delivery of goods), and *kafala bil darak* (surety for the purchase of goods sold).<sup>43</sup> All four of these types of *kafala* are defined in the *majella*.<sup>44</sup> Typically, individuals who lacked means or political power would seek *kafala* from a notable member of the community in order to gain financial protection or legal representation.<sup>45</sup> The *kafala* contract would bring no benefits to the *kafil* (guarantor), and any payment to the *kafil* for his services would have been considered *riba* (usury).<sup>46</sup>

The Islamic concept of *kafala* is clearly quite different from the term *kafala* as it is used today. Some have argued that today's *kafala* system is literally the opposite of what it is in *fiqh*—they point out that today "the *makfūl* guarantees the fulfillment of a labour contract with the *kafil* who pays the *makfūl* for his/her labour, presumably making a profit from the labour."<sup>47</sup> This type of capitalist labor exploitation under *kafala* sponsorship is antithetical to the sponsorship system as described in *fiqh*. Furthermore, where the *kafil* is meant to be responsible for the *makfūl*, today it is the *makfūl* (i.e. the migrant worker) who will be subject to punishment if the *kafala* contract is broken.<sup>48</sup> A contract form that was once meant to foster social solidarity has become one of social oppression.<sup>49</sup> The question, then, becomes: what can explain this change?

## 2. The Development of Modern *Kafala*

Some scholars trace the modern system of *kafala* to the British colonial era in the Gulf.<sup>50</sup> The practice of sureties for labor was widely practice across the British Empire, and in the Gulf, the British first introduced sureties through the pearl-diving industry.<sup>51</sup> Ship captains became formally responsible for their foreign divers in a similar way to how sponsors are responsible for migrant

41. *Id.* at 94.

42. *See, e.g.*, QUR'AN 16:91 (Marmaduke Pickthall, trans.) ("Fulfil the covenant of Allah when ye have covenanted, and break not your oaths after the asseveration of them, and after ye have made Allah surety over you. Lo! Allah knoweth what ye do.")

43. *See* Foster, *supra* note 38, at 141.

44. *Id.*

45. *See* Jureidini & Hassan, *supra* note 40, at 94.

46. *See* Foster, *supra* note 38, at 143.

47. Jureidini & Hassan, *supra* note 40, at 95.

48. *Id.* at 96.

49. *Id.*

50. *See, e.g.*, AlShehabi, *supra* note 39.

51. *Id.* at 7–8.

workers today.<sup>52</sup> In calling this system *kafala*, the British could connect the labor surety practice to the existing practice of *kafala* as used in contracts and bail proceedings, and therefore frame it in a way that seemed to align with existing local norms.<sup>53</sup>

Though the British may have set the stage for a new understanding of *kafala*, the system did not reach its present form until the oil boom of the 1960s and 1970s. The need for a larger labor force, in combination with the fear of a growing pan-Arab ideology, led the Gulf monarchies to increasingly seek new workers from beyond the Arab world.<sup>54</sup> *Kafala* was a way to maintain a majority-migrant labor force without giving them any legal rights or claims to citizenship. In the words of the late Saudi Labor Minister, Ghazi al-Gosaibi, “[w]e [ Saudis ] do not want the day to come when we are forced to allow them [ migrant workers ] to be represented in our parliaments or municipal councils.”<sup>55</sup>

Because the Gulf States have relied so heavily on redistributing oil income to support their citizen populations, they have created a rentier situation where the number of beneficiaries must be kept as low as possible. One way of doing so, as pointed out by al-Gosaibi, is keeping the millions of migrant workers in the region in a situation where they have no political or legal power. By tying rights to Arab ethnicity, the Gulf States can maintain an oil-dependent economy, relative political stability, and a high standard of living for their citizens.<sup>56</sup> However, in doing so, they deviate from Islamic law—not just in their corruption of the concept of *kafala*, but also in their disregard for the labor and contract rights that should be accorded to migrant workers within the modern *kafala* system.

## II. THE ROLE OF SHARIA IN SAUDI LEGISLATION

Saudi Arabia is one of two countries where the *ulama* (scholars of Islam) exercise a powerful role in domestic law and politics.<sup>57</sup> The *ulama* are divided into a number of professions, including judges, preachers, and jurists.<sup>58</sup> The jurists, commonly known as *muftis*, are able to issue *fatawa* (legal opinions) based on their understanding of Islamic law.<sup>59</sup> In order to understand the role of

52. *Id.*

53. *Id.*

54. See Robinson, *supra* note 12.

55. P.K. Abdul Ghafour, *Sponsorship System To Go*, NSHR Official Says, ARAB NEWS (Feb. 12, 2008), <https://www.arabnews.com/node/308767>.

56. See Faraz Siddiqui & Alea Stanton, *Blocking the Means to Exploit: Ending Kafala Under the Principle of Sadd al-Dhara'i*, 61 HOWARD L.J. 341, 346 (2018).

57. See WAEL B. HALLAQ, SHARI'A THEORY, PRACTICE, TRANSFORMATIONS 475 (2009) (stating that Saudi Arabia and Iran are the two countries in the world where the *ulama* exercise integral roles in domestic law and politics).

58. Cl. Gilliot, R. C. Repp, K.A. Nizami, et al., *Ulamā*, in ENCYCLOPAEDIA OF ISLAM (P. Bearman et al., eds., 2nd ed. 2012), [http://dx.doi.org/10.1163/1573-3912\\_islam\\_COM\\_1278](http://dx.doi.org/10.1163/1573-3912_islam_COM_1278).

59. E. Tyan & J.R. Walsh, *Fatwā*, ENCYCLOPAEDIA OF ISLAM (P. Bearman et al., eds., 2nd ed., 2012), [http://dx.doi.org/10.1163/1573-3912\\_islam\\_COM\\_0219](http://dx.doi.org/10.1163/1573-3912_islam_COM_0219).

the *muftis* in Saudi Arabia, and their role in upholding and eventually reforming the *kafala* system, I first provide a brief introduction to *sharia* law, then I illustrate how Saudi Arabia has attempted to ground its laws and policies in a particular interpretation of *sharia*.

