

**THE ADOPTION OF CHILDREN: AN EXPLORATION OF ISLAMIC LAW IN  
KINGDOM OF SAUDI ARABIA AND HOW IT COMPARES TO THE  
INTERNATIONAL STANDARDS SET BY THE HAGUE CONVENTION ON THE  
PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-  
COUNTRY ADOPTION**

by

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University of Pittsburgh, 2018

**Abstract**

This dissertation contains three main interrelated discussions. First, the Kingdom of Saudi Arabia (KSA) is provided as a case study of show how it could be incorporated into the Hague Convention for the international placement of Muslim orphaned children (at Chapter 2). Second, the main discussion considers that clarification is needed to help the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH) better understand the rules of *Kafala* as required under Islamic law in accordance with the *Qur'an* and *Sunna* (at Chapter 3). Consequently, the last discussion contends that some Muslim nations practice *Kafala* fostering in various adherence to Islamic law, adding to misrepresentations in international understanding of *Kafala*. Thus, this affects and causes confusion for member nations of the HCCH about what would serve as appropriate adaptations of the convention (at Chapter 4). Therefore, this study concentrates overall on how the HCCH of 1993 and 1996 can be used to unify and streamline the acceptance of the fostering of Muslim orphaned children through *Kafala* in much of the international community by clarifying the rules as delineated under Islamic law and using the practice of *Kafala* within the KSA as the subject of a case study. This clarification will serve to guide the immigration standards of the HCCH in regard to *Kafala* as an instrument of private international law.

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## PREFACE

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## 1.0 CHAPTER 1: OVERVIEW OF THIS DISSERTATION

### 1.1 PREAMBLE

“The Department of State has received many inquiries from American citizens who wish to adopt orphans from countries in which *Shari’a* Law is observed. There is a vast variance in the implications and observance of *Shari’a* law from country to country.”<sup>1</sup>

The comparative method utilizes the adoption of orphaned children with particular reference to the fostering process under Islamic law known as *Kafala* as practiced within the Kingdom of Saudi Arabia (referred to hereafter as KSA) and the legal standards set by the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (referred to hereafter as HCCH). In this regard, the differences in child placement between the practices of those under Islamic law, such as in KSA, and the practice of adoption used in western legal systems as contained in the international standards of the HCCH is highlighted in this study.

Approaching and understanding adoption practices can be challenging in general due to the profound differences between the legal systems of the member states to The Hague Convention and their different stances toward *Kafala*. It is also a challenge because Islamic

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<sup>1</sup> Adoption of Children from Countries in which Islamic Shari'a law is observed, Travel. State. Gov US. Department of State, Bureau of Consular Affairs [hereinafter Intercountry Adoption] *available at* <https://travel.state.gov/content/adoptionsabroad/en/adoption-process/faqs/islamic-sharia%20law.html> (last accessed Sep. 15, 2016).

countries have not applied *Kafala* in a uniform way leading to a deficiency in familiarity.<sup>2</sup> There are even differences in the application of *Kafala* within the same country.<sup>3</sup> Nonetheless, this dissertation approaches the practice of *Kafala* as practiced in the KSA as proposed case study subject for the practice across Islamic countries that follow Islamic Law. The main question addressed here is how the Hague Convention can be amended to better address the needs of orphaned children in countries that practice *Kafala* and thereby unifies its member States' policies regarding *Kafala*. To answer this question, the following issues must be examined to reach conclusion: Are these two systems compatible? Would the *Kafala* under the international HCCH be helpful in resolving some adoption issues, especially in the context of intercountry adoption? If so, what legal frameworks are to be employed to clarify this system? In reference to this main question and issues of interest introduced in this preamble, the following parts will clarify some practices, differences and similarities between the two systems of adoption, and address this thesis question as proposed above.

### **1.1.1 What is *Kafala*? Types of *Kafala* in Arabic Utilization**

In order to address these thesis questions, it is necessary to distinguish the meanings of the term *Kafala*, in Arabic, because it has different usages in different fields. In this dissertation, this word *Kafala* denotes:

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<sup>2</sup> *Issues Regarding Adoption in Islam*, ADOPTISLAM.CO.UK, <http://adoptislam.co.uk/1-19-issues-on-adoption.aspx> (last accessed Dec.17, 2015).

<sup>3</sup> *See, e.g.,* Morocco prohibits adoption, but there is different rules to practice *Kafala* system to foster or sponsor child, *See* Marianne Roux-Bouzidi, *Kafala, An adoption That Is Not An Adoption*, BABELMED.NET, (March.9, 2012) <http://eng.babelmed.net/cultura-e-societa/74-marocco/13064-the-kafala-an-adoption-that-is-not-an-adoption-2.html>. (last accessed Feb.11, 2016).

A. To guarantee<sup>4</sup> fostering of orphaned children

However, there are other terms of *Kafala*, which have different meanings such as:

B. Financial protection<sup>5</sup> and

C. The monitoring of migrant workers sponsorship<sup>6</sup>

Before delving into the concept deeply in the next coming chapters, it is important to explain briefly the variation in the meanings of *Kafala* in Islam in order to avoid mixing and confusion between these separate definitions. There is a need to distinguish, which type this dissertation refers to. First, as mentioned above, one definition deals with guardianship of orphaned children. More explanation regarding this type will be provided in chapter 2.

Second, another usage of the term of *Kafala* regards a system for the monitoring of migrant workers sponsorship.<sup>7</sup> This system has been used in Islamic countries especially Gulf States, Gulf Cooperation Council (GCC) such as KSA, Kuwait, Qatar, Oman, United Arab Emirates, and Bahrain.<sup>8</sup> This system based on the domestic labor law,<sup>9</sup> but in this regard, the word *Kafala* means sponsors for foreign employees.<sup>10</sup> Consequently, under this system, all unskilled laborers from foreign countries are required to have in-country sponsors. The sponsors are usually employers of

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<sup>4</sup> JAMILA BARGACH, *ORPHANS OF ISLAM: FAMILY, ABANDONMENT, AND SECRET ADOPTION IN MOROCCO*, 29 (2002).

<sup>5</sup> *Id.*

<sup>6</sup> MFI, Reform of the *Kafala* (Sponsorship) System: Migrant Forum in Asia Secretariat, available at <http://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf> (last accessed Aug 12, 2016). See also Froilan T. Malit, Jr. and Ali Al Youha, *Migration Information Source, Global Civil Society in Qatar and the Gulf Cooperation Council: Emerging Dilemmas and Opportunities*, MIGRATIONPOLICY.ORG (Apr. 9, 2014), <http://www.migrationpolicy.org/article/global-civil-society-qatar-and-gulf-cooperation-council-emerging-dilemmas-and-opportunities> (last accessed Aug 17, 2016).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* See also NAZLI KIBRIA, *MUSLIMS IN MOTION: ISLAM AND NATIONAL IDENTITY IN THE BANGLADESHI DIASPORA* 119 (2011).

<sup>9</sup> The *Kafala*: Research on the Impact and Relation of the Sponsorship System to Migrant Labor Bondage in GCC Countries, APMM, Asia Pacific Mission for Migrants (September 2014), 47 available at <http://www.apmigrants.org/articles/publications/Featured%20Researches/Kafala%20Research%202014-FINAL.pdf> (last accessed Aug 20, 2016).

<sup>10</sup> *Id.* at 9-24.

the migrant workers. The sponsors also have the responsibility to organize for all paperwork, including visas, for the migrant workers.<sup>11</sup>

Third, a final use of the word *Kafala* relates to financial transactions. *Kafala* is similar to the Western institution of surety bonds<sup>12</sup>, which are a legal contract that allows a third party to guarantee the delivery of a promise on a debt or to release the first party debt holder's liability.<sup>13</sup> Notably, *Kafala*, in the financial sense, must be carefully monitored by *Fuqaha* (legal jurists) under Islamic law to set its legal boundaries because usury is strictly forbidden under Islamic law.<sup>14</sup> In addition, legal definitions (terminologies) are important to describe the *Kafala* first and to comprehend its compatibility among adoption systems.

### **1.1.2 Islamic Law Definition of *Kafala*.**

The Islamic alternative to the conventional adoption is known as *Kafala*,<sup>15</sup> although it is not functionally equivalent to adoption<sup>16</sup> that is “a form of long-term foster care”<sup>17</sup> The literal meaning

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<sup>11</sup> *Id.*

<sup>12</sup> Bargach, *supra* note 4.

<sup>13</sup> TOM SPOORS, ISLAMIC FINANCE 90 (2014). See FRANK E. VOGEL & SAMUEL L. HAYES, ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN, 106 (1998). See *The Legal Meaning Of Kafalah*, LAW TEACHER, <http://www.lawteacher.net/free-law-essays/contract-law/the-legal-meaning-of-kafalah-contract-law-essay.php> (last accessed May 21, 2016). See also, TAKAFUL AND ISLAMIC COOPERATIVE FINANCE: CHALLENGES AND OPPORTUNITIES, 206 (S. Nazim Ali & Shariq Nisar eds., 2016).

<sup>14</sup> Bargach, *supra* note 4.

<sup>15</sup> Muslim Women's Shura Council, (August, 2011), Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child 8, available at <https://pdfs.semanticscholar.org/84f9/7560b61ea8b5510c69faf9a0a557350a2dbc.pdf> (last accessed Dec 30, 2017).

<sup>16</sup> SSRN. Nadjma Yassari, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, *The American Journal of Comparative Law* [Vol. 63], 928.

<sup>17</sup> KERRY O'HALLORAN, THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE 5 (2015).

of *Kafala* that related to orphaned children is “sponsorship”<sup>18</sup> or “guardianship”<sup>19</sup> *Kafala* is derived from the word whose meaning is “to feed.”<sup>20</sup> “*Kafala* is an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until he or she reaches majority. A form of unilateral contract, it is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption. Nevertheless, unlike adoption, *Kafala* neither confers inheritance rights nor any right to use the grantor’s family name.”<sup>21</sup> All of which are discussed in depth later in the second chapter.

### **1.1.3 Legal Definitions of Adoption Shared by Most Parties to the HCCH.**

Adoption in general means to give all parental rights permanently to adoptive parents exercise through a legal process such that a child can be taken into the adoptive parents’ home.<sup>22</sup> In addition, as Professor Kerry O’Halloran<sup>23</sup> defined the legal term of adoption “a legal method of creating between the child and one who is not the natural parent of the child an artificial family relationship analogous to that of parent and child.”<sup>24</sup> In the United States for purposes of intercountry adoptions, adoption is defined as, “the judicial or administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the minor's legal

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<sup>18</sup> Imad-ad-Dean Ahmad, *The Islamic View of Adoption and Caring for Homeless Children*, Adoption Fact Book III, Washington: National Council for Adoption, MINARET.ORG (1999) <http://www.minaret.org/adoption.htm> (last accessed Sep 4, 2017).

<sup>19</sup> Muslim Women’s Shura Council, *supra* note 15 at 6.

<sup>20</sup> Ahmad, *supra* note 18.

<sup>21</sup> O’Halloran *supra* note 17 at 604 at Footnote 3 Explanatory of *Kafala*.

<sup>22</sup> Child and Family Services Policy Manual: Adoption Definitions, Subsidized Adoption, Non-Recurring Adoption Expenses, and Medical Subsidy.) Mont. Code Ann. § 42-1-103 (601-1) available at <https://dphhs.mt.gov/Portals/85/cfsd/documents/cfsdmanual/601-1.pdf> See also JENNIFER FAIRFAX, THE ADOPTION LAW HANDBOOK 244 (2011).

<sup>23</sup> Adjunct Professor; PhD in Law Trinity College Dublin, Ireland

<sup>24</sup> O’Halloran, *supra* note 17 at 4.

parent and terminates the legal parent-child relationship between the adoptive child and any former parent(s).”<sup>25</sup> Remarkably, this form of termination in adoption practice is common in all Western nations.<sup>26</sup>

The focus of this study is specifically intercountry adoption. According to the Adoption Law Handbook intercountry adoption is defined as “the adoption of children who are citizens of one country by parents who are citizens of a different country.”<sup>27</sup> The most important international instrument regarding intercountry adoptions is the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. The HCCH an international treaty aimed to set up common provisions to guide intercountry adoptions for member countries. It states that it is intended to, “take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect to his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.”<sup>28</sup> For this reason, the HCCH contends that intercountry adoption “offers the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>29</sup> Keeping these basic and legal definitions in mind, the mechanisms of each system can be better understood. The mechanisms of each system are discussed below. It is important to stress that under Article 2 of the Convention only adoptions that create a permanent bond between the parent and the child are recognized.<sup>30</sup>

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<sup>25</sup> US. Citizenship and Immigration Services § 204.301 Definitions, 22 CFR 96.2

<sup>26</sup> BRIAN H. BIX, FAMILY LAW, THE OXFORD INTRODUCTIONS TO U.S. LAW 97-80 (2013).

<sup>27</sup> Fairfax, *supra* note 22 at 257

<sup>28</sup> HCCH. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at. art. 2.

## 1.2 THE MECHANISMS OF BOTH SYSTEMS

### 1.2.1 Mechanisms of *Kafala*

The term *Kafala* is reserved just for orphaned children under Islamic law, which is derived from the teachings of *Qur'an* and *Sunna*.<sup>31</sup> It also includes *al-Laquit* i.e., foundlings who are young children or babies found abandoned, with unknown parents or guardians, commonly placed e.g., in mosque, hospital, or in anyplace.<sup>32</sup> The consensus on the age of children would be 18 and under,<sup>33</sup> and of course this age is also considered to be the acceptable age for orphaned children.

Foundlings are in the category of orphans. As the Senior Scholars of KSA agree, those who take care of foundlings are worthy of receiving the great reward because foundlings are in greater need of family environment since they do not have relatives and parents.<sup>34</sup> Foundlings are otherwise known, according to *Hanbali* jurisprudence, as “forsaken,” i.e., a homeless child who

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<sup>31</sup> This Hadith derives from Sunna, as prophet Mohammad said "I and the one who looks after an orphan will be like this in Paradise, showing his middle and index fingers and separating them," Narrated by Muhammad Al-Bukhari, See SUNNAH.COM Book of Good Manners and Form (Al-Adab), The Superiority of the One Who Looks After an Orphan Reference: Sahih al-Bukhari 5304 In-book reference: Book 68, Hadith 53, and English reference: Vol. 7, Book 63, Hadith 224.

<sup>32</sup> See ABDULAZIZ ALDOGTHER, THE ABANDONED CHILDREN: THEIR RIGHTS AND THE KINGDOM OF SAUDI ARABIA'S CARE OF THEM 2 (2016). (Trans. interpretatively from Arabic to English by the author of the dissertation). See also, Fatwa Center, Islamweb.net, The Child's Mother Died Will the Child Called Orphan? Category: Charity and Its Provisions, Fatwa No.123237, June, 4. 2009 available at <http://fatwa.islamweb.net/fatwa/index.php> (last accessed Nov, 6, 2016). (Trans. interpretatively from Arabic to English by the author of the dissertation). To clarify at Qur'an stated that the *Kafala* just for orphaned children, and most of the Fatwas regard “fostering” in KSA, specific to foundling children “al-Laquit”, Also, at Fatwa Center, Islamweb.net, The Definition of Foundlings in Islamic law and their Provisions, Category: Al-Laquit, Fatwa No. 27077, Jan 2. 2003.

<sup>33</sup> Saudi Shura “Council” Approves the Decision of Childhood to 18 Years, ASHARQ AL-AWSAT NEWSPAPER, November 25, 2008 (10955) available at <http://archive.aawsat.com/details.asp?section=43&article=496255&issueno=10955#.VrAJOjaDGko> (last accessed Aug. 4, 2016). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>34</sup> Kingdom of Saudi Arabia Portal of the General Presidency of Scholarly Research and Ifta: The Department of Religious Research and Fatwa, Fatwa No. 20711 available at <http://www.alifta.net> (last accessed Jul. 27, 2017). (Trans. interpretatively from Arabic to English by the author of the dissertation).

has been found on the street or in a similar setting without known genetic parentage or relatives.<sup>35</sup> The *Ehtidan* under *Kafala* that is applied in KSA offers foundlings one of the best alternatives for fostering for their overall wellbeing according to the Senior Scholars in the KSA.<sup>36</sup>

According to the foregoing mechanisms, adoption itself is forbidden in Islamic law<sup>37</sup>, but foster care and rearing of orphaned children is permissible so long as kinship ties are not established, like that of a biological relationship between adoptive parents and the child; this is considered illegal.<sup>38</sup> According to the *Qur'an*, one cannot become a person's real son or daughter just by a declaration of adoption. As Allah says,

(4) "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".<sup>39</sup> (5) "Call them by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers - then they are [still] your brothers in religion and those entrusted to you. And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful."<sup>40</sup>

The *Kafala* instead advocates for alternative guardianship that treats orphaned children similarly to adoption in Western countries, but some provisions exist because Islamic law seeks to preserve ancestry and lineage to avoid complications of biological ties of adopted children.<sup>41</sup> Ultimately,

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<sup>35</sup> Al Mughni Alhanbali *Infra* note 220 at (al-qate book).

<sup>36</sup> General Presidency for Research and Ifta, The Permanent Committee of Fatwa: The Department of Religious Research and Fatwa at Fatwa No. 21145 *See also* section 2.6 at Chapter 2 of this dissertation.

<sup>37</sup> The Ruling of Adoption, Official Web for Imam Ibnbaz *available at* <https://www.binbaz.org.sa/list/fatawa> (last accessed Feb. 18, 2016).

<sup>38</sup> General Presidency for Research and Ifta *supra* note 36.

<sup>39</sup> The Holy Book Qur'an Sorat Al-ahzab (The Combined Forces) 21: 4.

<sup>40</sup> *Id* at. 21:5.

<sup>41</sup> Abd al-Wahhâb al-Turayrî, the Fatwa Department Research Committee, Who Says Islam Prohibits Adoption, *available at* <http://en.islamway.net/fatwa/53839/who-says-islam-prohibits-adoption> (last accessed Dec 18, 2015). (Trans. interpretatively from Arabic to English by the author of the dissertation). *See also*, Adoption in Islam, ISLAMWEB.NET (Nov. 9, 2013) <http://www.islamweb.net/ehajj/article/135420/adoption-in-islam> (last accessed Nov. 9, 2015).

for that reason, change of the child's family name and the succession of inheritance (other than the allowable third of an estate that may be willed) to adopted children are strictly forbidden under Islamic law. As such, it is not an element of *Kafala*. This is the main reason for why adoption is proscribed in Islam. More explanation of this will take place in the second chapter.

### **1.2.2 Mechanisms of Adoption**

In contrast, to the *Kafala*'s religious basis, the HCCH is based on the United Nations Convention on the Rights of the Child (UNCRC), of November 20, 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986).<sup>42</sup>

The type of children who can be adopted under international adoption standards set forth by the HCCH does not just include orphaned children whose parents are deceased. This system allows children who have parents that are alive to be adopted under certain circumstances. Thus, intercountry adoption laws can involve both orphaned and non-orphaned children. The evidence of this in the HCCH is the term "termination," which would indicate a break from biological parents or family relations. This suggests that its proceedings can regard a child whose parents may still be living.<sup>43</sup> Yet, within the articles of the HCCH, the term "orphan" is not defined and not even mentioned. This is notable because the term orphan is very important to the *Kafala*. Thus,

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<sup>42</sup> HCCH. 1993 *supra* note 28.

<sup>43</sup> *Id* at art.4 (1) art. 26 (1.c) (2) art. 27 (1) *See also, Adoption*, ENCYCLOPEDIA.COM 2005, <http://www.encyclopedia.com/topic/adoption.aspx> (last accessed Dec. 14, 2015). *See also* USCIS Orphan Process under the part of Hague Adoption Convention Cases *available at* <https://www.uscis.gov/adoption/immigration-through-adoption/orphan-process> (last accessed Dec. 24, 2015).

this lack of clarity creates a significant difficulty for amending the standards of international adoption under the HCCH to accommodate the *Kafala*. The bond created by an intercountry adoption is a permanent parent-child relationship according to the Article 3 in 1993 HCCH.

Accordingly, with the creation of an intercountry adoptive relationship between HCCH member States, an adoptive couple would have the option of changing the adoptive child's family name and/or pass inheritance to an adopted child, since there are no restrictions on this in the HCCH of 1993.<sup>44</sup> It depends on the laws of the sending and receiving countries, so variations may exist. To that end, the Explanatory Report of the 1993 Convention clarifies under note 89 that, "restrictions on the use of family names and the right to inherit from the adoptive family, should be respected in the Convention. Such respect, however, must not be allowed to interfere with the goals of the Convention for children from countries of origin when those countries' laws provide for full and unrestricted adoptions."<sup>45</sup>

Indeed, in the current state these systems are not compatible, so they need to be understood and recognized by each other, so that they may have a way of aligning to work together. The two systems function on different sets of principles, which prevent them from readily cooperating. Islamic law is not able to change its stance on adoption because it is based on religious tradition, but the HCCH can be adapted to better define orphanhood and to append provisions, which are needed for the *Kafala* system to fit within the traditional adoption system in Western countries. More elaborations will be provided in the second chapter concerning the provisions of *Kafala* under Islamic law.

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<sup>44</sup> G. Parra-Aranguren, Explanatory report on the Convention on Protection of Children and Co-operation in Respect of Intercountry adoption at note 89, Caracas (31 December 1993) *available at* <https://assets.hcch.net/upload/expl33e.pdf> (last accessed Dec.27, 2015).

<sup>45</sup> *Id.*

**Table 1.** Summary of the Mechanisms: Adoption vs. *Kafala*

Mechanisms of <i>Kafala</i> under Islamic law in the KSA	Mechanisms of Adoption under the HCCH
<ul style="list-style-type: none"> <li>▪ The main tenets of <i>Kafala</i> are derived from the teachings of <i>Qur'an</i> and <i>Sunna</i></li> </ul>	<ul style="list-style-type: none"> <li>▪ Principles of the HCCH are based on the United Nations Convention on the Rights of the Child (UNCRC) of 20 November 1989</li> </ul>
<ul style="list-style-type: none"> <li>▪ Adoption itself is forbidden, child placement should not create kinship ties. <i>Kafala</i> does not create a bond such as a permanent parent-child relationship between the adoptive parent and child. Under Islamic law, this is prohibited based on the <i>Qur'an</i></li> </ul>	<ul style="list-style-type: none"> <li>▪ The bond created by an intercountry adoption is a permanent parent-child relationship <u>according to the Article 3 in 1993 HCCH</u></li> </ul>
<ul style="list-style-type: none"> <li>▪ <i>Kafala</i> is reserved for orphans or foundlings only under Islamic law, so <u>no biological parental rights exist therefore they cannot be terminated</u></li> </ul>	<ul style="list-style-type: none"> <li>▪ Can involve both orphaned and non-orphaned children, so it requires the termination of existing parental rights as a condition of an adoption according to Articles 4-26 in 1993 HCCH</li> </ul>
<ul style="list-style-type: none"> <li>▪ Change of the child's family name, plus passing of inheritance to an adopted child are forbidden as means of preserving biological lineage</li> </ul>	<ul style="list-style-type: none"> <li>▪ Provides for the option of allowing change of the child's family name and/or inheritance to an adopted child (depends on country's laws variation may exist)</li> </ul>

### 1.3 THE STATEMENT OF PROBLEMS

#### **Main problem**

Study is lacking, which addresses the Islamic legal system of the KSA in regard to the practice of “fostering” orphaned children using the *Kafala* provisions that serve orphaned children, and none exists in English sources.

#### **Sub- problem-1**

Although it is mentioned briefly, the recognition of the *Kafala* under the HCCH on the Protection of Children and Co-operation in Respect of Intercountry Adoption is inadequate in its interpretation. As it is stated in Article 3, “the measures referred to in Article 1 may deal in particular with-- e) the placement of the child in a foster family or in institutional care, or the provision of care by *Kafala* or an analogous institution,”<sup>46</sup> and at Article 33 in paragraph (1), “If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *Kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.”<sup>47</sup>

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<sup>46</sup> HCCH. 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 at art. 3-e.

<sup>47</sup> *Id* at art. 33-1.

## **Sub-problem-2**

There is a need to propose a uniform practice of *Kafala*. This is due to the fact that some Muslim jurisdictions<sup>48</sup> have implemented a *Kafala* that is not practiced in a way that is consistent with Islamic law or in particular Islamic law as practiced in KSA or consistent with the provisions of *Kafala* itself.

### **1.4 OBJECTIVES**

There are three main objectives are as following:

- The main purpose is to serve as a comparative analysis of Islamic law as practiced in KSA and international standards set by the HCCH concerning the adoption rules for orphaned children.
- The second objective is to find methods to reconcile the different laws, so that these systems can collaborate under the HCCH regarding the immigration, and
- The final objective is to help provide jurisdictions around the world with a greater understanding of the *Kafala*.

Accordingly, the main objective of this study, which is to help the academic study of legal systems, specifically regarding the legal system of KSA, is addressed in a number of ways:

- This study makes a significant contribution in the field where legal literature is lacking and insufficient. Moreover, there is not enough information on the subject written in the English language in particular.<sup>49</sup>

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<sup>48</sup> Such as Algeria, a case in the Justification for Advocating a solution section below in this chapter has been provided to prof that. *See also* Chapter 4.

<sup>49</sup> Because it is a global language nowadays, particularly for communication about legal systems. *See* DAVID CRYSTAL, ENGLISH AS A GLOBAL LANGUAGE, 4-11 (2003).

- The findings of this research study bridge some of the gaps with regards to understanding the *Kafala* from an international perspective.
- The findings of this study also provide a viable basis for further studies concerning the *Kafala* and intercountry adoption.

Consequently, based on these foregoing facts, it is clear that there is a need for further research to shed light on the fostering rules under the Islamic law of KSA. Researchers who are interested in the same subject matter will be able to use the findings of this study as a foundation for their future studies.

## 1.5 SIGNIFICANCE

The primary goal of greater inclusion of *Kafala* in international law is the preservation of the kinship ties of children during placement, which explains the focus on KSA provisions and practice of *Kafala* in this study. In terms of the significance of this dissertation, the results will: first, clarify the rules of adoption within the *Kafala* under Islamic standards using KSA as an example and as a reference case to represent Islamic countries; second, explore the international standards of the HCCH on intercountry adoption used commonly around the world; and third, emphasize the similarities and differences between the two systems, and determine how they can both be used in conjunction to better serve and be more supportive of the adopted individual (*e.g.*, as in the case of intercountry adoption). Importantly, it provides the first full English translation of the KSA's *Executive Plan for Child Protection Code*. In the following section, I will demonstrate how I aim to advocate for solutions to these issues detailed in the three problems described above as a justification for change. The hope for the results would be that it may help to bring a progressive

change to the global legal enforcement of the rules of adoption, specifically concerning the *Kafala* to aid Muslim orphaned children worldwide.

## 1.6 JUSTIFICATION FOR ADVOCATING A SOLUTION

First, due to the limitation of sources regarding the topic of *Kafala* in KSA, this thesis advocates for more international discussion on the practice of “fostering” orphaned children using *Kafala* in particular, where the fostering is managed by a comprehensive body of law, which serves to protect orphaned children. Furthermore, it is very significant to mention children’s rights under the Executive Plan for Child Protection Code in KSA in general as a part of this discussion.<sup>50</sup> The basic purpose of posting the whole *Code* in this dissertation is to help to minimize the concern of authorities regarding the welfare of children in KSA, even if this *Code* is not the core issue addressed here; but also, besides this reason, it is for the reason that it is the first and only English translation of the *Code*. More demonstration is provided in Chapter 2 about this code.

Also, to advocate for the second problem, this thesis argues for the acceptance within the HCCH of alternative care for orphaned children, such as *Kafala* under Islamic law, which has obvious rules that must be upheld in order to qualify as being implemented in the name of the *Kafala*. The government of KSA prioritizes the legal implementation of the *Kafala*, thereby legally and wholly protecting their orphaned children under Islamic law. For this reason, KSA is the focus of this study and may provide a blueprint on how to legally apply the *Kafala*. Indeed, the reason why this current study’s use of English to explain Saudi Arabian legal policies concerning the

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<sup>50</sup> See Annex (A) of this dissertation.

adoption of children will help to resolve the main problem mentioned above of not having enough literature on this topic written in English. In part, the inclusion of a glossary of terms regarding Family Law in the KSA is an essential contribution to the field because there is not regular access to these terms in English. In effect, it will serve to familiarize Western scholars with Family Law legal terms in the KSA. With this aim, KSA may serve as appropriate framework for properly utilizing this law.

The importance of this issue is magnified by the growing number of opportunities for fostering children from the Muslim world. It is important to know that the Islamic religion represents the second major religion in the world after Christianity.<sup>51</sup> On top of that, opportunities for fostering children in the region are increasing since many children have lost their parents during recent wars and armed conflicts in the Middle East.<sup>52</sup> Hence, the number of Muslims in Western countries willing to adopt “foster” children according to the rules of Islamic law under the *Kafala* may be increasing as well. Thus, the crux of this dissertation in particular is to address this issue of unrest and revolutions presently happening in Muslim nations, which is resulting in many

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<sup>51</sup> IRVING EPSTEIN AND LESLIE J. LIMAGE, *THE GREENWOOD ENCYCLOPEDIA OF CHILDREN’S ISSUE WORLDWIDE*, 153 (2008).

<sup>52</sup> UNICEF declares 2014 ‘devastating year’ for millions of children trapped by conflict, U.N. News Center, available at <http://www.un.org/apps/news/story.asp?NewsID=49537#.WX-jwzOZOqA> (last accessed June 8, 2017). See also, Ruth Sherlock, *Thousands of Syrian Children Left to Survive Alone, Says UN*, TELEGRAPH.CO.UK (Nov. 29, 2013, 5:00 AM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10482142/Thousands-of-Syrian-children-left-to-survive-alone-says-UN.html> (last accessed July.8, 2016).

The most affected countries from arm conflict or so on nowadays are from Muslim countries wither in Middle East or not. e.g., Tunisia, Libya, Yemen, Afghanistan, Iraq, Egypt, Lebanon, and Syria.

orphaned children who are in need of protection and family environment.<sup>53</sup> The map below (Figure 1) shows several recent conflicts that might be factors in increasing displacement of children.<sup>54</sup>



**Figure 1.** Map pinpointing the Middle Eastern and other Muslim Nations who confronted several recent conflicts

Simultaneously, there are many Muslim people immigrating to Western countries that are members of HCCH. In Canada, Muslims made up the largest percentage of immigrants (over 1 million in 2011).<sup>55</sup> Also, according to polling and statistical analysis from Pew Research Center on Religion and Public Life, Muslim people have increased in Western countries, particularly in

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<sup>53</sup> Safiyyah Patel & Nabila Bana, *The orphans of Syria's war*, Displaced widows and children of Syria's war struggle for survival in Hatay, Turkey. ALJAZEERA.COM (May. 31, 2016), <http://www.aljazeera.com/indepth/inpictures/2016/05/orphans-syria-war-160528083608975.html> (last accessed July.11, 2016). See also, Zehra Kavak, IHH, Humanitarian and Social Research Center: Report on World's Orphans July 2014 at 2 available at <https://reliefweb.int/sites/reliefweb.int/files/resources/REPORT%20ON%20WORLD%27S%20ORPHANS.pdf> (last accessed July11, 2016).

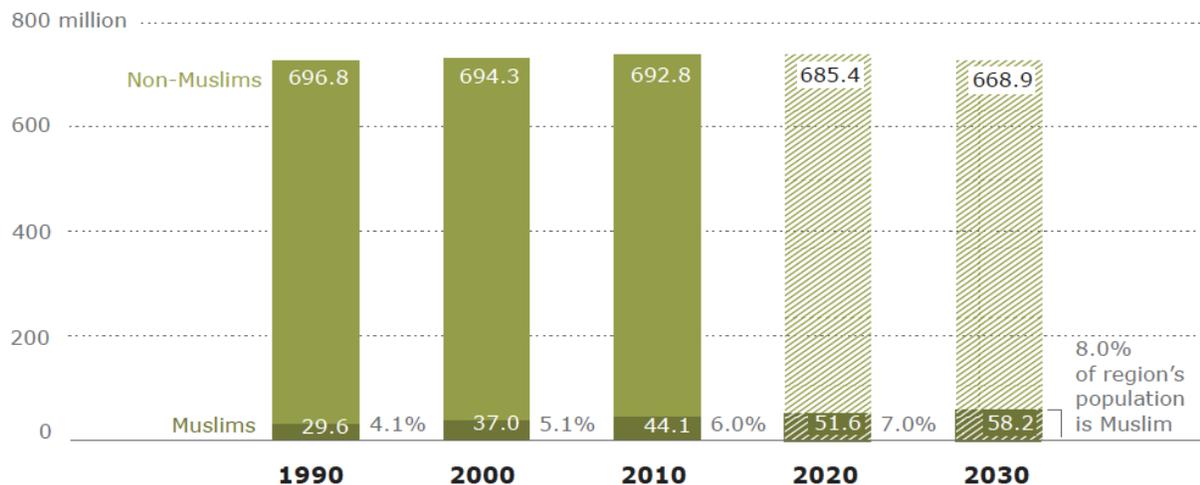
<sup>54</sup> Google Map (2018), [https://www.google.com/search?ei=Ob1bWrGHD8mF\\_Qbopq6QBA&btnG=Search&q=middle+east+map](https://www.google.com/search?ei=Ob1bWrGHD8mF_Qbopq6QBA&btnG=Search&q=middle+east+map).

<sup>55</sup> Immigration and Ethnocultural Diversity in Canada, Statistics Canada available at <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm> (last accessed Nov. 20, 2015).

Europe from 29.6 million in 1990 to 44.1 million in 2010. Also, according to this diagram that appears below (Figure 2), it is expected that the population of Muslims will increase over the next 20 years in many Western countries such as Italy, United Kingdom, Germany and France.<sup>56</sup>

**EUROPE**

**Muslims as a Share of Overall Population, 1990-2030**



Percentages are calculated from unrounded numbers. Cross hatching denotes projected figures.

Pew Research Center's Forum on Religion & Public Life • *The Future of the Global Muslim Population*, January 2011

**Figure 2.** Graph depicting Muslim migrant population to Europe.

Different countries that are members of the HCCH take different interpretations on protocol for *Kafala* cases. Some countries, such as France have contradictions in regard to recognizing *Kafala*. On one hand, they claim *Kafala* is “fully accepted” which is a good step, and they cite that it gives satisfactory parental rights according to *Harroudj vs. France*<sup>57</sup>. On the other hand, they commonly

<sup>56</sup> *Region: Europe, The Future of the Global Muslim Population*, PEWFORUM.ORG (January 27, 2011) [hereinafter Pew Research Centre], <http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-europe/> (last accessed Jan.1, 2016). See also Conrad Hackett, *5 facts about the Muslim population in Europe*, PEWRESEARCH.ORG (November 29, 2017) [hereinafter Pew Research Centre], <http://www.pewresearch.org/fact-tank/2016/07/19/5-facts-about-the-muslim-population-in-europe/> (last accessed Jan.1, 2016).

<sup>57</sup> *Harroudj v. France*, 43631/09 Eur. Ct. H.R. at 19 (2012), Refusal of Permission to adopt a child in *Kafala* foster care did not violate respect for family life.

reject applications for reunification<sup>58</sup> based on *Kafala* relationships due to filiation based on the belief that it is in the best interest of a child to live with or keep in touch with his/her biological parents according to Article 8 of European Court of Human Rights (ECHR) “Right to respect for private and family life.”<sup>59</sup> Other countries allow for *Kafala* cases through alternate adoption systems, such as in the United States, which employs both the HCCH adoption system and non-Hague system. In the US., *Kafala* may be considered on a case-by-case basis. Likewise, other countries deny cases of *Kafala* outright, such as Canada (and its provinces, including Quebec.)<sup>60</sup>

Unfortunately, a large number of countries that are members of the HCCH fall in this latter category and reject *Kafala*. Therefore, this dissertation will supplement this discussion by adding how the states, which are party to HCCH, have interpreted the *Kafala* differently under their domestic courts. For instance, one significant case exemplifies how the existing *Kafala* practices in some countries that are members of the HCCH have been misapplied, showing a lack of understanding of the *Kafala*. In this case, the Canadian federal government banned all pending adoptions from Pakistan and all other Islamic nations that follow the *Kafala* in 2013 over their disagreement with the *Kafala*.<sup>61</sup> In 2012, a Pakistani woman attempted to bring a baby girl was

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<sup>58</sup> Ramah McKay, Family Reunification May 1, 2003 available at <http://www.migrationpolicy.org/article/family-reunification> (last accessed Aug 6, 2016) See also, Rita Duca, *Family Reunification: The Case of the Muslim Migrant Children in Europe*, 1 Athens J. of Soc. Sci. 118 (2014).

<sup>59</sup> European Convention on Human Rights art. 8 “Right to respect for private and family life  
1. Everyone has the right to respect for his private and family life, his home and his correspondence.  
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” & Art. 14 “Prohibition of discrimination  
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>60</sup> Official Website on International Adoption in Quebec, *Countries that prohibit adoption –Kafala*, ADOPTION.GOUV.QC.CA, [http://adoption.gouv.qc.ca/en\\_kafala-et-adoption](http://adoption.gouv.qc.ca/en_kafala-et-adoption) (last accessed Dec.9, 2016).

