

DOCTOR OF PHILOSOPHY

Saudi Arabia and Human Trafficking: Poised between Sharī'a and International Law

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ABSTRACT

Human trafficking is considered to be a form of modern-day slavery or at least a practice that leads to the enslavement of people for exploitation and forced labour. This practice continues to exist in both historical and new forms in our contemporary society. As a symbol of the Islamic faith, coupled with its buoyant economy boosted by revenues from oil and gas resources, the Kingdom of Saudi Arabia (KSA) has been an attractive destination for many, including migrant workers. This has given rise to the consensual and non-consensual exploitation of people leading to human trafficking which is further exacerbated by the guardianship system (Kafala). This is in addition to anachronistic cultural views contrary to the true principles and practices under Islamic Sharīʿa, which is the predominant legal system in the country. Against this background, there are important questions to be asked; the research seeks to investigate the problem of human trafficking in the KSA and to what degree the prevailing laws adhere to international law and Islamic Sharīʿa in order to effectively combat this crime. Since contemporary international law considers that the principle of human trafficking is inextricably linked to the denial of the principle of human dignity, this research examines the relationship between human trafficking, the concept of human dignity, Islamic Sharīʿa and international human rights law. As the KSA is an Islamic country with a legal system based on Islamic Sharīʿa, the thesis investigates the framework of Islamic Sharīʿa in relation to human trafficking. It provides an in-depth analysis of Islamic and international approaches to combating human trafficking and concludes that the principles of Islamic Sharīʿa mostly do comply with international standards. However, the analysis also concludes that the laws and enforcement practices adopted by the KSA to prevent forced labour and slavery and other activities that lead to human trafficking are virtually ineffective. The analysis determines that these failures stem from the fact that the Kingdom neglects to properly adhere to Islamic

Sharī'a or international human rights law. In order to effectively eliminate human trafficking, the thesis suggests that the Kingdom re-evaluates its overall legal system and initiate the appropriate measures to comply with the frameworks of both Islamic Sharī'a and international human rights law.

Keywords: Human Trafficking, Islamic Sharī'a, International Human Rights Law, Kingdom of Saudi Arabia, Human Dignity, Exploitation, Forced Labour, Slavery

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LIST OF ABBREVIATIONS

ADHRB	Americans for Democracy and Human Rights in Bahrain
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDHR	Cairo Declaration on Human Rights
CEC	Council of Europe Convention on Action against Trafficking in Human Beings
CEDAW	Convention on the Elimination of All Form of Discrimination Against Women
CRC	Convention on the Rights of the Child on Human Rights
CRPD	Convention on the Rights of Persons with Disabilities
ESOHR	European Saudi Organisation for Human Rights
GCC	Gulf Cooperation Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHR	Islamic Charter of Human Rights
IHRL	International Human Rights Law
IICR	Initiative to Improve the Contractual Relationship
IIDHR	International Islamic Declaration of Human Rights
ILO	International Labour Organisation
Kafala system	Provisions of the sponsorship system
KSA	Kingdom of Saudi Arabia
LRII	Labour Relations Improvement Initiative
NCCTP	National Committee to Combat Crimes of Trafficking in Persons
NGOs	Non-Governmental Organisations
OPEC	Organization of Petroleum Exporting, Countries
Palermo Protocol	Protocol to Prevent, Suppress and Punish Trafficking of Persons, especially children and women
TIP	Trafficking in Persons
TOCs	Transnational Organised Crimes
TVPA	Trafficking in Persons Protection Act
UDHR	Universal Declaration of Human Rights

UIDHR	Universal Islamic Declaration of Human Rights
UNO	United Nation Organisations
UNODC	United Nations Office on Drugs and Crime
UPR	Universal Periodic Review
USA	United States of America
WPS	Wage Protection System

CHAPTER ONE

INTRODUCTION

1.1 Introduction

The Kingdom of Saudi Arabia (hereinafter, the KSA) continues to grapple with significant immigration challenges due to its geographical location, strategic position for religious rites, and stable economy.¹ Many people enter the country as legal migrant workers in various sectors,² while there are others who resort to illegal means.³ Some succeed in their endeavours, while others fall victim to human trafficking from criminal perpetrators who traffic, sell, or abuse them. Despite the government's apparent efforts to combat human trafficking, this inhumane practice continues for many reasons, such as social inequality, low socioeconomic background, and lack of education.

Slavery was practiced in the KSA until it was criminalised by the Ministerial Statement of 1962, which was enacted under the Slavery Act 1926.⁴ However, burgeoning economic growth in the

¹ GLMM, 'Demography, Migration, Labour Market in Saudi Arabia' (2018) <https://gulfmigration.grc.net/media/pubs/exno/GLMM_EN_2018_05.pdf> accessed 29 January 2023.

² Migrant Rights, 'Saudi Arabia signs agreements to recruit domestic workers from Sierra Leone, Thailand, and Burundi' (Migrant-Rights, 06 July 2022) < <https://www.migrant-rights.org/2022/07/saudi-arabia-signs-agreements-to-recruit-domestic-workers-from-sierra-leone-thailand-and-burundi/>> accessed 30 January 2023.

³ International Migration Report 2015: Migration and Displacement in a Changing Arab Region (United Nations and International Organisation for Migration, 2015) 16.

⁴ Suzanne Miers, Slavery and the slave trade in Saudi Arabia and the Arab states on the Persian Gulf 1921-1963' in Gwyn Campbell (ed), *Abolition and its Aftermath in Indian Ocean Africa and Asia* (1st edn, Milton Park, Abingdon: Routledge, 2005) 128. The decree to stop the slave trade and liberate the slaves in the kingdom of Saudi Arabia was issued on 8 Jumada Al Akhira 1382 AH/ 7 November 1962. This statement was published in Umm al-Qura newspaper No (1944) Friday 12 Jumada II 1382 which is corresponding to 09 November 1962.

KSA during the middle of the last century then attracted people from poverty-stricken neighbouring countries and those further afield creating an environment that exposed migrants to human trafficking. Consequently, the KSA initiated efforts to combat and criminalise human trafficking.⁵ During the last three decades, various laws regarding the proliferation of human trafficking have also been ratified, such as Article 2 (a) and (b) of the Protocol to Prevent Suppress and Punish Trafficking of Persons, especially Children and Women, (referred to below as the Palermo Protocol).⁶ These paragraphs provide:

The purposes of these Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children; and

(b) To protect and assist the victims of such trafficking, with full respect for their human rights.

Chapters Four, Five and Six, discuss the relevant legislation and policies enacted by the KSA include the following:

a. Royal Decree No M/26 on Border Security (1974);

b. Basic Law of Governance, 1992 (Royal Order No A/90 on Basic Law of Governance (1992);

c. Law of Criminal Procedure Royal Decree No M/39 (16 October 2001);

d. Saudi Labour Law, 2005 Royal Decree No M/51 on Saudi Labour Law (2005);

e. Royal Decree M/40 on Law for Combating Crimes of Trafficking in Persons (2009);

⁵ In particular, Saudi Arabia has signed up to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention against Torture and Other Cruel and Degrading Treatment (CAT). These conventions contain provisions concerning the prohibition of human trafficking, forced labour, domestic servitude and sexual exploitation.

⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (Palermo Protocol) (adopted 15 November 2000, entered into force 25 December 2003) UN Doc A/RES/55/25.

f. Regulation of Domestic Labour and Their Equivalents, Decree No. 310 issued on 07/09/1434 AH (2013).

To further strengthen the measures against human trafficking in the KSA, the government has introduced programmes that respond to the needs of the victims, such as the establishment of the National Committee to Combat Crimes of Trafficking in Persons (NCCTP) through the National Council of Ministers' Decision No. 244 of 20/7/1430 AH (13/7/2009). This body includes the Ministry of Social Affairs, the Ministry of the Interior, the Ministry of Justice, the Ministry of Culture and Information and the Ministry of Foreign Affairs. Its remit is to identify victims of trafficking and assist with a safe and guaranteed process for either repatriation of the victims back to their country of origin or permission to be resettled in the KSA.

The KSA remains an attractive destination for workers.⁷ Traffickers target the influx of migrants coming from neighbouring countries and from as far away as Bangladesh, Burma, Somalia, Kenya and elsewhere in Africa and South-Central Asia.⁸ Chapter Six, elaborates on how the influx of human trafficking has become a significant concern for the United Nations, NGOs and various international human rights organisations.⁹ Accordingly, a report from the US Department of State,¹⁰ 'Trafficking in Persons Report: Saudi Arabia' (TIP Report 2023),

⁷ Naeem Mohaiemen, 'Slaves in Saudi' The Daily Star (Vol 5 Delhi, 27 July 2004). < <https://archive.thedailystar.net/2004/07/27/d40727150297.htm>> accessed 25 February 2023.

⁸ US Department of State, 'Trafficking in Persons Report: Saudi Arabia' (June 2023) <https://www.state.gov/reports/2023-trafficking-in-persons-report/saudi-arabia/> accessed 10 July 2023; see also, ADHRB, 'Living as commodities: Human and sex trafficking in the GCC' (2016) <http://www.adhrb.org/wp-content/uploads/2016/11/ADHRB_Commodities_Web.pdf> accessed 16 November 2022.

⁹ Human Rights Watch, *As If I Am Not Human: Abuses against Asian Domestic Workers in Saudi Arabia* (HRW Publication 2008) 41.

¹⁰ US Department of State, 'Office to Monitor and Combat Trafficking in Persons' (*American State Government*) < <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-to-monitor-and-combat-trafficking-in-persons/>> accessed 25 February 2023; In 2000, the US Congress passed a law to protect victims of human trafficking by punishing perpetrators, protecting the victims,

states that the KSA is still among the primary destinations of trafficked persons in the Gulf Cooperation Council region (hereinafter the GCC region).

This thesis analyses the legal mechanisms adopted by the KSA to combat human trafficking while identifying the frameworks of International Law and Islamic Sharīʿa as practical tools to combat this crime. The thesis also examines the extent to which the KSA's legal mechanisms adhere to both legal frameworks.

The second section of this chapter sets out the research questions, while section three outlines the aim and objectives of the research. The study's contribution to current academic knowledge is discussed in the fourth section. Section five investigates the academic and theoretical justification for the study. The sixth section details the methodology employed, while the seventh section discusses methodological limitations. Finally, the research structure is outlined, and a summary of the chapters is provided.

1.2 Research Questions

The central research questions are:

- i. How is human trafficking defined in international human rights law and Islamic Sharīʿa?

and mobilising US government agencies to launch a global campaign against human trafficking. That law - in its last amendment - mandates the departments of State, Justice, Labour, Homeland Security, Health and Human Services, and the US Agency for International Development to prepare an annual report aimed at raising global awareness and prompting foreign governments to take effective measures to combat human trafficking. Since their enactment, these reports have largely focused on the efforts of the international community to exchange relevant information, and to adopt new and important ways to combat human trafficking. Countries that fail to take significant action to adhere to minimum standards for eliminating human trafficking receive a negative evaluation in this report. This negative assessment would recommend withholding non-humanitarian and non-commercial aid granted by the United States to that country.

- ii. What is human dignity, and how do concepts of dignity influence these definitions?
- iii. What are the legal mechanisms put in place by the KSA that aim to combat human trafficking?
- iv. How do these mechanisms comply with and balance international human rights law and Islamic Sharī'a principles and respective concepts of dignity?

1.3 Aim and Objectives of the Research

Although a number of scholars¹¹ have made attempts to discuss the problem of human trafficking in the KSA, there remain gaps in the scholarship in terms of exploring some of the existing systemic failures. These failures include the legal gaps concerning the nature and understanding of the problem of human trafficking in the KSA, its characteristics, and the effectiveness of the KSA's legislation in combating the crime. The aim of this study is to analyse and determine how effective the KSA's government's mechanisms have been in combatting the crime of human trafficking and whether these mechanisms adhere to both Islamic Sharī'a and the legal tools provided by international human rights law. In doing so, the meaning of human trafficking under the KSA's legislation and case law is examined. The discussion regarding the meaning of human trafficking also includes how it relates to the interpretation of the concept of human dignity under both international human rights law and Islamic Sharī'a. In an attempt to achieve these critical objectives, this thesis investigates the factors that are facilitating human trafficking to thrive, and those that are hindering the effective enforcement of laws against traffickers.

¹¹ Among these works are articles such as Ahmad Makhluf, 'Legal Procedures for Combating Human Trafficking at the National and International Levels: Saudi Arabia as a Mode' (2022) *Journal of the Institute of Public Administration* 1371; Abdulhamid Al-Harqan, 'Combating Trafficking in Persons and Protecting and Assisting Victims of Trafficking in the Kingdom of Saudi Arabia Under the UN Protocol' [2020] *Kuwait University Scientific Publication Council* 177.

The thesis also discusses how Islamic Sharī‘a complements and harmonises with international law with respect to human dignity. The study argues that the KSA will continue to face critical challenges in its efforts to eliminate human trafficking until its domestic legislation is improved and modernised to prevailing international standards. The difficulties set forth in this thesis involve the Kingdom’s failure to fulfil both international human rights law and Islamic obligations in order to effectively combat human trafficking. In essence, the thesis focuses its attention on specific areas that include;

- i. To discuss and investigate the definitions of human trafficking under international human rights law and Islamic Sharī‘a;
- ii. To identify the meaning of dignity, and examine how concepts of human dignity can influence the definitions of human trafficking;
- iii. To explain and discuss the efforts made by the KSA to combat human trafficking;
- iv. To critically analyse the extent to which the KSA’s human trafficking legislation is compatible with Islamic Sharī‘a, and international human rights law and respective concepts of dignity.

1.4 Contribution to Knowledge

Trafficking in persons involves the movement of individuals, either internally (i.e. within a single country) or across international borders, for the purpose of exploitation.¹² Internationally, there is a plethora of literature that broadly covers human trafficking. Academics including

¹² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (Palermo Protocol) (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25 art 3.

Obokata,¹³ Scarpa,¹⁴ Zimmerman,¹⁵ and Gallagher¹⁶ have extensively researched the international framework against human trafficking and discussed international measures designed to protect people and prevent trafficking. These studies also focused on human rights violations that are an integral part of the human trafficking process.

However, limited research has been conducted into human trafficking in the Middle East. Mattar is recognised as one of the leading academics who has undertaken research from an Islamic Shari‘a perspective within the Middle East,¹⁷ and he has examined the laws within Islamic countries that fail to implement anti-human trafficking laws in accordance with international laws. Additionally, his studies within the Middle East explore human rights legislation, the various ways people are trafficked within the Arab world, and the processes applied to combat human trafficking.¹⁸ However, Mattar's work does not specifically address human trafficking in the KSA. This research seeks to bridge this gap.

Given the provisions of the sponsorship system (herein referred to as ‘the Kafala system’) and how it is interpreted under Islamic Shari‘a, the KSA provides a valuable case study investigating the Kafala system impacts upon human trafficking, and its relationship between Islam Shari‘a and international law in the context of human trafficking. This study demonstrates

¹³ Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff 2006) 31; Carol S Brusca, ‘Palermo Protocol: The First Ten Years after Adoption’ (2011) 2 no. 3 Global Security Studies 1-13; Steward H Oppong, ‘Human Trafficking Through Organized Crime’ (2012) 2 International Journal of Humanities and Social Science 37.

¹⁴ Silvia Scarpa, *Trafficking in Human Beings Modern Slavery* (1st edn, Oxford University Press 2008).

¹⁵ Sarah Zimmerman, ‘Mending the Protection and Prosecution Divide. Looking at Saudi Arabia Human Trafficking Flaws and Possibilities’ (2016) 15 Washington University Global Studies Review 533.

¹⁶ Anne Gallagher, *the International Law of Human Trafficking* (Cambridge University Press 2010).

¹⁷ UN Office on Drugs and Crime (UNODC), ‘Combating Trafficking in Persons in Accordance with the Principles of Islamic Law’ (June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed 20 May 2022.

¹⁸ Mohammed Mattar, ‘Human Rights Legislation in the Arab World; The Case of Human Trafficking’ (2011) 33 Michigan Journal of International Law 101.

that Islamic Sharī'a is generally consistent with international law in the prohibition of exploitation and human trafficking.

However, there remains a dearth of literature on human trafficking at international level in relation to Islamic Sharī'a. It is noteworthy that most of the limited literature on human trafficking in the KSA is written in the Arabic language.¹⁹ These studies do not discuss or critically explain the extent to which the KSA's response to trafficking in persons is compatible with international human rights law and Islamic Sharī'a principles.²⁰

There is also almost no meaningful comparison between how Islamic Sharī'a is applied, and international standards concerning trafficking in persons. Moreover, because of the nature of society in the KSA, there is a shortage of literature critically analysing the KSA's approach to combating trafficking. In particular, research on migrant workers is brief, unreliable, or unavailable, rendering literature within the KSA to be insignificant. There are a few studies concentrating on which school of thought in Islamic Sharī'a is dominant within the KSA's legal system and how this might affect its response to trafficking in persons.²¹ However, for the most part, the literature on the political structures of the KSA's approach to combating trafficking is not robust. In particular, information about the legal system is limited.²² It should also be noted

¹⁹ For example, Muhammad Yasser, 'The legal framework for the protection of victims of trafficking in persons in the Saudi system: a comparative analytical study' [2020] *Journal of humanities and administrative sciences* 60.

²⁰ Among the key scholars are, Al-Harqan, Ababneh, Makhoulf, Al-Shahrani and Khorram. A primary objective of their studies was to demonstrate that Saudi law is consistent with international law. In addition, these studies did not discuss or explain whether Saudi human trafficking regulations are compatible with Islamic Sharī'a principles.

²¹ For example, Nasser Al-Shahrani, *The National Legislative Framework for Combating Human Trafficking in the Kingdom of Saudi Arabia* (Naif Arab University Press for Security Sciences Riyadh 2008).

²² Hossein Esmaeili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26 *Arizona Journal of International and Comparative Law* 1.

that migrant workers' rights appear to have been addressed in some detail in Islamic literature.²³ However, in the KSA, there is a limited focus on setting standards for labour rights, on migrant domestic abuses, and in relation to human trafficking.

This thesis attempts to compare human dignity under Islamic Sharī'a and international human rights law relating to trafficking in persons, and how it is treated and regulated under both systems. Consequently, the thesis bridges an important gap in comparison to previous studies relating to human trafficking by examining Islamic, international and regional anti-trafficking frameworks, especially in the area of preventing and suppressing this crime and the duty of the state to protect and assist victims of human trafficking. This is followed by an evaluation of the actions, practices and responses of the KSA within these frameworks. The extent of the critical comparative analysis illustrated within this thesis constitutes an original contribution to the body of research, since it has not been attempted before in legal literature, in either the English or the Arabic language.

1.5 Academic/ Theoretical Justification

The importance and significance of this study is to draw attention to the fact that currently there is considerable risk of the practice of human trafficking in the KSA.²⁴ This subject is gaining more importance in GCC countries due to their powerful political positioning within the Islamic world and beyond.²⁵ There is also a link between some aspects of human

²³ Abdulrahman Ghunaim and Alaa Bakeer, 'The crime of human trafficking A critical analytical study in the light of some international and Arab legislation' [2020] A generation of in-depth legal research 93.

²⁴ US Department of state, 'Trafficking in Persons Report: Saudi Arabia' (June 2020) <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> accessed 21 August 2022.

²⁵ The Royal Embassy of Saudi Arabia, 'Islam' (*Saudi Arabia's Embassy in Washington DC*) <https://www.saudiembassy.net/islam#:~:text=The%20Kingdom%20of%20Saudi%20Arabia%20is%20the%20heartland%20of%20Islam,areas%20of%20government%20and%20society> accessed 21 October 2022.

trafficking and Islam.²⁶ Critics argue that Islam condones exploitative behaviours such as sex trafficking due to the unequal or discriminatory status afforded to women in Islamic practice.²⁷

Many people in the KSA and other parts of the world who have become victims of human trafficking are forced to serve under poor and degrading conditions which are clear violations of human rights.²⁸ The condition of these people, mostly from poor countries, has often remained unchanged for many years due to a lack of appropriate legislation to address these challenges or the absence of political will to enforce existing rules. This is most prevalent among migrant domestic workers, such as private chauffeurs, and housekeepers, who account for up to 3,704,641 people in the KSA.²⁹ Compounding this challenge is the fact that many of these migrant workers are people who have been trafficked into the KSA, resulting in economic exploitation, forced labour, servitude, and prostitution. Unfortunately, illegal immigration and the KSA's practice of Kafala³⁰ (visa sponsorship), for instance, have allowed for the crime of human trafficking to flourish.³¹ Chapter Five discusses how the 'Kafala system' is inextricably linked to employment visas. This system, which emerged in the 1950's, regulates the relationship between employers and migrant workers, and binds the employee's

²⁶ The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 21 October 2022.

²⁷ *ibid*; see also Youssef Hassan, *The Crime of Slavery and Human Trafficking According to International Laws and Ways to Combat It* (National Books and Documents House Egypt 2013) 377.

²⁸ International Migration Report 2015 (n 3).

²⁹ UN Committee on the Elimination of All Forms of Racial Discrimination, 'Combined tenth and eleventh periodic reports submitted by Saudi Arabia under Article 9 of the Convention due in 2020' (27 February 2023) UN Doc CERD/C/SAU/10-11, para 120.

³⁰ See Abdul Rahman Saud, *Contemporary Guarantees* (Vol 2, King Fahd Library Riyadh 2004) 720.

³¹ UNHRC, 'Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/12: Saudi Arabia' 17th session (July 2013) UN Doc A/HRC/WG.6/17/SAU/3 para 70.

immigration status to the employer.³² The worker's remuneration is based on a salary, together with living accommodation in exchange for labour.³³

The Saudi Kafala system, particularly on domestic workers, is chosen as a case study because it grants sponsors various legal powers and controls over migrant workers, while establishing a vulnerable position for the employee within the relationship.³⁴ This prerogative goes beyond the legal relationship between employer and employee, which is regulated by labour laws and governed by a contract formalised with signatures of both parties.³⁵ These legal powers include the right to cancel migrant workers' residency visas if workers act without sponsors' permission.³⁶ Once cancelled, workers become illegal residents, at the risk of deportation or imprisonment.³⁷ Some believe that the sponsorship system therefore enables human trafficking through the denial of human rights, free movement, and the inability to change jobs or to leave the country even in emergency circumstances unless approval and consent is granted by the

³²Global Detention Project, 'Submission to the UN Committee on the Elimination of Discrimination against Women: Saudi Arabia' (June 2017) <<https://www.globaldetentionproject.org/submission-to-the-un-committee-on-the-elimination-of-discrimination-against-women-saudi-arabia>> accessed 2 May 2022.

³³ International Labour Organisation (ILO), 'Reform of the Kafala (Sponsorship) System', Policy Brief No 2 (2012) <<https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>> accessed 15 May 2022.

³⁴ Sovereign ordinance No. (2632) of 20 July 1962 states: "It is not legally permissible to deal financially with any non-Saudi except with the written consent of his/her sponsor or the one who brought them to Saudi. Under this consent, a person can sue the sponsor if the worker does not comply."

³⁵ Domestic workers cannot exercise basic rights without the consent of their sponsors. In other words, these rights do not become effective unless the sponsor agrees to them. These rights include opening a bank account, obtaining a driver's licence, renewing a residence card, bringing his/her family, visiting his or her relatives, getting married; even in the event of his/ her imprisonment, arrest or detention, he/she is not released without the presence of the sponsor. See the National Society for Human Rights 'Abolishing kafala provisions and reform the relationship between the employer and the migrant worker' (2008) the kingdom of Saudi Arabia, 4-9. See also Abdel Aal Derby 'The Obligations arising from the International Charters', (2011) National Centre for Legal Publications.

³⁶ibid; See also The Global Detention Project and Migrant-Rights.org, 'Submission To The UN Committee On The Elimination Of Discrimination Against Women: Saudi Arabia' (Global Detention Project and Migrant-Rights.org 2018).

³⁷ ADHRB's Submission to the Committee on the Elimination of Racial Discrimination Concerning Abuses Perpetrated by Saudi Arabia against Migrant Laborers <https://www.adhrb.org> accessed on 13 Aug 2023. See also the Global Detention Project and Migrant-Rights.org, 'Submission To The UN Committee On The Elimination Of Discrimination Against Women: Saudi Arabia' (Global Detention Project and Migrant-Rights.org 2018), https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SAU/INT_CEDAW_NGO_SAU_30032E.pdf accessed 5th August 2023.

employer.³⁸ The Kafala system empowers sponsors to the extent that they have the right to confiscate employees' passports, fostering the denial of freedom and basic rights.³⁹ As research shows, in relation to migrant domestic workers, there have been numerous reported allegations of violence against domestic workers.⁴⁰ In addition, there are other types of violations, for example, overwork, non-payment or reduced wages, or being forced to work in more than one household and the denial of days off. The research literature also reveals that domestic workers often live in poor conditions.⁴¹ Questions regarding employment timings and personal protection are rarely discussed.⁴² This has resulted in rampant abuses and various forms of exploitation. Child labour and forced labour as well as sexual assault are common occurrences among domestic migrant workers.

It is noteworthy that domestic workers are mostly vulnerable to exploitation under this system, as they are excluded from the protection of labour laws which protect other workers.⁴³ Instead, they are covered by distinct regulations under the Kafala system that provide less protections. For example, when a sponsor brings a domestic labourer to work into his or her home, they are often denied freedom of movement and are either locked inside or forbidden to leave the

³⁸ *ibid.*

³⁹ The regulations for recruitment affairs, in the context of determining the responsibilities of the sponsor and the sponsored person, stipulated as follow: "The sponsor has the responsibility to receive the sponsored person upon his arrival in the country who then has the duty to hand his or her passport to his sponsor. This process is required due to the fear of a sponsored person's escape. Therefore, the government, will not be able to know his or her place." See Shehata Ahmed, "sponsorship of residence and travel (a comparative study between jurisprudence and the Saudi system)" (2021) *Journal of the College of Islamic and Arabic Studies for Girls in Alexandria* 5 (3) 467 435.

⁴⁰ See the Human Rights Commission, Report on the Status of Human Rights in the Kingdom of Saudi Arabia 1433 AH / 2012 AD (Human Rights Commission: Riyadh, 1433 AH) 54

⁴¹ Romina Halabi, 'Contract Enslavement of Female Migrant Domestic Workers in Saudi Arabia and the United Arab Emirates', (2008) *Human Right and Human Welfare*, pp.43-58. Available at: <https://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.692.2351> accessed 06 January 2022; see also Report of the Special Rapporteur on extreme poverty and human rights on mission to Saudi Arabia to the 35th session of the Human Rights Council of the UN General Assembly, June 2017 A/HRC/35/26/Add.3.

⁴² The regulation of domestic service workers and suchlike did not specify the daily or weekly working hours. It was content with stipulating that the worker should enjoy rest for not less than 9 hours per day. It did not guarantee the domestic worker the right to weekly leave and make granting it subject to the approval of the employer.

⁴³ *ibid.*

premises without permission and unfortunately, they often face physical, psychological, and sexual abuses. This denial of freedom is said to be justified to protect sponsors' own financial interests from financial losses associated with paying very high fees to brokers (about 8 thousand dollars). Also at times, the high costs incurred lead to overburdening of the labourer.⁴⁴ The malevolent combination of the lack of legal protection, legally permitted vulnerability, abuse and exploitation has led several researchers and campaigners who consider the Kafala system to be a type of modern-day slavery in the country.⁴⁵

This research examines the extent of these violations and the abuses incurred through the Kafala system and argues that if the KSA is determined to eliminate human trafficking they must start by adhering to both international law and Islamic Sharī'a and abolish the Kafala system.

Over the years, criticisms have continued to arise concerning the subject of inhuman treatment of victims of modern slavery in the KSA, especially victims of human trafficking. In response to these growing and evolving patterns, the KSA's legal regime has made attempts through Islamic principles, and rules governing the principles of human dignity and human rights to address this problem. However, despite the expressed commitment of the KSA over the last two decades to uphold human rights through domestic legislation according to principles of Islamic Sharī'a and to establish programmes for the protection of labourers and migrant workers, it is evident that the enforcement of these legal and policy mechanisms remain far from adequate. This thesis therefore illustrates that the aforementioned failures are highly

⁴⁴ UN Doc A/HRC/35/26/Add.3 (n 13), para 51-53.

⁴⁵ See, e.g., Cole McCann-Phillips, *Domestic Worker Abduction Shows Urgency of Kafala Slavery Case*, Pulitzer Ctr., <https://pulitzerCentre.org/stories/domestic-worker-abduction-shows-urgency-kafala-slavery-case>.

unsatisfactory. Research suggests a lack of will and commitment to implement these laws as cases of abuse and violations continue to rise.⁴⁶ While it is noted that the KSA has ratified many international labour and human rights conventions, there are other conventions that need to be ratified such as the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the 2011 Domestic Workers Convention,⁴⁷ the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁸ The thesis concludes by proposing recommendations for changes in policy, law, social structure and social-legal mechanisms in order to prevent unjust treatment of migrant workers and human trafficking in the KSA.

1.6 Methodology of the Research

This legal research seeks to clarify the offence of people trafficking from the perspectives of international law, the KSA and Islam. Notwithstanding that the central focus of this thesis is on the Saudi Arabian government's approach to human trafficking, it is critical to position this analysis within the framework of Islamic Shari'a and international law. As part of the research methodology for this study, a critical analytical method and doctrinal legal research are utilised. McConville and Chui refer to doctrinal analysis as a 'black-letter approach' while discussing methodologies.⁴⁹ Through the application of the doctrinal analysis, this thesis provides a comprehensive examination of the adoption of anti-trafficking laws both nationally and internationally. This approach was adopted as a means of further enhancing understanding of

⁴⁶ Romina Halabi, 'Contract Enslavement of Female Migrant Domestic Workers in Saudi Arabia and the United Arab Emirates' (2008) 8 Human Right and Human Welfare 43.

⁴⁷ C189 - Domestic Workers Convention, (adopted 16 June 2011, entered into force 05 September 2013).

⁴⁸ UNHRC, 'Compilation on Saudi Arabia' 31st session (August 2018) UN Doc A/HRC/WG.6/31/SAU/2 para 2.

⁴⁹ Mike McConville and Wing Hong Chui, *Research Methods for Law* (2nd edn, Edinburgh University Press 2007); see also, Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83.

human trafficking by providing legal perspectives and definitions.⁵⁰ The investigation has been conducted by means of desk-based research, that analyses the law (international, Shari'a, and domestic) both in relation to human trafficking and dignity.

Doctrinal analysis is a systematic examination of recent legal developments with the purpose of identifying the fundamental principles and concepts that constitute legal doctrine. Furthermore, it investigates the formulation and application of legal concepts. A comprehensive analysis using legal reasoning and interpretation is conducted under this approach. As part of this technique, the researcher uses analytical tools to participate in legal reasoning and interpretation in a completely legalistic manner. A doctrinal analysis, as described by Slater and Mason, is a comprehensive and rigorous examination of legal theory, accompanied by a systematic explanation of how it is incorporated into the legal system. This doctrine is considered to be an authoritative and self-contained collection of laws that are all-encompassing.⁵¹

Doctrinal analysis mainly depends on primary materials, both local and international. Consequently, it has a crucial function in maintaining the principles of openness in the legal system and in elucidating the interpretations of legal clauses in a straightforward and succinct way. The primary sources for this dissertation consist of treaties, conventions, declarations, covenants, statutes, case laws, national and international, as well as the Qur'an and the Sunna of the Prophet Muhammad (PBUH), which are informally referred to as 'black letter laws'. The work establishes Islamic Shari'a measures that specifically address the criminal activity of

⁵⁰ *ibid.*

⁵¹ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman 2007).

human trafficking and its interconnected components, in accordance with their objectives. Regarding the primary origins of human trafficking, a legal analysis from the standpoint of international law is performed. Among the primary sources of international human rights instruments are the following:

- i. Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 09 March 1927);
- ii. Universal Declarations of Human Rights (adopted 10 December 1948);
- iii. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976);
- iv. International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 01 January 1976);
- v. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (Palermo Protocol) (adopted 15 November 2000, entered into force 25 September 2003).

Among the perspectives of Islamic Sharia are:

- i. The Islamic Charter of Human Rights of 1980 (ICHR);
- ii. The International Islamic Declaration of Human Rights of 1981 (IIDHR);
- iii. The Islamic Declaration of Human Rights of 1989 (IDHR) and;
- iv. The Cairo Declaration on Human Rights in Islam of 1990 (CDHR).

It is essential to have a comprehensive knowledge of the Saudi Trafficking in Persons (Offences) Act, which was enacted by Royal Decree No. M/40 on July 14, 2009.

Furthermore, the research also employs secondary sources by studying, reviewing and critically analysing materials written by academic legal scholars from books, articles, and research papers published in peer reviewed journals. The secondary sources of Islamic Shari'a for this thesis consist of (*ijtihad*) 'the striving of a legitimate scholar to reach a religious verdict', Islamic rulings addressing issues not present at the time of the Prophet (*fatwa*⁵²), consensus of the earliest generations of Muslims (*ijmā'*), rulings based on analogy (*qiyās*), other sources of *fiqh* such as unrestricted public interest (*Maqāṣid al-sharī'a and Maṣlaḥa*), and custom (*urf*), which are called *usul al-fiqh* rule. It critically examines the basic law (constitutional) and legal provisions governing the exercise of the Kafala system by the KSA Government and then the extent of the convergence and divergence between the KSA's regulations drawn from Islamic Shari'a with international conventions on human rights and human trafficking. Additionally, the research explores non-binding agreements at regional and worldwide levels, including publications authored by governments, scholars, and non-governmental organisations. It draws upon the established and improved norms and principles on human rights, which have been developed via UN Charter processes such as the Special Rapporteurs on Violence Against Women and Trafficking in Persons (TIP). They are further impacted by the findings from the Human Rights Committees' treaty monitoring procedures. An analysis of the legal principles established by these documents is undertaken to elucidate the human rights responsibilities imposed on member nations, particularly the KSA.

The research also explores how the theories and concepts of human dignity have influenced international human rights instruments and how these concepts are interpreted in the Islamic

⁵² In Arabic, فتاوى a fatwas is a legal ruling given by a qualified jurist on a point of Islamic law (Shari'a) in response to a question posed by a private individual, judge, or government.

world and its religious books including the Holy Qur'ān and Sunna.⁵³ As the main source of Islamic Sharia, these books serve as the KSA's guiding principle. For example, Article 26 from the KSA's Basic Law of Governance provides that

‘the State should protect human rights in accordance with the Islamic Shari‘a’.

The crime of human trafficking has implications that affect every sphere of the social, political and economic lives of citizens and victims alike. These implications are considered and examined in this thesis, taking into account the academic limitations of the methodologies used, as discussed in the next section.

1.7 Methodological Limitations

Within the KSA's Ministry of Justice, there remains a lack of transparency with regards to documenting and publicising court judgments. Therefore, this makes it difficult to analyse the application of international and regional instruments. A further important point is that proceedings involving victims are frequently conducted in secret sessions, with the public generally excluded. There is an additional significant consideration regarding judges in the KSA, who have substantial discretion in making their decisions.⁵⁴ Additionally, the absence of codified substantive civil and criminal regulations may result in discrepancies, making it impossible to streamline practices and reach definitive conclusions based on court decisions. In

⁵³ The Holy Qur'ān and the Sunnā are the two origins of the sources of law, followed by consensus, and then the analogy. The two origins of the law sources are incorporated into the Saudi constitution as two main sources of the state. Article 1 of the Basic Law of Governance states that ‘The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic, and its capital shall be the city of Riyadh’.

⁵⁴ Amnesty International, Behind Closed Doors: Unfair Trials In Saudi Arabia, 1 November 1997, MDE/23/08/97, available at: <https://www.refworld.org/docid/3ae6a98d8.html> accessed 17 August 2023.

addition, it is worth noting that since the Anti-Trafficking Act was passed in 2009, not many cases of human trafficking have been brought before the courts.⁵⁵

One of the few sources of reference is the KSA government's reports provided to the United Nations (UN) or non-governmental organizations (NGOs), as well as brief recorded audio conversations from the KSA's government meetings. It is also possible to find additional sources of information through the Universal Periodic Review (UPR) mechanism of the UN Human Rights Council and its meetings, where governments can detail actions they have taken to promote human rights in their countries and to perform their obligations under human rights law. Several reports relevant to the issue have been released at national level by the KSA's government, including the reports of the KSA's Human Rights Commission⁵⁶ and the Ministry of Justice's annual reports.⁵⁷

⁵⁵ UN Committee on the Elimination of Discrimination against Women (CEDAW), 'Concluding observations on the combined third and fourth periodic reports of Saudi Arabia' (14 March 2018) UN Doc CEDAW/C/SAU/CO/3-4, para 35.

⁵⁶ Saudi Arabian Standing Committee to Combat Human Trafficking, 'Annual Report, 2011'.

⁵⁷ Ministry of Justice, Research Centre, set of court verdicts (Riyadh, 2015).

1.8 Structure and Outline of the Thesis

This thesis comprises of six further chapters, which are as follows:

Chapter Two: Human Trafficking and International Human Rights Law

This chapter discusses definitions of the concept of human trafficking under different international conventions and agreements, including the Council of Europe Convention on Action against Trafficking in Human Beings (CEC), the United Nations Universal Declaration on Human Rights (UDHR), and the Palermo Protocol provisions. The chapter proceeds to highlight the different forms of human trafficking under international human rights law, discusses the root causes of the problem and provides examples of human trafficking. Additionally, it addresses and emphasises the importance of the concept of human dignity from the perspective of principles and provisions that may be applied in understanding and combating human trafficking. The chapter clarifies that human dignity and rights are universal, and that therefore victims of human trafficking are protected by these rights regardless of their sex, age, racial, ethnic, or national origin, immigration status, or any other possible type of discrimination.

Chapter Three: Human Trafficking and Islamic Sharīʿa

This chapter investigates the Islamic legal framework in relation to human trafficking, based on the sources of Islamic Sharīʿa and the differing views taken by Islamic Sharīʿa towards human trafficking. It defines the term ‘human trafficking’ in the Arabic language and in relation to Islamic laws and focuses on the various practices and forms of human trafficking which are prohibited under both Islamic Sharīʿa and international human rights law. It also critically analyses the respective penalties imposed for the crimes of human trafficking under Islamic Sharīʿa. The chapter then discusses the concept of human

dignity under Islamic Sharīʿa and its influence on how human trafficking is defined from an Islamic Sharīʿa perspective. The chapter demonstrates that Islam has not only supported a set of rights that preserve human dignity but has also instituted a series of punishments in civic society to prevent the abuse of these rights. Although there are no explicit written texts in the major sources of Islamic Sharīʿa prohibiting human trafficking, since it is a contemporary term, the chapter concludes that many customs and actions that contribute to trafficking are clearly prohibited. Moreover, Islamic Sharīʿa is appropriately positioned to supplement and support the international framework for combating human trafficking.

Chapter Four: Human Trafficking in the Kingdom of Saudi Arabia

This chapter identifies/explains/discusses the problem of human trafficking in the KSA and posits whether or not the government makes sufficient efforts to prevent and suppress the crime. The chapter analyses the legal framework developed by the KSA to combat trafficking in persons as well as the compatibility of these legal mechanisms with international human rights law and the concept of dignity. It also examines the state's duty to protect victims of human trafficking. Challenges regarding the application of the Anti-Human Trafficking Law stem from the fact that there are two definitions of this crime in the KSA's law resulting in an overlap between the crime of human trafficking and other crimes. Consequently, the government may punish both the perpetrators and the victim, thus depriving the victim of due protection in accordance with the provisions of international human rights law. The chapter also critically analyses an identified deficiency in the KSA's law which does not coherently define the forms of exploitation that correspond to the KSA's legal environment. Therefore, those entrusted with the application of the law need to refer to international conventions to understand what is meant, which might be difficult or impossible. This is because the concept of exploitation in itself remains complex due to the fact that its meanings and interpretations vary according to different legal and religious environments.

Chapter Five: The Kingdom of Saudi Arabia's Kafala System and Human Trafficking

This chapter provides an analysis of the practice of the slave trade and its association with the sponsorship system (Kafala). The chapter investigates how this system violates both international human rights law and the principles of Islamic Sharīʿa in particular in relation to migrant domestic workers, and how this issue can be addressed. This chapter proposes that Islamic Sharīʿa should be interpreted through a process of ijtihad⁵⁸ in accordance with the Hanbalī school of thought which was adopted by the KSA in an effort to establish protection for victims of the crime of human trafficking in accordance with international human rights law. The chapter also explains and discusses the measures taken by the KSA's authorities to combat human trafficking crimes and to improve the humanitarian condition of its migrant workforce by launching the Initiative to Improve the Contractual Relationship (IICR) and revising the Kafala system. Furthermore, the chapter recommends detailed steps and measures to be implemented to mitigate the current rules and implications of the provision of the Kafala system with respect to migrant domestic workers by adopting the practice of the Islamic Sharīʿa in accordance with the Hanbali doctrine.

Chapter Six : Conclusion and Recommendations

This chapter provides a summary of the conclusions of the preceding chapters in terms of the nature of human trafficking, its relationship to international human rights law and Islamic Sharīʿa, its connection with human dignity, and the effectiveness of the measures taken by the KSA's authorities to combat human trafficking. The chapter provides a series of recommendations to confront human trafficking in the KSA and it concludes with a consideration of possibilities for future research.

⁵⁸ Ijtihād, (Arabic: 'effort') in Islamic law, the independent or original interpretation of problems not precisely covered by the Qur'ān, Hadith (traditions concerning the Prophet Muhammad's life and utterances), and ijma' (scholarly consensus)

CHAPTER TWO

HUMAN TRAFFICKING AND INTERNATIONAL HUMAN RIGHTS LAW

2.1 Introduction

Transnational Organised Crimes (TOCs) are a threat to the peace, stability and security of the world.⁵⁹ These crimes have been a serious problem for most of the 20th century⁶⁰ and take various forms including terrorism, drug, arms and human trafficking.⁶¹ Human trafficking is a form of TOCs that has proven difficult to combat.⁶² Human trafficking involves the trafficking of humans both across international borders, and within national and domestic borders, for the purposes of exploitation of people as commodities to generate money.⁶³ Human trafficking is now a multibillion dollar industry comparable to the arms and drug trades.⁶⁴

Consequently, States under international law are committed to fighting human trafficking. However, governments historically have had difficulties in addressing the problem as organised

⁵⁹ The National Security Council, 'Transnational Organized Crime: A Growing Threat to National and International Security' <<https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat>> accessed 12 January 2022.

⁶⁰ Louise I Shelley, 'Transnational Organized Crime: An Imminent Threat to the Nation-State?' (1995) 48 *Journal of International Affairs* Editorial Board 463.

⁶¹ The National Security Council (n 1).

⁶² Khaled Fahmi, *The Legal System for Combating Human Trafficking Crimes; a Comparative Study* (Dār Al-Fikr Al-Jamii Alexandria 2011) 1-2.

⁶³ Conny Rijken and Dagmar Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (2009) 2009 *Security and Human Rights Journal* 212.

⁶⁴ UNODC, Human trafficking and the multi-billion dollar sale of people (*UNDOC*, 19 July 2012) <https://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking_-_organized-crime-and-the-multibillion-dollar-sale-of-people.html> accessed 30 March 2023; see also Carmen Niethammer, 'Cracking the \$150 Billion Business of Human Trafficking' (*Forbes*, 02 February 2020) <<https://www.forbes.com/sites/carmenniethammer/2020/02/02/cracking-the-150-billion-business-of-human-trafficking/?sh=4c3524e84142>> accessed 31 January 2023.

syndicates and criminal gangs perpetrate this form of crime with persistence and sophistication.⁶⁵ Also, national laws that criminalise human trafficking are often inadequate to prosecute this international form of criminal activity.⁶⁶

This crime is practiced on a global level and poses a threat to the international security and stability of the world.⁶⁷ As the crime of human trafficking targets humans it also leads to violations of human dignity and therefore it needs to be confronted with tenacity by all stakeholders in society.⁶⁸ The crime is one of the manifestations of modern slavery, which was formerly openly condoned, sanctioned and allowed by states, and is now prohibited,⁶⁹ though still practiced in some countries.⁷⁰ These crimes have serious political, economic and social implications with repercussions in every aspect of society.⁷¹ Although rooted in the practice of slavery, 'human trafficking' is a relatively recent term, first appearing in 1904.⁷² The crime has gained special importance as a result of its violation of the basic freedoms and dignity of human beings.⁷³

⁶⁵ Marina Caparini, 'Human Trafficking and Organized Crime' in Wilhelm Hofmeister and Patrick Rueppel (eds), *Trafficking in Human Beings: Learning from Asian and European Experiences* (Singapore Konrad-Adenauer Foundation and European Union 2014).

⁶⁶ Rijken and Koster (n 5).

⁶⁷ The National Security Council (n 1); see also Mohamed Mattar, 'Human Security or State Security? The Overriding Threat in Trafficking in Persons' (2006) 1 *Intercultural Human Rights Law Review* 249.

⁶⁸ Thiab Al-Bidayina and Rafi Al-Kharisha, 'Human Trafficking: Causes and Consequences' (2013) Vol 29 *The Arab Journal for Security Studies and Training* 403.

⁶⁹ Karen E Bravo, 'Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade' (2007) 25 *Boston University International Law Journal* 207.

⁷⁰ OCHA, 'Which countries have the highest rate of modern slavery and most victims?' (*Reliefweb*, 30 July 2018) < <https://reliefweb.int/report/world/which-countries-have-highest-rates-modern-slavery-and-most-victims> > accessed 31 January 2023.

⁷¹ *ibid*; see also Al-Bidayina (n 10).

⁷² Tabitha Bonilla and Cecilia Hyunjung Mo, 'The evolution of human trafficking messaging in the United States and its effect on public opinion' (2018) 39 *JPP* 201.

⁷³ Fahmi (n 4) 1-2.

Perpetrators of human trafficking take advantage of the porous borders that exist between countries, together with the ease of transportation between them.⁷⁴ In response to this fast-growing issue, the UN has produced legal frameworks aimed at combating, suppressing and prohibiting human trafficking.⁷⁵

UN efforts in this regard include the United Nations Convention against Transnational Organised Crime in 2000, and the Protocol to Prevent Suppress and Punish Trafficking of Persons, Especially Children and Women, which came into force on 25 December 2003. This Protocol represents the first serious international attempt to deal with human trafficking on an organised and comprehensive basis.⁷⁶ Although the Protocol when originally proposed was limited only to combating trafficking of women and children, it has since been expanded to include all cases of human trafficking, including men.⁷⁷ However, the title of the Protocol in its final form reflects the fact that statistics show that women and children are the most vulnerable to the crime of human trafficking.⁷⁸ The Protocol aims to prevent and suppress human trafficking, especially of women and children, and to provide the necessary protection and

⁷⁴ United Nations: UNODC Regional Office for Southeast Asia and the Pacific, 'Border Management', (*UNODC*) <<https://www.unodc.org/roseap/en/what-we-do/toc/border-overview.html>> accessed 27 August 2022.

⁷⁵ See some of the analysis of these efforts by the UN in Abdulatif Dehia, 'United Nations Efforts to Combat Trafficking in Persons' [2014] ASJP Journal 134.

⁷⁶ See the Palermo Protocol preamble. This Protocol was ratified by the KSA in 2007. It is considered one of the most important previous international attempts to deal with the phenomenon of trafficking in persons, as contained in Article (6) of the Convention on the Elimination of All Forms of Discrimination against Women, which was adopted and offered for signature, ratification and accession under United Nations General Assembly Resolution No. (34/ 180) dated 18 December 1979 and entered into force on 03 September 1981. It stipulates that 'States Parties shall take all appropriate measures, including legislative, to suppress all forms of traffic in women and the exploitation of the prostitution of women.' In addition, Article (35) of the Convention on the Rights of the Child, adopted and presented for signature, ratification and accession pursuant to United Nations General Assembly Resolution No. (44/25) dated 20 November 1989, and entered into force on 02 September 1990, stipulates the following: 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, sale or traffic in children for any purpose or in any form'.

⁷⁷ Salwaa Almifriji and Nozad Shwany 'Protecting women from human trafficking at the international and local levels' [2017] Journal of College of Political Sciences 7.

⁷⁸ UNODC, *Global Report on Trafficking in Persons* (United Nations Publication 2018) 25.

assistance to victims of this crime in a manner that fully respects their human rights, along with strengthening cooperation between State Parties to achieve these goals.⁷⁹

As of 2023, the Protocol has been ratified by 181 countries or regional organisations for economic integration⁸⁰ and, as of 2018, 168 countries had criminalised human trafficking in the spirit of the provisions of the Anti-trafficking Protocol.⁸¹ Although the Protocol provides an internationally accepted definition of human trafficking under international human rights law, this chapter argues that there are some gaps within it. These gaps can affect the way in which human trafficking is addressed especially where states register reservations to some of the provisions of the Convention and Protocol.⁸² This chapter also proposes the utilisation of the concept of human dignity to combat the basic causes of human trafficking under international human rights law. To do so, the chapter critically analyses human trafficking by considering its political, economic, and social causes, as well as the usefulness of the concept of human dignity under international instruments. The chapter also includes how the KSA has ratified a number of international instruments prohibiting slavery, human trafficking, servitude, and discrimination. Although not all of these pieces of legislation are directly related to human trafficking, many relate to the dignity, equality, and protection of human beings. These are issues directly or indirectly associated with human trafficking.

⁷⁹ The Palermo Protocol, art 2.

⁸⁰ United Nations Office on Drugs and Crimes, 'The Protocol' (UNDOC) <<https://www.unodc.org/unodc/en/human-trafficking/protocol.html>> accessed 05 February 2022.

⁸¹ Abdulhamid Al-Harqān, 'Combating Trafficking in Persons, Protecting and Assisting Victims of Trafficking Under the United Nations Protocol' (2020) 3 Law Journal of Kuwait University Scientific Publication Council 177; see also UNODC, *Global Report on Trafficking in Person* (United Nations Publication 2018) 45.

⁸² For example, the Kingdom has expressed reservations regarding paragraph 3 of Article 6, paragraph 1 of Article 7, and paragraph 2 of Article 15 of the Protocol in question.

Section two of the chapter discusses the concept of human trafficking, so that a workable definition and understanding of this concept can be identified. Section three includes an explanation of the different forms of human trafficking. Section four explains the political, economic, and social causes that have led to the spread of human trafficking. As a result, recognising these causes helps in identifying ways to eliminate the crime through international human rights law. Additionally, the section presents the limitations of the Palermo Protocol regarding the protection and assistance of human trafficking victims. The fifth section discusses the usefulness of the concept of human dignity in international human rights law. Section six outlines the contents of the conventions and instruments signed by the government of the KSA that are directly related to the issue of human trafficking. Section seven concludes the chapter.

2.2 Definitions of the Concept of Human Trafficking

In an era of the expansion of international relations, trade, globalisation, and economic inequality between developed and developing nations, human trafficking has become increasingly prevalent. The historical era of legal enslavement can be interpreted as the precursor to modern human trafficking.⁸³ Various authors and international organisations and agencies have attempted to define the concept of human trafficking. These definitions vary according to the programme of each organisation or agency, as outlined below. Arriving at a shared legal definition has become extremely difficult for various reasons ranging from lack of clarity as to the main constituents of the crime, to divergent legal interpretations and lack of standardisation and harmonisation.⁸⁴

⁸³ Rijken and Koster (n 5).

⁸⁴ Coster van Voorhout, Jill E.B, 'Human Trafficking for Labor Exploitation: Interpreting the Crime' (2007) 3 Utrecht Law Review 44.

Other reasons for the lack of a standardised definition of the term ‘human trafficking’ include problems associated with other concepts such as smuggling,⁸⁵ illegal immigration, forced labour, servitude, etc.⁸⁶ Therefore, this section discusses in two separate sub-sections the definition and understanding of the concept and practice of human trafficking within international conventions and agreements. Firstly, the definition of the crime of trafficking in persons under the Anti-trafficking Palermo Protocol will be discussed; secondly, the legal definition of forced labour or service, slavery, or practices similar to slavery, or servitude under the Palermo Protocol will be reviewed.

2.2.1 A Unified Definition of Human Trafficking under the Anti-trafficking Palermo Protocol

There was no internationally accepted definition for ‘trafficking’ until 2000, when the United Nations (UN) published a definition in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (also known as the Palermo Protocol).⁸⁷ The Protocol was made pursuant to the United Nations Convention against Transnational Organised Crime. One of the key requirements included in the Protocol is the enforcement of laws against human trafficking, which will be further elaborated on later. The Protocol has made a significant accomplishment by establishing a standardised definition for the crime of human trafficking. Article 3 (a) describes what trafficking in persons entails. This provision states: ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of

⁸⁵ Article 3(a) of the Anti-Smuggling of Migrants Protocol defines smuggling of migrants as “the arrangement of the illegal entry of a person into a State Party of which that person is not a national or a permanent resident, in order to obtain, directly or indirectly, a financial or other material benefit”.

⁸⁶ Muhammad Abdulhadi, *Human Trafficking between Islamic Jurisprudence and liberal Law* (Dār al-Fikr al-Jamii Alexandria 2015) 90.

⁸⁷ United Nations Office on Drugs and Crimes, ‘The Protocol’ (UNDOC) < <https://www.unodc.org/unodc/en/human-trafficking/protocol.html> > accessed 05 February 2022.

vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.⁸⁸

There is potential for ambiguity at both international and domestic levels about the distinction between migrant smuggling and human trafficking. While the distinction between them may be subtle, there are basic disparities between them. Migrant smuggling refers to the act of when a migrant willingly and expressly decides to unlawfully cross international boundaries, usually with the intention of gaining economic benefits. The role of the smuggler is only to facilitate the passage of the migrant over national borders.⁸⁹ Conversely, human trafficking does not invariably entail traversing state borders, nor does it necessitate illegal border crossings; rather, it is the coercion or deception of the trafficked individual for the purpose of exploiting him/her that sets it apart from the criminal activity of migrant smuggling.⁹⁰ Therefore, a clear differentiation can be made between migrant smuggling and trafficking in persons by their respective objectives: whereas migrant smuggling seeks to unlawfully transport individuals across a border, trafficking in persons is committed with the intention of exploiting those who are being trafficked. Accordingly, individuals who are trafficked are considered victims, whereas those who are unlawfully transported across national borders are considered offenders for

⁸⁹ As per Article (3/a) of the Protocol to Combat the Smuggling of Migrants, the term "smuggling of migrants" is defined as 'the coordination of the unauthorised admission of an individual into a State Party without that individual's nationality or permanent residency, with the explicit or implicit intention of acquiring a monetary or other form of financial advantage'.

⁹⁰ Tom Obokata, 'A Human Beings Framework to Address Trafficking of Human Beings', (2006) 24 Neth. Q. Hum. Rts. 379, 382.

violating immigration and domicile regulations.⁹¹ A distinct protocol has been established for each of these two offences due to the critical differentiating nature of between them. The Protocol to Combat Trafficking in Persons governs the crime of trafficking in persons, whereas the Protocol to Combat Smuggling of Migrants addresses the crime of smuggling migrants.

It is important to acknowledge that some individuals may choose to enlist the assistance of another person to unlawfully transport them over international boundaries. However, due to their vulnerability they ultimately become victims of a human trafficking enterprise. In practical terms, this is the most frequent situation. Therefore, it is crucial for local authorities to thoroughly examine the details of the unlawful border crossing and the working conditions. This investigation will help determine if the individual is an illegal immigrant or a victim of human trafficking.⁹² Furthermore, the distinction between the offences of human trafficking and migrant smuggling holds practical significance due to the fact that the responsibilities of the state vary in accordance with the characteristics of each offence. Although the Anti-Trafficking in Persons Protocol mandates that the State must safeguard and aid trafficked individuals as victims, the State is not required to provide protection and support to undocumented immigrants under the Anti-Smuggling of Migrants Protocol.⁹³

⁹¹ European Commission, Group on Trafficking in Human Beings, Report of the Experts Group on Trafficking in Human Beings (Brussels, 2004) 48.

⁹² Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights; Implementing the United Nations Trafficking Protocol', (2003) 44 Harv. Int'l L.J. 473 481-482.

⁹³ Venla Roth, 'Defining Human Trafficking and Identifying its Victims: A Study on the Impact and Future Challenges of International, European and Finish Legal Responses to Prostitution-Related Trafficking in Human Beings (Boston; Martinus Nijhoff Publishers, 2021) 97-98

The crime of trafficking in persons, like other crimes, is based on two pillars as highlighted by the United Nations Office on Drugs and Crimes.⁹⁴

First: The Material Pillar:

Under the Palermo Protocol, the Material Pillar of the crime of trafficking in persons consists of two elements: *the act* and *the means* used to commit the crime. It is necessary to analyse each element in detail below.⁹⁵

1. Act:

For the material element of the crime of trafficking in persons to be proven, the transportation of the victim from one place to another must have taken place. The stages of transportation as stipulated in the definition are: recruitment, transportation, transfer, housing or reception. Some criticise the definition's focus on transportation, as it differentiates the forms of exploitation on the basis of whether the victim is transported from one place to another or not.⁹⁶

2. Means used to commit the Act:

In order for the act of human trafficking to be deemed to have been committed, one of the elements stipulated in its definition must be present. The means include, threat or use of force, forms of coercion, abduction, fraud, deception, abuse of power, exploiting a position of vulnerability, or giving or receiving of payments or benefits to acquire a consent by a person having control over another person. The Protocol contains no further definition of these terms. However, in negotiating the text of the Protocol, it was stipulated that 'the abuse of power or

⁹⁴United Nations Office on Drugs and Crimes, 'The Protocol' (UNODC) <<https://www.unodc.org/unodc/en/human-trafficking/protocol.html>> accessed 05 February 2022; see also Youssef Hassan, *The Crime of Slavery and Human Trafficking According to International Laws and Methods of Combating It* (Modern University Office Egypt 2014) 25.

⁹⁵ Anne Gallagher, *The International Law of Human Trafficking* (New York Cambridge University 2010) 29-33.