#### A. *Sharia and the State: A Brief Overview*

Broadly speaking, *sharia* refers to the rules and regulations that are meant to govern the lives of Muslims.<sup>60</sup> The *maqasid* (objectives) of *sharia* are to protect five essential values: “religion, life, intellect, lineage, and property.”<sup>61</sup> An enormous number of books have been written about *sharia*, so in this section I simply provide a brief overview of how *sharia* is created and how it has historically interacted with political governance.

*Sharia* is commonly understood to have four sources that exist in a hierarchy of three levels of authority.<sup>62</sup> The first level of authority, comprised of two primary sources, is the “Revelation” as expressed through the Qur’an and the *sunna*.<sup>63</sup> The Qur’an is considered the speech of God as transmitted through the Prophet Muhammad, and is of such importance that some scholars consider it to be the only source of *sharia*.<sup>64</sup> The *sunna* generally includes “all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved.”<sup>65</sup> The majority of scholars derive the authoritative nature of the *sunna* from the Qur’anic reference to *hikmah* (wisdom), where God says to follow both the Book (the Qur’an) and the *hikmah*.<sup>66</sup> Partially as a result of the differing transmission methods of the Qur’an versus the *sunna*, jurists are meant to resort to the *sunna* only when they cannot find adequate guidance in the Qur’an.<sup>67</sup>

The third source of *sharia* (and the second level of authority) is *ijtihad*, the development of legal rules from the Qur’an and *sunna* based on methods of *ta’wil* (interpretation), including through *qiyas* (analogy).<sup>68</sup> The reasoning of *ijtihad* brings these interpretive methods together to derive rules that are in line with the *maslahah* (the common good), *istishan* (fairness), and the *maqasid*.<sup>69</sup> As *ijtihad* can lead to a variety of different rules, all purportedly based on Islamic principles, *ikhtilaf* (differences between scholars) has developed.<sup>70</sup> Whereas some

60. N. Calder & M.B. Hooker, *Sharī‘a*, ENCYCLOPAEDIA OF ISLAM (P. Bearman et al., eds., 2nd ed., 2012), [http://dx.doi.org/10.1163/1573-3912\\_islam\\_COM\\_1040](http://dx.doi.org/10.1163/1573-3912_islam_COM_1040).

61. MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 351 (3rd ed. 2003).

62. KNUT S. VIKOR, BETWEEN GOD AND THE SULTAN 31 (2005).

63. *Id.*

64. KAMALI, *supra* note 61, at 16.

65. *Id.* at 58.

66. *Id.* at 59 (interpreting QUR’AN 62:2).

67. *Id.* at 79.

68. *Id.* at 119.

69. VIKOR, *supra* note 62, at 67.

70. *Id.* at 73.

scholars see *ikhtilaf* as divine will and *ijtihad* as the right of all, most scholars see *ijma* (consensus) as an important signifier of legal authority.<sup>71</sup> As a result, *ijma* is the fourth source and final authoritative level of *sharia*. Once a rule reaches the point of *ijma*, it becomes binding on all and *ijtihad* on the same issue is no longer permitted.<sup>72</sup> Importantly, because of *ikhtilaf*, no truly universal *ijma* rules have ever been determined after the lifetime of the Prophet Muhammad.<sup>73</sup>

Around the mid-tenth century, four different *madhahib* (schools of Islamic law) began to develop.<sup>74</sup> These schools differed in their methodologies and rules. For example, the Hanbali school, to which Saudi Arabia adheres, uses a methodology that emphasizes the text of the Qur'an and *sunna* and de-emphasizes *qiyas*.<sup>75</sup> As a result of the differences between schools, *ijma* became understood as consensus within a school.<sup>76</sup> The existence of four schools was recognized as acceptable *ikhtilaf* and the schools (at least theoretically) accepted each others' existence as equally legitimate.<sup>77</sup> As a result, *muftis* typically accept that it is permissible for Muslims to seek advice from different *madhahib* to answer a legal question.<sup>78</sup>

In pre-modern Islamic societies, the implementation and interpretation of *sharia* tended to occur at the local level, with local *qadis* acting as judges and mediators and *muftis* providing guidance to both the *qadis* and the masses on issues of *fiqh*.<sup>79</sup> The relationship of the *muftis* and, more broadly, *sharia*, to society's rulers began to change during the Ottoman period when Ottoman Sultan Bayezid I invited the *ulama* to govern with him in order to legitimate his rule.<sup>80</sup> Through *siyasa sharia* (*sharia*-based public policy), the sovereign ensured the enforcement of *fiqh*, while the *muftis* provided the sovereign with political legitimacy.<sup>81</sup> *Siyasa sharia* became a way for a sovereign to supplement religious law (formed by the *qadis* and *muftis*) with legislation that complemented it (or at

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71. *Id.* at 74.

72. KAMALI, *supra* note 61, at 235.

73. *Id.* at 247.

74. VIKOR, *supra* note 62, at 103.

75. *Id.* at 102.

76. *Id.* at 109.

77. *Id.* at 106.

78. See e.g., *Fatwa No. 2961*, SAUDI ARABIA PERMANENT COMM. FOR SCI. RSCH. AND LEGAL OPS., <https://www.alifta.gov.sa/En/IftaContents/PermanentCommitee/Pages/FatawaSubjects.aspx?cultStr=en&View=Page&HajjEntryID=0&HajjEntryName=&RamadanEntryID=0&RamadanEntryName=&NodeID=4101&PageID=1373&SectionID=7&SubjectPageTitlesID=1392&MarkIndex=0&0#TherulingonaMuslimwhoadheres> (last visited May 5, 2021); *Am I Obligated to Follow Only One of the Four Sunni Legal Schools of Jurisprudence?*, DAR AL-IFTA AL-MISSRIYYAH, <https://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=5916> (last visited May 5, 2021).

79. See HALLAQ, *supra* note 57, at 159–196.

80. *Id.* at 198.

