

Child Fostering Care: Kafala in Western Countries

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Abstract. After a survey on the essential features of the Islamic child foster care called *kafala*, the present Chapter investigates how domestic legal systems of Western States have dealt with it, particularly concerning to the right of family reunification and to intercountry adoptions. The Chapter also is aimed at highlighting the consequences of the recognition of the *kafala* related to the religious freedom of the immigrant's family, with a special concern to intergenerational transmission of religious values and the religious education of children in host countries.

Keywords. foster care, adoption, freedom of religion, religious education

1. Introduction

In recent years, massive migration flows have arisen several issues regarding the cohabitation of different ethnicities, cultures and religions challenging in this way well established traditions in contemporary society. The multiculturalism that has thus interested western countries has greatly affected at different levels also the primary unit of the society, that is the family.²

It is known that family plays an essential role in life choices of individuals and in their migration plans, so that migrants who move primarily for family reason constitute the largest group in migration flows. According to the data collected by the Organisation for Economic Co-operation and Development (OECD) [1], among the Member Countries, family migration comprised 41 per cent –around 1.9 million migrants– of the total permanent migration flows in 2018. In the same year, the United States accounted for 40 per cent (768,300) of total family migration to OECD countries. According to the Eurostat, As for European Union, the records gathered by Eurostat, with a special focus on child migration, highlights that in 2020, 211,000 children (aged less than 15 years) were issued first residence permits in the EU for reasons related to family formation and reunification, which represents 68% of all first permits issued to children in the EU. These statistics offer a picture of the current global scenario of migratory flows and effectively demonstrate that migrant families are nowadays widespread in western countries, constituting an inescapable matter of fact.

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² Western countries are intended in the present work as countries characterized by a predominantly Judeo-Christian tradition, regardless of their geographical position.

The significant presence of cross-border families is carrying in western societies relevant transformations, particularly affecting consolidate family models. Indeed, their familiar systems, as cultural product, are characterised by roles and relationships for some extent different and far from the ones of the host countries. These models also comprise institutions that are mostly obscure in the foreign lands and that can alter marriage schemes, parenting affiliations, forms of cohabitation and even the ways of living together. Thus, migration flows are contributing to redefine the idea of family as traditionally perceived in our countries and, in the meanwhile, are rebuilding its structures. Given the strong intersection existing between identity and religion, this phenomenon is intensified by the move of people belonging to different faiths, which has produced the circulation of different models of family particularly shaped by religious tenets.

The pluralism that migration flows have provoked is deeply challenging western legal systems which have now to deal with new institutions transplanted by people coming from foreign backgrounds. In host nations, indeed, immigrants often claim for the recognition of their relationships born under the legal tradition of their countries of origin. Jurists are thus called upon to overcome such issues and to find a legal accommodation for these stranger family structures through flexible and dynamic solutions that can meet the demands of a multicultural society.

The diffusion of the Islamic institution called *kafala* represents an example of such phenomenon of circulation of different family models. It can be defined as a voluntary undertaking to provide for a child and take care of his or her welfare, education and protection³: it consists in a special guardianship with which an adult (the *kafil*) commits to take charge of the maintenance, protection and upbringing of an unaccompanied child (the *makful*), without creating any parental relationship. Indeed, this particular arrangement derives from the necessity to respect the Islamic prohibition to establish parental relationships beyond the biological filiation throughout an adoption, which, on the contrary, creates a legal relationship that is identical to that existing between parent and child.

Being this guardianship system unknown in western legal orders, the *kafala* has given rise to a number of concrete problems, principally related to its compatibility with the strict criteria imposed by domestic legislations for family reunification and intercountry adoption. The problems are exacerbated by two orders of circumstance that generally characterized Islamic Law.⁴ The first relies on the fact that the Islamic law is strongly fragmented due to the coexistence of different schools of thought and, as a consequence, inconsistent legislative texts and applications, depending on the State concerned. Therefore, the Shari'a Law appears as a multi-centric universe in front of the eyes of western scholars, who are unable to reduce to unity this multifaceted legal system. Notwithstanding, among the various interpretations and concrete applications, it is possible to find common features to use as reference. In addition to this demanding point, there is another aspect that challenges the western courts in recognizing the *kafala* placement. Indeed, the rules governing the *kafala* are part of a particular category of norms, which refer to "personal status" and thus go beyond national borders, affecting all Muslims regardless whether they are in their own country or not. This implies that a

³ The same term "kafala" is often used also in relating a system of sponsorship migrant workers, very common in the countries of the Arab Gulf. As this form of *kafala* falls outside the sphere of family law, it will not be considered here.

⁴ The term "Islamic law" refers to two related, yet distinct concepts, which are often conflated: *Sharia* and *Fiqh*.