⁹⁶ European Commission, 'Report of the Experts Group on Trafficking in persons' (Brussels 2004).

of a position of vulnerability' is any situation in which the person concerned has no real or acceptable alternative other than submitting to the abuse involved.⁹⁷

If any of the aforementioned means have been employed the exploited person's consent or absence of it is irrelevant according to Article 3 (b) of the Protocol, which states:

The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

In order for the consent of the person to be considered in the crime of trafficking in persons, the trafficker must not have used any of the means described in the previous paragraph.⁹⁸ If the victim (other than a child) agrees without the trafficker exercising one of the means stipulated in the Protocol, this is not regarded as the crime of 'human trafficking' as specified, although other criminal acts may have been committed such as abduction, kidnapping, etc.⁹⁹

The Palermo Protocol defines a child as any person under the age of eighteen years. Children are treated as special cases by the Palermo Protocol because they cannot give legal consent to being exploited even if the crime is committed without using one of the means stipulated in the definition of human trafficking. Only two components are required for trafficking of children to occur, the act itself, and the exploitation of a child.¹⁰⁰ Consent is meaningless by virtue of the fact that the person who is being trafficked is a victim who has no choice but to submit to

⁹⁷ UNGA, 'Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions' 55th session (3 November 2000) UN Doc A/55/383/Add.1 para 63: The Model Law on Combating Person Trafficking released by the United Nations Office on Drugs and Crime includes definitions of the means whereby a national legislature may define this term: See UNDOC, *Model Law against Trafficking in Person* (New York United Nations Publication 2009) 10-14.

⁹⁸ Al-Harqān (n 24).

⁹⁹ Nasser Al- Shahrānī, *International Efforts in Combating Trafficking in Human Beings* (Naif Arab University Press for Security Sciences Riyadh 2010) 7.

¹⁰⁰ The Palermo Protocol, art 3(c-d).

their exploiter.¹⁰¹ Also, the question of consent cannot be used to punish the victim for any illegal acts committed as a result of being trafficked, especially in relation to ‘immigration’.¹⁰²

Second: The Mental Pillar (*Mens Rea*):

The crime of human trafficking according to the Palermo Protocol is considered an intentional crime, and therefore the mental pillar can only be achieved by the availability of the general criminal intent represented by the offender’s knowledge of the elements of the crime and his/her free will to do the act. However, the question raised here is whether the act of exploitation is necessary for the realisation of the material pillar of the crime of trafficking in persons. In other words, is exploitation an element of the material pillar or is it considered a part of the mental pillar? It seems that the crime of trafficking in persons is deemed to have been committed even if the crime was aborted before the offender actually exposed the victim to exploitation since the original intention of this transfer was to exploit the victim. On examination of the definition of the crime of trafficking in persons in the Palermo Protocol, an explicit and clear answer to the aforementioned important question cannot be found. The definition of human trafficking in Article 3(a), as quoted above, does not seem to indicate that it is necessary for exploitation to actually occur in order for the crime of trafficking in persons to be committed. The United Nations Office on Drugs and Crime has indicated that it is sufficient for the crime of trafficking in persons to occur if the act and the means take place in accordance with the definition of the Protocol (for the purpose of exploitation).¹⁰³ This view is supported by what was stated in the explanatory report of the CEC on Action Against Trafficking in Human Beings of 2005, which

¹⁰¹ The Palermo Protocol, art 3(a-b).

¹⁰²United Nations Office on Drugs and Crimes, ‘The Protocol’ (UNODC) <<https://www.unodc.org/unodc/en/human-trafficking/protocol.html>> accessed 05 February 2022.

¹⁰³ United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations New York 2004) 268.

included a definition of the crime of trafficking in persons. This definition is identical to the definition stipulated in the Protocol; the exploitation does not actually occur until the crime of trafficking in persons takes place, although it is sufficient for the victim to be exposed to one of the acts referred to in the definition and also by one of the means specified for the purpose of exploitation.¹⁰⁴

It should be noted that the types of exploitation stipulated in the definition of the crime of trafficking in persons were not exhaustive, insofar as the UN General Assembly specified that they were the ‘minimum’.¹⁰⁵ In the definition, it may not be possible to list all the conceivable forms of exploitation (which is what some countries have suggested), and accordingly, the Protocol will be limited when confronting new forms of exploitation.¹⁰⁶ Among the main disagreements between the negotiators regarding the detailed description that would be included in the protocol, was whether unforced prostitution should be considered a form of human trafficking. In addition, it needs to be determined whether the primary goal of trafficking in persons is sexual abuse or whether it should include other aims that are in keeping with how the crime is committed, such as forcing people to work. Ultimately, a compromise was reached, as is evident from the definition. Consequently, the protocol's definition did not explicitly state that prostitution alone qualifies as a human trafficking offence. Furthermore, the definition did

¹⁰⁴ *ibid.*

¹⁰⁵ See UNGA, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime ‘Revised draft Protocol to prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nation Convention against Transnational Organization Crime’ (2-27 October 2000) UN Doc A/AC.254/4/Add.3/Rev.7, *supra* note 14; The term ‘minimum’ was used in Palermo Protocol to ensure that the other forms of exploitation, as well as new forms which are not named in the protocol, will be taken into consideration.

¹⁰⁶ *ibid.*

not restrict the motivation of human trafficking solely to sexual exploitation, although it encompassed all forms of exploitation, including sexual exploitation.¹⁰⁷

2.2.2 Legal Definition of forced labour or service, slavery, or practices similar to slavery, or servitude under the Palermo Protocol.

As far as the definition of the subject title is concerned, the Protocol did not adequately elaborate on the most important forms of exploitation provided for in the definition, which are forced labour or service, slavery, or practices similar to slavery, or servitude. Nevertheless, there are international agreements that provide explicit meanings for these words, and there is a near-universal consensus among nations about these definitions. Therefore, it is essential to consult these agreements when interpreting and implementing the definitions.¹⁰⁸ However, some believe that servitude includes all forms of practices similar to slavery,¹⁰⁹ and the presence of the word servitude in the definition does not add anything new and is a futile addition.

Slavery could be considered to be a form of forced labour in which one individual is completely controlled by another individual or group of people.¹¹⁰ A definition of slavery can be clearly found in the first international instrument related to slavery, specifically the Slavery Convention of 1926. Article 1 of this convention defined slavery as ‘Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. Any person in a state of slavery is obligated to perform labour. However, this is not the only

¹⁰⁷ Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’, (2001) 23 Human Rights. Q. 975 984-986.

¹⁰⁸ *ibid*.

¹⁰⁹ OHCHR, ‘The report of Abolishing Slavery and its Contemporary Forms: David Weissbrodt and Anti-Slavery International’ (2002) UN Doc HR/PUB/02/4 paras 11-18.

¹¹⁰ Amir Paz-Fuchs, ‘Badges of Modern Slavery’ (2016) 79(5) Modern Law Review 757; see also Muhammad Al-Fawaara, Forced Labour between International Prohibition and National Criminalization (2014) Vol 20, Al-Manara Journal for Research and Studies.

characteristic of the relationship between forced labour and slavery. The basis of slavery can be based on lineage rather than on any other reason. The Convention on Slavery was therefore drafted at a time when forced labour was being imposed forcefully and widely by colonial authorities. Under article 5 of the Slavery Convention, the contracting parties were obliged to 'take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery'. Consequently, the International Labour Organisation Forced Labour Convention No. 29 of 1930 was adopted, which prohibited forced labour in general, including slavery.¹¹¹ Thus, it can be concluded that forced labour or service can be defined as; 'All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. This can be done with or without payment.¹¹²

Following the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Practices Similar to Slavery of 1956 was adopted by the United Nations Conference of Plenipotentiaries. The convention builds upon the 1926 Slavery Convention, which is still operative, proposed to secure the abolition of slavery and of the slave trade. Furthermore, the Forced Labour Convention of 1930, banned forced or compulsory labour, by banning debt bondage, serfdom, child marriage, servile marriage, and child servitude. The first article included the following:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, and if the value

¹¹¹ International Labor Organization, Global Alliance Against Forced Labour, 2005, 7

¹¹² Mohammed Matter et al., 2010.

of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby

i-A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

ii-The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

iii-A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either one or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

International legislators followed the same pattern in their interpretation of forced labour, emphasising this meaning in the Convention on Forced Labour, in which reports of the International Labour Organisation attempted to define the types of circumstances that could constitute forced labour. Furthermore, it is worth noting that subsequent international accords, most notably the Palermo Protocol, which indirectly criminalised forced labour exploitation, failed to establish a precise definition of forced labour. As a result, the committees were tasked with interpreting the Protocol's provisions to emphasise the importance of using the definition of forced labour given in the Forced Labour Convention of 1930 in order to interpret its

provisions. Although there is a worldwide agreement on this definition, the conditions for its prohibition are not sufficiently established. Paz-Fuchs argues that there is a significant association between strict job conditions and the perception that slavery is rooted in compulsion. An individual's dignity being violated may lead to the conclusion that he or she did not freely participate in the work.¹¹³ A key challenge is distinguishing between poor working conditions and labour exploitation severe enough to fall under criminal law, and, in particular, human trafficking.

2.3 Forms of Human Trafficking under International Human Rights Law: An Overview

This section gives an overview of the different forms of human trafficking under international human rights law. Since it is difficult to exhaustively list all of them, this section provides an overview. Although forced labour and the sex industry are the primary subjects of human trafficking, it can be found in a variety of sectors. Most notably, human trafficking is prevalent in the employment sectors which require a large number of low paid, seasonal workers. Additionally, in these industries, human trafficking victims may face the withholding of identity documents, dangerous working conditions, and/or debt bondage. For this reason, the following sub-sections critically analyse the main forms of human trafficking relevant to the Palermo Protocol.

2.3.1 Sexual Exploitation of Others

The Palermo Protocol did not provide a definition of sexual exploitation or exploitation through the prostitution of others.¹¹⁴ However, Article 1 of the Convention for the Suppression of the

¹¹³ Paz-Fuchs 'Badges of Modern Slaver' (2016) 79(5) *Modern Law Review* 757.

¹¹⁴ Mohamed Mattar, *International Efforts to Combat Trafficking in Human Beings* (Naif University 2010) 145.

Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949, defines sexual exploitation of others as:

Any person, who to gratify the passions of another:

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person.¹¹⁵

According to the aforementioned article, everyone, especially women and children have the right to be protected from any behaviour that jeopardises their dignity, including protection against human trafficking and forced prostitution.

As Al-Mafarji and Ashwani highlighted, Article 1 of the Convention of 1949 was designed to simply protect women from any possible dangers associated with prostitution rather than to safeguard the rights of an autonomous individual and tackle prostitution itself.¹¹⁶ Even though this article prohibits sexual exploitation of others in general, it appears it does not distinguish between forced and voluntary prostitution or whether the individual involved consents or otherwise.

2.3.2 Forced Labour or Service

The Palermo Protocol did not define exploitation in the practice of forced labour. However, the International Labour Organisation (ILO) Convention on Forced Labour of 1930 contains a definition of the term ‘forced labour’, and there is an international consensus that this should

¹¹⁵ The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, merely states in its preamble that ‘Prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community’.

¹¹⁶ Salwa Al-Mafarji and Nozad shwany, ‘Protecting Women from Trafficking at the International and National Levels’ (2017) Journal of College of Law for Legal and Political Sciences 8.

be referred to when interpreting and applying this term.¹¹⁷ Forced labour was defined in Article 2 of the ILO Convention¹¹⁸ as:

All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.¹¹⁹

There are similarities between slavery and forced labour, as in both cases the person's freedom is restricted through the use of methods that involve violence or the threat of violence to the intended victim or a member of their family. The main difference between the two is that forced labour does not imply that the employer legally owns the person who works for him, whereas slavery is based on the right of the owner to exercise all the property rights guaranteed by the right of ownership over his property.¹²⁰

In addition, forced labour also includes the use of involuntary domestic service known as domestic servitude where the victim is forced to serve in a domicile through the use of force, coercion, or physical or psychological abuse. Finally, it also includes forced child labour, which involves children being forced to perform labour through involuntary servitude, debt bondage, or servitude through the use of force, fraud, or coercion. Chapter Four further demonstrates how some of these labour practices are a daily occurrence in the KSA.

2.3.3 Child Trafficking

¹¹⁷ For more details, see: UNODC, *Model Law against Trafficking in Persons* (New York United Nations Publications 2009) 15.

¹¹⁸ The International Labour Organization (ILO) of Forced Labour Convention (adopted 22 July 1930, entered into force May 1932); The convention was ratified by the Kingdom of Saudi Arabia in 1978.

¹¹⁹ Mohamed Mattar, *Research on Trafficking in Human Beings, Overview* (Naif Arab University 2010) 8.

¹²⁰ German Federal Ministry for Economic Cooperation and Development, 'Trafficking in Women, Forced Labour and Domestic Work in the Context of Middle East and Gulf Region (2006) Working Paper Anti-Slavery International <https://www.antislavery.org/wp-content/uploads/2017/01/traffic_women_forced_labour_domestic_2006.pdf> accessed 5 April 2022; see also Paz-Fuchs, (n 92).

Child trafficking includes any act or transaction whereby a child is transferred by an individual or group to another person in exchange for a reward or other form of compensation.¹²¹ Since their exploitation for sexual purposes falls within the first form, forced services come within the second form of human trafficking. In this case, the second form commodifies children, in that they can be purchased for the purposes of adoption or exploitation for the purposes of productive activities.¹²² It is not necessary for the crime of human trafficking to be committed by an organised criminal group, as the crime can be carried out by individuals as well.¹²³ A cross-border dimension is not required as the crime can be accomplished within the borders of a state. The crime can also be committed by the child's relatives, including the parents.¹²⁴ The Palermo Protocol, in Article 9, formulated a series of obligations on states with the aim of developing a plan to prevent this crime.¹²⁵ Furthermore, there was great pressure for state parties to put in place comprehensive policies, programmes and measures to prevent and combat trafficking and to protect victims, especially women and children, from being re-victimised.¹²⁶

2.3.4 The Removal of Body Organs

¹²¹ Optional Protocol to the Convention on the Rights of the Child on the sale of children in prostitution and pornography (adopted 25 May 2000, entered into force 18 January 2002) arts 2-3; Hassan.(n 50) 28.

¹²² Yacoub Ali, 'The Economic and Social Dimension in Combating Trafficking in Human Beings, Concepts and Trends' (2013) The Arab Initiative for Building National Capacities to Combat Trafficking in Human Beings, the Third Doha Forum to Combat Trafficking in Human Beings; See also some of these discussions by Amir Youssef, *Combating Human Trafficking and Illegal Migration in Accordance with International Facts, Charters and Protocols* (Modern Arab Office Alexandria 2011).

¹²³ Adel Bashir, 'Procedural guarantees for victims of human trafficking in Egyptian legislation No (64) 2010: a comparative study' (2019) 1 Al-Azhar University Faculty of Shari'a and Law in Damanhour 319.

¹²⁴ Article 1(d) of the 1956 Convention, thus consider the sale of children through:

'any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view of the exploitation of the child or young person or of his labour'.

¹²⁵ The Palermo Protocol, art 9: states that

1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from victimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

¹²⁶ *ibid.*

The Palermo Protocol explicitly refers to organ removal as a form of human trafficking. Article 3 (a) of the Protocol provides that:

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or *the removal of organs*.

In this regard, international instruments have prohibited the removal of human organs in the event that it is carried out through a commercial transaction or without the consent of the grantor, for example, contrary to the Council of Europe Convention for Human Rights and Biomedicine.¹²⁷ Chapter VII of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, stipulates in Article 21 that;

The human body and its parts shall not, as such, give rise to financial gain.¹²⁸

The purpose of the principle of the Prohibition of Financial Gain and Disposal of a Part of the Human Body is to ensure that the dignity of both the recipient and the donor is respected and that deceased donors have an inalienable right over their bodies. The principle also contributes to providing a system that maintains the quality and the safety of legally donated organs in which people can trust.¹²⁹

The next section explains the political, economic, and social causes that have led to the spread of the different forms of human trafficking prohibited under international human rights law.

¹²⁷ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 09 April 1997) CETS 164.

¹²⁸ The United Nations General Assembly Resolution no 59/59, dated 20 December 2004, entitled “Strengthening International Cooperation to Prevent and Combat Trafficking in Persons and Protect its victims”, in which the General Assembly condemns trafficking in human beings and urged members to cooperate to take the necessary measures to prevent Preventing, combating, and punishing the eradication of human organs and their trade.

¹²⁹ The Council of Europe, ‘Guide for the implementation of the principle of prohibition of financial gain with respect to the human body and its parts from living or deceased donors’ (COE, March 2018) <https://rm.coe.int/guide-financial-gain/16807bfc9a> accessed 26 August 2022.

2.4 The Main Causes of Human Trafficking and Victim Protection

Trafficking in persons is considered a crime with highly lucrative illicit returns. Trafficking in persons is motivated by many factors, both in the countries of origin and the countries of destination, as evidenced below. The state's obligations to protect and assist victims of trafficking in persons under the Palermo Protocol will also be reviewed.

2.4.1 Motives in Origin Countries

People may migrate abroad for various reasons, whether social or economic. There are push and pull factors for migration.¹³⁰ Push factors include economic reasons such as unemployment, and low salaries,¹³¹ whilst pull factors include migration legislation and labour market conditions in the receiving country.¹³² Therefore, it can be asserted that poverty is a reason for migration.¹³³ There may be other reasons, such as career difficulties, discrimination, and coercion in family relationships that drive people to migrate.¹³⁴

Social customs in areas that do not respect human rights may facilitate the exploitation of human beings, especially women and children.¹³⁵ Women and children are also more vulnerable to traffickers due to certain social, religious and cultural practices. Social exclusion and marginalisation are examples of harmful social practices. Religious and cultural norms may influence how women and girls are treated consequently making them more vulnerable to traffickers due to gender discrimination. For example, certain cultural practices such as various

¹³⁰ Christina Boswell, 'New Issues in Refugee Research: Addressing the causes of migratory and refugee movements: the role of the European Union' (2002) Institute for Peace and Security Policy University of Hamburg Working Paper No 73, 1 <<https://www.unhcr.org/research/working/3e19ac624/addressing-causes-migratory-refugee-movements-role-european-union-christina.html>> accessed 20 April 2022.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ Fahmi (n 4) 108.

¹³⁴ *ibid.*; see also Boswell (n 111).

¹³⁵ Adel Ali, *Combating Human Trafficking, Human Trafficking between Criminalization and Coping Mechanisms*, (1st edn, Naif University 2012) 55-62.

types of marriages, whether arranged, forced, temporary, or underage marriages can contribute to trafficking in persons.¹³⁶ Chapter Three examines details of some of these marriages and the injustice that arise for the vulnerable.

Due to economic conditions in some countries, families tend to send their children to work from a young age for the purpose of increasing household income. In doing so, parents are exposing their children to dangerous conditions in factories or other unregulated places of work.¹³⁷ In places where conflict thrives such as Syria and parts of Africa, children are sent to work and are exposed to the dangers of war, armed conflict, and child trafficking.¹³⁸ Child victims of human trafficking from economic poverty and conflict zones are more vulnerable than children from other locations, according to Fahmi and Zawali.¹³⁹

In poverty-stricken nations, human trafficking also goes unnoticed due to insufficient reliable data, or because data records are not properly gathered or maintained. For example, this gap can be used by traffickers engaging in abduction and trafficking of children.¹⁴⁰ With this gap, women also become more vulnerable and exposed to the risk of human trafficking due to existing social, economic or gender reasons.¹⁴¹ In poverty-stricken nations, women are usually exploited and trafficked as sex slaves, whereas men are more often vulnerable to exploitation for political or other reasons.¹⁴² This, however, can differ from one country to another and the same applies to the reliability of each country's data collection system.

¹³⁶ Education for Justice, 'Root Causes' (UNODC) <<https://www.unodc.org/e4j/zh/tip-and-som/module-7/key-issues/root-causes.html>> accessed 03 February 2023.

¹³⁷ Abdulrahman Ghunaim and Alaa Bakeer, 'The crime of human trafficking A critical analytical study in the light of some international and Arab legislation' [2020] A generation of in-depth legal research 93.

¹³⁸ UNICEF, 'Children Under Attack' (UNICEF) <<https://www.unicef.org/children-under-attack>> accessed 03 February 2023.

¹³⁹ Fahmi, (n 4); see also Wasilat Zawali, 'Psychological and Social Effects of Child Trafficking Crimes' (2021) *Almadad Journal* 166.

¹⁴⁰ Fahmi (n 4) 110.

¹⁴¹ Kevin Bales and Becky Cornell, *Slavery Today* (Groundwood Books 2008) 45; Louise Shelley, *Human Trafficking: A Global Perspective* (Cambridge University Press, 2010) 2; Shashi Punam, *Human Trafficking: Causes and implications* (unpublished 2018).

¹⁴² Steven Hick, 'The Political Economy of War-Affected Children' (2001) 575 *AAPSS* 106.

2.4.2 Attractions in Destination Countries

Social and economic conditions in target countries attract traffickers for various reasons including the need for unskilled, cheap labour. Many victims of human trafficking are attracted by the prospects of a stable economy, better employment opportunities, social security, and political stability. In many situations, witnessing others who have travelled abroad returning back to their homes, with wealth, serves as encouragement to others to do the same and migrate or travel in search of economic opportunities.

In countries with vibrant informal employment sectors, there is often a demand for cheap labour from unskilled people.¹⁴³ Unfilled job vacancies for workers such as domestic workers, farm labourers and cleaning services, are often filled by migrant workers as resident citizens are reluctant to work in those jobs for a variety of reasons including low pay. Moreover, informal sectors are also generally poorly regulated. These sectors are most notably those that employ a large number of low-paid, seasonal, and flexible workers such as those in construction, agriculture or domestic service.¹⁴⁴ This in turn affects compliance with rules on employment engagements and disengagements, therefore monitoring of labour standards proves difficult and, hence, these sectors become easy targets for undocumented migrant workers, thereby exposing them to human trafficking.

2.4.3 Restricted Immigration and Workforce Systems

¹⁴³ Michelle Simon, '5 Prevailing causes of human trafficking' (*The Borgen Project*, 08 April 2016) <<https://borgenproject.org/5-causes-of-human-trafficking/>> accessed 10 November 2021.

¹⁴⁴ Fahmi (n 4) 118.

The disparity in income levels between poor and rich countries has widened,¹⁴⁵ which has resulted in an increasing number of people seeking to migrate to wealthier nations for the purpose of obtaining employment or for other social needs including medical benefits and avoidance of religious persecution. Unregulated and unscrupulous people take advantage of this situation and use various deceitful methods to entrap these people into the nets of human traffickers.¹⁴⁶

Restrictive policies on immigration in some countries can contribute to human trafficking. Countries that have hard, inflexible immigration rules impact the ability of economic migrants to legally enter those countries due to immigration requirements which cannot be legally fulfilled; this can lead them to resort to other methods to ensure entry. Consequently, migrants may fall into the hands of human traffickers.¹⁴⁷

Governments in some countries have enacted restrictive policies to control internal and external migration.¹⁴⁸ Subsequently, these policies make people more vulnerable to human trafficking and labour force exploitation.¹⁴⁹ For example, human trafficking derives its strength and existence from forced labour. Many governments support the most restrictive immigration policies for political purposes. While these policies reduce opportunities for organised migration, they help provide more opportunities for human traffickers, as noted by Kaye.¹⁵⁰

¹⁴⁵ United Nations, 'Country Classification: World Economic Situation and Prospects (WESP)' (UN) <https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf> accessed 15 February 2022.

¹⁴⁶ Ali, (n 103).

¹⁴⁷ Education for Justice, 'Root Causes' (UNODC) <<https://www.unodc.org/e4j/zh/tip-and-som/module-7/key-issues/root-causes.html>> accessed 03 February 2023.

¹⁴⁸ Nazli Avdan, 'human trafficking and migration control policy: vicious or virtuous cycle?' (2012) 32 *Journal of Public Policy* 171.

¹⁴⁹ UNODC, *Global Report on Trafficking in Persons* (United Nations Publications 2012); see also Mohamed Mattar, 'Transnational Legal Responses to Illegal Trade in Human Beings' (2013) 33 *SAIS Review* 137.

¹⁵⁰ Mike Kaye, *the migration-trafficking nexus: combating trafficking through the protection of migrants' human rights* (The printed work UK 2003) 13.

The Palermo Protocol, under Article 9(4) stipulates the need for states to take measures to mitigate the impact of factors that contribute to trafficking, such as poverty, underdevelopment, and lack of opportunities. It further asserts in Article 9(5) that states should adopt and strengthen legislative, educational, social, and cultural measures in order to confront the demand that stimulates all forms of exploitation of persons, especially women and children.

2.4.4 The Palermo Protocol and its Limitations regarding the Protection and Assistance for Victims of Human Trafficking

Human trafficking is a criminal offence characterised by the exploitation of another person for the purpose of forced labour or commercial sex via coercion, fraud, or force, among other means. The exploitation of individuals below the age of 18 constitutes trafficking, irrespective of the presence or absence of means such as force, deception, or coercion.¹⁵¹ Exploitation plays a crucial role in the worldwide legal framework concerning severe kinds of abuse, such as ‘trafficking’, ‘forced labour’, and ‘modern slavery’. All prior conventions, laws, and programmes that were previously sanctioned to tackle these offences in the last several decades were fundamentally centred on exploitation. However, international law does not provide a specific meaning for the term ‘exploitation’.¹⁵²

While the Palermo Protocol successfully established a universally accepted definition of human trafficking, it did not explicitly define its concept of exploitation.¹⁵³ It is argued by some that

¹⁵¹ United States Department of State, 'Understanding Human Trafficking' (2023) <<https://www.state.gov/what-is-trafficking-in-persons/>> 29 December 2023.

¹⁵² Emma Crates, 'Construction and the Modern Slavery Act: Tackling Exploitation in the UK' (2018) Chartered Institute of Building (CIOB).

¹⁵³ United Nations Office on Drugs and Crime 'The Concept of Exploitation in the Trafficking in Persons Protocol' (2015) United Nations Vienna Publications.

the deliberate omission of a clear definition of exploitation is purposeful, since they believe that the criminal justice system is capable of discerning exploitation without any problem. Consequently, this omission is seen as a positive aspect. They contend that by keeping the nature of exploitation undefined, states and authorities will have more latitude to sanction any ‘unacceptable’ actions in the future. This strengthens the case for improving working conditions for vulnerable groups.¹⁵⁴ Despite the fact that there are some benefits to omitting the definition of exploitation, the ambiguity regarding its meaning is regarded by some as a gap in the law. It is crucial to designate certain behaviour as ‘trafficking’ since doing so has substantial and far-reaching consequences for both the individuals accused of engaging in that behaviour and the individuals who are claimed to be victims. There may also be consequences for nation-states, both inside and abroad. Internally, this might include developing a common understanding of the nature and scale of the ‘trafficking problem’, while internationally, it could impact the institutions and procedures that oversee the measures put in place by nations to combat ‘trafficking’.

The Trafficking in Persons Protocol lacks a clear definition of exploitation, a significant issue that allows states to interpret it without restriction. This results in those in positions of authority feeling that they have the authority to circumscribe what qualifies as exploitation; furthermore, what is considered a viable remedy often aligns with the interests and viewpoints of those in power, leading to a lack of inclusivity in the perspectives of influential individuals. They tend to prioritize their interests, leading to disparities based on race, class, gender, and age. This lack of inclusivity is constrained by their privilege, vested interests, and the underlying ideas that support them, resulting in a lack of comprehensive protection against human trafficking.

¹⁵⁴ *ibid.*

There are also concerns with the notion that some forms of work, such as sex work, are inherently exploitative. Distinct boundaries exist between behaviours that are seen as socially acceptable in terms of human dignity and those that are considered inappropriate. This recurrent anomaly can be attributed to the fact that individuals who draw these differences rely on their own innate cultural and social standards. Such matters and practices are widely disapproved of by a significant portion of the population. The lack of clear definitions may result in significant repercussions, and failing to specify the nature of exploitation may result in the absence of essential safeguards offered by the Trafficking in Persons Protocol to victims.

At the level of member States, if it can be taken into account that one of the most important objectives of the Anti-trafficking in Persons Protocol in accordance with Article 2(b) is ‘to protect and assist the victims of such trafficking, with full respect for their human rights’, this may lead one to believe that the Protocol obligated the Member States to take certain measures to ensure protection for victims. However, the Protocol actually lacked a clause requiring signatory nations to implement particular steps to ensure the protection and support of those who have been victims of human trafficking. All the provisions of the Protocol relating to the protection and assistance of victims, with the exception of the right of the victim to return to their country of origin, came in a non-binding form or did not add anything new to what was established by general legal principles.¹⁵⁵ Unquestionably, trafficking in persons has always resulted in a violation of the dignity and the fundamental freedoms of individuals; nevertheless the main motivation behind the establishment of an international system to combat trafficking

¹⁵⁵ Joan Fitzpatrick, ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking’ (2003) 24 Michigan Journal of International Law 1143.

in persons was to afford protection against transnational crimes.¹⁵⁶ Consequently, the Protocol is criticised on the grounds that it focuses on protecting the security of a state from the crime of trafficking in persons and not on protecting the rights of trafficked persons.¹⁵⁷

As a result, the Protocol is further criticised on the grounds that it views human trafficking as a crime rather than as a violation of human dignity and rights.¹⁵⁸ Since the Protocol is a supplementary agreement to the United Nations Convention against Transnational Organised Crimes and not a human rights convention, and falls under the responsibility of the United Nations Office on Drugs and Crime, the Human Rights Council is therefore not responsible for the promotion and enforcement of the Protocol.¹⁵⁹ Consequently, it does not guarantee additional protection for trafficked persons beyond that provided for in human rights conventions.¹⁶⁰ However, the fact that the Protocol is generally devoid of mandatory provisions to guarantee the protection and assistance of victims of trafficking crimes does not mean that the state does not have responsibility for these persons. This is especially so, since Article 14(1) of the Protocol confirmed that this instrument does not affect the rights, obligations and responsibilities of states and individuals under international law, including humanitarian law and international human rights law. Rather, the state's law makers may adopt more strict and severe measures than those stipulated in the Protocol.¹⁶¹ The provisions of the Protocol represent the minimum measures that the state must abide by. In view of the fact that the KSA has joined

¹⁵⁶ Gallagher, (n 68).

¹⁵⁷ *ibid.*

¹⁵⁸ Jo Goodey, 'Human Trafficking: Sketchy Data and Policy Responses' (2008) 8 *Criminology and Criminal Justice* 421.

¹⁵⁹ Al-Harqān (n 24).

¹⁶⁰ Alice Edward, 'Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour' (2007) 36 *Denver Journal of International Law and Policy* 9.

¹⁶¹ United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 art 34(3).

the Protocol, the goals and objectives stipulated in Article 2 are implicitly accepted.¹⁶² Therefore, the state must find an effective and comprehensive method to achieve the objectives of the Protocol at local level.

In addition to these limitations, even though the Protocol outlines victims' services aimed at assisting and protecting victims of human trafficking, each of these provisions begins with the permissive language that State Parties 'shall endeavour to', 'shall consider inappropriate cases', and 'to the extent possible' implement various victim protection measures. For example, Article 6 specifies that for their 'physical and psychological recovery', victims require medical care, housing, mental health counselling, legal help, and physical safety. This provision, however, requires that State Parties should merely 'consider implementing' such measures. Likewise Article 7 requires State Parties to 'consider providing' temporary or permanent residence for victims. The Protocol has a number of additional flaws. First, the acts that victims are forced to perform are not expressly protected from legal action. As a result, a victim can be charged with a crime they were forced to commit, such as prostitution, working without a permit, or possessing false documents. Second, since victim assistance is optional, victims who stay in a country to serve as prosecution witnesses may be held for months without access to critical services or work. Third, there is no reference of 'reintegration', or providing services upon repatriation to guarantee that a victim can safely re-enter society. The Protocol only alludes to collaboration among State Parties to guarantee safe repatriation of victims to their home countries. The victims are then effectively returned to the circumstances that led to their trafficking, where they face the possibility of becoming victims again.¹⁶³

¹⁶² Article 2 of Palermo Protocol reads as follows: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.

¹⁶³ Hyland (n 133).

In accordance with the Protocol, the state must develop policies, programmes and other measures to further protect victims of trafficking in persons from being victimised again, including cooperation with non-governmental institutions and other civil society institutions.¹⁶⁴

The Palermo Protocol stipulates the need for the state to adopt measures such as:¹⁶⁵

- i. Preserving the personal privacy and identity of the victims, which includes ensuring that the legal procedures and circumstances relating to the trafficking incident remain confidential;
- ii. Enabling victims to obtain information on relevant judicial and administrative procedures;
- iii. Providing assistance to enable victims to present their views and concerns, and taking these views into consideration at the appropriate stages of criminal proceedings against the perpetrators, without prejudice to the rights of the defence;
- iv. Enabling the physical, psychological, and social recovery of victims of trafficking in persons, including, where appropriate, cooperation with non-governmental organisations and other relevant organisations and other elements of civic society; in particular, the provision of the following:
 - a. Adequate housing;
 - b. Advice and information, especially regarding their legal rights, in a language that victims of trafficking in persons can understand;
 - c. Natural, psychological and material assistance;
 - d. Employment, education and training opportunities;
 - e. Provision of physical safety while within its territory;

¹⁶⁴ The Palermo Protocol, art 9.

¹⁶⁵ The Palermo Protocol, arts 6 and 7; United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 art 25; see also Gallagher (n 137).

- f. The right to obtain compensation for the damages victims have suffered; and Permission to stay within the state's territory temporarily or permanently in cases where this is required.

It is important to also acknowledge that the various elements of human trafficking under the Palermo Protocol are broad and comprehensive in nature which gives scope to aid in the fight against this crime as noted by Mattar.¹⁶⁶ However, there are limitations to this Protocol: scholars such as Al-Nusro and Abbās have criticised these elements as not being far-reaching enough.¹⁶⁷ For example, they do not make a sufficient link between the process of human trafficking and the transfer of victims.¹⁶⁸ Consequently, by leaving a loophole in the definition, the Protocol allows countries such as China to avoid their responsibilities by claiming that some human trafficking operations that take place in their jurisdictions do not fall within the definition and therefore cannot be regarded as trafficking in persons. In other words, they argue that the transfer of victims that occurs in their jurisdictions is not human trafficking.¹⁶⁹ Other countries have exploited this loophole by defining trafficking more broadly than what is stated in the Protocol, in order to widen the scope of the obligations contained therein and therefore classify illegal immigration as a form of human trafficking, which is often not the case as noted by Al-Nusur.¹⁷⁰

¹⁶⁶ Mohamed Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses' (2002) 26 *Fordham International Law Journal* 721.

¹⁶⁷ Muhammad Al-Nusro and Ola Abbās, 'Trafficking in Human Beings as A Transnational Crime and Ways of Fighting it: Analytical Study in the Light of International and National Legislations' (2014) 41 *Studies Sharī'a and Law Sciences* 1084.

¹⁶⁸ Al-Harqān (n 24).

¹⁶⁹ Ali (n 103); see also Youssef (n 103).

¹⁷⁰ Muhammad Al-Nusur, 'Human trafficking as a transnational organized crime and ways to combat it Analytical study in light of international and national legislation' (2014) 41 *Journal of Sharī'a and Law Sciences* 1140; see also James Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 *Virginia Journal of International Law* 1.

Since the UN Convention against Transnational Organised Crime is the foundational convention, its provisions apply to the protocols that supplement it. Hence, the crimes specified in this Protocol are criminal offences under the Convention.¹⁷¹ It should be noted, however, that unless the crime is transnational and associated with a criminal organisation, the Palermo Protocol as well as the Convention do not apply.¹⁷² The Convention against Transnational Organised Crime refers to the meaning of the term 'organised criminal group' in Article 2(a),¹⁷³ as;

‘Organised criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Also, Article 3(2) states that;

2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.¹⁷⁴

¹⁷¹ Article 37 of the Convention against Transnational Organised Crime stipulates the following

1. This Convention may be supplemented by one or more protocols.

2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.

¹⁷² Al-Harqān (n 24) 191.

¹⁷³ United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 art 2(a).

¹⁷⁴ *ibid* art 3(2).

It should be noted that the Convention against Transnational Organised Crime is limited by the above definition of an ‘organised criminal group’ as involving three or more people. This implies that if the crime is committed by less than three in an organised manner for a long time, it is not considered a crime of trafficking at the international level.¹⁷⁵

The next section explains how an understanding of human dignity is useful in relation to human trafficking under international human rights law.

2.5 Human Dignity, International Human Rights Law and the Prohibition of Human Trafficking

Understanding human dignity is critical to the discussion of rights under international human rights law. The definition of human dignity under international human rights law provides comprehensive information on the practices of human rights and how the dignity of humans is violated through human trafficking and the protective measures required for its victims. The concept of human dignity has become one of the fundamental values of international human rights law.¹⁷⁶

This section therefore discusses the concept of human dignity and the prohibition of human trafficking under international human rights law. The section is divided into two sub-sections. Firstly, the meaning of the concept of human dignity under international human rights law is examined. The second section then highlights the effectiveness of the concept of human dignity in countering and reducing the causes and incidence of human trafficking.

¹⁷⁵ Al-Harqān (n 24).

¹⁷⁶ Christopher McCrudden, ‘Human dignity and judicial interpretation of human rights’. (2008) 19 The European Journal of International Law 655.

2.5.1 The Concept of Human Dignity under International Human Rights Law

In ancient philosophy, dignity was frequently associated with status, especially to people in high ranking positions.¹⁷⁷ The Roman political aristocracy for instance had *dignitas*, while the lower-ranking plebeians did not.¹⁷⁸ Scholars have also observed that during that period, only men could possess *dignitas* while women could not.¹⁷⁹ This stratification was maintained when the term ‘dignity’ became part of the English language in the year 1225, giving preference to hierarchy and rank in the social system.¹⁸⁰ For instance, all criminal offences in England were ‘either against the king’s peace, or his crown and dignity; and are so laid in every indictment.’¹⁸¹

At the dawn of the age of enlightenment, the notion of dignity as an exclusive prerogative began to change and theorists made attempts to reconceptualise dignity. Termed as the ‘Essentialists’, philosophers such as William Parent argued that dignity is ‘a negative moral right not to be regarded or treated with unjust personal disparagement.’¹⁸² This position reflects closely Paine’s philosophy of the recognition of ‘the natural dignity of man.’¹⁸³ It is, however, evident that social, economic and political circumstances have affected the conception and commitment to respect human dignity.

Human dignity is considered by some commentators to be a vague concept.¹⁸⁴ The elusive nature of the concept of human dignity has led many commentators to argue that, at best, it is

¹⁷⁷Teresa Iglesias, ‘Bedrock Truths and the Dignity of the Individual’ (2001) 4 Logos: A Journal of Catholic Thought and Culture 114.

¹⁷⁸ *ibid.*

¹⁷⁹ Marcus Tullius Cicero, *Cicero: On Duties* (E M Atkins (ed), M T Griffin (tr) (Cambridge University Press 1991).

¹⁸⁰ Leslie Henry, ‘The jurisprudence of dignity’ (2011) 160 University of Pennsylvania Law Review 169.

¹⁸¹ *ibid.*

¹⁸² William Parent, *The constitution of rights: Human dignity and American values: Constitutional values and human dignity* (1992) 47.

¹⁸³ Gregory Claes, *Thomas Paine: Social and Political Thought* (1st edn, Routledge 1989).

¹⁸⁴ Conor O’Mahony, ‘There is no such thing as a right to dignity’ (2012)10(2) International Journal of Constitutional Law 551. See also Stephen Riley and Gerhard Bos, ‘Human dignity’ (IEP) <<https://iep.utm.edu/human-dignity/#:~:text=Human%20dignity%20can%20denote%20the,the%20concept%20can%20be%20put.>>> accessed 27 November 2022.

meaningless or unhelpful, and at worst, it could potentially harm the protection of fundamental human rights, despite the importance and emphasis placed on it in the text of international conventions, domestic constitutions, and court decisions.¹⁸⁵

According to Roberto Andorno, although human dignity is fundamental to the concept of human rights, it has never explicitly been defined in any legal provisions. In accordance with international statements, human dignity is innate to all people; it is from this dignity that all rights are derived. Despite the ambiguity in these statements, they nonetheless suggest that human dignity is a core value and a distinguishing quality of something.¹⁸⁶ Although playing a significant role in the UNESCO documents, human dignity is not defined, as the documents' authors believed the term is self-explanatory. However, this is disputed by both Matti Häyry and Tuija Takala.¹⁸⁷ Chris McCrudden explains human dignity as the 'minimum core', proposing the idea that every human being possesses an intrinsic worth that should be recognised and respected by others and that 'some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth.'¹⁸⁸

The KSA's definition of human dignity is solely derived from theology. The concept of human dignity is defined as 'every human life is significant and must be valued unconditionally'. This is perfectly embodied in Islam by the Qur'ānic concept of 'Karamh-al-insān' (human dignity).¹⁸⁹ The thesis discusses the concept of Human dignity in detail while Chapter Three elaborates on Islamic concepts.

¹⁸⁵ *ibid.*

¹⁸⁶ Vasil Gluchman, 'Nature of dignity and human dignity' (2017) 27 Human Affairs Journal 131.

¹⁸⁷ *ibid.*

¹⁸⁸ McCrudden (n 157).

¹⁸⁹ Mohamed Ali, 'Delineating the concept of human dignity in the Qur'ān: Karamah-al-Insan as an antidote to religious conflicts and violence' (2022) 9 Advances in Social Sciences Research Journal 220.

In the context of this research, theories of dignity are based on those which relate to both philosophy and theology, as the idea of human dignity in the KSA is one that is embedded in theology,¹⁹⁰ while the international law concept of human dignity is mostly developed through moral philosophy.¹⁹¹ The philosophical approach is one that derives from the argument that all humans possess common traits worthy of recognition.¹⁹² Although there is the argument that some humans may not be able to express some of these traits, the theological meaning has to a large extent defined dignity as a value given to all people by God.¹⁹³ Therefore, it is a divine gift regardless of their capacity to express any of these traits. Despite the difference, there is a grounded position in both, that suggests dignity as ‘an intrinsic quality of all human beings, bestowed upon individuals not by social rank, but simply by nature of being human.’¹⁹⁴ Although there may be inconsistencies in identifying and agreeing to some principles and approaches as they relate to several issues and problems, contemporary scholarship conceptualises dignity as a universal philosophy that supports the idea as put forward by John Locke, that human dignity is natural freedom that should not be infringed without appropriate justification.¹⁹⁵ This requires that every person is by nature entitled to some degree of respect, fairness, and just treatment, all of which are core standards in both philosophical and theological conceptions of the dignity of the human person. This idea also reflects the Kantian philosophy that dignity is not only about respect for people’s free will, ‘but also the concomitant obligation not to abrogate it by treating them as an instrument of another’s free will.’¹⁹⁶

¹⁹⁰ Saudi Basic Law of Governance (Royal Order No A/90) 1992 art 1.

¹⁹¹ Stephen Riley and Gerhard Bos, ‘Human dignity’ (IEP) < <https://iep.utm.edu/human-dignity/#:~:text=Human%20dignity%20can%20denote%20the,the%20concept%20can%20be%20put.>> accessed 27 November 2022.

¹⁹² Remy Debes, ‘A History of Human Dignity’ (LSE, 05 February 2018) < <https://blogs.lse.ac.uk/theforum/a-history-of-human-dignity/>> accessed 03 February 2023.

¹⁹³ Qur’ān, 17:70.

¹⁹⁴ Henry (n 161).

¹⁹⁵ Richard Tuck (ed), *Cambridge Texts in the History of Political Thought* (Revised student edn, New York Cambridge University Press 1996) 415.

¹⁹⁶ Immanuel Kant and Jerome Schneewind, *Ground work for the Metaphysics of Morals* (Yale University Press 2000).

It is evident that the hypothesis that defines the theological understanding of dignity is one that conceives humans as being close to God and worthy of respect. This notion emerged in the context of a transition from a mundane life to one that pursues worthiness through a defined belief about human beings' self-esteem. This can also be related to the rationalist natural law theory that is grounded on the moral basis of the universality of the dignity of human beings.¹⁹⁷ These and other similar ideas were the foundations of human dignity as part of human rights that after World War II led to renewed emphasis on formative commitments, culminating in the drafting of the UDHR.¹⁹⁸

These theoretical and historical conceptions of human dignity have in many ways revealed the similarities and strong connection between theological and philosophical thinking about human dignity. Both of these played a significant role across both national and international instruments that insist on the inherent dignity of the human person and even in relation to concepts of civil, political, economic, social and cultural rights.¹⁹⁹ It is against this theoretical background that the research examines, identifies, and analyses the interpretation of the legal framework defining human dignity in the KSA in comparison with international law.

2.5.2 The Usefulness of the Concept of Human Dignity in the Context of the Prohibition of Human Trafficking under International Human Rights Law

¹⁹⁷ Roberto Andorno, 'Human dignity and human rights', in Henk A M J ten Have & Bert Gordijn (eds), *Handbook of Global Bioethics Journal* (Springer Netherlands, 2014).

¹⁹⁸ Glenn Hughes, 'The concept of dignity in the universal declaration of human rights' (2011) 39 *Journal of Religious Ethics* 1.

¹⁹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); see also International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 01 January 1976) 999 UNTS 3 (ICESCR).

International human rights law and indeed the domestic legislation of most countries around the world have provisions to protect human dignity such as the rights to life, liberty, free movement, security of the human person, freedom from servitude, and freedom from inhuman and degrading treatment. These provisions are encapsulated in various international and regional conventions which strongly reject and criminalise different forms of human exploitation and the abuse of the dignity of the human person.²⁰⁰ These prohibitions are an attempt to protect human freedom. The foremost and most widely referenced of these, particularly in international human rights law, is Article 4 of the UDHR of 1948, which states that: ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’²⁰¹

Evidently, therefore, discussions in international human rights law consider human trafficking as a violation of the human dignity concept;²⁰² the protection of human dignity is an authoritative principle in international human rights law.²⁰³ Furthermore, analysis of many conventions and instruments in international law reveals that human trafficking violates rights protected under international human rights law. For instance, the original Article 11 of the Supplementary Convention on the Abolition of Slavery provided that slavery in all its forms, including human trafficking, threatens one’s personal dignity and is unlawful.²⁰⁴ Furthermore, the United Nations Charter and the UDHR are clear on their recognition of the inherent dignity

²⁰⁰ The International Labour Organization (ILO) of Forced Labour Convention (adopted 22 July 1930, entered into force May 1932).

²⁰¹ *Rantsev v. Cyprus and Russia*, [2010] ECHR, para. 282; Although the European Convention on Human Rights (the Convention for the Protection of Human Rights within the Context of the Council of Europe, signed in Rome on November 4, 1950) did not explicitly prohibit trafficking in persons within Article (4) which prohibits slavery, servitude and forced labour, in a recent case the European Court of Human Rights, ruled that trafficking in persons, due to it containing an actual exercise of property rights over trafficked persons, is incompatible with the dignity of individuals and falls within the forms of prohibited treatment stipulated in Article (4) of the Convention

²⁰² McCrudden (n 157).

²⁰³ Ali Barez, ‘Human Dignity as a Constitutional Idea, Political and Legal Studies’ (2016) 4 Centre for Legal and Political Studies at the College of Law and Politics 245.

²⁰⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 07 September 1956, entered into force 30 April 1957) 266 UNTS 3 art 11.

and inalienable rights of all members of the human family as the foundation for freedom and justice.

The preamble of the United Nations Charter States that ‘We the people of the United Nations are determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’²⁰⁵ Article 12 of the UDHR provides that no one should be subjected to arbitrary interference in one’s privacy, family life, honour or reputation.²⁰⁶ Thus, international human rights law is settled in its protection of human dignity through provisions that disallow any act or omission akin to slavery, including human trafficking, hence, a close relationship between human dignity and human trafficking is established.

Perhaps one of the most important measures that can be taken to protect people’s dignity and prevent them from falling victim to crimes of human trafficking (as stipulated in the UN Global Action Plan to Combat Trafficking in Persons), is to adopt provisions that provide protection and the necessary legal rights for workers and so reduce the risk of them falling victim to the crime of human trafficking.²⁰⁷ To enhance the protection of workers from being victims of the crime of human trafficking, it is appropriate for the state to consider acceding to the 1975 Migrant Workers (Supplementary Provisions) Convention,²⁰⁸ the International Convention on

²⁰⁵ United Nations: Peace, dignity, and equality on a healthy planet, ‘United Nations Charter: Preamble’ <<https://www.un.org/en/about-us/un-charter/preamble>> accessed 26 August 2022.

²⁰⁶ Universal Declarations of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 12.

²⁰⁷ UNGA, ‘United Nations Global Plan of Action to Combat Trafficking in Persons’ 64th session (12 August 2010) UN Doc A/RES/64/293 para 35; Al-Harqān (n 24).

²⁰⁸ C143 - Migrant Workers (Supplementary Provisions) Convention (adopted 24 June 1975, entered into force 09 December 1978); This Convention is yet to be ratified by the Kingdom of Saudi Arabia.

the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (the Convention on the Protection of All Rights of Migrant Workers)²⁰⁹ and the Decent Work Agreement for Domestic Workers of 2011 (Domestic Workers Convention).²¹⁰ The state should adopt in its national laws, at the very least, the provisions contained in the preceding three conventions, in addition to including best practices that protect workers from falling victim to the crime of human trafficking. This is especially important for those countries that have a large number of foreign workers, general and domestic workers in particular. Among those countries is the KSA.

It is worth noting that the establishment and constitution of the offices of the United Nations High Commissioner for Human Rights (OHCHR) is one of the most important efforts made to protect human dignity and promote a human rights-based approach to dealing with human trafficking. By its formation and under its mandate, the OHCHR has prepared the Recommended Principles and Guidelines on Human Rights and Trafficking in Persons.²¹¹ In addition, it has developed its Extensive Commentary²¹² which seeks to assist those involved in efforts to combat trafficking in persons, with the aim of fully integrating human rights into their analysis and response to trafficking. The document includes seventeen recommended principles that address the following main areas: (a) the priority of human rights; (b) prevention of trafficking; (c) protection and assistance; and (d) criminalisation, punishment, and redress. In

²⁰⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 01 July 2003) A/RES/45/158; This convention is yet to be ratified by the KSA.

²¹⁰ C189 - Domestic Workers Convention, (adopted 16 June 2011, entered into force 05 September 2013).

²¹¹ UNESC, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (20 May 2002) substantive session UN Doc E/2002/68/Add.1.

²¹² United Nations Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (New York and Geneva United Nations Publication 2010).

addition, these principles contain eleven recommended guiding principles that provide practical measures for their implementation.

The role and importance of dignity in human rights law cannot be over emphasised and the same concept applies under Islam as discussed in the following chapter. This centrality is due to the concept of dignity playing a critical role not only regarding theological perspectives but also in international legal discourses which have shaped the way for human rights laws and conventions. Most international conventions, such as the UDHR, the ILO Conventions, etc, as highlighted above, contain elements that deal with the protection of the dignity of the person. Moreover, it was in that regard that Le Moli described it as the foundation of human rights law, humanitarian law and the international legal system.²¹³

The principle of dignity in international law can be viewed as the bedrock for international human rights law. It was further noted by Le Moli that human dignity serves as a value and as a legal obligation as well as the source of ethics for states and non-state actors.²¹⁴ As a framework, and as incorporated into treaties, conventions and national laws, the concept of human dignity is used to shape laws that create an obligation on states and non-state entities to observe, promote and defend the dignity of a human person. The concept can be said to have assumed the status of *jus cogens* in international law as it plays a special and central role in protecting human rights under international human rights law due to its acceptance, recognition and incorporation into several legal instruments.²¹⁵ This argument is supported when the contents of the UN Charter and the UDHR, being principal legal instruments on

²¹³ Ginevra Le Moli, 'The Principles of Human Dignity in International Law' in Mado Andrenas et al (eds), *General Principles and the Coherence of International Law* (Queen Mary Studies in International Law, Brill NijHoff Publishers, 2009) 352 – 368.

²¹⁴ *ibid* 362.

²¹⁵ Thomas Weatherall, 'Human dignity as a general principle of law' in *Jus Cogens: International Law and Social Contract* (Cambridge University Press, 2015) 41-66.

human rights, are reviewed. For instance, the preamble of the UN Charter of 1945 reaffirms faith in and protection of the fundamental rights and dignity and worth of the human person. The UN Charter also recognised under Article 62 the importance of human rights and human dignity and conferred on its organs the duty of observing, promoting and protecting human rights and fundamental freedoms.

In a similar approach, the UDHR incorporated and reflected ideas about human dignity. For instance, Article 1 of the UDHR provides that ‘all human beings are born free and equal in dignity and rights.’²¹⁶ The UDHR contains numerous provisions protecting dignity. For example, Article 2 provides that ‘everyone is entitled to all rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Article 3 provides that ‘everyone has the right to life, liberty and security of person’. Article 4 states that ‘no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’ Article 5 provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’

Also, under Articles 13 and 14 of the UDHR it is stipulated that no person may be subjected to cruel, inhuman, or degrading treatment, and that the individual is free to move and choose their place of residence within the borders of each country and to leave any country, including their own, or return to it.²¹⁷ Additionally, the UDHR under its international agreements encourages states and stakeholders to adhere to best practices and aspire to upholding the human rights of persons and protect them from any form of exploitation of their dignity and rights. These provisions, together with Articles 7, 8, and 12 of the International Covenant on Civil and

²¹⁶ Universal Declarations of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1.

²¹⁷ *ibid* arts 5, 13 and 14.

Political Rights (ICCPR),²¹⁸ and Articles 2 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),²¹⁹ provide a legal framework for prohibiting human trafficking. The preambles of the ICCPR and ICESCR emphasise that all human rights are derived from the inherent dignity of the human person.²²⁰ They both promote universal respect

²¹⁸ Articles 7, 8 and 12 of the International Covenant on Civil and Political Rights read as follows:

Article 7 reads 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'

Article 8 reads '1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 12 reads '1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (public order), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.'

²¹⁹ Articles 2 and 7 of the International Covenant on Economic reads as follows:

Article 2 reads '1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'.

Article 7 reads 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.

²²⁰ The preambles in the ICESCR and ICCPR include the following 'The States Parties to the present Covenant, considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the

for human rights and freedom. These covenants recognise the ideal of free people living in a world without fear which can only be established if the right circumstances are put in place for everyone to exercise their civil and political rights as well as their economic, social, and cultural rights.

Human rights are universal and therefore victims of trafficking are entitled to all of the rights stated above regardless of their gender, age, racial, ethnic or national origin, immigration status, or any other type of potential discrimination. The following chapter, demonstrates how these same rights were also mandated in the Holy Qur'ān. Consequently, some rights such as the rights to a fair hearing and a fair trial,²²¹ and the right to an effective remedy²²² are rights that are particularly applicable for addressing the consequences of human trafficking. It can therefore be argued that the protection mechanisms under the relevant international conventions on the rights and dignity of the human person, labour rights, and social and economic justice as enumerated above under the UN Charter, the UDHR and the ILO Conventions, are aimed at enhancing the commitment of states on the protection and the promotion of the rights of all manner of people other than citizens, within the purview of their jurisdictions or authority.

The following section discusses the international conventions and instruments which are ratified by the KSA in an attempt to protect human dignity.

foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person'.

²²¹ Article 10 of the United Nations Universal Declaration on Human Rights (UDHR) states that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

²²² Article 8 of the United Nations Universal Declaration on Human Rights (UDHR) states that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.

2.6 An overview of relevant international conventions and instruments

The KSA is a party to some of the key international human rights instruments and conventions that are concerned with human trafficking i.e., the Genocide Convention,²²³ the Forced Labour Convention²²⁴ and the Supplementary Convention on the Abolition of Slavery.²²⁵ Although the KSA was among the 51 original members of the UN who were involved in drafting both its Charter and the UDHR, the state was intentionally absent from the voting process, to approve the Declaration in 1948.²²⁶ This abstention was due to the contention by the KSA that the Convention's wording on freedom of religion violated the precepts of Islam.²²⁷ The KSA also maintained that human rights guaranteed by the Islamic-based laws of the KSA surpass those secured by the UDHR.²²⁸ Additionally, the KSA has ratified several international conventions that prohibit slavery and similar violations such as human trafficking, servitude, and discrimination.²²⁹ Although not all of these pieces of legislation are directly related to human trafficking, they largely refer to human dignity, equality and protection, which are issues that directly or indirectly relate to human trafficking. These include:²³⁰

²²³ The Kingdom joined this convention on the 13 of July 1950, available at the following link <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en> accessed 18 August 2021.

²²⁴ The Kingdom joined this convention on the 15 of June 1978, available at the following link <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103208> accessed 18 August 2021.

²²⁵ The Kingdom joined this convention on the 5 of July 1973, available at the following link <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en> accessed 18 August 2021.

²²⁶ Abdulaziz Alwasil, 'Saudi Arabia's engagement in, and interaction with, the UN human rights system: an analytical review' (2010) 14 The International Journal of Human Rights 1072.

²²⁷ Claude Welch Jr, 'Defining contemporary forms of slavery: updating a venerable NGO' (2009) 31 Human Rights Quarterly 70.

²²⁸ Ministry of Information, 'Proceeding of Conference of Saudi Scholars and European lawyers on Islamic law and Human Rights (Riyadh Ministry of Information Press 1972) 15; See also Human Rights Watch, 'Human Rights Developments in Saudi Arabia' (HWR) https://www.hrw.org/reports/1992/WR92/MEW2-02.htm#P422_152635 accessed 23 August 2021.

²²⁹ These conventions will be discussed later in this section.

²³⁰ See United Nations Human Rights Office of the Commission, 'Saudi Arabia' (OHCHR) <<https://www.ohchr.org/EN/Countries/MENARegion/Pages/SAIndex.aspx>> accessed 02 August 2021.