81. *Id.* at 199.

least did not contradict it).<sup>82</sup> This system of *siyasa sharia* is the way that Saudi Arabia governs itself today.

### B. *The Role of Sharia in Saudi Arabia*

The relationship between Saudi Arabia's rulers and the *ulama* date back to the pact between Muhammad Ibn Abd al-Wahab, the founder of Wahabbism, and Muhammad Ibn Saud, a major tribal leader, in 1744.<sup>83</sup> As a result of this alliance, al-Wahhab became the chief *mufti* of the Najd (modern-day central Saudi Arabia), while Ibn Saud became the region's king.<sup>84</sup> In the Hijaz (the southern coast of modern-day Saudi Arabia and home of Mecca and Medina), the Ottomans had established Hanafi law, guided by a system of one chief *qadi* and three assistant judges from the other schools of law.<sup>85</sup> In 1932, Ibn Saud unified the Najd and the Hijaz, and began to unify the two existing legal systems.<sup>86</sup> Influenced by the Hijaz system, the court system in Saudi Arabia now gives *qadis* maximum independence to apply the *maddhab* (pl. *madhahib*) that best fits the circumstances of each particular case.<sup>87</sup>

Historically, *muftis* in Saudi Arabia issued *fatawa* informally, but they were brought into the fold of the modern state in 1953 when King Abd al-Aziz Ibn Saud, the founder of Saudi Arabia, created Dar al-Ifta.<sup>88</sup> In 1971, King Faisal, son of Abd al-Aziz, added more *ulama* to the government and divided the Dar al-Ifta between the Board of Senior Ulama and the Permanent Committee for Scientific Research and Legal Opinions.<sup>89</sup> Dar al-Ifta continues to promulgate *fatawa* which are often determinative in judicial practice, regardless of the *qadis*' freedom to exercise independent *ijtihad*.<sup>90</sup>

Importantly, though *fatawa* are often the basis of judicial decisions, adherence to them cannot be compulsory, even when the *mufti* is appointed by the State.<sup>91</sup> Additionally, there may not be a relevant *fatwa* (pl. *fatawa*) on every subject, making *siyasa sharia* that much more important. In Saudi Arabia, the king promulgates *siyasa sharia* through rules and regulations (*nizam*).<sup>92</sup> While *fiqh* acts as constitutional law does in the Anglo-American system, *nizam* acts as a subordinate system to fill in the gaps.<sup>93</sup> Most *sharia* courts will not hear

82. *Id.* at 200.

83. MUHAMMAD K. AL-ATAWNEH, WAHHABI ISLAM FACING THE CHALLENGES OF MODERNITY 1 (2010).

84. VIKOR, *supra* note 62, at 264.

85. *Id.*

86. *Id.*

87. *Id.* at 265.

88. AL-ATAWNEH, *supra* note 83, at xiii.

89. *Id.* at xiv.

90. VIKOR, *supra* note 62, at 267.

91. FRANK VOGEL, ISLAMIC LAW AND LEGAL SYSTEM 17 (2000).

92. VIKOR, *supra* note 62, at 267.

93. VOGEL, *supra* note 91, at 175.

the types of administrative matters that *nizam* tends to cover, so administrative courts govern those instead.<sup>94</sup> Although labor law, which includes both *nizam* and contract law, would seem to be within the realm of traditional *fiqh*, labor courts are considered administrative.<sup>95</sup> Though these courts are separate from *sharia* courts, and guided more by *nizam* than *fatawa*, their decisions are still subject to review if it is claimed that they violate *sharia*.<sup>96</sup>

For all the references to *sharia* as the basis of Saudi law, and despite the incorporation of the *ulama* into the government, some claim that the *ulama* in Saudi Arabia are declining in power.<sup>97</sup> Others claim that the *ulama* are simply legitimizing pawns for authoritarian Saudi rulers.<sup>98</sup> Though the *ulama* still exercise considerable influence over Saudi politicians, the *ulama* are ultimately not the legislators. *Fatawa* can form the basis for binding law, but they can only become binding law if made so by royal decree.<sup>99</sup> As a result, the *ulama* regularly issue *fatawa* that do not necessarily reflect the binding *nizam* of the Saudi state. One topic of *fatawa* that falls into this category is migrant labor. In the next section I will analyze these *fatawa* and the relevant *nizam* to show how both are only superficially grounded in *sharia*.

### III. THE LEGAL SYSTEM OF *KAFALA* IN SAUDI ARABIA

One of the most insidious aspects of the *kafala* system in Saudi Arabia is its entanglement with a myriad of labor and residency regulations. Although the word *kafala* was removed from Saudi laws in 2000,<sup>100</sup> the system itself remains through a collection of policies that keep migrant workers legally tied to their sponsors with few to no rights.<sup>101</sup> Most of the relevant policies are promulgated either by the Ministry of Interior or the Ministry of Labor, reflecting the understanding of migrant labor as both a security and a labor issue.<sup>102</sup> Though some of these policies include protections for migrant workers, these parts of the laws are rarely enforced.<sup>103</sup> This section provides a review of the current labor and resi-

94. *Id.*

95. Mahmoud Abdel-Baky, *Labour Claims in Saudi Arabia - jurisdiction, process and timings*, DENTONS (Nov. 10, 2020), <https://www.dentons.com/en/insights/articles/2020/november/10/labour-claims-in-saudi-arabia-jurisdiction-process-and-timings>.

96. *Id.*

97. See, e.g., Muhammad Al-Atawneh, *Authority-Holders in Contemporary Islamic Politics and Governance: The Case of Saudi Arabia*, 26 MIDDLE EAST CRITIQUE 123, 124 (2017).

98. See, e.g., MADAWI AL-RASHEED, *CONTESTING THE SAUDI STATE* 2 (2006).

99. Al-Atawneh, *supra* note 97, at 130.

100. *Saudi Arabia: Labor Reforms Insufficient*, *supra* note 10.

101. Asma Azhari, *The Kafala 'Sponsorship' System in Saudi Arabia: A Critical Analysis from the Perspective of International Human Rights and Islamic Law*, 10 SOAS J. POSTGRADUATE RSCH. 61, 64 (2016–2017).