Muslim cannot renounce to his/her personal law and, therefore, as a matter of principle, he/she cannot accept in host countries extensive interpretations of Islamic prohibitions, even if they are often the only way to ensure a recognition of certain institutions such as the *kafala*. On the other side, our legal panorama is based on secularism, so that it is quite reluctant to take into account regulatory models that are substantially religious.

Despite these difficulties, *kafala* is increasingly involving cross-border families, as well as administrative and judicial offices. However, it should be underlined that this institute is not affecting in equal way western countries. The most interested region is certainly Europe due to its geographical closeness to the majority of Muslim States or to States with a prevalence of Muslim believers. The presence of Muslim population in the EU is significant. In 2016, it was estimated at 25.8 million – 4.9% of the overall population – and it is continually growing. [2]. For this reason, the problems connected to the recognition of *kafala* are particularly significant in European States, where it constitutes a matter of particular concern and where the jurisprudence on this topic is copious. On the contrary, in other parts of the world, such as United States [3], Canada or Australia, the question is certainly well known by immigration authorities, but it does not reach the same appeal that it has in Europe.

However, the study of the Islamic *Kafala* cannot be simplistically reduced to a question of application of the rules governing private international law, but it involves several other challenging questions.

In particular, the movement of people belonging to different faiths, especially Islam, has created in Europe an overlapping of religious norms and secular legal norms which may produce not only misunderstanding in the cross-nationals practice, but also potentially violations of religious freedom. In this regard, *kafala* constitutes a particularly interesting case, since it does not simply represent a matter of care and maintenance of a child, but it is the expression of the traditional and religious values of the Islamic society.

After a survey on the essential features of the *kafala* as it is conceived in Islamic tradition, the present Chapter will first highlight how domestic legal system of Western States have dealt with *kafala* with the aim to find a possible accommodation of this institute in the internal law, specially concerning the right of family reunification and intercountry adoptions. A brief overview on the approaches undertaken by different countries will show how the *kafala* is slowly going to be a part of western host countries societies and legal systems.

Finally, the present study will investigate the consequences of the recognition of the *kafala* relating to religious freedom of the immigrant's family, with a special concern to intergenerational transmission of religious values and the religious education of children in host countries, examining both the prospective of the subjects involved: the child in custody and the adult caretakers.

The final aim of this contribution will be to evaluate how democratic and secularized societies can accept, integrate and translate into law new models of family which immigrants are bringing from their religious background.

2. Essential elements of the *kafala*

Among the means of protections and care for vulnerable children, like minor orphans or abandoned, the Islamic tradition does not include adoption.

According to the major opinion, indeed, adoption, is not admitted in Islam, being forbidden in the chapter of the Quran entitled “The Confederate Tribes”:

Allah has not made for a man two hearts in his interior. And He has not made your wives whom you declare unlawful your mothers. And he has not made your adopted sons your [true] sons. That is [merely] your saying by your mouths, but Allah says the truth, and He guides to the [right] way. Attribute them to their father: that is more just in the eyes of God, but if you know not the names of their fathers, then they are your brothers in faith and your dependents.⁵

As can be deduced from this passage, the basis of the prohibition relies on the need to preserve family-of-origin ties. This conception is strictly connected with the Islamic idea of family as an institution of holy origins in which filial bonds are a manifestation of Allah's will. Accordingly, man cannot establish by himself through artificial juridical bonds a new filial bond beyond the biological generation within marriage [4].

Due to the relevance of Allah's law as a source of legal duties, the prohibition of adoption is replaced in the national legislations of almost every Islamic Country.

Notwithstanding, the Koran also imposes a duty of brotherhood and solidarity towards orphans or abandoned children, which every Muslim must follow.

Because of the above-mentioned principles, Islamic tradition has created a special arrangement in order to ensure the care of unparented children, which does not break the links between the child and his/her biological parents and, thus, is consistent with the religious obligation. This is the *kafala*, a kind of particular guardianship or sponsorship where an adult takes charge of the needs, upbringing and protection of a minor without creating any family relationship.

Although the regulation of the *kafala* has specific characteristics in every single legal system of each Islamic country, it is possible to identify some common essential features of this institution in Islamic traditions.

In the *kafala* arrangement, the *kafil* (a married couple or an adult) commits him/herself to provide to the needs and to take care of an unparented child, the *makful*, until the reaching of the age of majority, in the same way as a good father would do.⁶ In practice, through the *kafala*, the *kafil* obtains the custody of a child who was not given to the custody of his/her biological parents. It should be specified that, in accordance with the Islamic family law, parental roles are different between men and women: women have to take care of children's growth (*hadana*), while men have the duty of maintain, the custody and the parental authority [5].

Regarding the effects of the *kafala*, it does not produce a filiation with the minor, but just a responsibility over the child. The child does not interrupt the relationship with his/her biological family in a manner that he/she is not legally integrated in the new family: *makful* does not take the *kafil*'s surname and neither does obtain any inheritance rights [6].

