

ESSAYS IN HONOUR
OF
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THE KAFALA OF ISLAMIC LAW – HOW TO APPROACH IT IN THE WEST

1 The origins of Islamic law and kafala

Islamic law (*sharia*) is a religious law, meaning that it has its foundation in religious texts. But the most striking aspect of the traditional Islamic law is that it was a product of independent reasoning (*ijtihad*) among individual jurists. It is perhaps the most extreme example of so-called “jurists law”. Traditional Islamic law was not subject to the authority of the state, not least because the state as we know it today did not exist during the formative period of the law.¹ The fact that political authority played only a minor role within the field of law can also be explained with reference to the divine nature of the law. According to the Islamic view, sharia is the normative path established by God. This means that God is the lawgiver and the duty of man is to formulate that will. According to the Islamic view, God has revealed knowledge about the established way through revelation of the Koran and by sending his prophet Muhammad, the last Prophet of Islam, who established a normative path (*sunna*) through his living and sayings. But humans are also entrusted with rational thinking. This combination between revelation and rational thinking is the ultimate source of Islamic law.² If the legal tradition pre-supposes that law is to be established through reasoning on the basis of revealed texts, the establishment of the law cannot be linked to political authority. The assessment of whether a conduct is in harmony with the sharia is based on sound legal and theological argumentation (knowledge), rather than political authority.

Very few of contemporary so-called Muslim countries adhere to the classic Islamic legal tradition, where the law is based solely on the interpretation and reasoning of individual scholars and legal schools. The classical system was abandoned in the nineteenth century (a bit earlier in some parts of the Mus-

¹ The modern state was introduced to the Muslim world in the nineteenth century, during the era of colonisation of the Muslim world. Pre-modern Muslim rule did not possess the pervasive powers of the modern state. Bureaucracy and state administration were thin and mostly limited to urban sites; see Hallaq, Wael, *An Introduction to Islamic Law* p. 7.

² Hallaq, *An Introduction to Islamic Law* p. 15.

lim world) during the process of transforming the Muslim countries into the present-day states. In the modern era, the new established states enacted regulations for practically all fields of law. In the field of family law and succession, enactments were based on principles allocated in Islamic sources, as interpreted by different legal schools. For example, the North African countries adhere to the Maliki school in the field of family law, Egypt to the Hanafi school, Saudi Arabia to the Hanbali, Indonesia to the Shafii school, Iran to the Jaffari school (Shia), and so on. Centralised justice systems (centralised court and administrative systems) accompanied by unified parliamentary legislation are not part of the Islamic legal tradition.

The following discussions on child adoption and foster care (*kafala*) of children in the Islamic Sharia will take departure in the classical sources of Islamic law, namely the Koran, the Sunna of the Prophet and the interpretation of these texts by leading Islamic scholars. This is essential in order to understand the reasons behind the legislation in several Muslim countries. For example, the Islamic prohibition on child adoption, maintained in most Muslim countries, is accessible only if we regard the Koranic provisions dealing with adoption. In order to illustrate the implementation of the Islamic verdicts, as expressed in the Koran and the sunna of the prophet, I will briefly describe the Moroccan law relating to *Kafala*. The Moroccan legislation is of particular interest since Morocco is a party to the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children.³ All EU Member States are expected to ratify the Convention.⁴ According to the Convention, *kafala* is explicitly recognised as a measure for the protection of children.

This article aims at exploring the institution of *kafala* under Islamic law and the reception of the institution within international treaties. My choice of topic has to do with the emerging ambition to accommodate Islamic legal institutions in international treaties, such as in the case of *kafala*. Today the “West and the Muslim world” are inter-connected, not least by way of the expansive immigration by Muslims into Europe. Professor Michael Bogdan, the protagonist of this *festschrift*, has described in a striking way the aims of comparative law and the studies of foreign law as a way of understanding others’ culture and way of living, and as a legal field that increases the open-mindedness among the peoples of the world.⁵ With regard to this I find it appropriate

³ Concluded 19 October 1996.

