



The Legal Production of Illegality: Obstacles and Opportunities to Protect Undocumented Migrants in the Gulf States

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The Legal Production of Illegality: Obstacles and Opportunities to Protect Undocumented Migrants in the Gulf States

*Elizabeth Frantz**

Abstract: Irregular migration has been identified as a major policy “problem” by Gulf governments. The prevailing approach focuses on punitive measures such as the imposition of fines on overstayers and law enforcement efforts involving detention and deportation. More recently, some governments have proposed that Gulf Cooperation Council (GCC) states work together to reduce the number of irregular migrants by imposing GCC-wide entry bans on migrant workers who have absconded from their employers. These efforts are unlikely to succeed in curbing the phenomenon. This chapter argues that the large number of migrants in an “irregular situation” in the Gulf States should be understood not as a result of insufficient migration controls but rather as a product of the rules on entry, residence and employment to which non-citizens are subject. Efforts to punish individuals are likely to be less effective than comprehensive policy measures designed to prevent and minimise irregularity. The chapter is divided into three parts: the first examines the production of irregularity – the constellation of factors driving migrants into irregular situations, including strict rules which create incentives for migrants to leave or avoid regular employment. The second part discusses the impact

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of irregularity on migrants, particularly how this affects their engagement with the labour market and ability to defend their rights. The third and final section discusses the role governments of origin and destination countries could play to develop more effective, sustainable approaches to address both the causes and effects of irregularity.

Introduction

In almost every region of the world, the question of how to respond to the problem of irregular migration is hotly debated. The prevailing government response in many countries has been to strengthen border controls, to introduce one-off or successive regularisation or amnesty campaigns, and to use punitive measures such as detention and deportation to assert state sovereignty and deter further arrivals. But these measures often fail to manage migration effectively or efficiently.

Saudi Arabia's recent crackdown on undocumented migrants is part of a familiar pattern. In 2013, the government embarked on one of the largest and most aggressive "regularisation" campaigns in the region's history. Portrayed as an effort to reduce unemployment among Saudi youth, the campaign followed an amendment to the labour law empowering police to enforce provisions against undocumented workers, including by detaining and deporting all foreign workers found working for someone other than their sponsoring employer (American Bar Association 2013). Some 20,000 workers were detained in the first two days (Human Rights Watch 2015: 1). By November 2013, when the "grace period" presumably meant to allow workers to regularise their status ended, five million workers had legalised their status, and at least one million had been expelled or left voluntarily (De Bel-Air 2014: 5). Hundreds of thousands more were deported in 2014 (Human Rights Watch 2015: 1). The campaign was accompanied by reports of ill-treatment of migrants, including attacks by Saudi police and citizens, and poor conditions in detention, including inadequate food and beatings by guards (Global Detention Project 2015: 68-9).

These events took place against the backdrop of rising unemployment among Saudi nationals, and in a political climate in which migrant workers are perceived as an economic necessity but a cultural and demographic threat. In such contexts, regularisation and expulsion campaigns such as those implemented by Saudi Arabia serve as "border spectacles" (De Genova 2014), displays of enforcement that make undocumented migrants visible as subjects to be punished in ways that both affirm national unity and give the impression the state is "in control." The stated goal

is to force undocumented migrants to leave or become included in the regular administrative framework. But this is only a stop-gap measure, a temporary fix rather than a holistic solution. Such approaches overlook, and in fact leave intact, the structures driving people to become undocumented in the first place.

In much of the public rhetoric in the Gulf States and beyond, undocumented migrants are cast as transgressive for working and living in the country without authorisation. This chapter proposes a different view. The aims are, first, to demonstrate that the large number of migrants in an “irregular” situation in the Gulf States should be viewed not as a result of insufficient migration controls but rather as a direct product of the legal rules on entry, residence, and employment to which non-citizens are subject. I take, as a starting point, a view of irregular migration not as a form of deviance on the part of migrants but instead as the effect of a constellation of laws, regulations, and practices established by the state for the express purpose of controlling migration. As De Genova’s work on Mexican migration to the US shows, the irregularisation of migration is a regular, predictable feature of the routine functioning of border management (De Genova 2014:8). Second, while seeking to avoid the often state-centred approach taken by many who have written about this subject, this chapter does have policy in mind. The second half of the chapter proposes a policy approach to undocumented workers that would both protect migrants’ rights and reduce the drivers of irregularisation in Gulf labour markets.