To create a *kafala* arrangement, the *kafil* must sign a contract before a judge or a notary and some conditions are requested on procedural and also substantial grounds.

Regarding procedural obligations, Islamic law usually requires that the child is previously declared "abandoned" from the competent Court, and when biological parents are known, they are called upon to give their approval. Moreover, in different Islamic Countries, it is necessary to listen to the *makful*'s opinion and obtain his/her endorsement to *kafala*. Once *kafala* is allowed, the public competent authority keeps the task of surveillance the evolution of the child's integration in the extended family.

⁵ Quran 33:4-5.

⁶ In several cases, if the foster child is a female, the *kafala* continues until she gets married.

Regarding the substantial conditions, the competent authority must ascertain the *kafil*'s suitability. In particular, he/she must be of age, be able to guarantee to the child an adequate care and a good growth, fulfil with dignity the parental role and responsibilities deriving from *kafala* and finally, but not least, he/she must believe in Islamic religion. The latter prerequisite of the belonging to Islam must be framed in a religious perspective: only a Muslim family can offer to the child the best environment which can guarantee a good education.

From this rapid analysis on the essential features of the *kafala*, clearly appears that this is an institution with a significant religious component. First, it derives from the necessity of the Islamic believers to obey a religious obligation, that is the prohibition of the adoption. Accordingly, its juridical effects are consonant with the religious prohibition to establish parental relationship beyond the biological filiation. Moreover, the suitability of the *kafil* is strictly related to his/her Islamic faith, being the *kafill* necessarily a Muslim who commits to educate in Muslim religion the child in custody. Thus, *Kafala* is not simply a matter of care and maintenance of an abandoned or orphan child, but it is the expression of the traditional social and religious values of the Islamic society.

2.1 The *kafala* in International Law

The Islamic institution of *kafala* has obtained a recognition in the principal international conventions relating to the protection of the child.

The 1989 New York United Nations Convention on the Rights of the Child (CRC) is the international document which first gave an explicit mention to the *kafala*. It affirms that State Parties shall ensure an alternative care for children who are permanently or temporarily deprived of their family environment and identifies the types of alternative care that these countries may provide to them. Among other tools such as adoption, family custody, or, in case of need, the placement in apposite institutions for children, the Convention includes the *kafalah* of Islamic law. It also specifies that, when countries are called upon to select among these solutions, they must consider the importance of a regular education of the child, as well as his ethnical, religious, cultural and linguistic origin.

On the contrary, *kafala* was not recognised by the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The omission is well explained in the *Explanatory Report* which clarifies that the Convention covers all kinds of adoptions that bring about the creation of a permanent parent-child relationship, no matter whether the pre-existing legal relationship between the child and his/her mother or father is ended completely (full adoption) or only partially (simple adoption). Therefore, the Convention does not cover placement which do not establish a permanent parent-child relationship such as the *kafala* [7]. The approach of the 1993 Hague Convention reflects the main concerns of the delegates which was focused mostly on the experience of intercountry adoption among the western countries and not in the Islamic world.

This lack of recognition was filled by the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for Protection of Children, which, after a very deliberate decision, ensures that *kafala* would be included among the measures of protection covered by the Convention. The including of the *kafala* was the result of the effort of Morocco, which previously had even asked for the redaction of an additional protocol of

the 1993 Hague Convention for the recognition of the Islamic institution. Article 3(e) specifically refers to “the placement of the child in a foster family or in institutional care, or the provision of care by *kafala*, or an analogous institution”. The 1996 Hague Convention also seeks to give an appropriate regulatory structure for intercountry *kafala*. On this regard, Article 33 requires that, if a Contracting State contemplates the provision of care of a child by *kafala*, and this provision of care is to take place in another Contracting State, it shall first consult the authority of the latter State. It also requires the consent to the placement by the authority of the receiving state.

While the 1993 Hague Convention excludes *kafala* from its scope of application, providing that adoption may take place only if the competent authorities of the State of origin have established that the child is adoptable, the 1996 Hague Convention poses to all contracting States the obligation to recognise a *kafala* measure taken by the authorities of another contracting State.

Moreover, the co-operation mechanism set out in this Convention provides several guarantees, which should be promoted to ensure that a placement is carried out in compliance with the two laws in question and the best interests of the child. Anyway, the obligation to recognise the *kafala* does not imply, per se, any obligation of the States to admit the child to its territory, an issue that is determined on by the laws on migration applicable in that State.

3. The relevance of the kafala in Western Countries

Although its recognition in some international documents, the Islamic *kafala* has been until recently a concept almost unknown across western countries, both of civil and of common law. In this legal tradition, indeed, the typical tool aimed at protecting unaccompanied children is the adoption, which, on the contrary, is not admitted by Islamic law since it establishes a parental bond beyond the biological affiliation. The divergence between those countries whose legal system is based on or influenced by Sharia and those of civil-law and common-law has provoked a significant gap in the protection of children under a *kafala* placement. Thus, the unawareness about this Islamic institution has given rise in western countries to a series of questions related to its recognition and enforcement and also to the applicable law and jurisdiction.

