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Kafalah: What replies to multiple issues?

Kafalah, which has been recognised by the UNCRC, raises complex and sensitive issues as to its forms and the safeguards that are linked to its implementation – in particular when it is of an international character.

What is kafalah?

Kafalah is generally known as the commitment of a person (*kafil*) to voluntarily care for the needs, maintenance, education and the protection of a child deprived of their family (*makful*). It does not sever biological parentage. It has an international character when its implementation occurs in another country.

Kafalah is a child protection measure specific to Muslim countries, and varies considerably in its effects from one country to

another. Furthermore, when it has an international character, the disparities between the legal and cultural systems of Muslim Law countries – most of them prohibit adoption explicitly – and those of Civil and Common Law countries, raise difficulties: applicable legal framework, assessment of the child's best interests, respect for his or her rights, and legal implications. A recent mission of the ISS/IRC in Morocco has, however, recalled the importance of placing (again) at the centre of the reflection process the fundamental need of children without a family, or at risk of so being, of growing up in a family environment whilst respecting the laws and cultures of all.

The best interests of the child beyond the disparity between legal systems

In order to ensure the respect for the rights of the child deprived of a family, it is fundamental that the countries involved, first and foremost, respect the principle of subsidiarity. Thus, first, all efforts must be undertaken to prevent family

separation, and, secondly, the widest available variety of family-type measures must be offered to the children, giving priority to domestic solutions. It is worth supporting, as a priority, any country in ensuring the implementation of these duties, and in helping it to establish strong competent authorities, with qualified professionals, in charge of the implementation of these procedures and their control, for example in terms of costs, required consents, etc. It is for the latter that ISS Switzerland has supported Algeria in strengthening, on the one hand, prevention measures in situations of abandonment linked, in particular, to the stigmatisation of single mothers and of children born out of wedlock, and, on the other hand, in strengthening domestic *kafalah*, as a family-type solution, before considering an intercountry placement. Thus, tools have been developed for professionals, aimed at focusing the decision-making process on the child, and at strengthening the assessment, preparation, matching and monitoring of *kafil* families (see p. 9).

The option chosen by the Tunisian model, on the other hand, wishes to offer a reply to the alarming issue of abandoned children, and to a social reality, through the coexistence of *kafalah* and adoption. This example demonstrates that these two measures can be included in the same child protection system, a solution that could inspire other countries (see p. 7). It is worth noting that the wider the variety of protection measures, including solutions such a long-term

mentoring (see p. 4), the better the opportunities for the needs of the child to be met.

A legal framework able to overcome the challenges?

Domestically, several Muslim Law countries, such as Algeria, Morocco, Syria and Lebanon, currently demonstrate a willingness to strengthen their *kafalah* system through several means, such as potential legal amendments. With a view to a better protection of the rights of the child *makfoul* (see pp. 7 and 9), the latter should strengthen its legal status, for example by reviewing the conditions for the revocability of the placement, and by fighting against the various forms of discrimination, which they may be faced with, in particular when establishing the child's civil status.

Internationally, in addition to the UNCRC and the Guidelines for the Alternative Care of Children, *kafalah* is also addressed by the 1996 Hague Convention¹, which provides for a system of cooperation and prior communication between Competent Authorities². This key international framework, in addition to the advantages that it offers, has important limitations when the implementation of a *kafalah* is put into practice in another country. On the one hand, its applicability is limited given the low rate of ratification of the 1996 Hague Convention by Muslim Law countries, as Morocco is the only Contracting country of Muslim Law to date. On the other hand, despite the rules of cooperation set by this instrument, confusion remains as to the conditions and the obligation of recognition of a measure that is unknown in the receiving country. The same applies to the legal effects relating to the child's rights: access to the territory, granting of nationality, social rights, etc.

Solutions as to the legal effects of an intercountry *kafalah*?

Thus, how to recognise the legal effects of the *kafalah* that exist in Muslim Law systems in a country where the latter is not known? Should one reject its recognition or search for mechanisms of transposition in accordance with international and domestic laws? These issues remain at the

heart of the debate relating to intercountry *kafalah*, and generate reflection as to the interaction between the 1993 and 1996 Hague Conventions – as already raised in Special Commissions³.

Indeed, these uncertainties raise several challenges, such as the disparity in the policies and practices relating to intercountry *kafalah*. Whilst some countries, such as Australia, do not recognise *kafalah* placements – which are not known in its protection system, other countries, such as France (see Monthly Review No. 196 of November 2015) and Belgium try to find solutions, given their particular context. Indeed, given the high number of inhabitants from Muslim Law countries, the latter have approved legal and practical mechanisms of recognition of this measure.

Furthermore, in such a context, some practices jeopardise the rights of the child. In Muslim Law countries: the declaration of *kafalahs* in relation to applicants residing abroad, whose intention clearly is to adopt the *makfoul* child back in their country. In receiving countries: the conversion into an adoption of a *kafalah* declared in a country that prohibits it. Here, the ISS/IRC would like to draw attention to the approach of some countries, which openly encourage their citizens to undertake adoptions of children from Muslim Law countries, which violate the domestic legislation of these countries as well as International Law.

Faced with these concerns, concrete replies, which the ISS/IRC and other experts are currently discussing, are necessary in order to ensure the respect for the fundamental rights of the child and in order to reach a legal and political consensus amongst the countries involved. A forthcoming issue of the Monthly Review will inform of the progress made in this shifting field.

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