- a) The 1926 Slavery Convention or the Convention to Suppress the Slave Trade and Slavery;²³¹
- b) The Forced Labour Convention 1930;²³²
- c) The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956;²³³
- d) The Convention on the Elimination of All Forms of Racial Discrimination;²³⁴
- e) The Convention on the Elimination of All Forms of Discrimination against Women;²³⁵
- f) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²³⁶
- g) The Convention on the Rights of the Child;²³⁷
- h) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;²³⁸
- i) The Protocol Against the Smuggling of Migrants by Land, Sea and Air;²³⁹

²³¹ Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 09 March 1927) 60 LNTS 253.

²³² The International Labour Organization (ILO) of Forced Labour Convention (adopted 22 July 1930, entered into force May 1932).

²³³ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 07 September 1956, entered into force 30 April 1957) 266 UNTS 3.

²³⁴ International Convention on Elimination of all forms of racial discrimination (adopted 07 March 1966, entered into force 04 January 1969) 660 UNTS 195. Its preamble states: "Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person".

²³⁵ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 03 September 1981) 1249 UNTS 13 (CEDAW) art 6; Article 6 of the convention requires member states to combat human trafficking: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".

²³⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 13; Article 13 of the Convention, for instance, refers to protection. The article states; "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given".

²³⁷ UN General Assembly, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 02 September 1990) 1577 UNTS 3 art 35; Member states are required to combat human trafficking under this convention. Article 35 says: " States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form".

²³⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (Palermo Protocol) (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25. The Kingdom joined this convention in 2007. Article 2 of the Protocol states that: " The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives."

²³⁹ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January

- j) The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;²⁴⁰
 - k) The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;²⁴¹ and
 - l) The Convention on the Rights of Persons with Disabilities and its Optional Protocol;²⁴²
- Relevant regional instruments to which the KSA is a party include:

- a) The Cairo Declaration on Human Rights in Islam;²⁴³
- b) The Covenant on the Rights of the Child in Islam;²⁴⁴
- c) The Arab Charter on Human Rights;²⁴⁵
- d) The Arab Convention to Combat Transnational Organized Crime;²⁴⁶

2004) 2241 UNTS 507. As of 20 July 2007, the protocol had been ratified by the Kingdom of Saudi Arabia, which signed it on 10 December 2002.

²⁴⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222. The preamble to this Convention, for instance, refers to human protection. The preamble states "Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security".

²⁴¹ UN Committee on the Rights of the Child (CRC), Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography: List of issues to be taken up in connection with the consideration of the initial report of Belgium (CRC/C/OPSC/BEL/1), 8 March 2010, CRC/C/OPSC/BEL/Q/1, available at the following link <https://www.refworld.org/docid/50b3565e2.html> accessed 25 September 2021. The Kingdom joined this convention on the 18th August 2010. The preamble to this Convention, for instance, refers to human trafficking and exploitation. The preamble states "Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking in children".

²⁴² UNGA, 'Convention on the Rights of Persons with Disabilities' 61st session (24 January 2007) UN Doc A/RES/61/106. The Kingdom joined this convention on the 24th June 2008. Article 1 of this convention says "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".

²⁴³ Cairo Declaration on Human Rights in Islam (*Adopted at the Nineteenth Islamic Conference of Foreign Ministers, 31 July to 5 August 1990*) art 11; Article 11 of this convention states that '(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them'.

²⁴⁴ Covenant on the Rights of the Child in Islam (adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen, in June 2005) OIC/9-IGGE/HRI/2004/Rep.Final art 17; Article 17 of this convention states that 'States Parties shall take necessary measures to protect the child from: 1. Illegal use of drugs, intoxicants and harmful substances, or participation in their production, promotion, or trafficking. 2. All forms of torture or inhumane or humiliating treatment in all circumstances and conditions, or his/her smuggling, kidnapping, or trafficking in him/her.

²⁴⁵ Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art 10; Article 10 of this convention states that '1. 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. 2. Forced labour, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited'.

²⁴⁶ The Arab Convention to Combat Transnational Organized Crime 2010, to which the Kingdom acceded by virtue of Decree No. (M/38) dated 10/6/1433 AH, corresponding to 01 May 2012, and in its eleventh article stipulated that: 'Each State Party undertakes to take the necessary measures, within the framework of its domestic

- e) Abu Dhabi document for the system (the unified guiding law to combat trafficking in persons);²⁴⁷ and
- f) The Declaration of Human Rights of the Cooperation Council for the Arab States of the Gulf.²⁴⁸

As the Kingdom has an absolute monarchical system and arguably without an official constitution or an elected legislative body,²⁴⁹ approaches to political expression, as well as issues concerning the rule of law and civil liberties, are not always compliant with international standards. Since the KSA's legal system is based on Islamic law (Sharī'a), in practice, secular legislation can be proposed and ratified by royal order or decree.²⁵⁰ Hence, the government can issue administrative action and decrees and can also include the decisions taken from closed-door summary tribunals where cases are heard and determined.²⁵¹ It can be argued that through

law, to criminalize the commission or participation in the commission of the following acts committed by an organized criminal group: 1. Any threat of force, or use thereof, or other forms of coercion, kidnapping, fraud, deception, abuse of power, or exploitation of the state of weakness in order to use, transport, harbour or receive people for the purpose of illegally exploiting them in the practice of prostitution or all other forms of sexual exploitation, forced labour, forced service, slavery, or practices similar to slavery or servitude. The consent of the victim of trafficking is not considered in all forms of exploitation when the means indicated in this paragraph are used'.

²⁴⁷ Abu Dhabi document for the system (the unified guiding law to combat trafficking in persons) was approved by the Supreme Council of the Cooperation Council for the Arab States of the Gulf at its twenty-seventh session, which was held in Riyadh on 10 September 2006 (11/19/1427 AH). Art 10 of this document stipulated procedures to protect victims of trafficking in persons, to ensure their rights to information, medical and psychological care as well as the right to accommodation during the investigation and trial phases if necessary.

²⁴⁸ The Declaration of Human Rights of the Cooperation Council for the Arab States of the Gulf, adopted by the Supreme Council of the Gulf Cooperation Council at its thirty-fifth session held in Doha on 09 November 2004, and approved by Cabinet Resolution No 376 and dated 21/8/1436 AH. This declaration criminalizes the use of persons in medical experiments in Article (5), trafficking in persons in Article (3), and trafficking in human organs in Article (4).

²⁴⁹ Alkarama Foundation, 'Report to the Committee against Torture under the Second Periodic Review of Saudi Arabia' (March 2016) <https://www.alkarama.org/sites/default/files/documents/ALK_CAT_KSA_ShadowReport_31032016_Final.pdf> accessed 22 August 2021; See also As'ad Abū Khalil, 'Constitutions in a Non-constitutional World: Arab Basic Laws and the Prospects for Accountable Government' (2002) 96 American Political Science Review 842; See also ALQST for Human Rights, ALQST Annual Report 2019 11, available at the following link: <https://www.alqst.org/ar> accessed 19 August 2022; See also Rashed Aba-Namay, 'The New Saudi Representative Assembly' (1998) 5 Islamic Law and Society 235; See also UNHRC, 'Report of OHCHR on Summary of Stakeholders' submissions on Saudi Arabia' 31st session (24 August 2018) UN Doc A/HRC/WG.6/31/SAU/3 para 3.

²⁵⁰ Saudi Law of the Council of Ministers 1993 art 20; Article 20 states that Laws, treaties, international agreements, and concessions shall be issued and amended by royal decrees upon review by the Council of Ministers, without prejudice to the Law of Shura Council.

²⁵¹ UNHRC, Vice President and Rapporteur: Mr Elchin Amirbayov (Azerbaijan) 'Report of the Human Rights Council on its eleventh session' 11th session (16 October 2009) UN Doc A/HRC/11/37 para 473.

its influence and guidance, the UN Human Rights monitoring bodies' remedial work has improved the KSA's general human rights situation, which is discussed in Chapter Six. To meet its obligations under various international treaties regarding human rights violations, the KSA has also promulgated several new laws and updated and amended existing ones, as is discussed in Chapters Four, Five and Six.²⁵²

2.7 Conclusion

The Palermo Protocol represents an important step to strengthen efforts to combat the crime of trafficking in persons at international and national levels: to reflect this, the Protocol adopts a unified definition of the crime of trafficking in persons. Prior to the Protocol, there had been no international definition of human trafficking, which in turn caused a delay in the task of unifying national efforts to combat it.²⁵³ The Protocol marks a turning point in the development of international law by addressing flaws in earlier international instruments that were less clear on what constitutes trafficking in persons and were not sufficiently thorough regarding the precise measures that must be taken to combat it. In contrast with past documents, the Protocol aims to combat human trafficking in all of its forms, regardless of the crime's exploitative intent, whether it took place internationally or not, and regardless of the victim's age or gender. Moreover, the Protocol acknowledges that this crime disproportionately affects women and children. The Protocol outlines a minimal standard methodology that all state parties must follow in order to enable international collaboration.²⁵⁴

²⁵² The Third Report on Human Rights Situation in The Kingdom of Saudi Arabia 2012 (Ambitious Leadership, Underperforming Authorities) 7.

²⁵³ Al-Harqān (n 24).

²⁵⁴ UNDOC, *Legislative Guide for the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children* (United Nations 2020) 32.

In addition, it is important to highlight that there are two pillars flowing from the definition of human trafficking in Article 3(a): material and mental pillars. It has been shown, however, that it is not entirely clear whether the concept of exploitation is an exclusive part of the mental pillar or whether it is also an integral part of the material pillar. It seems therefore that it is not necessary to assign exploitation to only one of the pillars, since the crime of trafficking in persons is proven even if the crime was aborted before the offender actually exposed the victim to exploitation. What matters most is the offender's original intention to exploit the victim by deploying the act and means as envisaged in the Palermo Protocol. Therefore, it seems that the offender does not need to actually benefit from the crime to be prosecuted for human trafficking.

While the Palermo Protocol established a universally accepted definition of human trafficking, however it did not explicitly define exploitation. Lack of clarity allows states to interpret exploitation without restriction, resulting in a predominantly biased categorization of acts as exploitative or neglecting other severe forms of exploitation. This lack of inclusivity from the perspectives of influential individuals who prioritize their interests, contributes to disparities based on race, class, gender, and age and may not accurately reflect diverse populations. It has also been observed that this definition of trafficking in persons is not broad enough. As discussed earlier in the chapter, the definition has been criticised by scholars who are of the view that it does not make a sufficient link between the process of human trafficking and the related process of transferring victims within or outside a country for the purposes of exploitation.²⁵⁵ Moreover, the absence of a definitional link between human trafficking and the transfer of victims creates a loophole in the law, such that it allows certain states to avoid their obligations under international human rights law to combat human trafficking, as they do not often treat the transfer of victims within their jurisdiction as an act of human trafficking.

²⁵⁵ Hyland (n 133).

This chapter also demonstrates that the concept of human dignity carries incommensurable moral worth and how it can serve as a useful tool in drafting legally binding rules to protect victims of human trafficking and punish their traffickers. There is no doubt that understanding what essential human dignity and its benefits, can help to counter the causes of human trafficking and therefore reduce the rate of trafficking at both the source and in the destination countries. Human dignity and rights are universal and therefore victims of trafficking are protected under those rights regardless of their gender, age, racial, ethnic or national origin, immigration status, or any other type of potential discrimination.

Finally, the importance and usefulness of the concept and value of human dignity to international human rights law cannot be overstated. This chapter analysed why dignity as a concept is the foundation for international human rights law and forms part of *jus cogens*. State and non-state actors are obliged by the United Nations Charter and the UDHR to observe, protect and promote the dignity of persons. The concept is central to most legal instruments protecting human rights in international law.

The next chapter addresses human dignity and human trafficking from an Islamic perspective. It analyses the different practices of human trafficking which are controversially prohibited under the Islamic Sharīʿa. It also discusses the different sects of Islam and their respective points of view on dignity and human rights. The chapter critically examines different Islamic sources in relation to human trafficking and human dignity and their consistency with international human rights law.

CHAPTER THREE

HUMAN TRAFFICKING AND ISLAMIC SHARĪ‘A

3.1 Introduction

The preceding chapter discussed international anti-trafficking frameworks and examined international laws aimed at suppressing and preventing the crime of human trafficking. It also discussed the usefulness of the concept of human dignity under international human rights law. This chapter provides insight into the prohibition of human trafficking according to Islamic Sharī‘a.

It is important to note from the outset of Chapter Three that some Islamic sects have permitted certain practices (temporary marriage, forced marriage, and the provisions of the Kafala system) that might lead to or be described as human trafficking. This has been attributed to their revised concept of Islamic teachings. Although this chapter argues that most Islamic scholars have strongly advocated for the prohibition of these practices and human trafficking in all its forms, it has generated controversy within contemporary Islam.¹ This controversy around Islamic Fiqh² has led to ambiguities related to the prohibiting of these practices, which may arguably impede combating human trafficking in Muslim countries. For example, the Shiism sect of

¹ Report of the 9th Regular Session of the OIC Independent Permanent Human Rights Commission. Adopted report titled: Position paper Human trafficking in OIC countries. May 2016. 70 available at <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 06 January 2022.

² For the purposes of this chapter, it is critical to distinguish between two important keys: Sharia and Islamic 'fiqh,' which are not interchangeable. The former refers to the divine and immutable sources of Islamic law, whereas the latter refers to the methods of applying that law, namely the understanding and interpretation derived from Sharia (through human effort). This differs from Sharia in that it can change depending on the time and circumstances. Said Ramadan, "Islamic Law, its Scope and Equity" (1970) 36. See also AAB Philips, The Evolution of fiqh: Islamic Law and the Madhhab (IIPH 1988).

Islam permits temporary marriage.³ Additionally, in certain sects of Sunni Islam;⁴ it is permissible for a man to marry a minor without her express consent (forced marriage),⁵ thus conflicting with the accepted international human rights standards. This chapter critically examines Islamic sources which validate the prohibition of these practices and human trafficking, according to those well-established principles of Islamic Sharia consistent with international human rights law.⁶

To do so, this chapter critically analyses human trafficking by considering various forms and penalties for these crimes in Islamic law, as well as explaining how the concept of human dignity in Islam can influence the definition of human trafficking. Consequently, this chapter addresses two key questions. The first of these is how is human trafficking defined in Islamic Shari‘a? The second question to be addressed is what is the concept of dignity in Islam and how does this concept influence the definition of human trafficking?

Section two of this chapter includes an explanation of Islamic Shari‘a and the KSA legal system.

Section three discusses the definition of the concept of human trafficking. Section four focuses

³ For a detailed description of this Fatwa, see <<https://www.sistani.org/arabic/qa/0501>> accessed 12 December 2021.

⁴ Sunni Islam (/sni, sni/) is the most populous Islamic sect, accounting for 85-90 percent of the world's Muslims. The term Sunnah, which refers to Muhammad's behaviour, is the source of this word. Following the Sunnis, there is another major sect known as the Shiites. The conflict between the two factions stems from the caliphate's eligibility following Muhammad, and this divergence eventually took on larger political significance, in addition to religious and judicial dimensions. According to Sunni tradition, Muhammad did not abdicate his Caliphate, and the Saqifa participants elected Abu Bakr to succeed him (the first caliph). In contrast, Shiites believe Muhammad chose his son-in-law and cousin Ali bin Abi Talib to succeed him. Sunni Islam: Oxford Bibliographies Online Research Guide (n.p.): (Oxford University Press, USA. 2010).

⁵ Journal of Islamic Research number (33) for the year (1412), Fatwas of the General Presidency of Scholarly Research and Ifta, No. (254). for a detailed description of this Fatwa, see <<https://binbaz.org.sa/fatwas/14257/%D8%AD%D9%83%D9%85->> accessed 13 December 2021; See also Alawi Al-Saqqaf, Al-Durar Al-Sunniah, a documented scientific reference according to the Sunni school, available at <<https://www.dorar.net/feqhia/4093/>> accessed 22 July 2022.

⁶ Ayman Adham, ‘The Political Economy of Work in Saudi Arabia: A Comparative Labour Process Analysis in Two Firms’ (PhD Thesis, DE Montifort University Leicester 2018); Azfar Khan & Hélène Harroff-Tavel, ‘Reforming the kafala: Challenges and opportunities in moving forward’. (2011) 20(3-4), Asian and Pacific Migration Journal, 293-313.

on the prohibition within Islamic Sharī‘a of forms of forced labour, child and temporary marriages along with the mandated punishment. Section five discusses the usefulness of the concept of human dignity in the prohibition of human trafficking under Islamic Sharī‘a. The chapter ends with several conclusions, the main one being that, although there is no explicit text in the major sources of Islamic Sharī‘a prohibiting human trafficking, there are many customs and practices which contribute to human trafficking and are also strictly forbidden in Islam. Furthermore, all the principles of Islam have sought to grant rights to all, including the vulnerable, in an effort to deepen the sense of human dignity. This implies that Islamic Sharī‘a’s values are appropriate to supplement and support the implementation of the framework to combat human trafficking.

3.2 An overview of Islamic Sharī‘a and the KSA legal system

In 610 CE, the Prophet Muhammed (PBUH) received the revelation of Islam in Makkah. Having had the same message conveyed to Abraham, Moses, and Jesus, this teaching was a moral and theological continuation of the earlier monotheistic faiths.⁷ According to this doctrine, there is only one God, who has neither father nor son, and steadfastly rejects the idol venerated by the Arabian tribes.⁸ As a religion, Islam aimed to change the harsh practices of the Arabian Peninsula and establish a set of standards of behaviour for everyone.⁹ In the Qur’ān, it is stated, ‘Indeed We sent Our Messengers with clear signs, and sent down with them the book

⁷ Qur’ān, 14:1, ‘Alif. Lam. Ra. (This is) a Scripture which We have revealed unto thee (Muhammad) that thereby thou mayst bring forth mankind from darkness unto light, by the permission of their Lord, unto the path of the Mighty, the Owner of Praise’.

⁸ Qur’ān, 30:1, ‘Say (O Muhammad (Peace be upon him)): ‘He is Allah, (the) One’

⁹ Wael Hallaq, ‘A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-fiqh’ (1999) Cambridge University Press 31.

and the balance that people may uphold justice'. The interpretation of this passage could be suggesting that God sent the Islamic message to promote human welfare and foster peace.¹⁰

As outlined by the Qur'ān, Islam aims to protect people from injustice by advising them to do what is right and prohibiting them from doing what is wrong. Furthermore, it empowers them to overcome burdens and yokes that have been placed upon them.¹¹ The KSA recognises Islam as the exclusive religious and legal foundation.

3.2.1 The Concept of Islamic Sharī'a

The word Sharī'a refers to Islamic Sharī'a. It is derived from the Arabic phrase that means 'taking the right path'¹², in which God's rule is referred to.¹³ The concept of Islamic Sharī'a can be understood both as a legal system and as a set of guidelines that encompass the entirety of a Muslim's daily life.¹⁴ Hence, Islamic Sharī'a is considered to be both a religious and a secular standard.¹⁵ Islamic legal scholars agree that the five main sources for establishing Islamic Sharī'a are the Holy Book (The Qur'ān), the Sunna (the traditions or known practices of the Prophet Muhammad), Ijmā' (Consensus), Qiyas (Legal Analogy) and (Maqāṣid al-sharī'a and Maṣlaḥa). The Qur'ān and the Sunna are the two primary sources of Islamic Sharī'a, which are the foundations of the Saudi Legal system.¹⁶ Ijmā' is an Arabic term referring to the consensus or agreement of the Islamic community on a point of Islamic Sharī'a based on legal analogy

¹⁰ Qur'ān, 57:25.

¹¹ Qur'ān, 7:157.

¹² Cherif Bassiouni and Gamal Badr 'The Shariah: Sources, Interpretation and Rule-Making' (2002) 1 UCLA Journal of Islamic & Near Eastern Law 135.

¹³ Majid Khadduri and Herbert Liebesny, *Origin and Development of Islamic Sharia: Law in the Middle East* (Lawbook Exchange 1955) 105.

¹⁴ SS Ali, 'Teaching and Learning Islamic Sharī'a in a Globalized World: Some Reflections and Perspectives' (2011) 61(2) Journal of Legal Education 207.

¹⁵ David Weissbrodt and others, 'International Human Rights: Law, Policy and Process' (2009) LexisNexis 239.

¹⁶ See the important research by Emilia "Using Islam to Protect the Rights of Migrant Workers: Bringing Kafala into Sharī'a Compliance in Saudi Arabia" UCLA Journal of Islamic and Near Eastern Law, 20(1) 2023 <<https://escholarship.org/uc/item/1ht6n3qz>>.

(Qiyas). These latter sources are collectively referred to as "the striving of a legitimate scholar to reach a religious verdict" (Ijtihad).¹⁷

3.2.1.1 Primary sources

3.2.1.1.1 The Qur'ān

The Holy Qur'ān is regarded as the most important scripture in the Islamic religion. A majority of scholars agree that the Qur'ān is considered to be the utterance of God, sent to the prophet Muhammad in order to guide his followers in virtuous behaviour and interpersonal relationships.¹⁸ Consequently, the laws included in the Qur'ān regulate civil contracts and alliances, as well as religious obligations. Islam maintains a clear distinction between acts of worship, which encompass devotional obligations, and transactions, which are legal transactions governed by Islamic Shari'a. It is widely believed that Islamic Shari'a is a comprehensive legal framework that includes religious duties (referred to as the five pillars) and regulations governing other aspects of transactions, including contracts, torts, property, crimes, punishments, and war and peace laws. Also included are issues pertaining to family law, such as marriage, divorce, child custody, inheritance, and wills. The Qur'ān consists of a total of 6,239 verses, out of which 500 verses are dedicated to the discussion of criminal law, contracts, duties, and other facets of the legal framework. Furthermore, the Holy Qur'ān uses the phrase 'dignity' or a related form, a total of 49 times. According to a certain scripture, the Almighty proclaims: 'We have granted dignity to the offspring of Adam'.

¹⁷ Muhammad Ata Alsaid Sidahmad, *The Hudūd* 432 (1995).

¹⁸ Fouad Sheyab, 'Sources of Judicial Judgment in Commercial Disputes: A Study in the Saudi Legal System' (2023) *Judicial Magazine*, Issue 2.

3.2.1.1.2 The Sunna

According to Islamic Sharī'a, the Qur'ān is the primary source of guidance, with the Sunna providing additional guidance. The Hadith, is often referred to as the Sunna of the Prophet which is a compilation of the teachings and actions of the Prophet Muhammad and therefore they have significant authority in Islam. The verses of Surah An-Nisa explain the authority of the prophet Muhammad and instructs believers to adhere to the Messenger who has been assigned to them by God.¹⁹ Thereunder, the Sunna explains and clarifies the Qur'ānic's general regulations, prohibitions, and commands. Furthermore, the results are corroborated by the Prophet's personal observations and accounts of scientific explanations and oral teachings that he shared with his disciples throughout his lifetime. Consequently, it may be said that there are two categories of Sunna: the Sunna pertaining to verbal expressions and the Sunna pertaining to physical deeds.

The Qur'ān is ultimately the most authoritative source, although both sources are essential to a great understanding of Islamic Sharī'a. Nevertheless, each of them may require some interpretation where supplementary legal sources are used when the primary sources or secondary sources of law are inadequate or uncertain in addressing specific issues.

3.2.1.2 Secondary sources

3.2.1.2.1 Ijmā' (Consensus among legal scholars)

According to Islamic jurisprudence, consensus is considered the third most important authoritative source. In the present context, consensus 'Ijmā'' refers to the shared viewpoint of Islamic jurisprudence, the consensus of a group of Muslim jurists regarding a particular ruling

¹⁹ As for the obligation of following the prophet and complying with his Sunnah, the Qur'ān states in Surah An-Nisa - 59: 'O you who have believed, obey Allah and obey his Messenger and those over you'.

or decision. The Prophet stated in a hadith that has been transmitted, ‘Indeed, Allah will not permit Muhammad's community to concur on an error’.²⁰ In addition, obedience to God and the Messenger, in addition to those in positions of authority within the Muslim community, is obligatory according to the Qur’ān.

3.2.1.2.2 Qiyas (legal analogy)

The analogy is the fourth source of Islamic Sharī‘a. It is a method of utilising rational thinking concerning the application of verdicts derived from the holy texts to various emerging issues that arise daily life. Four essential components are required for analogous reasoning: the origin, which describes the original subject; the branch, which represents the new subject; the explanation, which is a statement of the shared cause between the two; and the ruling, a statement that refers to the inferred rule derived from the analogy.²¹

Based on the sources of Islamic Sharī‘a, it can be said that rules are derived from the Qur’ān and Hadith, as well as consensus and a process of interpretation known as Qiyas. A certain process needs to be followed when these sources are in conflict. It is believed that the Qur’ān and the Prophet's Sunnah are the primary texts or fundamental sources in this approach. There are many circumstances in which logic and reason may be applied, provided that they do not contradict the teachings of the Qur’ān and Sunna.²² According to Baderin, the concepts of

²⁰ Muhammad Al-Uthaymeen, *Al-Sharh Al-Mumti’ ‘In Zad Al-Mustaqni’* Vol 7 (Dār Ibn Al-Jawzi 1428)

²¹ An analogy may be illustrated by dispossessing a murderer of his inheritance. As per the Sunnah of the Prophet, it is prohibited for a murderer to receive inheritance. Analogically, this norm encompasses testamentary law as well.

²² An illustration of this may be seen in the narrative of Muadh bin Jabal, who was designated by the Messenger to oversee the virtuous adjudicators in Yamen. Prior to assuming the position of judge, Muadh was inquired by the prophet whether there are any Qur’ān ic passages or Prophetic sayings that might serve as guidance in the judiciary. Muadh replied, "I will exert my utmost effort in rendering judgements." The Messenger consented to this. Thus, this practice reinforces the previously stated organisation of Sharia's sources.

Ijmā' and Qiyas assist individuals in interpreting and implementing the teachings of the Qur'ān and Sunna with intricate and constantly evolving situations.²³

3.2.3 The concept of Ijtihad and the Islamic schools of thought

Islamic jurisprudence, according to Islamic Sharī'a, refers to the cognitive process of uncovering and deducing principles pertaining to God's legal rules (Sharī'a). In Islamic jurisprudence, Ijtihad is the process of deriving legal views by analysing and interpreting writings from the law. It is crucial to comprehend that Sunni and Shiite legal philosophy include many distinct schools of thought. Sunni legal interpretation is grounded on four prominent schools of jurisprudence: Hanbalia, Malikia, Shafi'ia, and Hanafia. As a group of Shiites legal interpretation, there are several different branches, such as Twelver, Imami, Ismaili, Alawite, Druze, and Zaidi.

Islamic Sharī'a is fundamentally 'an exhaustive body of regulations' that can be implemented anywhere and at any time due to its well established structure. Islamic Sharī'a maintains that only God has complete knowledge and understanding of all matters. Consequently, a significant proportion of Muslims maintain the belief that Islamic Sharī'a is fair and regard it to have the natural principles that the rational mind should strive to understand and apply since it represents the ultimate truth. The validity of Islamic principles of law is derived solely from their existence rather than from their reason. Due to the divine and inviolable character of Islamic Sharī'a, these concepts are certain and not subject to speculation. Consequently, Islamic Sharī'a is different from other legal systems. While followers of Islam contend that secular law is

²³ Mashood Baderin, *International Human Rights and Islamic Sharī'a* (Oxford University Press 2003)

unsubstantiated, Islamic Sharīʿa maintains that the law as elucidated in the Qurʾān offers a clear and unequivocal basis for legal concepts. As for the Qurʾān, ‘This is the Book; in it is guidance sure, without doubt, to those who fear Allah’. That is a statement expressing agreement or confirmation.

Due to its immutable nature, Islamic Sharīʿa is inalterable by removal, or substitution, thus constituting an eternal source. However, it is feasible to differentiate between the unchanging principles of Islamic Sharīʿa and the adaptable regulations that may be periodically reinterpreted by careful examination.

Ijtihad may be described as a process used to read texts with the purpose of extracting standards from them. Muslims who engage in legal reasoning are obligated to adhere to the subsequent principles, as stipulated in the Qurʾān and the Sunna of the Prophet: Islamic scholars adhere to the principles of Islamic Sharīʿa and refrain from violating them. They focus their analysis on contemporary issues based on the Qurʾān and Sunna. In addition, it is not acceptable to rely solely on justice or common sense when making decisions. Accordingly, Islamic Sharīʿa provides an objective interpretation rather than one that is subjective. It is an unauthorised inference made without the approval of a governing authority. In addition, if the interpretation is speculative in nature and hypothetical, it therefore cannot be conclusive.

In summary, Ijtihad plays a vital role in the application of Islamic law in modern life, particularly in cases when there are no established sources for specific situations. It has a crucial function in contexts where criminal law is lacking, and Muslim scholars need to depict Islamic principles accurately. Therefore, it is incumbent upon individuals to assiduously seek divine

guidance and adhere to the textual foundations of Islamic Sharīʿa, specifically the Qurʾān and the traditions bequeathed by the Prophet, in order to discover principles and resolutions pertaining to social issues such as human trafficking.

The corpus of Islamic law can be broadly classified into three categories:

- i. Rituals and worship (ibadat);
- ii. Civil and other legal duties that include administrative, commercial, constitutional, labour, employment, family, and civil laws (muʿamalāt) in the modern sense; and,
- iii. Sanctions (uqūbat).²⁴

3.2.4 The Foundation of the Saudi Legal system

The official language of the KSA is Arabic, which is the language used in all of its official legal documents. Although legal materials come in various forms, they can be broadly categorised into three sources: Islamic Sharīʿa, statutory law,²⁵ and custom (*urf*).²⁶ The KSA acknowledges Islamic Shari'a as the only basis for its legal system. Sharīʿa refers to the body of Islamic law as it serves as a guideline for all legal matters in the KSA. In the Sharīʿa, and therefore in the KSA, there is no difference between the sacred and the secular aspects of society. In fact, the KSA has no formal constitution; however, by royal order in 1992, the King implemented the Basic Law of Governance. To the extent that the Basic Law can be considered an ‘informal’ constitution, Article 1 establishes the Qurʾān and the Sunna of the Prophet Muhammed as the ‘formal’ constitution. In light of this, there should be no inconsistencies between the laws of

²⁴ *ibid.* 424 – 433.

²⁵ According to Article Seventy of the Basic Law of Governance, the issuance and amendment of regulations, treaties, international agreements, and privileges are to be carried out through royal decrees.

²⁶ Ihab Eid, lectures In Principles of Law, College of Applied Studies and Community Service, King Saud University.

the State and the principal sources of Islamic Sharī‘a.²⁷ A notable characteristic of the KSA is that it does not have many secular laws. Nonetheless, this may also increase the difficulty of determining the true meaning of the law, particularly in a system that lacks judicial precedent. Traditional laws can be interpreted more flexibly in this manner.²⁸

The Basic Law has a total of 83 articles distributed throughout nine chapters.²⁹ Article 7 of the KSA constitution establishes that the KSA government has authority derived from the Holy Qur’ān and the Sunna of the Prophet Muhammed.³⁰ Under Article 44, the King is exempted from the separation of powers, which applies to the legislative, executive, and judicial branches. The monarch is their ‘ultimate authority’. As per Article 67 of the Constitution, if Islamic Sharī‘a does not directly address a legal issue, when a regulatory action is still needed, then a King may enact regulations (nizam) to address that issue in accordance with Islamic Sharī‘a. Furthermore, Article 68 of the Constitution provides for consultation and advice between the Council of Ministers and the Consultative Council (Majlis Al-Shura) re-established in 1992.³¹

The Consultative Council’s duties include policy advice and the creation of rules and bylaws that are consistent with Islamic Sharī‘a principles and serve the public interest.³² It was given the authority to create policies related to all public affairs, including economic, financial, and international affairs. As per the rule, an ordinance (nizam) could only be issued by royal order

²⁷ Saudi Basic Law of Governance (1 March 1992) art 8.

²⁸ Lisa Wynn, ‘Marriage Contracts and Women’s Rights in Saudi Arabia; Mahr, Shurūt, and knowledge distribution (2008) Islamic Legal Studies Program, Harvard Law School 200.

²⁹ The Saudi Basic Law of Governance was adopted on 1 March 1992.

³⁰ *ibid* arts 1, 7 and 48; Additionally, Rashid Aba-Namay's article ‘The Recent Constitutional Reforms in Saudi Arabia’ appeared in 42 International and Comparative Law Quarterly 295.

³¹ Its responsibility is to establish rules and regulations that serve the public interest while also adhering to Islamic Sharia.

³² Saudi Basic Law of Governance (1 March 1992) arts 67

or decree and would not come into effect until it was published in the official gazette.³³ According to Article 48, courts (including labour courts) must “apply Islamic Sharī‘a to the cases before them in strict conformity with the Qur’ān, and Sunna as well as other regulations issued by the Head of State”.³⁴ The Council of Senior Eulama was founded in 1971 to make sure governmental regulations follow Islamic law. An important function of this institution is to advise the King and the administration on matters of state. Over the years, the council has played an integral role in the development of government policy.³⁵

Council of Senior Eulama viewpoints regarding specific criminal law issues are considered authoritative by the legal profession. With the assistance of intellectuals and jurists, the State has been able to maintain Islamic Sharī‘a despite the KSA's incredibly rapid development.³⁶ During the past few decades, the KSA has frequently interpreted and applied Islamic Sharī‘a in a more traditional and conservative manner, which may explain why many observers perceive it as inflexible.³⁷

Considering its prominent religious position in the Muslim world with the location of two of the most significant Islamic holy mosques, the KSA has an obligation to safeguard its Islamic identity. Accordingly, it declares itself to be an Islamic State throughout, binding itself to

³³ Many Saudi Eulama view the word 'nizam' (ordinance or regulation) as a Western concept that is not permitted under Islamic Sharia. This word distinguishes itself from the word 'law' and is commonly used to refer to codified laws. It is also avoided to use the term "legislative authority" in preference to "regulatory authority," as a phrase that can only be applied to God as the only legislator. In 2004, AM Al-Jarbou published a case study on the independence of the judiciary in Saudi Arabia in 19 Arab Law Quarterly 5, 31.

³⁴ Saudi Basic Law of Governance (1 March 1992) arts 1, 7 and 48

³⁵ Anders Jerichow, *The Saudi File – People, Power, Politics* (St Martin’s Press 1998) 68.

³⁶ KSA History, Ministry of Foreign Affairs of the Kingdom of Saudi Arabia's website <https://www.google.co.uk/search?> accessed 01 December 2023.

³⁷ Hossien Esmaeili, ‘On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System’ (2009) 26 Arizona Journal of International and Comparative Law 1.

Islamic values and customs.³⁸ Additionally, the KSA is considered one of the nations most likely to maintain a strict Islamic legal system.³⁹ In this regard, the KSA has a distinct legal system compared with both the western and the Islamic systems that are practiced elsewhere.⁴⁰

In general, KSA laws are mistakenly thought to be solely based on Islamic Sharī'a. Conversely, due to the presence of regulations issued by the government, the law in reality is more comprehensive than it first appears. Consequently, the KSA has adopted a completely new interpretation of Islamic Sharī'a relating to the legislative authority of the government following the passage of these laws. This new methodology appears to acknowledge that it is possible to enact laws under Islamic Sharī'a 'without in any way infringing on the function reserved exclusively for God'.⁴¹

In addition, tribal values, traditions, and customs make an important contribution to the KSA's culture and their legal system, as in most of the Middle East. Esmaeili concludes that tribal law, tradition, or custom have a significant influence on the political and governmental structures of the KSA, as well as the laws pertaining to private and individual matters.⁴² It is, however, safe to say that Islamic Sharī'a is without a doubt the cornerstone of the Saudi legal system, as well as in the Islamic world. However, there is one critical point to note that no law shall conflict

³⁸ The Kingdom of Saudi Arabia, as protector of Islam's holy sites, holds a special place in Muslims' hearts. This is stated in paragraph 2 of part 1 of the KSA's Initial Report to the CRC.

³⁹ Cf Enid Hill, 'Comparative and Historical Study of Modern Middle Eastern Law' (1978) 26 *The American Journal of Comparative Law* 295.

⁴⁰ Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press 2010) 172.

⁴¹ KA Faruki, *Evolution of Islamic Constitutional Theory and Practice* (1971) 4.

⁴² Hossien Esmaeili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26(1) *Arizona Journal of International and Comparative Law* 1.

with Islamic Sharī‘a, as the Qur’ān and the Sunna constitute the primary sources of legal norms in the KSA.

The first place to look for information on Saudi Arabian law is the ‘fiqh’ of Islamic law. Fiqh is an Arabic Islamic jurisprudence term derived from the root word faqiha, meaning ‘deep and comprehensive understanding’. The Arabic literature has used the word ‘fiqh’ and its subtracts in the quest of knowledge, wisdom, and in-depth understanding of Islamic laws. One looks to the ‘fiqh’, or ‘ijtihād,’ of religious-legal scholars from the past and present who, through their knowledge and devotion, have become qualified in interpreting Islamic Law and deduce laws rather than from State legislation or court decisions. The majority of the recognised Islamic legal schools' body of knowledge, or ‘fiqh,’ is found in works authored by Muslim scholars (Ulama) throughout a nearly fourteen-century span.⁴³ Saudi Arabian judges base their decisions on these texts, particularly those that are regarded as canonical sources in every Islamic legal school.⁴⁴ According to Professor Frank Vogel, who examined the Saudi legal system:

Every source of Saudi law, with the exception of the Qur’ān, was written or assembled by academics known as Ulama. This includes the compilation of the Prophet's customs. Ulama's ability to produce these texts is based on their standing as scholars, not on any formal or official roles they may have, like judge or professor in an academic institution. Based on these sources, other Ulama, like Saudi Arabia's judges and Mufti, produce fiqh to provide guidance to others or settle disputes. Usually, a scholar is required to assess these materials and render a decision. A non-scholar has a moral duty to contact someone who is more knowledgeable than them when it comes to interpretation; they can do this by getting their fatwa or by reading a book where the expert has expressed their ideas.⁴⁵

⁴³ Frank E. Vogel. *Islamic Law and Legal System: Studies of Saudi Arabia* at 22, 142 – 143 & 370 – 373 (2000).

⁴⁴ *ibid.*16.

⁴⁵ *ibid.*145-146.

The Hanbalī school, the fourth orthodox school of law within Sunnī Islam, interprets Islamic Sharīʿa, which forms the basis for the implementation of Islamic law in the KSA courts. Even with the Kingdom's single school of Islamic law, there were still disparities in decisions and practices, which made it more challenging to get a reliable legal opinion. The scholars of the Hanablī school of Islamic law held differing views and philosophies, which contributed to the multiplicity of interpretations.

In June 1928, the Judicial Board of Saudi Arabia adopted a resolution, which was subsequently confirmed by the King, aiming to address the inconsistencies. The resolution declared that rulings would follow the established decisions found in Imam Ahmed ibn Hanbal's school of Islamic law due to its books' clarity and simplicity, the consensus of this school's adherents, and the presentation of evidence addressing any issues that may be at hand.⁴⁶

Specific Hanbali school books were named by the Judicial Board as the official and primary sources for the Shari'a courts under its purview. Judges were instructed to refer to the two previous Hanbali authoritative works written by renowned Hanbali jurist Mansur ibn Yunus al-Bahutī al-Hanbali (1052 A.H./1642) as per the resolution's paragraph (c):

Sharh Muntaha al-Iradat (Manual's Explanation); and Sharh al-lqna' (Manual for Explaining Al-Lqna').

When attempting to solve a particular issue, judges must abide by the solution offered by one of the books and not the other, or by the answer that both agree upon. If there is a disagreement,

⁴⁶ Abd al-Fattah M. Sayfi, *al-Ahkam al-ammah Lil-Nizam al-Jinai fi al-Sharīʿa al-Islamiyah Wa-Al-Qanun* [The General Rules of the Sharīʿa Criminal Justice System] 9 (1997).

nevertheless, Sharh al-Muntaha takes precedence. If neither of the two volumes is accessible or does not address a certain issue, judges should revert to an abridgment or synopsis of it:

A Synopsis of Al-Iqna', written by Sharaf al-Din Abu al-Naja al-Hajjawi (968 A.H./1560), is known as Zad al-Mustaqni' fi Ikhtisar al-Muqni'.

Mar'i ibn Yusuf al-Karmi's work Dalil al-Talib li Nayl al-Matalib, or A Synopsis of Muntaka al-Iradat (961 A.H./1554).

Other Hanbali law books may be studied and conclusions drawn in line with the prevalent opinion they contain if a solution is still not discovered.⁴⁷As a result of this decision, a royal decree was issued in 1349 A.H. (1930) which said that 'a judgement not based on those texts shall require an obligatory meeting, while it shall be sufficient to rule by what is found in the authentic law books of the school of Imam Ahmed ibn Hanbal, which may be applied without a meeting of court members'.⁴⁸

Furthermore, there are situations where judges on hearing such cases should or should not follow the instruction of other Sunni schools, depending on the specifics. The aforementioned resolution contained a significant exception in paragraph (b) that allowed the courts to adopt the views of other schools of Islamic law if they thought that doing so would help them reach a decision that would best serve the public interest.⁴⁹

⁴⁷ Al-Hay'a al-Qadaiyyah [Judicial Board] Decision No.3 (17/1/1347/ June 25, 1928), approved by Royal Decree of 24/3/1347/ Sept. 8, 1928. *See also* Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 Int'l & Comp. L. Q. 764 – 765, 761 - 787 (1989).

⁴⁸ Fuaad Hamza, *Al -Bilad al-Arabia al-Saudiya* [Kingdom of Saudi Arabia] 175-76 (1988).

⁴⁹ Al-Hay'a al-Qadaiyyah [Judicial Board] Decision No.3 (17/1/1347/ June 25, 1928), approved by Royal Decree of 24/3/1347/ Sept. 8, 1928. *See also* Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 Int'l & Comp. L. Q. 764 – 765, 761 - 787 (1989).

The Council of Ministers, the Shura Council, or the King codify family law, criminal law, legacy or inheritance, or many facets of Islamic contract law. The ‘codification of Islamic law’ debate is worth mentioning. Traditionalists, who favour applying Islamic law as it is understood by the Prophet's noble companions and as set forth in the Qur’ān and Sunna, with the assistance of explanations found in traditional jurisprudential sources, have strongly opposed this.⁵⁰ While that is outside the purview of this thesis, scholastically speaking, limiting the number of jurisprudential sources of the divine law (*fiqh*), which caused ambiguity and differing opinions when applied in court rulings, was a significant first step towards codification and a crucial way to standardise the Saudi Arabian judicial system.⁵¹

The 1953 establishment of the Saudi Council of Ministers as a formal decision-making body with legislative, executive, and administrative functions brought modern laws and regulations spanning a wide range of public and private law domains into the Saudi legal system in addition to Islamic law.⁵² The Saudi Corporation Law, which was enacted in 1385 A.H./1965, is a clear example of French influence in the field of private law. It was introduced into the Saudi legal system through ‘the Egyptian code which was directly patterned on French company law before the amendments of 24 July 1966’.⁵³ The Saudi Law of Criminal Procedure also contains several provisions that were borrowed from Egyptian and French law.⁵⁴ Many other legal systems, particularly the Egyptian and French systems, had an influence on numerous codes that regulate

⁵⁰ Bakr Abu Zayd, *al-Taqqeen Wa al-Ilzam [Rationalization and Necessity]* (1982); Wahbah al-Zihily, *Johoud taqqeen al-fiqh al-Islamī, [The Efforts to Codify the Islamic Fiqh]* (1987).

⁵¹ Abd al-Fattah M. Sayfi, *al-Ahkam al-ammah Lil-Nizam al-Jinai fi al-Sharia’h al-Islamiyah Wa-Al-Qanun [The General Rules of the Sharī’a Criminal Justice System]* 12-13 (1997).

⁵² Roger Perrot, *Institutions Judiciaires* 88 (1983); see also Al-Jazeera newspaper, ‘The Council of Ministers, history, figures, and facts from establishment to modernization’ Thursday 06/10/2022 Issue 18134 <<https://www.al-jazirah.com/2022/20221006/fe1.htm>> accessed 5 January 2024.

⁵³ *ibid.* 290.

⁵⁴ See Abdullah Mari Qahtani, 2 *Tatawwur al-Ijraat al-Jinaiyah Fi al-Mamlakah al-Arabiyah al-Saudiyah [The Development of the Law of Criminal Procedure in Saudi Arabia]* 528, & 363 (1998).

public finance, customs, ports, mines, and other areas which have been enacted in the field of public law.⁵⁵

As long as contemporary statute provisions do not violate divine law, they are generally valid and enforceable. As indicated, the objectives of Islamic Sharī‘a and the public interest (Maqāṣid al-sharī‘a and Maṣlaḥa) are the only foundation upon which contemporary statutory legislation and regulations can be established and enacted. This power is only used when Islamic law lacks a clear provision addressing a particular matter.⁵⁶ According to Article 67 of the Basic Law, ‘the regulatory authority shall lay down regulations and proposals to further the interests of the State, or remove what might be prejudicial thereto, in conformity with the Islamic Sharī‘a’.⁵⁷ Saudi Arabia refers to statutory laws that are autonomous, although not entirely independent, of Islamic Sharī‘a rules because, in accordance with the Islamic Sharī‘a God is sovereign and has the final say over matters of law. ‘The Arabic word ‘qanun,’ meaning ‘law,’ is not used in Saudi Arabia because Sharī‘a forbids it as it symbolises secular or temporal law’.⁵⁸

The government establishes the official sources of the KSA law, which include statutes, executive regulations, tables, laws, rules, procedures, international treaties and agreements,⁵⁹ ministerial resolutions and decisions, departmental circulars, and other pronouncements of the KSA official bodies with legal force. As previously stated, unless authorised by royal decrees following its study—typically by both the Council of Ministers and the Shura Council—no

⁵⁵ Roger Perrot, *Institutions Judiciaires* 290 (1983).

⁵⁶ Royal Decree No. 19746 (22/9/1379H, Mar. 20, 1960).

⁵⁷ The Basic Law of Governance, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992) art. 67.

⁵⁸ Roger Perrot, *Institutions Judiciaires* 290 (1983).

⁵⁹ According to Article Eighty-One of the Basic Law of Governance, the implementation of this system does not undermine the treaties and agreements that the Kingdom of Saudi Arabia has made with other countries, international bodies, and organisations.

legislations⁶⁰ or regulations, treaties, international agreements, or concessions may be adopted, negotiated, or changed.⁶¹

By issuing royal orders, the King can also independently create laws or policies. The head of an Islamic State, according to Islamic jurists, has the authority to enact laws, either directly or through interpretation, in order to meet growing social needs, address developmental concerns, and protect the public interest.⁶² The King used his legislative authority to promulgate the following constitutional instruments between 1992 and 1994.⁶³

- i. The Basic Law of Governance, Royal Order No. A/90, (27/08/1412H, Mar. 1, 1992);
- ii. The Shura Council's Law, Royal Order No. A/91, (27/08/1412H, Mar. 1, 1992);
- iii. The Council of Ministers Law, Royal Order No A/13. (03/03/1414H, Aug. 20, 1993);
and
- iv. The Law of Provinces, Royal Order No. A/92, (27/08/1412H, Mar. 1, 1992).

Furthermore, in order to guarantee that judges have access to the most recent working knowledge and to prevent inconsistencies in their rulings, the Law of the Judiciary established a research department. This department is housed within the Ministry of Justice and is composed of several experts with a minimum of a bachelor's degree. Its duties include indexing, abstracting, and classifying the principles established by higher courts, gathering collections of specific judgements, general rules, and precedents for publication, conducting research

⁶⁰ Legislation is divided into several sections; primary legislation (constitution), ordinary legislation (statutes) and subsidiary legislation (regulation).

⁶¹ The Council of Ministers Law, royal order, art. 7 (03/03/1414H, Aug. 20, 1993).

⁶² The Basic Law of Governance, royal order No. A/90, (27/8/1412H, Mar. 1, 1992) arts. 1 & 55.

⁶³ Sobhi Mahmansani, *Falsafat al-Tashri fi al-Islam* [The Philosophy of Jurisprudence in Islam] 127 – 130. (Farhat J. Ziadeh trans., by, Beirut; 1952).

projects, and responding to judges' inquiries.⁶⁴ The 2007 Law of the Judiciary's implementing rules also established the High Court's Research and Studies Department, which is made up of researchers who draft studies that the High Court's specialised circuits request.⁶⁵

Currently, the Ministry of Justice has released the 47th edition of its Code of Judicial Rulings, which is a compilation of court decisions from 2008 through 2024.

These decisions seem to set legally binding precedents for situations that are comparable in the future. It is beneficial in that it reduces the quantity of occasionally seemingly arbitrary rulings from certain courts. Similar departments with a director, several judges, specialists, and researchers were established as a result of the 2007 Law of the Board of Grievances. These divisions offer advice, carry out studies, categorise Board rulings, standard operating procedures, and precedents, and prepare them for publishing.⁶⁶ The Law of the Board of Grievances' implementing regulations also established the High Administrative Court's Research and Studies Department, which employs researchers whose job it is to prepare studies that the court's specialised circuits require.⁶⁷

To further address the demands of the judiciary, the King of the KSA issued a Royal Order on December 10, 2014, creating a committee to propose a project for the compilation of a Code of Judicial Rulings on legal situations and issues, categorised by Islamic jurisprudential category.⁶⁸ The committee, housed under the Ministry of Justice, has the authority to ask for research works and studies on Islamic jurisprudence and judicial precedents from specialists,

⁶⁴ The Law of the Judiciary, Royal Decree No. M/64, art. 89 (14/7/1395H, Jul. 23, 1975).

⁶⁵ The Law of the Judiciary, Royal Decree No. M/64, art. 89 (14/7/1395H, Jul. 23, 1975).

⁶⁶ *ibid.* art. 6(a), *amended by* Royal Decree No. M/4 (1/3/1401H, Jan. 7, 1981).

⁶⁷ *ibid.* art. 6(b), *amended by* Royal Decree No. M/76 (14/10/1395H, Sep. 20, 1975).

⁶⁸ Mahir 'Abdul-Majeed 'Abbood, *Some Guarantees of Justice in the Islamic Judiciary*, (Jan. 4, 2005).

researchers, and members of the court. The committee must weigh the views of the Islamic schools of law using a scientific method and in accordance with the guidelines of the Islamic Shari'a.

The 'Ijtihad' of religious-legal scholars and proof from Sharī'a scriptures must bolster all of the codified content.⁶⁹ The committee was given 180 days to complete its work after the Royal Order affirmed its independence. The committee divided the work among three subcommittees, each of which was made up of eminent judges with expertise in criminal, personal status, and private law. Because the work was so complex, the committee asked the Royal Court to extend the deadline for completion. The Royal Decree is seen by many academics as a significant step towards the final codification of laws and punishments under the Islamic Sharī'a, and the project is considered as a component of the extensive reform of the nation's legal system. Consequently, the evidence law (2021), the personal status law (2022), and, more recently, the civil transactions law (2023) were all codified by rules issued by the Kingdom later on, as per Islamic Sharia.

The Official Gazette (Umm al-Qura) is the publication where all Saudi statutory legislation and regulations are published.⁷⁰ The majority of Saudi statutory laws and regulations, as well as all the fundamental sources from the Sunni schools of jurisprudence, have been published in multi-volume works by private entities. The printed resources should be a researcher's initial choice.

⁶⁹ Royal Order No. A/20, (Dec. 10, 2014).

⁷⁰ Al-Shamil fi Anzimat Al-Mamlakah al-Arabiyyah al-Sa'udiyah [Comprehensive Collection of Saudi Arabian Regulations] 10 Volumes (Muhammad Rustom & Muhammad Al-Fuzanī eds.) (Beirut: El-Halabi, 2005).

It is noteworthy, nevertheless, that a sizable body of primary sources of Islamic Sharīʿa and its related sciences, including all the primary sources of the Hanbali school of jurisprudence, are now digitally accessible. The full texts of all the major sources of the Sunni schools of jurisprudence are available to attorneys, judges, scholars, and researchers through a number of independent internet services. With the advancements in search engine technology, interested parties can easily search through hundreds of volumes for a certain topic using the electronic copies of these primary sources. This allows users to compare and contrast different viewpoints from various Islamic schools of law.

Furthermore, all of the KSA's statutory laws and regulations are gathered, arranged, preserved, and made accessible by the Saudi National Centre for Documents and Archives. The Arabic full texts of multilateral, regional, and international conventions and treaties, as well as Saudi statutory laws and regulations, are comprehensively covered on the Centre's website.

The Compendium of Saudi Laws has also been updated by the Bureau of Experts, which has added modifications and removed laws that have been repealed. Its English online database is an officially recognised government website providing a trustworthy English translation of Saudi Arabian statutory laws and regulations. It has translated a number of significant Saudi statutory laws.

As the KSA is an Islamic state, as such, both criminal and civil proceedings in its court system are handled under Islamic law, or Sharīʿa. The King, who serves as both a source of pardon and the ultimate court of appeal, is at the head of the legal system. There are three primary components to the Saudi judicial system. The majority of matters in the Saudi legal system are

heard by the largest, the Sharīʿa Courts. The Supreme Judicial Council, Courts of Appeal, and Courts of First Instance (Summary and General Courts) comprise the hierarchy of Sharīʿa courts. Courts of First Instance are divided into the following: a- General courts. b- Criminal courts. c- Personal status courts. d- Commercial courts; and e- Labour courts. Each entity is preoccupied with the matters presented to it in line with the framework of this system, namely the legal proceedings system and the criminal processes system. With the King's assent, the Supreme Judicial Council has the authority to create further specialised courts.⁷¹

The Board of Grievances is an additional judicial system that hears cases involving the government in addition to the Shari'a courts. A number of special committees housed within government ministries handle certain disputes with limited adjudicatory or quasi adjudicatory jurisdiction, making up the third segment of the Saudi judicial system, the most significant being as follows: the Committee for Negotiable Instruments (a); the Commercial Agency Commission (b); the Committee for Combating Commercial Fraud (c); the Committee for Combating Cover-Up Activities (d); the Committee for Combating Cover-Up Activities (e); the Customs Committee (f); the Committee for the Resolution of Securities Disputes (CRSD) (g); the Committee for the Settlement of Banking Disputes (the 'SAMA Committee'); and (h) the Labour Disputes Committees.

The SAMA body established in 1987 by the Saudi Arabian Monetary Agency, is a special body tasked with investigating banking disputes between banks and their clients and mediating a resolution between the parties. Claims made by or against banks are outside the jurisdiction of the Board of Grievances and Shari'a courts, according to the Royal Order that established the

⁷¹ [Article 9 of the Judicial law. The law was enacted by Royal Decree No. M/78 on October 1, 2007.](#)

Saudi Central Bank Committee. Hence, the Committee has the authority to render binding decisions even though it is not a recognised court.⁷²

3.3 The Concept of the Crime of Human Trafficking in Islamic Sharī‘a

The basis of the Islamic religion, and its first sources, are the Qur’ān and the Sunnah.⁷³ These two sources are written in the Arabic language, and to understand the term ‘human trafficking’ in Islam, it is therefore necessary to refer to the contextual meaning of this term in Arabic.⁷⁴ This is in addition to defining human trafficking under Islamic Sharī‘a.

Therefore, this section is divided into two subsections. The first explores the meaning of the crime of human trafficking in Arabic terminology, whilst the second section discusses the Islamic definition of human trafficking.

3.3.1 The Definition of a Crime of Human Trafficking in Arabic Terminology

The term ‘the crime of human trafficking’ consists of three words: ‘crime’, ‘human’ and ‘trafficking’.⁷⁵ The meaning of each word must be understood separately. To understand the general meaning of this term, its content and its limits, this section briefly presents the meaning of each word in Arabic.

3.3.1.1 The Definition of a Crime in Arabic Terminology:

⁷² See further at <https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1384896_1.pdf>.

⁷³ Bassiouni Cherif, *The Sharī‘a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2013) 61; See also Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University Press 2008) 24.

⁷⁴ Sundus Momani, ‘The importance of the Arabic language in understanding Islam’ (*Sotor*, 25 July 2020) <<https://sotor.com/>> accessed 01 January 2022.

⁷⁵ Duha Al-Talabani, ‘An Analytical Study of the Law to Prevent Human Trafficking in Persons in Jordanian Law and Comparative Laws’ (2016) 43 *Studies of Sharia and Law Studies* 1283.

A crime, as defined in Arabic terminology “*Jarima*”, is: ‘a legal prohibition that Islam has enjoined with Fixed “*Ḥudūd*” or Discretionary “*Ta’zīr*” punishment’.⁷⁶

The legal prohibitions are: either to do an act that is forbidden or to disobey an act that is commanded.⁷⁷ The prohibitions have been described as legal prohibitions. Islamic Sharī‘a is the source of legality or otherwise, so the act or omission is not considered a crime unless it is specified by Islamic Sharī‘a, which entails a penalty.⁷⁸ Crimes are classified as those committed against God or those committed against a human being.⁷⁹ They are divided into Ḥudūd punishments, Ta’zīr or Qiṣās (retribution) and blood money.⁸⁰ The former is considered a violation of God's Ḥudūd, or ‘boundaries’, and is linked to punishments specified in the Qur’ān and, in some cases, inferred from Hadīth.⁸¹ The Ḥudūd punishment is:⁸² ‘The punishment that is truly ordained by God Almighty’.⁸³ The punishments for the crimes are specific and limited in number in the two main sources.⁸⁴ They are applicable to six categories of crimes:⁸⁵ *zinā* (illicit sexual intercourse),⁸⁶ *qathf* (false accusation of adultery),⁸⁷ *shurb al-khamr* (drinking

⁷⁶ Ali Al-Mawardī, *Al-Ahkām Al-Sultāniya* (Dār Al-Hadīth Cairo no publication date) 322.

⁷⁷ UNSDRI (tr), *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia* (Rome UNSDRI 1908) 35-42.

⁷⁸ *ibid.*

⁷⁹ UN Office on Drugs and Crime (UNODC), ‘Combating Trafficking in Persons in Accordance with the Principles of Islamic Law’ (June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed 10 August 2022.

⁸⁰ Silvia Tellenbach, ‘Islamic Criminal Law’ In Markus D Dubber and Tatjana Hornle (eds), *The Oxford Handbook of Criminal Law* (1st edn, Oxford University Press 2015) 249-252.