The most concerning issues in receiving States has regarded the right of family reunification and intercountry adoption, since, in a nutshell, the child under *kafala* is not consider as a family member of the person who looks after him or her. As for family reunification, this means that a *kafil* who lives in Europe has not the right to remove the child subjected to *kafala* from the country of origin and bring him with the “*kafala* family”. On the other side, as for intercountry adoptions, *kafala* rises problems in relation with the wish of western citizens to adopt orphan children from countries in which Shari’a Law is observed or also with the will of Islamic couples who want to form a family of their *makful* in the host country, but they are not allowed to adopt him/her because of the ban imposed by their personal religious status. Overall, it is problematic that the persons involved, who generally are used to live together and have strong emotional bonds, have no possibility to legally constitute a family unit with the child placed under *kafala*.

The question is of extreme importance since the lack of certainty in the implementation of the institution may lead to adverse consequences for the child (inability to know and access his or her origins, unstable legal status, limited access to

social services, obstacles to his or her rights and cultural and religious identity being respected, etc.) or even give rise to abuse and violations of children's rights.

In this context, national administrative authorities, as well as legislative bodies and national courts have dealt with *kafala* and the possible accommodation of this institute in domestic legal systems. Solutions in receiving States vary greatly and policies are strongly impacted by politic influences. Moreover, recognition and enforcement of *kafala* placements in another legal system is extremely complex as it involves various areas of law (civil law, family law, citizenship and immigration law, etc.). Nonetheless, it's possible to argue the existence of a general trend, for which national practices are striving to find possible solution in the view of the best interest of the child.

This study presents and examines the practices implemented in eight receiving States, chosen as examples due to their relevance for a high presence of immigrant population and in order to offer a global overview, taking into consideration different geographical areas.

Australian law is deemed fair in accommodating the needs of the Muslim population. It considers and recognizes the Islamic prohibition of adoption. At the same time, in Australia it may be possible for a child who has undergone a *kafala* arrangement to be taken into account in a permanent visa application as a member of the family unit of the person who has been awarded guardianship under the *kafala*.

In Belgium, a *kafala* cannot be equated with an adoption given that it does not create any parental relationship. Nonetheless, accordingly to the Code of International Private Law, a *kafala* decision may be recognised if it does not contravene some fundamental principle of Belgian law, such the public order. If recognised, the effects of a *kafala* are similar to unofficial guardianship. Furthermore, a law entered into force in 2005 has introduced in the Civil Code a specific regulation for the adoption of minors coming from States where the law applicable knows neither the adoption nor the placement with a view of adoption. Following this amendment, it became possible for individuals seeking to care for a child through *kafala* to adopt the child according to Belgian law. Thus, the removal of a child to Belgium with a view to adoption and the adoption itself are not prohibited, but are subject to a strict procedure, requiring in particular a report to be sent by the child's State of origin to the Belgian authorities, proof of consent if the child has reached the age of twelve, and an agreement between the authorities of both States (State of origin and Belgium) to entrust the child to its adoptive parents.

In Denmark, there are no domestic laws concerning *kafala* placements. Anyway, the *kafala* arrangement is never recognised as an adoption and, therefore, it cannot be automatically converted into an adoption upon the child entering Denmark. Nonetheless, an individual who has the guardianship of the child would use international private law including the 1996 Hague Convention. Indeed, such foreign placements can theoretically be recognised in Denmark under certain circumstances as a kinship care or guardianship placement. This means that the adults cannot have the same rights over the child, as if they are a biological parent. Moreover, the child may be granted only a temporary visa to reside in Denmark which does not assure that the child can stay permanently in Denmark. However, after a certain lapse of time, if a child enters through a guardianship placement and habitually resides in Denmark, there is the possibility that the guardians can make an application for a domestic adoption according to Danish laws.

A singular and different position has assumed France, where the Law on International Adoption of 2001 has introduced a norm which explicitly forbids the adoption of a minor under a *kafala* if the adopters (or even one of them) are from a country where the adoption is forbidden.⁷ Adoption of a foreign minor also may not be ordered where his or her personal law prohibits that institution. The law provides also an exception of this general prohibition. Indeed, the adoption is permitted if some conditions are cumulatively met: the adopters must live in France, their union must be regulated by the French law and, last but not least, the minor must have been born and must have lived permanently in France. Despite the introduction of this norm, the jurisprudence has shown opposition and confusion and the judges has continued in many cases to recognize the adoption of children under *kafala*. Furthermore, in 2014 a ministerial circular stated that foreign *kafala* decisions introduce a *recueil légal*, that is a measure of protection that does not create parentage. This is a temporary measure which is equivalent to a guardianship for children who are orphaned or abandoned – with or without established parental ties – and may be revoked.