102. See Motaparthy, *supra* note 26.

103. See, e.g., *Sponsorship System Violates Human Rights*, *supra* note 22.

dence laws that relate to the *kafala* system and compares these laws to the *fatawa* promulgated by Dar al-Ifta.

#### A. *Kafala in Saudi Labor Law and Residence Law*

The legal basis for the *kafala* system can be found primarily in the Saudi Residence Regulations, which state that everyone who enters the country must have a sponsor and that everyone who wishes to leave the country must seek permission from the Foreigners Control Office.<sup>104</sup> Both the labor law and the residency law emphasize that migrant workers may only work for their sponsoring employer while they are in Saudi Arabia.<sup>105</sup> In order to change jobs, migrant workers typically must seek the permission of their sponsor to transfer their sponsorship, and they must work for their original sponsor for one year before they can do so.<sup>106</sup> Though some migrant workers are allowed to change their sponsor unilaterally under certain conditions, such as if they are not paid for three months or if their sponsor fails to renew their work permit, they are practically inhibited from doing so by their isolation and a flawed complaints mechanism.<sup>107</sup> Similarly, although these requirements were relaxed for many migrant workers under the reforms of March 2021, migrant domestic workers must still seek employer permission to change jobs or leave the country.<sup>108</sup> If migrant domestic workers attempt to leave their employer without permission, and without one of the few legal justifications, then they can be charged with *huroob* (absconding).<sup>109</sup> Employers often use *huroob* charges to retaliate against migrant domestic workers who have attempted to access the justice system or change employers.<sup>110</sup> Migrant domestic workers accused of *huroob* are subject to criminal charges, arrest, jail, and deportation.<sup>111</sup>

Migrant domestic workers sometimes leave their employer in order to escape abuse. In the words of one advocacy organization, “when there is neither a system that prioritises workers’ grievances nor adequate shelter facilities for

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104. Residence Regulations, Law No. 17/2/25/1337, art. 5, 14 (Saudi Arabia), <https://gulfmigration.org/the-residence-regulations-law-no-172251337-6/>.

105. Zaid Mahayni & Zina Mahayni, *Saudi Arabia: The New Implementing Regulations to the Saudi Arabian Labor Law*, MONDAQ (May 6, 2016), <https://www.mondaq.com/saudi-arabia/employee-rights-labour-relations/489208/the-new-implementing-regulations-to-the-saudi-arabian-labor-law>.

106. Royal Decree No. M/51 Issuing the Saudi Labor Law, art. 39; Implementing Regulation of the Saudi Labor Law, art. 16, [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=74429](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=74429).

107. *Saudi Arabia Announces Labour Reforms*, *supra* note 9.

108. *Saudi Arabia: Labor Reforms Insufficient*, *supra* note 10.

109. Van Saraswathi, *Huroob, Runaway, Absconding: Trapping Migrants in Extreme Abuse*, MIGRANT-RIGHTS.ORG (Sept. 30, 2020), <https://www.migrant-rights.org/2020/09/huroob-runaway-absconding-trapping-migrants-in-extreme-abuse>.

110. *Id.*; *Huroob Cases on the Rise as Saudi’s Kafala Reforms Off to a Shaky Start*, *supra* note 25.

111. Saraswathi, *supra* note 109.

those who leave abusive homes, there are only two options available to the domestic worker: to continue in abusive employment conditions in the hope that things will improve, or take a risk and leave the household.”<sup>112</sup> Though many domestic workers stay in abusive conditions, others reasonably choose to escape, becoming criminals in the process.<sup>113</sup>

One of the reasons migrant domestic workers are in a particularly dire situation in Saudi Arabia is because the labor protections afforded to other migrant workers through a 2005 Royal Decree are not afforded to domestic workers.<sup>114</sup> Instead, domestic workers are governed by a separate ministerial decision issued in 2013.<sup>115</sup> There is a stark contrast in the protections accorded to migrant workers in the private sector (e.g. in construction, business, or clerical work) versus those accorded to domestic workers who work in private homes. For example, it is illegal for employers to confiscate the passports of workers in the private sector, but it is not explicitly prohibited for them to do so with domestic workers.<sup>116</sup> Workers in the private sector can only work 8 hours per day, whereas domestic workers can be required to work up to 15 hours per day.<sup>117</sup> Workers in the private sector are entitled to overtime pay, and workers in the domestic sphere are not.<sup>118</sup> Workers in the private sector are included in the Wage Protection System, which tracks wage payment (ensuring that wages are paid on time) and allows for transfer of sponsorship upon three months of non-payment, while domestic workers are not.<sup>119</sup> Workers in the private sector must be given 21–30 days of annual leave, while workers in the domestic sector are only entitled to 30 days every two years.<sup>120</sup> Finally, as previously stated, the labor reforms implemented in 2021 concerning the transfer of sponsors and ability to leave the country without the sponsor’s permission do not apply to domestic workers.<sup>121</sup>

As a result of this web of differing regulations for migrant workers in the private sector and those in the domestic sphere, migrant domestic workers are both more likely to be abused and less likely to be able to seek redress or

112. *Id.*

113. MIGRATION POL’Y CTR., SAUDI ARABIA’S LEGAL FRAMEWORK OF MIGRATION 4 (2018), [https://gulfinmigration.grc.net/media/pubs/exno/GLMM\\_EN\\_2018\\_03.pdf](https://gulfinmigration.grc.net/media/pubs/exno/GLMM_EN_2018_03.pdf).

114. *Id.*

115. *See* ILO REGULATORY FRAMEWORK, *supra* note 5 (comparing the Labor Law of Royal Decree M/51 of 2005 with the Ministerial Decision No. 310 of 2013 regulating the employment of domestic workers).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*; *see also* Saudi Arabia to Begin the Final Phase of the Wage Protection System, MIGRANT-RIGHTS.ORG (Nov. 3, 2020), <https://www.migrant-rights.org/2020/11/saudi-arabia-to-begin-the-final-phase-of-the-wage-protection-system> (explaining the Wage Protection System).