⁸¹ Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge University Press 2005) 45.

⁸² Mohamed El-Awa, *Punishment in Islamic Law* (American Trust 1981) 127-129.

⁸³ Ali Al-Marginānī, *Al-Hedāya Explanation of the Beginning of the Beginner* (Talal Youssef ed, Vol 2. House of Revival of Arab Heritage Beirut 1995) 339; see also Ali Al-Māwardī, and the royal rulings of Al-Māwardī. 344

⁸⁴ Peters (n 83) 30. The goal of Ḥudūd punishments is to deter future offenders from committing the same crime. According to Peters, fixed penalties must be carried out in public to deter others from committing the same offence; See also Javed Iqbal, *The Concept of State in Islam* (Iqbal Academy 2000) 24.

⁸⁵ Wahbah Al-Zuhily, *Al-fiqh Al-Islamī wa Adillatuh* (2nd edn, Dār Al-Fikr Letebah wa At-Twzia 1985) 193.

⁸⁶ Qur’ān, 24:2; If the perpetrator is married, the penalty is 100 lashes or death by stoning (adultery). As the Qur’ān, states ‘The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion [i.e., law] of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment’.

⁸⁷ Qur’ān, 24:4; For which is punishable by 80 lashes. As the Qur’ān states ‘Those who accuse the chaste women (of fornication), but they do not produce four witnesses, flog them with eighty stripes and do not accept their any evidence anymore. They are the sinners’.

alcohol),⁸⁸ *sariqah* (some types of theft),⁸⁹ *brigandage* (highway/armed robbery),⁹⁰ and *Baghī* (Transgression).⁹¹ Controversy exists over whether or not apostasy in regard to Islam is also a Ḥudūd crime.⁹² Ḥudūd penalties are never waived or curtailed.⁹³

Ta'zīr is a legitimate unspecified punishment for every sin that does not have Ḥudūd punishment, retribution 'Qisās'⁹⁴ nor any form of expiation (penance),⁹⁵ and it is to this definition that the majority of jurists refer.⁹⁶ The Qur'ān and Sunnah mention a few of the Ta'zīr crimes, but no specific punishments are identified.⁹⁷ Some have defined Ta'zīr as: 'Every sin for which there is no Ḥudūd punishment or any form of expiation'.⁹⁸ It can be said that the person who implements this discipline is a judge.⁹⁹ It could be argued that Islamic Sharī'a

⁸⁸ Al-Shāfi'ī, *Al-Umm* (Fawzi Abdul Mutaleb ed, 1st edn, Vol 7, 2001) 363; Muhammad Al-Sarakhsī, *Al-Mabsūt*, Vol 9, 295. Hadīth, Ṣaḥīḥ Muslim, No 3281; For which carries a penalty of 40 or 80 lashes. There is a controversy between schools; During the Prophet's lifetime, the 40-lash penalty for alcohol consumption was introduced into the Prophetic tradition. However, the punishment was increased to 80 lashes under the rule of ibn Al-Khattāb (the Prophet's Companion). This punishment was adopted by Mālikī and Hanafī, on the contrary, the Shafī and Hanbalī schools of thought followed the Prophet's lead and punished alcohol consumption with 40 lashes.

⁸⁹ Qur'ān, 5:38; For which results in amputation of the right hand as punishment. As the Qur'ān states [As for] the thief, the male and the female, amputate their hands in recompense for what they earned [i.e., committed] as a deterrent [punishment] from Allāh. And Allāh is Exalted in Might and Wise}.

⁹⁰ Qur'ān, 5:33; For which results in amputation of the right hand and left foot as punishment. As the Qur'ān states {Indeed, the penalty for those who wage war against Allāh and His Messenger and spread mischief in the land is death, crucifixion, cutting off their hands and feet on opposite sides, or exile from the land. This 'penalty' is a disgrace for them in this world, and they will suffer a tremendous punishment in the Hereafter}.

⁹¹ Muhammad Bassiounī, 'Crimes and the Criminal Process' (1997) 12 (3) Arab Law Quarterly 269.

⁹² Wetenschappelijke Raad voor het Regeringsbeleid and Scientific Council for Government Policy, *Dynamism in Islamic Activism: Reference Points for Democratization and Human Rights* (Amsterdam University Press, 2006) 109.

⁹³ Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003) 1.

⁹⁴ Qur'ān, 2:179. The Qur'ān states {There is life for you in retaliation, O people of understanding, so that you may refrain}; Qisās: A legal, specific, and exacted punishment that requires equality between the crime and the penalty when possible, and where its causes are: killing, injury, slashing, and removing the benefit of an organ. The right to enforce the Qisās punishment is held solely by the victim's closest heirs.

⁹⁵ Penance: It is what Islamic Sharī'a decrees as reparation for a deficiency or error, or as a restraint from sin and a violation.

⁹⁶ Muwaffaq Al-Dīn Ibn Qudāmah, *Al-Mughnī Sharh Mukhtasar Al-Kharqī* (Vol 12, Book World Publishing House Riyadh 1997) 523.

⁹⁷ Cherif Bassiounī (ed), *The Islamic Criminal Justice System* (Oceana Publications 1982) 212. Some Ta'zīr crimes: are mentioned in the Qur'ān, but they did not stipulate a punishment, for example, usury (unlawful interest) and bribery. As the Qur'ān states {And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property}; As also the Qur'ān states "Allah has permitted trading and forbidden 'Ribā' interest (usury)".

⁹⁸ Ibn Qayyim al-Jawziyya, *Informing the Signatories on the authority of the Lord of the Worlds, investigation: Muhammad Abdalsalām Ibrāhīm* (Vol 2, Dār al-Kutub al-'Ilmiyyah Beirut 1991) 76

⁹⁹ Abdelwahab Bouhdiba (ed) and Muhammad Ma'ruf Al-Dawalibī (ed), *The Different aspects of Islamic culture, The Individual and society in Islam* (Vol 2, UNESCO publishing 1998) 61.

sources broadly describe crimes while leaving particular details to Islamic states. The Qur'ān states 'O believers, obey Allah and the Messenger, as well as those given authorities (i.e. those in command) among you'.¹⁰⁰ Therefore, those responsible for maintaining public order and safety must decide on the appropriate punishment for Ta'zīr offences.¹⁰¹ Zeidan believes that the risk and the circumstances of the crime, the background of the offender and the extent of societal harm are all decisive factors in determining the disciplinary punishment.¹⁰² These penalties are for the purpose of applying and upholding justice, punishing criminals, and protecting the public interest.¹⁰³

Regarding crimes of retribution (Qīṣāṣ) and blood money, these are usually punishable by the same actions, as they are classified as personal rights.¹⁰⁴ Qīṣāṣ and blood money are considered exclusive punishments for individuals. Consequently, they can only be imposed once. As a result, there is no penalty range with upper and lower bounds. It is a personal right, meaning that the victim can be asked for forgiveness. If the perpetrator is pardoned, the Qīṣāṣ penalty will be waived.¹⁰⁵ There are five types of retaliation and blood money crimes: (a) deliberate murder (b) quasi-deliberate murder (c) manslaughter murder (d) intentional assault on a person below the level of killing and (e) unintentional assault on a person below the level of killing. An assault on a person below the level of killing is defined as an assault that does not result in death, such as by inflicting wounds and beatings.¹⁰⁶ The purpose of this division in Islam is to impose the appropriate punishment on offenders.

¹⁰⁰ Qur'ān, 4:59.

¹⁰¹ Mohammed Kamālī, *Sharī'a Law: An Introduction* (One World 2008) 187.

¹⁰² Abdulkarīm Zedan, *Almadkhal Le Derasat Al- Sharī'a Al Islāmyah* (Dār Al-Ressālah 1969) 45.

¹⁰³ *ibid.*

¹⁰⁴ Abdulqādir Odeh, *Islamic criminal legislation compared to secular law* (Dār al-Kateb al-'Arabī Beirūt no date of publication) 79.

¹⁰⁵ *ibid.*

¹⁰⁶ James Anderson, 'Homicide in Islamic Law' (2009) 13 Cambridge University Press 4 <Homicide in Islamic Law | Bulletin of the School of Oriental and African Studies | Cambridge Core> accessed 03 June 2023.

3.3.1.2 The Meaning of ‘Trafficking’ in the Arabic Language:

‘Trafficking’ in the Arabic language means buying and selling with the intention of making a profit through trade.¹⁰⁷ If the subject of trade is permissible, then the trade is lawful, such as trading in goods and merchandise. If the subject of trade is prohibited, then it is illegal to trade, such as drug trafficking and human trafficking.

3.3.1.3 The Meaning of ‘Humans’ in the Arabic Language

Humans are distinguished as beings capable of goodness and beauty, and by the nature of the human body. Humans are created female and male, one or the other, each are distinguished and each can be singular, and plural; the male is a human, as is the female; both are human beings, each with unique biological characteristics.¹⁰⁸

The text of the Holy Qur’ān states, ‘Say (O Muhammad): I am only a human being like you,’ indicating that people are equal in humanity, although people are distinguished for their greater knowledge, the ability to reason and rationalise and to do admirable deeds. Following this is stated, ‘It is revealed to me,’ showing that I am distinguished from you, indicating the uniqueness of each individual. In another verse, The Holy Qur’ān says, ‘No man has touched me,’ singling out the word ‘human.’ This is indicated in another verse, ‘So he represented to her a perfect human being’.

It is an expression of the angels who appeared to Mary in the form of a human being. The text of the Qur’ān: ‘This is not a human being,’ advocates a requirement to glorify him and exalt his position and that he is more honourable and generous than a human being.¹⁰⁹ The honouring of

¹⁰⁷ Muhammad Eid, *Organised Crime Gangs and Their Role in Trafficking in Persons* (Naif Arab University for Security Sciences Riyadh 2005) 91.

¹⁰⁸ Muhammad Ibn Manzoor, *Lisan Al 'Arab* (Vol 4, Dār Sader Beirūt 2010) 59.

¹⁰⁹ Nasser Al-Shahrani, *International Efforts in Combating Trafficking in Human Beings* (Naif Arab University Press for Security Sciences, Riyadh, 2010) 8; see also Al-Talabani (n 9). The term ‘human trafficking’ when

human beings in Islam is the fundamental basis of rights, and this is consistent with the preamble of the Universal Declaration of Human Rights, ‘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’.¹¹⁰

3.3.2 The Definition of the Crime of Human Trafficking under Islamic Sharī‘a

The practice of human trafficking has been known in the Islamic world for a long time.¹¹¹ It is considered one of the most serious crimes, especially when targeting children and women.¹¹² Human trafficking takes many forms,¹¹³ one of which is prostitution.¹¹⁴ Prostitution was a widespread practice in the era before Islam, and can be thought of as commodifying a woman’s body to earn a profit.¹¹⁵ Islamic Sharī‘a has prohibited sexual exploitation of others;¹¹⁶ before the spread of Islam, for example, if a person had a slave-girl, he would send her to commit adultery in order to gain money for the master.¹¹⁷ Therefore, the Qur’ān has revealed;

translated into Arabic may confuse some non-specialists, as some may take the term literally and assume it refers to the genuine sale and purchase of human beings or the existence of markets for slaves. The linguistic concept of the word ‘trafficking’ gives the Arabic reader this definition, whereas, in fact, it is only a metaphorical meaning, since this does not necessarily have to involve a sale and purchase transaction in the legal sense, whereas the actual meaning of the crime of human trafficking may involve other acts. It can also be said that the means of exploitation can be considered a crime of human trafficking.

¹¹⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

¹¹¹ Muhammed Shanqeetī, *Prohibition of Trafficking in Women and Their Independence in Islamic Law* (Naif Arab University for Security Sciences, Riyadh 2010) 452.

¹¹² Mohamed Mattar, ‘Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses’ (2002) 26 Fordham International Law Journal 721.

¹¹³ Mohammed Murād, *Islamic Sharia’s position on trafficking in women and children and organ transplantation* (Naif Arab University for Security Sciences Riyadh 2010) 446.

¹¹⁴ The OIC Independent Permanent Human Rights Commission, ‘Human trafficking in OIC countries’ (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 02 January 2022.

¹¹⁵ Qur’ān, 49:13. Islam had advocated equality and dignity among people: {People, we have created you from a male and a female and made you into nations and tribes that you might know one another. The noblest of you before Allah is the most righteous of you. Allah is the Knower, the Aware}.

¹¹⁶ UNODC (n 81).

¹¹⁷ Ali Ünal, *The Qur’ān with Annotated Interpretation in Modern English* (Tughar book USA 2008) 734.

And do not compel your girls to prostitution, seeking the materials of this life, while they desire to remain chaste. Should anyone compel them—then after their compulsion, Allah is Forgiving and Merciful.¹¹⁸

This form of human trafficking is currently known as the sex trade. The Arabian Peninsula knew slavery before Islam, as slaves were brought from African countries such as Abyssinia and Nigeria, for sale to others.¹¹⁹ With the advent of Islam, the Qur'ān came with a call for slaves to be treated with dignity.¹²⁰ Slavery was a system with many contributory factors, such as wars, piracy and kidnapping.¹²¹ In addition to people selling themselves, a father also had the authority to sell his children.¹²² This kind of treatment of humanity demonstrates evidence of the moral trajectory taken by the Qur'ān warranting the complete eradication of slavery.¹²³

This section is divided into two subsections. First, it highlights the definition of the crime of human trafficking in ancient Islamic jurisprudence. Second, it discusses the definition of the crime of human trafficking in contemporary Islamic scholarship.

3.3.2.1 The Definition of the Crime of Human Trafficking in the Ancient Islamic Jurisprudence

Since 'human trafficking' is a modern term, ancient Islamic jurisprudence scholars did not provide a definition of the crime of human trafficking.¹²⁴ However, forms of this trade have existed since ancient times, and have been discussed by scholars in Islamic jurisprudence books.¹²⁵ Human trafficking was forbidden by Islamic Sharī'a through punishment, as

¹¹⁸ Qur'ān, 24:33.

¹¹⁹ John Hunwick, 'Arab Views of Black Africans and Slavery' [2006] *West Africa, Islam, and the Arab world* 75.

¹²⁰ Gustave Le Bon, *The world of Islamic civilization* (1st edn, Tudor Publishing company 1974) 459-460

¹²¹ Abdullah Alwan, *The System of Slavery in Islam* (Dār Al-Salām for Printing Publishing and Distribution 1986) 11-12.

¹²² *ibid.*

¹²³ Adis Duderija (ed), *Maqāsid al-Sharī'a and Contemporary Reformist Muslim Thought: An Examination* (New York Palgrave Macmillan 2014) 236.

¹²⁴ Nurhayati and others, 'Human trafficking in the perspective of maqāsid al-sharīah' (2022) 22 *Jurnal Ilmiah Islam Future* 150.

¹²⁵ Majid Salmassi, 'The phenomenon of human trafficking, a jurisprudential study' [2014] *Journal of Ijtihād and Renewal* 1.

demonstrated throughout this thesis. However, local laws and international conventions have defined it using very similar terms.¹²⁶

The research demonstrates that Islamic and international laws both make provisions for combating trafficking in persons.¹²⁷ Several international and regional human rights instruments which have been adopted in the Muslim world, as well as by some Islamic constitutions and national legislation, condemn and prohibit trafficking in persons and related crimes.¹²⁸ This confirms that these laws do not contradict the principles of Islamic Sharī‘a.¹²⁹ This chapter further addresses some practices that lead to human trafficking under an Islamic human rights law perspective. Some Islamic countries maintain international principles and provisions in addressing the problem of trafficking in persons. These principles and rulings are based on Islamic legal traditions.

However, historical forms of human trafficking still persist. In fact, they represent some of the forms of human trafficking in the current era as well. These forms have developed in light of contemporary international trends and have recently revealed new patterns.

3.3.2.2 The Definition of the Crime of Human Trafficking in Contemporary Islamic Jurisprudence

Human trafficking has appeared in contemporary Islamic jurisprudence with several definitions, including:

All legal and illegal behaviour that turns a person into a mere commodity or a victim that is controlled by professional intermediaries across national borders. This is with the intent of

¹²⁶ Iyad Ibrahīm, ‘The Phenomenon of Human Trafficking’ (An Islamic jurisprudential vision) [2021] *Journal of Missan of Comparative Law Studies* 174.

¹²⁷ The OIC Independent Permanent Human Rights Commission (n 116).

¹²⁸ UNODC (n 81).

¹²⁹ *ibid.*

exploiting them for low-paid work or in sexual acts or others. These definitions applied whether the act was done with the will of the victim or by default, or in any other form of servitude.¹³⁰

It is noted that the above definition indicates that the crime of human trafficking occurs through legal or illegal activities. However, as mentioned in the previous chapter, international and regional charters and legislation related to human trafficking are limited to acts of recruitment, transportation, transfer and reception.¹³¹ In addition, one finds that the definition stipulates the transformation of a human being into a mere commodity, by professional intermediaries across national borders. However, the crime of human trafficking may also be carried out by either a professional or unprofessional intermediary and may be committed across either national or international borders with the intention of exploitation, whether with or without the victim's consent.¹³²

Human trafficking is also defined as: 'the recruitment or transfer of persons by force, coercion, or deception for the purpose of exploitation in all its forms, including sexual exploitation, forced labour, forced service, beggary, slavery, trafficking in human organs, and so on'.¹³³ This definition refers to the particular activities on which the crime of human trafficking is based, including recruitment and transportation, as well as the approach used to commit the crime, namely force, coercion, and/or deception. Moreover, the definition indicates that such acts should be for the purpose of exploitation. This definition does not limit the forms of

¹³⁰ Suzi Nashid, *Human trafficking between the shadow economy and the formal economy* (New University House for Publishing and Distribution Alexandria 2005) 172.

¹³¹ Kelly Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 Human Rights Belief 30.

¹³² Muhammad Al-Nusro and Ola Abbas, 'Trafficking in Human Beings As A Transnational Crime and Ways of Fighting it: Analytical Study in the Light of International and National Legislations' (2014) 41 Studies Sharia and Law Sciences 1084; see also About trafficking in persons and human rights on UN Website at the following link <<https://www.ohchr.org/en/trafficking-in-persons/about-trafficking-persons-and-human-rights>> accessed 01 August 2023; see also Babiker Al-Sheikh and others, *Combating Human Trafficking* (Studies and Research Centre, Naif University 2012) 132.

¹³³ Mohammed Al-Arian, *Operations of Human Trafficking and Mechanisms to Combat it* (New University House Alexandria 2011) 30.

exploitation, instead it gives examples, as indicated by the phrase ‘and so on’. This definition is consistent with the definition contained in the Palermo Protocol. Moreover, the definition includes all aspects of the crime of human trafficking, including the recruitment of children. It is therefore considered more comprehensive than others.¹³⁴

The following section explains various forms of exploitation under Islamic human rights law perspective.

3.4 Human Trafficking under Islamic Human Rights Law

It can be inferred that human trafficking crimes are based on human exploitation.¹³⁵ Thus, exploitation is what distinguishes human trafficking from some similar acts, for example, the crime of smuggling migrants, or illegal immigration.¹³⁶ In accordance with the definition in the Palermo Protocol, exploitation can take various forms, such as forced labour or services, prostitution or other forms of sexual exploitation, and the removal of organs.¹³⁷

Islamic Sharī‘a generally stipulates that the exploitation of human beings is prohibited due to the fact that in Islam, exploitation is contrary to human dignity.¹³⁸ The Qur’ān unequivocally states ‘and we have certainly honoured the children of Adam’.¹³⁹ Islamic Sharī‘a also explicitly prohibits certain forms of exploitation which are consistent with the Palermo Protocol.¹⁴⁰ This

¹³⁴ Fouad Abdelmoneim, *The principle of equality in Islam compared to Western democracies and Marxist regimes* (1st edn, Modern Arabic office 2002) 177.

¹³⁵ Nasser Al- Shahrānī, *The National Legislative Framework for Combating Human Trafficking in the Kingdom of Saudi Arabia* (Naif Arab University for Security Sciences Riyadh 2008) 8.

¹³⁶ Muhammad Abdulhadi, *Human Trafficking between Islamic Jurisprudence and liberal Law* (Dār al-Fikr al-Jamī Alexandria 2015) 90.

¹³⁷ Article 3(a) of the Palermo Protocol states that exploitation “shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

¹³⁸ Al-Shahrānī, (n 137) 8.

¹³⁹ Qur’ān, 17:70.

¹⁴⁰ Zuraini Ab Hamid & Khairil Azmin Mokhtar, *Human Trafficking: The International Malaysian Legal Law Framework and Sharī‘a Perspective* (2013) 21 IIUM Law Journal 287.

prohibition includes forced labour or services and the exploitation of the prostitution of others, as well as the prohibition of trafficking in the removal of organs.¹⁴¹ In addition to the practices covered by the Protocol in a specific form, a number of Islamists prohibit other forms of exploitation, including what may occur as a result of illegal practices on expatriate workers, forced marriage, child or pleasure marriage. Islamic Sharīʿa complies with international human rights law in prohibiting most of these practices. This section, therefore, is divided into three subsections; firstly, the general prohibition of exploitation in Islam; secondly, the viewpoint of Islamic schools of thought on the subject of forced and temporary marriage, as well as child marriage in Islamic Sharīʿa; and thirdly, human trafficking as being punishable under Islamic Sharīʿa.

3.4.1 Prohibition of Exploitation in Islam

Islamic Sharīʿa forbids exploitation in general¹⁴² and has explicitly stipulated the prohibition of exploiting people's needs and vulnerability. Specifically, Islamic Sharīʿa prohibits monopolising goods and services,¹⁴³ particularly in times of distress and panic. It was therefore decided to consider the practice of monopoly as a form of exploitation. For example, monopolising basic commodities in times of need, and times of crisis such as a pandemic for the purpose of increasing prices and making greater profit.¹⁴⁴ Islamic Sharīʿa also prohibits bribery, which is a key issue in this discussion. Bribes given to border control officials, and to customs, law enforcement, and other government officials, facilitate the commission of unlawful acts and the use of illegal means, as well as the exploitative practices which define the character of human trafficking. While some government employees may be content to disregard the crime in exchange for money, others actively seek to profit from the human trafficking

¹⁴¹ Al-Shahrānī (n 137); see also UNODC (n 81).

¹⁴² The OIC Independent Permanent Human Rights Commission (n 116).

¹⁴³ Arvie Johan, 'Monopoly Prohibition According to Islamic Law: A Law and Economics Approach' (2015) 27 MIMBAR HUKUM 166.

¹⁴⁴ Ibtisam Al-Ghamdī, 'Monopolizing the Victuals at the Epidemic Time: A Jurisprudence Comparative Study' (2020) Dhamar University College of Arts 352.

business.¹⁴⁵ As a result, the prohibition of bribery in Islam, along with many other Islamic principles, supports the comprehensive Islamic framework for combating human trafficking. As a result, bribes given to state officials to cover up this crime are forbidden and are thus punishable under Islamic Sharī'a.

Respecting people's rights and interests is considered one of the most important basic Islamic rules in transactions as well as removing injustice and grievances between people. Islam has guided and directed the path of lawful earnings through trade: the Qur'ān states: 'But Allah has permitted trade and has forbidden interest'.¹⁴⁶ However, Islam has also controlled and restricted trade to ensure that people's rights are observed, justice is established, and unlawful earning is forbidden. Obtaining people's money unjustly requires an element of exploitation. Consequently, the Qur'ān stipulates 'O believers, you should not usurp unjustly each other's wealth'.¹⁴⁷ Exploiting people is therefore forbidden according to the provisions of Sharī'a. Human trafficking crimes are based on human exploitation. To demonstrate this, the following sub-section presents the Islamic Sharī'a's position on some forms of exploitation, cited in international and Islamic definitions.

3.4.2 Forced labour and services

Forced labour is defined as work without remuneration or cost. Therefore, the worker is coerced into doing what the employer wants or demands.¹⁴⁸ The jurisprudential definition does not deviate from the linguistic meaning mentioned above.

¹⁴⁵ UNODC, 'Corruption as a Facilitator of Trafficking in Persons and Smuggling of Migrants' (March 2021) <https://www.unodc.org/roseap/uploads/documents/Publications/2021/UNODC_RSO_Corruption_Desk_Review_FINAL.PDF> accessed 06 February 2023.

¹⁴⁶ Qur'ān, 2:275.

¹⁴⁷ Qur'ān, 4:29.

¹⁴⁸ Sakr Al-Maqid, *Human Trafficking: An Arab Vision and the Efforts of Naif Arab University for Security Sciences in Combating it* (Naif Arab University Press 2010) 16-17.

The Islamic Sharī‘a emphasised the importance of workers’ rights. The prophet Muhammad (PBUH) said ‘Whoever hires an employee, let him know his wages’¹⁴⁹ and he (PBUH) said ‘Pay the worker his wages before his sweat has dried’.¹⁵⁰ The prophet Muhammad (PBUH) also reported that

‘Allah said, I will be an opponent to three types of people on the Day of Resurrection: -1. One who makes a covenant in My Name but proves treacherous; -2. One who sells a free person and eats his price; and -3. One who employs a labourer and takes full work from him but does not pay him for his labour’.¹⁵¹

Benefiting from the work or services of others is a contractual-based relationship, which is governed by terms agreed in advance by the two parties. Therefore, the emphasis is on the importance of workers knowing their wages before commencing work in order to guarantee their rights, and the obligation of the employer to promptly pay the worker's wages on completion of the work. So, the prophetic expression implies that it was obligatory to give the employees wage before their sweat dries up, which is a metaphor for paying the employees' wages in a timely manner.

The research demonstrates how exploitation of human beings through forced labour and services is a clear contravention of the Islamic Sharī‘a’s approach to respecting human rights. This is a clear violation of workers’ civil rights which requires civil liability for security, as well as criminal liability through Ta’zīr crime punishment.¹⁵²

3.4.3 Slavery and practices similar to slavery

¹⁴⁹ Badr Al-Ayni, *al binayah sharh al hidayah* (Vol 10, Scientific books house 2000) 224.

¹⁵⁰ *ibid* 243.

¹⁵¹ *ibid* 245.

¹⁵² Al-Shahrānī (n 137).

Enslavement is defined as the introduction of a person into slavery to become a slave, owned by others and enslaved to him; scholars have been using the jurisprudential meaning in the linguistic sense.¹⁵³

When Islam was first formed, slavery was already prevalent throughout the world and many parts of the world continued to accept the existence of slavery until the first quarter of the 20th century when the Slavery Convention was signed in Geneva on 25th September 1926. This was followed by the adoption of the Supplementary Convention on the Abolition of Slavery and its Trade and Institutions and Practices Similar to Slavery on 7th September 1956.

Islam has dealt with the issue of slavery in a manner that ensures its elimination. Islam has limited slavery to only two sources: the first is the prisoners of war of non-Muslim enemies who can be enslaved at the discretion of the Muslim ruler if he deems there to be an interest in doing so,¹⁵⁴ and the second is, if an enslaved woman gives birth to a child that is not her master's. However, if the father of the child is her master then the child is free. Therefore, by limiting the sources of slavery in Islam, it has expanded liberation of slaves through many legitimate provisions, including expiation, vows, old age and so on.¹⁵⁵

According to Islamic Sharī'a, slaves are considered to be human beings with rights and responsibilities. Sharī'a established these rights, and the Islamic Messenger advocated for slaves to be cared for until the time of his death and said

‘Your slaves are your brothers, and Allah has put them under your command. So, whoever has a brother under his command, you should feed him/her of what you eat and dress him of what

¹⁵³ Abu Al-Fadl Jamal Ibn Manzūr, *for the book of the Arab tongue* (Vol 11, Dar Sader 2003) 415; see also Ali Al-Jarjānī, *Al-taerifat for al-Jarjānī* (Riad El-Solh Square Beirūt 1985) 116.

¹⁵⁴ Ali Ghazālī, ‘Historical roots of the slave phenomenon on ancient nations and Arabs of the peninsula before Islam’ (2013) 15 *Journal of Historical Studies* 75.

¹⁵⁵ *ibid.*

you wear. Do not ask them (slaves) to do things beyond their capacity (power) and if you do so, then help them'.¹⁵⁶

Therefore, any form of slavery without rights is forbidden. 'Umar ibn al-Khaṭṭāb story says, 'When did you enslave people, and their mothers give birth to them free?'.¹⁵⁷ If the behaviour is prohibited according to the provision of Sharī'a, then it requires a Ta'zīr punishment determined by the ruler of the state, in order to restore the people's confidence and prevent corruption. This behaviour involves a blatant violation of the interests of both the individual and society.

Slavery-like practices take many forms and involve one or more acts of ownership. Examples include, when children are imprisoned in closed work sites to perform hard work in exchange for a small wage; or when women are held in houses in a manner that undermines their dignity, to exploit their needs; these are practices equating to slavery and they must be confronted with prevention, protection and prosecution in an effort to end slavery in all its forms.¹⁵⁸

3.4.4 Temporary Marriage for Pleasure, Forced and Child Marriages

Before expanding on the study of the provisions of Islamic Sharī'a regarding forced or temporary marriages or child marriages, it is important to note that there are some unethical customary practices, which are still very prevalent in some Islamic countries. These practices contradict Islamic principles and lead to exploitation.¹⁵⁹ In this section, the research examines some specific patterns of exploitative marriages, which arose as a result of religious and secular interpretation of morals and customs. As demonstrated in the previous chapter, these practices may lead to actions prohibited under international human rights law, and therefore they must

¹⁵⁶ Muhammad Al-Bukhārī, Saḥīh Al- Bukhārī (Vol Faith, Hadīth number 30).

¹⁵⁷ Al- Ghazālī, (n 156).

¹⁵⁸ Al-Shahrānī (n 137).

¹⁵⁹ UNODC (n 81).

be analysed according to the principles in Islamic Sharī‘a. There is no doubt that the Islamic Sharī‘a’s ban on these practices contributes to combating human trafficking.

These harmful customary practices are the result of traditional practices, passed down through generations which are a source of harm to individuals or groups. The Office of the United Nations High Commissioner for Human Rights has condemned some traditional practices, including forced marriage, child marriage, son preference, child pregnancy, as well as excessive dowries.¹⁶⁰

However, these practices remain prevalent in some Islamic countries. Most of their victims are women and children who are exposed to the most serious human rights violations which are undoubtedly in violation of the provisions and principles of Islamic Sharī‘a. These traditional practices are mostly rooted in cultures that arose in Arab history before Islam, or in an incorrect interpretation of Islamic Sharī‘a rulings. Therefore, this section is divided into two subsections. First, it discusses minor and forced marriages in Islamic *Fiqh*. Second, it discusses the issue of temporary marriage in Islamic *Fiqh*.¹⁶¹

3.4.4.1 Marriage for Minors and Forced Marriage

In some Muslim societies, young girls may be trafficked for the purpose of forced marriage.¹⁶² This practice is common in areas where ignorance of the provisions of Islamic jurisprudence abounds, as well as in societies where tradition and custom allow these violations to be

¹⁶⁰ OHCHR, ‘Fact Sheet No 23 Harmful Traditional Practices Affecting the Health of Women and Children’ (August 1995) <<https://www.refworld.org/docid/479477410.html>> accessed 06 January 2022.

¹⁶¹ A *fiqh* is an Arabic word meaning ‘deep understanding’ or ‘complete comprehension’, and it refers to the science of Islamic Sharia, derived from specific Islamic texts, which is independent of the beliefs or faiths associated with Islamic law itself.

¹⁶² United Nations Office on Drugs and Crime (UNODC), ‘The concept of ‘exploitation’ in the trafficking in persons protocol’ (2015) <https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf> accessed 06 January 2022.

committed.¹⁶³ The majority of Islamic jurists argue that Islamic Sharī‘a permits marriage to a minor without the girl's explicit consent to the marriage. Ibn al-Mundhīr¹⁶⁴ said,

‘The scholars are unanimously agreed that it is permissible for a father to give his young eldest daughter in marriage if her husband is a qualified person.’¹⁶⁵

On the contrary, others believe that the marriage is invalid unless the minor attains the necessary physical capacity, and that both parties must consent to this marriage. This group justifies their view with the verse ‘Test orphans until they reach marriageable age; then, if you find they have sound judgment, hand over their property to them’. The interpretation of ‘until they reach marriageable age’¹⁶⁶ is the validity of both the husband and wife for marriage, and that spouses bear the responsibilities of marriage. This is also the opinion of many commentators. Imām Al-Baghawī¹⁶⁷ said in the book of Ma‘ālim al-Tanzīl: ‘ “Until they reach marriageable age”,¹⁶⁸ refers to the age of mature men and women.” Al-Alūsī¹⁶⁹ also said in his book the Spirit of the Meanings’ (interpretation of the Holy Qur’ān): ‘Until they reach marriageable age and are suitable for guidance and education’.¹⁷⁰ Thus, it can be argued that the marriage of a minor is a deviation from the provisions of Islamic Sharī‘a, which is based mainly on the right of each

¹⁶³ UNHRC, ‘Report of the OHCHR on Preventing and eliminating child, early, and forced marriage’ (02 April 2014) 26th session UN Doc A/HRC/26/22, para 42.

¹⁶⁴ Abū Bakr Muhammad ibn Ibrāhīm ibn al-Mundhīr al-Naysabūrī was a student of al-Rabī' ibn Sulaymān, a Shāfi‘ī scholar who was a direct disciple of al-Shāfi‘ī. He would eventually rise to the rank of Ijtihād. Even though he was ranked of Ijtihād, he used to adhere to most of al-legal Shāfi‘ī's opinions.

¹⁶⁵ Muwaffaq Al-Dīn Ibn Qudāmāh, *Al-Mughnī* (Vol 9, Dār al kutub al islāmīa Riyadh 395) 398.

¹⁶⁶ Quran, 4:6.

¹⁶⁷ Ab Muammad al-usayn ibn Masd ibn Muammad al-Farr' al-Baghaw born 1041 or 1044 (433 AH or 436 AH) died 1122 (516 AH) was a well-known Persian Muslim mufasssir, hadith scholar, and Shāfi‘ī faqih who is well known for his important work *Malim at-Tanzl*.

¹⁶⁸ Qur’ān, 4:6.

¹⁶⁹ His surname is Al-Alūsī. He was a jurist, interpreter, and speaker. During his childhood, he studied sharia under the sheikhs of Baghdad. As a young man, he was enthusiastic about learning, intelligent and shrewd, and never forgot anything he was taught until he became the undisputed imam of his time. From a young age, he began to write and teach, which brought him fame and a growing number of students. Until 1263 AH, he served as Mufti in Iraq.

¹⁷⁰ Shihab al-Din Al-Alusī, *The Spirit of Meanings in the Interpretation of the Great Qur’an* (Vol 15, Dar revival of Arab heritage 2005) 117-118.

person to choose their spouse. This is a right granted for everyone in general under international human rights law.¹⁷¹

Consequently, it is conceivable to say that child marriage is not permissible until after puberty and only if it is in the best interests of the child. It is also not permissible to have sexual relations before children reach the necessary physical capacity. In the KSA, a new law prohibits the documentation of a marriage contract for anyone under the age of 18. After verifying their interest in the marriage, the court may authorise the marriage of a person under that age, male or female, if he/she is an adult.¹⁷² Islamic Sharī‘a considers puberty as the end of childhood.¹⁷³

The research establishes that according to various sects of Islamic Sharī‘a, the most popular viewpoint is to explicitly grant non-virgin women the right to choose a husband and enter into a marriage contract. This is the viewpoint of the Abū Ḥanīfa School of Islamic jurisprudence. However, in contrast to this viewpoint, the other three schools of thought hold that the woman's guardian must sign her marriage contract on her behalf. However, the wife must consent to the marriage. Although schools differ in opinion regarding the conclusion of the marriage contract by a guardian, a guardian is not permitted to arrange the marriage of a girl under duress. The explicit consent of both spouses must be given; otherwise, the marriage will become void. Therefore, marriage without the consent of both parties is prohibited by all schools of jurisprudence in Islam, as indicated previously.

¹⁷¹ Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages (adopted 10 December 1962, entered into force 09 December 1964) 521 UNTS 231 art 1.

¹⁷² Saudi Personal Status Law (Royal Decree No M/73) 2022 art 9.

¹⁷³ Muhammad Zia-Ul-Haq, ‘Legal Status of Children in Islamic Law Abstract’ <<https://iri.aiou.edu.pk/wp-content/uploads/2016/07/06-legal-status-of-children-in-islam.pdf>> accessed 2 February 2023.

The Prophet Muhammed (PBUH) said ‘A woman without a husband (or divorced or a widow) must not be married until she is consulted, and a virgin must not be married until her permission is sought’.¹⁷⁴ The research validates that this is consistent with international human rights law, however, it is clear that some customary practices violate the principles of Islamic Sharī‘a. It can be argued that the guardianship of a man over a girl in Islam may be a reason for exploitation, abuse and illegal practices that result in forced marriage.

3.4.4.2 Temporary Marriage for Pleasure (Mut’ah Marriage)

Mut’ah marriage or temporary marriage is one of the forms of marriage which is practised in some Islamic countries such as Iran and the eastern part of the KSA.¹⁷⁵ This form of marriage is when a man pays an amount of money to marry a woman for a certain period, such as for a day or more of marriage.¹⁷⁶ This marriage ends at a mutually agreed-upon time.¹⁷⁷ It can be argued that temporary marriage may in some circumstances give rise to human trafficking and sexual exploitation.¹⁷⁸

Temporary marriage is prohibited by Sunnī,¹⁷⁹ Ibadite,¹⁸⁰ Zaydī,¹⁸¹ and Ismailī¹⁸² sects.¹⁸³ They consider that temporary marriage is a forbidden marriage, and it is not permissible for anyone

¹⁷⁴ Ahmed Al-Nisa’ī, *Alsunan alkubraa* investigated by Shoaib Al-Arnaout (Vol 5 Al-Risāla Foundation Beirut 2001) 173.

¹⁷⁵ Marriage for pleasure or temporary marriage is a marriage based on the contract, the specified period and the dowry, in which the spouses do not inherit, and the woman does not have to spend on the husband.

¹⁷⁶ In the Shia sect; it is permissible for a divorced woman to conclude a temporary marriage contract without the consent of the guardian, but if she is a virgin, the consent of her guardian is required.

¹⁷⁷ Majd al-Dīn Abī al-Barakat, *Almuharar fi alfiqat ealaa madhhab al’iimam ’ahmadu* (Vol 2 Al-Sunan Muhammadiyah Press 1950) 23.

¹⁷⁸ UNODC (n 81).

¹⁷⁹ Abn rushd alhāfid, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid* (House of International Ideas Jordan 2007) 585.

¹⁸⁰ The Ibadi movement or Ibadism, is an Islamic school of thought that is followed in Oman, Algeria, Tunisia, Libya, and East Africa.

¹⁸¹ Zaidiyyah, or Zaidism is a Shia sect theologically related to the Ibadi and Mutazila schools.

¹⁸² Ismlism is a Shī‘a sect.

¹⁸³ Abdullah Ibn Qudāmah, *Al-Mughnī* (Vol 7, Cairo Bookshop 1989) 178.

to undertake or contemplate it.¹⁸⁴ On the contrary, the Shiite sect holds that temporary marriage is permissible according to Islamic Sharī'a.¹⁸⁵ The first group justifies the prohibition of pleasure marriage on the grounds that this marriage was permissible at the beginning of Islam, until the Prophet Muhammed (PBUH) prohibited it. The Shiite sect views pleasure marriages as being permissible based on the text from the Qur'ān, 'So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation'.¹⁸⁶ They interpret this verse in three ways. First, that the Qur'ān mentions enjoyment, although it does not mention that marriage, enjoyment, and pleasure are the same. Second that the Qur'ān enjoins the payment of wages as a contract of rent for the benefit of sexual intercourse. Third, that the Qur'ān commanded that the reward be paid after enjoyment, and this can only be in a contract such as for enjoyment and pleasure. Whereas a dowry is obligatory for a marriage; the husband pays the dowry first and then he can marry, so the noble verse indicated that pleasure marriage is permissible.¹⁸⁷ These interpretations have been discussed by scholars, and their conclusion confirms what is referenced by the verse, is a permanent marriage and not pleasure or temporary marriage. The Qur'ān mentions types of taboo at the beginning of the verse and permits what follows. 'And lawful for you, beyond all that, is that you seek after (them) with your riches (i.e., that you pay them a dowry)' As for naming what is given to women as a wage here, this terminology is correct and does not refer to temporary marriage.

The dowry in permanent marriage is called a wage, and the Qur'ān states: 'So marry them with the permission of their people and give them their due compensation according to what is acceptable'¹⁸⁸ i.e., their dowries. As for the delivery of the reward after sexual intercourse by

¹⁸⁴ *ibid.*

¹⁸⁵ Muslim Al-Nisāburī, *Sahīh Muslim* (Vol 1, Dār Al-Kutub Al- 'Ilmiyyah, Beirut 1991) 1023-1024.

¹⁸⁶ Qur'ān, 4:24.

¹⁸⁷ Alaa al-Dīn al-Kisā'ī, *Bada'ī al-Sana'ī fī Tartīb al- Sharī'ah* (Ali Ma'wad & Adel Abdul Mawjud eds, 2nd edn, Vol 3, Dār al-Kutub al-'Ilmiyyah Beirut 2002) 468-469.

¹⁸⁸ Qur'ān, 4:4.

saying ‘So, to those of them whose company you have enjoyed, give their dues (dowry)¹⁸⁹ as obligated’; this does not indicate the permissibility of Mut’ah marriage because in the verse there is an advance and a delay.¹⁹⁰ Therefore the correct interpretation is the prohibition of Mut’ah marriage since Imām Al-Shāfi‘ī said, ‘I don’t know of anything in Islam that was Halāl (Permissible) on one occasion, then became Harām (Forbidden), and then changed back again.’¹⁹¹ Ibn al-Arabī¹⁹² said, and Ibn Abbas¹⁹³ used to say that Mut’ah marriage is permissible, however when proven otherwise he retracted his earlier view. Therefore, there was a consensus on the prohibition of Mut’ah marriage.¹⁹⁴ Women's dignity is violated if they are married solely for men to enjoy their bodies as commodities to generate money.

It may be impossible to tell whether the practice of this type of marriage is by custom and habit, or if it is permissible according to the Shiite doctrine in Islamic Sharī‘a. However, this marriage may lead to illegal practices, such as sexual exploitation, which is forbidden in Islam, based on peremptory texts regarding the prohibition of deception and coercion and other immoral practices that are prohibited by Islam. Other types of marriages are widespread in some Islamic countries, such as marriage facilitated by a mediator: that is a broker. The male client will give the mediator a list of specifications about the future spouse such as social and economic status, education level, age, religious views, and/or beauty standards. A foreigner may choose one of

¹⁸⁹ In Islam, a dowry (in Arabic: مهر: Mehir also transliterated mehr, meher) is a mandatory payment, in the form of money or possessions paid by the groom, to the bride at the time of marriage, that legally becomes her property. While the mahr is often money, it can also be anything agreed upon by the bride such as jewellery, home goods, furniture, a dwelling or some land. Mahr is typically specified in the marriage contract signed during an Islamic marriage.

¹⁹⁰ *ibid.*

¹⁹¹ Shams Al-Dīn Al-Sherbinī, *Mughnī al muhtaj 'iilaa maerifat maeani 'alfaz alminhajī* (Vol 4, Dār Al-Kutub Al-‘Ilmiyyah Beirūt 2000) 232.

¹⁹² Ibn Arabī (1165 – 1240), full name Muhy al-Dīn Ab Abd Allah Muammad ibnAl ibn Muammad ibn al-Arab al-tim al-al-Andalus al-Murs al-Dimashq, nicknamed al-Qushayri and Sultan al-Arifin, was an Arab Andalusian Muslim scholar, mystic and poet.

¹⁹³ Abd Allah ibn Abbās, also known as Ibn Abbās, was a cousin of the Islāmic Pprophet Muhammad (PBUH) and is regarded as the greatest mufassir of the Qur’ān.

¹⁹⁴ Ahmed Al-Jassās, *Ahkam Al- Qur’ān*, investigated by Muhammad Al-Sādiq (Vol 3, Dār Revival of Arab Heritage, Beirūt 1992) 103.

these women and then marry her and take her with him to his homeland, where he may exploit her.¹⁹⁵ Thus, an originally lawful marriage may lead to unlawful practice.

The practice of some Muslim sects that permit their male followers to marry minors and permit forced marriage explicitly contradicts the provisions of international law, especially the Palermo Protocol discussed in Chapter Two, and these practices challenge the KSA's compliance with both international human rights law and Islam as well.

3.4.5 Human Trafficking as Punishable under Islamic Sharī'a

The research establishes that it is widely acknowledged that Islamic Sharī'a offers a comprehensive framework for organising all aspects of people's lives. The principles, commitments, commands, and one's limitations are established or derived from primary and secondary Islamic sources. This is classified as a comprehensive framework for the Islamic community.¹⁹⁶ As previously stated, crimes in Islamic Sharī'a are divided into three categories: firstly, the Ḥudūd crimes, secondly, Ta'zīr crimes and thirdly, the crimes of retribution (Qīṣā's) and blood money. This begs the question - how is human trafficking classified under Islamic Sharī'a? It must be remembered that the offence of human trafficking has not been defined or explicitly mentioned within Islamic legal sources, particularly the Qur'ān or Sunnah.¹⁹⁷

Subsequently, it is possible to conclude that this modern crime could be classified as a disciplinary offence (Ta'zīr punishment) as this category includes all crimes for which Sharī'a does not specify a punishment.¹⁹⁸ In other words, given the fact that there is no stipulated

¹⁹⁵ UNODC (n 81).

¹⁹⁶ Mohammed El-Awa, *Punishment in Islamic Law* (American Trust 1981) 135.

¹⁹⁷ Salmassī (n 127).

¹⁹⁸ UNODC (n 81).

punishment under Islamic Sharī‘a for the crime of trafficking in human beings, the sanction depends on the discretion of the ruler.¹⁹⁹ Therefore, the prescribed punishment for such an act can be different from one Islamic country to another. It is important to recognise that despite the latitude granted to rulers in Islam, they must impose the appropriate punishment for such a crime while keeping two critical factors in mind.

The first factor is that the primary goal of Ta’zīr punishment is the rehabilitation of the perpetrator, while also protecting the community’s interest from violations.²⁰⁰ Ta’zīr punishment may prevent a threat to one of the purposes of Sharī‘a, including the following five principles, which are called the five necessities in Islamic Sharī‘a - the preservation of ‘religion, life, reason, progeny, and property’.²⁰¹

The second factor is that human trafficking must be acknowledged, not just as a crime against the public, but also as a crime against the victim whose personal security and dignity have been curtailed and interfered with.²⁰² While clarifying the strictness of Sharī‘a forbidding theft and brigandage, Al-Hāgeel indicates that these crimes may jeopardise human beings' standing, dignity and lives, and as a result of these crimes, human lives will be endangered.²⁰³

This analogy can be extended to crimes involving human trafficking,²⁰⁴ since they both involve similar risks that endanger human life and generally jeopardise the security of any society. In

¹⁹⁹ *ibid.*

²⁰⁰ Peters (n 83) 66.

²⁰¹ Mohammed Al-Ghazālī, *Al-Mustafa Min ‘Ilm Al-Usūl* (Al-Matbah Al-Amiriyyah 1904) 287-288; See also Matthew Lippman, ‘Islam Criminal Law and Procedure: Religious Fundamentalism v. Modern Law’ (1989) 12 Boston College International and Comparative Law Review 29.

²⁰² Mohamed Mattar, ‘Human Security or State Security? The Overriding Threat in Trafficking in Persons’ (2006) 1 Intercultural Human Rights Law Review 249.

²⁰³ Suleiman Al-Hāgeel, *Human Rights in Islam and their Applications in Saudi Arabia* (King Fahd National Library 2001) 166.

²⁰⁴ UNODC (n 81).

support of this, Abū Al-Basāl states that human trafficking crimes, if organised and carried out on a large scale, may be considered as brigandage therefore border (Ḥudūd) punishment must be used.²⁰⁵ The Ḥudūd punishment can also be applied to some aspects of human trafficking such as kidnapping a child; al-Basrī's²⁰⁶ statement in this regard is to apply the Ḥudūd punishment for theft.²⁰⁷ Other aspects of human trafficking of a more serious nature, can also be construed as Ḥudūd crimes and, as such, an appropriate punishment must be imposed. Al-Murād also mentions that the penalties are inextricably linked to the offender's act. In this respect, if victims are killed while travelling to or after arriving at their destination, retribution can be extended and enforced.²⁰⁸ Therefore, the Qur'ān stated, 'We ordained therein for them: 'Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds for retribution'. Al-Qurtubī reported that the verse indicates that an assault on any part of a human is a crime punishable by reciprocity, where the verse prohibits any assault on the eyes, nose and ears, and then also mentions the prohibition against wounding any person. In the Qur'ān, it states 'wounds lead to legal retribution'.²⁰⁹ These punishments violate international human rights standards.

As a result, preventive measures lack an approach that includes a focus on protecting human dignity. Consequently, it becomes important to discuss the usefulness of the concept of human dignity in the context of the prohibition of human trafficking under Islamic Sharī'a in the next section.

²⁰⁵ Abu Al-Basāl, 'Establishing the limit of hirāba in Islam on those who practice organised trafficking in human beings' *Ammon* (Amman, 23 July 2011) <<https://www.ammonnews.net/article/92947>> accessed 06 January 2022.

²⁰⁶ Abū Sa'id ibn Abi al-Hasan Yasar al-Basrī, also known as Hasan of Basra (Arabic: Al-Hasan al-Basrī; 642 – 15 October 728).

²⁰⁷ Ahmed Al-Bayqahī, *alsunan alkubrā* (Vol 8, The Ottoman Encyclopedia Council Press Hyderabad, Deccan, India 1354) 267-268.

²⁰⁸ Mohamed Al-Murād, *Combat Human Trafficking* (Naif Arab University for Security Science Press 2005) 81.

²⁰⁹ Muhammad al-Qurtubī, *Aljamie li'ahkām al-Qur'ān wal mubīn lima tadamanuh min alsanat ay al-furqān* (Vol 8, Al-Risāla Foundation, Beirut 2006) 21.

3.5 Applying the Concept of Human Dignity in the Context of the Prohibition of Human Trafficking under Islamic Sharīʿa

There is no doubt that human dignity in Islam can be associated with the issue of human trafficking.²¹⁰ Islam honours mankind, as is reflected within several readings and aspects in the Qurʾān. Human trafficking is a violation of human dignity, and in the Qurʾān, honour is lauded by the Creator of mankind; therefore, the brotherhood of man cannot be despised by the honourable one.²¹¹ The Qurʾān contains many verses that establish the principle of honour and respect for human dignity and decree punishment for those who violate it.²¹² References to human dignity in Islam can be traced back to the revelations in the Qurʾān where it states that at the time of creation, God ordained that human beings are the vice-regents of God on earth because of their dignity.²¹³ God also ranked humans above all other creatures including angels.²¹⁴

‘We have honoured the children of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation’.²¹⁵

The honour that God bestowed on every human being, regardless of their religion, gender or colour, is protected by many provisions in Islamic Sharīʿa, to ensure that the rights guaranteed by Islam are not diminished.²¹⁶ Regarding protection it includes determining punishment for

²¹⁰ Abdulhadi Mohamed, *Human Trafficking between Islamic Jurisprudence and Positive Law* (Dār Al-Fikr Al-Jamiʿi Alexandria 2015)19 .

²¹¹ Kabuye Sulaiman, ‘The Islamic Worldview of God, Man and Nature, and Their Relationships’ (2020) 8(12) *Scholars Journal of Arts, Humanities and Social Sciences* 560.

²¹² Vaffi Sheriff, ‘Concept of Human Dignity in Islamic Thought’ (2019) 3 *International Journal of Research and Innovation in Social Science* 148.

²¹³ Mohammed Kamali, ‘Human dignity in Islam and its impact on society’ *New Straits Times* (Kuala Lumpur, 25 October 2017): see also Miklós Maróth, ‘Human dignity in the Islamic world. In: The Cambridge handbook of human dignity’ (2014) 13 *Journal of Political Studies Review* 156; See Qurʾan 38: 71-76 and in 7:11.

²¹⁴ Vaffi Sheriff (n 214).

²¹⁵ Qurʾān, 17:70.

²¹⁶ Ahmed Al-Asmar, *The Prophet, the Educator* (Dār Al-Furqān, Jordan 2001) 30; see also Shihāb al-Dīn al-Alūsī, *The Spirit of Meanings in the Interpretation of the Seven Muthani*, (Vol 8, Dar al-Kutub al-Ilmiyyah Beirut 1994) 112.

every unlawful transgression against the five necessities mentioned above.²¹⁷ Every transgression against these necessities is an infringement of a right that is safeguarded by Islamic Sharī‘a and requires a guarantee as well as punishment under its provisions. On the other hand, this protection constitutes the recognition of the human rights of the children of Adam.

Subsequently, this section discusses the concept of human dignity in the context of the prohibition of human trafficking under Islamic Sharī‘a. The section is divided into four subsections. First, the meaning of human dignity in Islamic terms is examined. The second subsection explains what the five necessities are; the third subsection discusses human rights in Islam. The fourth subsection emphasises the value of the concept of human dignity in combating and reducing the causes and incidence of human trafficking.

3.5.1 Understanding Human Dignity under Islamic Sharī‘a

Human dignity is a historical concept.²¹⁸ However, its emergence as a legal concept in constitutional law is relatively recent.²¹⁹ As a general rule in Islam any, legislation or action that contradicts the rules of Islamic Sharī‘a is considered null and void and therefore in the case of the KSA, the guiding principle of legislation is anything that does not conform to Islamic Sharī‘a is invalid.²²⁰ This is contained in Article 48 of the Basic Law of Government, which states: ‘The Courts shall apply rules of the Islamic Sharī‘a in cases that are brought before them,

²¹⁷ D Wanto, R Hidayat, and R Repelita, ‘Maqāsid Sharī‘a’s Change as Theory: From Classical to Cotemporary Maqāsid Sharī‘a’ (2021) 6 Al-Istinbāth Journal Hukum Islam 427.

²¹⁸ Ruiz Carlos, ‘Human dignity: History of an idea’ [2002] University of Santiago de Compostela at https://www.researchgate.net/publication/314643293_Human_dignity_History_of_an_idea accessed 16 July 2022.

²¹⁹ Barbara Misztal, ‘The idea of dignity: Its modern significance’ (2012) 16 European Journal of Social Theory 101.

²²⁰ Saudi Basic Law of Governance (Royal Order No A/90) 1992 art 1.

according to the Holy Qur'ān and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur'ān and the Sunna'.²²¹ Consequently, whenever a case is brought to the court, it will be considered in accordance with the positive laws endorsed by the ruler, provided that it does not violate Islamic Sharī'a. In the event that the positive law does not cover the incident, the judge must resort to Islamic Sharī'a.²²²

Although there are known areas of comparison, the concept of human dignity in international law is in contrast to Islamic principles in several ways. One of the most important contradictions demonstrated in this research is that, in Islam, God (the Creator) laid the foundation of human dignity, and its origin is substantiated as God unequivocally said in the Qur'ān 'and we have certainly honoured the children of Adam'.²²³ This is a divine honour that transcends every honour to mankind that has been brought about by human laws governing life affairs. A Muslim's sense of dignity stems from their faith in the Creator, the Lord of the worlds, and is reinforced by mankind's fear of God. The 'dignity', as in human dignity, is a matter of morality and not law, as morality is the origin of the religious faith that inspires the sense of gratitude in the depths of the human soul.²²⁴ The development of the secular concept of human dignity has been largely influenced by legal philosophy.

There is an extremely important distinction between the moral and legal standards of dignity. Jurists are aware that the frameworks of law and morals are not identical. When legal standards predominate, it is clear that the issue is one of external behaviours in the first instance, while

²²¹ See Article 48, the Constitution of the Kingdom of Saudi Arabia 1992

²²² The law of procedure before Shari'a Courts (Royal decree no. (m/21) 1421 art 1

²²³ Qur'ān, 17:70.

²²⁴ Abdulaziz Al-Tuwaijri, *Dignity in light of Islamic principles and publications of the Islamic Educational, Scientific and Cultural Organization* (2nd edn, ISESCO 2015) 7-8; see also Tariq Al-Bishri, *in the Contemporary Islamic Question: Contemporary Legal Status between Islamic Law and International Law* (Dār Al-Shorūk 1997) 30.

moral standards are primarily internal, connected to the conscience, and refer to religious belief. The research demonstrates that legal and ethical standards may overlap. When the legal judgement on an action relates to an element (intention and intent), or when the moral judgement relates to the practical situation, there is an overlap.²²⁵

The principles which define the concept of human dignity are sensitive and delicate, thus making it nearly impossible to determine their dimensions and implications. Therefore, it is very difficult to create a universal definition.²²⁶ However, the concept of human dignity involves an ethical principle that states that people should be treated as an end in themselves rather than a means, and that their dignity is above all considerations.²²⁷ The consolidation of this concept between individuals might assist in the elimination of human trafficking in societies.²²⁸

Tabataba'i²²⁹ points out that to acknowledge the dignity of a human being is to treat them carefully, and honourably.²³⁰ Saleh's²³¹ conception of human dignity insists that the idea must not be defined in the context of the physical nature of the human being, so that the person will not be used in trading or as an object such as a tool, rather they should be recognised as a holder in their own right.²³² In addition, human beings should be protected from being subjected to

²²⁵ Haitham Suleiman, 'The Moral of Legislation between Sharia and Modern State Laws' (2023) Vol. 5 Tajseer Journal 147.

²²⁶ Mahbobeh Abedi, and Majid Vaziri, 'Human dignity as a rule of Islamic jurisprudence' (2014) 30 VALIA Journal 148.

²²⁷ Kuwait's Constitution of 1962 (reinstated 1992) art 29.

²²⁸ Murad Wahba, *The Philosophical Dictionary* (Dār Qubā Modern 2010) 611.

²²⁹ Muhammad Husayn Tabataba'i was an Iranian scholar, theorist, philosopher, and one of the most prominent thinkers of modern Shī'ah Islam.