In Germany there are no specific legal provision ruling the recognition of the *kafala*. Anyway, there are other institution in German legal panorama that can be used to legitimise a placement of a child and give access and residence rights according to strict conditions. Specifically, the German law considers *kafala* placements as akin to a long-term foster care placement combined with the guardianship of the child. In some cases, *kafala* can also be comparable to kinship care if there is a kinship relationship between the persons involved.⁸ After two years of taking care of the child, there is the possibility for *kafil* parents to file a request for a national adoption to the German Court. In such cases, the Court will take into account the opinion of the local Child and Youth Services.

In Italy the question about the recognition of the *kafala* seems intricate, due to the lack of any specific normative reference that addresses the issue. Moreover, it should be noted a significant delay of the country in ratifying the 1996 Hague Convention, entered into force in 2016. Over these years, the Italian case law has evolved in its ruling on immigration provisions regarding family reunification and their applicability to situations such as *kafala*, turning from a restrictive interpretation towards a larger interpretation. The focus was mainly on the article 29 of the *Decreto legislativo* 25 July 1998 (also called *Testo Unico sull'immigrazione*), which permits third country nationals, when they are Italian residents, to obtain family reunification with minor children, specifying that “children adopted or fostered or subject to guardianship are all equally qualified as children”. The turning point in this scenario is represented by a decision of the United Sections of the Court of Cassation, the higher appeal judicial body, which in 2013 determined the principles and criteria to follow on the theme.⁹ In its ruling the Italian Court admitted the entrance in the national territory of a child entrusted under *kafala* to an Italian citizen residing in Italy for the purpose of family reunification.

⁷ Law no. 2001-111 of 6 February 2001 inserted new provisions in the Civil Code concerning intercountry adoption, including the new Article 370-3 in Chapter III (Choice-of-law rule concerning the legal parent child relationship established by adoption and the effect in France of adoptions granted abroad) in Title VIII on legal parent-child relationships by adoption.

⁸ Section 33 SGB VIII Kinder – und Jugendhilfe.

⁹ Court of Cassation, United Sections, n. 21108 of 9 September 2013. See also Cfr. Cass. 20 marzo 2008, n. 7472.

Indeed, the Italian Supreme Court's Joint Division has expressed that:

The nihil obstat to the entry in Italy requested in the interest of a minor, non-EU citizen, in custody of an Italian citizen domiciled in Italy with a decision of kafalah placement pronounced by the foreign judge whenever the minor is in charge of or lives together in the State of origin with the Italian citizen or serious reasons of health impose that the minor should be personally assisted by the latter.

Spanish legal framework has addressed the recognition of *kafala* in the latest reforms to the Law on International Adoption.¹⁰ On one hand Article 19 makes impossible to declare an adoption for children, when it is prohibited by their domestic law. On the other hand, Article 34 generally considers the question of the legal effects of decisions delivered by foreign authorities regarding child protection institutions that do not produce affiliation links or any form of parentage. Specifically, it states that foreign institutions aimed at protecting minors which, according to their domestic law, do not determine any affiliation relationship will be equated in Spain to foster care or, where appropriate, to a guardianship, as regulated in Spanish law. To this end, the law poses some conditions. In particular, the substantial effects of the foreign institution must be the same of those of Spanish foster care or those of a guardianship. Moreover, the effects of the foreign protection institution must not violate the Spanish public order and, at the same time, must fulfil the best interest of the minor. The norm thus can be referred also to the *kafala* placement, since the *kafil* and the *makful* are not in a parental relationship. In this way the Spanish Law carries out an equation based on the function of the *kafala*, that is similar with the one of the Spanish foster care. Once *kafala* is recognized, it will take exactly the typical effects of the Spanish institutions of foster care. Even if in Spain the *kafala* cannot be implemented as an adoption, its recognition as a foster care could facilitate a possible future constitution *ex novo* of an adoption of the child in custody [8].

The system gives relevance to the law of the country of origin of the child, in addition to the pertinent domestic law. Indeed, accordingly to the general prohibition of adoption typical of the Islamic States, the USA do not allow to US citizens to adopt a Muslim child overseas. Anyway, it is possible to obtain through a kafala the custody or guardianship in accordance with the law of the Muslim country of origin, and after that, claims the issuance of immigrant visas for orphans. Once arrived in US's territory as an orphan, the child can then be adopted in by the US citizens. For the purpose of emigration and adoption in the United States, the document giving legal custody must be valid under the law of the country in which it was obtained. This may take the form of a written consent from a Shari'a court or the competent authority, or a provision of law from the country where the child resides indicating the guardianship decree implies permission for the child to emigrate and be adopted in another country. To this end, the consular officer reviewing the case may even contact the Islamic court that issued the decree in order to have the confirmation of compliance with all relevant rules.

