



## Safeguarding children's rights in national and international Kafala

Building on ISS/IRC's 2008 comparative study on *kafala* (unpublished), this initiative is aimed at

- analysing the concept of *kafala*, its legal, practical and political implications at the national level, in countries influenced by and based on Sharia law;
- examining how this child protection measure is applied (benefits and risks) in other international contexts (e.g.: Civil and Common law countries);
- identifying potential solutions to the challenges arising from "international *kafala*".

### Better understanding *kafala*

*Kafala* is a child protection measure recognised in article 20 of the Convention on the Rights of the Child. However, its meaning, origin and application in practice remain diverse. This situation can be specifically complex in cases of "international *kafala*" where non-Islamic law States grapple with questions of applicable law, jurisdiction and recognition. It is therefore not surprising that the Special Commission on the 1993 Hague Convention in June 2015 dedicated a thematic session on *kafala*. Despite the often similar characteristics to other child protection measures, such as guardianship or simple adoption, *kafala* in principle cannot fully be assimilated to the latter. Different to adoption for instance, *kafala* does not create a legal child-parent relationship.

With the aim to preserve blood ties as the only way of filiation and to protect inheritance and patronymic rights, most countries influenced by or based on Sharia law explicitly prohibit adoption (*tabanni*) in their national legislation or by referring to the commonly accepted interpretation of verses 4 and 5 of the Qu'ran. However, Qu'ran mentions the importance of caring for orphaned and abandoned children. The study will help shed light and contribute to better understand the nature and the different characteristics of *kafala* in several countries in order to ensure, when used, it remains a child protection measure in both national and international contexts.

### Existing benefits and challenges of national *kafala* systems

The study will identify indicators of well-functioning *kafala* systems, for example clear procedures regarding evaluation and follow-up mechanisms to ensure the best interests of the concerned child.

#### ***Kafala* is considered beneficial:**

- as it offers a family-based solution, as opposed to long-term residential care;
- in cases where children have been abandoned for reasons such as birth out of wedlock and societal stigmatisation;
- due to a certain flexibility allowing adjustment according to evolutions in the child's individual situation (family-reintegration, family ties with the *kafil*'s family etc.);
- as it provides access to family allowances without depriving him/her of the rights towards the biological family as natural family ties are not permanently or irrevocably ceased.

**However, the study will also pinpoint risk factors, where *kafala* may not be a child protection measure when there is:**

- uncertain legal status of the child (e.g. revocation possibilities, lacking compulsory and free birth registration, no mentioning in the family registry);
- violation of the right to know one's origins due to inadequate records being kept;
- lack of adequate preparation, effective monitoring and regular follow-up can lead to children's exploitation and the incentive to placements for socio-economic reasons;
- prevalence of *kafala* placements for children born out of wedlock show the need to develop preventive and inclusive family support programs, especially destined to single mothers;
- lack of administrative and legislative framework (e.g. outdated and non UNCRC compliant legislation);
- non-existence of complaint mechanisms for children who are victim of abuses or exploitation;
- in some countries, high demand of *kafala* applicants compared to the children in need.

#### **What is *kafala*?**

Generally known as a person's (*kafil*) commitment to voluntarily take care of the maintenance, education and protection of a child deprived of his/her family (*makfoul*). The study does not cover *kafala* in the sense of the sponsorship system regarding labour migration as it is practiced in several countries of the Middle East.

#### **What is international *kafala*?**

Situations where a child is placed under *kafala* in an Islamic law country but the measure's implementation will occur in another country.