120. *See* ILO REGULATORY FRAMEWORK, *supra* note 5.

121. *Saudi Arabia: Labor Reforms Insufficient*, *supra* note 10.

protection from the State. Though the Saudi Basic Law states that all people, whether citizens or residents, are entitled to file suit on an equal basis, execution of this right is nearly impossible for migrant domestic workers.<sup>122</sup> Not only do they not have many protections to claim under Saudi law, but domestic workers are also subject to harsh penalties on absconding and subject to contracts that are written in a language, Arabic, that they might not understand. Even if they learn of a redress method, domestic workers will likely find it difficult to access legal redress due to the physical barriers to leaving their workplace. Reform is badly needed, and *fatawa*, endowed with religious legitimacy as potential sources of future law, could be a basis of such reform.

### B. *The Muftis and Kafala: A Toxic Mix*

Dar al-Ifta's Permanent Committee for Scientific Research and Legal Opinions (hereinafter "the Committee") has issued a number of *fatawa* related to *kafala*. At first glance, the tone of the *fatawa* seems beneficial for the protection of migrant workers. For example, in the 1970s and 1990s, the Committee issued *fatawa* stating that abuses in the *kafala* system contradicted the laws of Saudi Arabia; that earning money in return for *kafala* sponsorship was impermissible; that contract ambiguity was impermissible as a form of *gharar* (uncertainty); and that contract breaches in the *kafala* system were unlawful.<sup>123</sup> For example, when a person asked the Committee if he could charge his workers from other Islamic countries for their visa fees, the Committee responded "it is impermissible to take money from workers in return for acting as a sponsor for them."<sup>124</sup> In 1994, the Committee even published a report with legal parameters for *kafala*, recognizing that recruiting foreign workers was an important State policy.<sup>125</sup> This led to a *fatwa* in 2002 condemning the exploitation of migrant workers.<sup>126</sup>

A closer look at the *fatawa* available on the Committee's website shows that the *ulama's* approach to the issue of migrant labor is not so clear-cut. In

122. The Basic Law (1992), art. 47, <https://gulfmigration.org/the-basic-law-of-governance>.

123. Jureidini & Hassan, *supra* note 40, at 100. See, e.g., *Fatwa No. 4505*, SAUDI ARABIA PERMANENT COMM. FOR SCI. RSCH. AND LEGAL OPS., <https://www.alifta.gov.sa/En/IftaContents/PermanentCommitee/Pages/FatawaSubjects.aspx?cultStr=en&View=Page&HajjEntryID=0&HajjEntryName=&RamadanEntryID=0&RamadanEntryName=&NodeID=3072&PageID=5189&SectionID=7&SubjectPageTitlesID=5244&MarkIndex=0&0#GuaranteeIndians,Pakistanis>.

124. *Fatwa No. 13081*, SAUDI ARABIA PERMANENT COMM. FOR SCI. RSCH. AND LEGAL OPS., <https://www.alifta.gov.sa/En/IftaContents/PermanentCommitee/Pages/FatawaSubjects.aspx?cultStr=en&View=Page&HajjEntryID=0&HajjEntryName=&RamadanEntryID=0&RamadanEntryName=&NodeID=3070&PageID=5191&SectionID=7&SubjectPageTitlesID=5246&MarkIndex=0&0#Takemoneyfromworkersinreturn>.

125. See Jureidini & Hassan, *supra* note 40, at 97.

126. See Hanan N. Malaeb, *The Kafala System and Human Rights: Time for a Decision*, 29 ARAB L.Q. 307, 321 (2015).

particular, the *ulama* has very different standards for the treatment of Muslim and non-Muslim migrant workers.<sup>127</sup> In fact, the *fatawa* in response to questions about non-Muslim migrant workers are not as concerned about the workers' rights as they are concerned about the workers' presence in the country. For example, when one individual asked the Committee if it was permissible to hire a non-Muslim "servant" (i.e. domestic worker) or driver, the Committee responded that doing so would be impermissible for three reasons: first, because the Prophet Muhammad "ordered Muslims to get the Mushriks [polytheists] . . . out of the peninsula;" second, because doing so would involve drawing close to those who are untrustworthy; and third, because doing so could lead to "numerous evil consequences."<sup>128</sup> These types of *fatawa* find their legal basis in a *hadith* from 'Ibn Abbas, where the Prophet Muhammad allegedly said to "expel the pagans from the Arabian peninsula," and a *hadith* from Imam Malik that says "two religions shall not co-exist in the Arabian peninsula."<sup>129</sup> Though other prominent scholars of *hadith* have argued that these statements should only be interpreted to apply to the Hijaz, the Committee in Saudi Arabia has used them to declare that non-Muslim migrant workers should be expelled from the country.<sup>130</sup>

Were the *fatawa* to focus solely on the impermissible presence of non-Muslim migrant workers in Saudi Arabia, it might be reasonable to argue that the *muftis* would still support treating all workers present in the country in accordance with Islamic law. However, the obsession of the *muftis* with the expulsion of non-Muslim migrant workers has led them to issue *fatawa* with advice that contradicts the fundamental principles of fairness and the common good in Islamic law. For example, one citizen petitioned the Committee to ask if it was permissible for his brother to dismiss his "servant" (i.e. domestic worker) if he discovered that the servant was a Sikh sending home remittances to build temples in India.<sup>131</sup> The petitioner mentioned the verse in the Qur'an that exhorts believers to fulfill

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127. See generally AYAZ ASADOV, FATWA MAKING IN THE CONTEXT OF ABNORMAL JUSTICE: THE CASE OF MIGRANT WORKERS IN SAUDI ARABIA (2015), <http://isamveri.org/pdf/drg/G00315/ASADOVA.pdf>.