In US the recognition of the kafala seems effective, since the issuance of the immigrant visa in these cases essentially depends on demonstrating that the Shari'a law in force in the concerned country actually allows for the child to be adopted overseas.

Like the other western legal traditions, in the English legal system the main institution dedicated to the care of unparented children is the adoption, which, as it has

¹⁰ Law 54/2007, of 28 December, on Intercountry Adoption, as amended by Law 26/2015, of 28 July, which reforms the child and adolescent protection system.

been said before, is forbidden for Islamic believers. To give Muslim residing in UK the possibility to take care of an abandoned child, the 2002 Adoption and Children Act has regulated the new institute of the special guardianship. Although there is no direct reference to *kafala* and there are no provisions that can specifically be applied to Muslim family [9], this new institute seems to answer to the needs of those who are not allowed to adopt a child because of the religious prohibition, but they want anyhow to take care of him/her. This intention was clearly expressed in 2000 by the then-Prime Minister Tony Blair, who, in the White Paper preceding the reform of the Adoption Law, had specified that the new institute of special guardianship was proposed because «some minority ethnic communities have religious and cultural difficulties with adoption as it is set out in law» [10]. The English law requires, to obtain a special guardianship order, that the special guardian must be aged eighteen or over and must not be a parent of the child in question. Regarding the effects of the special guardianship, a special guardian appointed by the order has parental responsibility for the child and is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child. The special guardianship order does not affect the operation of any enactment or rule of law which requires the consent of more than one person with parental responsibility in a matter affecting the child; or any rights which a parent of the child has in relation to the child's adoption or placement for adoption.

In this way, the English special guardianship seems to reproduce the Islamic institution of *kafala*, insofar as it produces its main effect to simply create a parental responsibility over the child (until the reaching of the age of majority) and it does not dissolve the child's parental relationship.

From a global analysis of the implementation of the *kafala* in western countries has emerged an increasing relevance of this Islamic child placement, which is taken into account in different aspects. First, there is a clear position on the impossibility of treating a *kafala* as an adoption, respecting in this way the prohibition imposed by Sharia Law. Indeed, none of the examined States regard *kafala* established abroad as adoption. The relevance of the *kafala* in internal laws has proven to be effective especially in those States which require that the assessment of *kafil* candidates should be in accordance with the law of the Nation of the child (e.g., USA). In addition, some countries have introduced specific legal framework (e.g., France, Spain, Belgium). There are also cases of bilateral agreements between certain receiving States and States of origin (e.g., France, Spain). Cooperation among States is also promising, due to implementation of the 1996 Hague Convention or protocol applicable to the actors involved. However, every State is attentive to the interest of the child to have a family environment and to not remain without any protection. Therefore, legislations – or domestic courts where there is no specific legislation – have recognised the effects of *kafala* granted in a foreign country and have treated it as a form of guardianship or curatorship, or as placement with a view to adoption.

This brief overview on the approaches undertaken by different States shows how this institute is going to be a part of Western legal systems.

4. Right to freedom of religion and *kafala*

The expansion of this institute in western legal systems poses several issues about the coexistence not only of different normative orders, but also of different religions. As it has been said before, the *kafala* is not just a simple custody, but it is an institute with a

deep religious nature, which necessary involves the Muslim faith. Thus, the necessity to investigate the consequences of the *kafala* in the field of the right to religious freedom is very strong, especially with regard to the subjects involved: the child e his/her adult caretakers (for convenience of reference and due to their substantial role of parents, they will be mentioned in the next paragraphs as parents).

From the moment the *kafala* is created, the child (*the makful*), even if he/she maintains every legal bond with the biological family, starts to belong to the *kafil's* family environment.

From that moment, the life of the child will be totally immersed in the Muslim faith: the observance of certain practices of worship, a dietary regulation, the wearing of distinctive clothes or head covering, observance of holidays and days of rest are just some examples of this shaping. And the situation could be more meaningful if the *makful* is a girl, due to the widespread Islamic view of the woman as a subject under the authority of her father or her husband.

The strong involvement of the child in this religious environment may arise some questions on the impact on the possibility of the child to exercise his/her religious rights.

A special concern regards the Islamic legal tradition according to which a Muslim is not allowed to choose a religion other than his/her father. Thus, the *makful*, even if at age or with an advance level of maturity, has not the possibility to leave the family's religion and make a different religious decision. He/she has not the positive right to change religion and to choose another one. Moreover, he/she also has not the negative right to choose no religion at all.

Also the right of the child to be different from the religious belief of his/her family may be crashed when the child may arise the wish to integrate and enjoy the religious tradition of the host European Country [11]

In general, it has been stressed that for many children the right to freedom of religion may mean freedom from religious restrictions that impinge detrimentally on their lives.