Terminology

There are dangers associated with taking policy categories as the starting point for analysis (Mezzadra 2014: 121). Fixating on the figure of the “irregular migrant” could serve to reify problematic taxonomies, asserting some forms of cross-border movement as legitimate and others not. While the term “irregular migration” is used in this chapter, when speaking of people I have opted to use the term “undocumented migrant” in place of more derogatory terms such as “irregular migrants” or “illegal migrants.” It is worth mentioning, however, that the migrants we refer to as “undocumented” are not necessarily without papers; they may or may not have in their possession valid identity documents attesting to their citizenship. The meaningful distinction is that they are people whose entry, stay, or employment is not authorised by the state.

Historical Genesis of Contemporary Migration Policies

Migration has been a constant feature throughout the Gulf's recorded history. The port towns of Manama, Kuwait City, and Dubai attracted migrants from the opposite side of the Indian Ocean long before the discovery of oil. During the nineteenth century, migrants from India, Iran, and farther east, along with groups from the desert and inland agricultural areas of eastern Saudi Arabia, flocked to coastal Gulf towns to work in the pearling industry and commercial trade (Fuccaro 2005, 2009, 2010). Immigrants, settlers, sailors, and administrators from British India dominated the social landscape in early twentieth-century Manama (Fuccaro 2010: 28). Government apparatus were minimal, and patronage played a key role in facilitating migration, with settled migrants sending for kin and providing them with employment and protection upon arrival. Economic migrants continued to represent a large proportion of the urban population in the Gulf port towns after the discovery of oil in the 1930s, when foreign labour was sought for oil production, manufacturing, and construction (Fuccaro 2009: 208).

But a dramatic transformation took place in the 1960s and 1970s, when the oil boom prompted massive social, economic, and political shifts in the region. The 1973 Organisation of the Petroleum Exporting Countries (OPEC) embargo caused oil prices to quadruple. Many of the newly wealthy oil-exporting Gulf states became independent from Britain and began to launch large-scale infrastructure projects requiring manpower beyond the capacity of the local supply. The stock of expatriate workers began to swell. In the 1950s and 1960s, labour migrants to the Gulf had been predominantly Arab, but from the 1970s onward migrant workers from Asian countries were increasingly favoured. The proportion of Arab workers in the Gulf workforce declined from 72% in 1975 to 32% in the early 2000s (Kapiszewski 2006: 7, 9). This turn to Indian, Pakistani, and Bangladeshi labour was driven by the fact that Asians were less expensive to employ, easier to dismiss, thought to be easier to manage. Just as importantly, they were considered less of a political threat to ruling families (ibid: 6-7). The preference for Asian over Arab workers was not simply the result of market forces but had important political dimensions (Chalcraft 2010). Under the banner of Pan-Arabism, while Gulf monarchies were struggling to establish legitimacy among local populations, Gulf state borders had been relatively open to Arab labour. But from the 1970s onwards the popularity of the Pan-Arab concept declined, and Arab migrants were viewed with increasing suspicion by Gulf monarchies. Greater restrictions were imposed on Palestinian labour, and large numbers of Palestinian and Yemeni migrants were expelled from Saudi Arabia (Chalcraft 2010: 18), where the proportion of Arabs in the foreign

population dropped from 91 percent in 1975 to 33% in 2004 (Kapiszewski 2006: 8). In contrast to their Arab counterparts, Asian workers were not only “more easily alienated from politics, in no small measure because of language barriers, but they came without intra-Arab and regional entanglements” (Chalcraft 2010: 19). They were politically disenfranchised and could be segregated from the local population and “rotated” every few years, which further limited any political threat they might pose to royal families.