<sup>61</sup> Nusrat Mashooqullah Aleeza Munshi and The Minister of Citizenship and Immigration, Can. (2013), 2014 FC 982, [2014] F.C. (Can. Ont. F.C) available at <https://www.canlii.org/en/ca/fct/doc/2014/2014fc982/2014fc982.pdf>

abandoned, for whom she had legal guardianship in Pakistan, to Canada, but she was denied. The reason for this as interpreted by Canada's federal court indicates that this case did not meet Canada's standard of an original parent-child relationship, which is based on having ties with the biological parents. In fact, the Canadian government prevented the immigration of children from countries that practice Islamic law.<sup>62</sup>

Moreover, Canadian law has an obligation to the HCCH, which they cannot breach, made clear in the statement that “*Pakistani law allows for guardianship of children, but does not recognize our concept of adoption. Proceeding with further such placements would violate Canada’s obligations under The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.*”<sup>63</sup> According to the judgment the application was dismissed for judicial review.<sup>64</sup> It apparent that this issue also affects immigration law since it is a part of the process of intercountry adoption. Hence, immigration law would need to be adapted in addition in order to fully address the issues with the HCCH. Article 2 of the HCCH on the Protection of Children in 1993 states that, “The Convention covers only adoptions which create a permanent parent-child relationship.”<sup>65</sup> Conversely, Islamic law does not cover the permanent parent-child relationship so they use the *Kafala* rather than adoption under the rules of Islamic law, which is similar to foster care.<sup>66</sup>

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*See also* Nasser Shanifa, *Canadians Adopting from Muslim Countries Caught in Legal Limbo*, Federal government suspended adoptions from Pakistan in 2013 over Kafala arrangements CBC.CA (Jun. 01, 2015, 5:00 AM), <http://www.cbc.ca/news/canada/canadians-adopting-from-muslim-countries-caught-in-legal-limbo-1.3089651> (last accessed Dec.9, 2016).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* *See also* the notice from Government of Canada *available at* <http://www.cic.gc.ca/english/department/media/notices/2013-07-01.asp> (last accessed Dec, 2016).

<sup>64</sup> *Id.* at. 18.

<sup>65</sup> HCCH 1993 *supra* note 28 at. art. 2.

<sup>66</sup> Shanifa *supra* note 61. *See also* the notice from Government of Canada *supra* note 63.

Furthermore, in relation to the complex problem there are issues with the definitions of adoption and references to a “permanent parent-child relationship” in the HCCH that are not in accordance with the *Kafala*. According to the Explanatory Report of the HCCH in 1993, “For the purposes of this Convention, ‘adoption’ means the legal action by which all rights and responsibilities of biological parents in respect to a child are terminated and all rights and responsibilities are transferred to the adoptive parents”.<sup>67</sup> The definition of adoption used within the convention is therefore not compatible with the *Kafala*, because the Convention refers to transfer of rights from the biological parents. And there would be no “fostering” of a child with an existing parental relationship under the *Kafala*. Consequently, the main cause for the *Kafala* “fostering” is just to serve orphaned child who do not have any living biological parents.<sup>68</sup> More info will be provided in the second chapter.

In fact, the reasoning for denial of adoptions involving Islamic countries in Canada is due in part to the reasoning that *Kafala* is not strong enough to terminate the biological parent relationship according to

Article 4: “An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin...the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin.”<sup>69</sup>

And Article 26: “The recognition of an adoption includes recognition of - c) the termination of a pre-existing legal relationship

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<sup>67</sup> Explanatory Report HCCH *supra* note 44 at paragraph 2 (88).

<sup>68</sup> Mohammad Wilaly, *Kafalat Alyateem “Fostering orphan”* ALUKAH.NET (May. 31, 2010), <http://www.alukah.net/sharia/0/22221/> (last accessed Jan.9, 2015). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>69</sup> Shanifa, *supra* note 61. *See also*, HCCH 1993 *supra* note 28 at. art. 4- C-1.

between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.<sup>70</sup>

However, this requirement seems unnecessary given that *Kafala* guardianships are only permitted for orphan children who therefore have no living biological parents, or foundling. A requirement for the termination of biological parental rights makes the rule incompatible, so a review and adaptation of this policy for cases involving orphans, especially those coming from countries where documentation, such as death records and birth certificates, is not readily available, would be advisable.

Notably, within the official document put out by the HCCH, called “Outline: HCCH on Child Protection (1996)”, the *Kafala* is described as falling “outside the scope of the 1993 Intercountry Adoption Convention.”<sup>71</sup> This outline document briefs the Convention’s meaning and content.<sup>72</sup> This serves as evidence from within their own official document that the HCCH draws a line between their view of adoption and alternative forms, such as the *Kafala*. In conclusion, more HCCH articles should be amended and added to give a process for how to deal with *Kafala* through intercountry adoption processes with special consideration for the provisions of *Kafala*.

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<sup>70</sup> *Id* at art. 26 (1).

<sup>71</sup> HCCH. Outline of 1996 on the International Protection of Children (September 2008) *available at* <https://assets.hcch.net/docs/be4083a2-ed90-4dc2-bb97-13be22e6a5d8.pdf> (last accessed Dec.13, 2015). *See also*, WENDY ZELDIN, CHILDREN'S RIGHTS: INTERNATIONAL LAWS, ARGENTINA, AUSTRALIA, BRAZIL, CANADA, CHINA, FRANCE, GERMANY, GREECE, IRAN, ISRAEL, JAPAN, LEBANON, MEXICO, NICARAGUA, RUSSIA, AND THE UNITED KINGDOM, THE LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH CENTER 10-11 (2007) *available at* <https://www.loc.gov/law/help/child-rights/pdfs/childrens-rights.pdf>.

<sup>72</sup> *See* Wendy Zeldin, Law Library of Congress International Laws Children’s Rights, (August 2007) 12 as Zeldin the Senior Legal Research Analyst at Library of Congress Washington D.C. stated at citation 40 “The article summarizes the Convention’s contents” that refers to the Outline of 1996 *available at* <https://www.loc.gov/law/help/child-rights/pdfs/Children's%20Rights-International%20Laws.pdf> (last accessed Oct.13, 2016).

Since the *Kafala* is the closest form to adoption under Islamic law, the HCCH should be amended to clarify their position on long-term foster care options such as *Kafala* within the confines of the Convention. Consequently, the HCCH of 1996<sup>73</sup> is inadequate in its view of *Kafala* and risks leaving out many potential Muslim people who desire to foster children worldwide. As a result, in general I would like the HCCH to write more articles regarding *Kafala* so that procedural requirements can be established that would have to be met to satisfy intercountry *Kafala* of children. When adding information about the *Kafala* to their articles they must keep in mind the principles and provisions that must be followed under Islamic law to undergo a placement of a child with a country that follows the *Kafala*.

Therefore, it should also give a process for how to deal with adoption and *Kafala* to make a special consideration for the conditions and provisions of the *Kafala* so that Muslim people living in the Western countries that are party to the HCCH may not have custody denied due to potential misunderstandings. In this case, it would be beneficial for the HCCH to change its language in several instances. To supplement this argument, I contend that amendments of the HCCH should move to specifically address how its Member States, which are party to the convention, should interpret the *Kafala* under their domestic courts and immigration documents. More specific examples and recommendations are discussed in the conclusion.

As an example of this issue at play, the terminology of a “permanent parent-child relationship” is problematic since the Explanatory Notes from the 1996 HCCH discuss the analysis and call for changing the term “permanent” because of different connotations from French to English translation. In this case, the notes state that, “The text submitted to the second reading by the Drafting Committee (Work. Doc.-No 179) was criticized in as much as the English version

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<sup>73</sup> See HCCH 1996 *supra* note 46 at art. 3-e and art. 33-1.

(‘permanent parent-child relationship’) used the word ‘permanent’, and therefore was stronger than the French text. However, no changes were made because of the difficulties to translate into English the French expression ‘*lien de filiation*’.’<sup>74</sup>

I believe that Article 2, in a case such as this where language suggests that it will only cover “permanent parent-child relationships,” it should be amended to not use the term “permanent” because this phrasing precludes fostering with countries following the *Kafala*. This is because *Kafala* does not create a “permanent parent-child relationship,” despite the fact that *Kafala* requires a voluntary and often long-term commitment of taking charge of an orphaned child’s needs, upbringing, and protection. More will be elaborated in the third chapter under the argument section arguing that many countries do not sufficiently recognize *Kafala*.

By promoting a more consistent application of the *Kafala* system in Muslim countries a persuasive effect can be achieved because currently the inconsistent application across Muslim nations creates confusion regarding what the *Kafala* is and how to appropriately adapt the HCCH to include it. The cultivation of more consistent applications of *Kafala* across Islamic countries is needed. To this effect, some Muslim jurisdictions are practicing adoption (*al-tabanni*) even if it is prohibited such as Tunisia, Indonesia,<sup>75</sup> Somalia,<sup>76</sup> Malaysia<sup>77</sup> and Turkey.<sup>78</sup> To follow Islamic laws however, these countries should not be allowing the practice of adoption because it is prohibited under Islam. The fact that they are going against Islamic practice and allowing adoptions adds to the confusion of Western nations and policymakers who are needed to make

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<sup>74</sup> Explanatory Report HCCH *supra* note 44 at paragraph 2 (93).

<sup>75</sup> International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), “Specific Case: *Kafala*,” Fact Sheet No51, (Geneva: ISS, 2007).

<sup>76</sup> See DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 409 (1998).

<sup>77</sup> U.N. Child Adoption: Trends and Policies: Rep. of Department of Economic and Social Affairs Population Division, U.N. Doc. ST/ESA/SER\_A/292 (2009).

<sup>78</sup> *Id.* at. 347.

accommodations for *Kafala*. For example, one might mistakenly believe that Islamic law can be adjusted to allow for adoptions based on the fact that some Muslim countries are allowing adoption against Islamic law provisions, while in fact, it cannot.

Given this fact, the practices of adoption in Muslim countries are disparate and some of the countries are actually a part of the Hague Adoption Convention such as Turkey in 1993 and Morocco in 1996. They can therefore send orphaned child abroad for the purpose of adoption, as other countries of the common law world do.<sup>79</sup> Because countries that should be using the *Kafala* are using the practice of adoption instead, it makes it more challenging for the HCCH to know how to appropriately change to accommodate the practice of *Kafala* to satisfy Islamic law.

In Algeria, for example, the *Kafala* is utilized, but not followed according to Islamic law, in a legal respect.<sup>80</sup> For example, one case of Harroudj v. France illustrates some of these differences in adherence to Islamic doctrine on *Kafala*, including the act of granting a name change. According to the circumstances of this case, “In a decision of 19 January 2004, the President of the court of Bordj Menaïel (Algeria) admitted a request for the child to take the same name and authorized the change from Zina Hind to Hind Harroudj.”<sup>81</sup> Changing a Muslim child’s last name with the intent to attribute the child to his/her last name is a violation of Islamic law,<sup>82</sup> yet the court in Algeria still granted Harroudj that request. It should be emphasized that in this case with regards to the child’s name, the request was made by Harroudj to change it. To this point, since Algeria is a Muslim country, it is evident that the Algerian government’s procedure is not following a close practice of Islamic law.

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<sup>79</sup> O’Halloran, *supra* note 17 at. 603-607.

<sup>80</sup> See Harroudj v. France *supra* note 57 at 2.

<sup>81</sup> *Id.*

<sup>82</sup> See The Holy Book Qur’an, *supra* note 39-40.

## **1.7 BRIEF OUTLINE OF STUDY CHAPTERS (STRUCTURE OF THE RESEARCH)**

The study has been organized into different chapters. Chapter one provides an introduction to this study (proposal). It provides the background of the study, statement of the problem, the purpose of the study and advocates an argument to support my thesis. Under this chapter, a summarized structure of the study has also being explained. The next three chapters will represent the three problems, presented such that each chapter will discuss one problem area. The second chapter discusses KSA's system in general and its "fostering" equivalent adoption. It covers the background, roots, and history of *Kafala* under Islamic law and adoption. Also, it defines the *Kafala* of Islamic law, examines its legal applications in KSA, and emphasizes the significance of KSA's legal system in developing lawful implementation of the *Kafala* worldwide. Thus, this chapter focuses on the main problem, which is to use KSA's standards as an exemplary case. Chapter three presents the adoption in international standards. It covers the background of the HCCH in its different iterations of 1965, 1993, and 1996. It provides an examination of the Hague Adoption Convention, a private law and global inter-governmental organization, and compares its laws and procedures with the *Kafala* system. Chapter four provides the impact of practicing the *Kafala* in different methods amongst Muslim countries concerning the placement of children. Finally, chapter five ends up with a conclusion that contains recommendations and analysis of both systems, including a comparison study.

**Table 2.** The Chapter Details

<p>Chapter 1 Overview of this Dissertation</p>	<p>Introductory chapter with a preamble, statement of problems, objectives, significance of the study, justification for advocating a solution, brief of research structure, concluding with research methodology.</p>
<p>Chapter 2 General Background on the Kingdom of Saudi Arabia's Authority under Islamic Law and the Adoption Alternative's Rules</p>	<p>A clarification chapter, central to the purpose of this study. Introduces the thesis's first argument, starting with a preamble, and then explain the KSA's jurisprudence, the common doctrine, and judicial power. Also, covers the history and practice of adoption in Islam. Finally, discusses important relevant legislation in KSA such as <i>Fatwa</i> provisions under Islamic law regarding orphan children, foundlings, and their rights, as well as the rules of <i>Kafala</i>.</p>
<p>Chapter 3 Hague Convention and International Adoption Rules</p>	<p>A comparison of the requirements of <i>Kafala</i> as practiced in the KSA and HCCH's current accommodations for this institution with discussion about what can be amended to better create adequate conditions for intercountry placement. Serves as the second thesis argument, with a history of international adoption, a brief on related private international law, as well as differences between HCCH and other international law on the topic. Covers a vital part of this study: comments of the HCCH and an analysis of member states' varying policies on acceptance of <i>Kafala</i> as a basis for adoption and immigration.</p>
<p>Chapter 4 Practices in Selected Islamic Nations Concerning the Fostering of Orphaned Children Through <i>Kafala</i></p>	<p>Discusses the third thesis argument of how HCCH getting misunderstood due to the varying practice of <i>Kafala</i> in Muslim nations. Statistics provide information regarding the varying adherence to Islamic law in their practice of <i>Kafala</i> between different Muslim nations, including those who practice adoption explicitly despite its prohibition. An examination of the impact and consequences of those inconsistent practices on the international perspective.</p>
<p>Chapter 5 Conclusion</p>	<p>General conclusion, results of analysis, and recommendations.</p>

## 1.8 RESEARCH METHODOLOGY

### *Literature review and data Collection*

The structure of the methodology begins from the main problem to the sub-problems to advocating a solution, using library-based sources to conduct a literature review that focuses on legal cases that aim to prove and support the lawyer's defenses. Consequently, the literature review covers a great deal of principles that mostly touch on adoption cases. Additionally, the HCCH and the KSA's law are considered to be foreparts of this dissertation because they are central to the main topic. Furthermore, data collection used was based on qualitative and quantitative data.

During this process, various methods have been espoused. The main goal of this methodology in this respect is to evaluate how many countries accept the *Kafala* within their systems and to assess how significant this issue is, so as to understand the impact that making this contribution to the HCCH would have on immigration law. Thus, the methods aim to analyze the perspective of states that are party to the HCCH, so as to inform a plan of action that addresses the problem.

### 1.8.1 Literature Review

The following literature sources are primary resources and documents were gathered that concern both Islamic and international laws. Primary religious sources include excerpts of some verses from the holy book of the *Qur'an* and *Sunna* have been incorporated into this dissertation to serve as proof for that there is a precedent for taking care of orphaned children in the Islamic religion. Some primary sources were also used regarding international law. This type of resource includes legal instruments including the HCCH of 1965, 1993, and 1996, Outline and Special Commission

Meeting of the Hague Convention, as well as the UNCRC (1989). Furthermore, legal instruments such as Royal Decrees of the KSA have been provided to introduce important tenets of KSA's legal system and its jurisdiction. Also, official government websites (including those from the US., Canada, and Quebec) and official sites of the UN, as well as Islamic organizations served as primary sources.

Also, secondary sources were obtained through a method of database inquiries through library-based database services such as LexisNexis, Westlaw, and Bloomberg Law. These databases allowed access to secondary sources used for this study, which include peer-reviewed academic journals, legal cases and briefs, relevant books, law review, and interviews with specialists. The case studies mentioned are also an integral aspect of this literature review because they provide clear examples that serve as evidence in support of the primary argument. Also, new reports obtained from various newspapers and online news websites were used as part of the literature review. Many of the news reports cited in this study deal with the issue of how Islamic laws and the international laws regarding adoption have been used to protect the rights of orphaned children in Islamic countries where armed conflicts have been rampant. These primary and secondary sources together provide the backbone for this dissertation.

### **1.8.2 Data Collection**

Qualitative data collection for this dissertation involved interviews with government officials, including an international adoption counselor from Quebec, a deputy director of an orphanage in Saudi Arabia, and an immigration officer from the United States. These interviews were conducted by e-mail and phone contact and are included in full-text in the appendices. The format for these interviews was a question-and-answer style exchange. The annexes part, in the end, cover some

important original sources *e.g.*, treaties and conventions especially the Executive Plan for Child Protection Code in KSA as the first translated from Arabic into English among the academic legal study.

Secondary quantitative data collection involved the aggregating of relevant statistics from various sources including news organizations, academic studies, and literature. The data gathering technique required the study of documents associated with topics such as adoption, *Kafala*, immigration, and orphans, etc. Relevant statistics from these secondary sources build a basis for the arguments presented. Altogether both primary and secondary sources are used as a methodology to determine support for this dissertation.

## 2.0 CHAPTER 2: GENERAL BACKGROUND ON THE KINGDOM OF SAUDI ARABIA'S AUTHORITY UNDER ISLAMIC LAW AND THE ADOPTION ALTERNATIVE'S RULES

### 2.1 PREAMBLE

This chapter considers the legal and judicial structures and authorities of KSA. It is essential to understand the rules of KSA's legislature before researching a subject such as this, in order to avoid confusion that might arise from looking aimlessly into the rules. As it is, there is not enough research on the topic of laws governing the fostering of children in the KSA, which is used as a substitute system for adoption due to the fact that adoption is not compatible with KSA's religious-based legal system. This is because the KSA is a country that adheres to strict Islamic laws and rules. As such, the main constitution of KSA derives primarily from the Holy book *Qur'an* and *Sunna* doctrine.<sup>83</sup> According to the Basic Law of Governance in Article 7, "Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the *Sunna* of his Messenger, both of which govern this law and all the laws of the State."<sup>84</sup> Therefore, by using the *Qur'an* and *Sunna*, the government and majority of KSA follows *Sunni* rather than *Shiite* doctrine. Giving the context for KSA's legal system, there are three fundamental questions that relate to the subject of this dissertation and should be addressed before the discussion:

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<sup>83</sup> Saudi Arabia, Basic Law of Governance: Royal Order No. (A/91) 27 Sha'ban, 1412, Article 1 (1992).

<sup>84</sup> *Id* at art. 7.

### **2.1.1 Why is the Practice of *Kafala* in the KSA More Consistent with Islamic Law and What Makes It Worthwhile to Compare to an International Convention Over Other Muslim Nations?**

In order to answer the question of why KSA makes a good comparison point, there are many points that will provide this context. Outside the fact that there have not been studies regarding this exact topic, focusing on KSA specifically in English literature, allowing it to contribute greatly to the field, there are other reasons to concentrate on KSA as a case study in advocating for changes to the HC.

First of all, one important line of reasoning for focusing on the KSA is that its strict adherence to Islamic law means that it can practice *kafala* openly and by the books, unlike some other Muslim nations that may practice inconsistently. This open practice of *kafala* makes biological lineage more trackable and accounts for the placement of children legitimately, which is better aligned with the anti-trafficking origin of the HC. This is fundamental in choosing the KSA versus another Muslim nation, since its practice is not obscured in any way.

Second of all, geographically I would contend that, as shown in the map below (Figure 3),<sup>85</sup> KSA makes up the majority of the landmass of the Arabian Peninsula. Furthermore, the holy mosques of Mecca and Medina are located in KSA, which is important to note because prophet Muhammad's revelation occurred in Mecca, so making these locations religiously significant. As a result, a large portion of religious scholars emerged from these holy spots and spread Islam according to prophet Muhammad's *Sunna*. As such, KSA follows *Sunni* doctrine straight from the

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<sup>85</sup> National Online Project, *Map of Saudi Arabia*, NATIONS ONLINE, <http://www.nationsonline.org/oneworld/map/saudi-arabia-map.htm> (last accessed Oct. 29, 2017).

source, in an unadulterated form, free from synthesis.<sup>86</sup> This is in contrast with the fact that many derivative doctrines appeared after the life of prophet Muhammad. Nevertheless, *Salafi* doctrine of *Sunni* “who follow the *Sahabah* (companions of the Prophet, Muhammad) and the *Tabi`un* (Followers, the generation after the Companions of the Prophet) in *Aqidah* (creed)”<sup>87</sup> These points of reasoning help to demonstrate why this country is suited to be the subject of this study, given that Islamic law internally arose from it, making it more likely for Islamic law to be observed consistently.

Therefore, this dissertation serves as a sound model for basing proposed changes to the HCCH according to KSA’s law. This is unlike some other Islamic countries practicing Islamic law where there are numerous variations in adherence from country to country. For example, some have mixed jurisdictions such as Morocco, Algeria, and Tunisia, etc.<sup>88</sup> Consequently, some of them do not consistently follow Islamic provisions as set out in Islamic law. For this reason, it is important to focus on a country that follows Islamic law in a consistent manner such as KSA, who notably start to practice “Moderation”<sup>89</sup> of Islamism as prophet Mohammad advocated and explicitly states in *Qur’an*. Obviously, this Moderation was existed in KSA before the Awakening

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<sup>86</sup> See AL-JOWZIYYA, IBN QAYYIM, ET AL., MUQTASAR ALSWABIQ ALMURSALAH ALA ALJOHAMIAH WA ALMUATELAH, 1593 (2004) this source illustrates more about this doctrine of its merits and how it is pure from any heresies. Through this explanation, I do not mean to imply that other Islamic nations are without religious scholars (Ulema) or intend to cast any doubt on their knowledge. However, this point relates to the first goal, which is to address the lack of study in this field that explains how KSA deals with its children in conjunction with the Child Protection Code, and at the same time demonstrates the concept of *Kafala* clearly by adhering to exclusivity for orphaned children.

<sup>87</sup> See *supra* note 34 Kingdom of Saudi Arabia Portal of the General Presidency of Scholarly Research and Ifta, Wahhabism does not antagonize Al-ul-Bayt, It is the *Manhaj* of the *Salaf*, Fatwas of Ibn Baz, Volume. 9, (Part No. 9; Page No. 231) available at <http://www.alifta.net/fatawa/fatawaDetails.aspx?languagename=en&BookID=14&View=Page&PageNo=1&PageID=1215> (last accessed Feb.5, 2018).

<sup>88</sup> See Chapter 4 of this dissertation.

<sup>89</sup> See MOHAMMAD HASHIM KAMALI, THE MIDDLE PATH OF MODERATION IN ISLAM: THE QURANIC PRINCIPLE OF WASATIYYAH 73 (Tariq Ramadan ed., 2015). This book has explained the meaning of “Moderation”.

era in 1979 when some extremists began to appear.<sup>90</sup> Taken together, these points help to present a justification for this choice in focus of the dissertation, which helps explain why the practice of *Kafala* in the KSA under Islamic law is an important framework that can be used to deal with orphaned children and a worthwhile topic for discussion in the literature of the field. In addition, providing this information help to counter some books, journals, or articles that make arguments against KSA, presenting its strict adherence to Islamic law as a dark side and suggesting it to be a country without human rights and so on.<sup>91</sup>

However, not only is KSA's approach to Islamic law consistent and moderate, but also outstandingly, KSA has received recognition and many awards both locally and internationally for its efforts to protect children both generally and distinctly for orphaned children. It also has been involved with global treaties of children's rights. Additionally, it has demonstrated dedication to children's welfare by establishing the National Committee for the International Year of the Child (1979), which has since been retitled and converted to the Saudi National Commission for Child Welfare<sup>92</sup>, which coordinates the services of a variety of agencies in an effort to support and fulfill children's needs with Islamic teachings. In 1990, KSA contributed to the World Summit for Children.<sup>93</sup> Furthermore, on January 26, 1996, KSA ratified the United Nations' Convention on the Rights of the Child (UNCRC), which had taken place on November 20, 1989 in New York, by

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<sup>90</sup> See STEPHANE LACROIX, *AWAKENING ISLAM* 2-3 (George tran., 2011). See also, *The Future Investment Initiative, The NEOM Project, Crown Prince Mohammad bin Salman's talk*, YOUTUBE (Oct. 24, 2017), <https://www.youtube.com/watch?v=wYuDkkx4Ick>. (Trans. From Arabic to English by the author of the dissertation).

<sup>91</sup> See e.g., HRW. Human Rights Watch, Amnesty International.

<sup>92</sup> Report of the Kingdom of Saudi Arabia on Childhood, Ministry of Education, 2000 available at [https://www.unicef.org/specialsession/how\\_country/edr\\_saudi\\_arabia\\_en.PDF](https://www.unicef.org/specialsession/how_country/edr_saudi_arabia_en.PDF).

<sup>93</sup> UNICEF. Participation in the World Summit for Children, available at <http://www.unicef.org/wsc/country.htm> (last accessed Sep. 2, 2016).

the Royal Decree number (M/7).<sup>94</sup> However, “the Government of KSA entered reservations with respect to all such articles as are in conflict with the provisions of Islamic law.”<sup>95</sup> The extent of their involvement was referenced within the U.N. country profile titled “Saudi Arabia” (United Nations, 2005). KSA has adhered to measures of the UNCRC, submitting an initial and second periodic report after their entry into the treaty (CRC/C/136/Add.1).<sup>96</sup> Likewise, those are the most important conventions regarding matters related to children, but more international and domestic contributions are detailed in this chapter.



**Figure 3.** Map of the Arabian Peninsula

<sup>94</sup> Abdelwahab Alshqh, *Children Rights in the Kingdom of Saudi Arabia*, AL-JAZIRAH NEWSPAPER, February 03, 2007 (12573) available at <http://www.al-jazirah.com/2007/20070302/ar11.htm> (last accessed Sep. 5, 2017) (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>95</sup> U.N. *Treaty Collection, Chapter IV Human Rights: Convention on the Rights of Child*.

<sup>96</sup> U.N. *Convention on the Rights of the Child, Geneva, 29 May –15 June 1989, CRC/C/60/2*.

## 2.1.2 Why Can KSA Not Join the HCCH to Deal with Orphaned Children?

While KSA effectively joined the UNCRC, it is unable to join the HCCH as a means of addressing issues relating to children's rights because of its articles which are not in agreement with Islamic law, as had been previously expressed in KSA's reservations received by the UNCRC.<sup>97</sup> As a matter of fact, KSA did not join the HCCH (1993) because Article 40 clearly states that, "No reservation to the Convention shall be permitted," which would preclude it from joining based on obvious divisions on a fundamental level. Indeed, most of the articles in the HCCH that relate to *Kafala* go against the rules of Islamic law. This is owing to the fact that the provisions of HCCH speak specifically toward creating permanent parent-child relationships, which are expressly forbidden under Islamic law. Instead, Islamic law uses *Kafala* "fostering," to create guardianship-type relationships, because according to Islamic tradition, a child cannot become the child of another just by saying it is so.

This is due in part to the fact that the KSA uses tenets designated by the *Qur'an* and *Sunna* to interpret the process for child protection, which in accordance with those sources reserves *Kafala* solely for orphaned children. Also, as an important aspect of this alternative practice, it serves the public right to basic protection of familial lineages of orphaned children. Thus, the HCCH is incompatible with KSA's practice of child placement for orphans.

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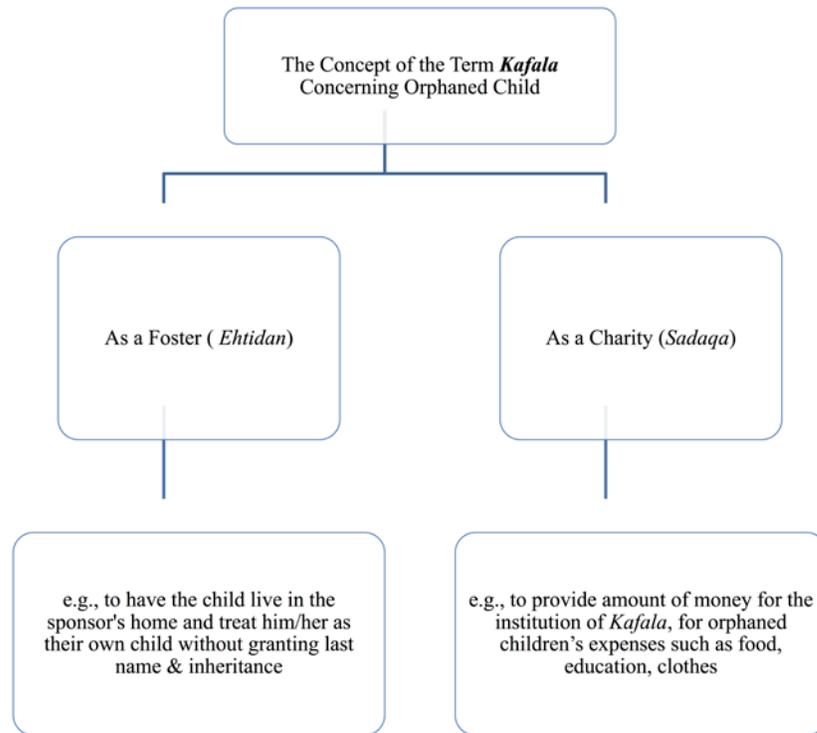
<sup>97</sup> U.N. Treaty Collection, Chapter IV Human Rights *supra* note 93.

### **2.1.3 Why Is It Valuable to Understand the Government and Authority Structures of KSA Especially as It Relates to *Kafala* “Fostering”?**

One such reason is so that the *Kafala* can be better understood, such that the HCCH can later clarify and modify its articles as they relate to the *Kafala*. Accordingly, KSA would serve as a highly representative country for the HCCH to understand how to employ the *Kafala* in order to better recognize fostering relationships as acceptable, so that jurisdictions of countries that are party to the HCCH can allow for legal guardianships in a way that will help deal with the problem of orphaned Muslim children worldwide in the case of immigration. Moreover, the resources that address KSA’s legal system in regard to the *Kafala* provisions that serve orphaned children are limited and mainly written in the Arabic language. As a preamble to the discussion of KSA’s legal system in-depth, *Kafala*’s concept under Islamic law is illustrated in the diagram below.<sup>98</sup>

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<sup>98</sup> (Trans. interpretatively from Arabic to English by the author of the dissertation).



**Figure 4.** The concept of the term *Kafala* in KSA

There are many questions about the permissibility in Islam of fostering children. Islamic law urges people to foster orphaned children. Within Islamic law, there is a system of protection known as *Kafala*, under which orphaned children can be protected.<sup>99</sup> The meaning of *Kafala* is a guardianship model, which considers religious constraints in the process of “fostering” orphaned children.<sup>100</sup> Also, it is intended to serve orphaned children, so here it is important that we know the extent of orphans’ rights in Islamic law as described in the basic sources of the law, the *Qur’an* and *Sunna*. Adoption as it takes place under Islamic law is most closely matched as a form of

<sup>99</sup> NGOs AND GOVERNANCE IN THE ARAB WORLD, 298 (Sarah ben. Néfissa, Nabil. Abd al-Fattah, Sari. Hanafi & Carlos Milani eds., 2005).

<sup>100</sup> Ahmad *Supra* note 18.

“fostering” and may exclusively take place in regard to orphans, contrasting with adoption as it is under the HCCH, which may include any children whose parents are living or deceased, known or unknown.<sup>101</sup> However, the general meaning of *Kafala* is an act of charity that takes care of orphaned children by providing for the child’s basic needs without granting him/her the child the family name, regardless of whether the child lives in an orphanage or in the foster parents’ home.<sup>102</sup> Furthermore, in this case to foster a child *Ehtidan* under *Kafala* is similar to adoption in that it involves “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/daughter.”<sup>103</sup> In 2006 the number of *Ehtidan* through *Kafala* of alternative families was 5159 as mentioned by Charity Committee for Orphans Care *Ensan*.<sup>104</sup> As such, the understanding of *Kafala*, as well as how it functions within the KSA are fundamental to this discussion. At the core of this dissertation is the comparative country, KSA. The following part provides its sources, doctrine, and legislative system.

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<sup>101</sup> See the mechanism in the Overview Chapter of this Dissertation.

<sup>102</sup> General Presidency for Research and Ifta *supra* note 36.

<sup>103</sup> International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), *supra* note 75.

<sup>104</sup> Charity Committee for Orphans Care *Ensan Infra* note 282 available at <http://www.ensan.org.sa/vb/showthread.php?t=67>(last accessed Feb. 5, 2018).

## 2.2 THE SOURCES OF ISLAMIC JURISPRUDENCE IN KSA

Judicial Decision-Making, always making their decision based on the four sources.<sup>105</sup>

### 2.2.1 The Holy Book, “*Qur’an*”

God’s word as revealed to prophet Muhammad by Gabriel. Originated from heaven, not created, worshipped by reciting, referred to its ruling, committed to obey its orders and avoid its prohibitions.<sup>106</sup>

### 2.2.2 *Sunna*

refers to what is traced and taken from the prophet Muhammad, such as his sayings, deeds, or emphasis.<sup>107</sup> Best known as “the practice and teachings of the Prophet Muhammad.”<sup>108</sup> Due to the fact that KSA exclusively follows the *Sunna*, some scholars have referred to it as the “Vatican of Sunni Islam.”<sup>109</sup>

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<sup>105</sup> See *Kingdom of Saudi Arabia* (Al Mamlakah Al Arabiyah As Suudiyah) available at <http://law.wustl.edu/GSLR/CitationManual/countries/saudiArabia.pdf> (last accessed Aug. 6, 2016).

<sup>106</sup> PROPHETS IN THE QUR’AN: AN INTRODUCTION TO THE QUR’AN AND MUSLIM EXEGESIS, 5 (Brannon M. Wheeler ed., 2002).

<sup>107</sup> MUHAMMAD ABUZAHRAH, USUL AL-FIQH, 101, (2006). (Trans. From Arabic to English by the author of the dissertation).

<sup>108</sup> Muhammad Hisham Kabbani, *Understanding Islamic law*, ISLAMICSUPREMECOUNCIL.ORG, <http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html> (last accessed Jul. 11, 2016).

<sup>109</sup> SHAHEEN ALI, MODERN CHALLENGES TO ISLAMIC LAW, 3 (2016).

### 2.2.3 *Ijma*, Consensus Agreement of the Muslim Scholars

Collective agreement in an era of time on religious rulings (legal judgment) among the Muslim community, especially Muslim scholars, about issues relating to any Islamic principle.<sup>110</sup>

### 2.2.4 *Qiyas*, analogy

Settling a branch of a question about a fundamental ruling using the process of deductive analogy, comparing the teachings of the *Hadith* with those of the *Qur'an*.<sup>111</sup>

The Imams and the four *Sunni* doctrines agree upon these principles defined above. The *Qur'an* and *Sunna* are the basis of Islamic law and the other two concepts of *Ijma* and *Qiyas* are based in rational endeavor.<sup>112</sup>

## 2.3 THE COMMON DOCTRINE IN KSA

In Islamic history, there are two main branches of Islamic jurisprudence: a) *Sunna* or *Jamaah*, and b) *Shiite*. All of the scholars of both *Sunni* and *Shiite* are considered to be jurists, called *Foqohaa*.<sup>113</sup> The root of the word *Foqohaa* is *Fiqh*, which leads to the question, what then is *Fiqh*?

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<sup>110</sup> AbuZahrah *supra* note 107 at 11.

<sup>111</sup> *Id* at 200.

<sup>112</sup> ABDULLAH ELWAN, LECTURE IN ISLAMIC LAW AND ITS JURISPRUDENCE AND ITS SOURCES, 5, (1983) available at <http://www.abdullahelwan.net/bohoth/16.pdf> (last accessed Oct. 11, 2015). (Trans. From Arabic to English by the author of the dissertation).

<sup>113</sup> SULIMAN AL FAYYAD, THE FOUR IMAMS 9, (2011). (Trans. interpretatively from Arabic to English by the author of the dissertation).

*Fiqh* means jurisprudence, which in this regard means the knowledge of *Fiqh*, which is the science of Islamic law. This science is based on religious rulings, which are concerned with the deeds of judged responsible persons. As such, dogmas and morality rulings are derived from reference to jurisprudence. For that reason, *Fiqh* is defined as jurisprudence familiarized with scholarly religious rulings derived from detailed references, which is prescribed in justice on those issues, and it is the four sources of Islamic jurisprudence (*Qur'an, Sunna, Ijma, and Qiyas.*)<sup>114</sup> Accordingly, this definition of jurisprudence is precise in that it clarifies the point of Muslim scholars with respect to rights. However, it is worth noting that the interpretations of each school for these resources can have different perspectives, thus different legal codes.

There are four doctrines prevalent in the *Sunni* Schools of *Fiqh* (Jurisprudence). They are *Hanafism, Malikism, Shafi'ism* and *Hanbalism*.<sup>115</sup> The first of the *Sunni* schools of law is *Hanafism* founded by Imam *Abu Hanifah Al-Nu'man bin Thabit* (700-767)<sup>116</sup> - (80 - 148 AH). The second school is *Maliki* School founded by Imam *Malik bin Anas* (715-795)<sup>117</sup> - (93 - 179 AH). The third school is *Shafi'I* School founded by Imam *Muhammad bin Idris al-Shafi'i* (767-820)<sup>118</sup> - (150-206 AH). The last school is *Hanbali* School called *Hanbaliyyah* founded by Imam *Ahmad bin Hanbal* (780-855)<sup>119</sup> - (164- 241 AH).<sup>120</sup>

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<sup>114</sup> MOHAMMAD AL-TAHANAWI, AL-KASHAF AN ENCYCLOPEDIA OF ARTISTIC AND SCIENTIFIC TERMINOLOGY, 41 (1996). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>115</sup> Al Fayyad *supra* note 105. The formulation of these nouns *Hanafism, Malikism, Shafi'ism* and *Hnabalism* are from this source. ISLAM: A WORLDWIDE ENCYCLOPEDIA, 564 (Cenap Çakmak ed., 2017).

<sup>116</sup> MUSLIM WORLD, MODERN MUSLIM SOCIETIES, 387 (2011).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> (AH) comes from the Latin term "Anno Hegirae" *i.e.*, After emigrating "Hijrah" when prophet Mohammad emigrated from Mecca to Medina, *See Hijri Date Conversion*, IHAMS.ORG INSTITUTE FOR HISTORY OF ARABIC-ISLAMIC MEDICINE AND SCIENCES

[http://ihams.org/index.php?option=com\\_content&view=article&id=47&Itemid=58&lang=en](http://ihams.org/index.php?option=com_content&view=article&id=47&Itemid=58&lang=en) (last accessed Jul. 8, 2017).