Actually, because in most cases the child entrusted in custody is coming from another Muslim family, the risk of forced conversion is not so high. On the contrary in this case it should be taken into account the right to carry on in the religion his/her has practised or been brought into.

4.1. *The child's right to religious freedom*

Historically in international law the right of the child to freedom of religion has always been a contentious matter [11]. The struggle on this issue is due to several factors.

It has been noted that the right of the child is in relationship (and potential conflict) with the interest of several communities to which the child belongs: the parents, the family, the state and sometimes the religious community [12].

In this dispute about the child's religious freedom the rights-responsibility of the parents to educate their child have a special importance. The religion of children seems to have been brought within the realm of the rights of their adult caretakers, since several international provisions recognize the rights of parents to ensure the religious education of their children in conformity with their own convictions [13].

Moreover, unlike socio-economic rights, recognizing children's civil and political rights, such as the right to freedom of religion, requires an acknowledgment that children have rights exercisable independently of, or even in opposition to, their parents [14].

4.1.1. Legal Framework

The one binding instrument which explicitly recognizes the right of the child to religious freedom is the 1989 United Nation Convention on the Rights of the Child (CRC). The treaty considers the children's rights in a comprehensive manner and all its provisions are informed by four guiding principles: non-discrimination (Article 2), the best interest of the child (Article 3), the right to life, survival, and development (Article 6), and the child's right to be heard and have his/her views taken into account in all matters in accordance with the child's age and maturity (Article 12).

The child's right to religious freedom is entailed in Article 14, which provides that States Parties shall respect the right of the child to freedom of thought, conscience, and religion. Article 14 was modelled on Article 18 of the International Covenant on Civil and Political Rights (ICCPR), which proclaims the right to freedom of religion of *everyone*.

Comparing the two provisions, immediately appears that Article 14 CRC omits two elements which, on the contrary, enjoy an express protection in Article 18 ICCPR: the freedom to have or to adopt a religion or belief of the own choice and the freedom to manifest this religion or believe. This lack raises some doubts about the scope of the child's right to religious freedom as enshrined in Article 14 CRC. Notwithstanding, the commentators are almost agreed that Article 14 CRC affords the same level of protection given by Article 18 ICCPR and prohibits, even if implicitly, any coercion which would impair the child's freedom to have or adopt a religion of the child's choice [15, 13, 14]. However, it's remarkable that at the completion of the first reading of the Convention, the draft article on religion expressly guaranteed to children the right to have or adopt a religion or belief of their choice [15]. But the agreement on this text was not possible due to the fact that in many States children follow their parents' religion as a matter of divine law. Thus, the omit seems intentional.

Article 14, at paragraph 3, of the CRC is identical to Article 18(3) ICCPR insofar as it limits the freedom to manifest one's religion or belief where prescribed by law and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

But the most significant boundary to child's freedom of religion is entailed in paragraph 2 of Article 14 CRC. It provides that State Parties shall respect the rights and the duties of parents to provide direction to the child in the exercise of his or her right in a manner consistent with the child's evolving capacities.

The recognition of the parental role is well established in international law: it is proclaimed also in Article 18 (4) of the ICCPR and in Article 2 of the First Protocol of the ECHR (which is the one convention provided of a jurisdictional enforcement mechanism), which affirms that "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

Article 14 (2) is said to be a compromise provision designed to address potential conflict between children's rights and parents' rights in this sensitive area [14]. On one hand, it clearly recognizes the role of parents in the religious upbringing of their children and, in this way, appears to give priority to the rights of parents in the exercise of the child's rights to religious freedom. On the other hand, it contains two elements as a counterbalance: the evolving capacities of the child and the rights of parents to provide only "directions". This should mean that the parental "direction" cannot involve any

form of physical or mental violence and must involve taking into account the child's view in line with the child's age and understanding.

The provision is consonant with Article 5 of the CRC, which establishes the "parents' right and duty to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by their children of their Convention rights". It seems to guarantee parental primacy in the exercise by children of their rights.

Moreover, it has been noted that, apart from Article 5, parental rights are explicitly mentioned in regard to freedom of religion, while they are not mentioned in articles regarding other rights of the child [10]. If the reason is the relative immaturity of the child to make his or her own decisions and exercise autonomous choice, this reason applies to many other rights. Evidently, regarding religion, parents are seen as having a right to shape their child's identity.

4.1.2. Theoretical Models

The key concept in the theories about the child's right to religious freedom is the autonomy of the child, his or her capacity to exercise rights independently of others and the acknowledgment that the child is a person capable of self-determination and not just an object of concern [16].

Taking the autonomy of the child as a presumption, the liberal model views the child as the holder of an independent right to religious freedom and nobody has the right to interfere.