This trend accelerated, as seen in the example of Kuwait. While the inflow of migrant labour had been relatively unregulated at the beginning of the oil era, this also gradually changed. A new set of immigration and nationality laws began to create new legal and political divisions between nationals and non-nationals, Arabs and non-Arabs (Fuccaro 2009: 223). The notion that GCC nationals should be entitled to privileges above and beyond those of non-nationals began to take hold (Crystal 1990: 79). In Kuwait, in 1948, two decrees established the first legal basis for nationality (*ibid*). By the late 1950s, with the number of expatriate workers increasing steadily, more explicit policies were passed favouring nationals. Labour laws specified the hiring of nationals, expatriates engaged in labour disputes were swiftly deported, and the formation and activities of unions were tightly regulated (*ibid*: 80). In 1964, a private sector labour law was passed limiting employment contracts to five years, compelling workers to register with the state and establishing priority for the hiring of Kuwaitis, followed by other Arabs (*ibid*). According to Crystal, “These policies encouraged Kuwaitis, including potential dissidents, to set themselves apart from expatriates. In the 1950s and 1960s, as Nasserism grew around the world, this policy was a very important containment mechanism” (*ibid*).¹ Fuccaro writes of Bahrain, “Immigrants, who had been the building blocks of pre-oil Manama, turned into possessors of visas and travel documents, a disciplined labour force subservient to the new economy” (2009: 211).

Opinion is divided over whether *kafala* requirements, as these restrictions became known, were in place when post-oil labour importation began in the 1940s. Longva writes with reference to Kuwait:

According to some testimonies there may have been a practice whereby migrants were vouched for by a respected citizen of Kuwait. If this was the case, then the practice was not formalized in the first decades of labour

1. In 1964, a private sector labour law was passed limiting employment contracts to five years, compelling workers to register with the state, and establishing priority for the hiring of Kuwaitis, followed by other Arabs (Crystal 1990: 79).

importation, since the text of the Aliens' Residence Law issued in 1959 and amended in 1963, 1965, and 1968 made no mention of it. The 1960 Law of Commercial Companies did stipulate that foreigners might not establish businesses in Kuwait except with Kuwaiti partners who, in turn, were required to have 51 percent ownership. This requirement of partnership, however, was not strictly the same as the requirement of sponsorship... (1997: 78).

What is clear is that by the 1950s and 60s, while natives from other parts of the Gulf could enter and settle freely in Kuwait, Indian migrant workers were required to have guarantees from employers in order to enter (Longva 1997: 78, citing Joukhadar 1980). By 1969, all migrant workers, including Palestinians, had to be guaranteed by Kuwaiti employers (Joukhadar 1980 and Russel 1989a as cited in Longva 1997: 78). While the sponsorship system had become common by the end of the 1960s, it was not until 1975 that it was finally codified in an amendment to the Aliens' Residence Law (Longva 1997: 79). By the 1980s, all foreigners originating from non-GCC states had to be under the sponsorship of a private citizen or private or state institution (Longva 1997: 79; see also Kapiszewski 2001: 202).

What is striking is how late what is now known as the "sponsorship system" became officially regulated. Longva's work suggests it emerged only recently as an administrative tool institutionalising a broader system of patronage and control over labour that had long been in place. It now functions ostensibly to ensure that no more workers enter than jobs exist, that migrants are personally tied to a national sponsor, and – in principle – that migrants stay only as long as they are employed. The reality is different, as we will see in the next section.

Contemporary Migration Policies and Factors Driving Irregularisation

Today, expatriates comprise 68% of the workforce in the GCC states (Gulf Labour Markets and Migration (GLMM) Programme 2013). The contemporary system under which migrants are recruited and employed is partially codified in law but also comes about through a constellation of regulations, administrative rules, bureaucratic procedures and practices. Although not homogenous throughout the region, the basic elements are similar: Foreign nationals must have local sponsors to obtain residence and work permits. These sponsors serve as the worker's guarantor and sole employer. Comparisons can be drawn with guest worker programmes in other parts of the world that also tie migrant workers to their employers. In most instances, the worker cannot change jobs or even leave the country without the

sponsor's consent, and the employer has the power to send the worker back to his or her country at any time. The fact that sponsors have the power to cancel workers' visas effectively shields them from legal responsibility to respond to charges of non-payment, forced labour, or abuse by allowing them to petition authorities to cancel workers' legal residency before a worker can pursue a claim. Employers often engage in practices that further the exploitative nature of the relationship, such as retaining passports and creating obstacles to prevent workers from leaving the country. The sponsorship system creates a labour market that is anything but free – migrant workers are bound to their employers for the terms of their service, which typically last two years. This contributes to profound inequality between worker and employer which, as the following passages describe, can produce "illegality."