²³⁰ Mohammed Tabataba'i: *the balance in the interpretation of the Qur'ān* (Vol 13, Al - Alami Foundation for Publications 1997) 165-170.

²³¹ Fawaz Saleh is a professor at the Faculty of Law at Damascus University, formerly Vice-President of the International Bioethics Committee at UNESCO. For a detailed description of his biography, see https://groups.google.com/g/aabfs_du/c/x5iEJCJMlKE accessed 16 July 2022.

²³² Fawaz Saleh, 'The Principle of Respect for Human Dignity in the Field of Bioethics: Comparative Legal Study' (2011) 27 Damascus University Journal of Economic and Legal Sciences 247.

scientific experiments that pose a danger to their life, and a vital organ should not be taken from a person and given to another person to save their life. Human dignity is the very essence of being a human entity. Therefore, the protection of human dignity is an absolute and indivisible principle; as it is of a sacred and an inalienable value.²³³ Since exploitation is the main purpose of human trafficking, the recognition of human dignity in Islam guarantees the fight against human trafficking in all its forms.

In Al-Layth's view,²³⁴ dignity requires people to be protected from harm. Moreover, if a person harms another, it constitutes an insult and violates the dignity of that individual.²³⁵ It is, however imperative that the individual refrains from committing a sin in order to maintain his/her dignity.²³⁶ It should be noted that, human dignity according to the Islamic texts is not restricted to rights alone, it also involves establishing duties as well.²³⁷ Consequently, a person who commits any act that violates the Islamic Sharī'a will be liable to punishments and denial of some of their rights accordingly. Based on this, it can be argued that human dignity in Islam positively affects the fight against human trafficking.

Islamic scholars are of the opinion that the honour and dignity which God has granted to every human being is irrespective of one's religion, whether they are a believer in Islam or not, one's nationality, or colour and is subject to many conditions that guide their applicability in order to ensure that they are not violated.²³⁸ Beginning with the idea of equality, which is the foundation of the rule of law and the equal dignity of all persons under Islamic Sharī'a. Islam decrees that

²³³ Saleh (n 234).

²³⁴ Al-Laith bin Al-Mudhaffar Al-Kinanī, one of the most important scholars of the Arabic language.

²³⁵ Muhammad al-Zubaidi, *The Crown of the Bride from the Jewels of the Dictionary* (Vol 17, Dar al-Hidaya Iran, without a date of publication) 973.

²³⁶ *ibid* 972.

²³⁷ Abdulaziz Altwaijri, *Human Dignity in the Light of Islamic Principle* (Islamic Organization for Education and Cultural Sciences Publications 2015) 21.

²³⁸ Kamali (n 215); see also Alusi (n 118).

there is no difference between any persons on judgement day except by the measurement of their piety. This is a fundamental position contained in the Qur'ān which states

People, We created you all from a single man and a single woman and made you into races and tribes so that you should recognise one another. In God's eyes, the most honoured of you are the ones most mindful of Him: God is all-knowing, all aware.²³⁹

Concerning the righteous, pious, noblest, and the most honoured person in this verse is referring to a purely celestial value.²⁴⁰ Islamic philosophy views piety as a choice that all people have the freedom to attain. People are equal in rights and duties; their freedom is reserved, and their respect is protected for their bodies, ideas, opinions or persons, even if they are non-Muslims.²⁴¹ Consequently, this verse clearly affirms that from an Islamic Sharia perspective that human dignity is universally recognised irrespective of race, religion, nationality, gender, or colour.

Human dignity is, according to Islamic Sharī'a, an inalienable value of people granted by God to all the children of Adam.²⁴² This was categorically stated in the Qur'ān, 'We have honoured the progeny of Adam'.²⁴³ This particular verse is clear in the universality of honouring all human beings, and this is discussed in detail by some of the interpreters of the noble Qur'ān. Tabatabaī's interpretation of the above verse says:

It appears that the meaning of the verse is a manifestation of the status of all human beings in general, with the exception that some of them are concerned with the divine special dignity, closeness and purely spiritual virtue. This text refers to polytheists, infidels, and Muslims.²⁴⁴

²³⁹ Qur'ān 49:13.

²⁴⁰ Editorial Board, Words with Meaning: The most honourable of you in the sight of God is the most pious of you, (1982) Vol 8, Ministry of Awqaf and Islamic Affairs 31.

²⁴¹ Ghayath Al-Ahmad, Human Dignity and its Applications in Medical Issues' (*CileCentre*, 17 January 2016) <https://www.cileCentre.org/ar/resources/articles-essays/alkramt-alansanyt-wttbyqatha-fy-alqdaya-altbyt> accessed on 20 May 2023.

²⁴² Wahbah Al-Zuhailī, 'Islamic jurisprudence and its evidence' (Vol 6 Dar Al-Fikr Damascus 1985) 41.

²⁴³ Qur'ān 17:70.

²⁴⁴ Tabatabaī (n 232).

In his work, 'The Spirit of the Meanings' (interpretation of the Holy Qur'ān), Al-Alūsī explained the foundation of the verse that says, 'We have honoured the progeny of Adam'. He explained that God granted dignity for human beings whether they are righteous or otherwise.²⁴⁵ Thus, dignity is granted to all merits of all people without exception.²⁴⁶ Human beings are created with honour and therefore should be treated as such without distinction as to race, colour, language or origin.²⁴⁷ The protection of this honour constitutes recognition of the human rights of all the children of Adam.

The research demonstrates that the Islamic concept of human dignity requires the full realisation of fundamental human rights as well as a high level of absolute justice and full equality.²⁴⁸ Simultaneously, this concept is fully consistent with the nature of the Islamic message addressed to all humanity. This is due to the fact that Islam is a humanistic religion calling for a universal message of finality from God to all people until the judgement day.

The Islamic concept of mankind is that of unique creatures distinguished by their traits, qualities and functions. Therefore, an order of rights and privileges must be created in order to allow people to carry out the functions and duties required of them providing for accountability, calculation, and reward and punishment.²⁴⁹ This is confirmed by Al-Yasouī's²⁵⁰ statement that the concept of human dignity is closely related to human rights and is the basis and prerequisite for it.²⁵¹ Conversely, Al-Ahmad defines dignity as an imprecise, ambiguous concept, for which a comprehensive definition is elusive. Nor it is easy to distinguish its dimensions. Human

²⁴⁵ Al-Alusi (n 118).

²⁴⁶ Farouk Mesahel, *Honoring Islam for Man* (Al-Risāla Foundation, Beirut 1985) 13; see also *ibid* 44.

²⁴⁷ Altwaijri (n 239).

²⁴⁸ Ali Al- Shurbaji, *Human Rights in Islam* (Dār al-Yamamah 2012) 27.

²⁴⁹ *ibid*.

²⁵⁰ Salah Abu-Jouda Al-Yasouī, is the director of Dār Al-Mashriq, and a member of the Jesuit Order. University Professor and Director of the Institute of Oriental Literatures at Saint Joseph University, Beirut and Director of Dar Al Mashreq since 2008.

²⁵¹ Salah Abu-Jouda Al-Yasouī, 'The Problematic Concept of Human Dignity: Cultural challenges based on human rights' (2016) 90 Mashreq 9.

dignity is an intrinsic value that makes one feel equal to others.²⁵² Furthermore, human dignity is a consistent value, which cannot be diminished or waived, even if the subject voluntarily submits to loss or infringement of it. It is agreed that human dignity is inconsistent with other issues, such as torture, abuse and degrading treatment. Islam has presented a comprehensive vision of human rights stemming from the view of humans as honourable creatures.

The objectives of Islamic Sharīʿa (Maqāsid al-Shari'a and Maṣlaḥa)²⁵³ are dedicated to ensuring respect for human dignity.²⁵⁴ An Islamic scholar, Muhammad Ibn Ashur, defined the objectives of Sharīʿa as the intent or intentions of Islamic decisions. Maqāsid al-Shari'a is crucial for mujtahids, he explained, since it provides them with the capability to not only interpret Sharīʿa writings but also offer answers to modern challenges faced by Muslims today.²⁵⁵ Maqāsid Sharīʿa provides a framework and guidance for the process of Ijtihad when it comes to settling situations that are in the interests of human beings while adhering to the Divine Will.²⁵⁶ The objectives of Islamic Sharīʿa are to preserve humankind from harm and to seek to protect human rights.²⁵⁷ The highest levels of Islamic Sharīʿa provide for the protection of the five necessities, collectively known as “daruriyyat” - the preservation of religion, the preservation of the soul, the preservation of reason, the preservation of progeny [honour], and the preservation of property. These are the basic purposes and values of Islam and must be protected as a priority for all members of society.²⁵⁸ This protection also includes the determination of the penalty and

²⁵² Al-Ahmad (n 234).

²⁵³ Maqāsid (Arabic: مقاصد, lit. goals, purposes) or Maqāsid al-Sharīʿa (goals or objectives of sharia) is an Islamic legal doctrine.

²⁵⁴ Nurhayati and others (n 126).

²⁵⁵ Muhammad Ibn Ashur, *maqasid alsharieat al'iislamia* (Presented by Hatem Bosma, The Egyptian and Lebanese Book House 2011) 50.

²⁵⁶ Mohammed Kamali, 'Maqasid Al-Sharia; The Objectives of Islamic law' (1999) 38 *Islamic studies* 193.

²⁵⁷ Ahmed Awad Hindī, 'The purposes of Islamic law and the reservations of Islamic countries to international agreements' [2013] *Al-Furqān for Islamic Heritage* 143: see also Ibrāhīm al-Shāṭibī, *almuafaqati in the Fundamentals of Sharia* (Dar Ibn Afan Saudi Arabia 2007) 17-20.

²⁵⁸ The first scholar to abandon the idea of restricting the number of maqasids was arguably Taqi al-Din ibn Taimiyyah. Additionally, he proposed obligations to fulfil contracts, maintaining kinship ties, and respecting one's neighbours. In terms of the afterlife, he listed values like love of God, sincerity, and trustworthiness. Consequently, Ibn Taimiyyah enlarged the scope of Al-Maqasid from a specifically limited list to a completely unlimited list of

compensation for any illegal exploitation of these purposes. There is no doubt that the crime of human trafficking is based on the exploitation of people's vulnerability. This exploitation is in violation of the principles of Islamic Sharī'a and human dignity. This subsection provides an analyses on the preservation of the five necessities in Islamic Sharī'a as the foundation of the KSA's secular regulations. Thus, the next subsection discusses these necessities in more detail.

3.5.2 Save the Essentials 'Daruriyyat'

No one doubts that every law legislated for society aims to carry into effect the intention of the legislator.²⁵⁹ All laws, especially the law of Islam, are for the good of mankind in the present and the future.²⁶⁰ By extrapolating the evidence from the Qur'ān and Sunnah, it is clear that Islamic Sharī'a has authority through rulings to improve the general welfare of society and individuals. The wisdom of the rulings of Islam is to bring benefits, which are the things that society members need to provide based on strong foundations.²⁶¹ It also aims to ward off evil, which is harmful to members of society, whether material or moral. These are called the purposes of Islamic Sharī'a, which define the general framework of Islamic Sharī'a and its goal is for beneficial purposes.²⁶²

Ibn Ashour²⁶³ says:

values. A majority of contemporary scholars agree with this approach, including Ahmad al-Raisuni and Yusuf al-Qaradawi. As part of Al-Qaradawi's expanded list of the maqasid, the concepts of human dignity, freedom, social welfare, and human fraternity have been included. All of these goals have been unquestionably supported by general and detailed evidence in the Qur'an and Sunnah. Kamali echoes al-Qaradawi's proposal and calls for the inclusion of economic development and technological advancement. There is no doubt that these are important aspects that determine the position of the Ummah (the Muslim community) in the global community. It appears that the maqasid Sharia continues to be open to ongoing improvement. This improvement will, in part, depend on the priorities of each generation. Abdualrahman ibn Qaasim, *Majmua Fatawa Shaykh al-Islam Ahmad Ibn Taymiyyah* (Beirut; Mu'assast al-Risalah 1398) 32: 134; see also Mohammed Kamali (n 258).

²⁵⁹ Amer Aljumrad and Khalida Altaei, *Rooting the Idea of the Single Will of the State* (2006) 8 ARLJ 211.

²⁶⁰ al-Shāṭibī (n 190); See also Khalid El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 27.

²⁶¹ Jasser Odeh, *Maqāṣid al-Sharī'a as a philosophy of Islamic legislation, a systemic view* (Higher Institute of Islamic Thought, Herndon, Virginia 2012).

²⁶² Duderija (n 125) 18.

²⁶³ Muhammad al-hir ibn 'Āshūr was a well-known Islamic scholar who graduated from the University of Ez-Zitouna.

we are looking at a legal issue in which a behaviour or act is forbidden or permissible. We first look at the reason or purpose for the legalisation or prohibition. Thus, there may be difficulty in determining whether an act or behaviour complies with or contravenes the law. One then looks at the intent and this is called the objective of the Sharī‘a.²⁶⁴

The greatest purpose of Islamic Sharī‘a is to bring goodness and ward off evil. This is achieved by reforming the human condition and dealing with the corruption of it. Humans are dominant in this world, and therefore the reform of human beings is for the good of the world.

People's interests in life are not always on the same level in terms of importance and danger, and neither are people's needs. Some interests are essential. These interests relate to the existence of the human being and the components of their life. Some of these interests come in the second degree to be complementary to the previous necessary interests.²⁶⁵ Necessity is related to need. According to the scholars of the principles of jurisprudence, it is what is based on a person's religious, worldly life, upon which their human existence in this world and their happiness in the hereafter depend. If these necessary interests are lost, the system of human life will be disrupted, people's interests will be corrupted, and chaos will spread in life, exposing their existence to danger, destruction and loss.²⁶⁶ The essential interests of people are limited to five concepts: religion, soul, reason, progeny (or honour), and property.²⁶⁷

The protection of the necessities, as expressed by Al-Shātībī²⁶⁸ consists of two theories: Firstly, what establishes the origin of human existence? Secondly, what prevents a person from the imbalance that occurs to them?²⁶⁹ Islam agreed to observe these basic principles and the

²⁶⁴ Muhammad ibn‘ Āshūr, *The Objectives of Islamic Sharia* (edn 8, Dar Sahnoun for Printing Tunisia 2018) 35-36.

²⁶⁵ Ibrāhīm (n 128): see also Al-iz Abdelsalam, *qawa'id al'ahkām fī masālih al-anām* (Reviewed and commented by Taha Saad Al-Azhar Colleges Library Cairo 1964).

²⁶⁶ Ibrāhīm Al-Shatibi, *Consents in the Fundamentals of Sharia* (2nd edn, Dar Al-Kutub Al-Ilmiyya Beirut 2009) 221.

²⁶⁷ Muhammad Al-Ghazālī, *almustasfaa from the Science of Fundamentals* (Dār Al-Arqām, Beirut 2016) 636.

²⁶⁸ Ab Isq, Ibrhm ibn Mūsā al-Shib was a Sunni Islamic legal scholar from Andalusia who followed the Malikī madhab.

²⁶⁹ Ibrāhīm Al-Shatībī, *al-muafaqatī in the Fundamentals of Sharī‘ah* (2nd edn, Dār Al-Kutub Al- ‘Ilmiyyah, Beirut 2009) 221.

essential interests of people, so they advocated for them, were supportive of them, and worked to protect and preserve them.²⁷⁰ The following sub-section focuses on preserving the soul, preserving the mind and its reasoning, and preserving its lineage.

3.5.2.1 The Right to One's Soul as part of Human Dignity

In the Qur'ān, it is stated 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'.²⁷¹

The text states that whoever has saved a soul has revived all people. In this sense, the revival of the soul is the liberation of the slaves. Given that the meaning of slavery for some jurists is a presumed death, those who have survived it have been revived from death.²⁷² Life in Islam equals freedom by demonstrating Islam's zeal for human freedom, making people feel more secure and reassured, and more willing to perform their duties and social functions.²⁷³ The verse's Islamic commandment to liberate the soul serves as an interpretive tool. Indeed, the call to raise up all people is evidence of the Qur'ānic's ethical path in the hierarchy, which guarantees the Islamic position on the abolition of slavery.

The right to life is one of the fundamental rights of humans and is an integral part of dignity. In Islam, God is the creator and He has bestowed dignity on mankind by giving them life. Life is something which cannot be bestowed by any human being and only God can give such rights. It is in this regard that the right to life is considered sacred and, therefore, in Islam it is not permissible to deprive a person of his life arbitrarily. This is consistent with the text of Article

²⁷⁰ Muhammad Abu Zahra, *The Philosophy of Punishment in Islamic Jurisprudence* (Reprinted by the Institute of Arab Studies Cairo, 1963) 42.

²⁷¹ Qur'ān, 5:32.

²⁷² Maher Al-Susi, *Human Dignity in the Light of Islamic Legislation* [2015] The Islamic University of Azza 57.

²⁷³ *ibid*: see also Hassan Abdulatif, *The Question of Freedom for Muhammad Heikal* (2022) 45 DRAM 3255.

6, paragraph 1 of the International Covenant on Civil and Political Rights: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.²⁷⁴ Since self-preservation is one of the necessary purposes and one of the manifestations of dignity, God ordered mankind to preserve their life and not put themselves in danger. The Qur’ān also states: ‘And spend in the way of Allah and do not throw [yourselves] with your [own] hands into destruction [by refraining]. And do good; indeed, Allah loves the doers of good’.²⁷⁵ God explicitly forbids the human in this verse to throw himself into ruin.

Preserving the soul from damage is accompanied by the preservation of some parts of the body, such as the human organs, the destruction of which is considered to be the same as the destruction of the soul, trafficking in human beings, and sexual exploitation of children, trafficking in human organs, as well as exploiting people’s needs and hardship. Self-preservation is related to the right to life with human dignity, as there is no life with humiliation. Therefore, any assault on a person through beating and torture constitutes an outright violation of human dignity and, as such, calls for punishment and compensation. This is consistent with the UDHR, which states: ‘Everyone has the right to life, liberty and security of person’.²⁷⁶

3.5.2.2 Respect the Human Mind and its Reasoning

Respecting a human’s will and thought is considered an honour for humanity in Islam. God honours human beings’ minds and also distinguishes them from other creatures as having intellect. As established in this research, Islam is keen to respect the human mind and integrity of all that can be tainted by ignorance and superstition. God taught human beings how to use the mind, to gain knowledge, to reason and to argue. In addition, God taught humans the use of

²⁷⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

²⁷⁵ Qur’ān, 2:195.

²⁷⁶ Universal Declarations of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 3.

evidence as well as the way in which their mental energy could be deployed without being wasted. In the Qur'ān, it states:

There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So, whoever disbelieves in taught religion and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.²⁷⁷

The above verse has decreed that there is no compulsion in accepting a prescribed religion. No one can be compelled to accept any particular religion as this could be considered as a breach of a human's right of free choice in what they believe.²⁷⁸ Despite the Creator's ability to force creatures to obey him, he gave them the freedom of choice to accept religion or not. One of the manifestations of human dignity in Islam is the human mental ability to reflect and choose.

3.5.2.3 Preserving the Lineage

As for preserving lineage, this means preserving the affiliation of children with their father. On the one hand, preserving lineage is intended for its own sake, and on the other it is a means of preserving offspring so that lineage does not cause mixing of genetics or to avert birth deformities etc. For this necessity, Islam has legislated for many provisions that begin with the prohibition of insulting honour, as slander, making it a 'Hadd' fixed punishment.

For example, Islam forbids adoption as it perceives adoption as an attack on the lineage of the child and the father; this also includes the sexual exploitation of children and the practice of pornography in all its forms. Therefore, everything that protects these necessities is called for by the true Sharī'a, and everything that violates these necessities is to be avoided.

3.5.3 Human Rights in Islam

²⁷⁷ Qur'ān 2:256.

²⁷⁸ Abdullah Al-Nasaft, *Tafseer al-Nasaft* (Yossef Bidwie & Mohie Meto eds, Vol 1, Dār al-Kalam al-Tayeb Beirut 1998) 211.

The idea of human rights did not emerge as an official issue until the thirteenth century as a result of racist and popular revolutions in Europe. This idea was largely developed in the eighteenth century in America in order to resist natural discrimination, political domination and the social system.²⁷⁹

Human rights were not then fully known or understood. In fact, they were not fully practised until the advent of Islam and its universal humanitarian call.²⁸⁰ The Noble Qur'ān and the Sunnah contained texts that honour and favour mankind over all other creatures. These two separate texts further command humanity and equality among themselves and their tribes.²⁸¹ The call in the texts is justified as it is directed to the totality of humankind by the address going thus 'O people', the word 'people' encompassing the word 'human' and 'mankind'. This was confirmed by the Messenger (PBUH) when he announced human rights in the Farewell Pilgrimage sermon and its practical application which Muslims have since adhered to in both theory and practice. The prophet Muhammed said:

O people, your Lord is one and your father Adam is one. There is no favour of an Arab over a foreigner, nor a foreigner over an Arab, and neither white skin over black skin nor black skin over white skin, except by righteousness. Have I not delivered the message?

They said, 'The Messenger of Allah has delivered the message'.²⁸² There is no sectarianism or populism between man and man, and there is no difference in terms of colour and language, as the Qur'ān states 'Another of His signs is the creation of the heavens and earth and the diversity of your languages and colours. There truly are signs in this for those who know'.²⁸³

²⁷⁹ Wahba Al-Zuhayli, *Human Rights in Islam* (5th edn, Dar Ibn Kathir Beirut 2008) 101.

²⁸⁰ Robert Traer, 'Human Rights in Islam' (1989) 28 Islamic Research Institute, International Islamic University, Islamabad 117.

²⁸¹ Adnan Al-Khatib, *Human Rights in Islam* (1st edn, Dar Tlass for Studies Translation and Publishing Damascus 1992) 32.

²⁸² Abu Amina Elias, 'Farewell sermon: Your lord is one, your father is one' (Daily Hadith Online). <https://www.abuaminaelias.com/dailyhadithonline/2011/12/30/lord-father-adam-one/> accessed 25 December 2022.

²⁸³ Qur'ān, 30:22.

Thus, the Prophet Muhammed (PBUH) emphasises two ideas in his sermons. The first is the establishment of a unified society in general. The second is establishing the unity of the nation based on brotherhood. This is considered to be the Muhammadan policy of assembling the discordant elements, and human races on one front based on equality. Additionally, it is how the companions of the Prophet Muhammed followed him, referencing this to an old saying about the ruler ‘Umar ibn al-Khaṭṭāb (RA) ‘When did you enslave people although they were born free?’²⁸⁴

As for the modern era, after many Arab and Islamic countries joined the United Nations, demands emerged for a statement of human rights in Islam. Consequently, publications concerned with human rights and provisions in Islamic Sharī‘a appeared and subsequently Islamic organisations and Islamic bodies began to formulate human rights texts and charters. Among those texts and charters,²⁸⁵ are the Islamic Charter of Human Rights of 1980 (ICHR), the International Islamic Declaration of Human Rights of 1981 (IIDHR), the Islamic Declaration of Human Rights of 1989 (IDHR), and the Cairo Declaration on Human Rights in Islam of 1990 (CDHR).²⁸⁶

Almost all articles of these charters agree on the following: that mankind is one family, all are equal in dignity and assignment, there is no distinction between them, they are born free, that slavery, exploitation and oppression are forbidden, that the right to life is guaranteed in Islamic

²⁸⁴ Ali Mansour, *Islamic Law and International Law* (Dār Al-Qalam Cairo 1390) 47.

²⁸⁵ Al-Zuhayli (n 212) 112-114.

²⁸⁶ Cairo Declaration on Human Rights in Islam (Adopted at the Nineteenth Islamic Conference of Foreign Ministers, 31 July to 5 August 1990).

Sharī'a for every human being, that the annihilation of the human species is prohibited, and that the sanctity of humankind and their reputation be preserved, whether a man is alive or dead.

3.5.4 The Role and Usefulness of Human Dignity in Islamic Sharī'a

The role and significance of human dignity in Islamic Sharī'a cannot be overstated. The concept is central to Islamic legal discourse, and it has had a profound impact on many Islamic rulings and provisions. Most Islamic conventions, such as the IIDHR, the ICHR and others as previously mentioned, contain ideas and elements addressing the protection of human dignity. In this regard, Ghamaz further described it as the foundation of the essential interests of Maqāṣid al-sharī'a and Maṣlaḥa and the protection of the five necessities of Islam.²⁸⁷

The research reinforces the importance and the utilisation of the principles of human dignity in Islam as the bedrock or source of law for Islamic Sharī'a. It establishes the legal framework and obligations of state and non-state actors to observe and respect human rights. Ghamaz stated that human dignity serves as a value, a legal obligation and a source of ethics for humans.²⁸⁸ As a framework, and as incorporated into Islamic treaties, conventions, and constitutions, the concept of human dignity is used to shape provisions and decisions that impose an obligation on states and non-state entities to observe, promote, and defend the dignity of a human person. In Islamic Sharī'a, the concept has been elevated to the level of jus cogens.²⁸⁹

Courts and tribunals in Muslim countries such as in the KSA have issued rulings and decisions demonstrating the importance of human dignity in Islam. For example, a decision issued by

²⁸⁷ Amin Ghamaz, 'Preserving Human Dignity as One of the Goals of Islamic Sharī'a and Status Quo; An Applied Fundamental Study' (2021) 4 Journal of the Faculty of Islamic Sharī'ah and Arabic Studies for Girls in Alexandria 190.

²⁸⁸ *ibid.*

²⁸⁹ Ahmed Mohamed, 'Human dignity in the Islamic perception and its jurisprudence applications: a comparative study' (2020) 3 Journal of the College of Sharī'a and Law 1679.

the Administrative Court²⁹⁰ addressed the issue of racism in the design of a trademark, resulting in the refusal of a particular trademark to be registered with the Ministry of Commerce.²⁹¹ Another provision called for the punishment of a group of public sector employees who violated their right to privacy.²⁹² Such acts, according to the Court, are violations of human dignity. As a result of its acceptance, recognition, and incorporation into Islamic primary sources, human dignity is very useful in Islamic legal discourse and plays a central role in protecting human rights under Islamic Sharī'a. This argument is supported by a review of the contents of the Islamic Charter and the Universal Islamic Declaration of Human Rights of 1990 (UIDHR), the primary legal instruments on human rights. For instance, the preamble to the Islamic Council of Europe Declaration emphasises the principles of human dignity by stating, 'The human rights decreed by divine law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice'.²⁹³

Furthermore, this declaration states in several parts that the principle of respect for human dignity is sacred. The essence of this declaration is how clearly it reflects the KSA's conception of human rights and human dignity, which is based on Sharī'a principles as laid out in the Qur'ān and Sunnah. The Qur'ān, for example, states, 'And we have certainly honoured the children of Adam and carried them on land and sea and provided for them of the good things and preferred them over much of what we have created, with [definite]

²⁹⁰ Qur'ān, 17:70. The court refused to register this trademark, which was submitted by a plaintiff in the Ministry of Commerce because of its violations of the principle of human dignity, which the court considered to be one of the principles considered in the Sharī'a. The court relied on the inclusion of this principle in general verses and evidence from the Qur'ān and Sunnah as mentioned in this chapter.

²⁹¹ For a detailed description of this, see Judgment No. (No 35/ 5/ت). dated the 3rd of Shaaban of the year 1427 (2006) from the Supreme Administrative Court.

²⁹² The court sentenced the accused female prison guards who were employed at Medina prison. The court convicted them of abuse of duty to care due to inspecting female visitors in a way that violates their dignity. For a detailed description of this, see Judgment No. (6-376) dated 12th Rajab of the year 1432 from the Supreme Administrative Court.

²⁹³ Salem Azzam, 'Universal Islamic declaration of human rights' (1998) 2 The International Journal of Human Rights 102.

preference'.²⁹⁴ In a similar vein, ideas about human dignity were incorporated and reflected in the CDHR. Article 1 of the CDHR, for example, states that 'All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations'.²⁹⁵ There are numerous provisions in the CDHR that protect dignity. For example, Article 2 states that 'Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life'.²⁹⁶ Article 11 states that '(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them'.²⁹⁷ Article 20 states that 'It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity'.²⁹⁸

As human rights are universal in Islam, victims of human trafficking are entitled to all of the above rights regardless of their gender, age, racial, ethnic, or national origin, immigration status, or any other type of potential discrimination. As a result, certain rights, such as the right to a fair hearing and trial, the right to access to justice, and the right to an effective remedy, are especially relevant when dealing with the consequences of human trafficking. Thus, it can be argued that the protection mechanisms enumerated above according to the Islamic Charter, the CDHR, and others under relevant international conventions on the rights and dignity of the human person, labour rights, and social and economic justice, are aimed at combating and suppressing human trafficking within national and international borders.

²⁹⁴ Qur'ān, 17:70.

²⁹⁵ Cairo Declaration on Human Rights in Islam (Adopted at the Nineteenth Islamic Conference of Foreign Ministers, 31 July to 5 August 1990).

²⁹⁶ CDHR, art 2.

²⁹⁷ CDHR, art 11.

²⁹⁸ CDHR, art 20.

These laws also aim to increase states' responsibilities and commitments to the protection and promotion of the rights of all people whether they are citizens or not, and who fall within their jurisdictions or authority. As a result, it is safe to assert that Islamic Shari'a and international human rights law are complementary in combating the crime of human trafficking. Reflecting on a number of international and regional human rights instruments adopted in the Islamic world, it is apparent that human trafficking and other related crimes are condemned and criminalised.

3.5.5 A Comparison of Human Dignity in International Law and Islamic Shari'a

International Law

Human dignity is highlighted in Article 1 of the UDHR.²⁹⁹ This Article is divided into three important parts. First, it declares that every human being is born free, and equal in dignity and rights. Second, it states that human beings are endowed with reason and consciousness. Finally, it declares, human beings should act towards each other in the spirit of brotherhood.

The first point to be noted is that the words 'dignity' and 'rights' are separately mentioned in this Article. This suggests that dignity is a precondition to all other rights and provides that human beings are equal and have dignity solely on the basis of their humanity. There is no precondition for dignity in international law. Furthermore, according to international law, the individual's human dignity is inviolable.

²⁹⁹ According to Article 1 of the Universal Declaration of Human Rights 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

The second most important point to be noted is that dignity is linked to reason and conscience. It implies that the dignity of human beings can be achieved by autonomy. In this regard autonomy means that all human beings are free to act by virtue of their reason and intellect. Every human is endowed with the freedom to act according to their own conscience. The final part to be considered is the spirit of brotherhood which implies that dignity is equal for all members of the human race. Therefore, equality and freedom should be considered universal for every human being.

The preambles of both the ICCPR and the ICESCR ascribe inherent dignity to all human beings. Similarly, Article 10 of the ICCPR refers to the inherent dignity of the human person.

Islamic Sharī‘a

From an Islamic perspective, ‘human rights’ have their roots in Islam as provided by Sharī‘a. The concept of rights in Islam revolves around two categories. The first category includes the rights of believers towards God (Allah). This group of rights is called the Rights of Allah i.e. (huqooq Allah). The second category includes human rights that describe the relationship between believers. This category is called huqooq al-‘insān or huqooq al-‘abad.

The concept of dignity in Islam has the same foundation as the western concept of dignity; however, as proven in the research they still differ on some points.

In Islam the concept of dignity can be seen in the hierarchy of sources of law. In the Qur’ān it is mentioned as:

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 we created with a marked preferment.³⁰⁰

It is termed as “karamah al-insān”.

The concept of dignity in Islam also provides that Allāh has granted the human with reason and the power of speech. This quality differentiates the human from all other living creatures. Allāh has created people with inherent dignity and placed them above all creatures; self-respect is also essential to the understanding of the integrity of the individual. In Islam, the concept of honour and dignity prohibits Muslims from prostration before any human being.

In the Qur’ān it is written that ‘*Yes we have indeed created man in the most perfect mould.*’³⁰¹

The concept of dignity varies when evaluating the opinions of the different schools of thoughts in Islam. The Hānafi School of thought portrays human dignity on the basis of the concept of *ismah bi al-adamiyyah*. *Ismah* means the inviolability and *Adamiyyah* relates to the concept of personhood. So, by combining these two terms it is evident that the Hanafi School of thought considers dignity as the basis of personhood. It infers that dignity is inviolable and equal for all, solely on the basis of personhood. Therefore, there is no pre-condition to achieve dignity. Moreover, the interpretation inferred from the Universalistic School, is that dignity is equal for all persons irrespective of religion, gender or race. In regard to Sarakhsī’s teachings, human beings are endowed with intelligence to carry responsibilities. Consequently, they are entitled to inviolability and freedom. The Hānafi School suggests equal and just treatment of every human being with dignity which is evident from the Qur’ān in the following verse:

³⁰⁰ Qur’ān 17:70

³⁰¹ Qur’ān 4:95

Oh, you who believe! Hold firm like witnesses before God whilst practicing justice.

May hate towards a people not incite you to commit injustice?³⁰²

On the other hand, Shafi'i, Hanbalī and Mālikī schools fall under the category of the Communalistic approach. According to this approach, the inviolable dignity is not an innate or inherent right, rather a right that is conferred on the human solely due to being a believer of Islam.

The innate and natural right of dignity is rejected by other schools of thoughts. They believe in the qualified right of dignity. That implies a dignity that is gained by the human due to his status as a Muslim. The Universal concept of dignity is therefore rejected.

As discussed in the subsection 3.4.1, according to the concept of Maqāsid Sharī'ah, daruriyyat, there are five divisions of necessities which include the protection of religion, life, reason, progeny and property. From a traditional perspective the protection of dignity is not explicitly provided. However, some argue that dignity is incorporated in the category of protection of family or reputation. In this respect, dignity is being considered as honour rather than the value or respect solely due to the reason of humanity.

In the Cairo Declaration on Human Rights of 1990, the concept of Human Dignity was also cited. Article 1 of this Declaration infers that dignity does not discriminate; therefore, it is equal for every human being irrespective of colour, race and religion. Furthermore, Article 6 declares equal dignity without any gender discrimination. The concepts provided by this declaration are close to the approach of Ḥanafī School of thought. Accordingly, it asserts equal dignity for the entire human race. Consequently, the hierarchy of dignity is highlighted by this declaration.

³⁰² Qur'ān 5:8

Though dignity is unqualified, good deeds according to Islam make humans more dignified than other creatures.

It is also important to highlight that Islamic Sharī'a and international human rights law both emphasis the commonality of dignity and a state's responsibility/obligation for the protection and promotion of it through legislation. With regards to Islam, its emphasis is on dignity over other factors. In the Qur'ān, it states for the angels there would be creatures created who will be vicegerents on earth and bestowed upon them with honour. In the Qur'ān Allah says that:

Just recall the time when your Lord said to the angels, 'I am going to appoint a vicegerent on the Earth'.³⁰³

Similarly, the concept of human dignity in Islam is seen in a treaty (written law/agreement) that the Prophet Muhammad (PBUH) partook before his prophethood, which is the *Hilf-Al-Fuhdul*, which translates to the 'League of the Virtuous'. Written up after the mistreatment of a Yemeni merchant, the treaty promised to uphold justice for all who were oppressed in Mecca, regardless of their status and background. During Mohammed's prophethood, the Prophet still acknowledged the validity and value of the treaty, saying it was 'more beloved to me than a herd of red camels' and 'if I were called to it now in the time of Islam, I would respond.' This treaty therefore, shows that Islam is following a set of principles and morals that are grounded in practicality and also protecting the rights and dignity of people.

Therefore, the Islamic state's duty is bound by Islamic laws and by incorporating Islamic concepts like dignity for the prevention of human trafficking in the state. Similarly, states have duties to respect the concept of dignity as enunciated in international human rights law. The

³⁰³ Surah Al-Baqara, 2: 30

above provides a comparison and contrast of the concepts of human dignity in international law and Islamic Sharī‘a, while the below further illustrates the parallels.

Parallels in Conceptions of Human Dignity in International Law and Islamic Sharī‘a

INTERNATIONAL LAW	ISLAMIC LAW
Human dignity is for all human beings. It is a universal concept.	In the Qur’ān dignity is provided for every human being by referring to them as children of Adam. According to the Ḥanafī School, human dignity is universal. Respect is given to all human beings regardless of their religion.
Human dignity is inherent.	The Ḥanafī School of thought regards dignity as a natural right, inherent to the human being.
Human dignity is unqualified.	According to Imām Abū Ḥanīfa and his disciples, dignity is universal for all human beings. It is granted to them as per the reason of their humanity. There is no condition attached with the concept of dignity. This concept is also found in Article 1 of the Cairo Declaration.
The concept of dignity is asserted in instruments such as the UDHR, the ICCPR and the ICESCR.	The concept of dignity is asserted in the Cairo Declaration.
States are under obligations to protect the dignity of citizens in international law.	Under Article 4 of the Cairo Declaration, human beings are entitled to dignity during life and after death. States are under obligations to protect this right.

Discrepancies between Conceptions of Human Dignity in International Law and Islamic Shari‘a

The discrepancies between conceptions of human dignity in international law and Islamic Shari‘a are related to the differences of opinion between the schools of thoughts in Islam.

INTERNATIONAL LAW	ISLAMIC LAW
Human beings are equally endowed with reason and conscience by reason of their dignity to have the right of autonomy. Their autonomy rights are considered as ‘anticipatory autonomy rights’.	In Islam, human beings are granted the intellect to carry the responsibilities given to them by Allah. Inviolability, autonomy, and freedoms are limited under the scope of religion. Dignity is granted to the unborn child as he/she has the code of human genome, so he/she is treated as a human and dignity is attached to him/her, therefore, deserves rights and at puberty, he/she bears duties. So, the principle of justice has more value in Islam than the principle of autonomy.
There is no hierarchy of dignity.	In Islam, a hierarchy of dignity is present. The rights are different on the basis of gender. Dignity is not exercised as an equal and inviolable treatment of human beings, rather it is mostly interpreted as the concept of honour.
The concept of dignity is absolute.	The concept of dignity is not absolute. Muslims are the vice-regents of Allah; absolute dignity belongs to Allah. Other than the Ḥanafī school of thought, schools and even some of the followers of the Ḥanafī school believe in the concept of qualified dignity. Dignity is related to the deeds done by Muslims. It is not solely based on humanity.

<p>Dignity demands a responsibility to act in the spirit of brotherhood.</p>	<p>The Communalistic Schools in Islam do not provide the Inviolable dignity to non-Muslims. According to their teachings, human dignity only belongs to Muslims. Disbelief excludes non-Muslims from the realm of dignity. Muslim jurists provide for dignity as a natural right; however, they confuse the right with the concept of dignity. There are many rights available to non-Muslims, however dignity is the foundation of all rights. Dignity and rights are two different concepts. Without having dignity, all other rights would not be exercised to their fullest.</p>
<p>Article 1 of the UDHR states that everyone is born free and equal in dignity.</p>	<p>The Cairo Declaration in its Article 2 declares life as a “gift of God”. It is different from the western approach of natural rights inherent in nature. The life and dignity of the unborn child is protected in this Declaration in Article 7. Life in this Declaration is protected throughout the term as per the will of Allah. It implies the dignity and protection of the unborn child as a living entity carrying the soul that is the source of life.</p>

It is noted that the second table indicates that there are significant differences in data, particularly regarding access to dignity from a religious perspective for believers (Muslims) and others termed as non-believers, both males and females. It is essential to acknowledge that these differences have no significant impact on who is protected from human trafficking. This

is due to the fact that all Islamic denominations prohibit human trafficking and exploitation regardless of their religious beliefs which are compatible with international law, as discussed in this thesis.³⁰⁴ According to Islamic Sharīʿa, the act of exploiting human beings and human trafficking is strictly forbidden regardless of who the victims are, whether that be due to their religion, race or beliefs. This is because Islam views exploitation and human trafficking as being in direct opposition to the sources of Islamic Sharīʿa and the inherent worth and value of every human being.³⁰⁵ However, the differences among various Islamic sects on the overall perception of who has access to dignity can lead to misunderstandings among their followers and potentially even the mistreatment of non-Muslims. The differences are related to the scope, nature, source and application of the concept of dignity.

Dignity is the intrinsic and fundamental characteristic for the protection of human rights in both Islamic Sharīʿa and international law. From the perspective of human trafficking, dignity plays a highly significant role in protection from abuse and coercion. The difference between the concept of dignity in Islamic Sharia and international law is important because the KSA constitution and laws are in accordance with Islamic Sharīʿa and the KSA is specifically aligned with the Ḥanbalī school of thought as indicated in Chapter 3.2.

In Islam, dignity is divided between the concepts of Ādamiyyah and Iṣmah.³⁰⁶ The former holds the meaning of personhood and humanity, and the latter belongs to the concept of infallibility

³⁰⁴ UN Office on Drugs and Crime (UNODC), ‘Combating Trafficking in Persons in Accordance with the Principles of Islamic Law’ (June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed 10 October 2023.

³⁰⁵ Nasser Al- Shahrānī, *The National Legislative Framework for Combating Human Trafficking in the Kingdom of Saudi Arabia* (Naif Arab University for Security Sciences Riyadh 2008).

³⁰⁶ Recep Senturk, ‘Sociology of Rights: "I Am Therefore I Have Rights": Human Rights in Islam between Universalistic and Communalistic Perspectives’ (2005) 2 Muslim World Journal of Human Rights 24.

and inviolability. The Islamic concept of dignity i.e. Karamāh al-Insān is divided into exclusionism and inclusivism approaches of fiqh. International human rights are universal, although in Islam the approach differs. The Ādamiyyah standard is the universal approach for the protection of dignity.³⁰⁷ This is the fundamental principle of the universal brotherhood and humanity of all mankind. According to this principle, Muslims are bound to protect the dignity of all humans regardless of their faith. The Ḥanafī school of thought follows this approach. However, in other Muslim fiqh, the situation differs. The importance of this issue arises as the KSA follows the Hanbali school of thought holding a different view on this matter.

The prevalent concept of human rights in accordance with Islamic Sharia is correctly defined through the concept of Iṣmah and Hurmah. The Iṣmah provides for the rights which fall under the paradigm of Daruriyyat or also referred to as ‘axiomatic rights’.³⁰⁸ The most important rights pertinent to this thesis and which relate to dignity, are the right to inviolability of life (iṣmat al-naḥs or iṣmat al-dam), and the right to inviolability of honour (iṣmat al-ird). The line of difference is drawn between the two concepts as to who is qualified for the protection of Iṣmah. With the exception of the Ḥanafī school of thought, all the other schools believe Iṣmah is acquired through faith where non-Muslims are not entitled to these Islamic human rights unless they make a contract with the Islamic state, a concept which revolves around the Ḍhimmi. The exclusionist approach of Shafi’i and the majority of the Ḥanbalī school of thought provides that non-Muslims do not qualify for the protection of Iṣmah and therefore they are not entitled to dignity as an innate value as they are non-believers.³⁰⁹

³⁰⁷ Recep Sentruk, ‘Islamic Law and Children of Adam’ (2022) 6 Renovatio: The Journal of Zaytuna College.

³⁰⁸ Ghamaz (n 289).

³⁰⁹ Abi Abdullah Muhammad bin Abdul al Rahman Bukhori, *Mahasin al islam wa Shariah al-Islam* (Beirut: Dar al Kutub al Ilmiyah 1985) 65

Karāmah al-insān, that is related to dignity or nobility of Muslims according to the majority of Muslim Fiqh leads to another concept of nobility or dignity which is ḥurmah al-insān or the sacredness of the humanity. The line of argument being raised is whether non-believers have ḥurmah or not. This concept is essentially attached to the perseverance of mu'min. Dignity in Islam is associated with sacredness and nobility, rather than universality as īmān is considered as the subject matter of karāmah as Shaykh Muḥammad Taqī Ja'farī and Shaykh Jawādī Āmulī argue that dignity is qualified, acquired as vicegerent of Allah.

The substantive consequence of the difference in approach of universal dignity and qualified dignity with the associated nobility of mu'min is the vulnerability of non-Muslims who are trafficked into the KSA.³¹⁰ As discussed earlier, other than those following the Ḥanafī school of thought, non-Muslims are entitled to dignity only in the presence of some contract with the Islamic state. Consequently, illegal non-believers cannot guarantee any legal contract with the state which opens a way of exploitation or modern-day slavery of non-Muslims who are trafficked into the KSA. In the absence of a contract there is no ḥurmah (dignity) as they are not muḥtaram (respectable), therefore they do not qualify to dignity. As Orthodox Islamic Jurisprudence considers non-Muslims as ḥarbī (belonging to war), their rights are not protected as the rights of Muslims.

As there is no contractual liability attached to contracts with non-Muslims, the rise of slavery of the trafficked non-Muslims is very prevalent. The Permanent Committee of Scientific

³¹⁰ Sayyid Ali, 'Principle of Human Sacredness (Hurmah) & Nobility (Karamah)' (2022) IqraOnline <https://iqraonline.net/principle-of-human-sacredness-hurmah-nobility-karamah/> assessed 7 January 2024.

Research and Legal Opinions gave a fatwa that it is impermissible for Muslims to hire non-Muslim migrant workers.³¹¹ The Committee's Fatwa even extends to the position that even a contract with the non-Muslims is impermissible. The reasons given are the untrustworthiness and other evil consequences. This fatwa without any thoughtful reasoning is not drawn from the Quran and Sunnah and has become a motive for trafficking and exploitation of workers from underdeveloped countries into the KSA. Therefore, for non-Muslims without a contract, this results in the lack of *ḥurmah* which poses a vulnerability for non-Muslims.

Given migrants are not protected enough or encouraged to be hired legally, but under the guise of trafficking, non-Muslims are still working in the KSA but exploited. Here they face racial discrimination and abuse in different ways. Christian women are trafficked and may be forced into religious conversion and slavery in KSA as their rights are not protected as Muslims are protected due to the principle of qualified dignity.³¹² Women from Ethiopia and Africa face the same situation as well.

The impermissibility and untrustworthiness of non-Muslims in the eyes of the Muslims of the KSA can be further assessed through another case of restrictions on Christian immigrants. For instance, in 2011, Filipina domestic workers were banned from entering the KSA. The reason was the same as discussed earlier. Non-Muslim workers were regarded as people of less dignity, so Muslims are reluctant to hire them and to treat them properly. So, the poverty-stricken people of the Philippines and other refugees struggled to enter into the KSA by legal means. Thus,

³¹¹ Fatwa No. 9657, 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=4704&PageID=5342&SectionID=7&SubjectPageTitlesID=5396&MarkIndex=0&0#Isitpermissibletohireanon-Muslim>.

³¹² Caroline Kimeu and Ventura Kireki, 'Modern-day slavery': Kenyan domestic workers tell of abuse in Saudi Arabia' *The Guardian* (27 September 2022).

migration started "under the radar", where the people choose themselves to be smuggled. They ignore the potential threats involved and become the victims of trafficking. Though the KSA has reversed this policy, the potential legal mind-set and the Fatwa of religious scholars regarding the rights of non-Muslims continues and is threatening.³¹³

The ratio of non-Muslims who are trafficked in the KSA is huge with no protection offered to them. Legal protections, such as contracts of work are discouraged, opening the way to the practice of trafficking and modern-day slavery. This exclusionist approach of human dignity by the Muslim schools of thought is not in alignment with the teachings of Quran and Sunna, but due to difference of opinions the violations of human rights are hard to handle and no tangible steps are taken to minimize them. This communal view of Islamic Jurisprudence permits the granting of fewer rights to non-Muslims and the surge in their trafficking and exploitation is due to these views.³¹⁴

In Sura al-Baqara it is explicitly mentioned as:

‘If they stop ‘persecuting you’, let there be no hostility except against the aggressors’.³¹⁵

The major difference of opinion regarding the dignity of non-Muslims between the Hanafī and other schools of thought arises because the concept of inviolability can be driven through ra'y i.e the opinion of Muslil Jurists or Khabar-al-wāhid. Ibn Ābidīn stated that ‘a human being has legal sanctity (karāmah), even if he is non-Muslim’.³¹⁶ Nevertheless, some of the Ḥanbalī jurists also invoke the universality of dignity as Alā’ al-Dīn al-Mardawī stated that:

³¹³ Pardis Mahdavi, ‘What happened when Saudi Arabia closed its borders to Christian immigrants’ The Conversation (27 January 2016).

³¹⁴ Mohammad Hashim Kamali, ‘Human dignity in Islam and its impact on society’ New Strait Times (25 October 2017).

³¹⁵ Qur’an 2:193.

³¹⁶ Ibn Ābidīn, *Radd al-muhtār alā al-durr al-mukhtār* (Beirut: Dār al-Fikr, 1966) 5,58.

Violation of the divine rights disappears with repentance, but the violation of human rights disappears with removing the traces of injustice.³¹⁷

Ḥanbalī and other schools of thought regard dignity, *karāmah*, as an acquired value rather than an innate and natural value. Due to this difference, the exploitation of non-Muslims in the KSA goes unnoticed as 13.4 million foreigners work in the KSA;³¹⁸ the correct figure of trafficked non-Muslims is unknown. Restrictions on immigration and the absence of legal protection under the laws of the KSA have resulted in a surge in the vulnerability of non-Muslims. The fatwah regarding the absence of *ḥurmah* regarding the contracts with non-Muslims is itself a proof of absence of dignity.

Dignity is well established as a 'natural right' and Islam has regarded dignity as *haqq tabi'i*, which is required to be obeyed in relations (*al-mu'amalah*) between people.³¹⁹ Furthermore, if the KSA truly aligns itself with well-established interpretations of Qūran and Sunnah, there should be no room for human rights violations in line with the practice with the Hanafī school of thought which adheres to the concept of universality of dignity.

3.5.6 Islamic Shari'a is more developed than international human rights law

It is important to note that the concept of human dignity is a much deeper concept in Islamic Shari'a than it is in international human rights law. While many concepts of dignity in international law are confined to theoretical concepts, the Islamic perspective integrates both theory and application. A major component of Islam's theory is that it is based on principles found in the Qur'an and the Prophet's teachings. The Islamic concept of human dignity does not

³¹⁷ Alī b. Sulaymān al-Mardāwī, *Tahrīr al-manqūl wa tahdhīb ilm al-uṣūl* (Doha: Ministry of Endowments and Islamic Affairs, 2013) 114.

³¹⁸ Office To Monitor and Combat Trafficking of Persons, U.S Department of State, *2022 Trafficking in Persons Report: Saudi Arabia* <https://www.state.gov/reports/2022-trafficking-in-persons-report/saudi-arabia/> assessed 7 January 2024.

³¹⁹ Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective* (Islamic Text Society) 134.

only refer to a theoretical or intellectual vision but rather to a living reality that has practical application in all aspects of Islamic Sharia.³²⁰ Islamic legislation contains many provisions that establish the principle of honour and respect for human dignity and decrees punishment for those who violate it.³²¹ For example, Islamic Shari'a forbids assault on a person, either verbally or physically, and requires retribution against the perpetrator as discussed in section 3 of this chapter. Islam recognizes the inviolability of the rights granted by God and no legislative body or country has the authority to modify or alter them.³²² Furthermore, it is impossible to withdraw or annul them. Human dignity is upheld by Islamic law through its continuous implementation, which complements the principles embodied in international human rights law. However, basic human rights may not always be enforced by authorities. The development of the secular concept of human dignity has been largely influenced by legal philosophy and morals. One may argue that a legal right, which is conferred by legislative assembly, can be simply revoked in the same way it was once granted. Similarly, this applies to the rights that have been acknowledged and endorsed by global leaders. They can confer them as they please and withdraw them when they wish; and they can openly violate them as they choose.³²³

The concept of dignity is the foundation of all human rights. Internationally, scholars from the great religions of the world, including Islam, came together to enshrine dignity as the prime driver for human rights through Article 1 of the Universal Declaration of Human Rights. It is

³²⁰ Huda Al-Daljan, *The Concept of Human Dignity in the Holy Qur'an and the Wisdom behind it* (2023) 172 Islamic University. Journal 13.

³²¹ Ahmed Mohamed, 'Human dignity in the Islamic perception and its jurisprudence applications: a comparative study' (2020) 3 Journal of the College of Shari'a and Law 1679.

³²² Syed Abul A'la Mawdudi's, 'Human Rights in Islam' (1407) 4 Al-Tawhid Journal, 1.

³²³ *ibid.*

believed that human rights are provided to individuals in Islam in accordance with their dignity and respect from God, which makes it distinct from western worldviews.³²⁴

Human dignity, honour, and equality are considered to be the tenets of human rights in Islam.³²⁵ Dignity is also considered to be an intrinsic and fundamental value.³²⁶ As a distinct worldview, Islam cannot be comprehensively analyzed using Western concepts, whether traditional or contemporary. Islam has its own unique criteria for measuring perfection, truth, and efficiency, as well as moral and immoral behaviour.³²⁷

Islam ensures equal human rights for all individuals, since it does not uphold any kind of nobility. As per the teachings of the Prophet (PBUH), there is no inherent superiority of Arabs over non-Arabs. Non-Arab descendants do not possess any inherent advantage over Arab descendants. Every race possesses the same dignity and entitlement; racial superiority does not exist. There is no difference between races other than piety and the awareness of God.³²⁸

The parting speech of the Prophet has great importance in Islamic history as it exemplifies the principles of dignity and human rights in Islam. The Islamic approach to human rights and dignity is posited to be more profound than the Western approach, since it is rooted on divine revelation rather than rational deliberation. An understanding of these different approaches and origins provides the fundamental distinctions between them.

³²⁴ Riaz Ahmad. Human Rights in Islam and the West (the last sermon of the Prophet and UDHR) Jihāt al-Islām Vol.6 (January-June 2013) No.2.

³²⁵ Tahir Qadri, Human Rights in Islam, Op. Cit. ,33.

³²⁶ Muhammad Kamali, The Dignity of Man, The Islamic Texts Society (2002) Cambridge, UK, 9.

³²⁷ Ali Shafique, Freedom of Thought and Islam, Royal Book company, Karachi, 1989 35.

³²⁸ Ahmad Bin Hanbal, Imam, Musnad Imam Ahmad, Hadith No. 411, Shaikh Ashraf Publishers, Lahore, 200.

The Universal Declaration of Human Rights (UDHR) is accepted as the principal source of human rights in our present time. This research attempts to draw comparisons between the Last Sermon of the Prophet (PBUH) and human rights as they relate to the UDHR.³²⁹ Under Islamic Sharia, human rights were extensive and were codified fourteen centuries ago.³³⁰ From the perspective of Islamic scholars, the UDHR does not introduce any novel ideas. The details of every UDHR clause are already integrated in Islam. Human rights are fully guaranteed and protected by Islam according to the rules of Islamic Sharia'.³³¹ From the standpoint of human rights, it is a restatement of Islamic beliefs. Some of the principles of the UDHR were previously established by religious lawgivers and preceptors and were firmly rooted in the faith before the declaration was made. Since every clause of the UDHR already existed in Islam in a better and more perfect form, nothing new has been published or initiated by the document.³³² In this sense, the UDHR is 1309 years younger than the Human Rights of the Last Sermon. Some consider the Holy Prophet's Last Sermon the first international charter. These rights are a revival of Islamic rights, not a new innovation.

The Islamic concept of human rights is more pragmatic, advantageous, and enforceable than Western concepts. The (UDHR) is often seen as a statement of human aspirations without authoritative enforcement. However, from an Islamic perspective, these rights are morally and legally feasible and can be enforced by the Islamic State, making them feasible both morally

³²⁹ See a good study by Saeed, Riaz Ahmad. Human Rights in Islam and the West (the last sermon of the Prophet and UDHR) *Jihāt al-Islām* Vol.6 (January-June 2013) No.2.

³³⁰ Suleiman Al-Hagheel. Human rights in Islam and their application, kingdom of Saudi Arabia, Riyadh, 2001, 123.

³³¹ Suleiman Al-Hagheel. Human rights in Islam and their application, kingdom of Saudi Arabia, Riyadh, 2001, 123.

³³² Ali Moghaddam, Towards International Islamic Human Rights: A comparative study of Islamic Law with Universal Human Rights, MA Thesis in University of Toronto, 2012, 94.

and legally.³³³ In contrast, the prophet's lecture not only lays out the specifics of the fundamental rights of people, moreover, it also offers a way to put those rights into practice. Every Islamic government has an obligation to protect these rights, and each Muslim is accountable to Allah for his or her actions.³³⁴

An important element of the final sermon is its depth, universality, and dignity. The human rights portion of the Prophet's last sermon shows great depth and universality. The sermon's language and content are evidently general rather than specific. Moreover, the UDHR is founded upon human intellect, but the Islamic Declaration on Human Rights is founded upon divine revelation. In this regard, Prophet Muhammad established these guidelines in the finest form approximately fourteen hundred years ago and style will always be pertinent.³³⁵ As a result, it is clear from this discussion that Islamic rights including dignity can be regarded as more comprehensive and universal than the UDHR.

According to Islam, the Prophet (PBUH) and Allah have emphasized the importance of security, protection, and guarantee. One might argue that Islamic rights are more effectively protected and assured in comparison to those delineated in the UDHR. These rights are guaranteed by Allah and his Prophet therefore guaranteed by the constitution and morality. While the foundations of Islamic and Western human rights vary, the UDHR's rights lack these

³³³ Abdulqadir Khan. *Pakistan Studies*, National Book Foundation, Islamabad, 2011, 88.

³³⁴ *ibid*, pp. 89.

³³⁵ <<http://www.islamland.com/Media/Books/HumanRightsinIslam.pdf/27/7/12>>.

assurances and security. To enforce it, the CDHR³³⁶ of OIC states that, any explanation or clarification of any of the articles in this Declaration must come from the Islamic Shari'a.³³⁷

The Islamic concept of human rights emphasizes the unity of human rights. Based on an Islamic perspective, freedom and other fundamental rights do not conflict since each has distinct limits and positions. Islam maintains a delicate balance between rights and obligations. The equilibrium was established by Allah and not by an emperor, government, or reformer.³³⁸ Similarly, rights are just a way to carry out your obligations in life.³³⁹ Due to the Western perspective's seemingly limitless concept of freedom and rights, there appear to be a conflict between Western perceptions and other essential human rights derived from human dignity and those expounded and recognised by Islam.