128. *Fatwa No. 9657*, SAUDI ARABIA PERMANENT COMM. FOR SCI. RSCH. AND LEGAL OPS., <https://www.alifta.gov.sa/En/IftaContents/PermanentCommittee/Pages/FatawaSubjects.aspx?cultStr=en&View=Page&HajjEntryID=0&HajjEntryName=&RamadanEntryID=0&RamadanEntryName=&NodeID=4704&PageID=5342&SectionID=7&SubjectPageTitlesID=5396&MarkIndex=0&0#Isitpermissibletohireanon-Muslim>.

129. SAHIH AL-BUKHARI 3053, <https://sunnah.com/bukhari:3053>; MUWATTA MALIK, MADINA, <https://sunnah.com/urn/530170>.

130. ASADOV, *supra* note 128, at 49–50.

131. *Fatwa No. 19653*, SAUDI ARABIA PERMANENT COMM. FOR SCI. RSCH. AND LEGAL OPS., <https://www.alifta.gov.sa/En/IftaContents/PermanentCommittee/Pages/FatawaSubjects.aspx?cultStr=en&View=Page&HajjEntryID=0&HajjEntryName=&RamadanEntryID=0&RamadanEntryName=&NodeID=4704&PageID=5348&SectionID=7&SubjectPageTitlesID=5402&MarkIndex=5&0#Recruitingdisbelievers>.

their obligations, and asked how it should be interpreted in this context.<sup>132</sup> The Committee responded that he should break the contract with the non-Muslim, and that retaining a work contract with a non-Muslim was impermissible.<sup>133</sup> According to the *ulama*, the contracts referred to in the Qur'an were lawful ones, which would not include those with non-Muslims, and therefore the verse calling believers to fulfill their obligations was not applicable in this situation.<sup>134</sup>

Because of their strong bias against non-Muslims, the *ulama* in Saudi Arabia offer even fewer protections for migrant domestic workers than the government does. Considering that non-Muslims make up much of the migrant domestic worker population in Saudi Arabia, the gap between the practical needs and reality of the country versus the legal ideals of the *ulama* is quite wide. The lack of enforcement of labor protections by the government, in combination with the outright hostility of the *ulama* toward non-Muslim migrant workers, makes the situation for migrant domestic workers that much more legally tenuous. The particular vulnerabilities of these non-Muslim migrant domestic workers are not mere potentialities, but have been borne out by the experiences of religious discrimination, racial discrimination, sexual harassment, and pressures to convert faced by non-Muslim (often Christian) African women employed as domestic workers.<sup>135</sup> For the Committee to allow abuse of non-Muslim migrant workers under the guise of their not belonging in Saudi Arabia is a contradiction of its earlier stances against the exploitative nature of the *kafala* system. Rather than being a voice of reform, it has become a voice of religious legitimacy for the abuse of non-Muslim migrant domestic workers.

#### IV. REFORMING THE *KAFALA* SYSTEM IN ACCORDANCE WITH SHARIA

Due to the myriad of abuses in Saudi Arabia's *kafala* system, human rights organizations and the International Labour Organization have called for a number of major reforms.<sup>136</sup> Such reforms include separating the migrant's work permit from a specific employer, giving the migrant the right to resign without losing their immigration status, and allowing them to exit the country without seeking permission from their employer.<sup>137</sup> They also include more basic reforms such as creating a standard contract and legislative framework that adhere to fundamental

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132. QUR'AN 5:1 (trans. Marmaduke Pickthall) ("O ye who believe! Fulfil your undertakings.")

133. *Fatwa No. 19653*, *supra* note 124.

134. *Id.*

135. See, e.g., Rabiya Jaffery, *From Trafficking to Sexual Abuse, Racial Discrimination Aggravates Abuse of African Women in Saudi*, MIGRANT-RIGHTS.ORG (Dec. 7, 2021), <https://www.migrant-rights.org/2021/12/from-trafficking-to-sexual-abuse-racial-discrimination-aggravates-abuse-of-african-women-in-saudi>; see also Caroline Kimeu, *supra* note 3.

136. See, e.g., ILO WHITE PAPER, *supra* note 4; "As If I Am Not Human," *supra* note 3.

137. *Id.*, at 16–20.

principles of human rights.<sup>138</sup> Though the wholesale abolition of the *kafala* system could be considered as a form of *sadd al-dhara'i* (i.e. blocking the means to an evil end),<sup>139</sup> this section will focus on three possible discrete reforms to the practice. In particular, it will address the ways that *sharia* could be used to create fairer contracts for migrant domestic workers, more just labor laws, and greater respect for the international human rights obligations owed to migrant workers in Saudi Arabia.

#### A. *Sharia as a Path to Fairer Contracts*

Migrant workers who work in the domestic sphere in Saudi Arabia are typically presented with two-year contracts. These contracts rarely contain specifics about the number of working hours or the details of work responsibilities, and they lack adequate enforcement mechanisms under the labor laws.<sup>140</sup> Because the contracts must be written in Arabic, many migrant workers have very little knowledge of the terms and conditions of their employment, including the exact salary that they will receive each month.<sup>141</sup>

The lack of clarity in these contracts, combined with their weak enforcement mechanisms, should make them dubious under *sharia*. First, concerning the lack of clarity, it is fundamental in Islamic contracts that the contracting parties know the object of the contract in order to avoid *gharar* (uncertainty).<sup>142</sup> Usually, in Islamic law, if a contract contains enough *gharar* that it could lead to discord and dispute, then it is invalid.<sup>143</sup> In employment contracts, *gharar* can arise from a lack of specification around the tasks assigned, duration, and compensation.<sup>144</sup> As a result, some scholars argue that the specification of wages in labor contracts is mandatory in Islam.<sup>145</sup>

The importance of clarity in contracts in Islamic law is related to the importance of their enforcement. In order for a contract to be upheld, as commanded by the Qur'an,<sup>146</sup> its terms must be known to both parties, and both parties must have entered the contract consentingly. According to the *sunna*, the Prophet Muhammad named those who break their contracts as one of the three types of people he would be against on the Day of Resurrection.<sup>147</sup> Importantly, the contracts that Muslims are meant to adhere to include political treaties with non-Muslim

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138. *Id.*

139. *See, e.g.,* Siddiqui & Stanton, *supra* note 56, at 342.