Although the phrase "irregular migration" tends to conjure images of people breaching borders, in the Gulf States, as in Europe (Jansen eds. 2014: xiii), most migrants do not arrive without documentation but rather fall into an irregular status after they have entered. This can happen in a number of ways. Migrants can enter an irregular status if they are brought to the Gulf by a recruiter or other intermediary under false pretenses, including being misled about the type of work they will perform. This can occur, for example, for women promised jobs as caretakers, domestic workers, or salespeople who find when they arrive that they are meant to work as sex workers. Migrants also may become undocumented if they overstay the time allowed by a valid residence permit or visitor's visa; this could be either a tourist visa, which is commonly issued for three months, or in the case of Saudi Arabia, a religious visa for Haj or Umrah pilgrimage.

The other three main ways migrants can become undocumented derive specifically from the workings of the sponsorship system. The first is through what is known as the "free visa" system, whereby sponsors sell visas to migrants, often with a substantial levy of several thousand dollars which they keep for themselves. In addition to the upfront cost, sponsors may also charge a yearly fee from the migrant to maintain the sponsorship relationship. In visas issued under this system, the sponsor usually has no intention of employing the migrant – the job under which the sponsor has obtained the visa is a fiction. Migrants in these circumstances may have a valid residence permit but are considered to have broken the law if they work for someone other than their sponsor and may be jailed or deported. In some instances, migrants do not know they are entering the "free visa" system until they arrive in the destination country. In other instances, workers intentionally seek out this arrangement, in some cases with help from kin or friends, as an alternative to the formal sponsorship system. Many come to realise that in contrast to the

highly rigid conditions imposed by the sponsorship system, working under a “free visa” gives them greater freedom and flexibility in employment. Work by Pessoa, Harkness and Gardner on “free visa” holders in Qatar found that while vulnerability permeated the daily lives of such migrants, many said they would not prefer to switch to the legal option (2014: 211). Under the “free visa” system, they could “shop around” for work, and they claimed they made higher salaries than officially sponsored workers (ibid). Another advantage is that they could leave jobs at will if employers mistreated or refused to pay them. They contrasted this with officially sponsored employers who are locked into abusive employment relations.

A second way workers may become undocumented is if they arrive for the purposes of a specific job but their sponsoring employer fails to issue, prematurely cancels, or does not renew their residence permit. Although it is the legal responsibility of the employer to obtain and renew workers’ permits, and workers cannot do this by themselves, it is the employee who can be charged overstay fees if their employers fail to do this and they stay in the country, and it is the employee who can be punished with detention and deportation.

The third way of becoming undocumented is if a worker absconds from his or her sponsoring employer. Rigidity in the sponsorship system preventing workers from transferring to new employers in case of a dispute means that workers with abusive employers may be forced to leave their sponsors and become undocumented as their only recourse to non-payment of wages or other types of mistreatment. Some people unwittingly become undocumented by leaving their place of employment, whereas others make deliberate decisions to enter an irregular situation. For domestic workers, the very act of leaving the workplace without permission can mean becoming undocumented, as they are often forbidden by the terms of their employment contracts from leaving their employers’ homes without permission. Their passports are commonly confiscated by their employers, so leaving an abusive employer usually results in loss of access to one’s identity documents. Many migrants know or come to understand that by going to their embassies, they may eventually be deported, and those who wish to remain in the country stay with friends and work illegally.