A major weakness of the UDHR's rights is the fact that their obligations have no specific deadlines or restrictions. Since these rights do not relate to duties, they remain weak. Nevertheless, duties are relevant to Islamic rights such as dignity. It implies that one has obligations in addition to these rights. For example, a Muslim will not be entitled to any rights if s/he break these duties. Islam implies that a peaceful community is dependent upon the interdependence of rights and obligations. In spite of Islam's adherence to several human rights, a significant portion of the population remains unaware of the majority of them. The world's perception of Islam and Islamic rule and governance is distorted because of ignorance and lack

³³⁶ CDHR: The Cairo Declaration of human Rights is an Islamic Human Rights Charter which was declared by The Organization of Islamic Countries (OIC) at Cairo on 1990.

³³⁷ <<http://www.oic-oci.org/english/article/human.htm/27/7/12>>.

³³⁸ Riaz Saeed, *The Quranic concept of freedom of expression: A descriptive study* (An unpublished PhD assignment) University of the Punjab, Lahore, 2012, 15.

³³⁹ Mohammad Khoder, *Human Rights in Islam*, Dar Khoder, Beirut, 1988. 100.

of appropriate knowledge regarding these human rights (including dignity).³⁴⁰ There is a strong agreement amongst Muslim scholars who say that the Prophet's last lecture is a comprehensive and eternal declaration of human rights which focuses on human dignity.³⁴¹

Accordingly, Islamic human rights and dignity could be viewed as having more universality, certainty, and protection than international human rights agreements, such as the UDHR. This is because the latter lacks robust moral or powerful assurances. These rights are immutable and irrevocable by nations and governments. Every scholar and nation has their own interpretation of these human rights. They support part of their argument with the claim that Islamic revelation is in accordance with human nature (*fitrah*).³⁴² A comprehension of the dynamic interplay between revelation and human nature necessitates an understanding of the concept of *fitrah*, which refers to an inherent inclination or quality. In accordance with the inherent qualities and characteristics of every living object, the revelation of the Quran discloses that God has imparted specific directives. In spite of this, Muslim scholars have endeavoured to demonstrate that revelation promotes and supports the maintenance of human dignity.

3.6 Conclusion

Having reviewed the literature on this topic, the research leads to the following conclusions. Foremost, that since early times, Islamic civilisations were keen to preserve human dignity regardless of gender, colour, language or even religion. Although there may not be a distinct definition or explicit text in the main sources of Islamic Sharīʿa regarding the prohibition of

³⁴⁰ Abdullah Al-Turkey, *Islam and Human Rights*, Islam house publisher Riyadh, 2006, 27.

³⁴¹ Sultan Khan and Hassan Choudary, *Social studies*, Ashraf Brothers, Lahore, 2011, 65.

³⁴² Qur'an, 30:30.

human trafficking, Sharī'a, in general, forbids exploitation and protects the rights of the vulnerable, especially those of women, children and migrant workers. Furthermore, the chapter attempted to distinguish between harmful and illegal customary practices, such as forms of forced and child marriages in addition to temporary marriages that violate the principles of Islamic Sharī'a, which arguably prohibits such practices. The chapter also examined how Islamic Sharī'a classifies human trafficking and the harsh punishments associated with this heinous crime. As a result, human trafficking may be classified as deserving of a Ta'zīr punishment; subsequently every country should impose severe penalties for this crime. At the same time, such a punishment should be imposed only in accordance with Islamic Sharī'a which guarantees protection for the accused. Islamic Sharī'a also includes a number of safeguards for victims of human trafficking. In essence, it seems reasonable to conclude that Muslim countries are competent to fully, adequately and effectively implement Islamic principles, consequently they have a religious obligation to prevent human trafficking and protect victims.

The principles and provisions of Islamic Sharī'a respect the human being and deepen the sense of human dignity through granting fundamental rights to them, such as the rights to life, liberty, justice and equality, which are considered necessary for a dignified livelihood. The concept often depends on the idea that dignity of a human is based on an ethical principle that states that mankind should be treated as an end in themselves rather than a means, and their dignity as human beings is above all considerations. The Islamic message seeks reform through advancing the happiness of mankind, whilst endeavouring to instil the utmost respect; through moral virtues, Maqāṣid al-sharī'a and Maṣlaḥa in addition to the protection of the five necessities of Islam.

Human dignity in Islam is considered as one of the most important of all principles. Hence, no decision or conduct by rule, law, or others of authority should be made in which there is an

affront to the Islamic principles of human dignity. Consequently, Islamic Sharī‘a, as required in Islamic countries, certainly contributes to the fight against human trafficking. As a result, it serves to strengthen and supplement the global framework for combating human trafficking. Lastly, within the scope of these topics, a comparison and contrast of combating human trafficking framework and human dignity study concluded that Islamic Sharī‘a is largely compatible and consistent with international human rights law. As a main finding, both frameworks identify the importance of protecting the dignity of citizens. Accordingly, it was determined that both can contribute towards the global efforts to combat human trafficking. Later chapters also support this idea, including within the critical analysis of the KSA’s failures to adhere to and enforce both of these legal principles in order to effectively combat human trafficking.

The following chapter explores and analyses the status of human trafficking in the KSA. It elaborates on how the Kingdom controls and seeks to prevent and suppress human trafficking offences, as well as provide protection and aid for victims. This protection should include the right not to be criminalised for any infractions committed as a result of being a victim of human trafficking. The chapter also addresses the extent to which the Kingdom complies with the broader principles of international human rights law related to human trafficking, as well as with the terms of the Palermo Protocol.

CHAPTER FOUR

HUMAN TRAFFICKING IN THE KINGDOM OF SAUDI ARABIA

4.1 Introduction

The legal and moral responsibilities for combating trafficking in persons lie primarily with the destination country,¹ due to the profiteering and exploitation taking place therein.² Among these destination countries is the KSA.³ According to the assertions recorded in the US State Department's annual report on evaluating countries' efforts to combat human trafficking, the government of the KSA does not fully comply with the minimum standards stipulated in the US Trafficking in Persons Protection Act (TVPA).⁴

In the KSA, approximately 13.4 million migrants work in a variety of industries, including commercial, construction, hospitality and housekeeping.⁵ In 2022, the population of the KSA was estimated at 32.02 million people.⁶ For more than eight decades the country's economy has attracted various migrant workers, and as the KSA is gradually opening its doors to foreign tourists and travellers worldwide, these figures are anticipated to increase substantially. These

¹ Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18 *International Criminal Justice Review* 318.

² *ibid.*

³ The responsibility of destination countries in the process of identifying victims of trafficking in persons is doubled. Given the scientific reality, it is often not possible to distinguish the victim of the crime of trafficking in persons from the illegal immigrant, except after the occurrence of the exploitation process that takes place in the country of destination. Anne Gallagher and Paul Holmes (n 1).

⁴ US Department of state, 'Trafficking in Persons Report: Saudi Arabia' (June 2020) <<https://www.state.gov/reports/2020-trafficking-in-persons-report/saudi-arabia/>> accessed 05 February 2022.

⁵ General Authority for Statistics: Saudi Arabia, 'Employment rate' (*Saudi State Government*) <<https://www.stats.gov.sa/ar/821-0>> accessed 05 December 2023.

⁶ Government of Saudi Arabia, 'Reports and Statistics' (*Saudi State Government*). <https://www.my.gov.sa/wps/portal/snp/aboutksa/saudiReportsAndStatistics!/ut/p/z1/jZDLDoIwEEW_hi0zK> accessed 8 September 2022; see also the combined report of the Kingdom of Saudi Arabia for its (tenth and eleventh) reports submitted in accordance with paragraph (1) of Article (9) of the International Convention on the Elimination of All Forms of Racial Discrimination (25 Jan 2023) UN Doc CERD/C/SAU/10-11.

migrant employees provide critical services while also continuing to financially support their communities and families in their respective countries of origin. These arrangements are usually advantageous and of mutual benefit to both the host country and the country of residence. However, a number of migrants become victims or are at risk of various forms of trafficking in persons through this trade.⁷ Thus, the KSA has become a notorious destination for human trafficking among countries in Asia and Africa.⁸ In light of that, this chapter seeks to elaborate on how the KSA aims to prevent and suppress crimes of human trafficking and protect and assist victims; and argues that victims must be protected from being criminalised for any violations committed as a result of being trafficked. The chapter also covers the extent to which the KSA complies or fails to comply with the general standards of international human rights law applicable to human trafficking, as well as the provisions of the Palermo Protocol, including articles 2, 3, 5, 6, 7, 9, 11, 13 and 14. Despite the Protocol having been ratified by the KSA, the chapter demonstrates that the KSA has not entirely completed the process of integrating the principles provided in the international legal framework on combating human trafficking.

Given the clandestine nature of human trafficking, it is very difficult to accurately measure the scope of this criminal activity.⁹ The UN believes that the extent of this crime recorded in official statistics is only the tip of the iceberg.¹⁰ Davor Raus, a United Nations Office on Drugs and Crime (UNODC) criminal justice expert, argues that the reason for the limited number of successful prosecutions for human trafficking worldwide may be due to the fact that the crime

⁷UNODC, 'UNODC & Saudi Arabia Join Forces to Protect Victims of Human Trafficking' (*UNODC*, November 2020) <<https://www.unodc.org/unodc/en/frontpage/2020/November/unodc-and-saudi-arabia-join-forces-to-protect-victims-of-human-trafficking.html>> accessed 05 February 2022.

⁸ US Department of state, 'Trafficking in Persons Report: Saudi Arabia' (June 2018) <<https://www.state.gov/reports/2018-trafficking-in-persons-report/saudi-arabia/>> accessed 2 September 2021; See also Global Detention Project and Migrants-Rights.org, Joint Submission to the UN Committee on the Elimination of Discrimination against Women (CEDAW) 69th session (19th February – 9 March 2018).

⁹ Sheldon Zhang and Jacque Larsen, 'Estimating the Size of the Human Trafficking Problem; MSE and other Strategies' (2021) 67 *Crime & Delinquency Journal* 2169.

¹⁰ UNODC, 'Global Report on Trafficking in Person 2016' (December 2016) <https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf> accessed 15 July 2022.

is complex, profitable and secretive, making it difficult to prove.¹¹ The relatively low incidence of convictions for human trafficking in comparison to the extent of the problem is also due to the fact that victims are frequently involved in violation of immigration regulations or prostitution. As a result, victims are unable or unwilling to disclose the exploitation they are exposed to for fear of criminal charges or even retaliation from the gangs involved.¹² In addition, they may face deportation back to their countries of origin by local authorities, especially if they are in violation of the immigration and residency regulations. These factors would deprive them of their financial gains; they may also be punished in their countries of origin by their traffickers or be at risk of further exploitation.¹³

The KSA ratified the United Nations Convention against Transnational Crime in 2005, the Palermo Protocol in 2007, and the Arab Charter on Human Rights in 2004,¹⁴ and enacted the Anti-trafficking in Persons Law in 2009.¹⁵ The KSA's ratification of the human rights instruments¹⁶ represents a step in the right direction. However, this chapter reveals how success

¹¹UNODC, 'Securing Evidence: The Key to Convictions for Human Trafficking' (UNODC, 18-20 January 2022) <https://www.unodc.org/unodc/en/human-trafficking/Webstories2022/securing-evidence_the-key-to-convictions-in-human-trafficking.html> accessed 15 July 2022; See also David Nelken, 'Human Trafficking and Legal Culture' (2010) 43 Israel Law Review 479.

¹²Sarah Zimmerman, 'Mending the protection and prosecution divide: looking at Saudi Arabia human trafficking flaws and possibilities' (2016) 15 Washington University Global Study Law Review 533.

¹³ Gallagher and Holmes (n 1); see also Johnny McGaha and Amanda Evans, 'Where are the Victims, The Credibility Gap in Human Trafficking Research' (2009) 4 International Human Rights Law Rev 244.

¹⁴ Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008); According to Royal Decree No. (M/19) dated 27/3/1430 AH, which is equivalent to March 23, 2009 AD, the Kingdom joined it. Article 10 (1) provides: 'Slavery and slave trade in all their forms shall be prohibited and punishable by law. No one shall, under any circumstances, be held in slavery or in servitude'.

¹⁵The Saudi government has acknowledged that the creation of the Law for Combating Crimes of Trafficking in Persons (2009) based on Royal Decree M/40 is a response to the current demand for international and regional obligations, and that all state regulations, including this law, do not contradict Shari'a. Cabinet Resolution No. 24, dated July 13, 2009, called for the establishment of a major national mechanism to implement the Human Trafficking Law. It performs a variety of functions, which will be covered in greater detail later in this chapter

¹⁶The Kingdom of Saudi Arabia is a party to many international conventions dealing with human rights, labour rights and the dignity of the human person. These conventions and instruments, require states to observe, comply with and show commitment to their responsibilities and obligations under international human rights law in combating and prosecuting human trafficking, forced labour, torture and other degrading and discriminatory treatments. In particular, Saudi Arabia has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against

will actually depend on genuine efforts being translated into actions capable of having a significant impact in terms of combating human trafficking. This is especially challenging due to the complexities involved. Addressing these challenges would require a major modernisation of the agencies which specialise in investigating and prosecuting crimes of human trafficking in addition to countering violations of human dignity.

The second section of the chapter examines the definition of the crime of trafficking in persons under the KSA's anti-trafficking law, while the third section deals with the state's duty to prevent and suppress crimes of human trafficking. The fourth section reviews the state's duty to protect victims of crimes of trafficking as well as the use of secular law such as criminal law,¹⁷ basic law of governance¹⁸ and labour law.¹⁹

The main conclusion drawn from the chapter is that ongoing failures persist with the KSA's efforts to prevent and suppress the crime of human trafficking. Overall, this chapter demonstrates that the KSA fails to comply with relevant international human rights law standards, in particular, the Palermo Protocol.

4.2 The Complexity in Defining the Crime of Trafficking in Persons in Saudi Law

Human trafficking requires the presence of two elements in order for the perpetrator to be held accountable for the crime as Chapter Two discusses (subsection 2.3). These elements are the material element, and the mental element. It is impossible to claim that a crime has been committed or to achieve a prosecution if one of these elements is absent. Hence, the next section addresses the definition of the crime of trafficking in persons in the KSA's law.

Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention against Torture and Other Cruel and Degrading Treatment (CAT).

¹⁷ Saudi Law of Criminal Procedure (Royal Decree No M/39)2001.

¹⁸ Saudi Basic Law of Governance (Royal Order No A/90) 1992.

¹⁹ Saudi Labour Law (Royal Decree No M/51) 2005.

4.2.1 Defining Trafficking in Persons in the KSA's Law and the Material Element

The first paragraph of Article 1 of the KSA's Anti-trafficking in Persons Law defines the crime of trafficking in persons as: 'Use, recruitment, transportation, harbouring, or receipt of a person for the purpose of exploitation'. On examining this definition, it can be argued that the KSA's regulator adopts a different definition from the one adopted by the Palermo Protocol. The difference between the two definitions is that the material element of the crime of trafficking in persons according to Article 1 of the KSA's Law is based on one element, the act relating only to the 'use, transportation, harbouring or receipt of a person'. On the other hand, the Palermo Protocol's definition adds the means element to the material element of 'the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'.

As can be seen, the KSA's public prosecutor does not need to prove that the accused used a specific method to commit the crime of trafficking in persons.²⁰ Consequently, it is sufficient to demonstrate the abuse and exploitation of the victim occurred. As a result, according to this definition, the KSA's Law goes further than the Protocol in criminalising human trafficking.²¹ Despite the fact that the KSA's regulations are more extensive in criminalising human trafficking than the Protocol, and despite the introduction of the *Musaned* programme,²² which

²⁰ Ahmed Makhoulf, 'Legal Procedures for Combating the Crime of Human at the National and International Levels: The Kingdom of Saudi Arabia as a Model' (2022) 62 Institute of Public Administration 1369.

²¹ UNODC, *Model Law against Trafficking in Persons* (New York United Nations Publications, 2009) 32.

²² UNHRC, 'National report submitted in accordance with paragraph 15 of the annex to Human Rights Council resolution 16/21; Kingdom of Saudi Arabia' 31st session (20 August 2018) UN Doc A/HRC/WG.6/31/SAU/1 para 91-62. This programme's goal is to protect the rights of people who are frequently victims of forced work. This policy identifies victims and sends them to protective services, as well as strengthens regulatory enforcement of expatriate labour protections. It has also had a major effect on preventing violations of domestic workers' rights as well as violations of applicable laws and regulations.

aims to identify victims and refer them to protective services,²³ studies show a low rate of prosecution and conviction of perpetrators of human trafficking in the KSA.²⁴

However, Article 2 of the KSA's Anti-trafficking Law also defines the crime of trafficking in persons.²⁵ This definition is somewhat different from the definition of trafficking in persons contained in Article 1 of the same Law. Article 2 of the KSA's Anti-trafficking Law,

Prohibits trafficking in any person, in any form including forcing, threatening, defrauding, deceiving, kidnapping him/her. Prohibits exploiting position, authority, exploiting a person's weakness, or giving a person money or benefits to gain approval of one person, to control another person for the purpose of sexual assault. Prohibits forced work or service, begging, slavery or semi slavery practices, enslaving, removing physical parts, or subjecting a person to medical tests.

While Article 1 restricts the elements of human trafficking to the act and exploitation, Article 2 highlights the means and alludes to the form of exploitation. However, the further definition of trafficking in persons in the KSA's Law in Article 2 may confuse the criminal justice agencies in the KSA. It is not possible to understand the reason why the KSA's regulators followed this approach, as there was no requirement to do so, especially since the definition of the crime of trafficking in persons is clearly stipulated in the Palermo Protocol. There was no need to further define trafficking, rather just to read across or copy the definition according to what was recommended by the legislative evidence issued in this regard, whether by the

²³ Recent reports show Saudi Arabia had 74 human trafficking cases during 1443 AH / 2022 AD. This represents 0.10% of the total criminal cases in which a judgement was rendered by the competent court. It is the lowest number among total criminal cases. An interview with the Public Prosecution regarding the number and types of human trafficking cases in 30 July 2022, the interview is available at the following link: < https://www.youtube.com/watch?v=NnlvD0N_Xj0> accessed 14 April 2023.

²⁴ UNHRC, 'Report of the Special Rapporteur on extreme poverty and human rights on mission to Saudi Arabia' 35th session (28 April 2017) UN Doc A/HRC/35/26/Add.3 para 55; see also UN Committee on the Elimination of Discrimination against Women, 'List of issues and questions relating to the combined third and fourth periodic reports of the Kingdom of Saudi Arabia' (31 July 2017) UN Doc CEDAW/C/SAU/Q/3-4 para 14; see also UN Committee on the Elimination of Discrimination against Women (CEDAW), 'Consideration of reports submitted by States parties under Article 18 of the Convention' (30 September 2016) UN Doc CEDAW/C/SAU/3-4; see also UN Committee on the Elimination of Discrimination against Women (CEDAW), 'List of issues and questions relating to the combined third and fourth periodic reports of Saudi Arabia' 69th session (09 November 2017) UN Doc CEDAW/C/SAU/Q/3-4/Add.1.

²⁵ Saudi Anti-Trafficking in Persons Law (Royal Decree No M/40) 2009 art 2.

UNODC,²⁶ the League of Arab States,²⁷ or the Organisation of the Gulf Cooperation Council.²⁸

The existence of two definitions of the crime of trafficking in persons is a drafting defect, thus creating unnecessary confusion.²⁹

Referring to these two definitions, this research finds that they both differ in their content to some extent from the Protocol's definition of the crime of human trafficking. Furthermore, Article 5 in the KSA's law confirms that the consent of a victim to any crime as stated in this law does not affect its enforcement, nevertheless, victims of human trafficking crimes may be vulnerable to punishment for adultery or as illegal migrants. When this occurs, it doubles the injustice suffered by the victims and deprives them of the protection set forth in the provisions of the Palermo Protocol. It also strengthens the perpetrators' influence over their victims by threatening them that the authorities would not provide assistance to them but instead would treat them as criminals.³⁰ Rather than the state providing the necessary legal protection under the provisions of the law, the victim may be punished for committing the crime of prostitution or for violation of immigration law contrary to the Principles and Guidelines on Human Rights and Human Trafficking.³¹ Consequently, this, in turn, could have a negative impact on the

²⁶ UNODC, *Model Law against Trafficking in Persons* (New York United Nations Publications, 2009) 31-32.

²⁷NCCT, 'Regulatory framework to combat trafficking in persons' (NCCT) <<https://www.ncct.gov.sa/ar/alatar-alnzamy-lmkafht-jraym-alatjar-balashkhas>> accessed on 19 June 2023.

²⁸ Abu Dhabi Document for the Unified System (Law) to Combat Trafficking in Persons for the Cooperation Council Countries, General Secretariat of the Cooperation Council for the Arab States of the Gulf (adopted by the General Secretariat of the Cooperation Council for the Arab States of the Gulf 2011) art 1.

²⁹Adel Majid, *Combating Human Trafficking Crimes in International Agreements and National Law* (Vol 1, Naif University Publishing House 2010) 128.

³⁰Abdulhamid Al-Harqan, 'Combating Trafficking in Persons and Protecting and Assisting Victims of Trafficking in the Kingdom of Saudi Arabia Under the UN Protocol' (2020) Kuwait University Scientific Publication Council 177; US Department of state, 'Trafficking in Persons Report: Saudi Arabia' (June 2013) < <https://2009-2017.state.gov/j/tip/rls/tiprpt/2013/index.htm>> accessed 17 July 2022.

³¹ UN Economic and Social Council, 'Report of the United Nation High Commissioner for Human Rights to the Economic and Social Council' (1-26 July 2002) UN Doc E/2002/68/Add.1; Principle 7 states that 'Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons'.

implementation of the KSA's Trafficking in Persons Law and thus may highlight the incompatibility of the position in the KSA with international human rights law standards.

There is no doubt that there is a crucial need to distinguish between the crime of human trafficking and other crimes, such as violating immigration regulations, especially in terms of dealing with the victims who are subject to this malicious act. Therefore, it is necessary for the KSA's government to enforce its international obligations under the Protocol by giving due protection to all victims of human trafficking rather than treating them as criminals, as a result of other crimes committed once trafficking has taken place.³² Rather, perpetrators of human trafficking must be held accountable under the judicial system of the KSA and any other relevant country.³³

The following evidence confirms that trafficked victims have been treated as criminals in the KSA as a consequence of exploitation. The following two documented judicial decisions that seem to support the proposition that victims of human trafficking are not treated as victims in the KSA's law. In one of these cases, based on the charges brought by the Public Prosecutor, the court correctly convicted the accused of the crime of trafficking in persons for his sexual exploitation of a number of women. However, the sexually exploited victims were also sentenced at the same time to disciplinary punishment for committing the crime of prostitution.³⁴ In another ruling, the court convicted a person of committing the crime of trafficking in persons for agreeing to transport and shelter a domestic worker in order for her to work for other people in return for a sum of money obtained by him. In its judgment the court omitted to state that the domestic worker was a victim or that she was subjected to coercion or

³²Victims can be accused of violating state regulations such as immigration or criminal law, victims therefore may be treated as the offender.

³³ Saudi Anti-Trafficking in Persons Law (Royal Decree No M/40) 2009 art 2.

³⁴ Ministry of Justice, *Judicial Judgments Collection* (Vol 22, Saudi Research Centre 2013) 223; Ministry of Justice, *Judicial Judgments Collection* (Vol 22, Saudi Research Centre 2014) 496.

fraud.³⁵ Punishing the victim or not providing the necessary recognition and protection for victims is considered inconsistent with international human rights law standards and the Palermo Protocol.³⁶ Consequently, the KSA will continue to face critical challenges in regulating trafficking unless its domestic legislation is improved accordingly.

4.2.2 The Mental Element of the Crime of Trafficking in Persons (*Mens Rea*)

With regard to the mental intent (*mens rea*), the law in the KSA on combating the crime of trafficking in persons is subject to the general rules of criminal responsibility (although the law does not explicitly stipulate that the crime must be committed intentionally for criminal responsibility to be established).³⁷ The mental component takes the form of the general criminal intent represented by the offender's knowledge of the elements of the crime and the direction of their free will.³⁸ In addition to the necessity of having a special criminal intent, the act must be done for 'exploitation'.³⁹ It is worth noting here that the purpose of the crime of trafficking in persons is often sexual exploitation for material gain. This represents 50% of all the crimes of trafficking in persons discovered worldwide, while the crime of trafficking in persons for

³⁵ Ministry of Justice, *Judicial Judgments Collection* (Vol 22, Saudi Research Centre 2013) 237.

³⁶ Aljazeera, 'US adds Saudi Arabia, Cuba to blacklist on human trafficking' (*Aljazeera*, 20 June 2019) < <https://www.aljazeera.com/news/2019/6/20/us-adds-saudi-arabia-cuba-to-blacklist-on-human-trafficking#:~:text=The%20United%20States%20on%20Thursday,designation%20that%20could%20bring%20sanctions> > accessed 14 February 2022.

³⁷ Abdelfattah Khidr, *Crime General Provisions in Contemporary Trends and Islamic Fiqh* (Riyadh Institute of Management 1985) 243.

³⁸ Mahmoud Ababneh, 'The Adequacy of the Provisions of Saudi Law in Protecting Against Trafficking Crimes in Persons' (2023) 63 *Institute of Administration* 513; see also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25; Article 5 (1) states: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol when committed intentionally"; For more details on the meaning of General Criminal intent, please look at Muhammad Hosni, *Explanation of the Penal Code: General Section* (6th edn, Dar Al-Nahda Al-Arabiya Cairo 1989) 587-637; See also Mohamed El-Erian, *Human Trafficking and Control Mechanisms* (Alexandria New University House 2011) 81.

³⁹ Ministry of Justice, *Judicial Judgments Collection* (Vol 11, Saudi Research Centre 2014) 151; In this context, the court confirmed in its decision No. 35269650 and dated 8 Jumada Al-Thani for the year 1435 AH in Case No. 3566689, that the offense of human trafficking does not exist unless it is proven that there is intent against the offender.

forced labour constitutes 38%.⁴⁰ The forms of human trafficking which are prevalent in the KSA include forced labour and to a certain extent, forced prostitution.⁴¹

4.3 Prevention and Suppression of Trafficking in Persons in the KSA's Law

In order for the KSA's efforts to be effective in combating trafficking in persons, this chapter argues that the KSA should not only criminalise the act of trafficking in persons, but it must also criminalise all forms of exploitation regardless of how a person has fallen victim to exploitation. This is consistent with international conventions that prohibit forced labour and service, or slavery and slavery-like practices. By applying international conventions, it is possible to overcome any complexities related to determining whether a person is an immigrant or a trafficker, whether the victim consented or not to being exploited, or other matters that may complicate proving that the accused committed the crime of human trafficking in persons.⁴²

Even if Article 3 of the Protocol did not prohibit forced and compulsory servitude, slavery, and practices similar to slavery as a stand-alone offence, the Model Law against Trafficking in Persons of the UNODC provides that such practices should be prohibited.⁴³ In addition to the prohibition of trafficking in persons and other forms of exploitation, Article 10 of the Arab Charter on Human Rights states:⁴⁴

1. Slavery and trafficking in persons in all their forms shall be prohibited and punished, and slavery and exclusion shall not be permitted under any circumstances.

⁴⁰ UNODC, *Global Report on Trafficking in Person 2020* (United Nation Publication 2021) 11.

⁴¹ Zimmerman (n 12); see also US Department of state, 'Trafficking in Persons Report' (June 2011) < <https://2009-2017.state.gov/j/tip/rls/tiprpt/2011/164233.htm> > accessed 18 May 2022.

⁴² UNESCO, 'Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council' (1-26 July 2022) UN Doc E/2002/68/Add.1 Principle 12 & Guideline 4.1; see also European Commission, op.cit., 53.

⁴³ UNODC, *Model Law against Trafficking in Person* (New York United Nations Publications 2009) 43-44.

⁴⁴ This obligation for the Kingdom of Saudi Arabia at least can be deduced from the texts of the treaties prohibiting forced and compulsory servitude, slavery and practices similar to slavery, to which the Kingdom is a party.

2. Forced labour and human trafficking for prostitution, sexual exploitation, exploitation through the prostitution of others or in any other way, and exploitation of children in armed conflicts are all prohibited.⁴⁵

However, the terms within the KSA's Anti-trafficking in Persons Law that refer to exploitation are not clearly defined, making its implementation more challenging. The terms used to refer to exploitation in the KSA's Anti-trafficking in Persons Law are sexual assault, forced labour or services, mendicancy, slavery or practises similar to slavery, servitude, or the removal of organs or for use in medical research. Therefore, the person entrusted with implementing the law should refer to international agreements to understand the meaning of these terms, which may be difficult or impossible.⁴⁶ These challenges are due to the fact that the people in charge of law enforcement lack the knowledge or expertise required by those who specialise in international law. As a result, it becomes difficult to establish proof that the accused committed the crime of trafficking in persons due to the complexities in understanding the terminology of the crime.

In addition to the above, the Protocol imposes on the member state a set of obligations with the aim of preventing and suppressing crimes of trafficking in persons. The state must seek, through research, information dissemination, and advertising campaigns, to prevent and suppress the crimes of trafficking in persons, and to take legislative, social and educational measures that

⁴⁵ Mohammed Mattar, 'Human Rights Legislation in the Arab World; The Case of Human Trafficking' (2011) 33 Michigan Journal of International Law 101. It should be noted here that the aspects of exploitation stipulated in the charter in Article 10(2) which include prostitution, sexual exploitation, the exploitation of the prostitution of others, or the exploitation of children in armed conflicts are among the aspects of exploitation that the charter emphasized but the prohibition was not limited to them as Article 10(1) prohibits trafficking in persons in all its forms.

⁴⁶ Zahraa Salman, *Human Trafficking According to the Provisions of the Protocol to Prevent Trafficking in Persons and Jordan's Obligations to It: A comparative study* (Dār Wā'il lil-Nashr wa-al-Tawzī' 2012) 17-83 and 86-68; see also UNODC, *The international Framework for Action to Implement the Trafficking in Person Protocol* (New York United Nation Publication 2006) 20.

reduce the demands that lead to cases of trafficking in persons.⁴⁷ The Model Law on Combating Trafficking in Persons issued by the UNODC included an optional article criminalising the users of services provided by victims of trafficking in persons, even if the beneficiaries of the services were not participating in the crime – as long as they know that those who provided the service were victims of trafficking crimes.⁴⁸ As an example of other international practices, the Council of Europe Convention on Action against Trafficking in Persons also stipulates that states should consider criminalising those who accept services derived from victims of trafficking.⁴⁹ Unlike the KSA's Anti-trafficking Law, the Council of Europe Convention correlates with Islamic Sharī'a on the necessity of criminalising connivance and benefiting from the services provided by victims of trafficking in persons. The KSA's law should therefore take guidance and inspiration from the Qur'ānic quote which states, 'Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression'.⁵⁰ Consequently, this indicates Islamic Sharī'a is not a stumbling block to the implementation of this provision on the national scale. This thesis suggests inserting a provision into the KSA's Anti-trafficking Law to criminalise benefits derived from a victim's services in order to protect their dignity as mentioned in the Model Law against Trafficking in Persons.⁵¹ The evidence confirms that

⁴⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25 art 9(2-5); see also United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) art 31(5).

⁴⁸ UNODC, *Model Law on Combating Trafficking in Persons* (New York United Nation Publication 2009) 42; Article 11 of the Model Law stipulates that "Anyone who benefits from a person's use of services or forced labour, or who gains in any form from using a person for services or forced labour, knowing in advance that those works or services lead to a mortgage of one or more Of the cases set out in the definition of human trafficking, he is guilty of a criminal act, and upon conviction, he is liable to imprisonment for a term, or to a fine of up to, or to both of these penalties.

⁴⁹ Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 01 February 2008) CETS 197 art 19.

⁵⁰ Qur'an, 5:2.

⁵¹ UNODC, 'Model Legislative Provision against Trafficking in Persons' (United Nation 2020) <https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf> accessed 12 April 2022.

criminalising the use of services of victims will deter perpetrators from continuing to commit this crime.⁵²

Section 4 of Chapter Two provides that Article 21 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families prohibits confiscating, destroying or attempting to destroy identification documents. Although the KSA is not a party to this instrument, it promulgated a bylaw in 2018, which was implemented by the Public Prosecutor in the KSA. It punishes employers (the sponsors) who withhold a worker's passport and imposes a penalty of 15 years in prison, and a fine of one million riyals. A total of 107 Human Trafficking departments have also been established in the Public Prosecution Office at all levels. The goal of these departments is to enforce the bylaws, investigate human trafficking cases, and refer perpetrators to relevant courts. However, despite this law, and the establishment of more than 100 human trafficking departments, up until July 2022, there were no cases in which the employer was convicted of retaining the worker's passport.⁵³ This failure to prosecute contrasts with the large number of complaints received by the KSA's Human Rights Commission and other non-governmental organisations in this regard, thus providing an example of the KSA's failure in fulfilling the 2018 bylaw obligations.⁵⁴

⁵² Julia O Connell Davidson, 'Absolving the State: The Trafficking-Slavery Metaphor' (2012) 14 Global Dialogue 31 <https://www.proquest.com/docview/1035287302> accessed on 05 September 2023; ICAT, 'Preventing Trafficking in Persons by Addressing Demand' (2014) ICAT Paper Series Issue 2 < https://www.unodc.org/documents/human-trafficking/2014/ICAT_Demand_paper_FINAL.pdf> accessed 18 May 2022.

⁵³ An interview with the Public Prosecution regarding the number and types of human trafficking cases in 30 July 2022 (n 23).

⁵⁴ See the Human Rights Commission, Report on the Status of Human Rights in the Kingdom of Saudi Arabia 1433 AH / 2012 AD (Human Rights Commission: Riyadh, 1433 AH) 54; According to the Saudi Human Rights Commission one of the most serious complaints it receives is related to the issue of expatriate workers, whether from the workers themselves, their countries, or international institutions. Among the most serious observations received by the authority related to the subject of this research and considered as a violation of human dignity, includes the following; the continuation of employers withholding the passports of migrant workers, the delay of some employers in paying wages, sometimes the worker's imprisonment inside the workplace for a long time, the migrant worker being prevented from changing an employer or job without the latter's approval, the migrant

The KSA's Anti-trafficking in Persons Law includes a set of measures aimed at preventing and combating trafficking in persons. The law criminalises trafficking in persons and, under Article 3, imposes severe penalties on those who commit this crime, such as imprisonment for a period of up to 15 years or a fine of up to one million riyals, or both.⁵⁵ Given that the offence of human trafficking is a crime punishable by imprisonment for more than three years, it is considered to be one of the major crimes that require arrest under the decision of the Attorney General, No.1, dated Muharram 1, 1442 AH (23-8-2020), based on Article 112 of the Code of Criminal Procedure.⁵⁶ This includes the following: 'Provided that the Public Prosecutor determines, after agreement with the Ministry of Interior and the Presidency of State Security, what is considered one of the major crimes that require an arrest, and this is published in the Official Gazette'.⁵⁷ The person accused of committing the crime of trafficking in persons is arrested and detained until the criminal case is resolved in court or there is a case of mandatory release.⁵⁸

It should be noted that Article 3 of the KSA's Anti-trafficking in Persons Law did not set a minimum period of imprisonment or a minimum fine. However, both should be included so that the prison sentence is not less than two years, and the fine is not less than 50,000 riyals, and the maximum limit is as currently stipulated in Article 3 but with the inclusion of the phrase 'or a fine equal to the value of the benefit that accrued to the perpetrators, or whichever is greater'.⁵⁹ This inclusion is crucial because perpetrators may benefit from exploiting victims; however, the penalty may not be sufficient or equal to that benefit received. For example, the

worker being prevented from leaving the Kingdom without the employer's consent, and workers suffering from the length of labour court proceedings and sessions, which hinders them from working or leaving the Kingdom. This sometimes persuades them to give up their complaints or accept an unfair settlement against them to end their proceedings.

⁵⁵ Saudi Anti-trafficking in Persons Law (Royal Decree No M/40) 2009 arts 3, 8, and 10.

⁵⁶ Saudi Press Agency, 'The Public Prosecutor's Decision Regarding Major Crimes Requiring Arrest' (*SPA*, 20 August 2020) < <https://sp.spa.gov.sa/viewfullstory.php?newsid=2124119> > accessed on 19 June 2023.

⁵⁷ Saudi Law of Criminal Procedures (Royal Decree No M/2) 2013.

⁵⁸ Abdalwahhab Hamid, *Mediator in Kuwaiti Criminal Procedures* (Kuwait University Press 1997) 4.

⁵⁹ Legislative Guides to the Organised Crime Convention and its Protocols, Part 1, para 262.

perpetrators may benefit from sexual abuse victims and receive 1,000,000 US dollars, but the penalty may be only 200,000 US dollars.⁶⁰

Moreover, Article 3 offers the choice between a fine or imprisonment. However, it is argued that this provision should be amended to state the following: ‘Any person who commits an act of trafficking in persons shall be punished by imprisonment for a period of not less than two years and not to exceed 15 years; as well as being fined no less than 50,000 riyals and no more than one million riyals, or an amount equal to the value of the benefit accrued by the offender, whichever is greater’.

According to Article 4 of the KSA’s Anti-trafficking in Persons Law, the penalty for perpetrators of human trafficking must be increased if the victim is a woman, a child, or a person with a disability, if the offence was perpetrated by an organised crime syndicate, if the perpetrator used or threatened to use a weapon, if the perpetrator was the victim's spouse or one of their relatives, if the offence was perpetrated by two or more people or if the offence was transnational.⁶¹ However, Article 4 regarding aggravating circumstances does not expressly state the punishment to be imposed and grants the judiciary broad authority to evaluate rulings under Islamic law. This means that judges have broad discretion in determining the appropriate type and severity of punishment for the situation at hand. Such discretion may lead to inconsistencies in sentencing, and therefore Article 4 should be amended to stipulate the degree of punishment due in such cases. The punishment must match the heinousness of the crime. As

⁶⁰ Makhoulf (n 20).

⁶¹ Saudi Anti-Trafficking in Persons Law (Royal Decree No M/40) 2009 art 4; Saudi Labour Law (Royal Decree No M/51) 2005.

discussed earlier, Islamic countries have the discretion to impose Ta'zīr penalties under Islamic law.⁶² Ta'zīr penalties for threatening a woman into forced labour are examples of this.

In order to deter individuals from intentionally withholding information regarding an incident of human trafficking, Article 7 of the Anti-trafficking in Persons Law stipulates that there should be a penalty imposed on those who do not report this crime, which consists of imprisonment for a period not exceeding two years or a fine of not more than 100,000 riyals, or both. Additionally, the penalty will be imposed on anyone who knows of the commission of a crime of trafficking in persons or who attempts to commit this crime, and who does not immediately notify the competent authorities. However, the above article permits the court to exempt some relatives, namely parents, offspring, spouses, brothers and sisters, from punishment if they fail to report crimes of trafficking in persons. Accordingly, it is argued that it would be desirable to reduce the penalty in the case of relatives, as opposed to granting an exemption, in order to prevent relatives from using this provision as a means of covering up crimes. Moreover, Article 9 punishes with imprisonment for five years and/or a fine not exceeding 200,000 riyals, on those who possess items obtained from trafficking in persons or who hide one or more of those who participated in the crime with the intention of helping them escape from justice. In this regard, the competent court may exempt the defendant from the penalty of harbouring accomplices if the defendant is the spouse of the person who has been hidden or one of their ancestors or descendants. It can be argued that Article 9 has a better structure than Article 7 as it only exempts the spouse, parents and offspring, while Article 7 also exempts siblings. In contrast, the Palermo Protocol does not exempt relatives from penalties. It is envisaged that if the KSA adopted the approach of punishing without any

⁶² Ta'zīr: It is a legitimate and not specified punishment for every sin that does not have Hudud punishment, retribution “ Qiṣās,”⁶² nor any form of expiation (penance). Muwaffaq Al-Dīn Ibn Qudāmāh, *Al-Mughnī Sharh Mukhtasar Al-Kharqī* (Vol 9, Cairo Library 1968) 179.

exceptions it would further help protect human rights and combat trafficking in persons in the country. Not exempting relatives from punishment would not contradict Islamic Sharī'a, as Islam has urged people to confront crime and not collude with the perpetrator, without exception.

To ensure that the offender does not enjoy the material gains resulting from the crime of trafficking in persons, Article 11 of the Anti-trafficking in Persons Law authorises the competent court to order the confiscation of private funds, luggage, tools and other things that may have been used or prepared for use in committing the crime of trafficking in persons or obtained due to a crime. This means that the KSA's regulator has made confiscation a permissible penalty for consideration by a judge, who can decide whether or not to impose it. However, it is recommended that the KSA's regulator includes a provision in the KSA's law to combat human trafficking that obligates the confiscation of assets obtained through the crime of human trafficking. This recommendation is in accordance with the provisions of Articles 12 and 14 of the UN Convention against Transnational Organized Crime.⁶³ Article 13 of the Anti-trafficking in Persons Law states:

Without prejudice to the liability of corporate persons if a crime of trafficking in persons is knowingly committed through, to the benefit of, or on behalf of a corporate person, said person shall be punished by a fine not exceeding 10,000,000 riyals, and the competent court may order temporary or permanent dissolution or closure of the same or any branch thereof.

The KSA's regulator has used similar wording in relation to other crimes to discourage corporate persons from engaging in unlawful behaviour.⁶⁴ However, the use of the word 'knowingly' in the article raises legal concerns.⁶⁵ It is worth noting that many of the countries

⁶³ United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) arts 12 and 14.

⁶⁴ Article (23) of the Criminal Code for Forgery Crimes, issued by Royal Decree No. (M / 11) dated 21 December 2013, is one of those laws that required corporate person knowledge.

⁶⁵ Muhammad Al-Shennawy, *Strategy to combat human trafficking crimes* (1st edn, Publications of the Strong Centre for Legal Publications 2014).

that have punished corporate persons have used the term ‘in its name’ or ‘on its behalf’.⁶⁶ A corporate person cannot be physically capable of, nor can it be conscious of, committing such an offence. Consequently, the question arises of how a corporate person can know and understand like an individual person. It could be argued that the wording of the aforementioned article places an additional burden on the Public Prosecution in proving intent to commit a crime and knowledge of it on behalf of a legal person. Since the Public Prosecution in reality cannot prove the corporate person is aware of the charges, the accused can be acquitted. The lack of knowledge of corporate persons is particularly apparent when the defence lawyer draws attention to it. This has detrimental effects on victims' rights in court.

For the purpose of evaluating and coordinating the efforts of the KSA in combating human trafficking and adopting best practices in this context,⁶⁷ the Saudi Human Rights Commission, in partnership with the Saudi Permanent Committee to Combat Trafficking in Persons and the relevant government agencies, and in cooperation with the Office of the High Commissioner for Human Rights, prepared the national plan to combat trafficking in persons for the years 2020-2023.⁶⁸ The national plan sought to ‘enhance joint action to ensure optimal implementation of the legal system to combat trafficking in persons, and to take measures to prosecute perpetrators of trafficking in persons and to provide the necessary protection for victims and those affected by these crimes’. The plan focused on four aspects: the preventive

⁶⁶ Ababneh (n 38).

⁶⁷ The Kingdom of Saudi Arabia established a committee in accordance with Paragraph (Second) of Cabinet Resolution No 244 dated 20 Rajab 1430 AH regarding the approval of the anti-trafficking system in relation to the committee to combat human trafficking. This committee is established by the Human Rights Commission, which consists of representatives from the Ministries of Interior, the Public Prosecution, Foreign Affairs and Justice, Social Affairs, Labour, and Advertising. The Human Rights Committee was charged with preventing and combating human trafficking, preparing media campaigns for research and information, and social and economic initiatives in order to prevent and combat human trafficking, and coordinate with state agencies regarding information and statistics related to human trafficking crimes.

⁶⁸ The combined report of the Kingdom of Saudi Arabia for its (tenth and eleventh) reports submitted in accordance with paragraph (1) of Article (9) of the International Convention on the Elimination of All Forms of Racial Discrimination (25 Jan 2023) UN Doc CERD/C/SAU/10-11; see also NCCT, ‘Regulatory framework for combating trafficking in persons’ (NCCT) <<https://www.ncct.gov.sa/ar/alatar-alnzamy-lmkafht-jraym-alatjar-balashkhas>> accessed 14 February 2022.

aspect and precautionary measures; protection; humanitarian assistance; and judicial prosecution, including national, regional and international cooperation.⁶⁹ Despite the efforts of the Human Rights Commission in cooperation with the Office of the High Commissioner for Human Rights in this regard, UN committees and other independent bodies and NGOs have raised concerns that the KSA government may fail to implement the comprehensive national strategy to combat human trafficking, and that the situation would continue to deteriorate.⁷⁰

Although the KSA abolished the sponsorship (Kafala system) by Cabinet Resolution No (166) and dated Rajab 12, 1421, it was abolished in name only. The National Society for Human Rights in the KSA considers this system to represent a violation of human dignity as it distorts the balance of the relationship between the private employee and employer. Under the Kafala system the employer holds broad power over the worker as a result making the employee vulnerable to exploitation (see Chapter Five).⁷¹ The rules of sponsorship also conflict with Article 24 of the Convention for the Protection of the Rights of All Migrant Workers, which underpins the legality of the migrant worker's residence in the country.⁷² Under the sponsorship system, the domestic worker cannot independently travel or be employed by a new employer without the consent of their employer (or what was called the sponsor). The system imposes restrictions on the worker subject to the control of the employer, which can mean working for long hours, working without pay, and being unable to return to their country or to transfer to

⁶⁹ The National Plan to Combat Crimes of Trafficking in Persons for the Years (2020-2023) can be found on the Human Rights Commission website at the following link: <https://hrc.gov.sa>. Due to the need to unify and organize international efforts in combating the crime of trafficking in persons, the Commission signed Human rights in the Kingdom of Saudi Arabia, a memorandum of understanding for technical cooperation with the Office of Monitoring and Combating Trafficking in Persons in the US State Department on 19 November 2018, approved by Decree No. Issue (4777) dated 28 Sha'ban 1440 AH.

⁷⁰ Ashraful Azad, 'Recruitment of migrant Workers in Bangladesh: elements of human trafficking for labour exploitation' (2018) 5 Journal of Human Trafficking 130; ECPAT report https://www.ecpat.org/wp-content/uploads/2016/04/Factsheet_Middle_East.pdf accessed 14 February 2022.

⁷¹ The National Society for Human Rights, *the third report on the human rights situation in the Kingdom of Saudi Arabia* (Riyadh 2012) 59-61.

⁷² Article (24) of the Convention for the Protection the Rights of All Migrant Workers states 'Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law'.

another employer. The system does not allow the worker to transfer from their job before the end of the contract period. Therefore, the worker often resorts to leaving their employment without permission, which is a violation of the residence law.⁷³ As a result, they are subject to prosecution in addition to being unable to enjoy the rights that the state provides to its residents.⁷⁴

The conditions for some sponsored migrants further worsen when they are not provided with the employment opportunity as agreed but instead are told to search for employment elsewhere. In this situation, rather than the migrant receiving a monthly wage from the sponsor, the migrant must seek employment and pay an annual or monthly fee to his/her sponsor for the privilege of being allowed to enter the KSA where opportunities are available.⁷⁵ This practice is in violation of the provisions of the KSA's Labour Law, which places the responsibility on the employer to finance all of the associated fees for the expatriate worker to legally enter the country. This includes the fees for residence and work permits, their renewal and the consequences of delaying renewal in terms of fines, fees for changing occupation, exit and return, and a ticket to return the worker to their home country on completion of the employment contract.⁷⁶ Subjecting the worker to the will of the employer is a flagrant violation of the worker's dignity, as this concept involves not only respect for a person's free will, but also an obligation not to treat the worker as an instrument of others' free will. Therefore, a text should be included in the

⁷³ H Harroff-Tavel and A Nasr, *Tricked and Trapped: Human Trafficking in the Middle East* (Geneva ILO 2013) 59-63.

⁷⁴ Trafficking in labour is contrary to the right to work, just as trafficking in prostitution is contrary to personal autonomy and human dignity. It is clear that humans are not objects to be exploited for the pleasure of another or to be used as a means to an end.

⁷⁵ The National Society for Human Rights, *the third report on the human rights situation in the Kingdom of Saudi Arabia* (Riyadh 2012) 60.

⁷⁶ Saudi Labour Law (Royal Decree No M/51) 2005 art 40(1-3).

KSA's laws stating that obtaining sums of money from expatriate workers in exchange for sponsorship and the retaining of workers' passports is a form of trafficking in persons.⁷⁷

With regard to the criminalisation of forced labour,⁷⁸ Article 28 of the Basic Law of Governance stipulates that 'the State shall enact regulations that protect the worker and the employer'. Article 61 of the Labour Law⁷⁹ prohibits the employment of the worker as forced labour or withholding the worker's wage or part of it without a legal basis. In addition, it obligates the employer to treat their workers with appropriate respect and to refrain from using words or performing actions that affect their dignity or religion. The penalty for breach of Article 61 is a fine ranging from 2,000 to 5,000 riyals.⁸⁰ In addition, the KSA introduced the Wage Protection System (WPS) to create a database that contains up-to-date information on the payment of wages to workers in the private sector, as well as to assess the extent to which businesses are committed to timely and complete payment of salaries.⁸¹

Article 61 of the KSA's Labour Law prohibits forced labour, however, rather than creating a separate offence, it has been implemented along with the prohibition on human trafficking. Article 61 appears to be intended only to prevent sponsors from using workers in a specific job without providing them with the intended compensation. The focus is on regulating the

⁷⁷ The article's author is anonymous, 'The charge of human trafficking pursues the brokers of sponsorships' (Makkah Newspaper, 10 January 2016) <
<https://makkahnewspaper.com/article/128597/%D8%AA%D9%87%D9%85%D8%A9-%D8%A7%D9%84%D8%A7%D8%AA%D8%AC%D8%A7%D8%B1-%D8%A8%D8%A7%D9%84%D8%A8%D8%B4%D8%B1-%D8%AA%D9%84%D8%A7%D8%AD%D9%82-%D8%B3%D9%85%D8%A7%D8%B3%D8%B1%D8%A9-%D9%86%D9%82%D9%84-%D8%A7%D9%84%D9%83%D9%81%D8%A7%D9%84%D8%A7%D8%A>> accessed on 01 August 2023. In this article, international law experts consider that the quantity of money obtained from the employees in exchange for sponsorship may subject them to prosecution for human trafficking.

⁷⁸ Saudi Basic Law of Governance (Royal Order No A/90) 1992 art 28.

⁷⁹ Saudi Labour Law (Royal Decree No M/51) 2005 art 61.

⁸⁰ *ibid.*

⁸¹ ILO, 'Wage Protection System in the Kingdom of Saudi Arabia' (ILO, 28 September 2021) <
https://www.ilo.org/beirut/events/WCMS_814419/lang--en/index.htm> accessed 01 April 2023.

relationship between the employer and the employee, as well as mandating wage payment, rather than labour exploitation. Furthermore, employers can only be punished for violating Article 61 of the Labour Law with a small fine: there are no severe penalties such as imprisonment.⁸² The KSA should however comply with the Forced Labour Convention No. 29, which urges countries that are members to enact the necessary laws to prevent forced labour by applying the appropriate punishment. This is also what was recommended by the ILO Committee.⁸³ The lesson to be drawn from this is that rights are only valuable if a breach results in a penalty which is proportionate to the violation and its impact on the victim.

One of the most controversial topics in the KSA, as in many countries around the world, is the ill-treatment of domestic workers.⁸⁴ Until recently, the KSA had no system of regulation in place to oversee the relationship between domestic workers and their employers, due to labour law excluding them from its provisions.⁸⁵ Therefore, the issuing of legislation for domestic service workers and suchlike⁸⁶ on July 16, 2013, represented a new development in the protection of domestic workers from falling victim to exploitation by the employer.⁸⁷ The Regulation prohibits the employer from assigning the domestic service worker to any work

⁸² UNHRC, 'Compilation on Saudi Arabia' 31st session (30 August 2018) UN Doc A/HRC/WG.6/31/SAU/2 para 39.

⁸³ ILO, *A global alliance against forced labour* (ILO Publication 2005) 64.

⁸⁴ ILO, *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO Publication 2013) 32.

⁸⁵ Saudi Labour Law (Royal Decree No M/51) 2005 art 7; Article (7) of the Labour Law stipulates that: "Domestic servants and the like are excluded from the application of the provisions of this system. (2) The Ministry, in coordination with the competent authorities, establishes a special regulation for domestic servants and the like governing their relationship with their employers, and specifies the rights and duties of each party, and submit them to the Council of Ministers.

⁸⁶ Saudi Regulation of Domestic Workers and & the like 2013. It was issued by Cabinet Resolution No. 310 and dated 7 Ramadan 1434 AH. It was published in Umm Al-Qur'an newspaper, issue (4477) on Shawwal 23, 1434 AH.

⁸⁷ The regulation defines the domestic service worker as "every person of a quality who performs a domestic service directly or indirectly on the employer, or any member of his family, and during the performance of the service is under the supervision and direction of the employer or a person who performs in a residence, such as the domestic worker, the domestic worker, or the private driver, the gardener, the housekeeper, and the like". As for the employer, the regulation defines him as "every person of a natural nature who has recruited a domestic service worker by himself, or through a licensed recruitment office, or contracted with him directly or indirectly to perform a domestic service".

which was not agreed upon in the contract or assigning a task that threatens the health or bodily integrity of the employee, or which threatens their human dignity.⁸⁸ Without prejudice to the penalties specified in other laws, the Regulation established penalties for an employer who violates its provisions, which are represented by a fine not exceeding 2,000 riyals, or a year's prohibition from recruiting, or both. If the violation is repeated, a fine of between 2,000 and 5,000 riyals will be imposed, or the employer may be prohibited from recruiting for a period of three years. It is also possible that both penalties could be imposed. However, if the violation is committed a third time, a Labour committee provided for in the legislation has the authority to permanently bar the violator from future recruitment.⁸⁹ Human Rights Watch has stated that this penalty is wholly inadequate because it provides for a simple disqualification from the right to recruit new workers.⁹⁰ The ILO Committee concurred, adding that in practice, the penalty does not act as a sufficient deterrent.⁹¹ There is evidence that recruitment is occasionally temporarily halted, only to be recommenced, or the worker is employed under a different guise.⁹²

Another deficiency in the Regulation of Domestic Workers is that it prohibits the worker from refusing to work or leaving the employer without a legitimate reason. This forces the worker to continue to do a job which they do not want to do; failing to do so would lead to a violation of the residency law, which is subject to punishment.⁹³ Article 15 of the Regulation stipulates that

⁸⁸ Saudi Regulation of Domestic Workers and & the like 2013 art 2.

⁸⁹ Saudi Regulation of Domestic Workers and & the like 2013 arts 17 and 19; according to Article (19) of the regulation, the stipulated fines devolve into a bank account to contribute to ensuring the accommodation and deportation of domestic workers, as well as the deportation of workers according to a mechanism approved by the Minister of Labour.

⁹⁰ Human Rights Watch, *As If I Am Not Human: Abuses against Asian Domestic Workers in Saudi Arabia* (HWR Publication 2008).

⁹¹ ILO, 'Observation (CEACR)- adopted 2009, published 99th ILC session (2010) (ILO)<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2309889> accessed 17 July 2023; see also Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and Emirates: Trafficking Victims?' (2012) 50 International Migration 180.

⁹² *ibid.*

⁹³ See also Saudi Arabia: Decision No. 310 of 1434 on Domestic Workers, GULF LABOUR MARKETS AND MIGRATION, <http://gulfmigration.eu/decision-no-310-of-1434-on-domestic-workers/> accessed 05 August 2021.

the domestic worker does not have the right to refuse to work without a valid reason, although it implicitly refers to the domestic worker's right to terminate the contract for a valid reason and obliges the employer to pay the fees for the removal of the domestic worker from their home. As referred to earlier, this is inconsistent with the Convention on the Protection of the Rights of All Migrant Workers. For example, Article 20 of this instrument prohibits deportation for reasons related to non-performance of the work contract.⁹⁴ Article 22 of the Convention also requires that deportation be justified and that the worker be permitted to appeal the deportation decision.

In addition, the Regulation does not specify the daily or weekly working hours. It only stipulates that the worker should enjoy rest for not fewer than nine hours per day. It does not guarantee the domestic worker the right to weekly leave and makes granting such leave subject to the approval of the employer. Nevertheless, the Labour Law specifies that the daily working hours should not exceed eight hours except in specific exceptional cases and that the worker should enjoy a weekly leave of no fewer than 48 consecutive hours with payment.⁹⁵

Beyond these specific concerns, there is evidence of a chronic lack of implementation of these provisions overall.⁹⁶ Despite the fact that the Ministry of Labour and Social Development claims that it conducts inspections and investigates alleged violations of the Labour Law, there are no publicly available statistics on enforcement efforts and little concrete evidence of

⁹⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 01 July 2003) A/RES/45/158 art 20.

⁹⁵ Saudi Labour Law (Royal Decree No M/51) 2005 arts 98 and 104.

⁹⁶ UNHRC, 'Report of the Special Rapporteur on extreme poverty and human rights on mission to Saudi Arabia' 35th sessions (28 April 2017) UN Doc A/HRC/35/26/Add.3 para 55.

findings.⁹⁷ National legislation has not yet provided sufficient sanctions to optimally protect workers. It can be argued that the KSA's regulations are inconsistent with the rights contained within the Convention on Domestic Workers.⁹⁸ The KSA's regulations are also inconsistent with the Convention on the Protection of the Rights of All Migrant Workers, especially Article 20 of the latter regarding the prevention of deportations for reasons related to non-implementation of work.⁹⁹ With reference to Articles 8 and 24 of this Convention, the rules of sponsorship provisions are also inconsistent with the worker's right to leave the country of work as well as the right of the migrant worker to be recognised as an individual before the law, as Chapter Five discusses.¹⁰⁰ The KSA's enactment of provisions consistent with these Conventions would lead to a more effective fight against human trafficking.