The KSA follows *Hanbali* doctrine commonly because *Al Imam Muhammad ibn Abdul Wahhab* selected this doctrine of *Alshaikh Ahmed ibn Hanbale* in the KSA, then it became the common doctrine of KSA.<sup>121</sup> Later, this doctrine was spread across the Arabian Peninsula.<sup>122</sup> Nevertheless, recently in 2009, the former king, king *Abdullah* expanded its council to comprise 21 members, who represent not just the *Hanbali* doctrine, but also all four *Sunni* schools.<sup>123</sup>

## 2.4 KSA'S JUDICIAL POWER: STATE AUTHORITIES

According to Article 44 in the Basic Law of Governance, the authorities of the state shall consist three branches: the Judicial Authority, Executive Authority and Regulatory Authority.<sup>124</sup>

### 2.4.1 The Executive Branch

KSA's executive branch is made up of three parts: the king, the Council of Ministers, and local

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<sup>121</sup> What Is Wahhabism and Is It A Fifth Doctrine or Follow Some the Four Schools? General Presidency of Scholarly Research and Ifta, Islamic Research Journal, Chapter 1, at 374 available at <http://www.alifta.net/Fatawa/fatawaDetails.aspx?View=Page&PageID=67&PageNo=1&BookID=4> (last accessed Aug. 10, 2017) See *supra* note 31 The Spread of Hanbali Doctrine in Saudi Arabia, Category: School of Islamic Jurisprudence, Fatwa No. 106070 March, 3. 2008.

<sup>122</sup> Ashraf Ahmed, *The Hanbali Doctrine Prevalence Through History*, AL-WATAN NEWSPAPER, July 30, 2014 (6905) available at <http://archive.al-watan.com/viewnews.aspx?n=42A86247-1B46-4B8E-A631-E6F06DF2B3D6&d=20140730> (last accessed Dec. 14, 2017). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>123</sup> Christopher Boucek, *Saudi Fatwa Restrictions and the State-Clerical Relationship*, CARNEGIEENDOWMENT.ORG, (Oct. 27, 2010), <http://carnegieendowment.org/2010/10/27/saudi-fatwa-restrictions-and-state-clerical-relationship/ffuv> (last accessed Oct. 27, 2010).

<sup>124</sup> Saudi Arabia, Basic Law of Governance: Royal Order No. (A/90) 27 Sha'ban, 1412, Article 44 (1992).

branches of ministries and other somewhat independent governmental agencies.<sup>125</sup> The king is the main authority of the Executive Branch in the kingdom, on top of his other significant duty of serving as the Commander-in-Chief of the military. The Executive Branch is also served by the Council of Ministers, who are selected, appointed, supervised, and dismissed by authority of the king.<sup>126</sup> On January 29, 2015, during the restructuring of state agencies by King Salman, two additional councils were established to fall under the Council of Ministers as declared in the Royal Decree No. A/69: the Council of Political and Security Affairs (CPSA) and the Council of Economic and Development Affairs (CEDA).<sup>127</sup> Thus, the Council of Ministers is part of the King's direct executive authority.

#### **2.4.2 The Legislative (Regulatory) Branch**

KSA's legal system is based on Islamic law with its foundation based on the *Qur'an* and the *Sunna*.<sup>128</sup> Within the structure of the legal system, the legislative authority is shared between the King, the Council of Ministers, and the Consultative Council.<sup>129</sup> The King has a notable, independent law-making ability, so he is positioned to have ultimate authority over the legislative bodies (the Council of Ministers and the *Shura* Council), as well as over all State authorities. He can pass, revoke, or amend any laws or regulations through Royal Order. Furthermore, the

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<sup>125</sup> *Id* at arts. 55-56-57 *See also*, Abdullah Ansary, UPDATE: A Brief Overview of the Saudi Arabian Legal System, *GlobaLex* (August 2015) available at [http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html) (last accessed Nov. 11, 2015).

<sup>126</sup> *Id.*

<sup>127</sup> Restructuring State Agencies: Reform & Development, *AL-EQTISADIAH NEWSPAPER*, Jan. 30, 2015 available at [http://www.aleqt.com/2015/01/30/article\\_927146.html](http://www.aleqt.com/2015/01/30/article_927146.html) (last accessed Nov. 11, 2015). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>128</sup> Basic Law of Governance *supra* note 122 at art. 1.

<sup>129</sup> *Id.* at art. 67.

legislative process allows the King to accept or reject any drafts or enactments of any legislation, including treaties, agreements, regulations, and concessions proposed by either of the two legislative bodies. His approval or rejection is then declared through Royal Decree.<sup>130</sup> Under this branch are the Council of Ministers, the *Shura* (Consultative) Council and Advisory Authorities (the Council of Senior *Ulama*).

### **The Council of Ministers**

The Council of Ministers engages in both executive, as well as legislative functions. Each minister can propose new bills, laws, or regulations relating to the affairs of his ministry.<sup>131</sup> There is also a legislative support of the Council of Ministers called the Bureau of Experts that is made up of a director, deputy director, assistant director, a general panel of counselors, and a number of special committees.<sup>132</sup> Consequently, the council is required to research existing legislation and legal measures regarding the topics at hand and present this information to members of the panel before preparing any new legislation to be in its final format.<sup>133</sup>

### **The *Shura* (Consultative) Council**

Besides the Council of Ministers, the *Shura* Council is also responsible for legislative duties in the KSA as set forth in the Basic Law of Governance. “Governance in the Kingdom of Saudi Arabia shall be based on justice, *Shura* (consultation), and equality in accordance with the Islamic law.”<sup>134</sup>

The main duty of the *Shura* Council as it is stated in Article 15 is: “The *Shura* council shall express

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<sup>130</sup> Basic Law of Governance, *supra* note 122 at art 44. *See also* INTERNATIONAL BUSINESS PUBLICATIONS, USA, SAUDI ARABIA COMPANY LAWS AND REGULATIONS HANDBOOK, 45-46 (2012).

<sup>131</sup> Saudi Arabia, Law of the Council of Ministries: Royal Order No. (A/13) 3 Rabi’ I 1414, Article 22 (1993).

<sup>132</sup> Saudi Arabia, The Bureau of Experts: Royal Order No. (431) 12 Safar, 1394 (1974).

<sup>133</sup> *Id.*

<sup>134</sup> Basic Law of Governance *supra* note 122 at art. 8.

its opinion on State's general policies referred by Prime Minister. The *Shura* council shall specifically have the right to exercise the following:

- a. Discuss the general plan for economic and social development and give view.
- b. Revising laws and regulations, international treaties and agreements, concessions, and provide whatever suggestions it deems appropriate.
- c. Analyzing laws.
- d. Discuss government agencies annual reports and attaching new proposals when it deems appropriate.”<sup>135</sup>

Furthermore, this legislative body is in charge of monitoring the performance of government agencies, allowing for greater public knowledge of the decision-making processes and ensuring accountability. The council has a chairman and 150 members, who are scholars chosen by the King. The most important role of the *Shura* council is the ability to propose new bills and/or amendments, which are then debated within the council and approved only if the legislation at hand receives two-thirds support from its members.<sup>136</sup> Certainly, no bill is passed until after review by the King.<sup>137</sup>

The way that a bill can become law is for it to receive approval from two-thirds of the Council of Ministers, the *Shura* Council and the King.<sup>138</sup> In the case that the two councils do not approve an issue, the issue would then be referred back to the *Shura* Council for review and to

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<sup>135</sup> Saudi Arabia, *Shura* Council Law: Royal Order No. (A/91) 27 Sha'ban 1412, Article 15 (1992).

<sup>136</sup> *Id* at art. 3.

<sup>137</sup> *Id* at art. 17.

<sup>138</sup> Law of the Council of Ministries *supra* note 129 at art. 14.

have a decision made that they deem fit. This new resolution would then be decided upon by the King, giving him the final say in the matter.<sup>139</sup>

### **Advisory Authorities (The Council of Senior *Ulama*)**

The Council of Senior *Ulama* is a scholarly body representing the nation's highest religious scholars as stated in the Basic Law of Governance<sup>140</sup> “*The source for fatwa (religious legal opinion) in the Kingdom of Saudi Arabia shall be the Book of God and the Sunna of his Messenger. The Law shall set forth the hierarchy and jurisdiction of the Board of Senior Ulama and the Department of Religious Research and Fatwa.*”<sup>141</sup>

## **2.4.3 The Judicial Branch**

### **2.4.3.1 Ordinary Court System**

#### **High Court (Supreme Court)**

The High Court should be located in the capital city Riyadh.<sup>142</sup> Its main function is to serve as the highest authority of the judicial system in Saudi Arabia. Its President is appointed by Royal Order of the King and its judges, all at least holding the title of Appellate Justice, are selected with the approval of the Supreme Judicial Council. Its panels are comprised of three judges within Criminal, Personal Status, Commercial, and Labor Courts. For the Criminal Division, the panel consists of five judges. The President of the High Court gives recommendations to appoint Chief

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<sup>139</sup> *Shura* Council Law *supra* note 133 at art. 17.

<sup>140</sup> See for more details SAUDI ARABIA A COUNTRY STUDY: FEDERAL RESEARCH DIVISION LIBRARY OF CONGRESS, 208 (Helen Metz. ed., 1993).

<sup>141</sup> Basic Law of Governance *supra* note 122 at art. 45.

<sup>142</sup> Saudi Arabia, The Law of the Judiciary: Royal Decree No. (M/78) 19 Ramadan 1428, Article 10 (2007). See Ansary *supra* note 125 as he elaborated an amazing chart about the Current Judicial System in Saudi Arabia at Chart 8 in his research.

Judges. The Supreme Judicial Council serves as the final decision-maker for these appointments.<sup>143</sup> The main duty of the court is to supervise the implementation of Islamic law and to follow through on enactment of regulations set forth by the King.<sup>144</sup>

It also reviews rulings sent down from the Court of Appeals. This is mandatory when cases involve *Qisas* (retaliatory punishment) or *Hudud* (punishment prescribed by the *Qur'an*), considered to be major offenses.<sup>145</sup> In this instance, this demonstrates how the kingdom holds itself to a high standard in its commitment to ensure justice in these cases. The High Court's review of the Court of Appeals decisions includes queries of law and procedure, such as if there is an objection to the Court of Appeal's judgment based on the judgment being in violation of Islamic law, incompetence of the court, improperly carrying out a judgment based on law, or fault of the court's summary or description of the case based on a discrepancy in fact.<sup>146</sup>

### **Courts of Appeal**

One or more Courts of Appeal should be located in each region.<sup>147</sup> This act gave the Courts of Appeal power to overturn decisions made by lower courts. Appeals include Labor, Commercial, Criminal, Personal Status and Civil circuits.<sup>148</sup> These divisions of the Court of Appeals each consist of a Chief Justice who is appointed by the President of the Court, as well as members given the title of appellate judge.<sup>149</sup> Also, it contains three judges in each circuit, except the Criminal Department, which contains five judges that deal with certain cases such as the *Qisas*,

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at art. 11.

<sup>145</sup> *Id.* at art. 10.

<sup>146</sup> *Id.* at art. 11.

<sup>147</sup> *Id.* at art 15

<sup>148</sup> *Id.* at art. 16. *See also* ALI ALZHRANI ET AL., PRINCIPLES OF LAW IN ACCORDANCE WITH THE REGULATION OF FORCE IN THE KINGDOM OF SAUDI ARABIA 128 (2013).

<sup>149</sup> *Id.* at art. 15.

*Hudud* and *Ta'zir* penalties.<sup>150</sup> Upon the court's ruling, a process for review is enacted to give consideration to the ruling's consistency with Islamic law wherein the judgment may be partially or wholly nullified based on the findings.

### **First-Degree Courts**

The First-Degree Courts are required to exist in each city, and in most districts as needed.<sup>151</sup> Also, it considers the trial lawsuit for the first time, and it consists of five main divisions: General, Criminal, Commercial, Labor, and Personal Status courts. Specialized circuits exist that include Enforcement, Approval, and Traffic circuits. First Degree Courts consist of one- or three-judge benches as determined by the Supreme Judicial Council. It also includes General, Criminal, Personal Status, Labor, Commercial and Enforcement courts.<sup>152</sup>

### ***General Courts***

General courts have jurisdiction when not deciding on cases within the jurisdiction of other courts or on cases of notaries public or the Board of Grievances. These cases would include lawsuits involving property disputes, ownership, rights or faults of ownership, restraint of interference with possession or recovery of possession, rent payments or contributions. The general court also covers cases involving issuance of title deeds, registration of endowment, as well as traffic accidents and violations.<sup>153</sup>

### ***Criminal Courts***

Criminal Courts are made up of several specialized circuits including one for *Qisas* (retaliatory

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<sup>150</sup> *Id.*

<sup>151</sup> *Id* at art. 18.

<sup>152</sup> *Id* at art. 20.

<sup>153</sup> Saudi Arabia, Law of Procedure before Islamic Law Courts: Royal Decree No. (M/1) 22 Muharram 1435, Article 31 (2013).

punishment), *Hudud* (punishment prescribed by the *Qur'an*), *Ta'zir* (discretionary punishment), and juvenile circuits. The circuits are made up of three-judge panels, except in certain specified offenses where the Supreme Judicial Council would designate the case to be heard by a single judge.<sup>154</sup>

### ***Personal Status Courts***

The Personal Status courts, as well as the Labor and Commercial courts, make up specialized circuits. The Supreme Judicial Council designates at least one judge to resolve disputes relating to divorce and family or personal matters within the Personal Status courts.<sup>155</sup> They take care of matters of registration of marriage, dissolution of marriage, divorce, including instances where the woman seeks the divorce called *Khul*, reconciliation (known as *Raj'ah*), custody, maintenance, and visitation rights.<sup>156</sup> Furthermore, the Personal Status Courts oversee issues of inheritance, including endowment, probate, paternity, absence from death, and determination of heirs. This also includes matters of division of succession, such as property disputes, carrying out of wills, minors and absentees.<sup>157</sup>

### ***Labor Courts***

Labor courts have the following functions of jurisdiction:

Resolving disputes related to employment contracts, wages, labor rights, workplace injuries, and awarding compensation in these respects. The Labor Courts also oversee disciplinary penalties of the employer on the employee or exemption thereof, lay-offs, complaints from either the employer

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<sup>154</sup> Saudi Arabia, The Implementation Mechanism of the Judiciary Law and the Board of Grievances Law: Royal Decree No. (M/78) 19 Ramadan 1428, Article 20 (2007).

<sup>155</sup> The Law of the Judiciary *supra* note 142 at. art. 23.

<sup>156</sup> Ansary, *supra* note 125.

<sup>157</sup> *Id.*

or employee in regard to resolutions, plus lawsuits regarding enforcement of penalties prescribed under the Labor Law, including those where employees are subject to provisions of the Labor Law, such as in the case of civil servants. This court also manages issues of application of the Labor Law and the Social Insurance Law.<sup>158</sup>

### ***Commercial Courts***

Another of the specialized circuits are the Commercial courts, which oversee any commercial disputes between traders, lawsuits filed against traders, disputes within partnerships, bankruptcy, and any other commercial disputes or lawsuits relating to commercial law.<sup>159</sup>

### ***Enforcement Courts***

The new Enforcement Law has overridden the previous practice of plaintiffs having to bring applications relating to enforcement of foreign judgments and arbitral awards before the Board of Grievances,<sup>160</sup> as it had done since 1982. Affected are arbitral awards, reconciliation statements approved by the courts, commercial papers, certified documents (issued in KSA and in foreign countries), judgments, judicial orders, other contracts and papers which the law gives the force of writs of execution.<sup>161</sup> The new Enforcement Law represents an effort to better align Saudi Arabian law with international standards in enforcement. This has led to increased confidence in business since trade disputes are settled more quickly.<sup>162</sup>

### **Specialized Courts & Specialized Criminal Court**

Specialized Courts have been established in KSA to help address problems of State security.

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<sup>158</sup> Saudi Arabia, Law of Procedure before Islamic Law Courts *supra* note 153 at art, 34.

<sup>159</sup> Alzahrani, *supra* note 142 at 127 in Specialized courts.

<sup>160</sup> See *The New Enforcement Law of Saudi Arabia: An Additional Step toward a Harmonized Arbitration Regime*, JONES DAY (September 2013), <http://www.jonesday.com/the-new-enforcement-law-of-saudi-arabia-an-additional-step-toward-a-harmonized-arbitration-regime-09-04-2013/>. (last accessed Nov. 15, 2017).

<sup>161</sup> Saudi Arabia, Enforcement Law: Royal Order No. (M/53) 13 Sha'ban 1433, Article 19 (2012).

<sup>162</sup> The New Enforcement Law of Saudi Arabia *supra* note 160.

Offenses against State security include terrorism and other offenses that have a large-scale impact on the nation's people, aim to cause fear and/or undermine the government for religious or political reasons. "National security courts" are an example of a specialized court that has been established to handle such offenses within many States. Since acts of terrorism are such a serious threat and are a top concern of Saudi Arabian society, these specialized courts ease the burden on the normal due process system from having to handle this type of case.<sup>163</sup>

Having this separate Specialized Court system to deal with acts of terrorism has allowed these offenders to be dealt with more expeditiously and appropriately by the specialized National Security courts, which is important because terrorists have been shown to be very difficult to apprehend and convict without designation of these special offenses, which justify the use of additional police force and expedient action from the courts.<sup>164</sup>

Specialized Criminal Courts try suspects in cases of terrorism, national security, and other similar offenses, such as the financing of terrorists.<sup>165</sup> Obviously, these offenses are all considered to be major crimes in Saudi Arabia. These courts have one- or three-judge panels, with crimes of *Qisas*, *Hudud* and *Ta'zir* facing the panels,<sup>166</sup> with the Supreme Judicial Council determining the panel composition for other offenses. The Minister of Justice created a specialized Appellate Criminal Court, where specialized three-judge panels holding the rank of appellate judge or higher, along with a chief justice, review cases.<sup>167</sup>

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<sup>163</sup> See Abdullah F. Ansary, *National Security Courts: A Comparative Study of European Legal Systems*, 107 – 111 (2005).

<sup>164</sup> *Id.*

<sup>165</sup> Saudi Arabia, The Supreme Judicial Council: Royal Decree No. (4/69) 9 Muharram 1430, (2009) See Naif Alghamdi, *A Foundational and Applied Comparative Study on the Specialized Court of Summary Justice*, 45-46 (2014). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>166</sup> Saudi Arabia, The Law of the Judiciary *supra* note 142 at art. 20.

<sup>167</sup> Saudi Arabia, Law of Terrorism Crimes and Financing: Royal Decree No. (M/16) 24 Safar 1435, Article 8 (2013) See also, Saudi Arabia, Minister of Justice issued order No. (5751) 2 Jumada I 1432 (2011).

#### **2.4.3.2 The Board of Grievances System (Courts)**

In 2007, a renovate of Saudi Arabia's Board of Grievances system was declared approved by Royal Decree. The Board of Grievances is responsible directly to the King as laid out in the Law of the Board of Grievances of 2007.<sup>168</sup> The following sections elaborate on its court types.

##### **High Administrative Court**

The High Administrative Court has to be located in the capital city of Riyadh, as does the High Court of the ordinary courts. The structure of it was set forth in the Law of the Board of Grievances of 2007, such that it should be composed of a Chief Justice (who holds ministerial rank and is appointed by Royal Order), several judges (who hold the rank of appellate chief justice and also appointed by Royal Order with recommendation of the Administrative Judicial Council).<sup>169</sup> Furthermore, a Chief Justice of the High Administrative Court heads its General Council, where two-thirds of members must attend meetings and majority vote rules.<sup>170</sup> It functions through specialized circuits using three-judge panels as appropriate.<sup>171</sup>

The jurisdiction of the High Administrative Court of the Board of Grievances covers the duties of reviewing rulings given or upheld by the Administrative Court of Appeal in the following situations: if the judgments are based on a ruling's inconsistency with the tenets of Islamic law, if the judgment was given by an incompetent court, if it is issued by a court that is not accepted as legitimate within the legal system, if there was an error or misrepresentation of facts within a case, if the ruling being objected disagrees with another settlement on the matter that was previously

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<sup>168</sup> The Implementation Mechanism of the Judiciary Law and the Board of Grievances Law Board 2007 *supra* note 152 at art. 1.

<sup>169</sup> *Id* at art. 10.

<sup>170</sup> *Id*.

<sup>171</sup> *Id* at art. 9.

established, or finally, if there are disputes over which court of the Board holds jurisdiction over the matter.<sup>172</sup>

### **Administrative Courts of Appeal**

This court is a part of specialized circuits with three-judge panels as well.<sup>173</sup> The main duty of this court is to hear decisions appealed from lower administrative courts by memorandum. In the case that the Administrative Court of Appeal decides to annul a provisional injunction, the case would be referred back to the Administrative Court for a ruling as a remand.<sup>174</sup> It is possible before the legal pleadings to allow for a review of final judgments of the administrative courts under certain conditions.<sup>175</sup>

### **Administrative Courts**

Provisions were made in the Law of the Board of Grievances of 2007 to allow for the establishment of administrative courts. These courts rule on cases regarding (a) rights in civil service, military service, and retirement legislation for employees of the government, as well as corporate identities, (b) rulings of administrative courts can be challenged when the appeal argues that the court had a lack of jurisdiction or when there is an issue of form or substance including disciplinary decisions, made by quasi-judicial committees, boards, or public benefit associations, (c) claims for compensation submitted by concerned parties for the decisions or actions by the administrative body claims for compensation submitted by concerned parties for the decisions or actions by the administrative body, (d) courts also rule on court cases where a person is challenging an

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<sup>172</sup> *Id* at art.11.

<sup>173</sup> *Id* at art.9.

<sup>174</sup> Saudi Arabia, Law of Procedure before the Board of Grievances: Royal Decree No. (M/3) Article 39, 22 Muharram 1435 (2013).

<sup>175</sup> *Id* at art.43.

administrative authority's decisions, actions, contracts disciplinary cases, administrative disputes, (e) requests for enforcement of foreign judgments or arbitral awards, and (f) hears cases that involve departments of the government concerned with administrative disputes.<sup>176</sup> The next section provides a primary element of this dissertation, specifying a historical background of the prior practices of adoption in past centuries amongst Arab nations.

## 2.5 THE HISTORY OF ADOPTION IN ISLAMIC LAW PRACTICE

Adoption has been practiced historically under Arab laws and nations in earlier eras and also it remained recognized during the lifetime of Prophet Muhammad.<sup>177</sup> However, due to the revelation verse from the *Qur'an* that prohibits the practice of adoption, prophet Muhammad later prohibited its practice.

### 2.5.1 Pre-Islam (*Jahiliyyah*)

The word "*Al-tabanni*" means adoption and it comes from the Arabic word, "*ibn*" meaning son. *Al-tabanni* was the practice of adoption into a tribe, which was a common Arab tradition during pre-Islamic times i.e., during the eras of ignorance<sup>178</sup> (*Jahiliyyah*).<sup>179</sup> At that time, among Arab

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<sup>176</sup> *Id* at art. 13.

<sup>177</sup> Yassari *supra* note 16 at 929. See also "The Origins of the Prohibition of Adoption (Tabanni) in Islamic History"

<sup>178</sup> WAHBAH ZUHAYLI, QADAYA AL-FIQH WA-AL-FIKR AL-MUASIR, 76 (2006). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>179</sup> The word *Jahiliyyah* is used to refer to the period before the coming of the Prophet, It refers to two things that are combined in this period: *Jahl* (ignorance) and *Jahaalah* (foolishness) See Muhammad Saalih al-Munajjid, *Use of the Word "Jahiliyyah" Period of Ignorance* (103660), (Feb. 3, 2008), ISLAMQA.INFO <https://islamqa.info/en/103660>.

tribal adoptees not biological sons of their adoptive fathers were always male, whether adult or children, to build a league of male for making their tribes strong once fighting occur in future.<sup>180</sup> In addition, pre-Islamic adoptions took place for many reasons, one of them being that the parents could not bear children, so this was for typical emotional causes.<sup>181</sup> Another reason would have been to secure an inheritance and also (to add additional tribe and military members as mentioned previously.)<sup>182</sup>

### **2.5.2 Pre-prohibition Adoption in Islam**

During the life of Prophet Muhammad and early Islam, the early Muslims limited the practice of adoption.<sup>183</sup> Khadijah is Prophet Muhammad's wife. When she married him, she gave him Zaid bin Hâritha (Zaid, son of Haritha), and he was a slave before Islam prohibited slaves. Prophet Muhammad was very nice to him and took care of him, so then the relationship had been changed from slave to son. Zaid's father and uncles came to the Prophet Muhammad looking for their son and hoping to learn his whereabouts. The Prophet released Zaid and gave him the freedom of choosing his fate. However, he rejected the prospect of leaving the Prophet. After that, the Prophet immediately responded by adopting Zaid. The Prophet said, "Zaid now is free and he will be my son and I will inherit him and he will inherit me," and then he came to be known as Zaid bin Muhammad (Zaid, son of Muhammad).<sup>184</sup>

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<sup>180</sup> SUAD JOSEPH, *ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURES, FAMILY, LAW AND POLITICS*, 1 (2005).

<sup>181</sup> *Id.*

<sup>182</sup> Yassari, *supra* note 16 at 927.

<sup>183</sup> Syed Kamran Mirza, *Adoption in Islam and History of Prophet Muhammad Marriage to Zainab Bint Jahsh*, FAITHFREEDOM <https://www.faithfreedom.org/Articles/SKM/zeinab.htm> (last accessed Sep. 5, 2017).

<sup>184</sup> IBRAHIM FAOUZI, *TADWEEN ALSUNNA* 335-336 (1994). *See also*, Islam web fatwa 71330

### 2.5.3 Post-Prohibition Adoption in Islam

This case continued until after the Prophet migrated to Medina and Zaid had grown up and became a married man, but his marriage did not go well and resulted in divorce. After Zaid's divorce from his wife, Zaynab, wisdom from Allah (God) was revealed that prohibited parental and filial adoption. These verses revealed to Muhammad gave the adopted son only the right of a client. This revelation allowed for an adopter to marry the ex-wife of his adopted son. For that reason, Prophet Muhammad married Zaynab after Zaid divorced her to demonstrate this verse. Of course, previously this marriage would have been forbidden since it would have been considered incestuous. Prophet Muhammad explained that the previous relationship was invalid and Zaid was not his true son anymore. Thus, after the revelation of this verse, he was called "Zaid, son of Haritha" again in reference to his biological father's name. Then, Allah (God) revealed verses about the issues related to Zaid's situation and revoked the adoption.<sup>185</sup>

#### 2.5.3.1 The Objective of Prohibiting Adoption in Islam (Why?)

Subsequently, all of these explanations for the prohibition of adoption aim to avoid confusing genealogical lineages. Adoption is regarded as "contrary to the *Qur'an* emphasis on maintaining authenticity in lineage, consanguinity and upholding truth and acknowledging reality."<sup>186</sup> This

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<sup>185</sup> *Id.* See the verses at chapter 1 of this dissertation *supra* note 39-40.

<sup>186</sup> Faisal Kutty, I, *Islamic Law and Adoptions* (June 20, 20s14). Forthcoming in Robert L. Ballard et al., *The Intercountry Adoption Debate: Dialogues Across Disciplines* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014); Valparaiso University Legal Studies Research Paper No. 14-5 *available at* SSRN: <https://ssrn.com/abstract=2457066> (last accessed\_May. 31, 2016).

prohibition is in accordance with one of the necessities outlined in the *Islamic maqasid*<sup>187</sup> of lineage protection. Muslim scholars have divided the verses and Hadiths into provisions, dogmas, ethics, family law and penalties, which each refer back to the *Islamic maqasid*.<sup>188</sup> For that reason, adoption would represent an attempt to coopt the calling to choose family members, which is contrary to the teachings of the *Qur'an* that suggest this responsibility should be left to Allah alone. In sum, provisions that deprived the adoption in Islamic law on account of losing of lineage biological and confusion of lineage, losing the rights of inheritance for the biological child, and the unmarriageable between the own child and the adoptive child. Thus, making confusions of the lineage might lead to incest.<sup>189</sup>

### 2.5.3.2 Conditions Making One Unmarriageable

The categories mentioned in the *Qur'an* determine which women are permanently prohibited from marriage. The three verses below explicitly ban marriage for these categories. However, note that marriage between relatives in general can exist, unless one of these conditions below in the verses is met thus making the marriage forbidden.

“And do not marry those [women] whom your fathers married, except what has already occurred. Indeed, it was an immorality and hateful [to Allah] and was evil as a way.”<sup>190</sup>

“Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your

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<sup>187</sup> Mosa Sayed, *The Kafala of Islamic Law- How to Approach it in the West*, ESSAYS IN HONOUR OF MICHAEL BOGDAN OFFPRINT 507-520 at 511 (2013) available at <https://infosomalia.files.wordpress.com/2014/04/the-kafalah-om-islamic-law-how-to-approach-it-in-the-west-mosa-sayed- uppsala-university-2013.pdf>.

<sup>188</sup> *Islamic maqasid*: These are the categories of the necessities for protection: 1) religion, 2) life, 3) mind, 4) lineage, and 5) property. See YOUSF ALBADAWI, ISLAMIC MAQASID BY IBN TAYMIYAH 63 (1999).

<sup>189</sup> Bargach *supra* note 4 at 51-58.

<sup>190</sup> *Qur'an*, Sorah An-Nisa (The women) 4:22

guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is ever Forgiving and Merciful.”<sup>191</sup>

“And [also prohibited to you are all] married women except those your right hands possess. [This is] the decree of Allah upon you. And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse. So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever Knowing and Wise.”<sup>192</sup>

Evidently, based on these verses, it can be concluded that the prohibition of adoption is upheld in order to maintain the concept of family as originating from the divine, willed by Allah.<sup>193</sup>

***Interpretation of These Categories:***

- a) Unmarriageable due to lineage (blood relation): There are in a relationship in which lineage makes one unmarriageable: mothers, daughters, sisters, aunts from the mother’s and father’s sides, and nieces from the sister’s and brother’s sides.
- b) Unmarriageable due to kinship (marital relations) that emerge because of marriage: There are relationships in which kinship makes one unmarriageable: wife's mother, *i.e.*, mother-in-law and beyond, the wife's daughter and her granddaughters and beyond, the son's wife and grandson's wife and beyond, and the father's wife.

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<sup>191</sup> *Id* at 4:23

<sup>192</sup> *Id* at 4:24

<sup>193</sup> See THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD 50-51 (Sue. Farran, James. Gallen, Jennifer. Hendry & Christa. Rautenbach, eds., 2015).

c) Unmarriageable due to the milk-foster relationship (breastfeeding) means not being able to marry any relation for whom you have been breastfed by.<sup>194</sup> The milk-foster relationship has the same provisions forbidding marriage as all of the previous unmarriageable situations due to lineage and kinship.<sup>195</sup>

### 2.5.3.3 Three Explicit Verses from the Qur'an Revealed to Prohibit Adoption

- **First verse**<sup>196</sup>

#### *Interpreting the verse:*

“That is, just like a woman does not become a mother if you address her as one, so also, a man does not become a son if you begin addressing him as your son.”<sup>197</sup> This verse was seen to have been regarding the adopted son Zaid, which led to him becoming ibn Haritha from ibn Muhammad, which he had been called since a young age. According to notable Sunni religious scholars, Muslim, Tirmidhi and Nasa'i adopted sons like Zaid were treated with the same respect, as a biological son would have been.<sup>198</sup>

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<sup>194</sup> Foundation of Choosing a Wife and to Avoid Taboo of Marriage, General Presidency of Scholarly Research and Ifta, Islamic Research Journal 24 1988 *Infra* note 201 available at <http://www.alifta.net/Fatawa/fatawaDetails.aspx?languagename=ar&View=Page&PageID=3472&PageNo=1&BookID=2> (last accessed\_May. 31, 2016).

<sup>195</sup> *Id.*

<sup>196</sup> See Qur'an *supra* note 39 at 21:4.

<sup>197</sup> *Surat Al-Ahzab*, ISLAMICENCYCLOPEDIA.ORG, <http://islamicencyclopedia.org/tafsir.php?id=33> (last accessed\_Sep. 29, 2017). See also, SYED ZAHEER, TAFSIR ISHRAQ AL-MAANI (1992).

<sup>198</sup> *Id.*

- **Second verse**<sup>199</sup>

***Interpreting the verse:***

“Allah refers this verse relating to Zayd's divorce, in which he also talks about the issue of attributing names and renaming the adopted children in relation to their biological father.” The verse clarifies that to call a child by his or her biological father’s name is just. However, when you do not know their biological father, they would be considered brothers in faith through Islam and a mentee. Yet, as Islam recognizes that Allah is kind and forgiving, if a child took the name of a father other than his biological one unknowingly, it would be a forgivable error, unlike someone who made such a choice with knowledge and intention (Ibn Jarir).<sup>200</sup>

**Hadith related to this interpretation in the second verse that explicitly ban adoption:**

Sa’d said: I heard the Prophet say: “Whoever claims to belong to someone who is not his father, knowing that he is not his father, Paradise will be forbidden to him.”<sup>201</sup>

- **Third verse**<sup>202</sup>

***Interpreting the verse:***

“Although the Prophet had sons, they all died in their infancy and so the description is accurate: he was ‘not the father of any of your men’ (Ibn Jarir), but rather a spiritual father of his followers (Asad).”<sup>203</sup> This verse is a warning message to teach people that through adoption it is not permissible to accept the surname of the prophet like a father.

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<sup>199</sup> See Qur’an *supra* note 39 at 21:5.

<sup>200</sup> Zaheer *supra* note 197.

<sup>201</sup> Sunan Ibn Majah, The Chapters on Legal Punishments, English reference: Vol. 3, Book 20, Hadith 2610 Arabic reference: Book 20, Hadith 2708 *supra* note 31 See The Hadith of the Prophet Muhammad at Your Fingertips, SUNAH.COM, <https://sunnah.com/>. See also Ministry of Islamic Affairs Advocacy and Guidance in Saudi Arabia, HADITH.AL-ISLAM <http://hadith.al-islam.com>. (last accessed Oct. 18, 2017).

<sup>202</sup> *Supra* note 39 at 21:40 Allah says, “Muhammad is not the father of any of your men, but (he is) the Messenger of Allah, and the Seal of the Prophets: and Allah has full knowledge of all things.”.

<sup>203</sup> Zaheer *supra* note 197.

There are some provisions under Islamic law regarding adoptee children (in other words, orphaned children) that have to be applied, understood, and taken into account, especially as it relates to inheritance, breastfeeding (milk-kinship), lineage, and marriage. The following section is about KSA's legislation (*Fatwa*) concerning the matter of orphaned children.

## **2.6 FATWA PROVISIONS UNDER ISLAMIC LAW REGARDING BREASTFEEDING, FOUNDLINGS, PROHIBITING ADOPTION AND THE GREAT REWARD OF THE KAFALA, "FOSTERING" ORPHANED CHILDREN<sup>204</sup>**

The *fatwa* is an essential basis of KSA Law that is considered within the Branch of Legislative Under Advisory Authorities (The Council of Senior *Ulama*).<sup>205</sup> It comes from one of several official agencies, which are made up of senior scholars called *mufti*.<sup>206</sup> They are *Fatwa* Noor Ala Al-Darb<sup>207</sup>, *Fatwas* Ibn Baaz,<sup>208</sup> Islamic Research Journal,<sup>209</sup> Senior Scholars Research<sup>210</sup>

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<sup>204</sup> Regarding to the translation of these fatwas (Trans. literally and interpretatively from Arabic to English by the author of the dissertation).

<sup>205</sup> Basic Law of Governance *supra* note 83 at art. 45.

<sup>206</sup> See as defined by Vogel, "In practice a lay Muslim seeking to act in harmony with God's law in some difficult or perplexing situation approaches a scholar of the law whom he or she respects summarize the situation faced and asks for his view of sharia ruling for the situation. In this function the scholar called a mufti and his opinion is called a fatwa, Hearing the mufti advice, the questioner is free to choose whether or not to follow it and apply the answer to his or her situation" VOGEL, FRANK E. ISLAMIC LAW AND THE LEGAL SYSTEM OF SAUDI: STUDIES OF SAUDI ARABIA, 5 (2000).

<sup>207</sup> A program broadcast, and it is known the Holy Qur'an Radio from Saudi Arabia each day. Many scholars participate to answer for listeners in Islamic Law provisions questions.

<sup>208</sup> Bin baz is a person who known as Grand Mufti in Saudi Arabia from 1992-1999.

<sup>209</sup> It is a journal that published by the general presidency for the departments of scholarly research and Ifta, invitation and guidance in KSA.

<sup>210</sup> It is a religious Islamic government agency in Saudi Arabia that includes a limited panel of religious personages, and they are all diligent scholars from various schools of jurisprudence, also, its president is the Grand Mufti of Saudi Arabia.

and *Fatwas* of the Permanent Committee.<sup>211</sup> In addition, *Fatwas* are also addressed from the Department of Call and Guidance at the Ministry of Religious Endowments and Islamic Affairs in Qatar that has the official online service to answer the *fatwas*,<sup>212</sup> as always, they cite their *fatwas* from the Permanent Committee for Scholarly Research and *Iftha* in KSA.<sup>213</sup>

Most of the *fatwas* regard “fostering” in KSA as specific to foundling children, known as *al-Laquit*<sup>214</sup> and worthy of receiving the great reward for those who take care of them. The foundling is the neediest child who needs care more than any other child because he/she does not have any relatives. Muslims are allowed, and are encouraged, to raise unknown or foundling children who are not genetically connected to them.<sup>215</sup>

Sponsors of foundlings will likely gain a rewarding feeling from raising these abandoned children if they treat them well because sponsoring a foundling would have the same types of gratification as sponsoring an orphan, if not more so, because the situation of foundlings is much more difficult. In the *fatwa* of the Permanent Committee for Islamic Research and Issuing *Fatwas*, it is stated that children of unknown parentage are considered orphans because they have lost their parents, yet there is a more urgent need for taking care of them than children of known parentage

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<sup>211</sup> Fatwas of the Permanent Committee is one of the prestigious scholarly committees in the present era and a stickler approach the prophet and are going to the people of impact approach, includes a selection of senior scholars in Saudi Arabia, and has high credibility in the scholarly and Islamic circles, praised the collection of scholars and students of Islam from the Sunnis and her great efforts in a statement of legal provisions for the people, and issuing fatwas on all affairs of life.