⁴ In force in Sweden since 1 January 2013.

⁵ Bogdan, Michael, *Komparativ rättskunskap* p. 26.

to devote this contribution to a legal construction that does not exist in the Swedish legal system.

2 The prohibition of child adoption in Islamic law

Adoption is an institutionalised practice through which a person acquires new kinship ties which are socially defined as equivalent to biological ties and which supersede the old ones, either wholly or in part.⁶ Adoption, meaning the creation of a permanent parent-child relation between persons not related by blood, entitling to all privileges (and obligations) belonging to a biological parent-child relation, is not recognised in the Sharia. This standpoint is based on the Koranic provision dealing with adoption. The relevant parts of Chapter 33 verses 4-5 in the Koran read as follows:

[God has not] made those whom ye claim (to be your sons) your sons. This is but a saying of your mouths. But Allah sayeth the truth and He showeth the way... Proclaim their real parentage. That will be more equitable in the sight of Allah. And if you know not their fathers, then (they are) your brethren in the faith, and your clients.⁷

These verses were revealed in relation to Zayd ibn Haritha. Zayd was a fallen captive, owned by Prophet Muhammad. Under the ownership of the Prophet, relatives to Zayd offered to pay a ransom in order to emancipate him from the enslavement. It is told that in reply, the Prophet offered Zayd to choose to go with his relatives without payment of any ransom.⁸ According to the story, Zayd preferred to remain a slave of the Prophet instead of being emancipated by his people. The story tells that following Zayd's decision the Prophet adopted him as his son by declaring at the Kaba (Mecca) "witness that Zayd is my son, he will inherit from me and I shall inherit from him".

According to earlier revelations in the Koran (Chapter 4 verse 23), a child-parent relationship was an impediment for the child or the father to marry the former spouse of the other. Since adoption had the same legal consequences as a biological relationship in the pre-Islamic customary rules, Muhammad was criticised for marrying Zaynab b. Jahsh, who was the divorced wife of Zayd.⁹

⁶ van Loon, J.H.A., "International Co-operation and Protection of Children with Regard to Inter-country Adoption", *Recueil des cours*, vol 244, 1993:VII p. 206.

⁷ Translation by Pickthall, Mohammed Marmaduke, *The Glorious Quran* (2000).

⁸ Naqvi, Ali Reza, "Adoption in Muslim Law", *Islamic Studies*, 1980:19 p. 286.

⁹ Landau-Tasserou, Ella, "Adoption, Acknowledgement of Paternity and False Genealogical Claims in Arabian and Islamic Societies", *Bulletin of SOAS*, 2003:66 p. 169.

The Koranic provisions relating to adoption (called *tabannin*) were a response to this criticism. According to the Koran adopted sons are not to be regarded as real sons, meaning that Muhammad's marriage with Zayd's former wife did not breach the Koranic prohibition to marry a former spouse of a descendant.

On the basis of the previously mentioned verses, Islamic scholars have unanimously agreed that adoption is against the Islamic dictates. In order to understand how the prohibition is to be interpreted, it is imperative to have in mind the ways adoption was exercised in the pre-Islamic time. After all, the Koranic rules relating to adoption were revealed as a reaction to the customary rules in pre-Islamic Arabia. The Koranic verse in question is sometimes interpreted as providing a pattern for how to organise family life. According to this reasoning, the prohibition on adoption cannot be linked to an isolated event in the Prophet's life but should rather be read in the context of how affiliation was created in pre-Islamic Arabia. The verse was necessary in the ambition of placing lineage (*nasab*) as the main affiliation connector within the revelation.¹⁰ This rule is supplemented by a corresponding provision on the field of inheritance. According to Chapter 8 verse 75 in the Koran, those who are kin are nearer one to another in the ordinance of God. This verse is complemented with provisions in the sunna of the Prophet. The basic *hadith* (a story relating to the Prophet's life) on the subject states that "whoever leaves property it is for his family".¹¹

The legal schools, and the classical Koran commentators, are in the agreement that these statements were intended to place biological relationships as the very foundation for inheritance.¹² These provisions abolished the customary rules of the pre-Islamic time, by which two persons could create inheritance rights among themselves through affiliation and oaths. This was also practiced in early Islamic times among the new Muslim community. For example, during the Medina period (622-630) alliances were created between the emigrants (the people that emigrated from Mecca together with the Prophet, called *muhajirun*) and their protectors in Medina (the *ansar*). With reference to these unions, a muhajir and an ansar were allowed to inherit each other.

