



Fact Sheet N° 51

Specific case

KAFALAH

Even though the institution of kafalah is of growing interest to many receiving countries, its meaning, its origin and the variety of its practices within the Muslim world remain quite unknown for most Western professionals. The information gathered by the ISS/IRC is summarised in this fact sheet in order to give the reader some general ideas about this specific child protection measure, as recognised by article 20 of the Convention on the Rights of the Child (CRC).

Source

Kafalah finds its origin in the Sharia. The Sharia is a set of rules, which governs the life of a Muslim. It is based on different sources, including the Koran, the Sunna (teachings from the Prophet's life), the Ijma and the Qiyas (collection of case-law), as well as other sources such as customary law, the opinion of savants, the Old Testament, etc. Different schools of thought have influenced the development of the Sharia, beginning with the distinction among Sunni, Shiite, Ismailia, etc. In addition, the social and historical evolution of the various Muslim societies have played an important role in the way the Sharia is understood and applied: some apply a strict reading of the Sharia, while some other Muslim countries have incorporated the religious sources into their legal system, but with a more or less important degree of adaptation.

The prohibition of adoption, as a means to create new filiation bonds, is based on an interpretation of two verses of Sura N° 33 of the Koran and is seen by Sharia law as a falsification of the natural order of society. It is declared *haram* (forbidden) in order to preserve blood ties as the only way of creating filiation. The preservation of inheritance rights and the protection of the surname also play an important role in Muslim social traditions.

However, the Koran gives an important place to orphans and to their protection; it values the care of an orphan in one's home. The child should be treated as a biological child, but he/she is not entitled to the same rights as the latter (in particular the name and inheritance). Thus, kafalah is the model proposed by the Sharia in this respect.

Definition

Kafalah is usually defined as "the commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way as a father would do it for his son" (art. 116 Family Code of Algeria). Kafalah creates the following effects: exercise of the parental authority and the obligation of maintenance of the caregiver on the one hand, and persistence of the family bonds and preservation of the child's family status on the other.

Different practices in different countries

As the Muslim world is very diverse, the following examples illustrate the fact that it is necessary to put any kafalah decision in its national context in order to understand its meaning. A special focus is put on the potential "international" aspect of a kafalah.

a) *Countries with strict application of a "non international kafalah"*: Iran, Mauritania, Egypt.

They reject kafalah at the international level, based on a strict interpretation of the Sharia and rejecting all equivalence between kafalah and adoption. Thus, abandoned children only have limited possibilities to leave their country in order to benefit from a placement abroad, except by relatives. At national level, child placements in non-biological families exist, but remain very limited or outside the legal framework (for example, traditional family placements).

b) *Countries with a "case-by-case" solution*: Morocco, Algeria, Jordan and Pakistan.

They estimate that the situation of children deprived of family and the lack of national applicants for kafalah is such that it may be necessary to allow international kafalah, as long as the applicants respect some of the procedural conditions for a kafalah (for example, the conversion to Islam).

- Morocco allows for international placements of abandoned children, in favour of nationals living abroad, but also by foreigners.

- In Pakistan, according to law, non-Muslim children may be adopted by non-Muslim applicants, whether nationals or foreigners. However, it is very difficult to find evidence of this practice and to know how the procedures are dealt with.

- Algeria and Jordan have systems, which privilege national candidates, but both countries allow for the placement of children abroad, either with nationals or with foreigners, under the condition that they have the same religion as the child, meaning that they are Muslim. However, international placements remain rare and documented to a limited extent.

It is to be noted that in Jordan, the word kafalah refers to the monthly financial support granted to children living with a single parent (for the greater part the mother).

c) *Countries having legislation on adoption or on the "conversion" of kafalah*: Tunisia and Indonesia.

Even though they are very much attached to Islamic values, these countries allow for adoption, with full legal consequences in relation to filiation. However, by law (in Indonesia) or by practice (in Tunisia), adoption is limited to national applicants, living in the country or abroad, but of the same religion as the child.

Common findings

- In the great majority of these countries, national legislation explicitly prohibits adoption, with a particular emphasis on concordance of religion between the adults and the child. The concept based in the Koran is respected and is the basis of this choice.

- The reasons for abandonment are very similar from one country to another: children born out of wedlock are the first victims of abandonment, and may remain stigmatised throughout their life.

- The issues of secrecy of kafalah and the name of the abandoned child are direct consequences of the previous issue, but efforts are being made, in an increasing number of countries, to oppose this practice.

- With the exception of Morocco, the international placement of children under kafalah remains rare, or even inexistent, except for nationals living abroad. However, it seems that individual cases have been processed over the years, but it is very difficult to have them documented.

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For more information:

BARGACH Jamila, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Rowman & Littlefield Pub Inc, Mars 2002, pp. 304

We are interested in your opinion! To tell us your experiences, ask us your questions about the themes addressed in this file, or to send us your suggestions for changes, don't hesitate to write to us at irc-cir@iss-ssi.org. We also invite you to share this file with other interested persons in your country. Thanks in advance!

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