<sup>212</sup> It is a great scholarly advocacy gate, within the network of Islamic "Islam Web", of the Department of Call and Guidance. Qatar is a Muslim Country its doctrine and majority are Sunni. See the evidence available at <http://www.islam.gov.qa/Articles.aspx?art=342&cnt=1&lf=185>. A lot of Muftis in this network are virtuous scholars, some of them from Saudi Arabia. The methodology of fatwa relies on the legitimacy of "the *Qur'an* and *Sunna* and the consensus and measurement of evidence.

<sup>213</sup> See General Presidency for Research and *Iftha* *supra* note 36 in *Fatwa* No. 21145.

<sup>214</sup> See *supra* note 32 that refers to Foundling, *al-Laquit*, or child with unknown parents.

<sup>215</sup> Fatwa Center, Islamweb.net *supra* note 32 *The Definition of Foundlings in Islamic law and their Provisions*, Category: Al-Laquit Fatwa No. (27077) May 31. 2008.

because they have no known relatives to go to when necessary.<sup>216</sup> Accordingly, he who sponsors a child of unknown parentage will be rewarded, just as the one who sponsors an orphan according to the prophetic tradition which says “I and the one who looks after an orphan will be like this in Paradise,” showing his middle and index fingers and separating them.”<sup>217</sup>

The following are samples of *fatwas* that concern foundlings and breastfeeding provisions in many situations.

**Fatwa 1 (Q)** I got married. After that, I found out that I was barren, yet I accepted Allah's will. For that reason, my husband divorced me, and I married my cousin (my aunt's son) who already has children from his first wife. Although he knew that I am unable to bear children before he married me, four years later after my marriage, I sponsored a foundling girl. The girl lived with my husband and me. By then, she was 40 days old and was not registered under our name because we know that this is impermissible; the orphanage used to give children unreal names. What is more important is that my husband's sister breastfed her along with her baby five times, so that my husband now cannot marry her in the future because he will be considered her uncle. The girl gave me the true feeling of being a mother. Now, the girl is three years old; she calls me “mother”, calls my husband “father”.... Is it unlawful to call us as our daughter does by kinship? How can I explain to her the situation when she grows up in a way that does not hurt her? I certainly have doubts about the matter. Ever since I heard of the prophetic tradition, which says, “If somebody claims to be the son of any other than his real father knowingly,” I was worried because she refers to us as

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<sup>216</sup> *Id* at *The Reward of a Foundling's Sponsor: The Provisions of Foundlings*, Category: Al-Laquit Fatwa No. (35697) Aug 3, 2003. *See also supra* note 34 as the original *Fatwa* cited from the Permanent Committee Fatwa: The Department of Religious Research and Fatwa in King doom of Saudi Arabia by Department of Call and Guidance at the Ministry of Religious Endowments and Islamic Affairs in Qatar *See also* General Presidency for Research and Ifta *supra* note 36 *Fatwa* No.21145

<sup>217</sup> Al- Bukhari *supra* note 30.

real relatives. I also doubt that my husband's sister has breastfed my foundling girl sufficiently [for various reasons]. Can we count this breastfeeding because I heard that it is possible to count five times of breastfeeding even if a child sucks little milk then stops? The times of breastfeeding count even if they are at the same time. Once, I read on an “Islam Question and Answer” website that breastfeeding does not have to be satisfactory; just having a breast in a child’s mouth and sucking milk from it is considered one breastfeeding.<sup>218</sup>

(A) When the girl calls you, your husband, or the rest of your relatives as “mother”, “father”, and the like, there is no problem, as long as she does so out of respect and showing love but not because she is a kinsperson of your family. If your husband’s sister (your sister-in-law) has breastfed her five times, she will be considered her mother, and your husband will be considered her uncle, and your father will be considered her indirect milk uncle. The breastfeeding does not have to be satisfactory, but it should be over separate times. The Prophet said: “What becomes mahram (forbidden for marriage) through breastfeeding is that which becomes mahram through blood ties.”<sup>219</sup> i.e., the breastfeeding makes forbidden what is forbidden through blood relations. The *Mufti* who answered this *fatwa* mentioned the explanation according to Ibn *Qudamah*’s book *Al Mughni*,<sup>220</sup> saying that the exact amount of breastfeeding should be based on customs and traditions, because Islamic Law discusses the matter without limiting it to a certain number of times or amounts. That is, one breastfeeding counts, and if a child is breastfed again, it is considered to be another breastfeeding. When the girl is old enough, tell her that your relationship

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<sup>218</sup> Fatwa Center, Islamweb.net *supra* note 32 *The Legal Decision of a Foundling Girl Who Calls the Wife and Husband Who Sponsor Her "My Mother and Father"* Category: Al-Laquit, Fatwa No. (223207) Oct 7. 2013).

<sup>219</sup> Sunan Ibn Majah, The Chapters on Marriage, English reference: Vol. 3, Book 9, Hadith 1938  
Arabic reference: Book 9, Hadith 2013 *supra* note 31.

<sup>220</sup> A Sunni Scholar, Abdullaah ibn Ahmad ibn Muhammad ibn Qudaamah Al Mughni Alhanbali 1147 1223, 541-620 AH.

with her is only based on a breastfeeding basis but not by kinship. To know the best way to tell her the truth without hurting her feelings, we advise you to contact our consultation.<sup>221</sup>

**Fatwa 2 (Q)** Please, I want a solution for this problem. I am an Iraqi woman who has feared Allah throughout my life. We obey Allah and live as per the traditions of tribes and clans. Back in the days of the 2003 wars in Iraq, we moved to a safer area where we found a child at our doorstep. As a result, I took care of him and breastfed him; there were no orphanages or police stations because of the war. A year later, we returned to our tribe; our tribe members were very conservative and asked me about the child. So, in order to avoid scandals, I told them that I gave birth to this child. I did not realize that this is unlawful. Over time, I realized that it is unlawful to say that this child is my son, although I have plenty of sons and daughters thanks to Allah. However, I took care of this child as my son out of mercy and tenderness. Now, what should I do to purify myself from this sin? If I tell my tribe the truth, they will punish my husband and me, and consequently, my husband, who is now powerless and sick, and will force me to end our relationship. In addition, my family will not approve of this because they consider a foundling to be a shame; thus, they will kill me, although I am not afraid of death. What I am afraid of is my daughters whose lives will be ruined because of this act and no one will ever marry them because they are, in the eyes of the tribe, the sisters of a foundling. So, how do I purify myself from this sin? Should I keep silent and tell no one about this secret sin in effect protecting my daughters' reputation and mine? I swear to Allah I did not know that doing this is unlawful; however, I thought that taking care of this child would entitle me to enter Paradise. Please, help me.<sup>222</sup>

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<sup>221</sup> *The Legal Decision of a Foundling Girl Who Calls the Wife and Husband Who Sponsor Her "My Mother and Father" supra note 215.*

<sup>222</sup> Fatwa Center, Islamweb.net *supra* note 32 *A woman has sponsored a foundling boy and she was obliged to register him under her husband's name. What is the legal decision of this action? Fatwa No. (155303).*

(A) I ask Allah to reward you for taking care of this child and raising him because doing so is considered one of the good deeds, which brings a believer closer to Allah. In the *fatwa* of the Permanent Committee for Islamic Research and Issuing *Fatwas*,<sup>223</sup> children of unknown parentage are considered orphans because they have lost their parents. Yet, there is a more urgent need for taking care of them than children of known parentage because they have no known relatives to go to when necessary. Accordingly, he who sponsors a child of unknown parentage will be rewarded just as the one who sponsors an orphan according to the prophetic tradition which says “I and the one who looks after an orphan will be like this in Paradise,” showing his middle and index fingers and separating them.”<sup>224</sup> We need to distinguish between the two cases:

The first case being whether you breastfed this child when he was less than two years old, with five satisfactory breast feedings; in this case, he will be considered to be your child through breastfeeding, your husband will be considered to be his father through breastfeeding, and the rest of your sons and daughters will be his siblings through breastfeeding. This is all evidenced legally according to the prophetic tradition, which says, “Breastfeeding makes unlawful (for marriages) the same things that blood ties make unlawful.”<sup>225</sup>

Then there is no problem if this child lives and mingles with you, but the only issue is if you attempt to register this child under your husband's name because this would be considered to be impermissible and is contrary to what Allah says in the Holy *Qur'an*. In the *fatwa* No. 24944, it is already explained that children of unknown parentage are not named after a certain person,

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<sup>223</sup> *Supra* notes 35-36.

<sup>224</sup> Al-bukhari *supra* note 31.

<sup>225</sup> Sunan Ibn Majah, The Chapters on Marriage, English reference: Vol. 3, Book 9, Hadith 1937, Arabic reference: Book 9, Hadith 2012 *supra* note 31.

but rather their names will be chosen generally and randomly, such as “the son of Abdullah, the son of Abdul Rahman” and the like.

The second case regards whether you have not breastfed this child, breastfed him less than five times, or breastfed him five times after he exceeded the unlawful age of breastfeeding (which is two years of age), because then he will be considered to be a stranger to you. Therefore, you and your daughters should wear *hijab* if he reaches or is about to reach puberty. Overall, if you have registered this child under your husband's name, you should change this in such a way that suits your circumstances and traditions. However, if doing so will expose you or your husband to an imminent danger, such as being killed or severely hurt, there is no problem in keeping silent until an opportunity arises to change this situation.<sup>226</sup>

**Fatwa 3 (Q)** My cousin is married, but his wife is barren, and they long to have children very much. They want to adopt a child from a relative, and so they adopted a baby girl from my brother since her birth. She has reached the age of eight, and they have sponsored the child to the fullest extent. Can they register her name under their family name or not?<sup>227</sup>

**(A)** For children like “foundlings,” who do not have the welfare to be brought up and do not know their parents, fostering is a legitimate matter of benevolence, such as in the case of orphans whose parents were killed in the wars, and so on. In some cases, this is a matter of charity and orphans and the poor and needy are brought to the door of a known Muslim in order to improve their standing of life. When parents place a child someplace, most often in a mosque, especially in cases such as an illegitimate child or a child resulting from an outrageous crime, the child (also

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<sup>226</sup> See ABDULLAH ALTAYAR & MOHAMMED ALMUSA, FATWA NOOR ALA AL-DARB FOR IMAM ABD AL-AZIZ IBN BAZ THE MUFTI OF KINGDOM OF SAUDI ARABIA: THE WHOLE FATWAS MORE THAN 2200 FATWAS (BREASTFEEDING BOOK)1858-1877.

<sup>227</sup> The official Web for Binbaz *Supra* note 37 at *Matters that Concerning the Adoption in General and Foundling*.

called a “foundling”) is itself innocent in that he/she does not have any guilt in the matter. If a Muslim brings up the child well and does their best for him or her, he/she will receive a great reward, but do not attribute the child to you, because they are not your own child belonging to you and your wife—unless the child is breastfed. In that case, the child will become a son or daughter to the woman’s husband through breastfeeding. Also, their cousins will become a cousin to the child through breastfeeding. However, do not register the child under your family name because it may cause people to think that the child was born to you based on the record and may perhaps lead the child to take part in the inheritance, which is impermissible. If it is not a son of breastfeeding, just take care of the child. In this case, does the woman that raised him have to wear a *hijab*? Yes, if the boy reaches puberty—unless the woman's sister or her mother breastfed the child, for example, breastfeeding during the first two years, which would result in it becoming a matter of breastfeeding.<sup>228</sup>

**Fatwa 4 (Q-1)** My family adopted my aunt's daughter to be as a daughter to them, because my father had not been blessed with many children. Kindly advise?<sup>229</sup>

(A) Adoption is not entitled in Islam. This is represented in Allah’s explanatory words: “Call them by (the names of) their fathers: that is juster in the sight of Allah. But if ye know not their father’s (names, call them) your Brothers in faith, or your *maulas*). In pre-Islamic time, adoption was known, whereupon *Zaid Bin Haratha* was called *Zaid Bin Muhamad*, upon him peace from God, thereafter God imposed verse from heaven, to be called after his father's name *Bin Haratha*, from which Islamic law prevailed. People are intended to belong only to their

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<sup>228</sup> *Id.*

<sup>229</sup> *Supra* note 34 Kingdom of Saudi Arabia Portal of the General Presidency of Scholarly Research and Ifta at Fatwa Noor Ala Al-Darb, Volume 23, In the Nursery Book, Adoption Rules *see also supra* note 37 Binbaz Official Web Issues Relating to Adoption and Abandoned Children.

parents; it is not entitled to adopt any person. Yet there is no objection when such a matter is brought up as when a person raises another parents' sons, provided that they treated them kindly. There is no objection if they did, but to be the son of someone, yet called the son of the other, is not entitled at all.

**(Q-2)** What is the religious ruling in adoption of children, and what is the ruling if such women are breastfeeding children in this case?<sup>230</sup> (This *fatwa* regards the issue of naming a foundling).

**(A)** As the previous verse answered, adoption is not allowed in Islam. A child should be named in such a fashion: the given name + *Bin Abdullah*, given name + *Bin Abd Al-Rahman*, given name + *Bin Abd Al-Mageed*, and so on, but he must not be given the family name because God says: “Call them by (the names of) their fathers.” On the other hand, because he belongs to him, it may be concluded that it makes him a recipient of inheritance, and his sons may consider him as a prohibited brother for girls along with other prohibitions. So, it is meant that fostering a child is allowed, such as in the case of fostering a child with an unknown identity. The orphan is a person that has an unknown father (also known as a foundling), so he/she should be treated kindly and be spent on, occurring most often in cases of wars with lost children, not able to find their fathers or mothers, or a child placed in mosques, with no one to rely on or treat him kindly. There is no objection to adopting such an orphan as a good deed, bringing him up and spending on him.<sup>231</sup>

Unlike the above examples that are based on real situations, presented to ask for advice from *muftis* who are considered to be senior scholars, an Islamic religious government body in KSA. These following briefings address hypothetical situations and expected *fatwas* “questions”

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

for the purpose of having answers ready when needed. These particular *fatwas* are about the allowances for the supplement of hormones and the number of times for breastfeeding.<sup>232</sup>

**Fatwa 1 (Q)** A married woman does not have children. If she takes a stimulant hormone to produce milk to nurse a baby in the first two years of the baby's life, will the baby belong to either of them?

**(A)** If this woman used the supply of milk, which relied on hormones for production, and she then breastfeeds the child five times or more in the first two years, she'd be the mother to the child. As Allah said in the *Qur'an*, "your [milk] mothers who nursed you." Also, in Aisha's *Hadith* it was said that "It was revealed in the *Qur'an*: About ten feedings clearly is deprived and then abolished to about five clearly. Then the Prophet died and the verses read in the *Qur'an* as they were."<sup>233</sup> This *Hadith* relates to how many times feeding a breastfeeding a baby can affect the legal consideration of the child as their son or daughter.

**Fatwa 2 (Q)** If a young woman was not married and did not have a marriage settlement and she breastfed a child in the first two years of his/her life because of the supply of milk and this lactation exceeded five times of feedings, is her milk going to place her within the category of "women who are unlawful to be married to because of a relationship by breastfeeding"? Is it required to make a marriage settlement before any breastfeeding?

**(A)** If she lactated the milk for the child five times or more in the first two years of the child's life, in so doing, she will become a mother to him through the act of breastfeeding, even if she has not married yet. This is the preponderant opinion of scholars.

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<sup>232</sup> The Permanent Committee for Scholarly Research and Issuing gave a briefing on what was the Grand Mufti of Poller: Latifa Mohammed al-Tamimi, director of the Women's Social overseeing the Eastern Region. Committee of the General Secretariat of the Council of Senior Scholars No. (974) 09/07/1431 AH (2010).

<sup>233</sup> Sahih Muslim, The Book of Suckling 1452 a, In-book reference: Book 17, Hadith 30, English reference: Book 8, Hadith 3421 *supra* note 31.

**Fatwa 3 (Q)** If a woman was divorced many years ago and did not remarry after her divorce, and she breastfed children after using her own supply of milk (lactation), in this situation, due to the breastfeeding, would it be “unlawful to be married because of a relationship by breastfeeding”?

**(A)** If she lactated the milk for a child five times or more in the first two years, in so doing, she would become a mother to the child through the act of breastfeeding even if she divorced many years ago.

**Fatwa 4 (Q)** If a grandmother was ninety years old and her husband died around five decades ago, and she used her own supply of breast milk (lactation) and breastfed a child over five times in the first two years of her/his age. Due to the breastfeeding, would it be “unlawful to be married because of a relationship by breastfeeding”? Is it permissible for the woman to stimulate milk in this situation using the effect of hormones or not?

**(A)** If it is proven that the supply of milk came from this grandmother, in a way that the breastfeeding was successful, whether it is due to the activating of the milk supply hormone (lactation) or not, the conclusion of this case would be based on the existence of milk in this woman and the basic rules of breastfeeding would apply (lactating the milk for the child more than five times over the first two years).

Relatedly, the following situation was medically documented in Ethiopia: A 56-year-old grandmother had nine-month-old twins that she cared for after her daughter ran away. However, the doctor that encountered this situation told her that if she would not breastfeed them, they would die.<sup>234</sup> Therefore, based on the *Fatwa*, this situation would be permissible, because if a physician specialist endorses the lactation (milk supply) for an older woman to breastfeed her grandchildren, it is considered valid milk.

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<sup>234</sup> ELIZABETH HORMANN, BREASTFEEDING AN ADOPTED BABY AND RELACTATION, 4 (2006).

**Fatwa 5 (Q)** If a woman repeatedly visited an orphanage and pumped milk into a baby's bottle so that it would be enough for the baby all day, and the milk was stored in the refrigerator until the child needed it during day or night times, and repeated this action five consecutive days or sporadically, where one of nurse residents can hand the child the milk, is her milk going to fall under the category of "women unlawful to be married because of relationship by breastfeeding"? Even if her milk was not fed into the baby's mouth immediately from her breast, and did not see him at all, but after several days or months after the end of the feedings she saw him/her?

**(A)** It is not required in the breastfeeding that a child being breastfed should suckle directly. If she pumped the milk into the bottle and the child drank from it five times, whether consecutive or sporadic during the first two years, this has become a “women unlawful to be married because of relationship by breastfeeding.”

**Fatwa 6 (Q)** A woman committed adultery and got pregnant. Is it permissible for her to breastfeed a child who is not her child and breastfeed her own child? Does her milk fall under “women unlawful to be married because of relationship by breastfeeding”?

**(A)** If a woman has given birth to a son/daughter out of adultery, it is her child that would categorize her as "women unlawful to be married because of relationship by birth" and the rights of inheritance and proving relatives of his/her mother would be allowed. About the child who is not her own that she breastfed, of course the child will be her son/daughter and also this would fall under “women unlawful to be married because of relationship by breastfeeding.”

**Fatwa 7 (Q)** If a woman got divorced and then she received a marriage proposal again, but the couple has not had sex yet, yet she has breastfed a child, would this new man be considered a father of the baby or not?

(A) The man is not the father of this child because the child will not become his child. It would become the child of the woman, but not of the man. It would remain the child of the existing father.

**Fatwa 8 (Q)** A woman fostered a female child by *Kafala* under the age of two years old and she fed her as defined legitimately. Then, she became her child through breastfeeding. The woman's mother married a man not her father after her father's passing. Is her mother's husband considered to be under the category of "women unlawful to be married because of a relationship by breastfeeding"?

(A) Yes, he is considered "women unlawful to be married because of relationship by breastfeeding" because he is a husband for the baby girl's grandmother through breastfeeding. As the Prophet said: "Breastfeeding makes forbidden what is forbidden through blood relations"<sup>235</sup>

**Fatwa 9 (Q)** If a woman breastfeeds a child five times in the first two years, but without her husband's knowledge, is it permissible or not?

(A) The wife should not breastfeed any children without her husband's permission, except their own children because that would be considered an ignorance of his rights. By breastfeeding a child, a mother proves that her husband is a father through the act of breastfeeding. An exception to this rule would be if the infant obligates, such that no one can breastfeed the child except her, or else the child will not accept lactation from others. In this case, the breastfeeding would not depend on the husband's permission because this is a case involving the need to rescue.

Since there are many situations that must be clarified in order to be acting in accordance with Islamic law. These *fatwas* help to preemptively answer many of these questions that may arise. These specific *fatwas* emphasize the importance of not transferring the title of father and mother inappropriately and also help to maintain clear paths of lineage that might get confused

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<sup>235</sup> *Supra* note 31 English reference: Vol. 3, Book 9, Hadith 1938, Arabic reference: Book 9, Hadith 2013.

through breastfeeding practices. Providing this type of background to the HCCH might help to provide more thorough understanding of all the caveats that need to be accounted for when considering inclusion of *Kafala* in its mechanisms.

## **2.7 ORPHANS' RIGHTS UNDER ISLAMIC LAW**

Orphans' rights are part of children's rights, which are the rights that Islam grants to parents toward their children before they are born, during the pregnancy, and after they are born up until puberty.<sup>236</sup>

### **2.7.1 The Significance of the Rights**

#### **2.7.1.1 Right of Custody and Child Support**

It is life's priorities that a child needs from the moment of birth such as breastfeeding, being taken care of, food, medical care, clothes, and emotional giving that relates to warmth, mercy and love—all things which he/she needs to feel safe and emotionally secure.<sup>237</sup>

#### **2.7.1.2 The Right of Education**

It is the important duty that aims to compose the child's personality in a moral way, e.g., teach him/her about the values and ethics of Islam with the parents serving as a good model for their

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<sup>236</sup> Omar Aljuhani, *Orphan Rights in Islamic Law: Comparative Study with International Charters* 16-17 (2007). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>237</sup> See for more details Tasnim Esteti, *Orphans Rights in Islamic jurisprudence*, 23-26 (2007). (Trans. interpretatively from Arabic to English by the author of the dissertation).

children. Parents must avoid preference among their children, excessive spoiling, roughness, or weakness.<sup>238</sup>

### 2.7.1.3 Inheritance Rights

The inheritance right that is commanded by God for the biological relatives' deceased according to *Qur'an* and *Sunna* consists of 12 groups, as they are known as *Ashab al-furud*, i.e., the category of people who have priority of inheritance from the core family itself.<sup>239</sup> They would include husband, wife, mother, father, paternal grandfather, grandmother (maternal and paternal), daughters, daughter to a son (granddaughter), female sibling of the same parents, female sibling of the same father, female sibling of the same mother, and male sibling of the same mother.<sup>240</sup> Anyone outside of these twelve distinct groups would not be eligible to receive full inheritance. By this logic, an orphaned child fostered by a family member who is not a blood relative would not be granted inheritance due to the interruption of lineage. Without express written bequest in a will, a *makful* would not automatically inherit any of the *kafil's* estate. The *kafil* may include the *makful* in a written will but the maximum designation may be one-third of the person's estate. This is why the *makful* cannot share in the inheritance.

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<sup>238</sup> *Id.*

<sup>239</sup> AL-SAYYID SABIQ, *FIQH AL SUNNAH*, 3/ 294-295 (2008) See also Mohd Awang, *The Islamic Inheritance Law (Faraid): The Manifestation of Comprehensive Inheritance Management in Islam*, 9 (2008).

<sup>240</sup> *Id.*

## 2.7.2 Welfare of Orphans Set Out in the *Qur'an* and *Sunna*

In the *Qur'an*, the rewards of doing the good deed of taking care of orphans is mentioned many times, advising against intimidation or hurting of the orphaned child, and also against taking the child's property unjustly.<sup>241</sup> Thus, the verses refer to some commands, which is actually the summation of the orphan's rights: a) Inclusion statement and recommendation for divine kindness to orphans coming from previous divine tenets, b) Statement of their social rights, c) Statement of their financial rights.<sup>242</sup> Furthermore, these rights (principles) stated in *Qur'an* reference their best interests.<sup>243</sup>

- “And [recall] when we took the covenant from the Children of Israel, [enjoining upon them], "Do not worship except Allah; and to parents do good and to relatives, *orphans*, and the needy. And speak to people good [words] and establish prayer and give *Zakah*." Then you turned away, except a few of you, and you were refusing.”<sup>244</sup>
- “Righteousness is not that you turn your faces toward the east or the west, but [true] righteousness is [in] one who believes in Allah, the Last Day, the angels, the Book, and the prophets and gives wealth, in spite of love for it, to relatives, *orphans*, the needy, the traveler, those who ask [for help], and for freeing slaves; [and who] establishes prayer and gives zakah; [those who] fulfill their promise when they promise; and [those who] are patient in poverty and hardship and during battle. Those are the ones who have been true,

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<sup>241</sup> SUHAIB SIRAJUDIN, *MASTER QURANIC ARABIC IN 24 HOURS* 204-206 (2014).

<sup>242</sup> *Id.*

<sup>243</sup> See NISRINE ABIAD AND FARKHANDA ZIA MANSOOR, *CRIMINAL LAW AND THE RIGHTS OF THE CHILD IN MUSLIM STATES: A COMPARATIVE AND ANALYTICAL PERSPECTIVE* 46-47 (2010).

<sup>244</sup> *Qur'an*, Sorah AL-Baqarah (The Cow). 1:83.

and it is those who are the righteous.”<sup>245</sup>

- “They ask you, [O Muhammad], what they should spend. Say, “Whatever you spend of good is [to be] for parents and relatives and *orphans* and the needy and the traveler. And whatever you do of good - indeed, Allah is Knowing of it.”<sup>246</sup>
- “To this world and the Hereafter. And they ask you about *orphans*. Say, "Improvement for them is best. And if you mix your affairs with theirs - they are your brothers. And Allah knows the corrupter from the amender. And if Allah had willed, He could have put you in difficulty. Indeed, Allah is Exalted in Might and Wise.”<sup>247</sup>
- “And give to the *orphans* their properties and do not substitute the defective [of your own] for the good [of theirs]. And do not consume their properties into your own. Indeed, that is ever a great sin.”<sup>248</sup>
- “And if you fear that you will not deal justly with the *orphan* girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those right hand possesses. That is more suitable that you may not incline [to injustice].”<sup>249</sup>
- “And test the *orphans* [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor - let

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<sup>245</sup> *Id* at 2:177.

<sup>246</sup> *Id* at 2:215.

<sup>247</sup> *Id* at 2:220.

<sup>248</sup> *Id* at Sorah An-Nisa (The women) 4:2.

<sup>249</sup> *Id* at 4:3.

him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant.”<sup>250</sup>

- “And when [other] relatives and **orphans** and the needy are present at the [time of] division, then provide for them [something] out of the estate and speak to them words of appropriate kindness.”<sup>251</sup>
- “Indeed, those who devour the property of **orphans** unjustly are only consuming into their bellies fire. And they will be burned in a Blaze.”<sup>252</sup>
- “Worship Allah and associate nothing with Him, and to parents do good, and to relatives, **orphans**, the needy, the near neighbor, the neighbor farther away, the companion at your side, the traveler, and those whom your right hands possess. Indeed, Allah does not like those who are self-deluding and boastful.”<sup>253</sup>
- “And do not approach the **orphan's** property except in a way that is best until he reaches maturity. And give full measure and weight in justice. We do not charge any soul except [with that within] its capacity. And when you testify, be just, even if [it concerns] a near relative. And the covenant of Allah fulfill. This has He instructed you that you may remember.”<sup>254</sup>
- “And know that anything you obtain of war booty - then indeed, for Allah is one fifth of it and for the Messenger and for [his] near relatives and the **orphans**, the needy, and the [stranded] traveler, if you have believed in Allah and in that which We sent down to Our

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<sup>250</sup> *Id* at 4:6.

<sup>251</sup> *Id* at 4:8.

<sup>252</sup> *Id* at 4:10.

<sup>253</sup> *Id* at 5:36.

<sup>254</sup> *Id* at Sorah Al-An'am (The Cattle) 8:152.

Servant on the day of criterion - the day when the two armies met. And Allah, over all things, is competent.”<sup>255</sup>

- “And do not approach the property of an *orphan*, except in the way that is best, until he reaches maturity. And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned.”<sup>256</sup>
- “And what Allah restored to His Messenger from the people of the towns - it is for Allah and for the Messenger and for [his] near relatives and *orphans* and the [stranded] traveler - so that it will not be a perpetual distribution among the rich from among you. And whatever the Messenger has given you - take; and what he has forbidden you - refrain from. And fear Allah; indeed, Allah is severe in penalty.”<sup>257</sup>
- “And they give food in spite of love for it to the needy, the *orphan*, and the captive,”<sup>258</sup>
- “No! But you do not honor the *orphan*”<sup>259</sup>
- “An *orphan* of near relationship”<sup>260</sup>
- “Did He not find you an *orphan* and give [you] refuge?”<sup>261</sup>
- “So as for the *orphan*, do not oppress [him].”<sup>262</sup>
- “For that is the one who drives away the *orphan*”<sup>263</sup>

The synopsis of these verses makes clear ten rights held by orphaned children:<sup>264</sup>

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<sup>255</sup>*Id* at Sorah AL-Anfal (The Spoils of War) 10:41.

<sup>256</sup>*Id* at Sorah AL-Isra (The Night Journey) 15:34.

<sup>257</sup>*Id* at Sorah Al-Hashr (The Exile) 28:7.

<sup>258</sup>*Id* at Sorah Al-Insan (The Human Being) 29:8.

<sup>259</sup>*Id* at Sorah Al-Fajr (The Dawn) 30:17.

<sup>260</sup>*Id* at Sorah Al-Balad (The City) 30:15.

<sup>261</sup>*Id* at Sorah Ad-Duhaa (The Morning Hours) 30:6.

<sup>262</sup>*Id* at 30:99.

<sup>263</sup>*Id* at Sorah Al-Ma'un (The Small Kindesses) 30:2.

<sup>264</sup>Fahad Al-Swidan, Orphans Rights in Islam, AL-JAZIRAH NEWSPAPER, August 03, 2012 (14554) available at <http://www.al-jazirah.com/2012/20120803/rj1.htm> (last accessed Dec. 18, 2017). (Trans. interpretatively from Arabic to English by the author of the dissertation). See also, Abiad and Mansoor *supra* note 243 at 46.

1. Prohibition of taking or using of orphan's property
2. Prohibition of oppression of orphans
3. The right of honor: kindness should be given easily without any moral compensation
4. Prohibition of forcing an orphan to make payment
5. The right to be fed
6. The right to shelter or "refuge"
7. Preservation of the right of inheritance until the child reaches the age of puberty
8. The right of beneficence
9. The right to justice
10. The rights of the abundant spoils or windfalls (In this case, the right interprets one given centuries ago during the life of prophet Muhammad.)

Moreover, under the *Hadith* of the *Sunna*, prophet Muhammad urges people to seek to aid in orphan welfare, and he emphasizes the right of and the need to protect orphaned children.<sup>265</sup>

- One *Hadith* speaks of reward for taking care of orphaned children<sup>266</sup>
- Another *Hadith* clarifies that "The Prophet said, "Avoid the seven great destructive sins." The people enquire, "O Allah's Apostle! What are they? He said, "To join others in worship along with Allah, to practice sorcery, to kill the life which Allah has forbidden except for a just cause, (according to Islamic law), to eat up *Riba* (usury), to eat up an orphan's wealth, to give back to the enemy and fleeing from the battlefield at the time of

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<sup>265</sup> See CHARLI CARPENTER, FORGETTING CHILDREN BORN OF WAR: SETTING THE HUMAN RIGHTS AGENDA IN BOSNIA AND BEYOND 93-96 (2010).

<sup>266</sup> See chapter 1 in this dissertation at the *supra* note 31.

fighting, and to accuse, chaste women, who never even think of anything touching chastity and are good believers.”<sup>267</sup>

## **2.8 THE SYSTEM OF CHILDREN’S RIGHTS IN KSA AND FOSTER CARE: THE RULES OF KAFALA FOR ORPHANED CHILDREN AND (*AL-LAQIT*) FOUNDLINGS**

Notably, Islamic law pays great attention to the rights of orphans and protects them.<sup>268</sup> The system uses the *Kafala* for orphaned children, which is derived from the teachings of the *Qur’an* and *Sunna*, in accordance with the KSA’s constitution.<sup>269</sup> The legal authority of KSA is strictly based in Islamic law.<sup>270</sup> Therefore, the adoption is prohibited based on KSA’s law at Article 15-15-1.<sup>271</sup> Remarkably, under this regulation established by the KSA, orphaned children are afforded certain rights: the right of custody, the right of being raised as a child until he/she reaches adulthood, and the rights of inheritance.<sup>272</sup> It is known in the Arab world that KSA has one of the best-developed *Kafala* systems of child foster care, and it is the most appropriate system under which to care for orphaned children.<sup>273</sup> Under KSA law, the word foundling (*Al-laqit*) denominates “unknown

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<sup>267</sup> Muhammad Al bukhari, *Sahih Al-bukhari*, 1018, 1993. (Book #51, Hadith #28).

<sup>268</sup> Abiad and Mansoor *supra* note 243 at 46.

<sup>269</sup> Basic Law of Governance, *supra* note 83 at article 1.

<sup>270</sup> See KNUT S. VIKOR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW*, 264-269 (2005).

<sup>271</sup> Executive Plan for Child Protection Code in Kingdom of Saudi Arabia, The Regulation for Children’s Protection System (Protection Rights Law). See Annex (A) of this dissertation.

<sup>272</sup> *Id.*

<sup>273</sup> Dina Fouad, Orphans in KSA get enormous support from government, ARAB NEWS NEWSPAPER, Aug.20, (2015) available at <http://www.arabnews.com/saudi-arabia/news/793921> (last accessed Dec. 18, 2017).

parents.”<sup>274</sup> In place of the word adoption, the word *Ehtidan* is used when a foundling lives with a sponsor.

Orphaned children and foundlings (*Al-laqit*) are treated in the same manner in KSA law, under orphaned children rights as the law states, “Orphans under KSA’s law are defined as a male or a female who has lost his/her parents under the age of 18, and he/she does not have any able sponsors or enough resources to live.” An unknown father would also categorize a child as an orphan. Additionally, this applies if there is evidence of an absent father, such as a case where he has not been seen for over 6 months and no one knows his residence.<sup>275</sup> KSA’s support for children of unknown parents continues even after age 18, especially for those living in orphanages. Government efforts are not confined only to those in the age of childhood for this category. To continue receiving government support, foundlings in orphanages must try to get married. This is called the “Subsidy to Marry” according to a Cabinet decision for subsidy grants.<sup>276</sup>

### **2.8.1 The Bureaucratic Structures of KSA Concerning Children Rights to Protection**

#### **Generally**

Royal Decrees were recently sent in 2014 to all Ministries as an announcement by King Abdullah bin Abdul-Aziz. Within these decrees was an obligation from the king that stated that all the

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<sup>274</sup> ABDULAZIZ ALDOGHUTHER, CHILDREN OF UNKNOWN PARENTS (AL-LAQIT); THEIR RIGHTS AND KSA’S CARE OF THEM 1 (2016). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>275</sup> Saudi Arabia, The Social Security Welfare System, Royal Decree No. M /45 Rajab 7, 1427 AH. arts. 1- 5 (2006). *See also*, ABDULKADIR SHAYKHLI, CHILDREN’S RIGHTS IN THE ISLAMIC SHARIA AND THE SAUDI REGIME AND INTERNATIONAL AGREEMENTS 217 (2016). (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>276</sup> Saudi Arabia, Social Support, Cabinet Decision No. 157 12 Ramadan, 1401 (1981).

ministries should enforce the described laws.<sup>277</sup> This Royal Decree included 25 articles about children's rights.<sup>278</sup> Based on this decree the rights of children have been written and established, and it has been titled the Child Protection System. Article 7 is the most important article that details the replacement care related to foundling and orphaned children. Under the regulations of Article 7 in chapter 2, it is stated, "The child who does not have family or a family environment might face neglect or exploitation. There is a system to protect these children including social welfare services and alternative care."<sup>279</sup> This system of alternative care is similar to foster care in that it is considered to be a sort of adoption in Western countries. This Article mentions the sponsorship of children. Consequently, the law determines commitment conditions.