Chapter 8 verse 75 in the Koran, alongside the traditions of the Prophet, abolished these practices and established biological kinship as the basis for inheritance claims. In the broader perspective, one might say that the Koranic message in this regard clearly aims at reforming the ways of how family life

¹⁰ Mattson, Ingrid, "Adoption and Fostering", Encyclopedia of Women and Islamic Cultures, vol 2 p. 1.

¹¹ *al-Bukhari*, vol 8 p. 384.

¹² *Al-Tabari, Jami al-bayaan fi tawwil al-Koran*, vol 10 s. 60.

was organised in the pre-Islamic society of Arabia. There is a clear ambition, in the Koran as well in the sunna of the Prophet, to place (biological) lineage as the main connecting factor in the Muslim community. This understanding is emphasised by Islamic scholars, since the protection of lineage is regarded as one of the five essential goals (*maqasiid*) of sharia.¹³

It follows that when the Islamic legal schools interpreted the Koranic rules as prohibiting adoption, they had the specific adoption system in the pre-Islamic time in mind. It is important to stress that this does not mean that adoption, as it is understood and practised in the contemporary societies of today, is necessarily in conflict with Islamic teachings. The perception is that the Koranic prohibition of adoption had a specific understanding and specific aims.

The conventional point of departure on the subject is that adoption in the pre-Islamic time was a full legal integration of an adoptee into the adoptive father's family. The adopted member of the family (tribe) was to be regarded as an equal member, just like the biological members of the family.¹⁴ In pre-Islamic times, the adoptee had equal rights, such as boot claims, maintenance and inheritance rights, but also the same obligations, such as taking part in tribal warfare, obligations of the raid and protection of tribe interests. The adoptee also acquired the name of the adopting father. Zayd was, for example, called Zayd b. Muhummad (Zayd the son of Muhammed) after the Prophet adopted him. After the revelation in Chapter 2 verse 220, the Koranic provision "proclaim their real parentage", Zayd was no longer called ibn Muhammad, but Zayd ibn Haritha.

3 Child protection according to the Islamic sources

3.1 The need to protect orphans and abandoned children

The most significant aspect of the Koran is its ambition to socially reform the society in which it was revealed. Muhammad was as much a social reformer as the founder of a religion.¹⁵ Indeed, nowhere in the Koran is the message

¹³ The sharia, according to the Islamic understanding, aims at providing societal welfare. It is intended to relieve, not burden, and provide common good in the society (so-called *maslabat al-umma*). The Sharia was created for the sake of human welfare. More specifically, Islamic scholars have identified five essential goals with the sharia. A rule (legal interpretation) that threatens one of these goals cannot be regarded as part of the sharia. The five essential goals of the Sharia are the protection of religion, life, intellect, property and lineage. The law has been developed to protect and promote these five areas of human life and the law cannot run counter these principles. Hallaq, *The Origins and Evolution of Islamic Law* p. 145 f.

¹⁴ Naqvi, Ali Reza, "Adoption in Muslim Law", *Islamic Studies* 1980:19 p. 285.