The assertion that “regular” migration is less dangerous is questionable when we consider the realities of life for low-wage migrants in the Gulf. Many migrate through legal channels only to find themselves in situations in which employers have absolute power. The fact that they arrive legally with valid visas and work contracts does not lessen the risk of mistreatment. Their movement across national borders may be regulated, but the work itself seldom is. When it is regulated, it is

done in ways that are heavily slanted in favour of the employer. One of the ironies of this situation is that, in some instances, migrants may enjoy greater autonomy while in an irregular status.

Employers of undocumented migrants have an unfair advantage in that they can pay them less for their services and discipline them with the threat of exposure to the authorities. Such workers are less likely than others to demand full pay or safe working conditions. They can be forced into some of the most hazardous work environments. The rise in the proportion of undocumented migrants in many countries is convenient to capital, sitting neatly alongside wider trends away from stability and towards flexibility in employment relationships. The undocumented migrant is “the prototype worker of informalisation” (Noll 2010: 263). They are maximally mobile, excluded from any welfare benefits, and utterly disposable.

Before concluding this section, it is worth mentioning that the children of irregular migrants – who may be second or even third generation migrants – are also usually undocumented. Even if they were born and spend their entire lives in one of the Gulf States, they will be considered foreigners and their legal status will be dependent on that of their parents. There is no data on the numbers of children of undocumented migrants born in the Gulf, but estimates for the number of children of migrants overall who are born in Saudi Arabia range from 1 million to 2 million (De Bel-Air 2014: 7).

No Right to Have Rights: The Legal Position of Undocumented Migrants

It is a common misconception that there are no strong laws protecting the rights of migrant workers in the Gulf States. In fact, labour laws in many of the Gulf States are progressive and contain a number of safeguards which should, in theory, apply to all workers. Most labour legislation in the region does not specifically distinguish between citizens and non-citizens, nor does it expressly exclude undocumented migrants. For example, in the United Arab Emirates (UAE), labour matters are governed by Law Number 8 of 1980 Regulating Labour Relations, which applies to all private sector employees, whether UAE nationals or expatriates, but which excludes certain categories, namely employees of the federal government as well as municipalities and those employed in local government projects, members of the armed forces, police and security units, domestic workers and agricultural workers. In Kuwait, the Law of Labour in the Private Sector Number 6 of 2010, which replaced the 1964 Labour Law, provides workers with more protections on wages, working hours and safety, and broadly defines a worker as “any male or female

person who performs a manual or mental work for an employer under the employer's management and supervision against a remuneration." It applies to all workers in the private sector, excluding domestic workers, and represents a "minimum level of workers' rights."

In reality, while the labour laws governing the private sector are thought to apply universally to all categories of paid work, albeit with exceptions for some categories, the safeguards they provide are *de facto* not applied to undocumented migrants. The letter of the law might not discriminate against undocumented migrants but its application does. In practice, the application of labour protections against basic employment-related infringements, such as non-payment of wages or unfair dismissal, presupposes having a residence and work permit, and in practice those who do not are usually detained and deported before they can pursue a legal claim against an employer or recruiter. Employment rights are effectively subordinated to immigration requirements.

Further research is needed to understand the way the courts have dealt with migrants in an irregular situation. Do the courts affirm that undocumented migrants have a legal right to be paid for work performed even if they did not have authorisation from the state to undertake the work for that specific employer? Absent in-depth research, reports from NGOs and human rights groups suggest this population generally receives very little protection or support in the legal system, and that as soon as they are found to be residing without authorisation or working for someone other than their sponsor, they are swiftly detained and eventually deported (Global Detention Project 2015). They reportedly have very little room to challenge detention and deportation decisions. This means that employers who do not pay wages, impose excessive working hours, forcibly confine or physically or psychologically abuse workers without documentation go unpunished. In effect, by pursuing deportation before a migrant can pursue any legal claims against his or her employer, the state is neglecting its duty to fully enforce the labour law.

Writing about the plight of stateless people, Hannah Arendt coined the term "the right to have rights" with reference to those who, by virtue of losing their rights as citizens, were effectively rendered without rights (Arendt 1958). In the case of undocumented migrants, it is not that they have no rights but that their rights are systematically ignored. Any human rights and labour protections are practically inaccessible to them. In this regard, they represent a challenge to the notion that human rights are universally applicable (Noll 2010: 241).