To foster a foundling from an orphanage, there are legal steps that have to be followed. The applicant can go to any office that is related to fostering orphaned children, a practice known as *Ehtidan*, to start the process of *Kafala*. Then, the ministry starts the procedures under the Personal Status laws.<sup>280</sup> For more clarification, see diagram below that provides more details about:<sup>281</sup>

- The Law for implementing Children's Protection System in KSA
- The Procedures in KSA's Ministry in Case of Family Request to Sponsor Orphaned Children *Ehtidan* Under *Kafala*
- KSA's Bureaucratic Structures on *Kafala* Rules

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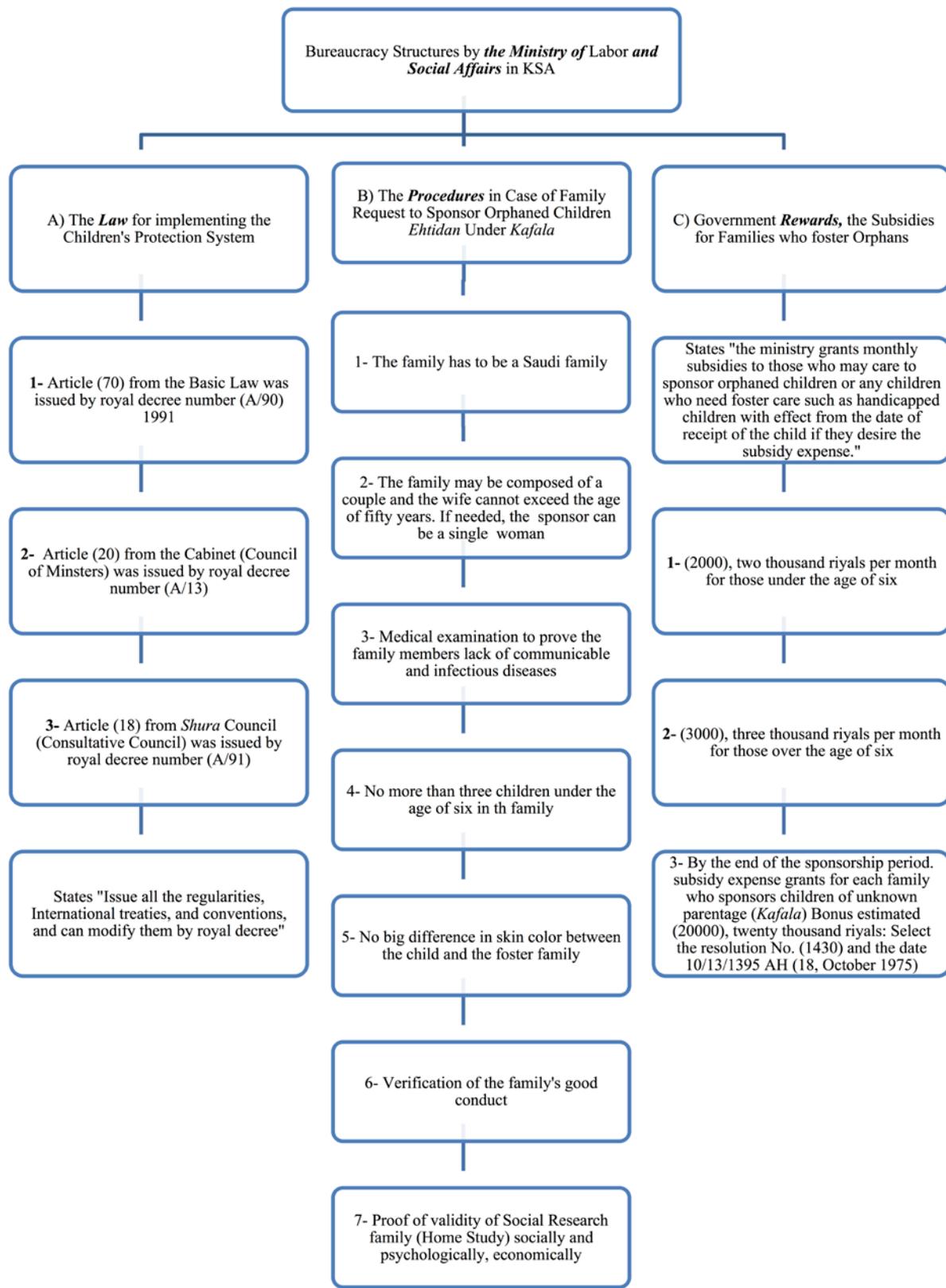
<sup>277</sup> Saudi Arabia, Child Protection System, Authority Cabinet Experts: Royal Decree No. M/14 3 Safar, 1436, (2014).

<sup>278</sup> Executive Plan for Child Protection Code *supra* note 268.

<sup>279</sup> *Id* at. art. 7.

<sup>280</sup> *Id*.

<sup>281</sup> (The author of this dissertation creates this figure according to the Ministry of Labor and Social Affairs in KSA, and Executive Plan for Child Protection Code, and translated interpretatively from Arabic to English.



**Figure 5.** Bureaucratic structures regarding rules of *Kafala* in the KSA

In the diagram above under section B titled the Procedures in the Case of Family Request to Sponsor Orphaned Children *Ehtidan* Under *Kafala*, in condition 5, it specifies that there can be no big difference in the skin color of the child and the foster family. This is not intend racial discrimination, but aims to avoid sensitivity of child and prevent undue challenges. The intention is to allow the child to provide conditions conducive to a safe and happy childhood. If there is not a guardian available of a similar skin color, then the child can be fostered without meeting this condition. Nonetheless, the purpose of this legal condition is to maintain the child's best interests.

In this discussion, it is desirable to demonstrate the history of legislation as it relates to the legal frameworks that provide for protection of children in the KSA, such as the Child Protection Code (translated in the Annex). Highlighting the Child Protection Code is important because many people know about the guardianship rules of *Wali* or *Mahram* (guardianship of women), which have already become widely known as a violation to women, but these rules taken alone may create misconceptions about the full scope of the issue. For example, seeing that the guardianship rules say that women must follow the structure of a male guardianship, people may interpret this statement to mean that there are proper protections from potential abuses for young women and girls in the KSA.

However, they do not know that the legal system provides protection against abuses of children through the Child Protection Code. This system provides serves to protect female youth. Mentioning this code in conjunction with the discussion of male guardianship is valuable to shed light on how it really works, and to show that there are some institutional protections that exist through the Child Protection Code.

## **2.8.2 Organizations Contributing to KSA's Protection of Orphaned Children**

### **Domestically**

*Ensan*, a charitable society for the care of orphans, is a major aid organization in KSA that provides extensive care to orphaned children. It has established several branches of support for children, including education, medical care, jobs, money, home, marriage, and entertainment. King Salman established this charity in 1998 when he was the prince, or mayor of Riyadh, the capital city of KSA. There are currently twelve operational branches in KSA of *Ensan* and it supports more than 40,000 orphans.<sup>282</sup> In addition, there are 88 official charities in all regions of the Kingdom of Saudi Arabia that aim to support orphaned children.<sup>283</sup>

## **2.8.3 International Instruments and Treaties Ratified and Acceded by Royal Decree in KSA**

Most of the titles below are legal instruments adopted in the KSA that relate to human rights and apply to the protection of children in general, as well as to women. These instruments demonstrate the continued efforts of the KSA to protect human rights. In effect, they help to justify the use of KSA as an international example of *Kafala* fostering by showing the country's dedication to issues of child protection and human rights.

- Convention on the Rights of the Child (CRC) of 20 November 1989.<sup>284</sup>

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<sup>282</sup> *Charity Committee for Orphans Care in KSA*, ENSA.COM <https://ensanonline.com/ensanportal/default.aspx> (last accessed Jan.5, 2018). This organization registered in the Ministry of Labor and Social Development No. 166.

<sup>283</sup> See Yatem, *Your Guide to the Official Charity Committees for Orphans Care in Saudi Arabia*, YATEM.CO, <http://yatem.co/> (last accessed Dec. 18, 2017).

<sup>284</sup> Saudi Arabia, Royal Decree No. M /7 16 Rabi II, 1416, (1995). See also Alshqh *supra* note 92.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984<sup>285</sup>
- International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.<sup>286</sup>
- Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979<sup>287</sup>
- Covenant on the Rights of Children in Islam 2005.<sup>288</sup>
- A Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000.<sup>289</sup>
- The Convention on the Rights of Persons with Disabilities and its Optional Protocol of 13 December 2006.<sup>290</sup>
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, Child prostitution and child pornography of 25 May 2000.<sup>291</sup>
- Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in armed conflict of 25 May 2000.<sup>292</sup>
- The National Committee for the International Year of the Child 1979 has been retitled and convert to the (Saudi National Commission for Child Welfare)<sup>293</sup>,
- 1990 World Summit for Child.<sup>294</sup>
- Arab Charter on Human Rights, in 1994, States of the League of Arab are 22 members, and KSA was one of them.<sup>295</sup>
- KSA ratified in 2008 Covenant on the Rights of Children in Islam 2004, The Organization of Islamic Conference Member States (OIC) is 57 member states that established it.<sup>296</sup>

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<sup>285</sup> Saudi Arabia, Royal Decree No. M/11 4 Rabi II, 1418, (1997).

<sup>286</sup> Saudi Arabia, Royal Decree No. M/12 16 Rabi II, 1418 (1997).

<sup>287</sup> Saudi Arabia, Royal Decree No. M/25 28 Jumada I, 1421 (2000).

<sup>288</sup> Saudi Arabia, Royal Decree No. M/54 20 Sha'ban, 1427 (2006).

<sup>289</sup> Saudi Arabia, Royal Decree No. M/56 11 Jumada II, 1428 (2007).

<sup>290</sup> Saudi Arabia, Royal Decree No. M/28 22 Jumada I, 1429 (2008).

<sup>291</sup> Saudi Arabia, Royal Decree No. M/38 18 Rajab, 1431 (2010).

<sup>292</sup> Saudi Arabia, Royal Decree No. M/39 18 Rajab, 1431 (2010).

<sup>293</sup> Report of the Kingdom of Saudi Arabia on Childhood, Ministry of Education, 2000.

<sup>294</sup> UNICEF, *Participation in the World Summit for Children*, <http://www.unicef.org/wsc/country.htm> (last accessed Sep. 2, 2016).

<sup>295</sup> Saudi Arabia, Royal Decree No. M/19 24 Rabi I, 1430 (2009) *See* League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008. *See also*. Arab Charter on Human Rights (1994) Article 38 "(a) The family is the basic unit of society, whose protection it shall enjoy. (b) The State undertakes to provide outstanding care and special protection for the family, mothers, children and the aged."

<sup>296</sup> The Organization of Islamic Conference Member States, Covenant on the Rights of Children in Islam *OIC/9-IGGE/HRI/2004/Rep. Final*.

- Kuwait Document for unifying law for the care of minors' funds and those of the Gulf Cooperation Council (GCC) in 2005.<sup>297</sup>
- Arab Standard Model for the Care of Minors in 2001 adopted by States of the League of Arab which KSA among them.<sup>298</sup>

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<sup>297</sup> Saudi Arabia, Shura Council Decision No.102/80 Safar, 1426 (2005).

<sup>298</sup> States of the League of Arab, Council of Arab Ministers of Justice. Resolution No. 323-C of 22 February (2002).

### 3.0 HAGUE CONVENTION AND INTERNATIONAL ADOPTION RULES

#### 3.1 PREAMBLE

First and foremost is a discussion on the background of the HCCH as it relates to children and adoption including (a) The Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (1965),<sup>299</sup> (b) The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993),<sup>300</sup> and (c) The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996).<sup>301</sup> Further, included in this chapter are discussions pertaining to the history of international adoptions and the statistical representations of countries that have ratified the 1993 Hague Adoption Convention. However, the most important argument in this chapter is the Convention of 1993 and 1996 regarding *Kafala* and Islamic law.

- In 1993, according to Article 2, “the convention covers only adoptions which create a permanent parent-child relationship.”<sup>302</sup>
- In 1996, according to Article 3, “the measures referred to in Article 1 may deal in particular with... e) the placement of the child in a foster family or in institutional care, or the provision of care by *Kafala* or an analogous institution...”<sup>303</sup>

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<sup>299</sup> HCCH. Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions.

<sup>300</sup> HCCH. 1993 *supra* note 28.

<sup>301</sup> HCCH. 1996 *supra* note 46.

<sup>302</sup> HCCH. 1993 *supra* note 28. at. art.2.

<sup>303</sup> HCCH. 1996 *supra* note 46.

- According to outline of the Hague Convention on Child Protection “*Cross-frontier placements of children written in 1996*: The Convention provides for co-operation between States in relation to the growing number of cases in which children are being placed in alternative care across frontiers, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of *Kafala*, which is a functional equivalent of adoption but falls outside the scope of the 1993 Intercountry Adoption Convention.”<sup>304</sup>

This represents a significant contradiction that exists between the two conventions, such that it causes a confusion about the *Kafala* for countries that are members of the HCCH because of the subtleties of the rules. Thus, there is a need for these rules to be detailed by the HCCH. In doing so, the rules of the *Kafala* as indicated by Islamic law and prescribed by the *Qur’an* and *Sunna* can be made more clear and incorporated. This matter was a focal point in Chapter 2 previously and includes clarifications according to Islamic law specifically in the system of KSA. There are three sections to follow that answer fundamental questions regarding this study:

### **3.1.1 What is the Significance of the HCCH as the Focus of this Study?**

The following points give the context of why this convention is important:

- According to one legal scholar who has had a long successful history of working in law specifically in the field of adoption, Elizabeth Bartholet<sup>305</sup>, a notable aspect of HCCH is that it has given precedence over intercountry adoption, meaning that an intercountry

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<sup>304</sup> The Outline of HCCH. 1996 *supra* note 71.

<sup>305</sup> Professor at Harvard Law School, Specialist in Adoption.

option would be preferred over placement possibilities such as institutional care that would take place in the child's home country.<sup>306</sup> As a result, it is important to make alternative placement options, such as *Kafala*, well-understood internationally through a channel such as the HCCH since the preferred placement would, therefore, involve another country.

- Many countries have joined this convention. About 50% of countries in the world are Contracting States of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Moreover, several countries have started the process of ratification, but have not yet completed it.<sup>307</sup> Collectively, HCCH is well represented worldwide.
- It is one of only a few international legal frameworks dealing with the topic of intercountry adoption.<sup>308</sup> Others include the UN Declaration Relating to the Welfare of Children (1986) and the UNCRC (1989). These last two are very generalized, while the HCCH is the most specific on the topic of intercountry adoption.
- Based on Dr. Selman Peter's<sup>309</sup> research, between the years of 1998 and 2007, the top 10 receiving countries of all 23 reported countries (ranked from the largest to smallest) are the United States, Spain, France, Italy, Canada, Netherlands, Sweden, Norway, Denmark, and Australia. Among these ten countries, the top five accounts for more than 80% of overall adoption, and the US is responsible for around 49% of all cases.<sup>310</sup> Obviously, most of the adoptions in the world are happening with HCCH member nations. Therefore, because of

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<sup>306</sup> See Elizabeth Bartholet "International Adoption, chapter in "CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE", edited by Lori Askeland. ISBN # 0-313-33183-9., 113-115(2005) available at <http://www.law.harvard.edu/faculty/bartholet/pdfs/IAChapter5FINAL.pdf> (last accessed Sep. 5, 2015).

<sup>307</sup> HCCH. 1993 *supra* note 28.

<sup>308</sup> See Erichsen *Infra* note 549 at 77.

<sup>309</sup> Professor at Newcastle University, UK, Visiting Fellow in the School of Geography, Politics and Sociology.

<sup>310</sup> Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, Vol. 52 (5) INTERNATIONAL SOCIAL WORK 575-594, 588 (2009).

how widely used and prominent the HCCH is, it is significant for this framework to be made adequate for cooperation with *Kafala* and appropriate adaptations made to accommodate international cases of this type.

- Some of the most popular sending countries that conduct international adoptions with the US (one of the HCCH member states, and the most active country in regard to international adoption) have significant Muslim populations. For example, Ethiopia as having adoption 37% as of 2008<sup>311</sup> and 33.9% as of 2007,<sup>312</sup> India has 14.4% as of 2010,<sup>313</sup> and Nigeria has 48.8% as of 2010.<sup>314</sup> Due to the significant and growing proportions of Muslims in the world, adoption rates in countries with Muslim populations are also increasing, even while adoption rates in other Western nations decrease.<sup>315</sup> An analysis of this information suggests that with increasing Muslim populations and evidence of a growing need for child placement in these regions of the world, greater recognition of *Kafala* in an appropriate way with Islamic law by international law is necessary. Therefore, presenting this information in regards to its importance in choosing the HCCH.
- There are alternative existing conventions dealing with the topic of intercountry adoption, but they are localized. One example is the European Convention on the Adoption of Children of 1967, which is limited to Europe.<sup>316</sup> Contrastingly, HCCH deals worldwide.

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<sup>311</sup> *Id.* at. 581.

<sup>312</sup> Jimma Times, *Ethiopia: Muslim Critics Reject National Census for Missing Millions*, MUSLIMPOPULATION.COM <http://www.muslimpopulation.com/africa/Ethiopia/Muslim%20critics.php> (last accessed Dec. 19, 2017).

<sup>313</sup> *Muslim, The Future of World Religions: Population Growth Projections, 2010-2050*, PEWFORUM.ORG. (April 2, 2015), [hereinafter Pew Research Centre], <http://www.pewforum.org/2015/04/02/muslims/> (last accessed Jan. 4, 2017).

<sup>314</sup> *Id.*

<sup>315</sup> Selman *supra* note 310.

<sup>316</sup> European Convention on the adoption of Children (Revised), Treaty CETS No. 202 and explanatory report, Strasbourg (France), 27. XI. (2008), <https://rm.coe.int/1680084823>.

As UNICEF has attested, the HCCH represents an important development in dealing with the specific topic of international adoption because the obligations of its members create strong safeguards that satisfy the requirements of other primary conventions, such as those of the UNCRC.<sup>317</sup>

- Finally, The Hague is an internationally important city, known for the international justice arising from it. For example, it is the site of the important institution of the International Court of Justice (ICJ), as well as the Permanent Court of International Justice (PCIJ), which is considered to be the “World Court.”<sup>318</sup> The Hague is a hub of UN activity along with other select locations in Europe and Central Asia including Geneva, Switzerland and Vienna, Austria.<sup>319</sup> Thus, The HCCH serves as the major center for the UN. In fact, it has come to be known as “the Mecca of international law,” nearly a century after the completion of the Peace Palace.<sup>320</sup>

### 3.1.2 Proposed Study (A Hypothetical Cases)

Imagine a Muslim couple seeking to immigrate or find asylum in a Western country, such as Canada, France, or the United States of America, etc. Then, the couple becomes deceased and leaves the children behind as permanent residents in the new country. These children may not be able to readily return to their country due to extenuating circumstances stemming from a variety

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<sup>317</sup> UNICEF. *Intercountry Adoption* (2015) [https://www.unicef.org/media/media\\_41918.html](https://www.unicef.org/media/media_41918.html) (last accessed Mar. 24, 2017).

<sup>318</sup> VAUGHAN LOWE, *INTERNATIONAL LAW: A VERY SHORT INTRODUCTION*, 49 (2015).

<sup>319</sup> *Europe and Central Asia*, UNITED NATIONS., <https://www.un.org/en/sections/where-we-work/europe-and-central-asia/index.html> (last accessed Apr. 4, 2017).

<sup>320</sup> International City of Peace and Justice, *Guide to International Organisations in The Hague available at* <https://www.denhaag.nl/en/residents/international-the-hague/international-organisations.htm> (last accessed Apr. 4, 2017).

of possible reasons, such as situations requiring asylum seeking, or a country severely damaged by war or armed conflict, or even just a family who no longer has any friends or cousins to take them in the country of origin. In this case, the children actually end up staying in their new country, perhaps in an orphanage or placed with adoptive families.

Another hypothetical case, A Muslim couple on their way to immigration to any Western country because of the civil unrest or so on. They have an unknown child taking care of him/her through *Kafala*. Nevertheless, they found the country will not accept the child under *Kafala* because they are obligated to HCCH rules such as the issue of permanent parent relationship and termination all the previous parent's relationship.

However, the problem here is that the adoption of children under Islamic law is prohibited as described in the *Qur'an* and *Sunna*, such that for a Muslim couple, an alternative to adoption is the most suitable option. One of the solutions that might mitigate the circumstances of this case would be for the HCCH to add or edit articles that relate to the sponsorship (rather than enforcing requirement of a permanent parent-child relationship), so that the new country would then follow the HCCH as an international treaty, in order to facilitate such a sponsorship. In its current state, the HCCH lacks clarity about the procedures through which such a sponsorship could operate. In turn, the lack of procedures for a sponsorship creates a need greater unity among HCCH member states in their willingness to cooperate with an alternative form of placement such as *Kafala*. These factors allow for uncertainty for children whose best interest is to be placed in an HCCH member state.

### **3.1.3 Is It Possible to Change or Amend a Convention? (A Proposal to Modify: Has the HCCH Ever Changed or Amended Any of Its Conventions During Its History?)**

Yes, there are two instances of amendments to its documents as in the 1929 version modified in 1955 and the 1961 version modified in 1996. A precedence for amending the HCCH has been established by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Done at The Hague On 28 September 1955 – The Hague Protocol to the Warsaw Convention 1955.<sup>321</sup> This laid out the protocol for making changes to the previously ratified document. This protocol laid out in the 1955 amendment procedure is important to this argument. This helps to answer questions regarding how a change could be employed to the intercountry adoption convention by serving as a model and setting out a process.

The Hague Protocol to the Warsaw Convention of 1955 demonstrates that the acts of inserting, replacing, and deleting text from previously ratified articles are possible. In this example, 17 adjustments were made to the text. Additionally, the Final Clauses establish a process for enacting the amendments. Their precedence would indicate that the process would begin with a reconvening of the member States at a convention to read and interpret the document including the new changes together. Subsequently, an individual Member State would need to seek ratification of the newly amended document through its government. Based on the 1955 amendment procedure, it was determined that 30 signatory states would be needed to ratify the

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<sup>321</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Done at The Hague On 28 September 1955 - The Hague Protocol to the Warsaw Convention 1955 *available at* <http://www.jus.uio.no/lm/air.carriage.warsaw.convention.hague.protocol.1955/doc.html> (last accessed Sep. 29, 2016).

new document to approve the amendments. If these 30 signatory states are achieved, the amendments go into effect 90 days after the receipt of the thirtieth signatory state's documents are signed. At this point, the changes would be registered with the UN by the convention's host country. Once this amendment has been registered, any countries pursuing membership to the HCCH would be subject to adherence to the newly adopted policies. A process for denunciation of the amendment also exists for member countries that disagree with the proposed changes, allowing countries to send notification to the convention's host country. From there, it takes six months for the denunciation to take effect.

The other example is the 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 replaced the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants according to Article 51 in the Convention of 1996.<sup>322</sup>

Consequently, these examples serve as evidence for the argument that international treaties such as this can be changed, amended, or have additions or replacements made to existing rules. With the knowledge that amendments such as this have happened in the past, it is therefore reasonable to argue for changes to be made that could help to unify countries stance on this issue in order to help orphaned children, which is essential to *Kafala*.

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<sup>322</sup> HCCH. 1996 *supra* note 46 at. atr.51.

### 3.2 HISTORY OF INTERNATIONAL ADOPTIONS

Historians trace the commencement of formal international adoptions to the middle of the twentieth century, mainly after the end of the Second World War, when American soldiers returning from war exposed the serious problems that children who were displaced by war faced.<sup>323</sup> Generally, the war's aftermath inspired international adoptions since many children were either left as orphans or were displaced after the death of their parents and guardians.<sup>324</sup> Some of the children were separated from their families. Soon after the end of the Second World War, especially during the 1950s, troops of the United States Army saw how children had been left orphans and some were displaced;<sup>325</sup> the soldiers subsequently took the information home, prompting some of United States' citizens to start adoption by proxy.<sup>326</sup>

The concept of intercountry adoption is generally connected to demographic changes, especially fertility levels and the number of orphaned and abandoned and abandoned children.<sup>327</sup> This supports the root of international adoptions as emanating from the effects of the Second World War. In support of this notion, The Future of Children, an organization dealing with issues of children, has explained that during the 1940s, Western nations became interested in undertaking intercountry adoptions as important solutions to the challenges that orphaned children and children

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<sup>323</sup> Jennifer A. Ratcliff, *International Adoption: Improving on the 1993 Hague Convention*, 25 MD. J. OF INT'L L. 336-338 (2010) available at <http://digitalcommons.law.umaryland.edu/mjil/vol25/iss1/16> (last accessed Oct 20, 2016).

<sup>324</sup> Celica Bojorge, *Intercountry Adoptions: In the Best Interests of the Child?* Vol 2 No. 2 (QUTLJJ) 267-268 (2002). PDF

<sup>325</sup> Vanessa Virgiel, *Adoption and Child Trafficking: Structural Violence in the International Adoption System* 8-15 (2014) University Honors Theses. Paper 114. See Ellen Herman, The Adoption History Project: Timeline of Adoption History, available at <http://pages.uoregon.edu/adoption/timeline.html#timeline5> (last accessed June. 22, 2016).

<sup>326</sup> See for more details about Proxy Virgiel *Id.* at 12-15.

<sup>327</sup> Jean-François, Mignot, *Adoption in France and Italy: A Comparative History of Law and Practice (Nineteenth to Twenty-First Centuries* 13 (2015) available at <https://halshs.archives-ouvertes.fr/halshs-01326724/document>.

without guardians faced in their home countries.<sup>328</sup> The nations were mainly responding to the problems that were faced by European children, mostly from Greece and Germany, due to the war. In this regard, more than 5,000 children were adopted from Europe between 1948 and 1953.<sup>329</sup>

Even though the roots of international adoptions can be traced back to the period following the Second World War, the contemporary motivation of such adoptions is based on the divide between the poor and the rich populations in the world, where couples from the Western nations seek to adopt children facing the dangers of civil strife in their poorer home countries.<sup>330</sup> Essentially, most of the receiving countries are relatively wealthy and are under-populated due to low birthrates with a few children in need of adoptions.<sup>331</sup> On the contrary, sending countries have high birthrates, many children without homes and constant domestic discord due to political uncertainties.<sup>332</sup> In addition to the foregoing facts, evidence shows that children who are given up for international adoptions often come from countries experiencing population explosions, which explain the reason why internal unrest is rife in those countries.<sup>333</sup>

Due to the issue of civil strife abroad, other countries have become increasingly interested in adopting children who are as left as orphans and/or displaced. For instance, after the Korean War, many children were orphaned and homeless. In response to their situation, American citizens and citizens of other Western countries started to adopt these children.<sup>334</sup>

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<sup>328</sup> Richard E. Behrman et al., *Adoption, The Future of Children* Vol.3 No.1 9-10 (Spring 1993) available at <https://pdfs.semanticscholar.org/ed00/5aa76f75147eede8eb3fae806c8fb4abb628.pdf> (last accessed June. 4, 2016).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 10.

<sup>331</sup> Ratcliff *supra* note 323 at 338-339. *See also* Bartholet *supra* note 306, by Elizabeth Bartholet at 107-109.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *See* WUN KIM, *CHILD PSYCHIATRY AND HUMAN DEVELOPMENT*, 141-154 (1995).

The collapse of communism has been considered to be the last historical wave of international adoptions.<sup>335</sup> According to *The Future of Children*, the collapse of communist economies such as Romania in 1989, and the political challenges in some of the European countries like Bulgaria and Poland, opened those countries up for capitalist Western nations to consider adopting children who were available for international adoption. As a result, between 1989 and 1991, more than 1,000 children from Romania were adopted into families from other Western countries.<sup>336</sup>

As international adoptions gained momentum after the Second World War, an international legal framework became necessary to ease the process. In response to that need, the UN General Assembly ratified a number of declarations and conventions. First, by its Resolution 41/85 of 3 December 1986, it drafted the 1986 United Nations Declaration Relating to the Welfare of Children (the 1986 Declaration) as one of the international legal frameworks to provide for the protection of children.<sup>337</sup> The Declaration specifically provides that a child who cannot be adopted in his or her home country can be adopted in a foreign country,<sup>338</sup> while this Declaration mandates state parties to consider the culture and religion of a child while determining his or her international adoption case.<sup>339</sup> In sum, the establishment of the 1989 UNCRC and the 1993 HCCH adopted by the UN further underlines the history of international adoptions. While this history helps to explain the trends in child adoption generally, further detail specific to the history of the HCCH and its three iterations is provided below.

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<sup>335</sup> Robert B. Bluey, *Surge in Russian Adoptions Followed Communism's Collapse*, CNSNEWS. (July. 7, 2008, 8:05 PM), <http://www.cnsnews.com/news/article/surge-russian-adoptions-followed-communisms-collapse> (last accessed July.21, 2016).

<sup>336</sup> See Richard E et al, *supra* note 328.

<sup>337</sup> U.N. General Assembly, A/RES/41/85, 95th at U.N. Doc. A/RES/41/85 (Dec. 3, 1986).

<sup>338</sup> *Id.* at. art. 17.

<sup>339</sup> *Id.* at. art. 24.

### 3.3 ANALYSIS OF THE PRIVATE INTERNATIONAL LAW ON ADOPTION OF (HCCH)

#### 3.3.1 The Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (HCCH of 1965)

This convention was concluded on the Tenth Session in 1964.<sup>340</sup> However, it was only signed on November 19, 1965.<sup>341</sup> The only three States that had signed it were Australia, the United Kingdom of Great Britain and Northern Ireland, and Switzerland.<sup>342</sup> However, the three States denounced the Convention after giving their notifications to that effect.<sup>343</sup>

This convention was the first convention intended to address the topic of adoption.<sup>344</sup> The main objective was to facilitate intercountry adoptions between member states by dealing with issues regarding the choice of law, recognition of adoptions and the jurisdiction to grant adoptions.<sup>345</sup> The focus only applied to adoptions between Contracting States, whereby persons who wanted to adopt must have been nationals of one of the Contracting States and must have had their habitual residence within one of those countries.<sup>346</sup> Importantly, the Article further specified

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<sup>340</sup> HCCH. 1965 *supra* note 299 at art. 18.

<sup>341</sup> See Hans Van Loon, Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, 3 THE INT'L J. OF CHILD. RTS. 463-468 (1995) *available at* [http://www.iss-ssi.org/2007/Resource\\_Centre/Tronc\\_CI/thcvloon.pdf](http://www.iss-ssi.org/2007/Resource_Centre/Tronc_CI/thcvloon.pdf) (last accessed June.16, 2016)

<sup>342</sup> HCCH. 1965 *supra* note 299.

<sup>343</sup> *Id.*

<sup>344</sup> Gates, Crystal J. (1999) "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?," Indiana Journal of Global Legal Studies: Vol. 7: Iss.1, Article 14, 377 (1999) *available at* <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1181&context=ijgls> (last accessed June.16, 2016).

<sup>345</sup> Chantel Ryan, Intercountry Adoption: Past, Present and Future Concerns Regarding Its Existence and Regulation 143 (2008).

<sup>346</sup> HCCH. 1965 *supra* note 299. at. art. 1.

that for children to be adopted, they must have met certain criteria: to be under the age of eighteen years as at the time the adoption applications was made; to not have been married; to be a national of either of the Contracting States; and to have his or her habitual residence in one of the states.<sup>347</sup> Conditions are stipulated under which it shall not apply, one being where adopters and prospective adoptive children having the same nationality and habitual residence in one country.<sup>348</sup>

Article 3 gave jurisdiction to grant adoptions to the authorities of the Contracting State where adopters had habitual residence and the authorities of the State in which adopters were nationals. Therefore, according to the foregoing provisions, nationality and habitual residence of both the adopters and the children to be adopted were very crucial elements with respect to its application.<sup>349</sup>

Notably, this convention never actually came into force. According to Article 19, it was supposed to come into force on the sixtieth day after a third country deposits its instrument of ratification to the Ministry of Foreign Affairs of the Netherlands, as specified under the second paragraph of Article 18 of the Convention. Upon coming into force, referring to Article 19,<sup>350</sup> Also, this Convention provided that it would be in force for five years, a condition that would also have applied to States that had acceded to or ratified it. The provisions of Article 23 further clarify that, on the expiry of the five years, and in the absence of any denunciation, the convention may be enforced implicitly every five years. The renewal only applies if no country that has ratified or

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<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at. art. 2.

<sup>349</sup> *Id.* at. art. 3.

<sup>350</sup> *Id.* at. art. 18-19.

acceded to it has not denounced.<sup>351</sup> However, all the countries that had initially ratified have since denounced this convention, leaving it with no Contracting States.

The denunciation of the Convention by the States that had signed it marked its failure. The failure of this convention is blamed on the fact that it only focused on situations such as those that occurred in Europe in the 1960s.<sup>352</sup> More specifically, the claims indicated that it merely catered to the European countries with relatively close geographical distances and that it only encouraged adoption among European countries with relatively analogous socioeconomic, legal and cultural systems.<sup>353</sup> With respect to legal systems, it is apparent that most countries did not become parties to this convention because they might have felt that its provisions were significantly incompatible with their legal systems.<sup>354</sup>

The failure to be signed by enough States delayed its coming into force such that by the time it could come into force in 1978, the socioeconomic situations and realities that underlaid the need for intercountry adoption at that time had changed radically.<sup>355</sup> Given the above challenges to this convention, the Hague Conference on Private International Law, referred to in short as the Hague Conference, determined that there was a need for a different comprehensive approach because it felt that the Convention had many “shortcomings”.<sup>356</sup> As a result, one of the conventions that was concluded, adopted, and brought to force by the Hague Conference was the Hague

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<sup>351</sup> *Id.* at. art. 23.

<sup>352</sup> *See* Loon, *supra* note 341 at. 1.

<sup>353</sup> *Id.* *See also* The African Child Info. HUB, The Former and CURRENT Secretary General of The Hague Convention (HCCH) (2013) *available at* [http://africanchildinfo.net/index.php?option=com\\_k2&view=item&id=6769:the-former-and-current-secretary-general-of-the-hague-convention-hcch&Itemid=117&lang=en](http://africanchildinfo.net/index.php?option=com_k2&view=item&id=6769:the-former-and-current-secretary-general-of-the-hague-convention-hcch&Itemid=117&lang=en) (last accessed June. 11, 2016).

<sup>354</sup> Loon *supra* note 341 at. 1.

<sup>355</sup> *Id.*

<sup>356</sup> The Law Reform Commission Consultation Paper: Aspects of Intercountry Adoption Law (LRC CP 43-2007) 15 (2007) *available at* [http://www.lawreform.ie/\\_fileupload/consultation%20papers/Final%20Aspects%20of%20Intercountry%20Adoption%20Law%20CP.pdf](http://www.lawreform.ie/_fileupload/consultation%20papers/Final%20Aspects%20of%20Intercountry%20Adoption%20Law%20CP.pdf) (last accessed Dec. 20, 2017).

Convention of the 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, which will be described in more detail in this section below.

### **3.3.2 The Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption (HCCH of 1993)**

As opposed to the 1965 convention, HCCH of 1993 is an international legal instrument that primarily deals with international adoptions of children with special emphasis on preventing child trafficking.<sup>357</sup> While the conclusion of this Convention happened in 1993, but it didn't come into force until May 1, 1995.<sup>358</sup> The convention was initially approved by 66 States<sup>359</sup> and signed by 63 of them.<sup>360</sup> It is meant to protect children from corruption, exploitation and abuses that are associated with international adoptions.<sup>361</sup> In this regard, it has been viewed as very crucial, because it offers an official international and interstate reverence of adoptions that transpire within the intercountry context to guarantee that adoptions under its care will be recognized generally and enforced in the jurisdictions of other State party to the convention.<sup>362</sup> The majority of intercountry adoptions are often based on the provisions of this convention.<sup>363</sup>

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<sup>357</sup> HCCH. 1993 *supra* note 28. at. art.1 *See also* Ratcliff *supra* note 323 at 336.

<sup>358</sup> *Id.*

<sup>359</sup> *See* Katherine Sohr, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega 's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 *Pace Int'l L. Rev.* 559.16 (2006) available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1091&context=pilr> (last accessed May 6, 2016).

<sup>360</sup> Bojorge, *supra* note 320 at 266.

<sup>361</sup> *See* HCCH. 1993.

<sup>362</sup> Gina M Croft, *The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 *THE GEOR. J. OF INT'L & COMP. L.* 621, 629 (2005).

<sup>363</sup> Lisa Hillis, *Intercountry Adoption under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?* Vol. 6: Iss. 1, Article 8. *GLOBAL LEGAL STUD. J.* 237-256 (1998). *See e.g.*, has been placed in the overview chapter1 in this dissertation, the Canadian's jurisdiction "Proceeding with further such placements

The objectives of the convention are explicated in Article 1 as previously stated: to create safeguards to guarantee that intercountry adoptions are undertaken in the best interest of children, taking into consideration the children's fundamental rights as documented and safeguarded under international law; to create a structure of teamwork among State parties to the convention to make sure that the safeguards created are adhered to in order to prevent the abduction or trafficking of children; and to guarantee that the recognition within the jurisdictions of state parties are made in line with the provisions of the convention.<sup>364</sup>

Since its inception, 90 states have ratified it as of 2013.<sup>365</sup> The members include both sending and receiving countries.<sup>366</sup> Some countries have also signed, but not ratified; these countries include Russia and South Korea.<sup>367</sup> Most of the States that have not ratified or signed the Convention forbid foreign adoptions of their children and they do not allow their citizens to adopt foreign children.<sup>368</sup> Notably, among the Muslim countries of which the majority of citizens are Muslims, only Turkey and Albania are State parties.<sup>369</sup> However, these countries are exceptions to the rule because many other Muslim nations have not become members due to the incompatibility of the HCCH with tenets of Islamic law.

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would violate Canada's obligations under The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption."

<sup>364</sup> HCCH. 1993 *supra note 28*. at. art.1.

<sup>365</sup> Jean-François Mignot, *Populations & Societies: Why is Intercountry Adoption Declining Worldwide?* 2 (2015) available at [http://www.ined.fr/fichier/s\\_rubrique/23160/population.and.societies.2015.519.adoption.world.en.pdf](http://www.ined.fr/fichier/s_rubrique/23160/population.and.societies.2015.519.adoption.world.en.pdf) (last accessed Aug. 2, 2016). *see also* FRED M. SHELLEY THE WORLD'S POPULATION: AN ENCYCLOPEDIA OF CRITICAL ISSUES, CRISES, AND EVER-GROWING COUNTRIES 118 (2015).

<sup>366</sup> *Id* at. 2.

<sup>367</sup> *See* HCCH. 1993 *supra note 28* [hereinafter Status Table].

<sup>368</sup> Council of Europe Adoption and Children: A Human Rights Perspective 18-19 (2011) available at <https://wcd.coe.int/ViewDoc.jsp?p=&id=1780157&direct=true> (last accessed June. 4, 2016).

<sup>369</sup> *See* HCCH. 1993 *supra note 28* [hereinafter Status Table]. (2015) available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> (last accessed June. 4, 2016).

### **3.3.3 The Hague 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 (HCCH of 1996)**

Despite the fact that this convention concluded on October 19, 1996, it did not enter into force until January 1, 2002,<sup>370</sup> with seventeen countries.<sup>371</sup> According to its Preamble, one of the reasons for the convening was the revision of the Convention of 5 October 1961 regarding the powers of authorities and the law applicable to the protection of minors.<sup>372</sup> It is one of the primary international conventions dealing with identical issues of parental responsibility;<sup>373</sup> the other one is Brussels II, which is primarily used by the European Union (EU) member states.<sup>374</sup> As the Hague Conference on Private International Law was drafting the provisions for this convention, the EU members were also negotiating the draft provisions of Brussels II, with consultations taking place between the two groups with regards to both instruments.<sup>375</sup>

This convention sets out its objectives: to determine the state with the jurisdiction to take appropriate measures to protect children and their property; to determine the law to be applied by such a state with the exercise of its jurisdiction; to provide for the recognition and enforcement of the foregoing measures in all Contracting States; and to establish cooperation between authorities of member States as may be essential to realizing these goals.<sup>376</sup> Importantly, Article 2 provides

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<sup>370</sup> HCCH. 1996 *supra* note 46.

<sup>371</sup> See Nigel Lowe, *The Jurisdictional Rules Under the 1996 Hague Convention on the Protection of Children*, 1 J. OF FAM. L. & PRAC.15-23 at 15 (2010).