¹⁵ Roberts, Robert, *The Social Laws of the Quran* p. 2.

clearer than with regard to the rights of children, with the status of orphaned children being given special attention. There are many verses in the Koran that command the fair treatment of orphaned children. The Koran's emphasis on orphans, the weak and the poor has been explained with references to the societal change that the Arabic society was undergoing at the time of the revelation. It is said that a new basis of community was presenting itself in material interests.¹⁶ The old tribal community and tribal solidarity, as well as the security that came from clan and family relationships, were losing ground in favour of a more individualised way of organising life. A vulnerable situation became even more exposed through the partial collapse of the social safety net which tribal solidarity constituted. This societal change is very important to bear in mind in order to understand not only the verses containing social rules relating to the protection of orphaned children, but also the rise of Islam. The rise of Islam is very much connected with the change from a nomadic to a mercantile economy.¹⁷ These societal changes reinforced the situation for stigmatised groups such as orphaned children.

The primary Koranic statement regarding orphaned children is found in Chapter 2 verse 220, which has the following content: "And they question you concerning orphans. Say: to improve (*islaah*) their lot is best. And if you mingle your affairs with theirs, then they are your brothers." In the classical texts the expression *islaah* has been interpreted as meaning enhancement of orphaned children's financial position. According to al-Tabari (d. 923), in his classic Koran commentary Tafsir al-Tabari, orphans were often excluded from taking part in social benefits. The verse was revealed as an answer to such concerns. As a reply, the Koran required the Muslim community to act favourably towards orphans. According to the interpretations of al-Tabari, Muslims should provide orphans with food and shelter.¹⁸ If orphans have property, the verse also encourages Muslims to administrate it in accordance with the best interests of the child.¹⁹ The verse is primarily regarded as constituting financial obligations towards orphaned children.

According to some Muslim scholars, Chapter 2 verse 220 and the concept of *islaah* are attached with a broader meaning than the one provided by al-Tabari and other classical scholars. According to this wider interpretation, *islaah*,

¹⁶ Watt, Montgomery, *Muhammed at Mecca* p. 73.

¹⁷ Watt, *Muhammed at Mecca* p. 79.

¹⁸ Al-Tabari, Abu Jaffar Muhammad ibn Jarir, Tafsir al-Tabari – *Jamii al-bayaan fi tawiiil al-Koran*, Vol 2 p. 415 ff.

¹⁹ Bernström, Mohammed Knut, *Koranens budskap* p. 66 note 206. Chapter 4 verses 5-6 also contain rules that regulate the administration of property belonging to orphans.

which could mean repair, heal and make good, is understood to mean “the best interest of the child”, covering all aspects of child’s life, and consequently not only an obligation to secure the financial interests of the child.

The verses in the Koran which deal with orphaned children are complemented with verdicts from prophet Muhammad, clearly settling the main content in the message. A noteworthy aspect of the story is that the Prophet himself was an orphan. His father died before his birth, and at the age of seven he lost his mother. So the prophet himself personally experienced the difficulties faced by orphans. The *hadith* collections, which gather the sayings, rulings and traditions of the Prophet, contain several rulings by the Prophet which explicitly deal with the treatment of the poor and orphans. The most well-known hadith (tradition) would perhaps be his statement “I and the person who looks after an orphan and provides for him, will be in Paradise like this” (and the Prophet held two fingers together).²⁰

In summary, both the Koran and the traditions of the Prophet emphasise the duties to care for children in need, such as orphaned and abandoned children.

3.2 Kafala

3.2.1 Definition

Islamic scholars within the classic *fiqh* (Islamic jurisprudence) literature, on the basis of these understandings, have produced a system relating to foster care called *kafala*. Fostering of children is highly recommended and regarded as a sign of religious piety.²¹ In Islamic countries kafala is used in place of adoption, as this institute is practice in the West (the creation of a permanent parent-child relationship). The Islamic institution of kafala is a form of foster care of children. It is often defined as a commitment to take care of the maintenance of the child, and the education and the protection of a minor in the same way as parents would do for their biological children.²² Even though kafala arrangements are always intended to be permanent, in the sense that they last until the child reaches adulthood, they do not create a legal parent-child status (legitimate filiation) that produces specific personal status legal entitlements.²³

In several Islamic countries, such as in Egypt, Algeria, Tunisia (adoption is

²⁰ Sahih al-Bukhari, vol 8 p. 33 f.