An Alternative Policy Approach to Reduce the Irregularisation of Migration

The interweaving of residence rights with employment relations such that individual sponsors/employers are empowered to control workers' migration status creates the conditions by which many people either opt to or unwillingly become undocumented. At a policy level, the tools most commonly used by Gulf governments involve the issuance of general amnesties. Rather than being open-ended amnesties for all, such measures generally allow an opening for an administrative process lasting several months during which individual cases are assessed, and people without legal status can either leave the country without paying overstay penalties or regularise their stay and become assigned to a sponsoring employer. But amnesties may actually encourage migrants to gamble on future regularisation efforts, encouraging them to enter an irregular status if they assume there will eventually be a way out. Amnesties are often followed by crackdowns in which migrants without the proper documents are arrested and deported, resulting in considerable hardship for many migrants and generating considerable expenses for the state.

A more effective, holistic solution designed to prevent workers from becoming undocumented in the first place would be to enable greater flexibility in the sponsorship system to allow workers to change jobs without individual sponsor approval and to repeal the power of individual employers to cancel workers' visas. This would take away migrants' fear of being deported by their employers and would give them greater flexibility to choose their employment, thereby removing the main incentives which lead them to opt into the "free visa" system. While there has been some experimentation with reforms to the sponsorship system to achieve greater flexibility, most notably in Bahrain, the governments of many Gulf countries so far have been reluctant to fully implement reforms that would dismantle the sponsorship system. One unstated reason may be the fact that the current system, and the disposable labour it produces, is convenient to many employers. The "free visa" system is also highly lucrative for the sponsors who make use of it.

Given states' reluctance to dismantle the sponsorship system, this chapter proposes an alternative approach to address both the causes and effects of irregularisation. This approach involves separating enforcement of the laws and administrative procedures governing migrants' residence and legal status from those governing their employment. This entails severing jurisdiction over labour matters from matters of immigration, two spheres which in most Gulf countries are already dealt with by separate organs of the state.² Another way of describing this is

2. In most of the Gulf States, although the nomenclature of government departments differs,

Carens' notion of "firewalling." Carens argues that states should establish firewalls "between the enforcement of immigration law, on the one hand, and the protection of general human rights, on the other" (2013: 132-133). This guarantees that people can pursue legal claims concerning employment-related abuses without exposing themselves to arrest and expulsion. Ultimately, such a strategy would privilege the implementation of the labour law over immigration enforcement and would have the effect of ensuring that the existing laws and regulations governing working conditions apply equally to all workers regardless of their migration status. One serious drawback in the context of the Gulf is that this approach alone would not sufficiently address the situation of domestic workers, who are specifically excluded from coverage in the labour laws of the Gulf States.

In order to maintain a firewall approach in practical terms, training and strong guidelines would have to be provided stipulating that labour inspectors should not be influenced by whether workers are documented or not in the course of their duties with respect to working conditions. This approach also would require ensuring that the courts and other administrative apparatus responsible for hearing migrants' claims in employment-related matters would not provide information to the authorities handling removal proceedings. Legal immunity from deportation would need to be ensured to protect undocumented migrants filing claims against their employers.

For a firewalling strategy to have a real impact, workers would need practical access to channels of legal redress in order to be able to make claims against abusive employers. At the moment, state systems for processing and adjudicating migrants' grievances are extremely difficult to navigate even for those with valid legal status and written employment contracts.³ Steps would need to be taken to ensure that documented and undocumented migrants alike had access to the basic resources needed to make claims, such as access to translation services and the legal right to take up other remunerative work while cases are ongoing. These aspects of the workings of the justice system are within the state's capacity to control, and this is an area of governance where incremental improvements could have a significant impact on the well-being of hundreds of thousands of workers.

There is a risk that ensuring employment rights regardless of immigration status could serve to increase the incentives for other migrants to become undocumented.

labour matters are dealt with by ministries of labour, and legal disputes resulting from them are adjudicated by the federal and local courts, whereas deportation matters fall within the remit of ministries of interior.