<sup>372</sup> HCCH. 1996 *supra* note 46 at. art. 51.

<sup>373</sup> *Id* at. art. 1. See also Lowe *supra* note 371 at. 16.

<sup>374</sup> Lowe *supra* note 371. at. 10.

<sup>375</sup> *Id.* at. 16.gel

<sup>376</sup> HCCH. 1996 *supra* note 46 at. art. 1.

that the convention is applicable to children from the moment they are born until they attain the age of majority, which is eighteen years.<sup>377</sup>

Remarkably, this convention is the second international legal instrument to recognize *Kafala*<sup>378</sup> on the international plane with respect to the protection and adoption of children. Accordingly, it provides for the measures that have been outlined in Article 1 above, which deal particularly with the placement of children in foster families, within institutional care, or the provision of care under *Kafala*, or equivalent institutions. Significantly, Article 33 provides that a competent authority, an issue addressed under Articles 5 to 10, must consult with the Central Authority of the State of origin, if the placing of a child under *Kafala* or analogous institution is to take place in another state.<sup>379</sup> Therefore, it is evident that the HCCH of 1996 has enabled the use of the *Kafala* under the international framework to protect children and their interests, a scenario that has eliminated religious, racial and legal prejudices that had existed with regard to the use of the *Kafala* system of child protection. The matter of *Kafala* as it relates to the HCCH will be further discussed later as the main and case of this dissertation.

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<sup>377</sup> *Id.* at. art. 2.

<sup>378</sup> *Id.* at. arts. 3 (e) -33 (1).

<sup>379</sup> *Id.* at. art. 33 (1). 33 according to arts 5,6,7,8,9 and10.

## 3.4 DIFFERENCES BETWEEN UN DOCUMENTS & HCCH

### 3.4.1 Views on Child Placement

The UN on the Rights of the Child (UNCRC) was an initial attempt made by the United Nations (UN) in the 1980s to open discussions on creating a system for international adoption.<sup>380</sup> Likewise, in 1989 an attempt at international negotiation on the issue of adoption was made.<sup>381</sup> This resulted in what we now know as the UNCRC, the first step in regulating the baby trade across borders. Previous UN instruments have also attempted to deal with the issue of the adoption of children; such instruments have included the 1959 Declaration of the Rights of the Child, which focused on the special reference to foster care and adoptions of children in need, as well as the UNCRC.<sup>382</sup> In addition this document of UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally<sup>383</sup> which, is about adoption, but to understand the overall in UN documents are differentiated from HCCH as Prof. Bartholet stated: “they stopped short of fully legitimating such adoption.”<sup>384</sup>

In contrast, the HCCH of 1993 focused exclusively on international adoptions; all states that permit international adoption played significant roles in its drafting and approval. The key

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<sup>380</sup> ALLAN VERBRUGGE, ADOPTION CONTEMPORARY ISSUES COMPANION, 48 (2006).

<sup>381</sup> *Id*

<sup>382</sup> *See* Ratcliff, *supra* note, 323 at 336-355. *See also* Declaration of The Rights of the Child Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959. This was the basis of the basis of the Convention of the Rights of the Child adopted by the UN General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990 *available at* <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf> (last accessed Dec. 6, 2016).

<sup>383</sup> U.N. General Assembly *infra* note 388.

<sup>384</sup> Bartholet *supra* note 306.

provision of the convention is that international adoptions are possible where it is determined that a suitable foster family cannot be found in a home country, but in a foreign member state.<sup>385</sup>

Notably, the UNCRC has a differing view from the HCCH on the placement of children. While the UNCRC has a preference for in-country placement options before considering international adoption, the HCCH has the opposite view.<sup>386</sup> It holds the belief that it is in the best interest of the child to find parents (whether internationally or domestically) rather than to favor that the child should remain in his or her home country in orphanage.<sup>387</sup>

### **3.4.2 Differences in Inclusion of *Kafala***

The UNCRC directly states in Article 20 that, “a child temporarily or permanently deprived of his or her family environment, or in whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State... such care could include, inter alia, foster places, *Kafala* of Islamic law, adoption or if necessary placement in in suitable institutions for the care of children.”<sup>388</sup> This shows the possibility of openness that a convention can have on adoption and placement options. The HCCH in general may seem to adhere to only the most traditional adoption arrangements, those which create a permanent parent-child relationship, but this need not be the only stance.

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<sup>385</sup> Verbrugge *supra* note 380 at 49.

<sup>386</sup> *Id* at 49.

<sup>387</sup> See Bartholet *supra* note 306.

<sup>388</sup> U.N. Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49 available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last accessed Aug 1, 2016).

The Hague Conference has a conflicting and inconsistent view on *Kafala*, clearly stating that the purpose of the HCCH of 1993 was for permanent parent-child relationships only, but mentioning it in HCCH of 1996, and then clarifying it in the official Outline of the 1996 convention that it considered institutions such as *Kafala* to fall outside of its scope in 1993.<sup>389</sup> Meanwhile, the CRC shows that it is possible to work with non-traditional arrangements, such as *Kafala*, when dealing with child placement across borders, especially when the child’s safety and best interests are at stake.

Yet, even though the CRC recognizes *Kafala* as a possible placement option, Article 20 later suggests that the decision about what care option is best for a child should be determined by national will.<sup>390</sup> This further adds to the ambiguity of what action should be taken. Professor Sara Dillon<sup>391</sup> questioned whether leaving a matter such as this to “national will” should remain a valid approach, proposing that clearer direction may be needed given what we know about the psychological effects of adoption and with more recent developments in intercountry adoption provisions such as HCCH.<sup>392</sup>

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<sup>389</sup> See for more details overview chapter 1 section 1.6 justification for advocating a solution.

<sup>390</sup> SARA DILLON, INTERNATIONAL CHILDREN’S RIGHTS, 499, (2010). See also, UNCRC *supra* note 388.

<sup>391</sup> Professor of Law at Suffolk law School Boston; JD Columbia University, PhD Stanford University USA

<sup>392</sup> Dillon *supra* note 390.

### 3.5 THE TREATMENT OF *KAFALA*

The purposes of the section,<sup>393</sup> are to provide kinds of evidence to support, as is common in legal theory. The following discussions serve to demonstrate how the current articles of HCCH are inadequate for providing a framework to work in conjunction with the *Kafala* system. They demonstrate that adjustments are necessary.

#### 3.5.1 The Reaction to *Kafala* Vis-à-vis Immigration Law Matters

This reaction leading to declined entry based on requests utilizing *Kafala* documents within some HCCH member States result from the primary issues in this study. This indicates either 1) generally misunderstands the provisions of *Kafala*, or 2) inadequately recognizes the institution despite its inclusion in the 1996 Convention. Citing obligation to the HCCH, an unintended consequence is the rejection of child placements through *Kafala* by some member nations, demonstrating a need for clarification through the HCCH.

The explanations of these facts above come together, *i.e.*, are interrelated issues. Hence, the subsequent paragraphs serve to elucidate the matters in detail. In this regard, there are a variety of responses to *Kafala* serving as a basis for immigration. These various reactions are an obvious repercussion of HCCH's omission and not having a fully developed stance on *Kafala*. This can have the consequence of rejection of entry into some HCCH member countries when petitioned

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<sup>393</sup> To clarify, in this section, this dissertation's author criticizes how the HCCH deals with *Kafala* in three main ways: 1) By demonstrating how its member States who utilize HCCH policies to guide their immigration process enact different policies regarding *Kafala*, 2) by highlighting how HCCH has limited discussion and information in its documents about *Kafala*, and 3) by sharing shortcomings of HCCH in general throughout its adoption treaties, whether in 1965, 1993, or 1996.

by a family unit involving these kinds of guardianships rather than ones of a biological or adoptive nature. As such, there are actually two pieces to the issue to consider. The first is that some countries are explicitly not accepting *Kafala* as a valid form of parental guardianship, which would be demonstrated by adequately recognizing the institution and granting equal rights as a parental guardian.<sup>394</sup> Second, others have existing requirements and directives that specify for only immediate family members to apply for reunification, such as spouses and biological children as demonstrated in specific cases in the EU.<sup>395</sup> Further details on this second issue can be found in the section regarding the countries of the EU.

Family reunification is a step on the way to the full recognition of *Kafala*. Without this interim step, it is unlikely that the goal of equality between adoptive rights and *Kafala* can be achieved. By not allowing for immigration based on *Kafala* relationships, families are not able to live together in the country of their choosing, let alone ask for recognition of their guardianship in that country. There is little chance for progress in changing relevant legislation to better recognize *Kafala* as a basis for the granting of fostering rights if those countries do not allow for immigration on this basis.

Furthermore, there is a fundamental misunderstanding about the immigration mechanism concerning which kind of children specifically may be taken under *Kafala*, as this system should be reserved only for orphaned children including foundlings according to the *Qur'an* and *Sunna* by which Islamic law is based and which governs in the KSA. The HCCH can help to solve this

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<sup>394</sup> See for more details overview chapter 1 section 1.6 justification for advocating a solution, the case of Nusrat Mashooqullah Aleeza Munshi and The Minister of Citizenship and Immigration, between Pakistan and Canada.

<sup>395</sup> See EUR, Family reunification available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:133118> (last accessed Nov. 1, 2016).

issue by unifying the understanding of *Kafala* in its articles and establishing the process by which immigration and guardianship rights may be recognized by its member States correctly.

I would say to achieve that goal, additional content would need to be added to the provisions of the HCCH that would clarify its position on *Kafala*, so as to help unite its member countries, and to form a process for completing the transfer of guardianship rights internationally for individuals needing accommodations for *Kafala*. Moreover, the HCCH needs to specifically address how it can be adapted to serve orphans and foundlings. The end result would help to solve the problem that currently exists, which is that many countries have different policies on family reunification based on *Kafala* and further differences on the granting of guardianship status in these cases.

To clarify this point, the chart below highlights some of HCCH member States' stances on these matters, including immigration and adoption in cases of *Kafala*.

**Table 3.** Selected HCCH's Member States' Policies Regarding Reunification and Adoption Based on *Kafala*

	<b>Grant Family Reunification Based on <i>Kafala</i></b>	<b>Grant Adoption Based on <i>Kafala</i></b>
<b>US</b>	Possible (with documentation of a foreign court granting guardianship, <i>Kafala</i> order, or custody order) <sup>396</sup>	Yes, through alternate by (non-HCCH) system <sup>397</sup>
<b>UK</b>	Possible (limited to families coming together to the UK, not to reunite a separated child) <sup>398</sup>	Yes, through the granting of a “special guardianship” by a tribunal in accordance with the Adoptions and Children Act of 2002 in cases where religious and cultural traditions make adoption an inappropriate solution <sup>399</sup>
<b>Italy</b>	Yes, such as “bilateral treaties” between Morocco and Italy <sup>400</sup>	Possible with restrictions (adoptions from abroad are legally recognized, but <i>Kafala</i> is not equated with adoption, so an adoption would need to be sought from the Italian government) <sup>401</sup>

<sup>396</sup> USCIS. Citizenship and Immigration Service, Policy Memorandum, November 6, 2012, (PM-602-0070.1) available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2012/November%202012/Simple%20Adoption.pdf> (last accessed Dec. 5, 2016).

<sup>397</sup> *Id.*

<sup>398</sup> Duca *supra* note 58, Duca has studied some specific European countries' stances on *Kafala* and their resulting effect on immigration. This serves a basis for my dissertation to develop the ideas further by discussing more in detail the varying positions on *Kafala* of counties not just in Europe but all over the world, as well as the potential for change through the HCCH.

<sup>399</sup> Julie Malingreau, *International Kafala: A Right for the Child to Enter and Stay in the EU Member States*, 16 Eur. J.L. Reform, 405 (2014). Malingreau has already elaborated on the important documents that can help to understand EU's regulations on the matter of immigration as it concerns *Kafala* especially with the positions on family reunification and their intricacies. However, in my dissertation I have added two more countries, the US and the Canada, so this dissertation builds off of Malingreau's foundation by adding a discussion of how HCCH could effectively solve these problems, as well as detailing the complexity of the immigration rules specifically as they concern *Kafala* worldwide. See the Objectives and the Significance of this study in the overview chapter and the Recommendations in the conclusion chapter.

<sup>400</sup> Julie. Ranger et al., *Immigration and Adoption of Children under Kafalah: A judicial journey* In Revue du Barreau, Tome 7, 2013, 130 (2013) available at [http://classiques.uqac.ca/contemporains/helly\\_denise/Immigration\\_and\\_Adoption\\_of\\_Children\\_under\\_Kafalah/Immigration\\_and\\_Adoption\\_of\\_Children\\_under\\_Kafalah.pdf](http://classiques.uqac.ca/contemporains/helly_denise/Immigration_and_Adoption_of_Children_under_Kafalah/Immigration_and_Adoption_of_Children_under_Kafalah.pdf)

<sup>401</sup> Malingreau *supra* note 399 at. 406.

<b>Spain</b>	Yes, under “family regrouping” immigration laws <sup>402</sup>	Possible only for Moroccan minors <sup>403</sup>
<b>France</b>	Mostly rejected, unless involving Algeria or other Maghreb country of origin <sup>404</sup>	No, forbidden completely if sending country does not recognize adoption (established by Harroudj v. France decision) <sup>405</sup>
<b>Belgium</b>	No <sup>406</sup>	Allowable with 3 restrictions (that the child be an orphan, that the country of origin allows for adoptions, and that the child cannot first be placed in a home in the country of origin) <sup>407</sup>
<b>Canada &amp; Québec</b>	Not by law, but has been granted in the past on case-by-case basis <sup>408</sup>	No, based on HCCH, arguing they cannot grant if the sending country does not recognize adoption <sup>409</sup>
<b>Netherlands</b>	Possible but not likely (with special considerations for the age of the child, the situation of the sending country, and the degree of dependence) <sup>410</sup>	Possible with restrictions (a decision of adoption from abroad is normally legally recognized. However, <i>Kafala</i> is not equated with adoption, so an adoption would need to be sought from the Dutch government) <sup>411</sup>

From this chart, it can be understood that the lack of a clear stance on *Kafala* by the HCCH allows for a complicated mix of differing policies in its member countries. There are vastly different stances from country to country regarding the permission of immigration and granting of parental rights as it relates to *Kafala*. This presents a problem for those seeking immigration and adoption

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<sup>402</sup> *Id.* at. 407.

<sup>403</sup> *Id.* at. 406.

<sup>404</sup> *Id.* at. 407.

<sup>405</sup> *Id.* See also Harroudj v. France *supra* note 57.

<sup>406</sup> *Id.* at. 407.

<sup>407</sup> *Id.* at. 405.

<sup>408</sup> Ranger et al., *supra* note 400 at 125.

<sup>409</sup> See Nusrat Mashooqullah Aleeza Munshi and The Minister of Citizenship and Immigration *supra* note 61.

<sup>410</sup> Malingreau *supra* note 399 at. 421. This is sourced from Malingreau’s analysis of the *Sen v. The Netherlands* case, where she mentions the importance of the three criteria that were revealed in the case and drew a conclusion for how such criteria could affect decisions regarding cases of immigration with *Kafala*.

<sup>411</sup> *Id.* at 405. See also Dutch Civil Code, Adoption Decreed in the Netherlands Section 10.6.2 at art. 10.105.

status on the basis of *Kafala*, but it also represents a challenge for member countries to establish their own policies, precedence, and process. Efforts should be made to create a more unified stance among HCCH member countries. The HCCH, as an international treaty, is capable of establishing a clearer position regarding *Kafala*, including a process by which its member States may adopt and follow. Simple overviews of several conflicting policies from various member countries regarding family reunification and adoption in these cases help to express the degree of complexity of this issue.

For example, the US is the most sufficient and is the country closest to fully comprehending the necessities of child placement required by *Kafala*, because it specifically references the category of orphaned children in its policies.<sup>412</sup> Similarly, Belgium understands it is intended for orphaned children. Yet, at the same time, other countries do not seem to recognize that *Kafala* is intended for orphaned children. Therefore, it is essential to clarify this aspect of *Kafala*. To illustrate the point, this dissertation will thoroughly demonstrate the ambiguity and argue that it must be better-defined relying on the law.

#### ***Details of Select HCCH Member States' Laws Affecting Immigration and Kafala***

- United States of America

To understand the United States' stance on adoption with Muslim countries, the case of Matter of Ashree, Ahmed and Ahmed, can be examined.<sup>413</sup> This case regards three visa petition proceedings in 1971, where petitions for visa status were denied to three Yemeni relatives who filed on behalf of a child. After the court's denial of the petitions, the relatives appealed the case to a higher court.

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<sup>412</sup> *Infra* notes 419-423-424. USCIS. Citizenship and Immigration Service.

<sup>413</sup> Matter of Ashree, Ahmed and Ahmed, Interim Decision 2190, 1973 available at <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2190.pdf> (last accessed Oct. 11, 2016).

The court decided to dismiss both appeals and deny the motion to grant the child visa status, citing the fact that the country of Yemen uses Islamic law to decide cases involving family status. Islamic law, the ruling stated, does not recognize adoption as it is practiced in Western societies and therefore cannot be used to establish a relationship for visa petition purposes in the US.<sup>414</sup>

Further adhering to this stance, a court ruled in a subsequent case in 1975 that a Yemeni citizen applying for immigration status in recognition of dependent children under guardianship would not be allowed admission to the US.<sup>415</sup> Instead, the five defendants were denied admission and were deported. The basis for the legal judgment cites passages from the *Qur'an*, highlighting that the Yemeni definition of adoption, based on Islamic law, does not create a permanent legal relationship in the same way as adoptions in Western countries do. Instead, they are more of a kinship, guardianship, or charitable act toward the poor. The court mentioned previous cases where there was a willingness to compare and allow for other forms of adoption, such as “simple adoptions” used in countries like China and Hong Kong. In these cases, the simple adoptions were seen as comparable and the adoption and immigration proceedings were allowed to continue. However, the court said that the Islamic form of adoption is not seen as comparable, because it does not create the same legal status as Western adoptions.<sup>416</sup>

However, today under certain conditions, the USCIS states that it may recognize and accept *Kafala* relationships as a valid alternative to adoption in the US. For this purpose, the US. has created and has allowed for two systems of adoption to exist within its borders. The first, of course, is the Convention adoption system. The second is the non-Convention adoption system. Those

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<sup>414</sup> *Id.*

<sup>415</sup> Matter of Mozeb, et al. In Exclusion Proceedings, Interim Decision 2422, 1975 available at <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2422.pdf> (last accessed Oct. 17, 2016).

<sup>416</sup> *Id.* at 433.

who would use the non-Convention adoption system would not be held to the same requirements and standards of the Convention system.<sup>417</sup> Families who follow Islamic tradition may be allowed to seek adoption and immigration status within the US of a child from their home country by applying through the non-Convention system.<sup>418</sup>

According to the Policy Memorandum released by the USCIS,<sup>419</sup> the US has made some adaptations that have allowed *Kafala* to be used as a basis for adoption status in the US under certain circumstances. The first of which would be if a child originates from a country and religious background that does not require the use of traditional Islamic law, such as multi-ethnic or multi-religious countries where Islamic law is present, but alternative law systems are available.<sup>420</sup> According to the Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA), if a child lives in a multi-ethnic or multi-religious country, a child may become eligible for legal adoption in the US because they would be governed by a set of laws other than tradition Islamic law. There would be room for case-by-case judgment dependent on the child's religious background. For example, an orphaned child from India may be eligible for adoption dependent on their religious background because there are multiple sets of adoption laws

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<sup>417</sup> Non-Hague Adoption Process *available at* <https://travel.state.gov/content/adoptionsabroad/en/adoption-process/how-to-adopt/non-hague-adoption-process.html> (last accessed Dec. 8, 2016).

<sup>418</sup> *See e.g.*, A case demonstrating the effectiveness of this non-Hague system is that of a woman named *Safa Alfalikawi* from Kuwait who had a child through *Ehtidan* who had been abandoned by his mother. *Alfalikawi* was accompanying her husband who had an academic scholarship in the US. They had taken the child with them to the US bringing along their associated *Kafala* document for the *Ehtidan* of the orphaned child. They easily entered the US without any obstacles and all were accepted based on the *Kafala* guardianship. However, it is important to note that this case was regarding a couple visiting US for an extended period of time due to academic studies, not planning on seeking citizenship.

<sup>419</sup> USCIS. Citizenship and Immigration Service, Policy Memorandum, (PM-602-0070) July 9, 2012 *available at* <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/guidance-adoption-valid-ina-july-9-12.pdf> (last accessed Aug. 2, 2016).

<sup>420</sup> *Id.*

within the country. Different sets of laws may be used for people of different religious backgrounds within one country that has multi-religious beliefs.<sup>421</sup>

The second possible condition for adoption status of a *Kafala* relationship would be if the child is an orphan. In this case, the orphaned child can be brought to the US for adoption and a *Kafala* order from the home country might establish custody for the prospective parents.<sup>422</sup> In a USCIS decision dated December 6, 2010, it was ruled through an appeal that adoption status could be sought for a child of *Kafala*, if they meet the standards of the definition of an orphan. In a case where a child does not fit under the definition of orphan, the USCIS would decline an application for the classification of the child as an immediate relative (pursuant to the Immigration and Nationality Act (INA) 8 U.S.C. § 1101(b)(1)(F)). However, according to this appeal decision of the USCIS, in the case where a child is ruled to fit the definition of an orphan, a petition would be allowed move forward for continued processing.<sup>423</sup> The definition of orphaned children as stated by INA for the objectives of the US. is,

“A child may be considered an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. The child of an unwed mother or surviving parent may be considered an orphan if that parent is unable to care for the child properly and has, in writing, irrevocably released the child for emigration and adoption. The child of an unwed mother may be considered an orphan, as long as the mother **does not marry** (which would result in the child’s having a stepfather) and as long as the child’s biological father has not legitimated the child. If the father legitimates the child or the mother marries, the mother is no longer considered a sole parent. The child of a surviving parent may also be an orphan if the surviving parent has **not married since**

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<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> USCIS. Citizenship and Immigration Service, Public Copy available at [https://www.uscis.gov/sites/default/files/err/F1%20-%20Petitions%20for%20Orphans/Decisions\\_Issued\\_in\\_2010/Dec062010\\_01F1101.pdf](https://www.uscis.gov/sites/default/files/err/F1%20-%20Petitions%20for%20Orphans/Decisions_Issued_in_2010/Dec062010_01F1101.pdf) (last accessed Dec 2, 2016).

**the death of the other parent (which would result in the child's having a stepfather or stepmother).”<sup>424</sup>**

In general, according to the US Department of State, it may or may not be possible to adopt an orphaned child from an Islamic country practicing Islamic law, depending on that country's willingness to allow the child's emigration and adoption in the US.<sup>425</sup> However, due to the varying practices of Islamic law between Muslim nations, there is a possibility for some countries to grant the necessary permissions needed to complete the adoption of orphaned children in the US. The Department of State emphasizes that the potential adoption relies on whether or not the sending country is willing and able to provide documentation that releases the child for emigration and adoption abroad.<sup>426</sup>

Based on the Department of State's statement mentioned above, it is promising that the US demonstrates a willingness to cooperate with applicants from Muslim sending countries, but still some complications exist because Muslims are being granted adoptions in the US., which goes against Islamic law. This issue can be ameliorated by the establishment of a framework to adapt the current traditional system to provide guardianship rights in cases of *Kafala* without requiring applicants to seek adoptive rights for those from Islamic countries that do not allow adoption. As such, the ideal response would be for recognition of the unique relationship created by *Kafala* as satisfactory for immigration or guardianship purposes.

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<sup>424</sup> USCIS. Citizenship and Immigration Service, Orphans *available at* <https://www.uscis.gov/tools/glossary/orphan> (last accessed Dec 5, 2016).

<sup>425</sup> Non-Hague Adoption Process *supra* note 417 *see also* Intercountry Adoption From Hague Convention and Non-Hague Convention Countries, Child welfare Information Gateway, Factsheet for Families July 2014 *available at* <https://www.childwelfare.gov/pubPDFs/hague.pdf>

<sup>426</sup> Adoption of Children from Countries in which Islamic Shari'a law is observed *supra* note 1.

- Canada

Unlike the US, which is willing to cooperate with Muslim applicants, countries like Canada are flatly rejecting adoption petitions from people hailing from Muslim nations on the basis of *Kafala*. This is actually in line with Islamic teachings but does not demonstrate a readiness to have future changes that would result in allowing the transfer of guardianship rights in cases of *Kafala*.

In its current form, Canada has not yet made any adaptations toward allowing for non-traditional adoptions. This is illustrated in Canadian case law, such as the recent case involving the denial of adoption to a Pakistani couple based on their *Kafala*.<sup>427</sup> The country cited their strict adherence to the HCCH standards when explaining the justification for this decision. This shows that the HCCH itself may need to be the pacemaker on the issue of inclusion for non-traditional forms of adoption, rather than relying on individual countries to make changes themselves. As this Canadian case illustrates by ultimately denying this application for adoption based on a *Kafala*, countries' governments may look to the HCCH for guidance on issue such as these and may base their response on their individual interpretation of the treaty.<sup>428</sup>

While it is in agreement with Islamic law to reject adoption applications for *Kafala* in cases such as these, Canada's justification shows that there is a need for more clarification from the HCCH because it suggests that *Kafala* does not sever legal ties with biological parents. This justification reveals a misunderstanding of the institution because *Kafala* is reserved only for orphans or foundlings who would therefore have no biological parents. Moreover, a bigger problem exists; unlike the US or the UK, Canada does not have provisions to recognize the rights

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<sup>427</sup> See Nusrat Mashooqullah Aleeza Munshi and The Minister of Citizenship and Immigration *supra* note 61 for more analysis and the case's fact.

<sup>428</sup> *Id.*

of guardianship via the institution of *Kafala*.<sup>429</sup> This leads Muslim people to apply for full adoption so that they may obtain full parental rights needed to care for their *makful* and function in society, but that goes against Islamic law.

Another case that is illustrative of the difficulties faced by the failure to address the issue of recognition of *Kafala* in the Western world is detailed in the journal article, “Immigration and Adoption of Children under *Kafalah*: A judicial journey.”<sup>430</sup> In it, the tribulations of an unnamed Moroccan-Canadian dual citizen referred to as “X” is discussed as a means of demonstrating the lengths required to have a Moroccan-issued *Kafala* recognized in the province of Quebec. The claimant began his efforts in 2007 in the province to have his Moroccan-issued *Kafala* recognized by Quebec to create a path for the child’s effective immigration and domicile with him. After many judicial actions, the case finally came to a conclusion in 2011. After taking actions in Morocco to have a *Kafala* order, a name change, and inheritance rights issued to the child, he also arranged for immigration orders from Morocco and had his brother-in-law care for the child while he began the immigration and adoption process in Quebec for the child. X applied for immigration through the normal federal and provincial channels in Canada with all going well until the application was finally rejected on the federal level with the issue of the child not being considered a “dependent child” and with *Kafala* not being recognized as an equivalent to adoption due to the lack of a non-opposition form.

The claimant appealed these decisions twice up to the Superior Court of Quebec. At the same time, the claimant took other legal actions that might aid in his case. He sought parental authority and recognition as the child’s legal tutor. He also filed a motion claiming that the

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<sup>429</sup> *Id.*

<sup>430</sup> Ranger et al., *supra* note 400.

decisions preventing him from living with the child were unconstitutional. He also attempted to ameliorate the problem of the child not meeting the criteria to be an adopted child by starting adoption procedures in Quebec using two different methods: one seeking recognition of the *Kafala* as an adoption and another seeking placement of the child with him as a means of adopting him. In the first effort, the judge recognized the order of *Kafala* from Morocco, along with the permissions to have the child travel and live abroad with the family, but did not equate the order to adoption. The judge did however rule that the Moroccan order would be enforceable in Quebec effective immediately.

Unfortunately, the judge did not give sufficient details as to how the order should be executed. For that reason, after two requests, the Court of Quebec – Youth Division ruled both times that it did not have jurisdiction to oversee the execution of the judge’s ruling. A third judge was then involved who subsequently ruled that the case had failed to prove that Moroccan orders were equivalent to adoption. In an effort to try another route, the claimant attempted to request a placement of the child with him by an internal adoption procedure in the jurisdiction of a tribunal rather than through an international adoption procedure. This would allow an adoption of the child to occur after the child had lived in the province for 6 months. Alas, this procedure was suspended when the child had to travel abroad to Morocco for the ruling of a tribunal there. The Moroccan tribunal was able to issue a ruling that showed that the domicile of the child was indeed in Quebec and not in Morocco.

The claimant sought to use this decision and have it recognized by the judiciary in Quebec. This case was seen by the same judge who had initially ruled the *Kafala* enforceable in the province, so she ruled to recognize the Moroccan decision, make it enforceable, and request its execution in the province. Yet again she did not clarify how this was to be done. Meanwhile the

suspended placement procedure had resumed, but the judge in this case ruled that the adoption laws of Quebec did not allow for the placement of the child with the claimant suggesting that the child's residence would still be in Morocco as far as the placement procedure is concerned. The claimant, X, appealed this decision. The Court of Appeals unanimously granted the placement, which would allow for the adoption of the child by the claimant. Moreover, the court ruled that for immigration purposes, the child would be considered the dependent child of the claimant. The judge cited as evidence the fact that an illegitimate child in Morocco is not to have paternal filiation and with the abandonment by his mother, the child would not necessitate consent from biological parents, meaning that the child's guardians could now consent in the matter. Also, the judge explained that the Moroccan order of the child's immigration should be respected, as would be the expectation of such a Canadian order in Morocco. The judge concluded that flexibility should be shown to individuals that are seeking such orders and the purpose of the law respected, with understanding that applicants are coming in good faith and the orders sought are in the best interests of the child.<sup>431</sup>

This case displays the extremes to which Muslim individuals may be subjected when seeking recognition of their *Kafala* orders in Western nations. Despite the fact that ultimately the claimant was able to receive recognition of his relationship with the child, the effects of the case are limited to this specific case and the possibilities for it to create precedence are narrow due to the unique set of circumstances. Notably, this ruling also applies solely to the province of Quebec and not to the Canadian nation as a whole, nor toward any other nation. As such, it provides limited help to other prospective seekers of *Kafala* who may come in the future. More than anything, it

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<sup>431</sup> *Id.*

serves as a tale of the inherent difficulties of cobbling together two different systems of child placement.

### **Country of EU**

Due to the fact that *Kafala* is a foreign institution to Europe, a continent consisting of around 15 countries and territories with populations totaling around 565,560,000 people made up of a Christian majority.<sup>432</sup> Therefore, no national laws of EU specifically recognize and refer to this institution of *Kafala*.<sup>433</sup> The result is that is a complication to issues of immigration and entry into Western nations if the case involves a *Kafala* order. For that reason, case law is important in establishing precedents and to make inferences about each country's particular stance on the acceptance of this institution as a basis for immigration, including family reunification. Moreover, no country of the EU legally equates a *Kafala* relationship to the bond created in a traditional adoption because it does not establish permanent parentage. Still, private international law rules differ from state to state when it comes to intercountry adoption.<sup>434</sup>

### **Stances on *Kafala* in the EU**

Of the variations, three main patterns can be examined according to the EU countries regulations. The first is for a country to create a specific category such as a special guardianship, which allows for the transfer of parental responsibility without severing biological ties. The second option is to allow for adoption based on *Kafala* under certain circumstances. In this regard, countries following this strategy would have individual circumstances that need be met in order for special consideration to be given that would allow for an adoption to be granted to an applicant when a

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<sup>432</sup> *Regional Distribution of Christians, Global Christianity - A Report on the Size and Distribution of the World's Christian Population*, PEWFORUM.ORG. (December 19, 2011), [hereinafter Pew Research Centre], <http://www.pewforum.org/2011/12/19/global-christianity-regions/> (last accessed Dec. 11, 2016).

<sup>433</sup> Malingreau *supra* 399 at 405.

<sup>434</sup> *Id.* at. 404-405-406.

*Kafala* relationship already exists. However, historical significance is considered and exception to these rules is given to populations when links exist to Muslim majority areas and the European country.<sup>435</sup> The third and final stance is for the unequivocal forbiddance of adoption in cases of *Kafala*.

- Belgium

The country's laws follow the second stance on *Kafala*, allowing for adoption in cases of *Kafala* under special circumstances. First and foremost, the Belgian Civil Code under Article 361-5<sup>436</sup> that it requires that the domestic laws of the sending country be respected in regard to their recognition of the institution of adoption. In accordance with the principles of *Kafala*, Belgium requires that a child should be an orphan or with no parents and also necessitate that an effort be made to place the child in a family in their country of origin before parental rights may be transferred to a Belgian guardian. On the other hand, in Belgium, *Kafala* is not a valid basis for applying for family reunification. Yet, Belgium law leaves open the possibility for case-by-case discretion in granting residence permits when humanitarian concerns are involved.<sup>437</sup>

- Netherlands

Likewise, the Netherlands also allows for adoptions based on *Kafala* relationships in certain cases. The example record of Netherlands in the *Sen v. the Netherlands* case mentions some of the individual considerations that may exist, specifically three influencing criteria: the age of the child, the situation of the child's home country, and the degree of dependence on the guardian.<sup>438</sup> These considerations may increase the likelihood that an exception in the case of *Kafala* relationship may

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<sup>435</sup> *Id.*

<sup>436</sup> *Id.* See 36.5 of the Belgian civil Code See also art. 10.108 of the Dutch civil Code available at <http://www.dutchcivillaw.com/legislation/dcctitle10101066.htm> (last accessed June. 22, 2017).

<sup>437</sup> Malingreau *supra* note 399 at 407.

<sup>438</sup> *Id.* at 421.

be granted, but it is not guaranteed and in fact, it is still more likely that the request will be denied since it may be possible for the guardian and child to establish a home together in the child's country of origin.

- Spain

Due to Spain's former links to the Muslim country, the country may give special permission to Moroccan applicants. Accordingly, Spain fits the second stance on cooperation with granting adoptions in cases of *Kafala*. In Spain, family reunification may be invoked in the case of *Kafala* and a visa may be granted.<sup>439</sup>

- Italy

Italy follows the second stance on granting adoptions in cases of *Kafala*, making exceptions to allow for it in certain predetermined situations. Based on previous jurisprudence, Italy seems not inclined to consider *Kafala* as a justification for family reunification. This is likely because Italy is trying to balance two main interests at the same time: 1) the protection of children and family unity and 2) reducing migration and protecting its borders.<sup>440</sup> There is some indication that Italian jurisprudence is leaning toward the protection of children and family unity over concern for migration. One piece of evidence is from Italian immigration law Article 28, which says that in legal matters that might affect families and children, what must be given highest priority is the best interest of the child.<sup>441</sup> In this article, Italy mentions UNCRC, which further supports the belief

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<sup>439</sup> *Id.* See Spanish civil Code art. 9.4 and 9.5 available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=221319#LinkTarget\\_6329](http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6329) (last accessed June, 22, 2017).

<sup>440</sup> *Kafala* and family reunification visa in Italy., SANTANIELLO & PARTNERS INTERNATIONAL LAW FIRM <http://www.legalsl.com/en/kafala-and-family-reunification-visa-in-italy.htm> (last accessed Jan 6, 2018).

<sup>441</sup> Duca *supra* note 58 at 116. See also Italian Immigration Law available at <http://italian-immigration-law.blogspot.com/2015/03/family-joining-procedure-and-residence.html> (last accessed Aug 12, 2016).

that Italy might be in favor of recognizing *Kafala* as justification for reunification going forward, which would ensure the protection of children.

Furthermore, an Italian Court discussed on record the fact that it is not a good result for a child to be denied the right to live with a potential foster family in Italy. By excluding groups of children for family reunification, it would disproportionately affect Islamic children, and children without biological ties such as orphans and foundlings. By this logic, Italian judges believe that recognizing *Kafala* as a basis for immigration in cases of family reunification would be in a child's best interest.<sup>442</sup>

In Italy, according to Italian immigration law, historically legislative decisions regarding cases of *Kafala* have resulted in denials of visas based on EU provisions (art. 4 EU directive 2003/86/EC of 22 September 2003 on the right to family reunification).<sup>443</sup> Italy's views on *Kafala* appear to be contradictory in the sense that judges have said family reunification may be in the best interest of a child, even in a *Kafala* relationship, given that they live in a suitable and safe family environment, such as a family's home in Italy; yet at the same time, it has been summarized that, "in English Immigration law, like *Italian* and *French* immigration law, the *Kafala* Islamic system is not mentioned among the prerequisites for the achievement of family reunification, since such institute is unknown."<sup>444</sup>

- France

France also makes special exceptions in cases of *Kafala* based on individuals from its former territories, but it actually falls into the third category of stances on *Kafala*, because it expressly

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<sup>442</sup> *Id* at 117.

<sup>443</sup> *Id* at 115.

<sup>444</sup> THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD 54 (Sue Farran, James Gallen & Christa Rautenbach, eds., 2016).

denies adoptions after the establishment of a *Kafala* relationship. The exception would be for a minor who attains French nationality by staying in the country for more than five years while under the care of a French citizen.<sup>445</sup> Nonetheless, immigration also affects the matter. In this case, the issue of family reunification based on a *Kafala* relationship in France has come up several times since 2005. For example, French judges have denied applications for family reunification based on *Kafala*. At the same time, the right of residence in France is not given automatically, which limits the cases it would consider as valid requests for family reunification.<sup>446</sup>

Yet, some special exceptions have been made under French law for Algerians and other people hailing from Maghreb countries.<sup>447</sup> French judges allow Algerian *makful* that regularly reside in France to benefit from the allowance of family reunification based on Franco-Algerian Agreement of 27 December 1968.<sup>448</sup> However, a *kafil* with French citizenship who applies for family reunification would be denied. This is because French judges believe that it is in the best interest of the child to remain in his/her home country with biological family.<sup>449</sup> It is important for European judges to consider the best interest of the child as a primary factor in deciding cases of family reunification.

Nevertheless, the final decision is still left up to the judge. This means that a foundling or orphaned child may be considered for family reunification, but if a judge verifies the existence of any biological family in the *makful's* home country, the judge would consider the child remaining in the home country as the better choice. Thus, this makes France's position on *Kafala* as a valid

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<sup>445</sup> Malingreau *supra* note 399 at 410. See also, ISLAM AND POLITICAL-CULTURAL EUROPE, 90-93 (W. Cole Durham, David M. Kirkham, & Tore Lindholm eds., 2012).