²¹ Mattson, Ingrid, “Adoption and Fostering”, *Encyclopedia of Women and Islamic Cultures*, vol 2 p. 1.

²² International Social Service, International Reference Service for the Rights of Children Deprived of their Family, Fact Sheet No 50, Specific case Kafalah.

²³ Muslim Women’s Shura Council, “Adoption and the Care of Orphan Children – Islam and the Best Interest of the Child” (2011) p. 6.

not prohibited in Tunisia) and Morocco, kafala is mediated by the state. In other words, kafala is similar to foster parenting and a form of “guardianship”, not an informal or “customary” adoption, which allegedly takes place through secret agreements.²⁴

3.2.2 *Kafala according to Moroccan law – an example*

According to estimations made by UNICEF, some 6,500 Moroccan infants are abandoned at birth each year.²⁵ The reason behind this figure is, first and foremost, the Moroccan cultural perception of illegitimacy. According to the prevailing view, extramarital relations are associated with disgrace, because the honour of the family rests on the marriageability and virginity of daughters.²⁶ If a woman chooses to keep a child who is the result of an extramarital relation, it is often equal with the “social death” of the woman. Closely connected to this is a cultural outlook that sees children born out of wedlock as unworthy and as a child of sin (*wald ihram*).²⁷ The fate of the child is often societal rejection and social and legal discrimination.

Today, the situation of abandoned children is addressed on several levels within the Moroccan legislation, i.e. within the new family code called *al-Mudawwana*, the Penal Code and labour law. In September 2002 Morocco also enacted an additional law regarding kafala.²⁸ According to this enactment, kafala should not be misunderstood to mean adoption (*al-tabanni*), an institution recognised by the *al-Mudawwana*. According to the *al-Mudawwana*, adoption does not entail a legitimate filiation or lineage. According to Article 1 in the 2002 enactment, Kafala is reserved for anyone under the age of eighteen who is abandoned, orphaned or a child with parents who are incapable of exercising their parenthood. Kafala can be given to a Muslim couple or a Muslim woman who is mature and able to financially provide for the child.

A number of administrative measures need to be carried out in order to place a child in a kafala arrangement. In the case of kafala care of an abandoned child, the first part of the process is to legally establish a child as abandoned.²⁹

²⁴ Muslim Women’s Shura Council p. 6.

²⁵ UNICEF, *Morocco Country programme document 2012-2016*, 2011 p. 3.

²⁶ Bargach, Jamila, *A Study on Abandonment and the Practice of Kafala in Morocco*, for Amici Dei Bambini, 2007 p. 13.

²⁷ Bargach, *A Study on Abandonment and the Practice of Kafala* p. 13.

²⁸ Law number 15-01 (by *dahir* number 1-02-172, Official bulletin 5 September 2002)

²⁹ When an infant is found, the district attorney needs to give the child a name and inscribe him or her in the civil register. After that, the judge of minors issues a statement of legal abandonment. It is only at this point that the child can be taken into kafala care. Bargach, *A Study on Abandonment and the Practice of Kafala in Morocco* p. 11.

An abandoned child according to the Moroccan law is under the guardianship of the judge of minors, both before and after a kafala placement. Following the establishment of the child as abandoned, the kafala proceeding starts with an application of request to the judge, from the parties wishing to take a child under kafala (Article 9). The decision is taken on the basis of consultation between different legal instances (Article 16), including assessing the suitability of the applicants. The law offers the judge extensive room for interpretation as how to approach a specific case. The investigation that needs to precede a decision on kafala is often disclosed and varies from one district to another.³⁰ The decision is also often delayed because of the transition of the file through many different authorities. If the applicants are provided with the right of kafala, the decision is noted in the registrar's ledgers. According to the law it should be supervised by competent authorities, but in reality there is no follow-up.