According to Zimmerman, the KSA's government has failed to show proof of increased endeavours to fight the crime of trafficking in persons. It has made no promise to take any further actions, owing in part to insufficient regulations.¹⁰¹ Therefore, the ILO Committee advocated that the necessary steps be taken to ensure that the relevant bodies study these issues and that effective laws are enacted, as well as ensuring that deterrent penalties are imposed on those who violate workers' rights.¹⁰² The enactment of such improvements in the law could be viewed as an important indicator of national capacity building, and efficiency in combating

⁹⁷ UN Committee on the Elimination of Discrimination against Women (CEDAW), 'Concluding observations on the combined third and fourth periodic reports of Saudi Arabia' (14 March 2018) UN Doc CEDAW/C/SAU/CO/3-4 para 29.

⁹⁸ International Labour Organization (ILO), 'Convention Concerning Decent Work for Domestic Workers, 16 June 2011, PRNo.15A' < <https://www.refworld.org/docid/4e0d784e2.html> > accessed 11 July 2023.

⁹⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 01 July 2003) A/RES/45/158 arts 8, 20 and 24.

¹⁰⁰ Article 8(1) of the Convention on the Protection of All Rights of Migrant Workers states that migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention; see also NCCT, Conformity of the Saudi Rules and Regulations with the Conventions on Basic Human Rights' < <http://nshr.org.sa/en/?publication=conformity-of-saudi-laws-and-regulations-with-the-basic-conventions-on-human-rights> > accessed on 19 June 2023.

¹⁰¹ Zimmerman (n 12).

¹⁰² *ibid.*

human trafficking in all of its forms, including forced labour and sexual exploitation. In the KSA, the enactment and application of laws are associated with Islamic traditions. As a result, a number of observers, including Dudley, have stated that Islamic countries, such as the KSA, have not succeeded in preventing, in detecting, nor in prosecuting those involved in human trafficking as a result of societal customs and traditions.¹⁰³ Despite the authority that an Islamic state benefits from Islamic law regarding punitive penalties for violators, the KSA has failed to enact legislation fit for this purpose which has contributed to an increase in exploitation and violations of workers' rights.

To summarise this section, the KSA's Anti-trafficking Law and other related regulations remain problematic and need to be drastically improved and developed in order to comply with international human rights law and Islamic Shari'a. The next section examines the protection and assistance of victims of human trafficking.

4.4 Protection and Assistance for Victims of Trafficking in Persons

Considering that the crime of human trafficking is a serious violation of human rights, the protection and assistance for victims in a manner that respects human rights must not be neglected. First, the legal system established for victim compensation are examined. Second, the protection of victims' rights not to be arrested or tried for any violations committed as a result of being a victim of the crime of trafficking in persons are considered. Finally, the measures taken to protect and assist victims of trafficking in persons under the KSA's legal system are reviewed.

4.4.1 The Right to Compensation for Human Trafficking Victims

¹⁰³Schuyler Dudley, 'Human Trafficking in the Middle East and North Africa Region' [2013] Topical Research Digest: Human Rights and Human Trafficking 74.

Among the rights stipulated in the Palermo Protocol is the need for each state to ensure that ‘its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered’ as Chapter Two (subsection 2.2) demonstrates.¹⁰⁴ The Protocol emphasised the importance of compensating the victims without naming the party responsible for compensation.¹⁰⁵ A number of studies have recommended the need to provide guarantees of compensation for victims,¹⁰⁶ and the need to establish specialised bodies to assist victims. The state’s guarantee to compensate victims is an important assurance to victims. Victims in general have the right under the KSA’s legal system to request compensation for damage suffered by claiming this personal right before the court and by initiating a criminal case in accordance with Article 147 of the KSA’s Criminal Procedure Law.¹⁰⁷ However, this provision relates to physical injury, rather than psychological abuse, and does not normally apply to human trafficking victims.¹⁰⁸

According to Shelton, compensation is an important remedy to ensure that wrongful acts are not committed in violation of victims’ basic human rights.¹⁰⁹ Islamic Sharī‘a, which is the basis of the KSA’s legal regime according to Articles 1, 7, and 48 of the KSA’s Basic Law of Governance, has the utmost precedence in regulating and applying the rules of the state’s obligation to compensate the victims of crimes in the event that the perpetrator is unknown or

¹⁰⁴Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25 art 6(6).

¹⁰⁵ Mustafa Taher, *An Overview of the Federal Law to Combat Human Trafficking in Light of Contemporary International Trends* (Publications of the Centre for Security Research and Studies Abu Dhabi 2008); also see Duha Talabani, ‘An Analytical Study of the Law to Prevent Human Trafficking in Jordanian Law and Comparative Laws’ (2016) 43 Studies Journal, Sharī‘a Sciences and Law 1283.

¹⁰⁶ Dalia Abdelaziz, *The Role of the Victim in the Criminal Phenomenon* (New University House Alexandria, 2013).

¹⁰⁷ Saudi Law of Criminal Procedures (Royal Decree No M/39) 2001 art 148; Article 148 stipulates: (Those who suffered harm from the crime - and his heirs after him - may claim his/her private right before the court before which the general criminal case is being heard, at any stage of the case, even if his request was not accepted during the investigation).

¹⁰⁸ Abdul Aziz Al-Salama, ‘Compensation for Moral Damage’ (2010) 48 Journal of Justice 192.

¹⁰⁹Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press 2006) 215.

is unable to pay the specified compensation, or if the state is unable to bring the accused person to trial. Accordingly, in this situation the Muslim treasury becomes the guarantor to meet the victim's needs in accordance with the analogy of dealing with blood money. This is pursuant to the Islamic principle which was established by Imām Ali Ibn Abī-Tālib (RA) which is 'No blood is spared in Islam'¹¹⁰ meaning that if retribution is not performed then blood money is given from the Muslim treasury.¹¹¹ This is in accordance with what was narrated when the Messenger (PBUH) said 'I am the heir of the one who has no heir, and I will pay blood money on his/her behalf and inherit from him'.¹¹² This means that the compensation will be paid from the Muslim treasury if the perpetrator is unknown, or the perpetrator or his/her family are unable to pay.¹¹³ Accordingly, Islamic Sharī'a conforms to international provisions such as Article 6 of the Palermo Protocol regarding compensating victims of crimes in the event the offender is unknown or is unable to pay compensation.

Unfortunately, no such provision exists in the KSA's Trafficking in Persons Law. It is suggested that the KSA's Anti-trafficking Law should include a provision for victims of human trafficking to be compensated by either the state or by the perpetrators. Furthermore, the state should provide victims with the ability to return to safety following the harm that they have endured as a result of the crime of human trafficking. A provision stating a victim's right to compensation and establishing a government support fund must therefore be included in the KSA's Anti-trafficking Law.

¹¹⁰ Ali bin Hazm, *Al-Mahalli in Antiquities* (Dār Al-Fikr Beirūt without date) 11.

¹¹¹ Wahba Al-Zuhaili, *Islamic jurisprudence and its evidence* (Vol 8, Dār Al-Fikr, Syria, without date) 4.

¹¹² Suleiman Al-Sijistanī, *The Sunan Book: Sunan Abi Dawud* (Vol 3, 2nd edn, Al-Sa'ada Press 1950) 170.

¹¹³ Abdulrahman Al-Khalḥfī, 'The Extent of the State's Responsibility to Compensate Crime Victims: Basis and Scope a Study in Jurisprudence and Comparative Legislation' (2011) 2011 Sharī'a and Law Journal 309.

4.4.2 The Right of Victims not to be Arrested or Tried for any Violations Committed as a Result of being a Victim of the Crime of Trafficking in Persons

Although one of the most important rights for victims, the right of victims not to be arrested or tried for any violations committed as a result of being a victim of the crime of trafficking in persons, was not explicitly stated in the Palermo Protocol, it is stipulated in the Guiding Principles.¹¹⁴ These principles were recommended by the Office of the United Nations High Commissioner for Human Rights in the United Nations Global Action Plan to Combat Trafficking in Persons.¹¹⁵ These rights are of great importance in protecting victims of trafficking in persons, including the right of victims not to be arrested or prosecuted for violations related to the irregularity of their entry or residence or the illegal activities in which they participated as a result of being victims of the crime of trafficking in persons.¹¹⁶ Ensuring that this right is included in domestic legislation would contribute to encouraging victims of crimes of trafficking in persons to report the crimes they are exposed to, without fearing that they will become the subject of legal accountability. This right is stipulated in the Protocol against the Smuggling of Migrants by Land, Sea and Air, Article 5 of which states ‘Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol’.¹¹⁷

¹¹⁴ UNESC, ‘Report of the United Nation High Commissioner for Human Rights to the Economic and Social Council’ (1-26 July 2002) UN Doc E/2002/68/Add.1 Principle 7, in relation to protection and assistance states that ‘Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons’.

¹¹⁵ UNGA, ‘United Nations Global Plan of Action to Combat Trafficking in Persons’ (12 August 2010) 64th session UN Doc A/RES/64/293 para 26.

¹¹⁶ UNESC, ‘Report of the United Nation High Commissioner for Human Rights to the Economic and Social Council’ (1-26 July 2002) UN Doc E/2002/68/Add.1 Principle (7); See also UNHRC, ‘Report of the Special Rapporteur on Trafficking in Person, Especially Women and Children, Joy Ngozi Ezeilo’ 20th session (16 March 2012) UN Doc A/HRC/20/18/Add.3 para 68.

¹¹⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004); Anne Gallagher, ‘Recent Legal Development in the Field of Human Trafficking; A critical review of the 2005 European Convention and Related Instrument’ (2006) 8 European Journal of Migration and Law 163; Council of Europe Convention on Actions Against Trafficking in Humans (adopted 16 May 2005, entered into force 2008) CETS 197 art 26; Article 26 of the CEC stipulates that every country is supposed not to punish victims of trafficking in persons for the illegal acts that they have been coerced into. Some criticized the wording of the

The KSA's laws do not stipulate the right of victims not to be arrested or tried for violations committed as a result of being victims of the crime of trafficking in persons. However, there is no valid reason for this not to be expressly stipulated in the KSA's laws. This is essential as Chapter Three elaborates especially in light of the Qur'ānic prohibition in verse 33 of Sūrat an-Nūr, which states not to compel others to engage in prostitution in order to obtain the materials of this life while remaining chaste. Accordingly, if anybody forces them, Allah is Forgiving and Merciful. As a result of this verse, anyone forced into prostitution will be exempt from being arrested or tried. The Prophet (PBUH) also emphasised this by saying:

Verily Allah has pardoned [or been lenient with] for me my Ummah [community of Muslim believers]: their mistakes, their forgetfulness, and that which they have been forced to do under duress.¹¹⁸

By comparing the KSA's Anti-trafficking in Persons Law with international human rights law, it becomes evident that the protective measures for victims in the KSA are insufficient. A victim-centred approach is missing, and the KSA has yet to fully commit to the international human rights framework. Various factors support this assertion, including the criminalisation or the removal of domestic workers who are victims of trafficking.¹¹⁹ There is no formal procedure in place to identify victims of trafficking; workers who have escaped exploitation yet face the risk of being treated as illegal migrants rather than as exploited victims; or domestic workers who are trafficked may face criminal charges. This in turn tends to intensify the perpetrators' control over their victims, by threatening that they will be treated like criminals rather than as victims by the authorities if they resort to the law.¹²⁰ As a result, the KSA's Anti-

article on the grounds that it does not obligate the state not to punish, but the agreement referred at least to this procedure through the protocol, which is not mentioned.

¹¹⁸ Nasser Al-Shahrani, *The National Legislative Framework for Combating Human Trafficking in the Kingdom of Saudi Arabia* (Naif Arab University Press for Security Sciences Riyadh 2010).10 ; see also Sunan Ibn Majah: The Book of Divorce (2043).

¹¹⁹ Daan Everts, 'Human Trafficking; The Ruthless Trade in Human Misery' (2003) 10 Brown Journal of World Affairs 149.

¹²⁰ Abdulhamid Al-Harqan, 'Combating Trafficking in Persons and Protecting and Assisting Victims of Trafficking in the Kingdom of Saudi Arabia Under the UN Protocol' (2020) Kuwait University Scientific Publication Council

trafficking in Persons Law falls short of the standards enshrined in Islamic and international treaties.

It is necessary to adopt an approach based on dignity when dealing with trafficking in persons (see Chapter Two). This approach helps to ensure that victims are treated as human rights holders rather than just ‘pure witnesses during a trial’,¹²¹ which should work to increase the rate of successful prosecutions against trafficking. Counselling and supporting victims during their recovery may increase the chances of discovering what happened.¹²² According to McSherry and Kneebone, human trafficking must be considered a human rights issue as the behaviour of human traffickers presents a significant risk to human rights promotion and protection. The dignity and human rights approach has the advantage of treating trafficked people as victims of human rights violations rather than as criminals or violators of national immigration laws. This approach also aids the investigation of factors that might lead to trafficking, for instance, poverty, inequality, discrimination, and persecution.¹²³ Therefore, compelling governments to address human rights concerns is crucial in order to eliminate this crime.¹²⁴

As a result, to foster a victim-centred approach in the KSA, all victim-related measures must be guided by recognised human rights standards, including the principles of victim protection and respect established by international human rights law and Islamic Sharī‘a.¹²⁵ The

177; US Department of state, ‘Trafficking in Persons Report: Saudi Arabia’ (June 2013) < <https://2009-2017.state.gov/documents/organization/210741.pdf> > accessed 1 June 2022.

¹²¹ Bernadette McSherry and Susan Kneebone, ‘Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights’ (2008) 12 International Journal of Human Rights 67.

¹²² Nourah AlShareef, *Child Trafficking from the Perspective of Islamic Law* (LAP LAMBERT Academic Publishing 2008) 168.

¹²³ McSherry and Kneebone (n 121).

¹²⁴ Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (MartinusNijhoff 2006) 34.

¹²⁵ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 art 5; This Protocol is one of the instruments in this area that have been examined in this thesis.

obligations of the State under the law are applicable to each victim within the State's territory as well as to all other victims subject to its jurisdiction. Therefore, the enjoyment of rights must be accessible for all people, including trafficked domestic workers, regardless of nationality, religion, or immigration status.

4.4.3 Protection and Assistance for Victims of Trafficking in Persons under the KSA's Legal Regime

Article 15 of the KSA's Anti-trafficking in Persons Law stipulates that the rights of the victim during the investigation and court stages include the following:

1. Being informed of their statutory rights in a language they understand.
2. Being given the opportunity to state their status, including being a victim of trafficking in persons, as well as their legal, physical, psychological and social status.
3. Being referred to a competent doctor if it appears that they need medical or psychological care, or if they request it.
4. Being placed in one of the medical, psychological or social rehabilitation centres if it appears that their medical or psychological condition or age requires this.
5. Being placed in one of the specialised centres if they need shelter.
6. Being provided with security protection if necessary.
7. If the victim is a foreigner and there is a need for them to remain in the KSA, or to work while the investigation or trial procedures are in progress, then the Public Prosecution or the competent court may assess that.

It appears from the text of Article 15 that the KSA's Anti-trafficking Law recognises some rights of victims of trafficking in person crimes stipulated in the Protocol in a non-binding manner. This includes the right to work and reside. However, the KSA's Anti-trafficking Law in Article 15(7) stipulates that these rights are only for the duration of the investigation or trial procedures, and they do not grant the victim the right to remain or work after this period

contrary to Article 7(1) of the Palermo Protocol.¹²⁶ The Permanent Committee for Combating Trafficking in Persons in the Human Rights Commission which is referred to in section 4.3 of this chapter, is concerned also with following up on the status of human trafficking victims in order to prevent re-victimisation. The Committee liaises with the suitable parties to return the victim to their original domicile in the country to which they belong, according to their nationality, or to their place of residence in any other country should they so request. The Committee should recommend keeping the victims in the KSA, should they wish to remain, and legalising their status to enable them to work if necessary. Such a recommendation, if approved, would be subject to periodic review.¹²⁷ These rights should not be conditional upon the victim's testimony. With regard to the state's duty to protect personal privacy as well as the identity of the victim of the crime of human trafficking in accordance with the Criminal Procedures Law of 1435 AH, the law includes general texts related to criminal cases which are applicable to cases of crimes of trafficking in persons. Among these texts are the preserving of confidentiality of investigation procedures and the judge's authority to keep trial sessions secret if exceptional circumstances justify this.¹²⁸ However, the law in the KSA does not exempt victims of trafficking in persons from being punished for violations related to their irregular entry or residence or the illegal activities in which they participated as a result of being victims of the crime of trafficking in persons.¹²⁹

This is contrary to what is stipulated in international human rights law.¹³⁰ Failure to absolve victims of trafficking offences encourages perpetrators to threaten victims with reporting their

¹²⁶ Article 7 (1) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime reads as follows; 'In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases'.

¹²⁷ Saudi Cabinet Resolution No. 244 of 20 Rajab 1430 H para 2.

¹²⁸ Saudi Law of Criminal Procedures (Royal Decree No M/39) 2001 arts 68 and 145.

¹²⁹ Makhlouf (n 20).

¹³⁰ UNESC 'Report of the United Nation High Commissioner for Human Rights to the Economic and Social Council' (1-26 July 2002) UN Doc E/2002/68/Add.1; Principle 7, in relation to protection and assistance states that "Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or

status resulting in legal action.¹³¹ According to a Human Rights Watch report on the KSA, the KSA's authorities often treat foreign trafficking victims as criminals, who are then arrested, detained, prosecuted or deported. Victims are sometimes prosecuted.¹³² The absence of legislation exempting victims of human trafficking from charges resulting from the illegal activities in which they participated constitutes an obstacle to achieving cooperation with the competent authorities. As a result, it is necessary to re-evaluate the KSA's laws to explicitly address this issue and thus provide an approach that acknowledges these special circumstances to ensure that human trafficking victims are not imprisoned, detained, or otherwise punished for any criminal activities they were forced to engage in, such as illegal entry or forging travel documents.

To summarise this section, a discussion on the protection and assistance of victims of human trafficking in the KSA clarifies the need to improve and develop provisions in this regard. However, the main issue remains that there is a lack of clarity in understanding human trafficking. It must be expressly stated that victims of the crime of trafficking in persons should not be arrested or prosecuted for the illegal activities in which they have engaged. Compensation for victims should also be provided. Any decriminalisation and compensation of victims of trafficking in persons would be in accordance with the principles of international human rights law and Islam.

4.5 Conclusion

residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons".

¹³¹ ADHRB's Submission to the Committee on the Elimination of Racial Discrimination Concerning Abuses Perpetrated by Saudi Arabia against Migrant Laborers <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FNGO%2FSAU%2F30856&Lang=en> accessed 05 August 2022.

¹³² Human Rights Watch, *As If I Am Not Human: Abuses against Asian Domestic Workers in Saudi Arabia* (HWR Publication 2008).

The discussion presented in this chapter seeks to determine whether or not the government of the KSA makes sufficient efforts to prevent and suppress the crime of human trafficking in order to protect and assist victims. These efforts were assessed in accordance with the standards of international human rights law in general and in light of the provisions of the Palermo Protocol in particular. As demonstrated, the KSA has ratified this Protocol and many human rights conventions, therefore is legally obligated to implement their provisions. However, the KSA has failed to fulfil its stipulated commitments. Despite the efforts made by the Kingdom, the state has not fully complied with all its obligations to prevent and suppress crimes of trafficking in persons and to protect and assist victims in accordance with the provisions of relevant international conventions, and the protection of human dignity. There remain four significant implementation gaps as explained in the following.

First, there are two definitions of the crime of human trafficking in the KSA's Anti-trafficking Law, which may lead to unnecessary complexity. The KSA's law should have followed the definition of the crime of human trafficking as set out in the Palermo Protocol to remove any such confusion.

Second, the KSA's law does not define the forms of exploitation in accordance with what has been agreed upon under international law. The definition remains unclear and the forms of exploitation in question remain vague. Given that the concept of exploitation is complex, and its forms vary according to different legal environments, consequently accurate defining language compatible with the KSA's legal environment is required. Currently, the KSA's judicial authorities implementing the relevant legal system refer to international agreements to understand and comprehend the terms as discussed above. However, this process causes challenges in implementing the law.

Third, the KSA has not ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, nor the 2011 Domestic Workers Convention, and falls short of the standards set by these two instruments. In addition, the KSA's law does not explicitly exempt victims of trafficking in persons from arrest and prosecution for violations related to the illegality of their entry or residence, or the illegal activities in which they participated as a result of being victims of the crime of trafficking in persons. Failure to exempt the victims from prosecution leads to a lack of cooperation in uncovering and proving these crimes, which is in violation of the provisions of international human rights law. Furthermore, contrary to what is stipulated in international law, the laws of the KSA do not allow victims of human trafficking to seek compensation for damages suffered as a result of being victims of this crime.

Finally, additional violations of international human rights law remain prevalent in the KSA, such as the confiscation of identity documents and the use of force or threats. A human dignity and rights approach would increase pressure on the KSA government to address these issues. The rights-based approach could also be used to explore factors that contribute to human trafficking, such as poverty, inequity, discrimination, and persecution. In conclusion, in order for the state's efforts to be effective in combating trafficking in persons, this chapter argues that the state should not only criminalise the act of trafficking in persons, rather it must also criminalise all forms of exploitation through the application of both Islamic Sharī'a and international laws.

The following chapter investigates and examines how the KSA's Kafala system poses challenges in terms of combating human trafficking and how these can be addressed in light of

international human rights law and Islamic Sharī‘a. The Kafala system has defined the relationship between migrant workers and their employers for decades. The importance of this chapter is to demonstrate not only why this system has become increasingly controversial but how it has also contributed towards widespread exploitation due to insufficient regulation.¹³³ The next chapter therefore discusses the Kafala system in detail in light of international human rights law and Islamic Sharī‘a.

¹³³ Kali Robinson, ‘What is the Kafala System’ (*Council on Foreign Relations*, 18 November 2022) <<https://www.cfr.org/background/what-kafala-system>> accessed 13 February 2023.

CHAPTER FIVE

THE KSA'S KAFĀLA SYSTEM CONCERNING MIGRANT DOMESTIC WORKERS AND ITS IMPACT ON THE FIGHT AGAINST HUMAN TRAFFICKING

5.1 Introduction

As examined in the previous chapter, the KSA has faced significant human trafficking challenges in recent decades.¹ Chapter Five focuses on the KSA's state's application of the provisions of the sponsorship system (herein the Kafāla system) and how this violates international human rights law and the principles of Islamic Sharī'a, as well as on how the issue can be confronted. The KSA's economy has gained global recognition through the trading of crude oil, which has resulted in economic growth while largely preserving long-held traditions and cultural heritage.² This growth has also attracted a global workforce to strengthen its economy.³ This workforce consists of millions of migrant workers originating from the southern and eastern parts of Africa and Asia to work in agriculture, domestic services, and the construction industry.⁴ Unfortunately, this movement of labour has not been impervious to the

¹ Karim Tahir, 'the Kafāla system in Saudi Arabia as a form of modern slavery' (MSc in Globalization and Sustainable Development, Norwegian University of Science and Technology 2019).

² The embassy of Saudi Arabia: Washington DC, 'Economy & Global Trade' (*Saudi Embassy*) <<https://www.saudiembassy.net/economy-global-trade>> accessed on 02 January 2023.

³ UNODC, 'UNODC & Saudi Arabia Join Forces to Protect Victims of Human Trafficking' (*UNODC*, 02 November 2020) <<https://www.unodc.org/unodc/en/frontpage/2020/November/unodc-and-saudi-arabia-join-forces-to-protect-victims-of-human-trafficking.html>> accessed 05 July 2022.

⁴ Global Detention Project, 'Submission to the UN Committee on the Elimination of Discrimination against Women: Saudi Arabia' (*Global Detention Project*, June 2017) <<https://www.globaldetentionproject.org/submission-to-the-un-committee-on-the-elimination-of-discrimination-against-women-saudi-arabia>> accessed 22 July 2022; see also Sarah Zimmerman, 'Mending the protection and prosecution divide: looking at Saudi Arabia human trafficking flaws and possibilities' (2016) 15 Washington University Global; Study Law Review 533.

perils of human trafficking and the KSA's authorities have been unable to stop the growth of trafficking or adequately prosecute the orchestrators.⁵ As discussed in Chapter Three, Islamic Sharī'a prohibits all forms of human trafficking; however, the KSA's interpretations of Islamic Sharī'a have been inconsistent with international human rights standards.⁶ Human trafficking involves many practices that are unambiguously prohibited under international human rights law. Feingold asserts that human trafficking is a flagrant infringement of human rights that affects persons of all age groups, particularly women.⁷ Accordingly, I will consider in this chapter the human rights implications of the Kafala system in addition to the relevant international instruments.

The Kafāla system presents particular difficulties in relation to human trafficking and is addressed in detail in this chapter. The second section discusses the slave trade and the introduction of the Kafāla system, while the third section critically analyses the provisions of the Kafāla system and work visas in the KSA. The fourth section evaluates the Kafāla system which is derived from the KSA's application of Islamic Sharī'a when dealing with migrant domestic workers. The fifth section focuses on both the KSA school of Ḥanbalī thought and Sharī'a principles for combating human trafficking and exploitation. Section six reveals that the Kafāla system is a major contributor to the problem of human trafficking in the KSA.⁸ This section also discusses the failures in legal protection and support for trafficked victims. Instead of solving the influx of human trafficking in the region, the continuation of certain practices, justified on the basis of Islamic law, allows human trafficking to thrive.

⁵ Hélène Harroff-Tavel and Alix Nasr, *Tricked and Trapped: Human Trafficking in The Middle East* (Geneva ILO 2013) 42.

⁶ UN Office on Drugs and Crime (UNODC), 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' (June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed 20 May 2022.

⁷ David Feingold, 'Think Again: Human Trafficking' (Foreign Policy, 20 October 2009) <<https://foreignpolicy.com/2009/10/20/think-again-human-trafficking>> accessed 02 December 2023.

⁸ Americans for Democracy and Human Rights in Bahrain (ADHRB) report 26 Jan 2018 (*OHCHR*) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SAU/INT_CEDAW_NGO_SAU_29966_E.pdf> accessed on 14 May 2022.

Although the KSA's reliance on Islamic law has contributed significantly to defending people's rights and dignity, there remains a contradiction in the way Islamic Sharī'a is applied. This contradiction results in human trafficking and modern forms of slavery continuing to thrive and go unpunished. At times it is argued that violations of international human rights law such as human trafficking in the KSA are permitted and even encouraged by Islam.⁹ This chapter briefly discusses how the KSA's government abolished the practice of slavery and the slave trade and how Islamic Sharī'a responds to international anti-trafficking principles through legal methods. This chapter also argues that Islamic Sharī'a not only discourages human trafficking; rather, it offers solutions for combating human trafficking as demonstrated through condemning exploitation.¹⁰ Additionally, many modern forms of human trafficking are also prohibited in Islam as they are violations of Maqasid al-Sharī'a which ultimately protects dignity and human rights.¹¹ The protection of the rights of the vulnerable, particularly women and children, is grounded in Islam. The principles of Islamic Sharī'a for the most part do comply with international standards as an ideal framework for curbing human trafficking.¹² Therefore, the Islamic legal system has the potential to supplement international laws against human trafficking as demonstrated in this chapter. In summary, despite the KSA's constitutional adherence to Islamic Sharī'a which promotes human rights, there still remains a contradiction in the way Islamic Sharī'a is applied in the Kingdom.

5.2 The Slave Trade and the Kafāla system in the KSA

⁹ The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 04 January 2022.

¹⁰ UN Office on Drugs and Crime (UNODC) (n 6).

¹¹ Nurhayati and others, 'Human trafficking in the perspective of maqāṣid al-sharīah' (2022) 22 Jurnal Ilmiah Islam Future 150.

¹² The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 06 January 2022.

Although, Chapter Three demonstrates how the slave trade and slavery were previously practised within the Arabian Peninsula for centuries prior to the advent of Islam,¹³ the legal position on slavery today is based on Islamic principles and traditions. The KSA's government issued a royal directive in 1937 to the princes of the regions, known as 'Instructions Concerning Trafficking Slaves' which contains provisions that forbids the slave trade or slavery.¹⁴ Article [a] of the royal decree provides for the liberation of the victims free of charge, while article [c] provides for the punishment of human traffickers by imprisonment for a period not exceeding one year.¹⁵ However, even with these provisions, slavery and the slave trade had been on the rise.¹⁶ This view had been supported by both American and British slavery investigative bodies, which in 1955 considered the KSA to be a state that bred the slave trade.¹⁷ However, in 1962 the enactment of article 10 in the ministerial statement of the new policy of the country completely abolished slavery and other related practices.¹⁸ The government was also compelled to compensate former slave owners.¹⁹ The abolition of slavery in the KSA was based on Islamic

¹³ Murray Gordon, *Slavery in the Arab World* (New Amsterdam 1989) 225; See also John Hunwick, 'Arab Views of Black Africans and Slavery' [2006] *West Africa, Islam, and the Arab world* 75.

¹⁴ The Saudi government issued a regulation to this effect in 1937 in the form of a royal decree entitled "instructions concerning trafficking slaves". Article 1 of this royal decree states the following: Since the provisions of the Noble Sharī'a prohibit the enslavement or purchase of nationals of states in treaty relations, it is therefore strictly forbidden:

1. Importing slaves from any country to the Kingdom of Saudi Arabia by sea.
2. Importing slaves into Saudi Arabia by land, unless the slave trader had a government document evidencing that the importing person was recognized as a slave in the country from which he was imported at the time of the issuance of this regulation.
3. It is forbidden to enslave free people in Saudi Arabia.
4. Purchasing or owning any imported or enslaved person in violation of the previous provisions after the issuance of this Law.

The royal decree further adds:

Any violation of the previous provisions entails punishing the perpetrators, as follows:

- (a) Freeing the slave free of charge
- (b) The application of customs regulations applicable to smugglers.
- (c) Aggravated imprisonment for a period not exceeding one year.

¹⁵ *ibid.*

¹⁶ Bernard Lewis, *Race and Slavery in the Middle East: An Historical Enquiry* (Oxford University Press 1990) 167.

¹⁷ Murray Gordon, *Slavery in the Arab World* (New Amsterdam, 1989) 225-228.

¹⁸ James Lee Ray, 'The Abolition of Slavery and the End of International War' (1989) 43 *International Organization* 405.

¹⁹ Murray Gordon, *Slavery in the Arab World* (New Amsterdam 1989) 233; As a result of the emancipation of 1,682 slaves that year, the government paid 8,679,242 riyals to their masters (equivalent to £1,785,000) in compensation to their masters.

jurisprudence in line with new developments. Consequently, in principle, Islamic Sharī‘a, which forms the basis of the KSA’s secular policy in the fight against human trafficking, meet the international standards required to end the problem.²⁰ Despite the progress toward abolition of slavery discussed above, the phenomenon has persisted and evolved into a variety of forms, including what is currently known as human trafficking.²¹

As a result of its geographical position, strategic location, and stable economy, the KSA has faced widespread immigration issues. As a spiritual centre of all Muslims for the annual pilgrimage and other religious observances, the Kingdom also attracts millions of visitors, many of whom remain illegally in the country.²² In addition, as an oil-rich country which is geographically close to some vulnerable poverty-stricken nations, the KSA has become a desirable destination for expatriate workers who are more vulnerable to human trafficking.²³ The flow of migrant labourers into the KSA became more prominent from the early 1970’s, as increased production of petroleum products created a need for both skilled and unskilled labourers.²⁴ As living standards improved for its citizens, opportunities for domestic services and the rate of immigration labour expanded. It is no accident, therefore, that when the Organization of Petroleum Exporting Countries (OPEC) began to raise oil prices, many

²⁰ Myada O El-Sawi, ‘Beyond the “Tiers” of Human Trafficking Victims: Islamic Law’s Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law’ (2011) 39 Georgia Journal of International and Comparative Law 391.

²¹ It can be said that human trafficking for the purposes of forced labour and forced services is one of the most prevalent forms in all countries of the world, and in particular in the wealthiest Islamic countries. Due to the presence of large numbers of foreign workers and immigrants who work in manual labour and factories, as well as domestic service, many of them are exposed to the risk of exploitation.

²² UNHRC, ‘Report of the Special Rapporteur on extreme poverty and human rights on mission to Saudi Arabia’ 35th session (28 April 2017) UN Doc A/HRC/35/26/Add.3 para 61; see also Muhammad Humaidan, ‘Umrah Pilgrims Warned Against Overstaying’ (*Arab News*, 07 August 2009) <<https://www.arabnews.com/node/326880>> accessed 17 February 2023.

²³ El-Hadi Bouamrine and Fakhar Hisham, ‘Migrant Labour in the Gulf Cooperation Council Countries: A Reading of Sponsorship System’ (2021) Vol 6 Journal of Labor and Employment Law 306; See also Majed Alzahrani, ‘The System of Kafāla and the Rights of Migrant Workers in GCC Countries- With Specific Reference to Saudi Arabia’ (2014) 16 European Journal of Law Reform 377.

²⁴ Fairsquare Policy Brief No 1, ‘Migrant Workers in Saudi’ (2020) <<https://fairsq.org/wp-content/uploads/2020/11/FS-Policy-Brief-1-Saudi-Arabia-1020.pdf>> accessed 11 July 2022

countries started sending workers to the KSA.²⁵ Recently, the KSA has become the largest recipient of domestic labourers, with over 66% of households having a domestic labourer.²⁶ This necessitated the establishment of rules for regulating the affairs of the expatriate workers, which eventually resulted in the provisions of the Kafāla system.²⁷ However, this system has since been abolished, except for these five categories of employment: private drivers, guards, domestic workers, shepherds and gardeners,²⁸ due to the fact that they are not covered by the KSA's labour law.²⁹ Alhayja and Alkhasawna argued that the exclusion of domestic workers from the labour law relates to the nature of their work.³⁰ As a consequence, it creates a direct link between the domestic worker and the homeowner that goes beyond the limits of that of a worker's relationship with their employer. Therefore, the relationship between employers and domestic workers enables the domestic workers to see the finer details of the homeowner's private lives which has the potential to deepen bonds between them. This is what prompted some legislation such as the KSA's measures to exclude domestic workers from the labour law.³¹ The following section will review the provisions of the Kafāla system and work visas in detail.³²

5.3 The Provisions of the Kafāla System and Work Visas in the KSA

²⁵ Md Mizanur Rahma' 'Beyond labour migration: the making of migrant entrepreneurship in Saudi Arabia' , (2018) 33 International Sociology 86.

²⁶ Abdullah Al-Yousef, 'Domestic workers. Social relevance that entrenches dependency and sows negativity in children' Al-Riyadh Newspaper on 23 January 2016 Issue 17379.

²⁷ Omar Al Shihabi, 'The Date of the Creation of the Sponsorship System for Migrant Workers in the Gulf States' [2018] Gulf Centre for Policy and Development 150; see also Bouamrine and Hisham (n 23).

²⁸ KSA labour legislation does not apply to these five groups of workers. This is why the Kafāla system reforms cannot be extended to these five categories of workers.

²⁹ Nisha Varia, 'Sanctioned Abuses: The Case of Migrant Domestic Workers' (2007) 14 Human Rights Brief 17: see also Human Right Watch, 'Saudi Arabia; Labour Reforms Insufficient' <<https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>> accessed 10 August 2023.

³⁰ Al-Haijā' and Al-Khasawneh, Legal Regulation of the Work of Domestic Workers and the like (2016) Studies of Shari'a and Law Sciences 837.

³¹ *ibid.*

³² Romina Halabi, 'Contract Enslavement of Female Migrant Domestic Workers in Saudi Arabia and the United Arab Emirates' [2008] Human Rights and Human Welfare 43.

In order for a migrant worker to enter the KSA and be licensed to work, the migrant must find a KSA national who is willing to sponsor and bear all the obligations imposed by the state, as well as a passport and entry visa.³³ This is in accordance with the provisions of Article 11 of the KSA's Residency Law crowned with Royal Attestation No. 17-2/25/1337 on 09/11/1371 AH [1952/07/30]. This is a secular law derived from the KSA's application of Islamic Sharī'a, which stipulates that

The sponsorship of the sponsors in this Regulation is final and may not be released except in the case if another sponsor offers the same obligations and has the same satisfactory characteristics of the sponsor who is requesting release.

In case no other new sponsor offer was submitted, and insistence of the current sponsor on cancelling his sponsorship due to legitimate reasons, the foreigner will be detained if found, and shall be instructed to leave within one week maximum.³⁴

The Kafāla system is considered a type of guarantee in the KSA. This type of guarantee is applied to the expatriate workforce, specifically migrant domestic workers, where permission for the expatriate to work is linked to being sponsored. Accordingly, the sponsorship represents the legal identity of the expatriate and his/her ability to work within the jurisdiction of the state.³⁵ The Kafāla system is therefore considered to be a network of legal-labour relationships, connecting the sponsor, the state, and the sponsored person.³⁶ The sponsor, in theory, represents and is legally responsible for the expatriate workers during their stay in the Kingdom.³⁷ As a result of the Kafāla system, the state delegates authority to the citizen/employer to supervise the migrant worker's entry into the country and their well-being during employment.³⁸

³³ Abbās Mohammed Abbās, *Legal Status of Foreigners in the Gulf States: A comparative study* (E-Kutub Ltd London 2017)166; also see Adnan Daoud Abdel Shammari, 'International Protection of the Rights of Migrant Workers and Their Family Members' (Masters of Law, University of Baghdad 2014).

³⁴ The Saudi Residency Regulation (Supreme Royal Order No 17/2/25/1337) 1952 art 11.

³⁵ Al Shihabi (n 27).

³⁶ Anh Nga Longva, 'Keeping Migrant Workers in Check: the Kafāla System in the Gulf' (1999) MERIP 20.

³⁷ Sara Hamza, 'Migrant Labor in the Arbaian Gulf' (Supervised Undergraduate Student Research and Creative Work, University of Tennessee-Knoxville 2014).

³⁸ Omar Al-Shihabi and others, *Constant and Transforming 2014: The Gulf between Societal Dissension and the Interdependence of Money Power* (Gulf Centre for Development Policies, 2015) 272; see also Bouamrine and Hisham (n 23).

The Kafāla system has been implemented through a set of bureaucratic and legal procedures that regulate the relationship between the sponsor, the expatriate, and the state. Among the most important of these measures are the following:

- i. **Entry/Residence Visa** - An expatriate must obtain a state-issued visa in order to be able to work legally in the country.³⁹ This visa needs a citizen sponsor (or someone authorised by the state).
- ii. **Exit visa** - a state-issued visa that allows an expatriate to legally exit the country.⁴⁰
- iii. **No Objection Certificate** - A certificate is required before an expatriate changes his/her job within the country.⁴¹ The certificate proves that the current sponsor has no objection to the worker transferring his/her sponsorship to work for another sponsor.⁴²

Considering that migrant workers are dependent on their employers for their personal life, Zou argues that they are more likely to develop hyper-dependence which may lead to the emergence of exploitative relationships.⁴³

5.4 Evaluating the Kafāla System in light of international human rights law and Islamic Sharī'a

³⁹ The Saudi Residency Regulation (Supreme Royal Order No 17-2/25/1337) 1952 art 4, 11 and 39. These articles prohibit foreign workers from working in Saudi Arabia unless they are sponsored by a Saudi, confirming the non-Saudi disqualification.

⁴⁰ These powers are outlined in Ministerial Order No. 8/451, dated 04/02/1406. The Ministry of the Interior's Special Rights Procedures Guide (1406) 1 65: see also Bandar Hajjar, *Amending the bail provisions and correcting the relationship between the employer and the migrant worker* (National Association for Human Rights Riyadh, Saudi Arabia, 2008) 10.

⁴¹ Bouamrine and Hisham (n 23).

⁴² Al Shihabi (n 27).

⁴³ Mimi Zou, 'The legal construction of migrant work relations: precarious status, hyper-dependence and hyper-precarity (PhD thesis, Oxford University, UK 2014).

Many authors across the globe criticise the Kafāla system for failing to comply with the minimum international standards for eradicating human trafficking.⁴⁴ For this reason, the Kafāla system can be considered a source of human suffering in the KSA.⁴⁵ Various reports from international media, social media, and the US State Department have provided revealing accounts into the acts of atrocities committed by hosts against migrant workers.⁴⁶ The following section addresses the extent to which the Kafāla system breaches Islamic and international human rights law, and the Kingdom's efforts to reform the Kafāla system.

5.4.1 The Kafāla System, Islamic Law and international human rights law

The Kafāla system which is based on the state's application of Islamic Sharī'a in the KSA restricts the freedom of the migrant domestic workers by prohibiting them from changing jobs or leaving the country temporarily or permanently, with the exit permit linked to the approval of the sponsor.⁴⁷ The KSA's law imposes the necessity on domestic service workers to submit an exit permit signed by the sponsor before the competent authority.⁴⁸ This strict application of the Kafāla system has led to the flight of many migrant workers as a result of practices imposed on them by employers.⁴⁹ Therefore, the KSA has put in place a law requiring the sponsor to report the 'escape', the terminology used in this circumstance. If the worker is found, the sponsor must bring them back unless his/her place of residence cannot be obtained.⁵⁰ Referring to these laws, it is apparent that there is a conflict between the Kafāla system and provisions of

⁴⁴ Joshua Nelson, 'The Ethical Implications of the Kafāla System' (2014) 11 Pitt Political Review 41.

⁴⁵ Hanan Malaeb, 'The "Kafāla" system and human rights: time for a decision' (2015) 29 Arab Law Quarterly 307.

⁴⁶ Human Rights Watch, *As If I Am Not Human: Abuses against Asian Domestic Workers in Saudi Arabia* (HRW Publication 2008); see also the report of the European Saudi Organisation for Human Rights (ESOHR) <<https://www.esohr.org/en/>> accessed 05 April 2022.

⁴⁷ These powers are outlined in Ministerial Order No. 8/451, dated 04/02/1406. The Ministry of the Interior's Special Rights Procedures Guide (1406) 1 65; see also Ruba Jaradat, *Reforming the sponsorship system in the Gulf to improve the international reputation and investment environment*, Al-Arab Newspaper, founded in London in 1977, Issu 10628, Year 39 on 10 May 2017; Hajjar (n 40) 44.

⁴⁸ Circular No. 51/8/T issued by the Ministry of Justice on 04/20/14009 prohibits foreign workers from working in Saudi Arabia unless they are sponsored by a Saudi, confirming the non-Saudi disqualification.

⁴⁹ Migrant forum in Asia Policy Brief No 2, 'Reform of the Kafāla (Sponsorship) System' (2012) <<https://pdfslide.net/documents/policy-brief-no-2-reform-of-the-Kafala-sponsorship-policy-brief-no-2-reform.html?page=1>> accessed 16 September 2022.

⁵⁰ The Saudi Residency Regulation (Supreme Royal Order No 17/2/25/1337) 1952 art 57.

international law, as Chapter Two discusses with reference towards article 8 of the 1975 Migrant Workers Convention and articles 6 , 7 and 13 of the 1948 Universal Declaration of Human Rights (UDHR), article 6 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and articles 8, 12, 13 and 16 of the 1966 International Covenant on Civil and Political Rights (ICCPR). It also conflicts with articles 1, 5 and 6 of the 1926 Convention to Suppress the Slave Trade and Slavery and article 1 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

Accordingly, international human rights organisations such as the Human Rights Watch have called on the KSA to abide by international labour laws and human rights standards in regard to this category of migrant workers.⁵¹ The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization indicated in its observations related to the Forced Labour Convention of 1930 No. (29) that:⁵²

The so-called visa-related Kafāla system may in some countries of the Middle East constitute a fertile ground for forced labour and urged governments to adopt legislative provisions specifically designed for the difficult conditions faced by this category of workers and to protect them from exploitative and abusive practices.⁵³

In order to explain how some provisions of the Kafāla system violate international instruments relating to human rights and the laws of the International Labour Organization, this chapter discusses some of the broad authorities granted to sponsors over workers in light of Islam and international human rights law.

⁵¹ UNHRC, ‘Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the annex to human rights council resolution 5/1’ 4th session (14 November 2008) UN Doc A/HRC/WG.6/4/SAU/3 para 37.

⁵² Khalid Al Sayed, *GCC and Arab Spring Countries* (Orient Printing and Publishing House Doha Qatar, 2013) 105.

⁵³ ILO, *Employer-Migrant Worker Relationships in the Middle East: Exploring scope for internal labour market mobility and fair migration* (ILO Publication 2017) 3.

5.4.1.1 Deportation of the Migrant Worker

Article 13 of the ICCPR obligates the state to limit the reasons for expulsion.⁵⁴ It stipulates the necessity of enabling deported foreigners to file a grievance against the decision to deport them before it is implemented. The Kafāla system in the KSA is inconsistent with this provision, for example, Article 33 of the KSA's residency system issued by Royal Order No. 17-25/2/1338 on 09/11/1371 AH [13-7-1952] stipulates that 'the Ministry of Interior may withdraw from any foreigner the right of residence and instruct him or her to leave the country without giving reasons'. Although the state has the right to prevent foreigners from residing in the country, the wording of this provision is inconsistent with the text of Article 13 of the ICCPR.

The Kafāla system also allows the sponsor to deport the sponsored person immediately after the end of the contractual relationship with him/her.⁵⁵ Consequently, the sponsored person is prevented from availing of the time-consuming process of suing the sponsor or claiming his/her right through official channels; the system links the loss of residence permits to the loss of work itself.⁵⁶ This is inconsistent with the text of Article 8(1) of the Migrant Workers (Supplementary Provisions) Convention, No. 143 of 1975, relating to migration under abusive conditions and the promotion of equal opportunities for migrant workers, which was formulated as follows:

- 1- On condition that he/she has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as being in an illegal or irregular situation by the mere fact of the loss of his/her employment, which shall not in itself imply the withdrawal of his/her authorisation of residence or, as the case may be, work permit.⁵⁷

⁵⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 13. This Convention has yet to be ratified by the Kingdom of Saudi Arabia.

⁵⁵ Bouamrine and Hisham (n 23).

⁵⁶ ILO, *Employer-Migrant Worker Relationships in the Middle East: Exploring scope for internal labour market mobility and fair migration* (ILO Publication 2017) 17.

⁵⁷ C143- Migrant Workers (Supplementary Provisions) Convention (adopted 24 June 1975, entered into force 09 December 1978) art 8. This Convention has yet to be ratified by the Kingdom of Saudi Arabia.

5.4.1.2 Freedom of Movement for the Domestic Migrant Worker and the Right to Leave the Country

Migrant workers in the KSA are often subjected to illegal detention and denied the right to free movement and travel, or to leave the country without obtaining the consent of the sponsor.⁵⁸ The investigation conducted by Mantouvalou confirms that female migrant workers are denied the right to freedom of movement within the country.⁵⁹ This denial of the right to free movement is inconsistent with a number of international human rights instruments. For example, Article 13 of the UDHR stipulated that:

- 1- Everyone has the right to freedom of movement and to choose his/her place of residence within the borders of the state;
- 2- Everyone has the right to leave any country, including his/her own, and to return to his/her country.

This was confirmed by Article 12 of the ICCPR, which gives everyone lawfully present in a territory the right to freedom of movement and freedom to choose his/her place of residence within that territory.⁶⁰

Freedom of movement, as stipulated by the provisions of international human rights law, is compatible with Islamic Sharī'a.⁶¹ The human right to freedom of movement is achieved through the means of Islamic Sharī'a, and therefore is one of the established rights in Islam. The Qur'ān stipulated that 'He is the One Who smoothed out the earth for you, so move about in its regions and eat from its provisions'.⁶² Islam does not restrict the freedom of the individual

⁵⁸ ADHRB (n 8); see also Bouamrine and Hisham (n 23).

⁵⁹ Virginia Mantouvalou 'Am I Free Now?' Overseas Domestic Workers in Slavery.'(2015) vol 42, 3 Journal of Law and Society, 329 JSTOR, <http://www.jstor.org/stable/43862437> accessed 28 Nov. 2023.

⁶⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12.

⁶¹ Nasser Al-Baqmi, *Human Rights in Islam and its Applications in Saudi Systems* (3rd edn, King Fahd Security College 2015) 183.

⁶² Qur'ān, 67:15.

to move from one place to another, except for a matter necessitated by the individual's own interest or the public interest, as in the case of a pandemic outbreak in a town, for example, where it is feared that an individual's transfer to another city will lead to the transmission of infection to the people of that city. The Prophet Mohammed (PBUH) said: 'If you hear of a plague in a land, do not enter it'.⁶³

The Prophet Mohammed (PBUH) wrote in the book of rules which regulates relations between Muslims and Jews living in the city of Medina stating, 'whoever wants to leave the city is safe, and whoever stays in it is safe'.⁶⁴ This is an explicit text ensuring the right of movement for each individual to leave whenever he/she wants.⁶⁵ The Qur'ān confirms this: 'Have they not journeyed through the earth, and had hearts to reason with, or ears to listen with? It is not the eyes that go blind, but it is the hearts, within the chests, that go blind'.⁶⁶

Islam urges people to host immigrants as well as to be kind to them, help them and provide them with safety. The Qur'ān made this act obligatory for Muslims, even if those who migrated to them were non-Muslims. The Qur'ān affirmed this by saying,

And [also for] those who were settled in the Home [i.e., al-Madinah] and [adopted] the faith before them. They love those who emigrated to them and find not any want in their breasts of what they [i.e., the emigrants] were given but give [them] preference over themselves, even though they are in privation. And whoever is protected from the stinginess of his soul – it is those who will be the successful.⁶⁷

5.4.1.3 Changing Job

⁶³ Narrated by Al-Bukhari 7/130 (5728) on the authority of Usama bin Zaid.

⁶⁴ Moheb Al-Hawikli. *Human Rights and Security Measures* (Naif Arab University of Security Sciences 2006) 46.

⁶⁵ Abdulmalik Al-Maafry, *The Biography of the Prophet* (2nd edn, New Tomorrow House Mansoura Egypt 2003) 103.

⁶⁶ Qur'ān, 22:46.

⁶⁷ Qur'ān, 59:9.

According to the rules applicable to changing job in the KSA, a domestic worker cannot transfer to work for another employer without the written approval of the first employer.⁶⁸ The primary sponsor can accept or reject the request. Current literature indicates that Kafala is an abusive system, since workers are unable to switch employers when their employment requirements change.⁶⁹ This is inconsistent with the text of Article 6(1) of the ICESCR which gives the migrant worker the right to choose to work freely and without guardianship from anyone. Paragraphs 1 and 3 of Article 8 of the ICCPR also gives the migrant worker freedom from being forced to work.⁷⁰

The Kafāla system violates international law in two particular aspects. The first is in relation to the concept of slavery contained in Article 1 of the Slavery Convention 1926, as amended by the 1953 Protocol. This provision defines slavery in terms of a person over whom all or part of the powers arising from the right of ownership are exercised.⁷¹ Although Article 1 links the concept of traditional slavery to ownership in which a person is treated as a commodity, it also adopts an expanded definition of the concept of slavery, as the exercise of ownership powers over another person. Powers akin to ownership exist for the KSA's sponsors over workers. For example, a domestic worker cannot work for someone other than his/her sponsor, except with

⁶⁸Ministry of Human Resources and Social Development: Inquiry about transferring sponsorship to a new Saudi sponsor. <https://myeleservices.com/%D8%A7%D8%B3%D8%AA%D8%B9%D9%84%D8%A7%D9%85-%D8%B9%D9%86-%D9%86%D9%82%D9%84-%D9%83%D9%81%D8%A7%D9%84%D8%A9-%D8%A5%D9%84%D9%89-%D9%83%D9%81%D9%8A%D9%84-%D8%AC%D8%AF%D9%8A%D8%AF-%D9%8A%D8%B9%D9%85%D9%84/> accessed 24 June 2023; see also Shehata Ahmed, 'sponsorship of residence and travel (a comparative study between jurisprudence and the Saudi system)' (2021) 5 Journal of the College of Islamic and Arabic Studies for Girls in Alexandria 465.

⁶⁹ Bridget Anderson, *Doing the dirty work? The global politics of domestic labour* (Palgrave Macmillan 2000). See also Bina Fernandez, Traffickers, Brokers, Employment Agents, and Social Networks: The Regulation of Intermediaries in the Migration of Ethiopian Domestic Workers to the Middle East (2013) International Migration Review, 47(4), 814-843. <https://doi.org/10.1111/imre.12049>.

⁷⁰ International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 01 January 1976) 999 UNTS 3 (ICESCR) art 6(1); see also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 8.

⁷¹ Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Martinus Nijhoff 2015).

the permission and approval of the latter.⁷² It is also acceptable for the sponsor to waive the worker's sponsorship in favour of another employer in return for financial consideration.⁷³ These powers are similar to the powers of the master over the slave in terms of selling a slave. Other authorities granted to the sponsor are in relation to his/her dealings with the worker, including dealing with the escape of a worker. Consequently, such authority and provisions included in the Kafāla system are considered as acts of slavery as specified in the Convention and contrary to upholding human dignity and measures required to combat human trafficking.⁷⁴ Article 5 of the 1926 Convention on Slavery states:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.⁷⁵

The extended powers granted by the provisions of the Kafāla system to the sponsor over the sponsored person could compel the domestic worker to perform work that is not stipulated in the work contract. Therefore, this work could be a form of exploitation as stipulated in the KSA's Anti-trafficking in Persons Law.⁷⁶

⁷² The requirements for transferring a worker to another employer are outlined in the Ministerial Order No. 8/451, dated 04/02/1406. Ministry of Interior, *Special Rights Procedures Guide* (1409) 65; see also Bouamrine and Hisham (n 23).

⁷³ Alaa Khalifa, 'Yousef Al-Adwani; No Legal Text Criminalizing the Employer's Waiver of the Maid in Return for Money' (*Al-Anbaa*, 03 November 2019) <<https://www.alanba.com.kw/ar/kuwait-news/932984/03-11-2019-%D8%A7%D9%84%D8%B9%D8%AF%D9%88%D8%A7%D9%86%D9%8A-%D9%84%D9%80-%D8%A7%D9%84%D8%A3%D9%86%D8%A8%D8%A7%D8%A1-%D9%86%D8%B5-%D9%82%D8%A7%D9%86%D9%88%D9%86%D9%8A%D8%A7-%D9%8A%D8%AC%D8%B1%D9%85-%D8%A7%D9%84%D8%AA%D9%86%D8%A7%D8%B2%D9%84-%D8%A7%D9%84%D8%AE%D8%A7%D8%AF%D9%85%D8%A7%D8%AA/#:~:text=%D9%82%D8%A7%D9%84%20%D8%A7%D9%84%D9%85%D8%AD%D8%A7%D9%85%D9%8A%20%D9%8A%D9%88%D8%B3%D9%81%20%D8%A7%D9%84%D8%B9%D9%80%D9%80%D9%80%D8%AF%D9%88%D8%A7%D9%86%D9%8A%20%D8%A5%D9%86%D9%87,%D8%A7%D9%84%D8%AA%D9%86%D8%A7%D8%B2%D9%84%20%D9%81%D9%8A%D8%AA%D9%85%20%D8%B0%D9%84%D9%83%20%D8%A8%D8%B7%D8%B1%D9%8A%D9%82%D8%A9%20%D9%82%D8%A7%D9%86%D9%88%D9%86%D9%8A%D8%A9>> accessed on 24 June 2023.

⁷⁴ Hajjar (n 40).

⁷⁵ Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 09 March 1927) 60 LNTS 253 art 5.

⁷⁶ Saudi Anti-Trafficking in Persons Law (Royal Decree No M/40) 2009 art 2; Article 2 defines trafficking in persons as 'Prohibits trafficking in any person in any form including forcing, threatening, defrauding, deceiving, kidnapping him/her. Prohibiting exploiting position, authority, exploiting a person's weakness, or giving person money or benefits to gain approval of one person to control another person for the purpose of sexual assault.

Additionally, the excessive restrictions on the transfer of sponsorship make the migrant domestic worker feel compelled to work, regardless of poor working conditions, consequently making it a form of forced labour.⁷⁷ This action is prohibited by Article 5 of the 1926 Slavery Convention which empowers the state to take measures to prevent forced labour; and to punish perpetrators, as stipulated in Article 6 of the Convention:

Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions.⁷⁸

Furthermore, the Supplementary Convention for the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted in 1956, was more extensive in describing the concept of slavery. Article 1 of the Convention stipulates that:

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926.

One such practice, as included in Article 1(b) is

Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status,

This fully applies to the situation of the non-Saudi worker being subject to the provisions of the Kafāla system.

Prohibits forced work or service, begging, slavery or semi slavery practices, enslaving, removing physical parts, or subjecting a person to medical tests’.

⁷⁷ Migrant forum in Asia Policy Brief No 2, ‘Reform of the Kafāla (Sponsorship) System’ (2012) <[https://pdfslide.net/documents/policy-brief-no-2-reform-of-the-Kafāla-sponsorship-policy-brief-no-2-reform.html?page=1](https://pdfslide.net/documents/policy-brief-no-2-reform-of-the-Kafala-sponsorship-policy-brief-no-2-reform.html?page=1)> 29 November 2022.

⁷⁸ Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 09 March 1927) 60 LNTS 253 art 5.

Forced labour contravenes both international law and Islamic Sharī‘a. The word 'work' and its derivatives are repeated in the Holy Qur’ān 359 times. God made the value of a person according to the amount of work they achieve in this world. The Qur’ān states that ‘To each are degrees in accordance with what they have done. And your Lord is not unaware of what they do’.⁷⁹ This is in addition to other words that explain the importance of toil, striving and making an effort. Under Islamic Sharī‘a, a person can refuse any job they do not want, unless the higher interest of the nation calls for it (such as during crisis or war) since the higher interest of the group takes precedence over an individual interest. Otherwise, it is not permissible to force a person to do specific work.⁸⁰ The employer has responsibilities in Islam, including:

1. Paying the worker's wages equivalent to their efforts without prejudice or procrastination.
2. Providing the worker with a decent life commensurate with their efforts and toil.
3. Giving what is worthy of honour without discrimination.
4. Providing elements of protection that prevent them from being unjustly exploited according to their circumstances.
5. The employer has no right to force the worker to work for them or ask them to work for longer hours than what were agreed upon. This should only be done by the full choice of the worker and provided that they are given a wage commensurate with the work done.⁸¹

5.4.1.4 Recognition of the Worker's Legal Personality

The procedure followed by the police department following the arrest of a domestic worker on suspicion of a crime requires that the sponsor be present for the worker to be released from custody.⁸² The migrant domestic worker remains detained without justification if the employer refuses to attend. This procedure is a violation of international human rights law as the domestic worker is treated as if he /she has no legal personality. Therefore, this is inconsistent with

⁷⁹ Qur’ān 6:132.