<sup>446</sup> Duca *supra* note 58 at 117.

<sup>447</sup> See Table: 3 of this dissertation.

<sup>448</sup> See Harroudj v. France *supra* note 57 at 10.

<sup>449</sup> Duca *supra* note 58 at 118.

basis for approving family reunification confusing. France cites Article 8 of the CEDU<sup>450</sup>, which discusses respect for family unity.<sup>451</sup> Ironically, in this regard they actually mean the right of the child to remain in his home country close to his biological family and not meaning to move to France to be with his/her *kafil*.

- United Kingdom

The United Kingdom, or the UK as it is commonly known, is made up of four countries, each having their own independent judicial systems. The nation includes England (English law), Wales (English law), Northern Ireland (Northern Ireland law), and Scotland (Scots law). While in general the laws of each country are sovereign, some laws share jurisdiction over all of the countries, such as laws regarding immigration.<sup>452</sup> For that reason, the UK's stance as a whole helps to answer the question at hand. The UK takes the first stance on *Kafala*, which allows for a special guardianship in these cases.<sup>453</sup>

Yet, in the immigration law of the UK, *Kafala* is not mentioned as a possible prerequisite or basis for requesting family reunification, which may lead to complications in reuniting a guardian and child of *Kafala* in this nation. This is because it is considered a foreigner institution, and not something familiar to the laws of the UK. For that reason, a *kafil* living in the UK does not have the right to bring their *makful* into the nation. According to their immigration law, adoptions that occur in other countries would only be recognized by the UK if the other country were on the “designated countries” list from the 1976 Adoption Act (reconfirmed from the 2002 Adoption and

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<sup>450</sup> CEDU is a French language translation referring to the ECHR.

<sup>451</sup> *Id*

<sup>452</sup> The Difference Between The UK, *England, and Great Britain*, TODAYIFOUNDOUT.COM (Jan.10, 2012) <http://www.todayifoundout.com/index.php/2012/01/the-difference-between-the-uk-england-and-great-britain/>.

<sup>453</sup> Malingreau *supra* note 399 at 407.

Children Act). The main issue with this reasoning is that *Kafala* is not really a form of adoption.<sup>454</sup> However, the same Adoption and Children Act of 2002 also has a section about *de facto* adoptions. On this topic, there is a condition if there is evidence that a relationship has been established between a *makful* and *kafil*. In this case *Kafala* could be considered.<sup>455</sup>

These requirements help judges in the UK to ensure that a relationship between the guardian of the child in a *Kafala* relationship actually exists. This is important because it helps to protect against false adoptions and human trafficking. But, notably, this means that the law is actually designed to help a family coming together to the UK that wants to bring along a *makful*. It is not particularly helpful for a child to come alone to join a *kafil* already living in the UK. Even though there is the possibility for allowing family reunification based on *Kafala* has referenced in the UK's laws, there still may be complications in the process of getting approval because judges want to establish the genuine transfer of parental responsibility. This is a problem because a transfer of parental responsibility requires a break with the child's family of origin, which is not something *Kafala* provides.<sup>456</sup>

### **EU Legislation Affecting *Kafala***

As the previous country stances on *Kafala* illustrate, it is important to analysis the EU in detail through this dissertation because of the wide variation in responses to *Kafala*, and especially considering the influx of Muslim people migrating to the area as mentioned in the overview first chapter. Aside from individual countries' laws and provisions related to this matter, the EU also

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<sup>454</sup> AA (Somalia) (FC) (Appellant) v Entry Clearance Officer (Addis Ababa) (Respondent), Michaelmas Term [2013] UKSC 81 *on appeal from: 2012 EWCA Civ 563 JUDGMENT*, Heard on 21 November 2013 *available at* <https://www.supremecourt.uk/cases/docs/uksc-2012-0181-judgment.pdf> (last accessed Aug. 6, 2016). *See also* Immigration Rules Part 8 Family- Members- Para 309 A. *available at* <https://www.gov.uk/government/organisations/home-office> (last accessed Aug 6, 2016).

<sup>455</sup> Duce has been clarified more about *de facto* adoption requires and the perspective according to that in *Kafala* in English law ruling *supra* note 58 at 118-119.

<sup>456</sup> *Id.*

has special procedures that relate to this issue according to the European Court of Justice (CJEU). The issue is made more complex in the EU in that each country has its own national policies on immigration and granting adoptions, but also must comply with EU Human Rights laws that may conflict or override the individual country mandates on the matter. In summary, *Kafala* has complex implications on immigration and international adoption law within the EU. In European law, a few instruments are relevant to *Kafala*. The first of such instruments are family reunification procedures and related provisions. The second are rulings by the CJEU.<sup>457</sup> Third are the human rights, set up by the European Charter of Fundamental Rights (the Charter).<sup>458</sup>

### **Family Reunification Regulations in the EU**

As far as the family reunification procedure, we can look to some regulations in EU law related to freedom of movement for workers and their families.<sup>459</sup> Another regulation is following Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 which is related to refugees<sup>460</sup> The first regulation to this effect was adopted in 1968. It gave workers the right to move freely through Europe and also the right to bring their family members with them, but this regulation is not in forced anymore.<sup>461</sup> The other regulation in this vein is the Maastricht Treaty, known

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<sup>457</sup> Malingreau *supra* note 399 at 409.

<sup>458</sup> Charter of Fundamental Rights of the European Union *infer* note 481.

<sup>459</sup> See Article 45 of the EUR, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> (last accessed Nov. 14, 2016). [hereinafter EUR-Lex Access to European Union Law].

<sup>460</sup> *Id* at art.78.

<sup>461</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ. L 257, 19.10.1968, p. 2–12 (DE, FR, IT, NL). [hereinafter EUR-Lex Access to European Union Law].

officially as the Treaty on European Union (TEU), which was enacted in 1993.<sup>462</sup> This particular treaty established the citizenship of the European Union. This further promoted the freedom of movement for citizens of the EU, even allowing for movement of citizens' family members within the EU without regard for citizenship of the family members.<sup>463</sup> Moreover, the EU has recently adopted several directives and articles that shape legislation on immigration within the EU.<sup>464</sup> There is two directives of particular may interest with regards to *Kafala*: 2003/86/EC and 2004/38/EC.<sup>465</sup>

### ***1) Directive 2003/86/EC***

The Directive 2003/86/EC states:

“(Citizenship of the Union – Article 20 TFEU - Directive 2003/86/EC - Right to family reunification - Union citizens who are minor children living with their mothers, who are third country nationals, in the territory of the Member State of which the children are nationals – Permanent right of residence in that Member State of the mothers who have been granted sole custody of the Union citizens – Change in composition of the families following the mothers’ remarriage to third country nationals and the birth of children of those marriages who are also third country nationals – Applications for family reunification in the Member State of origin of the Union citizens – Refusal of the right of residence to the new spouses on the ground of lack of sufficient resources – Right to respect for family life – Taking into consideration of the children’s best interests)”<sup>466</sup>

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<sup>462</sup> Treaty of Maastricht on European Union *available at* <http://EUR-lex.Europa.EU/legal-content/EN/TXT/?uri=uriserv%3Axy0026> (last accessed Sep. 14, 2016). [hereinafter EUR-Lex Access to European Union Law].

<sup>463</sup> *Id.*

<sup>464</sup> Sergio Carrera & Massimo Merlino *CEPS: State of the Art on the European Court of Justice and Enacting Citizenship* 86 (2009).

<sup>465</sup> *Misuse of the Right to Family Reunification: Marriages of Convenience and False Declarations of Parenthood, French contact point of the European migration network (REM) (2012) available at* [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/family-reunification/09a.france\\_national\\_report\\_misuse\\_of\\_the\\_right\\_to\\_fm\\_final\\_feb2013\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/09a.france_national_report_misuse_of_the_right_to_fm_final_feb2013_en.pdf) (last accessed Nov. 19, 2016). *See also* Handbook on European law relating to the rights of the child 54 (2015) *available at* [http://www.echr.coe.int/Documents/Handbook\\_rights\\_child\\_ENG.PDF](http://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF).

<sup>466</sup> EUR, Judgment of the Court (Second Chamber) (2012) *available at*

The first directive regards the topic of family reunification. More specifically, it describes general requirements for granting a family reunification as well as the circumstances under which exceptions may be made. Generally, this directive defines family as including only nuclear family members, which would include spouses and minor children which can be biological or adopted.<sup>467</sup> This definition itself would preclude *Kafala* as a basis for family reunification.<sup>468</sup>

However, we can look to the exceptions mentioned in this directive to see how *Kafala* might be considered. The exceptions mentioned include situations where children are “entrusted to a third party.” This particular phrasing may allow the directive to apply to cases of *Kafala*, but as an exception rather than a rule.<sup>469</sup> The legal point of view, to apply this directive to *Kafala* is complicated in EU due to the lineage, and family relationship.

Other exception exists, especially where the rights of EU citizenship may be infringed upon by denying the entry of a guardian or dependent. For example, the case below demonstrates how such exceptions are justified.

“For the purpose of examining whether the Union citizens concerned would be unable, in fact, to exercise the substance of the rights conferred by their status, the question of the custody of the sponsors’ children and the fact that the children are part of reconstituted families are also relevant. First, since Ms S and Ms L have sole custody of the Union citizens concerned who are minors, a decision by them to leave the territory of the Member State of which those children are nationals, in order to preserve the family unit, would have the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been

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<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0356> (last accessed Feb. 12. 2017). [hereinafter EUR-Lex Access to European Union Law].

<sup>467</sup> See *Misuse of the Right to Family Reunification* and see also Handbook on European law relating to the rights of the child *supra* note 465.

<sup>468</sup> Handbook on European law relating to asylum, borders and immigration 120 (2014) available at [http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded\\_en.pdf](http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf).

<sup>469</sup> Malingreau *supra* note 399 at 410-412.

maintained up to the present. Secondly, any decision to stay in the territory of that Member State in order to preserve the relationship, if any, of the Union citizens who are minors with their biological fathers would have the effect of harming the relationship of the other children, who are third country nationals, with their biological fathers.”<sup>470</sup>

Through this lens, it can be seen that the EU makes exceptions, overriding individual country rulings and granting residency in cases where a child may be deprived of their right to fully enjoy the EU citizenship. In general, this applies to situations where a child is dependent on a guardian who is being denied entry to the country or vice versa.<sup>471</sup> However, as seen in this case, it may also apply in cases where an adopted child would be denied entry, due to the fact that it may affect the child’s ability to maintain contact with biological parents living in the country of origin.<sup>472</sup> Yet, these justifications for exception outlined in the 2003/86/EC do not expressly discuss situations involving *Kafala* or orphans, who do not have biological ties. As such, what justification can be given for allowing exceptions in cases involving orphans or children of *Kafala*? For these cases, the answer is much less clear.

## 2) Directive 2004/38/EC

The directive states, “European Union citizens have the right to move freely and live in another EU country, subject to any conditions set out in the EU’s treaties. This free movement of people is one of the EU’s fundamental principles.”<sup>473</sup> This Directive regards the right of citizens of the

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<sup>470</sup> Case C-356/11, O, S v. Maahanmuuttovirasto, 2012 E.C.J. and Case C-357/11, Maahanmuuttovirasto v. L, 2012 E.C.J § 51 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0356#ECR\\_62011CJ0356\\_EN\\_01-E0001](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0356#ECR_62011CJ0356_EN_01-E0001) (last accessed Jan. 7, 2018). [hereinafter EUR-Lex Access to European Union Law].

<sup>471</sup> Malingreau *supra* note 399 at. 412.

<sup>472</sup> Practical Handbook on the Operation of the 1996 Hague Child Protection Convention, 149 HCCH (2014) available at <https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf> (last accessed Dec. 4, 2016).

<sup>473</sup> EU Freedom of Movement and Residence available at <http://Eur-lex.Europa.EU/legal-content/EN/TXT/?uri=uriserv%3A133152> (last accessed Dec. 21, 2016). [hereinafter EUR-Lex Access to European Union Law].

EU to move and live freely between member States and it is also known as “the Citizenship Directive.”<sup>474</sup> It may be useful as a justification for bringing a family together in Europe based on a *Kafala* relationship if the 2003/38/EC directive is unsuccessful.<sup>475</sup> The language of this directive is important. This directive states that member States should ease the entry and residence of family members if their dependents were members of the household of a citizen of the EU.<sup>476</sup>

The main issue with this directive is that while it provides for the rights of both EU citizens *and* their family members to move freely through the Union, its definition of family member defines this as a direct descendant and/or dependent direct relative. In this case, it is unclear whether direct must mean biological without making an assumption. In the case of orphans taken into *Kafala* relationships, they may fit the category of dependent in that they are literally dependent

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<sup>474</sup> Rahman-further fleshing out of the position of third-country nationals under the Citizenship Directive, EUTOPIALAW. (November 29, 2012), <https://eutopialaw.com/2012/11/29/rahman-further-fleshing-out-of-the-position-of-third-country-nationals-under-the-citizenship-directive/>.

<sup>475</sup> Malingreau *supra* note 399 at. 413-419.

<sup>476</sup> *Id* at 314. *See also* Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States amending Regulation 1612/68, 2004 O.J. (L 158) 87-88. [hereinafter EUR-Lex Access to European Union Law], at art.1 (“This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

art. 2 ‘For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.””)

*See also*, BLACKSTONE'S EC LEGISLATION 2006-2007, 259 (Nigel G. Foster. ed., 2006).

on the *Kafil* as their guardian to provide shelter, food, education, and safety. Whether or not this qualifies, as a direct descendant is not unambiguous based on the definition.

However, the phrasing of “dependents” is such that it may provide an opportunity for acceptance of *Kafala* as a justification for family reunification. Still, the term “facilitate” does not guarantee that a member state of the EU will accept a request for family reunification on this basis. Rather, it simply gives a priority for consideration against other applicants who might not have a link to EU citizen. Furthermore, member states of the EU would not be required to grant adoption status to dependents if their home country does not allow this institution. They could grant immigration status and documentation, which would allow a family to reunite and live together without overstepping their jurisdiction. Because this provision relates specifically to movement within the EU, it stands to reason that this directive as justification for reunification should be invoked in situations where a citizen of the EU has moved from one member state to another member state and then applies for reunification with their dependents.<sup>477</sup> For this reason, the Directive may not prove useful or feasible in many situations.

These directives serve as possible legal means for families with ties through *Kafala* to use for justification for family reunification. The language of these directives is vague and ambiguous in this regard though and there has been little to no legal precedence for this strategy, but it is theoretically possible. While these directives represent a possibility for arguing for immigration status for situations such as these, clearer paths are needed to assist those EU citizens who might want to take children through the institution of *Kafala*, but cannot currently manage to do so using the existing legal provisions provided by their country and EU as a whole. Guidance from the HCCH may provide valuable assistance in these cases, by establishing a straightforward answer

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<sup>477</sup> Malingreau *supra* note 399 at. 411-412.

to these legal questions and complications. The CJEU oversees these directives and rules on judgments involving these claims, demonstrated more in depth later with the discussion on case law examples.

### ***3) Article 7 of the European Charter of Fundamental Rights and Article 8 of the European Court of Human Rights***

There are final instruments in human rights situations that may be beneficial in a case involving family reunification based on *Kafala* in countries of the EU: Article 7 of the Charter<sup>478</sup> and Article 8 from the ECHR concern immigration for families in the EU.<sup>479</sup> Both articles concern citizens' right to respect for their private and family life. To quote, Article 8 of the ECHR: Both articles concern citizens' right to respect for their private and family life. To quote,

Article 8 of the ECHR: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>480</sup>

Article 7 of the Charter: "**Respect for private and family life** Everyone has the right to respect for his or her private and family life, home and communications."<sup>481</sup>

If it is a matter of EU jurisdiction, Article 7 of the Charter will apply. The main qualification for invoking this article is the determination of whether EU law applies to a given situation. However,

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<sup>478</sup> See Malingreau *supra* note 399 at 419.

<sup>479</sup> Harroudj v. France *supra* note 57 at 10-11.

<sup>480</sup> European Court of Human Rights, Council of Europe European Convention on Human Rights at. art. 8 available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (last accessed Dec. 21, 2016). See also Łukasz Bojarski, et al., *The European Charter of Fundamental Rights as a Living Instrument* (2014).

<sup>481</sup> Charter of Fundamental Rights of the European Union: 2010 O.J. (C83) 389. Proclaimed by the Commission, 7 December 2000. Proclamation and text at 2000 O.J. (C364) 1.

if it is deemed that EU law does not apply and that the member country's law should preside instead, Article 8 of ECHR can be considered secondarily.<sup>482</sup> This measure assures the respect of family and private life in the EU. In this regard, the ECHR has determined that individual country laws of the EU must not violate Article 8.

### **Cases Law Related to these Directives**

- Summary of Facts and Judgment

These cases may be used to serve as justification for immigration. The cases of *Zambrano*, *McCarthy*, *Dereci*, and *Iida* ruled on by the CJEU determine that citizens of the EU do not need to move to exercise their human rights guaranteed by their European citizenship. These judgments look at the issue of whether third-country nationals have a right to residence based on a family relationship with an EU citizen if that citizen has never utilized their right to movement within the EU.<sup>483</sup> The following case facts help to illustrate this position.

In the first case of *Zambrano*,<sup>484</sup> Colombian nationals applied for refugee status in Belgium, but were denied but not deported based on the fact that Colombia was experiencing a civil war at that time. Subsequently, Mr. and Mrs. Zambrano were registered as residents in Belgium starting in 2001. Meanwhile, the two children of the Zambranos were granted full citizenship of Belgium based on the country's rules. At the same time, Belgian authorities continued denial of the Zambrano's attempts to apply for citizenship based on their relationship with their children. The court of Brussels referred this case to the CJEU, citing the potential

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<sup>482</sup> Malingreau *supra* note 399 at. 419-422.

<sup>483</sup> See CHIARA BERNERI FAMILY REUNIFICATION IN THE EU: THE MOVEMENT AND RESIDENCE RIGHTS OF THIRD COUNTRY NATIONAL FAMILY MEMBERS IN OF EU CITIZENS (2017).

<sup>484</sup> Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), 2011 E.C.R. I-01177 [hereinafter EUR-Lex Access to European Union Law] available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62009CJ0034> (last accessed Jan. 2, 2017).

application of rights of European citizenship in this matter. In this case, the CJEU granted Mr. Zambrano, the father of the Belgian-national children, the right to live and work in Belgium even though his children had not exercised their right of free movement. It was determined that as EU citizens, the right to full enjoyment of citizenship is considered to be fundamental. Without their father living with them in Belgium, the court determined that the children could not fully enjoy their rights of citizenship of the EU and so it ruled in favor of granting the father immigration status.<sup>485</sup>

In the second case of *McCarthy*,<sup>486</sup> the CJEU made a slightly different decision. Mrs. Shirley McCarthy, a British-Irish national, applied for the right of residence of her Jamaican-national husband in the UK. She had never exercised her right of movement in the EU and was not considered to be a “worker, self-employed person, or person of sufficient independent means”.<sup>487</sup> This fact served as the basis for the argument that she was dependent on her husband as a provider. However, the court decided that it would be a matter of the national court because Mrs. McCarthy was not considered a dependent of her husband. Furthermore, the court maintained that its ruling would not inherently force Mrs. McCarthy to leave the EU. At the same time though, it would not provide for the right of her husband to live and work in the UK because ultimately denying his immigration would not impede her enjoyment as an EU citizen.<sup>488</sup> This ruling is in line with the

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<sup>485</sup> *Id.*

<sup>486</sup> Case C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department*, 2011 E.C.R. I-03375 [hereinafter EUR-Lex Access to European Union Law] available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0434> (last accessed Jan. 2, 2017). See also for more analysis Stephen Coutts, *Case C- 434-09: Shirley McCarthy v. Secretary of State for the Home Department*, GLOBALCIT.EU <http://globalcit.eu/case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department/>(last accessed Jan. 2, 2017).

<sup>487</sup> *Id.*

<sup>488</sup> Chiara Rauceca, *Special Issue: Lisbon vs. Lisbon , Fundamental Rights: The Missing Pieces of European Citizenship?* [Vol. 14 No. 10] German J. 2022-2040 (2013) available at

CJEU ruling of *Zambrano*, but demonstrates the limitations of the application of this justification for family reunification: it is limited to dependents.

The case of *Dereci*<sup>489</sup> concerns the application for immigration of adult relatives from Turkey of an Austrian citizen. This matter questioned whether Austrian citizens could use EU law to secure the right of residence for their adult family members if they had never exercised their freedom of movement in the EU. Ultimately, the court ruled to decline the relatives' application for immigration status in Austria. This decision further clarified the court's position that it had established in the earlier *Zambrano* and *McCarthy* cases. Through this conclusion, the court determined that it could rule positively only in situations where EU citizens were not only forced to leave their country but also the EU entirely. This ruling limited the cases in which family reunification would be granted based on EU law to the extent that it pertained to largely just scenarios including children and their caregivers.<sup>490</sup>

The last case of *Iida*<sup>491</sup> involved a Japanese citizen and his German wife. They had a daughter that carried three nationalities: from the US as she was born there, from Germany, and from Japan. Iida was seeking immigration status through family reunification in Germany. The plaintiff in this case, the Japanese husband, was not protected under the Directive 2004/38/EC because he did not meet the residence requirement. The CJEU found that European laws do not apply when the claimant is not governed by European law (i.e., a foreign national wanting to join

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[https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b26dc262cd94d030ee9aad/1454534082898/GLJ\\_Vol\\_14\\_No\\_10\\_Rauceca.pdf](https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b26dc262cd94d030ee9aad/1454534082898/GLJ_Vol_14_No_10_Rauceca.pdf)/(last accessed Mar. 8, 2018).

<sup>489</sup> Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 2011 E.C.R. 00000 [hereinafter EUR-Lex Access to European Union Law] available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0256> (last accessed Jan. 2, 2017).

<sup>490</sup> *Id.* at 4. See also, Malingreau *supra* note 399 at 416.

<sup>491</sup> Case C-40/11, *Yoshikazu Iida v. Stadt Ulm*, 2012 Gen. Ct [hereinafter EUR-Lex Access to European Union Law] available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0040> (last accessed Jan. 2, 2017).

his or her European relatives). This further outlines the extent to which these Articles may be used as justification for family reunification. While they could be of assistance to applicants who are reuniting based on *Kafala*, there are limitations to which the law would apply. More about these rulings' applications on *Kafala* is discussed below.

- The Effect of EU's Rulings in these Cases on Immigration

These cases together demonstrate that according to European law, a citizen need not move between countries in order to exercise their rights as a European citizen. However, in order to use this is justification for the immigration of a third-country relative, the situations are limited to relationships between guardian and dependent such that the enjoyment of EU citizenship relies on the right of residence of the guardian.<sup>492</sup> The resulting effect of denial would be deprivation and impedance of EU citizenship rights. Applications of these cases on *Kafala* are examined further below.<sup>493</sup>

### **Applications of these Cases on *Kafala***

The previous argument of the scholar<sup>494</sup> regarding matters of immigration, family reunification, and *Kafala*, has already provided a very robust discussion intended to determine possible solutions that would bring together European law and the institution of *Kafala* together. However, my

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<sup>492</sup> GONÇALO MATIAS, CITIZENSHIP AS A HUMAN RIGHT: THE FUNDAMENTAL RIGHT TO A SPECIFIC CITIZENSHIP, 142 (2016).

<sup>493</sup> Based on these cases, according to Malingreau's examination, it can be gathered that if a citizen of the EU would like to use these directives to support a case for family reunification involving *Kafala* based on their rights as an EU citizen, they would not need to exercise their right of freedom to move. However, they would have to prove that denial of their dependent child's immigration would force them to leave the member State and ultimately the EU. This means that there must be convincing evidence to show that the denial of immigration would cause the EU citizen to have to leave their country (perhaps to care for their dependent child in another country and the EU as a whole). Furthermore, it is imperative that a claimant should be a citizen or have residence status of a country of the EU for the directives and articles to apply to his or her case. This was demonstrated in the case of Iida, for which the court ultimately ruled that a Japanese citizen could not be protected under EU law. Based on the case precedence of Iida, it can be concluded that cases of *Kafala* would not be considered under Article 7 of the Charter and therefore Article 8 would be more related, as the article of the ECHR providing the right to respect for private and family life.

<sup>494</sup> The scholar is Malingreau.

intention of including these cases is to illustrate in detail the positions of the member States of the 1993 HCCH Convention as comprised in Table 3. Consequently, vis-à-vis featuring each case's details, it is apparent that the cases hold significance on the current discussion about *Kafala* because they establish case precedence over issues such as immigration (family reunification) and citizenship (recognition of the family structure). While, these cases do not explicitly involve *Kafala*, they demonstrate what could be successful strategies or legal entry points to for Muslim people to pursue, as a way to seek family reunification with a dependent of a *Kafala* relationship. These laws and directives are some methods that current residents of the EU can use to argue for the justification of their family reunification. They are complicated and often open to interpretation, such as whether one needs to exercise their right to move in order to invoke the right to reunify their family.

The relationship of these cases to *Kafala* is that they help to shed light on how a legal argument could take place to use a *Kafala* relationship to meet the standards of family reunification measures in the EU, *i.e.*, by analogy to it. From *Zambrano*, it is clear that the CJEU will honor EU citizens' right to the enjoyment of their citizenship, which is hampered by the absence of a guardian. This means that for a child to fully enjoy their EU citizenship, they need a parent or guardian in the country with them because they are dependent on them. However, this same right of enjoyment of EU citizenship does not extend to family relationships that do not involve dependents, such as spousal relationships. This was made clear by the McCarthy case. In light of this, a *Kafala* relationship would have to prove that the *makful* is a dependent of the *Kafil*. Similarly, the *Dereci* case showed that a family relationship (those outside of immediate family, such as cousins), other than guardian and dependent, would not suffice to justify family reunification. In terms of *Kafala* this means that a *Kafil* must prove that the *makful* is dependent

on him/her as a guardian. Finally, the case of *Iida* brings up the question of what constitutes a “family member,” where in this specific case a husband was permanently separated from his wife when trying to apply for the right of residence. This applies to *Kafala* since this would be considered a gray area relationship that is not biological and not a permanent parent-child relationship. The ruling in this case demonstrates that an applicant must be an EU citizen in order to use EU laws as a defense. Notably, none of these cases deals directly with the topic of *Kafala*, but their rulings can be extrapolated to better understand how the EU might rule in a case such as this. However, the articles and directives used as justification in these cases also played an important role in the *Harroudj vs. France* appeal that appeared before the ECtHR, which deals directly with *Kafala*.

#### **European Case Law Specific to *Kafala* in *Harroudj v. France*.**

The first time *Kafala* is explicitly mentioned by the ECHR is *Harroudj v. France*. According to the facts, a single woman in her 40s, named Harroudj was born in and lived in France. Zina Hind was an abandoned child from Algeria. Harroudj was the applicant to foster this girl. The judge in Algeria granted Harroudj a couple legal proceedings in 2004 to become the legal guardian of the child through *Kafala*. With another the legal proceeding, she was also granted permission to pass on the family name of Harroudj to the child Hind, and finally to travel together to live in France.

Shortly after, Harroudj and the child arrived and lived in France. Two years passed before Harroudj applied for full adoption of Hind, advocating using Article 3 of the 1993 HCCH as justification. In response to this application, the decision was to dismiss the case. Harroudj appealed the decision, this time using Article 8 and 14 of the ECHR. Responding the appeal and its new justifications, on October 4, 2012, ECtHR ruled that French laws denying adoption after *Kafala* are not in violation of Article 8 of the ECHR, which serves to protect the right of European

citizens to private and family life.<sup>495</sup> In the original case, the Court of Lyon argued that a name change was not enough evidence to establish a guardianship, which would serve as the basis for considering an adoption. However, the French court also acknowledged that *Kafala* is a satisfactory relationship that preserves the best interests of the child and seeking an adoption would not be necessary because *Kafala* is fully accepted in France. France did not grant the request for an adoption, but this outcome is still positive for the recognition of *Kafala*. In recognizing and expressing the view that the *Kafala* sufficiently protects and provides for the best interests of children, just as a legal adoption would, there is potential for the two systems to work together.

The plaintiff appealed this case to the ECtHR, citing that this decision was in violation of Article 8 of the ECHR, which protects private and family life of EU citizens. Subsequently, ECtHR dismissed the appeal and found in favor of France's initial decision, "whose law does not allow the adoption of a foreign minor where the child's state of nationality prohibits adoption." In general, the court applies the concept of family life to parents and siblings but rejects the notion of family life as being met between non-nuclear relatives because their relationship does not sustain the elements of dependency other than emotional ties. However, the ECtHR decided in this case that family life existed between the woman and the minor child, but it did not find that the denial of the request for adoption constituted an interference with the family's life. France's decision was upheld. The ECtHR took issue with the woman's reasoning that it would be necessary to grant a full adoption because the country of France views *Kafala* to be analogous. Ultimately, the court found that the *Kafala* relationship would suffice to maintain adequate family life, so no violation of the ECHR existed.<sup>496</sup>

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<sup>495</sup> See Harroudj v. France *supra* note 57.

<sup>496</sup> *Id.*

This case is notable because the integration of *Kafala* relationships into European law has a significant impact on immigration rulings. Furthermore, the case provided some valuable insight into the views of the court, especially in demonstrating that they viewed the relationship of the plaintiff and her *makful* as representative of “family life” sufficiently to meet the definition of ECHR Article 8. The breakdown of the plaintiff’s case happened when the court decided that an adoption was not depriving the plaintiff of the right to respect for her family life. Family life in this case would not be unduly affected because the French court maintained that France gives equal rights to *Kafala* as it does to adoption. This is true despite the fact that France does equate *Kafala* to adoption, which is established in French Civil Code (Article 370-3) by a law from 6 February 2001, which states:

“The requirements for adoption are governed by the national law of the adopter or, in case of adoption by two spouses, by the law which governs the effects of their marital relationship. Adoption, however, may not be granted where it is prohibited by the national laws of both spouses. Adoption of a foreign minor may not be ordered where his or her personal law prohibits that institution, unless the minor was born and resides habitually in France...”<sup>497</sup>

The fact that France views *Kafala* as an equivalent institution and did not violate Islamic law is in support of the views of this dissertation that France respects the perspective of Islamic principles in this matter of prohibited adoption.<sup>498</sup> Importantly, the court mentioned that to determine how countries should adapt their laws to accommodate *Kafala* domestically, they should look to international law.<sup>499</sup> This supports the main argument of this dissertation because it shows

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<sup>497</sup> Patrick Kinsch, *Harroudj v. France: Indications from the European Court of Human Rights on the Nature of Choice of Law Rules and Their Potentially Discriminatory Effect*, 2913/2014 BRIT. Y.B. INT’L L. 39,44.

<sup>498</sup> Faisal Kutty, *Islami Law, Adoptions and Kafala* (2012) available at <http://www.jurist.org/forum/2012/11/faisal-kutty-adoption-kafalah.php> (last accessed Nov. 11, 2016).

<sup>499</sup> *Id.*

how important the guidance of international laws and treaties such as the HCCH can be in guiding country's stances on accommodating *Kafala*.

### **Brief and Result of this Primary Argument**

What the *Harroudj v. France* case demonstrates clearly in regard to the consequences on this dissertation's main thesis is how *Kafala* and the traditional adoption system are not set up in a way that promotes cooperation because of the reliance on the definition of what constitutes a permanent parent-child relationship. Still, the case gives cause for a positive outlook for the frameworks of Western adoptions and *Kafala* to begin to work together. By recognizing and expressing the view that the *Kafala* in its current form sufficiently protects and provides for the best interests of the child, just as a legal adoption would, the path is paved for the two systems to work together. To make further progress, this idea should be embraced not just by France, but by the HCCH as a whole.

In sum, this main argument concerning recognition of *Kafala* and subsequent granting of family reunification is a complicated issue, because by granting adoptions to Islamic individuals provisions of Islamic law are actually violated due to the fact that the practice of true adoption is prohibited under the law. It is the question of what is more important: for families to be able to live together in a foreign country of their choosing or for Islamic law to be followed perfectly. This dissertation suggests<sup>500</sup> that it is more important for Islamic law to be respected and therefore these petitions for intercountry adoption should be rejected. Recognition of the *Kafala* as a sufficient protection of children's best interests will offer a chance for the system to be better integrated into Western legal systems, rather than calling for conversion from this Islamic tradition to an institution such as adoption that would violate the provisions of religious law.

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<sup>500</sup> See the recommendations in the conclusion of this dissertation.

However, on the issue of family reunification, it may be considered a suitable pursuit in any case because it would not change a person's *Kafala* status. Rather, it simply deals in immigration law, allowing families to migrate to foreign countries as a unit, whether biologically related or not. The relationship that family reunification has to this thesis is how countries may define and recognize "family" relationships. In other words, would *Kafala* fall under the legal definition to allow for the application for family reunification? That may be a very complicated question, which many countries are in the midst of deciding now. For example, can a *makful* and *kafil* count as "family" because they are not biologically related and do not constitute a permanent parent-child relationship? Some countries are allowing for family reunification with a *makful* and *kafil* because *Kafala* is the closest equivalent to adoption in Muslim culture. This is a positive step for Muslim families to be granted family reunification because it allows them to live together in the country of their choosing.

To reiterate, this dissertation does not advocate for Islamic petitioners to be granted full adoption status in these countries. This would go against Islamic law of the child's sending country and the individual's religious traditions. Rather, a better option would be for countries to have an internationally unified way of granting the same rights to *makful* and *kafil* as they would for adoptive parents and children. What must really be requested is for HCCH to guarantee that through its provisions children of *Kafala* would be granted the closest equivalent guardianship rights as other children, making adaptations in consideration of the main prohibitions of *Kafala* (such as measures that would not require the passing of inheritance rights or the child's name change, set age limits of 18, and require petitioners to be Muslim couples). A parallel system set up by the HCCH could help to establish such a framework allowing for international recognition resulting in the transfer of guardianship rights in respect to the traditions of *Kafala*.

It should be noted that currently some countries do recognize *Kafala* and their guardianship right is respected, such as the UK and US, but other countries do not recognize *Kafala* orders, such as Canada. This failure to recognize this institution results in individuals seeking parental rights from these countries through the only system available to them, adoption. In these situations, *Kafala* is used as a basis for requesting an adoption from foreign countries that do not give adequate guardianship rights. While a country is justified to reject an application for adoption to an Islamic petitioner based on a *Kafala* relationship, an unfortunate result may still occur for Muslim families if the country also denies immigration (family reunification) based on *Kafala*. Through better understanding of *Kafala* and its focus on orphans, a framework could be set up to help countries accept the institution of *Kafala* in a way that would give adequate recognition of guardianship rights, allowing them entry to Western nations.

Therefore, the HCCH can help to fix this problem mentioned above, especially as it regards orphaned children and foundlings, by developing a clear framework to provide guidance on intercountry immigration and guardianship rights in cases involving *Kafala*. This can be accomplished by having HCCH adapt its current language, which precludes orphaned children and those of unknown parentage based on its requirements to terminate biological relationships. If those objectives can be accomplished, the laws and legal jurisprudence of individual countries would not need to disproportionately affect children from Islamic countries, for which *Kafala* is the closest approximation of adoption in providing protection of children. Instead, member States of the HCCH would need only to accept and ratify the changes, which could then be implemented by the respective countries, allowing for a streamlined and expedient transition.

### 3.5.2 Insufficient Information and Discussion of *Kafala* in HCCH Documents

- Observations from the Explanatory Report regarding *Kafala*

Another objection that is related to the *Kafala* is documented in the Explanatory Report of the Convention of 1993. Below in the notes from the Explanatory Report, it should be noted that the delegates representing Egypt at this Convention brought up reasonable objections and suggestions that would allow for better recognition and understanding of *Kafala*.<sup>501</sup> Unfortunately, the Working Document submitted during this Convention was not approved when voted on and the suggestions were not implemented. The notes provide insight into many criticisms of the Hague Convention as seen by Islamic countries.

The first mention of the issue is brought up in note 42 from the Explanatory Report. It recounts that Egypt submitted Working Document No. 124, which proposed adding another paragraph to the Preamble of the convention that would read as following: “Taking into account the other alternatives and forms of child care, *e.g.*, foster placement - *Kafala* as enshrined in Islamic law, and the need to promote international co-operation therein.”<sup>502</sup> As support for this argument to include alternative forms of care such as fostering, custody, and *Kafala*, the delegate from Egypt cited the fact that inclusion is more clearly outlined in other existing conventions such as the UN Declaration of 3 December 1986 on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, as well as the UNCRC. This was to say that alternatives to adoption are recognized around the world and provided that they afford the same level of care for children developmentally,

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<sup>501</sup> Aranguren *supra* note 44. *See also* the overview first chapter of this dissertation for more details in this matter.

<sup>502</sup> *Id.*

socially, and educationally, they should be recognized within the HCCH as well, especially since there are countries where adoption is not permitted. He added that such recognition would be in line with the mission of preventing child trafficking and abuse.<sup>503</sup> Yet, despite the argument presented and evidence cited, the proposal was not given enough support for consideration on the floor.