The meaning of kafala is defined in Article 2 as a gift of care that is not extended to name and inheritance rights (inheritance dispositions in favour of the child need to be provided by testamentary wills, by the authority of a court). Articles 22 and 24 specify kafala further as a responsibility to take care of the child, such as giving the child affection and to provide for his or her education. The articles stipulate that persons entrusted with a kafala care order in all cases are to take care of the child in the same way as if the child were their biological child. For that reason, the mentioned article stipulates that the kafala placement is to follow relevant rules in the family law. The kafala placement ends when the child reaches the age of majority (18 years). Other grounds for termination include the death of the child or the kafala parents, or if the kafala parents have failed to provide for the child in accordance with the kafala entrustment. In case of divorce between the kafala parents, the kafala care is not terminated; instead, the child is placed with one of the kafala parents with the application of relevant custody rules in family law.

4 Kafala in cross-border cases

4.1 The case³¹ of *Harroudj v. France* (43631/09)

In 2004 the applicant, a French national, was granted by decision of an Algerian court the right to take an Algerian born child of unknown parents into kafala care. The applicant took the child to live in France, where she applied to adopt

³⁰ Bargach, *A Study on Abandonment and the Practice of Kafala in Morocco* p. 11.

³¹ *Harroudj v. France*, case no 43631/09 of 04/10/2012.

the child. French courts rejected her application in 2007 because Algerian family law made no provision for adoption. Like in most Muslim countries, adoption is prohibited in Algerian law. Instead, the Algerian family law provides for kafala, which is defined as a voluntary undertaking to provide for a child and take care of his or her welfare and education. According to French law, it is prohibited to adopt a foreign child if the law of his or her country of origin does not authorise adoption. The applicant disputed the outcome, claiming that the refusal of authorisation to adopt the child was an interference with her family life, as it is guaranteed in Article 8 in the European Convention on Human Rights.

The European Court on Human Rights shared the French Government's view that the refusal of authorisation to adopt the child did not violate the applicant's right to respect of her family life. According to the Court, the margin of appreciation open to the French state here was wide, not least because of the lack of consensus among states as to whether or not the law of the child's country of origin constituted an obstacle to adoption. Furthermore, the French courts had also taken into account the provisions in the Hague Conventions of 1993 and 1996 and the Convention on the Rights of the Child, which explicitly recognise kafala in Islamic law as protecting the child's best interest in a similar way as adoption.³² Therefore, the Court concluded that the French court's refusal of permission to adopt had been largely in keeping with the spirit and aims of the international treaties. And, perhaps the weightiest factor was that French law enabled the applicant to enjoy a parental authority that enabled her to take all decisions in the child's interest, and the applicant had also succeeded in giving the child her family name. Even if kafala did not create inheritance rights and did not entitle the child to acquire the nationality of the guardian, the applicant could still include the child in her will and choose a legal guardian in the event of her own demise. According to the Human Rights Court, the respondent state had made a flexible compromise between the law of the child's country of origin and its own law. Furthermore, according to French law, a child who could not be adopted because of his or her personal status under Islamic law had the right to apply for French citizenship – and thus become adoptable – if the child had lived in France for at least five years in the care of a French national. In gradually erasing the restrictions on adoption in this manner, French authorities had, in the view of the Court, made an effort to

³² Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Inter-country Adoption, Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children and UN Convention of 20 November 1989 on the Rights of the Child.

encourage the integration of children without immediately severing the ties with the laws of their country of origin, thereby respecting cultural pluralism and striking a fair balance between the public interest and that of the applicant.

4.2 Kafala in international treaty

Kafala is recognised as an alternative method of care in several international treaties. The basic treaty is the UN Convention on the Rights of the Child, adopted in November 1989 in New York. Article 20 of the Convention requires the contracting states to offer special protection for children deprived of their family environment. Such care can include, *inter alia*, kafala according to Islamic law.