⁸⁰ Sayf aldiyn Shaheen, *Human Rights in Islam* (1st edn, Safir Press Riyadh Saudi Arabia, 1993) 51-53.

⁸¹ Riwayat Alzihar, *Human Rights in Islam* (1st edn, Dār Al-Mohammed Jeddah Saudi Arabia, 2002) 279.

⁸² Hajjar (n 40).

Article 16 of the ICCPR which states: ‘Everyone shall have the right to recognition everywhere as a person before the law’. Moreover, the circulars relating to the Kafāla system concerning migrant domestic workers use the phrase ‘receiving the worker’.⁸³ It can be argued that this phrase violates human dignity because the Arabic phrase ‘receive’ is used for objects and should not be used or applied to people. It should be replaced by terminology such as informing the employer of the status of the worker, or the time specified for his/her release.

The KSA’s legal system also grants the sponsor the authority to notify the Ministry of Interior of the escape of the domestic worker if they are withdrawing their labour.⁸⁴ The employer can report the worker’s absence as an escape or runaway, especially if there is a dispute between the two parties. The Arabic phrase ‘escape’ implies that the worker is held captive by the employer. Therefore, the use of this term should be declared unlawful in all the KSA’s legal regimes. I suggest that the phrase ‘the worker's absence from work or departure’ be used instead of a worker's escape. A penalty, such as a fine, should be imposed on the employer and compensation must also be stipulated for the worker when the employer reports without justification that the worker is absent.

The lack of recognition by the Kafāla system of migrant domestic workers' legal personality is inconsistent with Article 6 of the UDHR which states: ‘Everyone has the right to recognition everywhere as a person before the law.’ The Declaration also provides in Article 7 for the equality of all before the law and their right to enjoy protection from any discrimination that violates the Declaration. The Declaration is consistent with Islamic law in this regard. Islam has established the legal personality of the citizen and the immigrant on an equal basis,

⁸³ These circulars and instructions can be found on the Ministry of Interior's website (*MOI*) <<https://www.moi.gov.sa>> accessed 16 September 2022.

⁸⁴ Migrant rights, ‘Abolish Absconding Charges’ (*Migrant-Rights*) <<https://www.migrantrights.org/campaign/abolish-absconding-charges/>> accessed 30 July 2022.

regardless of gender. Islamic jurists have detailed the provisions of civil capacity and criminal responsibility, and they have not neglected the capacity of the distinct and undistinguished person. ‘Umar ibn al-Khaṭṭāb’s message to Abū Mūsā al-Ash‘arī⁸⁵ included judging that all people are equal, with ‘Umar writing: ‘People are equal to one another’. This is an original rule in Islam.⁸⁶

Therefore, no Islamic Sharī‘a text differentiates immigrants from others. The principle of equality in this regard is clearly established in Islam. Among the texts that indicate equality is the saying of the Prophet Mohammed, (PBUH)

‘O people, those who have gone before you were destroyed because if anyone of high rank committed theft amongst them, they spared him or her; and if anyone of low rank committed theft, they inflicted the prescribed punishment upon them’.⁸⁷

Among the general provisions of the Qur’ān, it is stated ‘O you who have believed, be constantly upright with equity (with others), witnesses for Allah, even if it be against yourselves or (your) parents and nearest kin’.⁸⁸ Residents of Islamic nations enjoy equality before the law and the judiciary. The provisions of Islam are applied to all, whether they are Muslims or not, and they enjoy their rights and abide by their duties. Therefore, they are in the protection of the Islamic nation. The Prophet Mohammed, (PBUH) said: ‘Whoever harms [others], Allah will harm them, and whoever causes hardship [to others] Allah will cause hardship to them’.⁸⁹

5.4.2 The KSA’s Efforts to Reform the Kafāla System

⁸⁵ Abū Mūsā Abd Allah ibn Qays *al-Ash‘arī*, better known as Abu Musa al-Ash‘ari (Arabic: أبو موسى الأشعري, romanized: *Abū Mūsā al-Ash‘arī*) (died c 662 or 672) was a companion of Muhammad and an important figure in early Islamic history.

⁸⁶ Muhammad Othman, *Human Rights between Islamic Law and Western Thought* (Dār Al-Sharq, 1982) 130.

⁸⁷ *ibid.*

⁸⁸ Qur’ān, 4:135.

⁸⁹ At-Tirmidhī said, after quoting this report: This is a hasan ghareeb hadith. Al-Albaanī also classed it as hasan in *Sahīh at-Tirmidhī*. It was also classed as hasan by the commentators on *al-Musnad*. Ibn Muflih said in *al-Aadāb ash-Shar‘iyyah* (1/11): Its isnād is jayyid [good].

The KSA launched the Contractual Relationship Improvement Initiative (CRII) on 11th November 2020 to reconsider the issue of the KSA's sponsorship of migrant workers. On 14th March 2021 the Labour Relations Improvement Initiative (LRII) officially abolished the main provisions of the Kafāla system - the need to obtain the approval of the sponsor when changing a job, or travelling outside the country either permanently or temporarily.⁹⁰ The initiative specifies procedures for these circumstances. Workers can change jobs or travel, provided that they have given their employer at least 90 days' notice, and employees have the right to change jobs after one year of service.⁹¹ The CRII included two types of reforms and improvements to the conditions that affect expatriate workers: abolishing the term 'Kafāla' and limiting the relationship of the expatriate worker to the employer within the framework of the working relationship.⁹² Other specific improvements are represented in the development of new mechanisms that would improve the conditions of expatriate workers. The terminology of 'sponsor' and 'sponsored person' has been replaced with the terms 'employee' "*Aleamil*" and 'employer' "*Sahib Aleamal*". The initiative also introduced controls related to the employer's relationship with the expatriate worker. For example, an electronic contract documentation programme designed to raise and measure the cultural awareness of workers, and an insurance programme for the rights of workers were introduced.⁹³ In addition, measures were introduced to protect expatriate workers. In light of this, the Ministry of Interior issued specific instructions stipulating the necessity of disbursing the entitlements of all expatriate workers through commercial banks approved in the KSA by opening a bank account in the name of the worker and linking any procedure related to his/her financial transfers through the linked bank. This

⁹⁰Human Resources and Social Development, 'Labour Reform Initiative (LRI) Services Guidebook' (HRDS, 31 March 2022) <https://hrsd.gov.sa/en/policies/labor-reform-initiative-lri-services-guidebook> accessed 11 July 2022.

⁹¹ *ibid.*

⁹² Al-Arabiya, 'Saudi Arabia bids farewell to the sponsorship system for expatriate workers' (Al-Arabiya, 14 March 2021) <<https://www.alarabiya.net/aswaq/economy/2021/03/13>> accessed 11 July 2022.

⁹³ Human Resources and Social Development, 'Labour Reform Initiative (LRI) Services Guidebook' (HRDS, 31 March 2022) <<https://hrsd.gov.sa/en/policies/labor-reform-initiative-lri-services-guidebook>> accessed 22 September 2022; Soaad Alya'la 'A new contractual system in Saudi Arabia folds the page of the sponsorship system' (Independent Arabia, 14 March 2021) accessed 22 September 2022.

account is considered to be a method of control over the worker's entitlements; obligating the expatriate worker to open an account in a Saudi bank, and obligating the employer to transfer the worker's salary to this account.

However, unfortunately this initiative excludes five occupations: private drivers, guards, domestic workers, shepherds and gardeners.⁹⁴ These workers are isolated from the general public and unaware of many of their rights, moreover the Kafāla system has intensified the vulnerability of domestic workers to human trafficking. The exclusion of these five categories, including domestic workers,⁹⁵ contradicts international conventions and reinforces the principle of slavery. In June 2021, a group of United Nations special rapporteurs expressed 'deep concern' regarding the conditions of migrant domestic workers in the KSA.⁹⁶ Their report highlighted that some migrant domestic workers live in slave-like conditions and abuse in the modern era and that the treatment of these workers amounts to human rights violations placing migrants 'at the mercy of employers'.⁹⁷ KSA legislation does not impose any significant penalty for mistreatment of migrant workers or provide protection by the competent authorities.⁹⁸

⁹⁴ KSA labour legislation does not apply to these five groups of workers. This is why the Kafāla system reforms cannot be extended to these five categories of workers.

⁹⁵ Al-Arabiya, 'Four o'clock Bulletin: The abolition of sponsorship system in Saudi Arabia' (*Al-Arabiya*, 14 March 2021) <<https://www.youtube.com/watch?v=C9RZX-zjOGs>> accessed 20 June 2022>.

⁹⁶ Committee for justice, 'UN Concerned About Allegations Of Mistreatment Of Migrant Workers In Saudi Arabia Despite Recent Reforms' (*Committee for justice*, 08 August 2021) < <https://www.cfjustice.org/un-concerned-about-allegations-of-mistreatment-of-migrant-workers-in-saudi-arabia-despite-recent-reforms/>> accessed 11 September 2022.

⁹⁷ *ibid*; see also Omayya Chidiac 'Migrant Construction and Domestic Workers in the Arab Gulf States: Modern-Day Slaves' (Master of Laws, York University in Toronto 2014).

⁹⁸ The article's author is anonymous 'Domestic Workers in Saudi Arabia: Torture, rape and Enslavement of Individuals.' (Alwaght newspaper: Analysis & news, 24 November 2021) <2021http://alwaght.net/ar/News/209783/%D8%A7%D9%84%D8%B9%D9%85%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D9%85%D9%86%D8%B2%D9%84%D9%8A%D8%A9-%D9%81%D9%8A-%D8%A7%D9%84%D8%B3%D8%B9%D9%88%D8%AF%D9%8A%D8%A9--%D8%AA%D8%B9%D8%B0%D9%8A%D8%A8-%D9%88-%D8%A7%D8%BA%D8%AA%D8%B5%D8%A7%D8%A8-%D9%88-%D8%A7%D8%B3%D8%AA%D8%B9%D8%A8%D8%A7%D8%AF-%D9%84%D9%84%D8%B9%D8%A8%D8%A7%D8%AF> accessed 02 July 2023>.

5.5 The Impact of the Application of the Ḥanbalī School of Thought and Islam on Reforming the Kafāla System in the KSA

Islamic Sharīʿa generally stipulates that the exploitation of human beings is prohibited since any form of exploitation is considered to be contrary to human dignity.⁹⁹ Furthermore, Islamic Sharīʿa also explicitly prohibits certain forms of exploitation.¹⁰⁰ This prohibition includes several categories, which are similar to what is contained in the Palermo Protocol, for example, the prohibition of forced labour and the prohibition of the exploitation by the prostitution of others, as well as the prohibition of trafficking in human organs.¹⁰¹ In addition to the practices covered by the Protocol regarding specific forms, the Ḥanbalī doctrine in Islam prohibits other forms of exploitation, including what may occur as a result of illegal practices applied to expatriate workers.¹⁰² This section discusses the impact of the application of Ḥanbalī thought in Islam on combating human trafficking in the KSA and is divided into three subsections; first, the prohibition of mistreatment of people; second, how the Kafāla system violates the principle of human dignity in Islam; third, the best mechanism to end the Kafāla system and available alternatives.

5.5.1 Prohibition of Mistreatment of People, Forced Labour and Servitude

Islamic Sharīʿa forbids exploitation and emphasises the rights of workers, as the prophet Mohammed (PBUH)¹⁰³ said, ‘Whoever hires a worker, let them know their wages.’¹⁰⁴ and ‘Give

⁹⁹ Nasser Al-Shahranī, *Combating Human Trafficking The National Legislative Framework in the Kingdom of Saudi Arabia* (Naif Arab University for Security Sciences Riyadh 2008).

¹⁰⁰ Zurainī Ab. Hamid & Khairil Azmin Mokhtar, ‘Human Trafficking: The International Malaysian Legal Law Framework and Sharīʿah Perspective’ (2013) 21 IIUM IIUMLJ 287.

¹⁰¹ Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (Palermo Protocol).

¹⁰² Adnan Zulfiqar, ‘Religious sanctification of labour law: Islamic labour principles and model provisions’ (2007) 9 University of Pennsylvania Journal of Labour and Employment Law 421.

¹⁰³ The abbreviation "PBUH" stands for "Peace Be Upon Him." When the Prophet Mohammed's name is mentioned, Muslims generally say this in honour of him.

¹⁰⁴ Sunan al-Tirmidhī: Faith and vows (3857), Ahmed's document: (3/59).

the hired workers their wages before their sweat dries up'.¹⁰⁵ He also quoted 'Allah would be the enemy of three persons on the day of Resurrection and one of them would be the one who hired somebody for a stipulated wage, took full advantage of their labour and then did not give them their due'.¹⁰⁶

Benefiting from the work or service of others is a contractual relationship governed by conditions agreed upon by the two contracting parties. The emphasis on the employee's knowledge of their wages before commencing work was a guarantee of their rights, and the employer is obligated to pay their wages upon completion of the work.¹⁰⁷ The order by Prophet Mohammed (PBUH) that workers should receive what they are owed before their sweat dries up is a metaphor for the timely payment of wages.¹⁰⁸

Work itself is highly valued in Islam, and is considered to be an act of worship.¹⁰⁹ Islamic jurisprudence also includes recognised rights for both the employer and the worker.¹¹⁰ It is important to note that in Islam, the notion of a contract (covenant) is not only regarded as a legal custom between two parties, moreover it is regarded as a covenant or a promise before God and mankind.¹¹¹ For example, there must be a clear agreement before the worker implements the agreed work, in order to protect the worker and urge them to work honestly and

¹⁰⁵ Sunan Ibn Mājah: Rulings (1995) 287.

¹⁰⁶ Sahīh al-Bukharī, Sales (2227), Sunan Ibn Majah: Rulings (2442), Ahmad's document: (2/357); see also Fathi Al-Faurī, 'The Jordanian Law on Preventing Trafficking in Persons and Islamic Law' (2019) 46 Shari'a and Law Sciences Journal 379.

¹⁰⁷ The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 04 January 2022.

¹⁰⁸ Tariq A Al-Maena, 'the worker his dues before his sweat has dried up' (*Gulf News*, 27 December 2014) <<https://gulfnews.com/opinion/op-eds/pay-the-worker-his-dues-before-his-sweat-has-dried-up-1.1432644#>> accessed 04 January 2022.

¹⁰⁹ Ali Abbās, 'Islamic work ethic: a critical review' (2008) 15 Cross Cultural Management: An International Journal 5.

¹¹⁰ Kazi Arshadul, 'Rights of Labourers in Islam: Bangladesh Perspective' (2018) 9 Beijing Law Review 345.

¹¹¹ S B Choi, N H Han, M Khan, and J H Bae, 'Towards a Better Understanding of Good Faith Concept in Islamic Contract Law' (2018) 7 International Journal of Engineering & Technology 247.

safely, and to fulfil contracts according to the established principles.¹¹² The Qur'ān, states 'O you who have believed, fulfil [all] contracts'.¹¹³ Therefore, the nature of the contract for workers from an Islamic perspective is different from others because the contract has prophetic tradition; also in the Qur'ān, Allah commanded people to fulfil contracts in general.¹¹⁴

Offering and accepting work in Islamic Sharī'a involves important principles. For example, the agreed-upon work must be legally permissible. Conversely, this implies that trafficking for any illegal practice, such as selling organs or prostitution, is prohibited in Sharī'a.¹¹⁵ Likewise, Islam encourages work and discourages the practice of laziness and begging, which can be one of the activities of forced 'labour'.¹¹⁶ The Prophet Mohammed (PBUH) praises people who work hard and condemns begging and laziness.¹¹⁷ One Islamic scholar of the Ḥanbalī School Ibn Taymiyyah¹¹⁸ asserts that the act of begging is forbidden, although other Islamic scholars mention that begging is permissible if it is out of necessity, and no one is harmed.¹¹⁹ Furthermore, if no one is being lied to, it is permissible to ask for material aid.¹²⁰ Therefore, the exploitation of a person for the purpose of begging in the context of human trafficking is a prohibited act under Islamic law as there is no necessity for the perpetrator, whose only goal is

¹¹² Arshadul, (n 110).

¹¹³ Qur'ān, 5:1.

¹¹⁴ Hussein Hassan, 'Contracts in Islamic law the principles of Commutative justice and liberality' (2002) 13 Journal of Islamic Studies 257.

¹¹⁵ The OIC Independent Permanent Human Rights Commission, 'Human trafficking in OIC countries' (May 2016) <<https://oic-iphrc.org/en/data/docs/studies/358156.pdf>> accessed 06 January 2022.

¹¹⁶ Muhammad Al-Bukharī, *Sahīh Al-Bukharī* (1st edn, Vol 3, Book 34, Hadīth number 286, Dār Ibn Kathīr, Damascus, 2002); Narrated Abu Huraira: Allāh's Messenger (PBUH) said "By Him in Whose Hand my life is, it is better for anyone of you to take a rope and cut the wood (from the forest) and carry it over his back and sell it (as a means of earning his living) rather than to ask a person for something and that person may give him or not. This statement demonstrates the respect and encouragement that Islam has for work.

¹¹⁷ Myada O El-Sawī, 'Beyond the "Tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39 Georgia Journal of International & Comparative Law 391.

¹¹⁸ Ibn Taymiyyah (ابن تيمية), was a Sunnī Islamic scholar, muhaddith, polymath, theologian, judge, philosopher, and sometimes controversial thinker and political figure who lived from 22 January 1263 until September 26, 1328.

¹¹⁹ Islam Web, 'Begging in Islam' (*Islamweb*, 18 April 2004) <<https://www.islamweb.net/en/fatwa/87527/begging-in-islam>> accessed 12 December 2021.

¹²⁰ Al-Sayed Sabqī, *Fiqh al-Sunnah* (4th edn, Vol 3, Dār Al-Fikr, 1983).

to gain profit through deception. This act often also involves harm and threats for the victims of human trafficking.

In conclusion, the exploitation of human beings through forced labour and service is an explicit violation in Islam resulting in the denial of the dignity and rights of the worker.¹²¹ As a result, it necessitates the provision of civil compensation as well as criminal liability via the Ta'zir penalty.¹²² This sanction is consistent with international human rights law which prohibits the trafficking in persons, for forced labour and forced services as enshrined in the Palermo Protocol.

5.5.2 The Kafāla System and the Human Dignity Principle in Islam

The Kafāla system grants the employer various privileges to impose on the personal lives of those they sponsor. These impositions are closely related to the issue of exploitation of workers which is contrary to the principle of freedom in Islam.¹²³ Several jurists view the existence of the Kafāla system as a violation of the rights of workers in Islam. For instance, Mohamed Mattarhas explicitly stated that this system contradicts the teachings of Islam and should be abolished.¹²⁴

The Permanent Committee for Scholarly Research and Issuing of Fatwas in the KSA has prohibited the sponsor from taking compensation in return for sponsoring the worker in the state so that he can work freely.¹²⁵ This ban has also been acknowledged and endorsed by the

¹²¹ El-Sawi (n 20).

¹²² For more details on the meaning of the crime of Ta'zīr in Islam, see Chapter Three, Section 2.1.1 of this thesis.

¹²³ UN Office on Drugs and Crime (UNODC) (n 6).

¹²⁴ The sponsorship system provides a black market for visas, leaving dozens of workers living in unworthy conditions. A large number of workers reside in a small space, and this is really flawed. The way of life is inconsistent with Islamic principles which calls for respect for human rights; see also UN Office on Drugs and Crime (UNODC), 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' (June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed 20 May 2022.

¹²⁵ Fatwas of The Permanent Committee for Scholarly Research and Iftaa (*Shamela*) <<https://shamela.ws/book/8381/9230>> accessed 24 June 2023.

Ḥanbalī school.¹²⁶ It has been justified on two bases: first, sponsorship in Islam is a contract of donation, not a contract of exchange, and it is not permissible for the sponsors to take a fee for it. Second, obtaining compensation in return for sponsoring a person is considered bribery, which is forbidden by Islamic Sharī‘a. Opposing this, others have said that it is permissible to take compensation for the worker’s sponsorship.¹²⁷ This is the view of Abdullah bin Manea.¹²⁸ In addition to provisions of the Kafāla system contradicting Islamic Sharī‘a and international law, the Kafāla system's guiding principle is to help others.¹²⁹ As a result, forcing the worker to pay in exchange for Kafāla is illegal because it violates human dignity. When contemplating the elements on which the Kafāla system are based, it becomes clear that the system leads to exploitation and abuse of foreign domestic workers. Such treatment may lead to a potential component of human trafficking.¹³⁰ Therefore, it can be said that the authority exercised by the employer over the worker under this system is a prohibited act under the Ḥanbalī doctrine in Islam.¹³¹ This legal prohibition is in addition to the principles contained in the KSA’s comprehensive legal framework for combating trafficking in persons. Therefore, this practice is not permissible at all, whether with or without compensation, since the provisions of this system are contrary to human dignity in Islam.

5.5.3 The Need to Abolish the Kafāla System

The relationship between the migrant domestic worker and the employer should be within the framework of the labour relationship and thus those provisions of sponsorship that are not

¹²⁶ Suleiman Al-Mulhim, ‘Taking compensation on Kafāla’ [2014], Journal of the Saudi Fiqh Association 517.

¹²⁷ Nazia Hammad, *Contemporary Jurisprudence Issues in Money and Economics* (Dār Al-Qalam Damascus, 2001) 300; According to Nazia Hammad, taking money in exchange for Kafal is permissible.

¹²⁸ Abdullah bin Manea, *Research and Fatwas in Islamic Economics* (1st edn, Vol 3, Saudi Arabia Dār Alam Al-Kutub for Printing Publishing and Distribution, 2016) 331.

¹²⁹ Ray Jureidini and Fares Hassan, ‘The Islamic Principle of Kafāla as Applied to Migrant Workers: Traditional Continuity and Reform,’ Migration and Islamic Ethics, 2 (Residence, Naturalization and Citizenship 2020) 92.

¹³⁰ UNHRC, ‘Report of the Special Rapporteur on trafficking in persons, particularly women and children, Sigma Huda’ 4th session (25 April 2007) UN Doc A/HRC/4/23/Add.2, para 63.

¹³¹ Asma Azharī, ‘The Kafāla 'Sponsorship' System in Saudi Arabia; A critical analysis of International human rights and Islamic Law’ (2017) 10 The SOSA Journal of postgraduate Research 61.

related to the working relationship should be abolished. It is clear from the previous sections that the powers granted to the sponsor (the employer) over the sponsored person (the worker) are the cause of the problem. These prerogatives go beyond the working relationship between the two parties. This extends to personal matters related to the migrant domestic worker and matters related to their relationship and dealings with others, in addition to matters relating to the domestic worker's relationship with the state of the KSA. This relationship should be restored to its normal state, limiting the relationship between employees and employers to the framework of labour law. Therefore, the provisions of the Kafāla system and its authority over employees must be abolished.

There are three key relationships that shape the experiences of migrant domestic workers in the KSA. The first is the employee-employer relationship. This relationship is related to the worker's carrying out the agreed work and is solely a labour relationship between the two parties. It is therefore regulated by the labour contract and law. The KSA's Ministry of Labour oversees this relationship. The Ministry puts in place measures and mechanisms to ensure that the worker obtains his/her rights in accordance with the provisions of the contract and the law. The Ministry also develops the necessary means to activate the overseeing bodies at the Ministry and expedite the bringing to a solution of labour cases between the two parties through qualified bodies in international and Islamic Sharī'a. Workers may object to such decisions before the High Labour Courts.

Second is the relationship of the migrant domestic worker with the state. The worker needs the services of some public institutions in the country (e.g. to obtain a travel visa or driver's license, or for the issuing or renewal of residence). They must also respect state regulations. The worker should enjoy security and protection over themselves and their money. This worker-state

relationship is not a matter for the employer, and the state must set the necessary controls to maintain this independence. This relationship should be clearly incorporated through the enactment of new residency and immigrations laws in the KSA. Any new residency law must cancel any requirement for the employer's approval of matters relating to the worker's personal life or relationship with others.

Third is the worker's relationship with other individuals or entities in the KSA that the worker may need to deal with. These relationships do not affect the employer and therefore, the employer should not be involved. The worker has an independent status with others, as is the case with any citizen.

The solution I suggest in this case, is to abolish the Kafāla system between the migrant domestic worker and sponsor. The relationship of the domestic worker with the employer must be restricted to the framework of work, as governed by contract and labour law. Thus, the relationship between the two becomes that of an employer and an employee, not a sponsor and a sponsored person. As a consequence, the domestic worker's sponsorship should be considered void. A new residency law must be issued regulating the relationship of the migrant worker with the state. In addition, any regulation of sponsorship provisions should be removed from the bodies supervising the affairs of migrant workers, such as labour agencies and the General Directorate of Passports.

5.5.4 Establish an Obligatory Insurance Policy

The purpose of this proposal is to create a mandatory agreement that protects both employers' and employees' financial or material rights. If this protection was provided, sponsorship provisions would no longer need to be required. If the goal of the Kafāla system is to protect the financial rights of the employer and others, the existence of this policy document will protect

the rights of both parties. The existence of this policy ensures and guarantees the fulfilment of these financial rights.

The policy that is proposed by this research aims to cover the expatriate worker's responsibilities. This for example is if they cause damage to the employer or others. Additionally, the policy would cover the employer's responsibility, such as paying the worker's salary. In order for this proposal to achieve its purpose, this policy document must be mandatory, so that the employer cannot be allowed to hire the domestic worker until after the submission of this document.

The following provides more clarification on the most prominent features of the proposed document including scope of coverage of the document (damages to be covered and the beneficiaries thereof). The worker and the employer would equally benefit from the policy at the same time, i.e. it would be a double liability insurance policy, so the worker would be the beneficiary of the policy by allocating the following risks:

- i. Securing the employer's payment of the worker's wage for a defined term of no less than six months, as well as any other financial dues, such as the end-of-service gratuity or any other compensation declared by the court.
- ii. Unemployment insurance in the case of a worker's dismissal for a period of three to six months, with a maximum length of 12 months in the event of an unresolved court dispute with the employer.
- iii. Insurance that would pay the cost of the travel expenses should the employee travel to his home nation.
- iv. Legal Protection Insurance: Coverage would include the cost of legal representation or advice obtained by the employee solely in cases that s/he filed.

The following risks would be covered by the policy for the employer as well:

- i. Damages incurred by the employer as a result of the employee's actions, including those that result from the employee's absence from work, 'escaping', and so forth. A list of

these items classed as damages can be prepared. For instance, it could include the employer's expenses and recruitment costs as well as any loss represented by the employee's expenses.

- ii. Damages coming from theft, embezzlement, destruction, or disclosure of trade secrets.
- iii. Damages caused by the worker to others (other than the employer) stemming, for example, from incidents of damage or loss, etc.

Concerning the document's term and cost, the duration of the document would be effective for the period of residence, which would begin on the date on the work contract and be tied to it. As a result, the insurance would be tied to the contract, both in existence and nonexistence. In terms of the document's predicted cost over a year (its worth or price), the researcher believes it would not surpass a suitable limit. As one of the factors determining the cost or value would be the number of workers subject to it, the greater the number, the lower the cost of the policy. (As previously stated, the number of domestic workers in the KSA exceeds 3,700,000). Its price would also be determined by the maximum financial coverage for one year. In terms of who would bear the cost of this document, the researcher believes that there is justification for the employer to bear its full cost in exchange for reducing the cost of the worker's entry visa paid by the employer. To ensure the seriousness of the progress of this process and the reduction of the cost of this policy, the Ministry of Labour could limit the sale of this policy to a specific number of insurance companies that quote the best insurance offers and have a commercial reputation for reliability and financial solvency. This document should also be a 'unified document', which means that its content should be consistent from one insurance company to the next, or from one worker to the next.

5.6 Conclusion

Islamic law in principle is powerful in preventing, punishing and suppressing human trafficking, especially when children and women are the victims.¹³² Yet, the KSA's application of provisions of the Kafāla system, and the constitution of the KSA which is based on the Qur'ān and Sunnah, have generated considerable controversy in dealing effectively with the human trafficking problem which in effect does not comply with the teachings of Islam and international human rights law.

As human trafficking is a problem that affects the Muslim world in general, including the KSA, an Islamic approach that complements and supports the international legal framework to address this problem could be a valuable asset. The KSA's provisions of the Kafāla system concerning migrant domestic workers are condemned not only by international laws but also by the Qur'ān and Islamic principles; therefore, it should be abolished. It is suggested that Islamic Sharī'a should be interpreted through the process of ijtihad in accordance with the Ḥanbalī school of thought which is adopted by the KSA's state in an effort to establish protection for victims of the crime of human trafficking by reforming the KSA's law particularly the Kafāla system. Furthermore, Muslim religious scholars should issue the necessary fatwas to strongly condemn the causes of human trafficking such as the Kafāla system and the harmful and illegal acts that lead to it.¹³³

The main conclusion reached is that although the Kingdom has enacted domestic anti-trafficking legislation and implemented measures, it has also enacted provisions that have a negative impact on the fight against human trafficking such as the Kafāla system. The Kafāla

¹³² UN Office on Drugs and Crime (UNODC), 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' (June 2009) <<https://www.refworld.org/docid/4a69b6ba2.html>> accessed on 15 May 2023.

¹³³ In Arabic, فتاوى a fatwas is a legal ruling given by a qualified jurist on a point of Islamic law (Sharī'a) in response to a question posed by a private individual, judge, or government.

system is not fully compliant with relevant international standards or with Islamic Sharī'a. Therefore, the approach of the KSA's legislative system regarding the Kafāla system and human trafficking requires to be re-evaluated, to take into consideration both the true spirit of Islamic Sharī'a and international human rights standards.

The State's launching of the CRII on 11th November 2020 to review the issue of the KSA's sponsorship of the migrant worker represented a major step towards improving the humanitarian conditions of migrant workers. The launch of the LRII (see section 4.2) brought important reforms such as abolishing the requirement of obtaining approval from the sponsor when changing jobs or travelling outside the country permanently or temporarily. Unfortunately, for unknown reasons, this initiative excluded five occupations, including the migrant domestic worker. This is despite the fact that the most vulnerable groups to human rights violations and exploitation are domestic workers. It is suggested that the State should abolish the Kafāla system and reassess the KSA's laws on human trafficking in accordance with both the provisions of Islamic Sharī'a and international human rights law in order to establish a coherent and satisfactory framework in relation to migrant workers.

The following chapter investigates and discusses statements from the KSA's reports to the UN human rights treaty monitoring bodies which relate to human trafficking. It also discusses the reactions of various UN human rights bodies and institutions to the reports submitted. The goal is to further analyse the KSA's compliance with international human rights law on this issue.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The aim of this thesis was to determine and analyse how effective the KSA's enforcement mechanisms have been in combating the crime of human trafficking and whether these mechanisms adhere to both Islamic Sharī'a and the legal tools provided by international human rights law.¹ Over the past two decades, the issue of human trafficking has become a major concern for the UN. Muslim countries, specifically in the GCC region including the KSA, have been affected by human trafficking at an alarming rate. This thesis has illustrated the failures of the KSA government to properly adhere to international human rights law and Islamic Sharī'a in order to prevent human trafficking. As a result, the KSA will continue to face critical challenges in efforts to eliminate human trafficking unless its domestic legislation is improved.

Part two of this chapter highlights how the four research questions have been answered. Part three consolidates the main recommendations. Part four outlines suggestions for future research.

6.2 Conclusions

The research questions centred on analysing how effective the KSA government has been in combating the crime of human trafficking by adhering to Islamic Sharī'a and the legal frameworks provided by international human rights law.

6.2.1 Research Question 1: How is human trafficking defined in both international human rights law and Islamic Sharī'a?

¹ Article 1 of the Saudi Basic Law of Governance states that the Constitution of the Kingdom of Saudi Arabia is based on the Holy Quran and the teachings of the prophet.

Chapter Two began by providing the most widely accepted definition of human trafficking, that is the definition stipulated in Article 3 of the Palermo Protocol. The definition in this Protocol includes many aspects of human trafficking, such as the transport, recruitment, and harbouring of persons by means of coercion, force or abduction, in addition to deception in order to exploit and abuse vulnerable people. At a minimum, exploitation includes prostitution of others or other forms of sexual exploitation, forced labour, slavery or slavery like practices, servitude, or the removal of organs. This detailed and comprehensive definition shows that human trafficking is a crime that involves different strands and variables which may include organised individuals or groups who recruit or participate in transporting and harbouring persons. This thesis analysed the Protocol and the provisions of the UDHR, as well as the legal definition of forced labour or service, slavery, or practices similar to slavery, or servitude under the Palermo Protocol. Chapter Two of this study highlighted the importance of the Palermo Protocol in regard to human trafficking issues at both regional and international levels; they not only define human trafficking in a broader context moreover they emphasise the need for the cooperation of states on this matter.

As was discussed in Chapter Three, established scholars of Islamic jurisprudence did not provide a definition of the crime of human trafficking, due to the novelty of the relevant terminology, despite the presence of different forms of these crimes since ancient times. Nevertheless, aspects of human trafficking were discussed by the scholars, who opposed certain forms of human trafficking and proposed penalties for those crimes. Undeniably the KSA's domestic law and international conventions have defined human trafficking using similar terminology. In contemporary Islamic jurisprudence, human trafficking is defined as the recruitment or transfer of persons by force, coercion, or by deception for the purpose of any

kind of exploitation of people including sexual exploitation, forced labour, and servitude, in addition to slavery, begging, human organ trafficking, etc.

Both Islamic Sharī‘a and international law contain provisions to combat human trafficking. Many international and regional charters have been adopted by the Islamic world which condemn and prohibit the crime of human trafficking and any related crimes. Consequently, this confirms that these instruments coincide with the principles of the Islamic Sharī‘a. Given that, the Islamic Sharī‘a framework can contribute to and support international efforts to combat human trafficking in persons. On that basis, Islamic countries are fully equipped to effectively implement these principles.

6.2.2 Research Question 2: What is dignity, and how do concepts of dignity influence human trafficking definitions?

Since efforts to oppose and outlaw slavery are fundamentally derived from the Islamic concept of the dignity of the human person, all forms of slavery, including human trafficking, are forbidden in Islam. Chapters Two and Three demonstrate that the idea of human dignity in the KSA is embedded in Islamic theology, while the concept of human dignity in international human rights law is developed through philosophy. The philosophical approach is derived from the argument that all human beings possess common attributes which must be recognised despite the argument that some people may not be able to express those traits. However, the theological view of the human being had prominently defined human dignity as a value bestowed upon all people; therefore, it is a divine gift regardless of the ability of people to express these attributes. Both approaches indicate that dignity is ‘the essence of all human beings and is not granted to people by their social status rather simply through their nature of

being human beings'.² Contemporary studies portray human dignity as a universal philosophy. This supports John Locke's concept of dignity which states that human dignity is a freedom that should never be violated without proper justification. This requires that each person has the right to be respected and accorded fair treatment; this is a fundamental concept in the theological and philosophical definition of human dignity.³ This idea also reflects Kantian philosophy which states that dignity not only requires the respect of others' free will 'but also the concomitant obligation not to abrogate it by treating them as an instrument of another's free will'.⁴

Chapter Two and Three stressed that the importance of the concept of human dignity for both international human rights law and Islamic Sharī'a cannot be overemphasised. These chapters analysed the reasons for the importance of human dignity as a concept in international human rights law and Islamic Sharī'a, and as a part of *Jus Cogens*. Furthermore, these chapters also illustrated that the concept of human dignity carries a moral value that is inalienable and can be utilised to create legally binding laws that protect the victims of human trafficking and prosecute the perpetrators. Human dignity is universal; therefore, the rights of the victims of human trafficking crimes must be protected, regardless of race, age, gender, ethnicity or immigration status. The fundamental purpose of human dignity in both the principles of Islamic Sharī'a from which the KSA derives its legislation and international human rights law is the protection of others from harm.

6.2.3 Research Question 3: What are the legal mechanisms put in place by the Kingdom of Saudi Arabia that aim to combat human trafficking?

² Leslie Henry, 'The jurisprudence of dignity' (2011) 160 University of Pennsylvania Law Review 169.

³ Richard Tuck (ed), *Cambridge Texts in the History of Political Thought* (Revised student edn, New York Cambridge University Press 1996) 415.

⁴ Immanuel Kant and Jerome Schneewind, *Groundwork for the Metaphysics of Morals* (Yale University Press 2002).

In Chapter Two, it was shown that the KSA is a signatory and party to numerous international instruments pertaining to labour rights, human rights, and the dignity of human beings. This thesis found that the Kingdom has institutions and committees that are given the mandate and full support to manage the perpetrators of human trafficking, to refer the perpetrators to the relevant investigating bodies, and to refer them to the court for trial in fulfilment of its commitments towards the various conventions.⁵ Many of the KSA's legislative and administrative measures have been taken in order to achieve the ultimate goal of dealing effectively with human trafficking in all of its forms.⁶ These measures include the initiatives of the National Committee on Combating Human Trafficking to work with the relevant NGOs.⁷ The Committee's intention is to enhance the ability to implement human rights conventions, to ensure timely submission of reports to UN human rights treaty monitoring bodies, and to ensure the coordination of data collection and analysis of the content and consultation with civil society organisations. The KSA's Anti-trafficking in Persons Law defines the crime of human trafficking and criminalises it with a penalty of up to 15 years imprisonment.⁸ Also, the KSA's Labour Law is designed to prevent torture, forced labour, and violations of labour dignity.⁹ Moreover, this study demonstrated that the KSA has enacted other legislation such as the basic law of governance (1992)¹⁰, Regulations of Domestic Workers and Those of Similar Status (2013),¹¹ the Protection from Abuse Law (2014),¹² the Child Protection Law (2014),¹³ and the

⁵ UN Committee on the Rights of the Child (CRC), 'Consideration of reports submitted by States parties under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography' (26 September 2017) UN Doc CRC/C/OPSC/SAU/1 para 28; see also UN Committee on the Elimination of Discrimination against Women (CEDAW), 'Consideration of reports submitted by States parties under Article 18 of the Convention' (30 September 2016) UN Doc CEDAW/C/SAU/3-4 para 27.

⁶ Letter from the permanent delegation of the Kingdom of Saudi Arabia to the United Nations (dated 31 March 2023, Ref No 413).

⁷ It was formed by the Council of Ministers Resolution No. 244 - 20/07/1430H (13/07/2009) headed by the President of the Human Rights Commission. The membership includes representatives from the Ministries of the Interior, Foreign Affairs, Justice, Social Affairs, Labour, Culture and Information, and Public Prosecution Service.

⁸ Saudi Anti-Trafficking in Persons Law (Royal Decree No M/40) 2009) arts 1 and 3.

⁹ Saudi Labour Law (Royal Decree No M/51) 2005 art 61.

¹⁰ Saudi Basic Law of Governance (Royal Order No A/90) 1992.

¹¹ Saudi Regulation of Domestic Workers and & the like 2013.

¹² Saudi Regulation on Protection Against Abuse (Council of Ministers Resolution No 332 of 01 November 2013).

¹³ Saudi Regulation of the employment of domestic workers (Ministerial Decision No 310 of 2013).

Anti-Harassment Law (2018).¹⁴ Additionally, the KSA has also established government institutions such as the Human Rights Commission and several human rights departments in the Ministry of Islamic Affairs, and has implemented other initiatives on combating abuses, forced labour, slavery, human trafficking and any other practice that may lead to exploitation. The KSA has launched a programme to enhance public awareness of human trafficking and ill treatment of migrant workers which includes developing and implementing a national plan to effectively oversee and supervise that.

6.2.4 Research Question 4: How do these legal mechanisms comply with and balance international human rights law and Islamic law principles and respective concepts of dignity?

Although the KSA claims that the above mechanisms are derived from the principles of the Islamic Sharī'a and are consistent with the international human rights law, the study concluded that they are not sufficiently compatible with either Islamic Sharī'a or international human rights law in relation to the concept of human dignity. I argue that the KSA's unwillingness to establish proactive investigation and monitoring mechanisms are the most problematic issue. As the studies show, men and women travel to the KSA from countries of central south Asia, the Middle East, or Africa. Most of them have been brought into the country either willingly or trafficked as domestic workers or low-skilled workers, accordingly falling into servitude. These workers may be subjected to non-payment of wages, their passports being withheld, and workplace confinement, in addition to working long hours without rest, food deprivation, threats, physical and sexual abuse, or restriction on movement. These practices are violations of human dignity in both Islamic Sharī'a and international human rights law.

¹⁴ Approving the Saudi Anti-Harassment Law (Royal Decree No M/96) 2018.

As was discussed in Chapter Six, despite the reports submitted to the UN Committees by the KSA government on the efforts made to combat human trafficking, many observers argue that the KSA government neither makes enough effort to combat human trafficking or forced labour, nor does it commit to taking additional steps to mitigate human trafficking. Consequently, the plight of victims is exacerbated by a judicial system that fails to meet international standards. Judges often ignore allegations of torture, solitary detention, and the denial of recourse to legal representation, thereby facilitating confessions through coercion. There are indications that when employers are aware of a migrant's intention to file a complaint against them, the employers falsely accuse the migrant worker of anything which can lead to their detention. In many cases, threatening the migrant worker is sufficient to keep the victim of human trafficking silent. As discussed in Chapter Four, the KSA's law does not explicitly provide an exemption for victims of trafficking in persons from arrest and prosecution in relation to their unlawful entry or residence or illegal activities in which they participated as a result of being a victim of human trafficking. This results in a lack of cooperation in detecting and proving such crimes which is a violation of the provisions of international human rights law. Moreover, Chapter Four highlights that, contrary to international law, the KSA's law does not provide a compensatory right for victims of human trafficking. As demonstrated, the KSA has weak mechanisms for regulating, enforcing, and combating human trafficking and forced labour, and prosecuting the perpetrators. Similarly, the KSA has arbitrary provisions that tend to restrict the oversight functions and the independence of human rights activists and NGOs in the Kingdom. In spite of the efforts made by the KSA, the state has not fully complied with its obligations to prevent and suppress human trafficking, and to protect victims in accordance with international human rights law, the principles of Islamic Shari'a, and the concept of human dignity.

As was discussed in Chapter Five, the relationship between migrant workers and their employers is defined through the Kafala system under which enables employers to acquire broad powers over migrant workers consequently leading to the abuse of powers, depriving the workers from returning to their home country even in the event of emergency and forcing workers to perform work that is not prescribed by their employment contract. In addition, the worker must request the permission of the employer if they wish to work elsewhere, furthermore the employer can report workers as absconding if they act without their permission. This may lead to the imprisonment or deportation of the migrant worker. Despite the 2021 reforms of the Kafala system, this thesis established that the Kafala system still has many flaws and concluded that the KSA does not fully comply with either international or Islamic standards and their respective concepts of dignity.

Overall, this study demonstrated that the KSA faces considerable challenges in numerous areas associated with human trafficking, such as the restriction of movement of migrant workers, the withholding of wages and the detention of those found to be working illegally. The research showed that the conditions for migrant workers in many cases violate human dignity, both as defined within the Islamic faith and as developed in Western philosophical and jurisprudential writings and thought. The thesis revealed that because human dignity is integral to both the Islamic tradition and international human rights law, it is both possible and desirable for the KSA to adopt mechanisms to integrate the two complementary concepts of human dignity into domestic law and to apply them appropriately.

6.3 Recommendations

Human trafficking is a blatant assault on human rights, human dignity, and the entirety of the human species. As such, governments must take action by ratifying international treaties and

enacting domestic legislation that prohibit human trafficking. In conclusion, a number of concerning shortcomings have been identified in the KSA government's overall anti-trafficking policies. The adoption of several recommendations including passing particular pieces of legislation in the fight against the crime of trafficking in persons, has the potential to correct these shortcomings as discussed in this thesis. Based on the above conclusions, the following recommendations are proposed according to their priorities (short, medium, and long-term).

For short-term recommendations; It is recommended that the KSA government amends the Anti-trafficking in Persons Law and others in the following ways:

- i. Unify the definition of the crime of trafficking human beings under the KSA's law, therefore removing the confusion that results from the existence of two definitions of the crime of trafficking in persons under the current law.
- ii. Include a new article criminalising the use of services provided by victims of trafficking in persons, even if the beneficiaries of the services were not participating in the crime, assuming they knew that those who offered the service were victims of trafficking crime.
- iii. Criminalise all forms of exploitation provided for in the definition of human trafficking, even if the other elements of the crime of human trafficking are not met. The goal of criminalising human trafficking is to protect people from exploitation.
- iv. Define the forms of exploitation according to international law and in clear and accurate language that corresponds to the KSA's legal environment. In its current form, exploitation in the KSA's Anti-trafficking in Persons Law is ambiguous and the person entrusted with the application of the law will need to refer to international conventions to know what is meant by these terms. This may be difficult or impossible for those entrusted with the task of applying the law.

- v. The KSA's Anti-trafficking in Persons Law must be amended to clearly stipulate both mandatory and minimum penalties of imprisonment as well as fines. The researcher highly recommends expanding financial penalties such as fines and confiscation of the enormous profits resulting from this trade, since the desire to reap the profits resulting from the trade is the motivation for it.
- vi. Include a new article in the KSA's Anti-trafficking in Persons Law stipulating that victims of human trafficking shall not be considered perpetrators of this crime, or violators of the KSA's residency regulations. As a result, these victims should not be held accountable for participating in those illegal activities in which they may have been involved against their own will.
- vii. Provide the person who may be a victim of human trafficking with a period of recovery and reflection of at least 30 days, to enable them to obtain adequate information and advice. This would help to achieve their cooperation with the competent authorities in order to strengthen the fight against human trafficking.
- viii. Ensure that the right to adequate and appropriate compensation for damages from the known offender is recognised and communicated to victims of human trafficking.
- ix. Establish a fund dedicated to helping victims of human trafficking in the KSA. This could be funded through fines and the confiscation of seized assets, and support should be allocated by the KSA to this fund. This fund could contribute to victims being rehabilitated and returned to society, and financially assisted for their return to their home countries.
- x. It is recommended that a provision be inserted into the Saudi Law of Criminal Procedure that allows a secret decision to be considered null and void if it is issued in a case that should have been heard in public. By incorporating such a text, it would be possible to ensure that these regulations are strictly observed.

- xi. The implementation of granting permits to victims of trafficking to remain in the country regardless of their willingness to cooperate with the prosecuting authorities needs to be considered. According to the analysis of this research, the KSA does not implement this human rights approach, and therefore, it recommends that the State should amend its current practices. The KSA should enforce Article 7 outlined in the Palermo Protocol and consider adopting appropriate measures that permit victims to remain in the country. This is the case when either a victim is cooperating with a criminal investigation or proceedings, or it is deemed necessary due to the individual's circumstances.

Regarding medium-term recommendations:

- i. Increase educational support for those in charge of the administration of criminal justice. This should be implemented through specialised legal training programmes in combating human trafficking. It is the duty of the government to cooperate with NGOs and other elements of civil society in relation to protection and prevention as stated in Articles 6 and 9 of the Palermo Protocol.
- ii. Media campaigns should be intensified to raise awareness of the dangers and consequences of the crime of trafficking in persons, through publicly displayed visual images and personal stories. The mandatory penalties resulting from its commission must also be publicised. Increasing the public's awareness could be achieved through increasing the role of visual, audio, and online social media sources regarding human trafficking and its penalties.
- iii. There is a need to create suitable housing for victims of human trafficking in general and domestic workers in particular. Shelters should be set up throughout the country to provide protection and assistance to all victims of trafficking. Shelters must provide

temporary and long-term services for victims in the form of safe housing, provide helplines and case management and medical care, in addition to providing psychological support, legal counseling, consular assistance, and immigration services. All of these would facilitate the process of assisting and protecting victims. In this context the special needs of children should be considered.

- iv. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the ILO Domestic Workers Convention of 2011, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights should all be ratified to strengthen the protection of migrant workers from becoming victims of the crime of human trafficking. In addition, attention must be given to the Global Compact for Safe, Orderly and Regular Migration in 2019. Accession would enhance the position of the KSA in combating the crime of trafficking in persons.¹⁵
- v. There is a need to conclude bilateral and multilateral agreements between countries that would allow direct contact between the authorities for investigating instances of human trafficking without delays caused by excessive bureaucracy. Agreements are needed between the KSA and several countries, in particular with neighbouring Yemen, which has been inflicted by a savage civil war and widespread poverty. These conditions increase the likelihood of human trafficking through criminal networks, with the KSA as the prime destination due to its close proximity and stable economy.¹⁶
- vi. The Kafala system should be completely abolished, and the KSA's laws pertaining to human trafficking should be re-evaluated expeditiously while considering both the

¹⁵ Jane McAdam, 'Global Compact for Safe, Orderly and Regular Migration' (2019) 58 International Legal Materials 160.

¹⁶ UN, 'Combating Human Trafficking in Yemen' (UNODC) <https://www.unodc.org/romena/ar/Stories/2013/March/combating-human-trafficking-in-yemen---stepping-it-up.html> accessed 08 April 2023.

Islamic Shari'a's concept of human dignity and international human rights law, in order to establish a cogent, complementary, and satisfactory legal framework.

- vii. A programme of study in subjects related to human rights and dignity conforming to Islamic Shari'a and international law should be mandatory at all academic levels.
- viii. In order to ensure enforcement, the public prosecution department should consider monitoring complaints received by the Saudi Human Rights Commission and other non-governmental organisations regarding employers (sponsors) who withhold passports from their employees. Prosecutorial oversight must ensure enforcement of these complaints are handled in accordance with the Law of Criminal Procedure, 2001 and other bylaws.
- ix. This study has shown that it is important to take into account all aspects of criminality that contribute to human trafficking including the expansion and development of measures to combat it. There is a lack of enforcement regarding the identification and prosecution of offenders in the KSA. Therefore, it is suggested that the KSA should enforce strategies that focus on identifying victims, providing them with incentives and support in accordance with IHRL, and prosecuting those responsible for abuse.
- x. It is recommended that an interpretative or executive regulation be prepared to provide proper interpretation of the various articles of the KSA's Anti-Trafficking Law.

Regarding long-term recommendations; It is recognised that it will be challenging to change the cultural perspective within the KSA. However, in order to eliminate the crime of trafficking in persons, it will be important to eliminate all negative aspects of the KSA's culture and traditions, including the provisions of the Kafala system, the exploitation of migrant workers, and the practice of temporary marriage for pleasure, as well as forced marriage and child marriage.

It is necessary to educate people to distinguish between what currently passes as socially acceptable and what Islamic Sharī‘a forbids. For example, the confinement of domestic workers to their residence of employment must be forbidden and they must be enabled to leave when desired. In particular, citizens must be made aware of hostile practices against migrant workers, the most important of which are the confiscation of identity documents and the employment of the worker by force or threats, all of which should constitute criminal acts punishable by law. In this context, it is preferable to adhere to the text of the Holy Qur’ān and the Prophet's Sunnah, which prohibit exploitative practices and require good treatment of immigrants. Moreover, the KSA should allow and facilitate the establishment of NGOs in the KSA, similar to the practice of other advanced countries.

Overall, it is recognised that the KSA has a long way to go in terms of fulfilling its obligations to combat human trafficking. Comprehensive steps adhering to both Islamic and international laws are recommended in this thesis in order to eliminate the problem of human trafficking and exploitation. This thesis is written in the hope that it will provide the foundation and driving force for change in the KSA. Therefore, I hope that the relevant government agencies in the KSA will study the above findings and recommendations and come to the same conclusions in order to achieve real and practical changes in the state’s response to human trafficking.

6.4 Future Research

There are remaining issues that are pertinent to this topic which fall outside the purview of this particular study, but which could be addressed in future studies. For example, the use of technology by organised criminals in the context of human trafficking is one of the most

significant of these issues. The use of technology to facilitate the identification, recruitment, coercion, and control of victims by traffickers is on the increase.¹⁷ Technology and the Internet can be used by perpetrators through the entire cyber-trafficking process, from coercion and control, to marketing and selling the products and services derived from their exploitation, and finally, to profit laundering.

The situation in the KSA regarding how the state manages migrants and refugees fleeing from wars and places of conflict is another aspect that could be examined in the future. This is of particular importance given the increased numbers of refugees from conflict zones such as Ukraine, Sudan, Yemen, Syria, and Iraq.

TABLES – NATIONAL AND INTERNATIONAL LAWS

Treaties and Other International Instruments

1926 Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 09 March 1927) 60 LNTS 253

¹⁷ UNODC, ‘Technology facilitating trafficking in persons’ (*UNODC*) <<https://www.unodc.org/e4j/en/tip-and-som/module-14/key-issues/technology-facilitating-trafficking-in-persons.html>> accessed 19 February 2023.

1930 The International Labour Organization (ILO) of Forced Labour Convention (adopted 22 July 1930, entered into force May 1932)

1948 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 12 January 1948, entered into force 1951) 78 UNTS 277

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

1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 02 December 1949, resolution 317 (IV), (entered into force 25 July 1951)

1954 Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 06 June 1960) 360 UNTS 117

1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 07 September 1956, entered into force 30 April 1957) 266 UNTS 3

1961 Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175

1962 Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages (adopted 10 December 1962, entered into force 09 December 1964) 521 UNTS 231

1966 International Convention on Elimination of All Forms of Racial Discrimination (adopted 07 March 1966, entered into force 04 January 1969) 660 UNTS 195

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

1966 International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 01 January 1976) 999 UNTS 3 (ICESCR)

1975 C143 - Migrant Workers (Supplementary Provisions) Convention (adopted 24 June 1975, entered into force 09 December 1978)

1979 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 03 September 1981) 1249 UNTS 13

1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

1989 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 02 September 1990) 1577 UNTS 3

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 01 July 2003) A/RES/45/158

1997 Council of Europe Convention for Human Rights and Biomedicine 1997, 04 April 1997, ETS No. 164, (entered into force 01 December 1999)

2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222

2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227

2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507

2000 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (Palermo Protocol) (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25

2000 United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209

2002 Optional Protocol to the Convention on the Rights of the Child on the sale of children in prostitution and pornography (adopted 25 May 2000, entered into force 18 January 2002)

2005 Council of Europe Convention on Action against Trafficking in Human Beings 2005, ETS No 164 (entered into force 01 February 2008)

2006 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 03 May 2008) 2515 UNTS 3

2006 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3

2011 C189 - Domestic Workers Convention (adopted 16 June 2011, entered into force 05 September 2013)

Regional Instruments

1990 Cairo Declaration on Human Rights in Islam (*adopted at the Nineteenth Islamic Conference of Foreign Ministers, 31 July to 5 August 1990*)

1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 09 April 1997) CETS 164

2004 Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008)

2004 The Declaration of Human Rights of the Cooperation Council for the Arab States of the Gulf (adopted by the Supreme Council of the Gulf Cooperation Council at its thirty-fifth session held in Doha on 09 November 2004)

2005 Council of Europe Convention on Actions Against Trafficking in Humans (adopted 16 May 2005, entered into force 2008) CETS 197

2005 Covenant on the Rights of the Child in Islam (adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen in June 2005)

2005 Covenant on the Rights of the Child in Islam (adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen, in June 2005) OIC/9-IGGE/HRI/2004/Rep.Final

2010 The Arab Convention to Combat Transnational Organized Crime 2010

2011 Abu Dhabi Document for the Unified System (Law) to Combat Trafficking in Persons for the Cooperation Council Countries, General Secretariat of the Cooperation Council for the Arab States of the Gulf (adopted by the General Secretariat of the Cooperation Council for the Arab States of the Gulf 2011)

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1952 the KSA's Residency Regulation (Supreme Royal Order No 17/2/25/1337) 1952

1974 the KSA's Border Security (Royal Decree No M/26) 1974

1992 Kuwait's Constitution of 1962 (reinstated 1992)

1992 the KSA's Basic Law of Governance (Royal Order No A/90) 1992

1993 the KSA's Law of the Council of Ministers 1993

2001 the KSA's Law of Criminal Procedure (Royal Decree No M/39) 2001

2005 the KSA's Labour Law (Royal Decree No M/51) 2005

2009 the KSA's Anti-Trafficking in Persons Law (Royal Decree No M/40) 2009

2009 the KSA's Standing Committee for Combating Trafficking in Persons, established pursuant to Cabinet Resolution No. 244 of 13 July 2009

2013 the KSA's Regulation of the employment of domestic workers (Ministerial Decision No 310 of 2013)

2013 the KSA's Regulation on Protection Against Abuse (Council of Ministers Resolution No 332 of 01 November 2013)

2013 the KSA's Regulation of Domestic Workers and & the like 2013

2013 the KSA's Law of Criminal Procedures (Royal Decree No M/2) 2013

2013 Approving the KSA's Anti-Harassment Law (Royal Decree No M/96) 2018

2020 the KSA's Personal Status Law (Royal Decree No M/73) 2020

2021 The draft of the KSA's Penal Code 2021

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About the Author

Dr. Abdulatif Al-Kharji is a distinguished Saudi lawyer and Assistant Professor, recognized for his dual expertise in legal practice and academic scholarship. A member of the General Assembly for Combating Human Trafficking, Dr. Al-Kharji brings nearly two decades of experience that bridges traditional Sharia law and modern legal systems.

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As co-founder and partner at Assesseur Law Firm and Legal Consultancy in Riyadh, Dr. Al-Kharji has represented clients in complex matters involving administrative, commercial, real estate, family, and corporate law. He is also deeply involved in legislative drafting and arbitration, known for his analytical rigor and ethical professionalism.

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Coming from a renowned judicial family—his grandfather, Judge Abdullah Al-Kharji, was among the prominent educators of King Abdulaziz—the author continues a proud legacy of service to justice in the Kingdom.

Dr. Al-Kharji's career reflects a rare harmony between legal tradition and modern reform, making him a leading voice in the ongoing development of Saudi Arabia's legal landscape.