3. This is illustrated well for the state of Qatar in a recent report by Gardner et al. (2014).

But the benefits far outweigh this. There are moral justifications – it could make a huge difference in migrants’ lives, lessening their vulnerability and ensuring a basic standard of legal protection for all workers which today does not exist. It would take away the fear of detention and deportation which currently enables employers to exploit workers. There are also strong pragmatic reasons the state could be encouraged to consider this approach. Ensuring that employment laws apply to undocumented workers, and that employers who abuse them can be sanctioned, would effectively raise the costs of employing undocumented workers. This could decrease the incentives for those employers to hire them, ultimately leading to a reduction in the scale of irregularisation by tackling the “demand” side.

There are clear precedents for upholding the employment rights of undocumented workers in international law. Although the Gulf States are not signatories to most international human rights and labour rights treaties, it is worth mentioning that two of the main treaties dealing with the rights of migrant workers guarantee employment rights to undocumented workers. This includes ILO Convention 143 of 1975, which guarantees undocumented workers “equality of treatment ... in respect of rights arising out of past employment as regards remuneration, social security and other benefits.” Similarly, the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families states in Article 25(3) that “employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by any reason of any ... irregularity [in the workers’ stay or employment].”

There have also been rulings affirming the need to separate the enforcement of legal provisions relating to working conditions from immigration law by the ILO body which examines the application of ratified ILO Conventions, the Committee of Experts on the Application of Conventions and Recommendations (CEACR). In a decision on Malaysia in relation to the Labour Inspection Convention 81 of 1947, the Committee emphasized the fact that “the primary duty of labour inspectors is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers, and not to enforce immigration law.”⁴ The Committee requested the Malaysian government to provide information on “action undertaken by the labour inspectorate in the enforcement of employers’ obligations towards migrant workers, including those in an irregular situation, such as the payment of wages, social security and other benefits.”

4. See Malaysia, CEACR Observation, published 104th ILC session, 2015. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3177140.

At the national level, the intersection of migration and employment law has vexed the courts in many countries. Comparing jurisprudence in the UK, United States, and Canada, Bihari (2011) writes that while in the UK the courts have generally subordinated employment law to the enforcement of immigration law, courts in the US generally have been more inclined to enforce the employment and labour rights of undocumented workers. This has been the subject of a great deal of debate in recent years, however. In 2002, the US Supreme Court issued a decision in *Hoffman Plastic Compounds v. NLRB* denying labour rights for undocumented migrants. The five-four ruling said that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally fired for union organising. Criticisms were made that this let the employer off the hook, and the four dissenting judges argued that labour and immigration legislation represent two independent spheres of law which should be upheld independently of one another (Bihari 2011: 19). Following the Hoffman case, other US government agencies including the Department of Labor and the Equal Employment Opportunity Commission have asserted their commitment to enforcing laws within their jurisdiction without regard to workers' immigration status (Human Rights Watch 2004: 119). In 2013, the Inter-American Court of Human Rights examined the Hoffman ruling and issued an advisory opinion holding that American states have an obligation to guarantee the labour rights of all workers, and that undocumented workers are entitled to the same protections as citizens and those working lawfully. There are also other examples from the US in which the courts have been more favourable to undocumented workers. In a 2002 case involving allegations of illegal trafficking in persons and involuntary servitude of an Indian woman brought to the US as a domestic worker, a judge in New York refused to allow defendants to conduct discovery into a worker's immigration status, noting that '[A]llowing parties to inquire about the immigration status of other parties, when not relevant, would present a danger of intimidation [that] would inhibit plaintiffs in pursuing their rights...'⁵

France provides another perspective. There, all workers, regardless of their immigration status or whether they hold a valid residence or work permit, are entitled to a minimum level of labour protection (Murphy 2015). Undocumented workers are entitled to salaries not less than the guaranteed minimum wage, payment for overtime, annual paid holidays, and compensation if the employment ends early.

5. *Topo v. Dhir*, 210 F.R.D. 76 (S.D. N.Y. 2002).