The challenges created by kafala in cross-border cases have also been addressed within The Hague Conference of Private International law. Within the Hague Conference in particular, two instruments deal with the protection of children. The first Convention is the Hague Convention of 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption. The Convention covers only adoptions which create a permanent parent-child relationship (Article 2). The expression includes both so-called full adoptions (“strong adoptions”), which terminate a pre-existing legal relationship between the child and his or her biological family, and so-called simple adoptions (“weak adoptions”), which maintain legal ties to the child’s biological family.³³ Kafala is not regarded as creating the type of required relationship. However, during the negotiations on this Convention, Egypt submitted a working document (Work. Doc. no 124) suggesting the addition of a new paragraph to the preamble that could take into account the kafala as enshrined in Islamic law and the need to promote international co-operation in respect of kafala. The Egyptian delegation stressed the consideration of this alternative within the Convention, as kafala often provides for health, social and educational concerns regarding the child which correspond to adoption.³⁴ The notion was that the Convention would be equally useful for cross-border placement of children through kafala. However, the kafala question was postponed to be dealt with in the negotiations on a new, more general Convention on the protection of children.³⁵

These negotiations resulted in special provisions in the Hague Convention of

³³ Jänterä-Jareborg, “Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption”, *Nordic Journal of International Law*, 1994:63 p. 189 f.

³⁴ Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, paragraph 3 (42).

³⁵ van Loon, Hans, “The Accommodation of Religious Laws in Cross-border Situations: The Contribution of the Hague Conference on Private International Law”, *Cuadernos de Derecho Transnacional*, 2010:2 p. 264.

1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children. The 1996 Convention has a wide scope of application. The object of the Convention is to protect the person or the property of the child by providing rules on jurisdiction, applicable law to parental responsibility, rules on recognition and enforcement and the establishment of co-operation between authorities of the contracting states in order to achieve the purposes of the Convention (article 1). The measures referred to in Article 1 may deal in particular with the placement of the child in a foster family or institutional care, or the provision of care by the *kafala* (Article 3 e).

It was upon the initiative of the Moroccan delegation that *kafala* was included in the Convention.³⁶ The Moroccan delegation (Work. Doc. no 10) emphasised by reference to the old law of *kafala* in Morocco (from 1993) that *kafala*, was a measure established by authority decision (for example by a judge of minors/guardianship judge) for children in need of protection. A *kafala* arrangement could be entrusted to a social institution or a Muslim family for the care of the child's person (such as shelter, maintenance and education) and, if needed, for the property of the child. If necessary, the *kafala* entrustment can include a delegation of guardianship (which otherwise is under the judge of minors/guardianship judge). The Moroccan reference to *kafala* as an institution based on law and dependent on a decision by a competent authority is undoubtedly caused by the fact that the Convention requires the involvement of state agencies. In accordance with the Moroccan standpoint, *kafala* was in the end indisputably regarded as a measure of protection, which for this reason must fall within the scope of the application of a convention on the protection of children.³⁷ In regularly held seminars within the framework of the Hague Conference, the cross-frontier placements of children made by way of the Islamic institution of *kafala* have been explored as a main topic connected to the 1996 Convention.³⁸

Recognition of a *kafala* arrangement under the 1996 Convention presupposes that the concerned states are parties to the Convention. As a measure of protection, *kafala* custody is protected in cross-border cases through article 16 (4) in the Convention, because parental responsibility which exists under

³⁶ Lagarde, Paul, *Explanatory Report on the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and, Measures for the Protection of Children* p. 546

³⁷ Lagarde, Paul, *Explanatory Report on the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and, Measures for the Protection of Children* p. 546.

³⁸ Hcch International Family Law Briefings, March 2011.

the law of the State of the child's habitual residence subsists after a change of that habitual residence to another state. Furthermore, a measure taken by the authorities of a Contracting State shall be recognised by operation of law in all Contracting States.

The Convention has been interpreted as providing possibilities for children from countries within the Islamic tradition to be placed in family care in Europe under controlled circumstances.³⁹ Such a placement may then be followed by an adoption in the receiving country, unless that country's laws prescribe the continued respect of the original kafala for the child.⁴⁰ This is the case in the Netherlands, Italy, Spain and France, as is illustrated in the case of *Harroudj v. France*.

