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## EDITORIAL

### Avenues for solution in light of domestic and cross-border *kafalah* practices

In December 2020, the ISS/IRC published its analysis of domestic and cross-border *kafalah* practices, in order to promote greater respect for the rights of the *makful* child.<sup>1</sup>

Recognised in the main international instruments relating to children's rights (UNCRC, Guidelines for the Alternative Care of Children, 1996 Hague Convention), *kafalah* is a protection measure specific to those States, whose legal systems are based on *Sharia* or have been influenced by the latter (States of origin). Outside this group of States, it is however not well known or just little known; this has been the ISS/IRC's main drive to focus a study on this issue (see Editorial of Monthly Review No. 213 of July 2017). Through the analysis of about twenty countries of origin as well as of civil law and common law countries, whose laws hardly mention *kafalah*, but who are faced with issues relating to its recognition and implementation (receiving States), the study intends to respond, in particular, to the following questions: what is its background and its various characteristics? How is it currently recognised and implemented in receiving States? Above all, how it is possible to address the current challenges at domestic and cross-border level in order to ensure that *kafalah* remains indeed a protection measure respectful of children's rights?

#### **Domestic *kafalah*: Avenues for solution in order to ensure the protection of *makful* children in their own country**

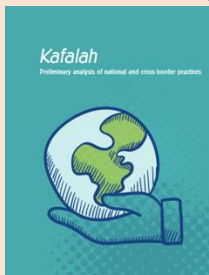
The ISS/IRC addresses the subject of *kafalah* within the framework of the general situation of children's rights and alternative care in States of origin. Indeed, the study demonstrates that this

field is rapidly developing: many States have initiated or are undertaking reforms to strengthen their legal system (e.g. Iran, Jordan, Morocco, Tunisia); others have, for example, started to develop or strengthen a variety of family-type measures, such as *kafalah* or other measures, including foster care (see p. 10). However, this review also leads to a general observation as to the fact that a child-centred approach is still lacking in many of the examined contexts.

Thus, how can we remedy persistent challenges (e.g. lack of or insufficient formal procedures, Family Law provisions conveying unequal rights, stigmatisation of children born out of wedlock, etc.) in order to ensure the universality of international child-rights standards whilst respecting the cultural characteristics of these States? In its study, the ISS/IRC offers three key actions, aimed, in particular, at (1) strengthening child protection systems, *inter alia*, through cross-sectoral cooperation, the allocation of adequate financial resources, or the development of data collection and management systems; (2) generating changes in professionals' attitudes in relation to children without family care; and (3) ensuring minimum procedural safeguards for family-type *kafalah*, based essentially on in-depth assessments undertaken by qualified and trained professionals.

## Cross-border *kafalah*: Avenues for solution aimed at ensuring the continuity of *makful* children's protection in another country

Could a cross-border *kafalah* placement be beneficial to some children, who cannot be cared for adequately in their State of origin? If so, in the absence of sufficient safeguards at national level, it remains however difficult to preserve the continuity of the children's protection when the *kafalah* becomes cross-border. Furthermore, there are few disaggregated data on this type of placements. Given the current annual intercountry adoption statistics (see Monthly Review No. 247, December 2020), it is however of



concern to notice that some receiving States continue to treat these placements through the prism of intercountry adoption. For the ISS/IRC, this view demonstrates the incompatibility and heterogeneousness of current responses in this field. Certainly, the study also demonstrates that the recognition and implementation of a *kafalah* placement in another legal system is extremely complex and raises many questions relating to jurisdiction, applicable law and inter-State cooperation. Yet, an inadequate or too simplistic

approach, which does not do justice to the nature of the measure itself, may put the children and their rights at risk. Is this situation not contrary to the essence of a protection measure?

Furthermore, when cross-border *kafalah* placements are indeed undertaken, how may a fair balance be struck between the respect for the *kafalah's* nature, as defined by each State of origin, and the safeguard of the full implementation of the child's rights in the receiving State, without any discrimination in relation to this country's other children? It is encouraging to notice that some promising practices may be drawn in relation to cross-border *kafalah*, some of which are presented in the study. For the ISS/IRC, it is essential that – from a child-rights perspective – a joint approach between the principles of International Public Law and the rules of International Private Law in this field is applied (see also p. 4). From this perspective, the ISS/IRC offers concrete avenues in order to (1) strengthen the safeguards of the current systems, in particular through increased cooperation tools (bilateral agreements, etc.); and (2) establish a procedure in four stages for the management of individual cases, which takes account of immigration and material laws on the short, medium and long term.

**The ISS/IRC's study does not intend to provide an exhaustive analysis of *kafalah* across the world and in all its aspects, but rather to address this specific care measure and its recognition and implementation based on the practice of some States of origin and receiving States. It truly hopes that it will be widely disseminated as a working tool, and above all, that it will be able to contribute, with its reflections and guidance, to *kafalah* placements respectful of children's rights at domestic and cross-border level.**

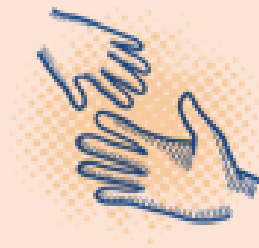
The ISS/IRC team  
January 2021

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**Reference:**

<sup>1</sup> Available in English and French at: <https://www.iss-ssi.org/index.php/en/resources/publications-iss?layout=edit&id=300#1-1-kafalah-preliminary-analysis-on-national-and-cross-border-practices--2020>.

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[irc-cir@iss-ssi.org](mailto:irc-cir@iss-ssi.org)  
[www.iss-ssi.org](http://www.iss-ssi.org)

**ISS**  
32 Quai du Seujet  
1201 Geneva / Switzerland