For example, John White argues: «if the parents have an obligation to bring up their child as a morality autonomous person, they cannot at the same time have the right to indoctrinate him/her with any beliefs whatsoever, since some beliefs may contradict those on which his/her educational endeavours should be based». Also J. Feinberg has identified the child's religious freedom as a sub-species of the child's "right to an open future", which can be violated if there is religious indoctrination of such severity that the child has little or no chance of leaving that religion for another [17].

On the contrary, there is another stream, often inspired by some religious principles, that regrets the view of the child as an autonomous legal subject [18]. He or she has no independent legal right of religious liberty in the family, assuming that parents' and children's convictions must be harmonious. In particular Ahdar and Leigh underline the dangers of the liberal theories about the child's religious freedom. In his opinion granting to children legal religious rights is potentially damaging to family integrity and parental confidence. Moreover, children, even mature ones, must still be shielded from the consequences of making a "bad" religious decision [18].

Most recently, a study of Sylvie Langlaude [19] on the right of the child to religion freedom under international law has advanced a new balanced position: it neither states that a child cannot have an independent right to religious freedom, nor does it state either that the autonomy of the child is the most important aspect (because the child has a right to religion freedom without necessarily having powers of enforcement or waiver over it). She undertook her analysis finding the major lacks in the work of the United Nation Committee on the Rights of the Child. The Committee, in her view, puts religion in a negative light, since it is implicit in her work that being religious may be negative for children and insists very much that the child must be able to leave a religion. Furthermore, the Committee tends to treat the child as an autonomous believer, ignoring his/her relationship with the family and the community and creating in this way a set of rights of the child against the parents. On the contrary, for the author the right of the child

to religious freedom is based on the interest of the child to be unhindered in his/her growth as an independent actor but always in the matrix of parents and religious community. Thus the child has a right to religious freedom not against the parents, but against the state. The child has a negative right that the state should not interfere in the relationship between child, parents and religious community, and the child has a positive right to protection, procedures, and substantive benefits.

5. Conclusions

Due to the growing relevance of the Islamic *kafala* in western societies, European legal systems cannot ignore it and pass it over. Its diffusion throughout European territory is by now a factual situation to face.

As the eminent scholar Alan Watson has argued, the success of a legal transplant will depend on the ability of the host national legal order to adapt to the new decontextualized model, but also on the compatibility of these models with the values and principles that characterise the host countries [20].

Thus, there is the necessity to reconcile the features of this institution, the *kafala*, which derive from religious tenets, with the principles which govern secular States, because if they don't learn to cohabit, they will clash.

About the case of the legal transplant of the *kafala*, one of the most concerning issue regards the right to freedom of religion of the child in custody in front of the parental right/duty to educate him/her in the Islamic religion.

Following the liberal stream, which views the child as an autonomous holder of rights, the *kafala* arrangement would not be accepted, since with this special guardianship the religious rights of the child are strictly connected with the parental upbringing. On the contrary, the *kafala* would be consonant with the conception which affirms that the child has not any independent religious rights. But both theories lead to a potential conflict between the secular legal order and the religious norm. In the former model there would be a breach of the parental rights supported by some religious tenets, and in the latter model the right to religious freedom, which is a fundamental principle of a democratic society, would be at risk.

In this way the balanced theory of Sylvie Langlaude [19] would be the most attractive, insofar it affirms that the child has some religious rights, but only against the State, not against the parents. Seeing at the *kafala* from the perspective of this model, the child has not only the right that the State does not interfere in their education, preventing parents from bringing up their child in accordance with their own religion, but most of all, the child has a right against the state to be brought up in their parents' faith. This means that the child does not have a right to be protected from their parents' belief: it is no coercive to bring a child into a religious community. The state has a duty to protect the choice of the child to join the religion of his/her choice, but only after the child has come of age.

But the religious freedom of parents with regard to the nurture of their children is not absolute but just qualified [21]. This means that the exercise of their religious rights could be subject to certain limitations and balanced with other rights or principles, first of all the well-being of the child. The fundamental principle which is able to limit parental rights is the best interest of the child. It is enshrined in Article 3 of the Convention on the Rights of the Child, which states that in all actions concerning children the best interest of the child shall be a primary consideration. It is regarded as a general

principle which underpins all the other provisions of the Convention, but it is also by now considered, more generally, a principle of interpretation in international law [15].

There is a lack of agreement over what constitutes the children's interest, because, as it has been underlined [22], deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Notwithstanding, it is possible to identify a core of this concept, which, without any doubt, rejects any form of violence, abuse or maltreatment. In this way, it is possible to affirm that the child has the right that the state protects his/her against the parents but only in certain circumstances, when the parental direction happens with physical or mental violence or involves the child in harmful religious postures and practices.

With the firm condition of respect of the principle of the best interest of the child, the special guardianship of *kafala* may be able to find its own accommodation among the values of the host legal order.

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