Although the Convention is important in the field of child protection, this assumption presupposes that Islamic countries ratify the Convention. At present, Morocco is the only contracting party that applies the institution of kafala within its domestic law. Furthermore, the use of kafala in cross-border situations presupposes domestic rules on kafala, which can also be used in cross-frontier entrustments. This is not always the case in the Islamic states. Studies confirm that the procedure that precedes a cross-border kafala entrustment is very time-consuming, requiring numerous steps such as proof of conversion to Islam by the applicants, a state certificate that confirms that the country of origin respects the original kafala entrustment, and so on.⁴¹ Nevertheless, the recognition of kafala as a measure of protection, within the 1996 Convention, is an additional tool of protecting children in international cases and also of symbolic importance in that it recognises an Islamic institution of child protection.

5 Kafala under Swedish law

The only published case in Sweden regarding kafala care is a decision from the

³⁹ van Loon, *The Accommodation of Religious Laws in Cross-border Situations: The Contribution of the Hague Conference on Private International Law* p. 264.

⁴⁰ van Loon, *The Accommodation of religious Laws in Cross-border Situations* p. 264.

⁴¹ Bargach, *A Study on Abandonment and the Practice of Kafala in Morocco* p. 11 f. During recent years, the Moroccan press has published articles on children taken into kafala overseas by parents falsely converting to Islam. As a reaction to this, the Ministry of Justice and Liberties issued a circular in 2012 banning non-Moroccan residents from taking Moroccan children under kafala. The right of parenting through kafala is, according to this circular, granted exclusively to applicants who are habitually resident in Morocco. The ministry's decision to ban non-resident applicants from taking Moroccan children into kafala care have been very much criticised by Moroccan organisations, as this will affect the lives of thousands of children in desperate need of care. *Morocco World News*, 30 October 30 2012.

Swedish Supreme Court announced in 1991 (NJA 1991 p. 21). In this case, a married couple of Moroccan origin, habitually resident in Sweden, applied for permission to adopt a child that they had under kafala care. The husband had dual citizenship (Swedish and Moroccan) and the wife was a Moroccan citizen. The kafala care, which the Swedish Supreme Court qualified as “custody in accordance with Moroccan customary law” without using the term kafala, had been registered in the Moroccan judicial system. This definition seems surprising considering that at the time, Sweden had ratified the UN Convention on the Rights of the Child that explicitly mentions care under kafala.

The case concerned the application of the Swedish Law (no. 1971:796) on International Legal Regulations Concerning Adoption (LIA). An application for permission to adopt, according to LIA, is governed by Swedish law (§ 2). However, if the child’s country of origin does not authorise adoption (which is the case in Morocco), the court must determine whether an authorisation to adopt will result in significant harm to the child in the child’s country of origin. According to the Supreme Court, because the child was firmly integrated into the applicant’s family, an authorisation to adopt was not to be seen as rendering such harm to the child. The Supreme Court did not determine the status of kafala under Swedish law. However, the Court did not reject the kafala entrustment. On the contrary, kafala was regarded as a foundation for integrating the child into the family of the applicants.

The 1996 Haag Convention has dramatically changed the legal situation in Sweden with regard to kafala. The Convention provides for the recognition of kafala entrustment emerging from a Contracting State. In these cases, Sweden is obliged to recognise a kafala care arrangement as a measure of parental responsibility. On the other hand, the 1996 Haag Convention does not regulate whether a kafala placement may be followed by an adoption in Sweden. That question needs to be analysed as an application for permission to adopt, governed by the general rules in LIA. Swedish law lacks rules and decisions on the impact of a kafala care arrangement outside the scope of 1996 Haag Convention, for example in immigration cases invoked by kafala as a foundation for family reunification.⁴²

⁴² In immigration cases it is uncertain whether kafala constitutes the type of required relationship; see, among other cases, Case no. UM 7119-08, The Administrative Court of Stockholm (Migration Court).