140. *Legal Framework for Migrant Domestic Workers, supra* note 17.

141. *See Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia, Hum. Rts. Watch* (July 2004), <https://www.hrw.org/reports/2004/saudi0704/saudi0704.pdf>.

142. HALLAQ, *supra* note 57, at 243–244.

143. *Id.*

144. *Id.* at 257.

145. *See, e.g.,* Iftikhar Ahmad, *Religion and Labor: Perspective in Islam*, 14 J. LAB. & SOC'Y 589, 597–598 (2011).

146. QUR'AN 5:1 (trans. Marmaduke Pickthall).

147. SAHIH AL-BUKHARI 2270, <https://sunnah.com/bukhari:2270>.

kingdoms (mentioned in the Qur'an) and promises made with non-Muslim people (found in the *sunna*).<sup>148</sup> Considering these examples in the context of the broad consensus amongst Islamic scholars that Muslims are meant to act justly, even towards non-Muslims, contemporary scholars have shown that contracts between Muslims and non-Muslims are subject to this same Islamic obligation of enforcement.<sup>149</sup> The contracts between Saudi Muslim employers and their domestic migrant workers, regardless of religion, should therefore be both clear and enforced.

### B. Sharia as a Path to Better Labor Laws

Though clearer and more enforceable contracts are necessary elements of *kafala* reform, they cannot stand alone; rather, they must be accompanied by stronger and more inclusive labor laws. Both the Qur'an and the *sunna* are full of examples of the ways that workers are supposed to be treated.<sup>150</sup> In particular, workers must be adequately and promptly remunerated and treated justly.

In the Qur'an, fair wages are a right that should "never be withheld" from those who have performed good work.<sup>151</sup> In a famous *sunna*, the Prophet Muhammad says that God will oppose three men on the Day of Resurrection, one of whom is a man who breaks his promises and one of whom is a man who hires a worker but does not give him his wages.<sup>152</sup> The latter person is compared in other *hadith* to a slave-owner.<sup>153</sup> In yet another *sunna*, the Prophet Muhammad emphasizes the importance of prompt remuneration, saying "give the worker his wages before his sweat dries."<sup>154</sup> These and other *sunna* are interpreted by scholars to mean that employers cannot unduly withhold the wages of an employee, even if it is temporary.<sup>155</sup> Doing so would be engaging in forced labor, which is inherently unjust and therefore incompatible with *istishan*.

Islamic law not only calls for prompt payment of wages, but it calls for these wages to be fair. For example, in one *sunna*, the Prophet Muhammad tells a man to treat his servants well, feeding them his food, clothing them with his clothing, and helping them with their burdens.<sup>156</sup> Some scholars interpret this *sunna* liberally, claiming that Islam requires employers to provide workers with a

148. See Andrew March, *Sources of Moral Obligation to non-Muslims in the 'Jurisprudence of Muslim Minorities' Discourse*, 16 ISLAMIC L. AND SOC'Y 54 (2009).

149. See generally, *id.*

150. See generally, Ashgar Ali Ali Mohamed & Farheen Baig Sardar Baig, *Treatment of Migrant Workers: The Islamic Perspective*, 6 AUSTL.J. BASIC AND APPLIED SCI. 97 (2012).

151. QUR'AN 11: 85 (trans. Yusuf Ali) ("And O my people! Give just measure and weight, nor withhold from the people the things that are their due . . .")

152. SAHIH AL-BUKHARI 2270, <https://sunnah.com/bukhari:2270>.

153. See Ahmad, *supra* note 145, at 599.

154. SUNAN IBN MAJAH 2443, <https://sunnah.com/ibnmajah:2443>.

155. See Ahmad, *supra* note 145, at 599.

156. SAHIH MUSLIM 1661a, <https://sunnah.com/muslim:1661a>.

myriad of benefits, including housing, medical care, job training, or meals.<sup>157</sup> In the words of Al-Banna, an Egyptian union leader, Islam gives everyone the right to a decent life.<sup>158</sup> Even taking a more moderate approach, it seems clear that Islam at least requires employers of domestic workers to provide these workers with adequate accommodation and food, and to treat them with basic respect.

Importantly, the protections given to employees by *sharia* do not seem to be based on distinctions between believers and non-believers. In the Qur'an, God says "I suffer not the work of any worker, male or female, to be lost."<sup>159</sup> Similarly, the Prophet Muhammad says in his last sermon, "No Arab has superiority over any non-Arab and no non-Arab has any superiority over an Arab; no dark person has superiority over a white person and no white person has any superiority over a dark person. The criterion of honor in the sight of Allah is righteousness and honest living."<sup>160</sup> Finally, in a different *sunna*, the Prophet Muhammad and Abu Bakr employ a pagan man to look after their camels, and they treat him justly.<sup>161</sup> All of these are evidence that *sharia* does not allow discrimination on the basis of sex or religion or race in guaranteeing employees' fair treatment and access to wages.<sup>162</sup> As a result, not only should the contracts between Saudi Muslims and their non-Muslim migrant domestic workers be clear and consensual, but they should provide for fair wages and prompt remuneration as well.

### C. Sharia as a Path to Meeting Further International Human Rights Obligations

Even when Islamic law does not speak to the specific realities of contemporary globalized labor systems, or to the specific human rights abuses ongoing in the *kafala* system of Saudi Arabia, it can still be used to understand Saudi Arabia's obligations within the international human rights treaty system. For example, scholars like Mashood Baderin have used concepts like *maslahah* and the *maqasid al-sharia* to illustrate shared values in international human rights treaties and Islamic law, while those like Abou El Fadl emphasize *ijtihad* as a way for Muslims to adapt Islamic law to contemporary needs.<sup>163</sup> Additionally, the *ulama* of some countries, such as Egypt, have spoken of the Islamic foundations of the human rights to life, freedom, and equality.<sup>164</sup> Meanwhile, other

157. See, e.g., Ahmad, *supra* note 145, at 598.

158. *Id.* at 604.