#### **Different forms of *kafala***

- Via notary decision (care provided by an extended family member for children with a known parent)
- Via judicial decision (for abandoned children or children whose parents are unknown)
- Via administrative decision (by a specific commission)

#### **Other existing child protection measures in Islamic legal systems**

- sarparasti* (Iran)
- damm* (Iraq)

### Variety of legal effects depending on each country

- Parental authority, e.g. custody (e.g. Tunisia, Morocco)
- Legal guardianship and representation (Algeria)
- Persistence of biological family bonds
- Preservation of the prior child's family status
- No or limited inheritance rights
- Exceptional patronymic rights
- Termination when the child reaches majority
- Revocation possibilities at any time
- Filiation ties only under strict conditions

## How to ensure children's rights in international kafala?

International *kafala* could be particularly beneficial in cases where the child could benefit from a cultural and religious continuity or a preservation of family bonds regarding placements with an extended family member living abroad, similar to international kinship care for instance. However, the reception of a *kafala* placement within the legal system of another country is highly complex and its non-regulation can be source of abuses and violations of children's rights.

### Practical challenges and risks

In fact, on both sides, in countries of origin and receiving countries, several practices and arrangements have been developed. On the one side, while some Islamic countries strictly apply Sharia law and prohibit international *kafala* (Iran, Mauritania, Egypt), others are more flexible and decide on a case-by-case basis (Algeria, Morocco, Jordan, Pakistan) or even allow adoptions aside from *kafala* (Tunisia, Indonesia). Likewise, practices in receiving countries differ and can result in risks for the child, for example:

- several countries **refuse to recognize** *kafala* placements as it is a foreign concept to their legal system. This can however put the child, who is for instance already living with his/her new family in the receiving country into a grey zone (e.g. uncertain and unstable nature of the residence status, limited access to social benefits and protection);
- in others, once the child is brought to the receiving country, the **conversion into an adoption (full/simple)** is commonly practiced and implicitly accepted, by all involved actors, although the child's country of origin's legislation is clearly being violated, which can be contrary to the child's best interests. This can lead to situations clearly situated outside international safeguards: inadequate evaluations, doubts regarding the child's adoptability, lack of informed consent of the biological parents, insufficient preparation of the child and the "adoptive parents".

### Potential solutions

Consequently, *kafala* – primarily intended to protect vulnerable children – could end up clearly violating the rights of the child (family based care, nationality, legal status, access to social benefits etc.). Therefore, the study's objective is to pinpoint a selection of **promising practices** that encourage an ethical and child-rights based approach to the challenges related to international *kafala*, as envisioned in international standards.

1) Firstly, it will examine existing **bilateral agreements or legal provisions** that establish clear criteria and evaluate the child's best interests on a case-by-case basis

2) Secondly, it will focus on the **provisions of the 1996 HC** regarding jurisdiction, applicable law, recognition and cooperation, in particular on the specific procedure of articles 33, 23 II, which requires an enforced cooperation between implicated administrative and judicial authorities of different countries regarding transnational placements.

3) Potential criteria deciding on the exact reception modalities could also be deduced from **ECHR jurisprudence or national case-law**.

4) The means and benefits of **direct judicial communication** will also be studied in order to avoid conflicts among legal systems.

**In order to comply with international standards and to respect the legislation of the country based on Islamic law, ISS/IRC considers enhanced cooperation mechanisms at all stages of the transnational placement procedure as essential element to providing solutions to issues related to international kafala.**

### International legal sources

Article 20 of the UNCRC  
Article 3 of the 1996 HC  
§§ 2a) and 161  
Alternative Care  
Guidelines

NB: Explicitly excluded from the application scope of the 1993 HC

## Methodology of the study

A number of select and regionally representative countries (Islamic legal countries and receiving countries) will be thoroughly analysed. ISS has contacted various experts and stakeholders from multi-disciplinary fields to gauge their interest in contributing to the study. Some have already expressed their interest in collaborating (e.g. Tunisia, Belgium, Canada, Lebanon, France) although a broader group is being explored. The role of ISS in this project will be to update several parts of the 2008 study in accordance with new legislative and practical evolutions, to coordinate and collate the various external contributions. Based on their expertise, experts of the study are free to choose whether to draft a specific section or to assume a consultative role. A core group will be established to undertake drafting of the text under the lead of ISS.

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