Conclusion

This chapter has sought to demonstrate that the current matrix of laws and regulations governing the recruitment and employment of migrant labour in the Gulf States developed as the region became increasingly intertwined with global capitalism through the oil trade with the interaction of money, capital, and the state. Migration policies emerged in the context of a particular kind of state – one that distributes oil rent to citizens in exchange for political acquiescence, the pursuit of free-trade policies, and a laissez-faire economy, and most importantly, one in which migrant worker populations vastly exceed the number of nationals. Under these conditions, the sponsorship system has been instituted as part of a broader dynamic generated by oil revenue alongside administrative policies aimed at separating and controlling expatriates. As it is currently configured, the system produces highly unequal relationships of control by employers over workers that create strong incentives for irregularisation.

Although labour laws throughout the Gulf States do not distinguish between expatriates and migrants, or documented versus undocumented workers, in practice becoming undocumented puts workers in an extremely weak legal position. They have little or no recourse to any protection from the law. Any complaint about mistreatment by an employer or recruiter could result in removal, so most undocumented migrants avoid contact with the state. This means that in practice, they have few rights as workers, and their employers can exploit them with impunity. Despite the vulnerabilities, these constraints are why many migrants opt to seek more autonomy by becoming undocumented.

The current policy tools used by governments in the region to tackle the problem of irregularisation involve short-term amnesties that are usually followed by crackdowns involving detention and deportation. These approaches ignore the factors that drive workers to become undocumented in the first place. They focus on punishing irregularity, both in fact and rhetorically, over the public policy interest of enforcing labour laws. An alternative would be for states to take steps to ensure that all workers, regardless of their migration status, have full access to legal remedies and protection against exploitation from employers. A firewalling strategy, or a bifurcated approach to legal jurisdiction separating matters concerning migration status from employment, would address the legal void vis-à-vis undocumented work that currently exists. This would guarantee undocumented workers the rights they are currently promised under existing labour legislation. The effect would be to raise the costs of hiring undocumented workers for employers, thus decreasing demand. The current situation of undocumented migrants is broadly favourable to

the prevailing power structures. Adopting a strategy that would penalise employers of undocumented migrants would threaten the interests of those who already yield power and influence in Gulf societies. Achieving this under the current political conditions would be difficult. But a firewalling approach has enormous potential, and unlike many law enforcement approaches currently deployed by states, it does not involve “managing” or “controlling” flows of undocumented migrants in ways that infringe their rights. This is important in a context of global wage inequalities, where people will continue to migrate to redress the balance despite the narrowing of legal migration channels to do so.

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SKILFUL SURVIVALS: IRREGULAR MIGRATION TO THE GULF

The Gulf States are among the most sought-after destinations by global migrants. Part of this migration is irregular, due to five main causes: entering without a proper visa; overstaying after a visa or residence permit has expired; being employed by someone who is not the sponsor; absconding from a sponsor; and being born in the Gulf to parents with an irregular status. The treatment reserved for migrants in an irregular situation marks out the Gulf States. Arrest and detention are widespread practices in spite of constitutional guarantees against arbitrary imprisonment. Staying without a proper visa or absconding from a sponsor is regarded as a criminal act, and foreign nationals who commit such acts are detained in the same prisons as common law criminals with no clear right of recourse. Domestic workers, most of whom are women employed by private households and, therefore, not protected by labour laws which in the Gulf apply only to businesses, are particularly subject to arbitrary sanctions and jail.

Lived experiences suggest that migrants may not see their irregular status as being disastrous. Many, in fact, are willing to perpetuate this situation, despite their awareness about possible arrest, jail term, and deportation. A theme that emerges repeatedly in interviews indicates the lack of options open to migrants elsewhere, including their country of origin. Migrants in an irregular situation learn to negotiate the formal and informal spaces and systems they encounter. Most irregular migrants seem to share one characteristic: resilience. As their stay in the Gulf lengthens, they gather enough capacity to exercise their agency to achieve a skilful survival in the face of adversity. A wide-ranging system of mutual benefits constituting win-win situations for varied actors enables and perpetuates irregular migration.