159. QUR'AN 3:195 (trans. Marmaduke Pickthall).

160. See Ahmad, *supra* note 145, at 600.

161. SAHIH AL-BUKHARI 2263, <https://sunnah.com/bukhari:2263>.

162. See Ahmad, *supra* note 145, at 600.

163. See Shannon Dunn, *Islamic Law and Human Rights*, THE OXFORD HANDBOOK OF ISLAMIC LAW (2018), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199679010.001.0001/oxfordhb-9780199679010-e-26>.

164. See, e.g., *Human rights in Islam: What are they?*, DAR AL-IFTA AL-MISSRIYYAH,

scholars have uncovered a right to human dignity throughout the Qur'an.<sup>165</sup> All of these interpretations of Islam lead to the conclusion that Islamic states like Saudi Arabia should have no qualms ratifying and upholding treaties that protect these same values.

Unfortunately, Saudi Arabia has not ratified the two foundational treaties of international human rights law, the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").<sup>166</sup> Saudi Arabia also has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("the Migrant Workers Convention"),<sup>167</sup> a treaty that forms part of the nine core international human rights instruments as defined by the U.N. Office of the High Commissioner of Human Rights.<sup>168</sup> Of the five human rights treaties Saudi Arabia has ratified, it has submitted *sharia*-based reservations to retain the right to interpret the treaty in accordance with *sharia* law.<sup>169</sup> These reservations have been controversial because they seem to allow Saudi Arabia to interpret the treaties unilaterally, thereby violating a basic concept of a multilateral treaty regime.<sup>170</sup>

Although Saudi Arabia should be encouraged to ratify all nine of the core international human rights instruments, it still has obligations to workers under the Conventions and Protocols it has ratified as a member of the International Labour Organization ("ILO"). These Conventions and Protocols, which represent international labor standards, are legally binding on all ILO member states that ratify them.<sup>171</sup> Saudi Arabia has not only ratified the conventions concerned with forced labor, but it has also ratified conventions addressing hours of work and a right to weekly rest for industrial workers.<sup>172</sup> However, the *kafala* system remains a pipeline for forced labor, and migrant domestic workers remain beyond the reach of most labor protections.

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<https://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=7478>.

165. See, e.g., Mohammad H. Kamali, *Fundamental Rights of the Individual: An Analysis of Haqq (Right) in Islamic Law*, 10 AM. J. ISLAMIC SOC. SCI. 340, 353, 356 (1993).

166. *Status of Ratification Interactive Dashboard*, U.N. OHCHR, <https://indicators.ohchr.org> (last visited May 5, 2021).

167. *Id.*

168. *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. OHCHR, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (last visited Jan. 9, 2022).

169. *Status of Ratification Interactive Dashboard*, see note 167.

170. *Legal Framework for Migrant Domestic Workers*, *supra* note 17.

171. *Conventions and Recommendations*, ILO, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang—en/index.htm> (last visited Jan. 9, 2022).

172. *Ratifications for Saudi Arabia*, ILO, [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103208](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103208) (last visited Jan. 9, 2022).

If Saudi Arabia would ratify and implement the ICCPR, the ICESCR, and the Migrant Workers Convention, it would have a system for migrant domestic workers that was more *sharia*-compliant than the current *kafala* system. These treaties call for a myriad of human rights protections that are also recognized in *sharia*, including prohibitions on forced labor, the right to freedom of movement, the right to fair working conditions, and the right to adequate standards of living.<sup>173</sup> Though the ICCPR and ICESCR are meant to apply to everyone within a state's territory, the Migrant Workers Convention extends these rights explicitly to migrant workers. By using *sharia* to reform the *kafala* system, Saudi Arabia would not only uphold Islamic notions of human dignity, justice, and equality, but it would be able to better comply with its obligations under international human rights law as well.

### CONCLUSION

The *kafala* system in Saudi Arabia today functions as a system of indentured servitude. By connecting the legal immigration status of migrant domestic workers to their employers, Saudi Arabia essentially privatizes the regulation of migrant labor. This privatization creates a system that is ripe for abuse, particularly for non-Muslim domestic workers who live with their employers. Though Saudi Arabia has periodically engaged in reforms of the *kafala* system through *nizam*, these reforms have been poorly enforced and have typically explicitly excluded domestic workers. For example, in the latest reform of the system, which occurred in 2021, domestic workers were specifically excluded from new labor protections.<sup>174</sup> Even the *fatawa* calling for reform of the *kafala* system have only called for improvements to the treatment of Muslim migrant workers. As a result of both the State and the *ulama*, non-Muslim migrant domestic workers are therefore in an environment where abuses are not only allowed, but sometimes legally and religiously condoned.

As Saudi Arabia embarks on "Vision 2030" to diversify its economy, it has the perfect opportunity to either heavily reform the *kafala* system or abolish it altogether. Though organizations like Human Rights Watch, Amnesty International, and the International Labour Organization have spent years calling attention to the abuses of the *kafala* system using the language of human rights, these calls seem to have landed on deaf ears. As a result, it is time to call for reform of *kafala* in Saudi Arabia not only using the language of international human rights, but using the language of *sharia* as well. Phrasing these calls for reform in ways that are cognizable in Islamic law would make them both

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173. See International Covenant on Civil and Political Rights, art. 8, 12, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, art. 7, 11, Jan. 3, 1976, 993 U.N.T.S. 3.

174. *Saudi Arabia Eases 'Kafala' System Restrictions on Migrant Workers*, *supra* note 8.

more relevant and more urgent to Saudi Arabia, a country explicitly governed by *sharia*. Fortunately, the Qur'an, *sunna*, and religious scholars all support fair and transparent contracts, adequate compensation for labor, and a recognition of human dignity. In the future, more human rights organizations should engage the global *ulama* to develop *sharia*-based arguments in support of the reform and eventual abolition of *kafala*. By arguing that the contemporary *kafala* system is un-Islamic, human rights advocates might gain more traction across the Gulf and, ultimately, more protections for the migrant workers they seek to protect.