Even still, explanatory note 72 details that Egypt resubmitted Working Document No. 124 for consideration based on its proposal to add a new article to the first chapter that would read as such after an initial amendment to the language: “This Convention shall not apply to citizens of the countries in which adoption is considered against the public policy unless intercountry adoption is necessary for the best interests of the child.”<sup>504</sup> This addition would help to alleviate situations in which an adopted child is originally from a country where adoption is prohibited which might cause undue distress with consequences to the child related to matters of the country of origin’s cooperation in the adoption and other issues such as taxation upon reentry to the country. This might help to provide a compromise where countries by which adoption is against public policy may be able to participate in intercountry adoption in cases of necessity or to make it allowable for citizens to be adopted from countries that do not practice adoption but do not explicitly state that it is against public policy. Unfortunately, the proposal could not be opened up for vote because there was not initially enough support from the other Member States.<sup>505</sup>

Note 90 from the Explanatory Report makes clear that the Egyptian delegation was adamant from the start of the conference that a resolution was necessary to adequately reconcile the language of the convention to better allow for intercountry placements of children under

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<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

alternative types of care like fostering and guardianship, such as *Kafala* used widely in Islamic countries since these countries may not allow for adoption. The note states that other member countries did not hold this opinion though. Rather, the majority maintained that the concept of adoption would be broad enough to include alternative forms of care.<sup>506</sup>

One of Egypt's recommendations was adopted during this convening, the Explanatory Report notes under note 314. Working Document No. 53 proposed the addition of a new paragraph, *sub-paragraph b*, to be added into the convention's text. The new paragraph would help to ensure the preservation of the link between the adopted child and his or her heritage including aspects of their original ethnicity, culture, and religion in line with recommendations made by the UNCRC. This proposal received support from other member nations, while it was noted that this was an important cause and would help to bypass issues of preservation of ethnicity and cultural ties encountered by the Hague Convention on the Civil Aspects of International Child Abduction. The inclusion of this paragraph was approved and sent to the drafting committee via Working Document No. 179, and the appropriate placement was discussed as either in Chapter IV or Chapter II.<sup>507</sup>

From this point on, the Explanatory Report of the convention makes no further mention of *Kafala*, nor inclusion of other alternative forms of care. The notes detail the proposals presented by Egypt during this convention and demonstrate that Islamic countries desire such a change. These motions to add in more inclusive language failed to receive enough support by other member countries at the HCCH.

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<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

The failure to receive support should not necessarily indicate that the majority of members did not want such a change. Rather, it may reflect the fact that a vast majority of member countries of the HCCH do not have significant Muslim populations<sup>508</sup> and therefore may not find such an issue to be of priority or importance. Future advocacy for this cause may help to inform member countries of the significance of such a change for countries of the Muslim world.

- Limited Discussion of *Kafala* by the Special Commission (SC) of the 1993 HCCH

The Special Commission has meetings every five years as a regular practice, in this convention 1993 started since 1994, to gather updates regarding the practical operations of HCCH's Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Some years the *Kafala* has been mentioned in the Special Commission's meeting notes, but its scope and discussion were very limited and it did not mention updates about any progress made to incorporate the system. All of the meetings started in 1994, and continued to meet regularly in 2000, 2005, 2010 and 2015, and took place at the Peace Palace in the Hague.<sup>509</sup>

- **The first meeting** of the SC was held from October 17 - 21, 1994 immediately after the convention of 1993,<sup>510</sup> which “discussed the Seventeenth Session of the Hague Conference on Private International Law, which appears under Part C in the Final Act,” and did discuss *Kafala* under the section of Status of the Convention.<sup>511</sup> At this meeting, a proposal was discussed that had been suggested by an expert of Morocco to recognize other forms of child protection that do not create permanent

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<sup>508</sup> *Id.* at. Note. 21-22.

<sup>509</sup> HCCH, [hereinafter Special Commission meetings].

<sup>510</sup> Permanent Bureau, *Special Commission of 1994, Report of the Special Commission on the Implementation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, Report of the Special Commission of October 1994 + Annexes available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=933> (last accessed Feb. 12, 2017).

<sup>511</sup> *Id.*

parent-child relationships, which would include *Kafala*. The Special Commission supported that sentiment, but they concurred that such a decision went beyond its delegation and should be taken up by Special Commission on General Affairs and Policy of the Conference that was to be held from June 20-23, 1995. The result of this matter was to include the terminology *Kafala* or analogous institutions in the revised 1961 Convention on the Protection of Minors, which is known today as the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Concluded 19 October 1996).<sup>512</sup>

It is important to note that despite the Special Commission's discussion of *Kafala* and resolution to make mention of it in future revisions, references to this institution were not included in their Annexes, especially in the "Recommendation Concerning the Application to Refugee Children and Other Internationally Displaced Children of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption."<sup>513</sup> There is a relevant reference made in this Annex to orphans, which sums up the position on the inclusion of orphans. In this regard, they clarify that adoption involving orphans should not be "considered lightly" unless the death of both birth parents can be verified due to the possibility of "re-emergence of the parents."<sup>514</sup> Interestingly, the SC suggests that

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<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> *Recommendation concerning the application to refugee children and other internationally displaced children of the Adoption Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Annex A to the Special Commission Report of October 1994 available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=934&dtid=2> (last accessed Feb. 25, 2017).

more non-permanent solutions should be sought in such cases, which actually would serve as an argument in favor of the inclusion of *Kafala* in HCCH adoptions, but is confounded by the necessity to prove that both parents are deceased.

- **The second meeting** was held from November 28 - December 1, 2000.<sup>515</sup> They discussed *Kafala* under the title “International Placements Not Within the Scope of the Convention.” In this regard, there was agreement that the issue needed to be further considered of how to enact regulation of alternative placements that fall outside the scope of adoption such as *Kafala*. The agreement on this issue supports this thesis. However, this consideration of how best to regulate this institution is not described further at this meeting. Instead, the SC states that specific member countries, such as the UK and Spain, have made efforts to enact domestic legislation regarding *Kafala*, implying that such action might suffice in adjusting for this Islamic institution. For Spain, an adaption is made for families to place abandoned children from Morocco with a Spanish family through *Kafala* as a long-term alternative care.<sup>516</sup> The UK described its endeavor to establish legislation to address this institution and had taken the step of contacting certain sending countries.<sup>517</sup> This reference to *Kafala* in the 2000 meeting of the SC embodies one of the main analyses of this thesis, which is the suggestion that individual domestic laws in each country will serve as an effective tool in the inclusion of *Kafala* in intercountry

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<sup>515</sup> Permanent Bureau, *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (28 November-1 December 2000) (April 2001) available at <https://assets.hcch.net/upload/srpt33e2000.pdf> (last accessed Feb. 25, 2017).

<sup>516</sup> *Id.*

<sup>517</sup> *Id.*

child placement. The argument put forth in this thesis rather contends that a more unified top-down approach is needed to be effective, such as the enacting of legislation by the HCCH itself not by a bottom-up approach by individual countries.

- **The third meeting** was held from September 17 – 23, 2005.<sup>518</sup> Nothing was specifically mentioned about *Kafala* or alternative care, let alone orphaned children in general. This is surprising given that the previous meeting, there was some significant discussion of the need for consideration of mechanisms by which to regulate and thereby appropriately interact with kinds of alternative institutions such as *Kafala*.
- **The fourth meeting** held from June 17 – 25, 2010.<sup>519</sup> In this meeting, the conversation regarding individual member country legislation and mechanisms used to incorporate *Kafala* was continued. The experts were given the opportunity to share both the measures taken and the formal procedures enacted involving placement through *Kafala* in their individual States.<sup>520</sup> Again, this implies that the SC is satisfied by the bottom-up approach that leaves the legislation regarding inclusion of *Kafala* up to each member country and is not actively working to create

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<sup>518</sup> Permanent Bureau, *Report and Conclusion of the Second Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption (17-23 September 2005)* available at [https://assets.hcch.net/upload/wop/adop2005\\_rpt-e.pdf](https://assets.hcch.net/upload/wop/adop2005_rpt-e.pdf) (last accessed Dec. 27, 2017). See also Conclusions and Recommendations of the Second Meeting of the Special Commission. See also Jennifer Degeling, Principal Legal Officer, with the assistance of Carlotta Alloero, Intern, A Discussion Paper on Accreditation Issues.

<sup>519</sup> Permanent Bureau, *Detailed Draft Agenda for the Special Commission of 17 to 25 June 2010 on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* Academy Building of the Peace Palace, The Hague available at [https://assets.hcch.net/upload/wop/adop2010agenda\\_e.pdf](https://assets.hcch.net/upload/wop/adop2010agenda_e.pdf) (last accessed March. 23, 2017).

<sup>520</sup> Permanent Bureau, *Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention (17-25 June 2010)* available at [https://assets.hcch.net/upload/wop/adop2010\\_rpt\\_en.pdf](https://assets.hcch.net/upload/wop/adop2010_rpt_en.pdf) (last accessed March. 25, 2017).

a unified set of policies and procedures. This is problematic given that the meeting notes of the SC in 2010 note that “some States do not recognize *Kafala* and others allow for *Kafala* to be ‘converted’ into full adoptions.”<sup>521</sup> Through this admission, the SC acknowledges that the reception of *Kafala* in each country is unequal. This supports the idea that a unified approach would be more effective in that it would lead to more consistent cooperation with *Kafala* and HCCH member countries.

The supporting documents provided in this meeting serve to reiterate the HCCH’s concerns about working with orphaned children due to fears of child trafficking, laundering, and falsification of documents.<sup>522</sup> While those fears are founded based on trends in certain regions of the world and specific cases, acting too strictly on these concerns prevents full interaction with countries utilizing *Kafala* because it is intended to be reserved for orphaned and foundling children only. An adaptation is needed to serve the best interests of these children.

- **The last meeting** was held from May 8 – 12, 2015.<sup>523</sup> As a part of the meeting’s conclusions and recommendations, the SC suggested that the topic of *Kafala* be discussed at the next SC meeting, which will be held presumably in 2020, as it is the regular practice for the child protection measure. They further offered that the subject should be added to the topics discussed at the fourth “Malta Judicial Conference on Cross-Frontier Family Law Issues,” which actually took place from

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<sup>521</sup> *Id.*

<sup>522</sup> Permanent Bureau, *Information Document No. 5 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Guidelines on Post-Adoption Services and the use of video Interaction Guidance available at <https://assets.hcch.net/upload/wop/adop2010id05e.pdf> (last accessed Mar. 25, 2017).

<sup>523</sup> See *Special Commission of June 2015 Permanent Bureau*.

May 2 – 5, 2016<sup>524</sup> The pattern seen from this meeting and the previous meetings is that the SC recognizes that further work is needed in delineating specific policies and procedures regarding *Kafala*, but each time the full discussion is deferred to the next meeting, which result in five year gaps in discussion. The SC has also expressed a need for further guidance from the SC of the HCCH as a whole and has sought guidance from other conferences such as the Malta Judicial Conference. The need for this dialogue is apparent, but it has yet to happen in any manner that results in progress.

### 3.5.3 General Comments on Adoption Regulations in HCCH

- Slight practicality and implementation

Even though the 1993 HCCH was a great step toward providing protection for children on the international plane, there have been claims that it is not practical.<sup>525</sup> For instance, it has been argued that the HCCH does very little to make it practically implementable in the real world. Many individual States lack the necessary resources and strong governmental support that are required to establish and sustain a Central Authority to deal with adoption as per Chapter III in the convention.<sup>526</sup>

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<sup>524</sup> *Id.* See also *Malta IV Conference on Cross-frontier Child Protection and Family Law* available at <https://www.hcch.net/en/news-archive/details/?varevent=486> (last accessed Mar. 25, 2017).

<sup>525</sup> Ratcliff *supra* note 323 at 347.

<sup>526</sup> *Id.* at 349. See also HCCH 1993 *supra* note 28.

- Vagueness of clarification

Other weaknesses that have been associated with the 1993 HCCH are that it is vague in terms of construction and interpretation and that it does not provide any effective sanctions against State parties that do not adhere to its provisions.<sup>527</sup> In fact, the Committee on the Rights of the Child of the UN<sup>528</sup> made known their concerns after concluding their observations that, “this form of adoption is not necessarily a measure of last resort,”<sup>529</sup> and emphasized the fact that adoptions have been occurring between States which have ratified the 1993 HCCH and State parties which have not.<sup>530</sup> In order to address the weaknesses, it has been suggested that each member State should establish a Central Authority to oversee the adoption system within its jurisdiction.<sup>531</sup>

- Lacking an organization for global oversight

Some critics of the HCCH have suggested that more oversight is needed than just the establishment of Central Authorities in each member country. The provisions in the HCCH set up the requirement for a Central Authority in each participant country, but provide little further guidance or follow-up. It may therefore be advisable that the HCCH set up a global agency to oversee each country’s adherence to its provisions and processes.<sup>532</sup> To set up such an agency, would require an investment, but it may be wise to direct some portion of adoption fees to assist in this effort.<sup>533</sup>

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<sup>527</sup> *Id* at 337.

<sup>528</sup> Republic of Korea, 32nd Sess., U.N. Doc. CRC/C/15/Add.179 (2003).

<sup>529</sup> Dillon *supra* note 390 at 43-44.

<sup>530</sup> *Id.*

<sup>531</sup> Ratcliff *supra* note 323 at 347.

<sup>532</sup> Dillon *supra* note 390 at 499-500.

<sup>533</sup> *Id.*

- Absence of important terms

Neither of the conventions include the terms “orphaned children”, “armed conflict” or “war”. These terms are important because there are an increasing number of difficult crises happening nowadays in the Middle East that are leading to the orphaning of children, which results in a vulnerable group in need of advocacy. In the Canadian Government’s Help Center website under the Frequently Asked Question section, an important matter is discussed through the following question: “Can I adopt a child from countries experiencing conflict or natural disasters?”<sup>534</sup> The answer to this question as provided on the website states, “No. Canada follows the recommendations set out by the Hague Convention: Children from countries suffering from armed conflicts and natural disasters should not be considered for international adoption, and family tracing should be the priority in all cases.”<sup>535</sup> Despite Canada’s membership of the HCCH, this position runs counter to basic human rights due to the fact that it should be within our conduct to help and protect orphaned children, especially those who have lost their families due to armed conflict and civil wars. It is contradictory that countries like Canada would take a stance that prohibits the international placement of children from countries experiencing war and armed conflict, when that is a major cause of the orphaning of children and therefore creates a need for intercountry adoption. Furthermore, as the Outline of Hague Intercountry Adoption Convention mentions, HCCH expanded after World War II when the numbers of intercountry adoptions increased considerably.<sup>536</sup> Despite this fact, HCCH itself does not specifically take orphaned children who have explicitly lost their parents during armed conflicts and wars into consideration for intercountry adoption.

- Issues of Language

One issue with the HCCH is that it is based on a set of principles that are sometimes explicitly stated and other times implied. These principles are meant to set a minimum standard.<sup>537</sup> However, being more explicit and clear in these views and principles would be beneficial because relying on the understanding of implied language can lead to ambiguities, especially when taken in the context of international use and translations between languages. Three prime examples are detailed below:

*1) Defining adoption and “permanent parent-child relationship” have been areas of criticism.* According to the U.S. Department of State Bureau of Consular Affairs, adoption is defined as follows: “Legally speaking, adoption is the judicial and administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the minor's legal parent and terminates the legal parent-child relationship between the adoptive child and any former parents. Making the decision to adopt is one of the most important choices that you will make in your lifetime. This decision will not only forever change your life, but also the life of a child.”<sup>538</sup> Interestingly, the phrase “permanent parent-child relationship” becomes important when considering the HCCH. Notes within the convention’s Explanatory Report state that, “The text submitted to the second

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<sup>534</sup> Help Centre, Government of Canada *available at* <http://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=1202&top=2> (last accessed Apr. 23, 2016).

<sup>535</sup> *Id*

<sup>536</sup> HCCH. Outline of 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption (January 2013) *available at* <https://assets.hcch.net/docs/e5960426-2d1b-4fe3-9384-f8849d51663d.pdf> (last accessed Nov. 20, 2016).

<sup>537</sup> Ratcliff *supra* note 323 at 347.

<sup>538</sup> Travel. State. Gov US. Department of State, Bureau of Consular Affairs *supra* note 1 under Adoption Glossary.

reading by the Drafting Committee (Work. Doc. No 179) was criticized in as much as the English version ("permanent parent-child relationship") used the word "permanent", and therefore was stronger than the French text. However, no changes were made because of the difficulties to translate into English the French expression '*lien de filiation*'.<sup>539</sup> Furthermore, the subtle effect that the use of language can have on the purpose and functionality of the provisions turns out to be significant to this discussion.<sup>540</sup> Following in that vein, this treaty began as an instrument meant to enable parents to adopt children from abroad, but by the time it was enacted it had become an instrument to enable a foreign child to have a family.<sup>541</sup> From this, we can conclude that language and word choice play a significant role in the interpretation of this document.

2) *Defining adoptability and "due consideration" are issues needing to be resolved.* In the HCCH of 1993 in Article 4(b), the groundwork for determining if a child should be considered adoptable internationally is laid out. To this end, it says that an adoption "shall take place only if the competent authorities of the State of origin... have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests." The phrasing of "due consideration" within that article leaves much ambiguity of what that effort may entail.<sup>542</sup> Critics maintain

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<sup>539</sup> Aranguren *supra* note 44.

<sup>540</sup> Dillon *supra* note 390 at 111-112.

<sup>541</sup> *Id.* See also the original article by Cynthia Price Cohen, *The United Nations Convention of the Rights of the Child: A Feminist Landmark*, 3 Wm. & Mary J. Women & L. 29 (1997).

<sup>542</sup> O'Halloran *supra* note 17 at 163.

that there should be more specifically detailed steps and a timeline within which this effort should occur.<sup>543</sup> For example, Sara Dillon, a researcher of international children's rights, argues that both the UNCRC and the HCCH "leave a substantial degree of discretion to participating states."<sup>544</sup> For this reason, she suggests that it is unclear based on either document whether a country can decline international adoptions based on factors such as the number of children currently in institutions such as orphanages and other care situations.<sup>545</sup> There is a definite need to clarify and define terms when discussing the prospect of intercountry adoption.

3) *Article 33 of the HCCH of 1996 states*, "If an authority... contemplates the placement of the child in a foster family or institutional care, or the provision of care by *Kafala* or an analogous institution, ... it shall first consult with the Central Authority or other competent authority of the latter State."<sup>546</sup> This wording leaves open the question of whether it applies to children who might go to live with extended family in an outside nation. Netherlands proposed a clarification on this issue, asking if it suffices for a child to reside in another Contracting State with extended family or if only nuclear family would be considered.<sup>547</sup> This issue about defining the phrase "family of origin" demonstrates how the language of the HCCH provision has led to questions about its mechanics and has left many of these questions unanswered.<sup>548</sup> However, even if this particular matter is to be clarified

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<sup>543</sup> *Id*

<sup>544</sup> Dillon *supra* note 390 at 495-496.

<sup>545</sup> *Id.*

<sup>546</sup> HCCH. 1996 *supra* note 46 at the overview chapter 1.

<sup>547</sup> Practical Handbook on the Operation of the 1996 Hague Child Protection Convention, 151 HCCH (2014) available at <https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf> (last accessed Dec. 4, 2016).

<sup>548</sup> *Id.*

and resolved by the HCCH, it still does not address specific scenarios that might involve orphaned children with no discernible family members or foundlings who have been abandoned without a trace of their heritage or family lines.

- Visas or citizenship issues

Although the HCCH helps to bring potential adoptive parents and children together internationally, it does not assist with granting visas or citizenship. The issue of citizenship and alien status could pose a problem with a placement of a child if it may be disrupted later when the child must obtain official documentation. This is a problem that should be a point of future focus for the HCCH so that the process of immigration is more streamlined for international adoption cases.<sup>549</sup>

- Making the adoption process more challenging and more rigorous

Another criticism of ratifying the HCCH is that by employing more rules and regulations surrounding international adoptions, it may discourage potential adoptions by nonresidents. The articles of the HCCH are intended to create a more stable and predictable adoption process, but inherently they make the adoption process more challenging and more rigorous. This may lead to a decline in the number of international adoptions.<sup>550</sup> It is evident that a decline has taken place in the total number of international adoptions within the US since the ratification of the HCCH. Before the HCCH was ratified by the US, the total number of international adoptions in 2006 was 20,675, in comparison to a dramatic decrease in 2015 of just 5,647.<sup>551</sup> While many factors may

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<sup>549</sup> JEAN NELSON-ERICHSEN, *INSIDE THE ADOPTION AGENCY: UNDERSTANDING INTERCOUNTRY ADOPTION IN THE ERA OF THE HAGUE CONVENTION* 83 (2007).

<sup>550</sup> *Id.* at 76. See also *supra* note Bartholet 306 at 115.

<sup>551</sup> Kevin Voigt & Sophie Brown, International adoptions in decline as number of orphans grows, CNN.COM, Sep.17, 2013, 6:52 AM), <http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/> (last accessed Apr. 2, 2016).

contribute to this decline, one explanation may be due to the increasing level of rigor required to adopt internationally. For example, the HCCH would have a country attempt to match a child in their home country before allowing the child to be adopted internationally. This can take a lot of time, potentially one to four years.<sup>552</sup>

- Paperwork and bureaucracy

Even when parents and children are matched internationally, the wait time can become longer as the paperwork and bureaucracy add more complications to their match.<sup>553</sup> This can add more months and years to the process, as the paperwork must be sent and received between different nations and through different offices.<sup>554</sup>

- Cost issues

Cost is another major factor that may help to explain the significant decrease in international adoptions. An adoption through an HCCH member country can cost around \$50,000 and costs for adoptions continue to rise.<sup>555</sup> The additional bureaucracy brought on by the implementation of HCCH creates potential for even greater increased costs that would likely be passed on to prospective parents. As such, further decline in adoption numbers due to cost factors would be expected if the rigorous standards of the HCCH create more needs in regard to resources to create a Central Authority and provide oversight.<sup>556</sup>

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<sup>552</sup> *Id.*

<sup>553</sup> *See supra* note Bartholet 306 at 115.

<sup>554</sup> Voigt *supra* note 551.

<sup>555</sup> *Id.*

<sup>556</sup> *See supra* note Bartholet 306 at 115.

- Lacking Global Participation

The major world players have ratified it within their countries.<sup>557</sup> For example, Russia and Japan are not currently member countries of the HCCH, among many others.<sup>558</sup> This leaves out many children from being considered “adoptable” and it flies in the face of the HCCH’s main tenet that intercountry adoptions are carried out with the purpose of serving children’s best interests. When Hague member countries and non-Hague member countries cannot work together to adapt their systems to accommodate special adoption cases, the interests of children are not at the forefront of the issue.

- Member Countries Circumvent HCCH

Even though many major countries are contracted States of the HCCH, it is important to note that the majority of intercountry adoptions are taking place outside of this system. This is problematic when member countries are trying to use a subset of rules to sidestep the often-restrictive processes of the HCCH<sup>559</sup> This may be another sign that the HCCH needs to be adjusted and adapted to suit the needs of their members and other countries.

- Failures of the HCCH of 1965

The fact that the 1965 HCCH was too narrowly focused on European countries and situations specific to the 1960s ultimately led to its failure to be employed. It was unsuccessful from the start, with only three countries signing it.<sup>560</sup> There was a reluctance of other countries to become member

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<sup>557</sup> O’Halloran *supra* note 17 at 187.

<sup>558</sup> See HCCH. 1993 under Status Table *available at* <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> (last accessed June 4, 2016).

<sup>558</sup> HCCH. 1996 *supra* note 46.

<sup>559</sup> O’Halloran *supra* note 17 at 187.

<sup>560</sup> HCCH. 1965 *supra* note 299.

States at the time because its provisions and articles proved to be incompatible or opposed to existing domestic laws of individual countries. To aggravate the issue, Article 15 of this convention provides members with the option to ignore any provisions that they deem against their public policy. As such, the convention failed to deliver the uniformity that an international convention of this kind might intend.<sup>561</sup> The lack of sufficient numbers of member nations resulted in the later denunciation by the countries that had originally been signatories of it. Additionally, this 1965 convention has been criticized for its definitions of “consent” and “abandonment” in the relation to an orphan’s status, which complicates jurisdiction over which nation determines the child’s best interest.<sup>562</sup> This of course, can be connected to the primary argument of this study about the term orphan.

- Scholarly Criticisms (Subjectivity of the “Best Interests of the Child” in Article 3 of UNCRC)<sup>563</sup>

The HCCH is founded on the principles established in international instruments such as the UNCRC (1989) and the General Assembly Resolution (1986).<sup>564</sup> The principles of the HCCH are especially influenced by the UN.<sup>565</sup> The UN claims to take its stance based on the principle of “best interests of the child.” The phrase “best interests of the child” can be interpreted in many ways. Unfortunately, a neutral understanding of this phrase is hard to come by and it can be used

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<sup>561</sup> Ryan *supra* note 345.

<sup>562</sup> *Id.*

<sup>563</sup> See Johanna Schiratzki, *Some Reflections on the Principle of the Best Interests of the Child – in the Light of Normality and Exceptions, Defining and Understanding “children” for Legal Research in Scandinavia*, International Family Law, Policy and Practice Vol.1.1, 8-13 (2013) available at <http://www.frburton.com/archive/journal1.pdf> (last accessed Dec. 30, 2017).

<sup>564</sup> U.N. Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986).

<sup>565</sup> HCCH 1993 & 1996 *supra* notes 28-46.

as a legal tool to defend an adult's view of what they desire for the child, rather than what the child may actually benefit from the most.<sup>566</sup> In addition, another aspect that some scholars have criticized about the UNCRC's approach toward the best interests of the child is that the concern for children's interests may not be authentic in its current form, when those interests must be interpreted by adults systematically.<sup>567</sup> By including this phrase, both the UN and HCCH seem to undermine their interest in preserving the best interests of children by being overly broad and unclear in their description of this concept.

Overall, this section is intended to describe in detail the treatment of *Kafala* in its current form to help illustrate ways in which HCCH can be made better and more inclusive. It is a document in need of regular attention to reflect suggested updates and amendments, as its articles play out in the global realm. Adaptations can be made to reflect the needs of *Kafala* and make them more compatible. In order to do so, it will be of utmost importance to first and foremost clarify the tenets and requirements of *Kafala*, while also identifying a case to serve as an indicator for what provisions can be made to work to put the two systems in agreement. Therefore, as HCCH increases its reputation as a global intergovernmental organization and states that it responds to "global needs" as it does on in its official website,<sup>568</sup> it also needs to seek further support and help to make such improvements.

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<sup>566</sup> See Andrew Bainham, *The Privatisation of the Public Interest in Children*, *Modern Law Review* Vol. 53, No. 2, 206–221 (March 1990).

<sup>567</sup> FAMILY LAW POLICY IN NEW ZEALAND, 302 (Mark Henaghan & Bill Atkin, eds., 2007).

<sup>568</sup> HCCH, A world Organisation, About HCCH available at <https://www.hcch.net/en/about> (last accessed Dec. 28, 2017).

## **4.0 CHAPTER 4: PRACTICES IN SELECTED ISLAMIC NATIONS CONCERNING THE FOSTERING OF ORPHANED CHILDREN THROUGH *KAFALA***

### **4.1 PREAMBLE**

As was stated in one of this dissertation's problems, some confusion surrounds *Kafala* in Western countries due to the various differing practices of this institution in Islamic nations. In fact, there are multiple ways in which the practice of *Kafala* in some Islamic nations strays from the strict adherence to Islamic doctrine. Theoretically, these countries are adherents to Islamic law, but some follow tenets more strictly than others. For example, some Muslim-majority nations maintain a separation of governing law and national religion, while others use an Islamic framework as the basis for their legal system. Additionally, some countries have updated the traditional provisions of Islam to fit a more modern system of laws. Finally, a select few Muslim-majority nations follow Islamic law in its most traditional form as the primary legal system, with KSA<sup>569</sup> as notable example. The issue is complicated even further by the many variations of application of Islamic law and the use of other sources of law within the jurisdictions of some Islamic nations. In some countries, Islamic law is the base law that is practiced and followed. In other countries, there is a mixed jurisdiction with use of Islamic law, as well as the country's individual civil law or otherwise.

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<sup>569</sup> O'Halloran *supra* note 17 at 603.

Moreover, in some other Islamic countries, there are individual doctrines practiced that are based on Islamic law, but have distinct differences in their specific orientation toward *Sunni* or *Shiite* practice, and are therefore variations from Islamic law in its truest form.<sup>570</sup> Due to these discrepancies between observances of Islamic doctrine, especially concerning *Kafala*, it is not always a well-understood concept internationally.

With these concerns in mind, it would be advisable to focus on a single nation's practice of *Kafala* in order most effectively adjust international law such as the HCCH. In fact, because KSA practices *Kafala* as defined in Islamic law, it is able to practice it openly and regulate the practice effectively. This above-board version of *Kafala* used in KSA fits with HCCH's anti-trafficking efforts as well. Furthermore, the practice followed in KSA to preserve orphan's names helps to better track biological family lineage, which again suits the needs of HC's intentions. As such, the KSA is able to guarantee better protection of orphaned children through placement by *Kafala*, which is more in line with the mission of the HCCH to provide for the safeguarding and care of children.

The next sections express evidence of the variations in practice of *Kafala* among different Muslim nations. Notably, the individual countries' interpretations of the *Qur'an* and religious texts may dictate their stances on appropriate applications of *Kafala*. This may be influenced by the primary religious doctrine to which the country ascribes.<sup>571</sup> Sometimes the variation between the practices of *Kafala* from one Muslim country to another are so significant that any effort to combine them under one understanding of the term proves to be futile and leads to misunderstandings of the conditions needed to satisfy the practice at its core.<sup>572</sup> Thus, the primary

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<sup>570</sup> *Id* at 609.

<sup>571</sup> Ranger et al., *supra* note 400 at. 33.

<sup>572</sup> *Id* at 10.

principles of *Kafala* that relate to religious laws must be studied and thoroughly understood by the international community before venturing onto the path of making adaptations for accommodation. Nevertheless, regardless of different practices, this dissertation would advocate for anyone from any country with a *Kafala* relationship to be able to utilize the HCCH for international placement and/or family reunification. Those with adoptive relationships just currently have a greater opportunity to use the HCCH as it stands, but *kafala* should receive equal treatment under international law.

## 4.2 ISLAMIC COUNTRIES THAT PRACTICE KAFALA CONSISTENTLY WITH ISLAMIC LAW

The Gulf Cooperation Council (GCC), consisting of KSA, the State of the United Arab Emirates (UAE),<sup>573</sup> the State of Kuwait,<sup>574</sup> the Sultanate Oman,<sup>575</sup> the State of Qatar,<sup>576</sup> and the Kingdom of Bahrain,<sup>577</sup> provide similar conditions for the fostering as KSA. Hence, they utilize *Kafala* for the placement of orphaned children, especially in cases of abandoned children.

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<sup>573</sup> Fatima Al Shaali, "*Ehtidan*" A program Allows Emirati Families to Foster Unknown Parents, AL-BAYAN NEWSPAPER, April 03, 2013 available at <http://www.albayan.ae/across-the-uae/news-and-reports/2013-04-03-1.1854711> (last accessed Jan 9, 2018) (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>574</sup> The Official Gazette of Kuwait, Law No. 80 of 2015, *Regarding Family Foster Care (Ehtidan)* KUWAIT TODAY NEWSPAPER, available at <http://kuwaitalyawm.media.gov.kw/> (last accessed Jul 7, 2017).

<sup>575</sup> U.N. Committee on the Elimination of Discrimination against Women: Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW /C/OMN/1 (2010).

<sup>576</sup> Karam Alhaliwi, *The Waiting List of the Foster' Parents More Than the Orphaned Children*, AL-WATAN NEWSPAPER, January 31, 2013 (6360) available at <http://archive.al-watan.com/viewnews.aspx?d=20130131&cat=statenews4&pge=3> (last accessed June 29, 2017) (Trans. interpretatively from Arabic to English by the author of the dissertation).

<sup>577</sup> Bahr. Ministry of Labor and Social Development, Family Sponsorship Committee available at <http://www.mol.gov.bh/childhood/childhood-welfare/family-fostering-unit> (last accessed June 29, 2017).

These countries of the GCC adhere more closely to the practice of traditional Islamic law, especially regarding personal status law, which includes provisions about *Kafala*, as they relate to inheritance, custody, and divorce. Despite that, some of the nations of the GCC may practice mixed jurisdictions, employing individual national laws in areas of trade and others. Contrastingly, the KSA does not. Given this information, KSA still maintains a unique qualification of practicing Islamic law as its sole legal system. It therefore is a working example of the requirements of the *Kafala* system as outlined in Islamic doctrine.

#### **4.3 ISLAMIC COUNTRIES THAT PRACTICE *KAFALA* INCONSISTENTLY WITH ISLAMIC LAW**

Most of the countries that are located on the African Continent, such as Morocco, and Algeria follow *Kafala*, but have an inconsistent application and are not in full compliance with all the mechanics of Islamic law. Indeed, numerous Muslim nations employ what are called *Kafala* guardianships in their jurisdictions using their individual country law, such as in the case of the Algerian court system.

However, the rules and conditions as practiced by these nations, do not actually fall within the rules of *Kafala* guardianships as dictated by Islamic law. Instead, Islamic nations, if they are to adhere to Islamic law, should practice a prohibition of adoption in their jurisdictions. Yet, contradictory practice is evident in their actual application of the law. Proof of this kind of inconsistent practice is made clear in some legal proceedings. For example, the act of granting a child the last name of the adoptive parents, as happens in the case of *Harroudj v. France*, does not appear to have followed the applicable law prohibiting such a practice, as it is included in the legal

provisions of Algeria, which are based on Islamic law. Demonstrative evidence is provided regarding Algeria and Morocco, which are Muslim-majority countries following legal systems based on Islamic law and are located in the Northwest region of the African continent in the Maghreb region<sup>578</sup>. Notably, as Pew statistics estimate, these two countries had the second and third largest Muslim populations respectively in the Middle East in 2011.<sup>579</sup>

- Algeria

Its legal system is based on French and Islamic law.<sup>580</sup> The evidence that Algeria does not follow Islamic law consistently is demonstrated via the *Harroudj v. France* case law, in which the child was granted the guardian's last name:

The facts of the *Harroudj v. France* case and their significance were already discussed in Chapter 3 to highlight France's reaction to *Kafala* as a Western nation. However, in this chapter, it is brought up as evidence of an inconsistent practice of Islamic law, where a name change was granted by the child's home country of Algeria. This act violates the tenets of Islamic law, which aims to protect biological lineage. Consequently, this is a prime example of a ruling that is inconsistent with Islamic law in that it is not allowable for a child of *Kafala* to have their name changed to match their adoptive parents. This is clearly prohibited under Islamic law, and yet was granted by the court of Bordj Menaiel (Algeria). Furthermore, the name change was not ultimately of assistance to the case in France, as the Lyons Court of Appeals in France argued that a name change is not enough evidence to establish a guardianship. The court cited an executive decree,

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<sup>578</sup> See Jacobs, Michael D., *Hegemonic Rivalry in the Maghreb: Algeria and Morocco in the Western Sahara Conflict* (2012) available at <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=5282&context=etd>

<sup>579</sup> *Supra* note 53 The Future of the Global Muslim Population, Region: Middle East-North Africa available at <http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-middle-east/> (last accessed Feb 12, 2017).

<sup>580</sup> *Algeria*, ARABRULEOFLAW, <http://www.arabruleoflaw.org/countryprofiles/algeria.html> (last accessed Feb 20, 2017) See also LEONARD WOOD, ISLAMIC LEGAL REVIVAL, RECEPTION OF EUROPEAN LAW & TRANSFORMATIONS IN ISLAMIC LEGAL THOUGHT IN EGYPT, 1875-1952, 107 (2016).

which established that a name change is not necessarily indicative of the holder of the right of the *Kafala* guardianship. Yet, while the French court acknowledges that *Kafala* is a satisfactory relationship that preserves the best interests of the child they also use that same reasoning to deny the appeal for adoption status, stating that the *Kafala* serves the child as it stands and an adoption is not necessary.

Furthermore, even though the provisions of Algerian family law prohibit adoption (*al tabanni*) in Article 46 under the Algerian Family Code and it establishes *Kafala* as an alternative to adoption under Article 116,<sup>581</sup> the practice remains inconsistent. *Harroudj v. France* brings to light the absence of law implementation where the ruling judge does not adhere to the law appropriately as it is written—in this case specifically under Islamic law followed by the court’s nation. In this situation, the practice of *Kafala* in Algeria does not appear to be administered as it is intended and outlined by the *Qur’an* and *Sunna*

- Morocco

As a former French colony, achieving independence in 1956, Morocco observes a legal system based on a combination of French civil law along with Islamic law, with inclusion of some Jewish traditions.<sup>582</sup> Morocco is not currently a party to the HCCH of 1993, but intercountry placements through *Kafala* can be arranged through international adoption agencies, such as Hopscotch Adoptions.<sup>583</sup> However, despite using *Kafala*, Morocco is varying in its adherence to Islamic law in its practice.

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<sup>581</sup> Kinsch *supra* note 493 See also DARIUSCH ATIGHETCHI, ISLAMIC BIOETHICS: PROBLEMS AND PERSPECTIVES 139 (2007).

<sup>582</sup> Netty Butera and Kevashinee Pillay, Update: Introduction to the Moroccan Legal System (2013) *available at* <http://www.nyulawglobal.org/globalex/Morocco1.html> (last accessed Jul. 7, 2017).

<sup>583</sup> *Morocco Adoption Agency: Muslim Families and Adoption*, HOPSCOTCHADOPTION, <http://www.hopscotchadoptions.org/pages/morocco.html>. (last accessed Jan. 3, 2018).

For example, types of *Kafala* for children are divided into two sorts in Morocco: a) the judicial *Kafala* and b) the notary-certified *Kafala*. These two types are sometimes referred to as extra-familial and intra-familial.<sup>584</sup> The judicial *Kafala*, or extra-familial type, only regards abandoned children who are permanently placed in orphanages; such children often include those who have known and unknown family affiliations.<sup>585</sup> With respect to notary-certified *Kafala*, or intra-familial type, it is used exclusively for children with known family affiliations. Traditionally, this form of *Kafala* was used for placements within the same family setting.<sup>586</sup> However, this does not uphold Islamic principles given that Islamic law specifies that it should be reserved for orphaned children. This type of *Kafala* is then equivocal with Islamic principles, in that it may include children who are not considered orphans.

While intra-familial *Kafala* is traditionally used for children with known family members who can take custody should biological parents be unable,<sup>587</sup> but it does not actually follow the guidelines of Islamic law in that it involves children with known parentage. For example, this might occur where a cousin, whether from the father's or mother's side, would be willing to take care of children as a favor to the family. Therefore, this traditional matter is legal to practice, as long as there is no filial relationship requiring transfer of name or inheritance over the limit of one-third of the estate, but we cannot call it *Kafala* because *Kafala* as outlined in Islamic law is solely for orphaned children.

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<sup>584</sup> See Malingreau *supra* note 399 at 404.

<sup>585</sup> Marianne roux-bouzidi, *The Kafala, an adoption that is not an adoption (1) available at* <http://eng.babelmed.net/cultura-e-societa/74-marocco/13064-the-kafala-an-adoption-that-is-not-an-adoption-2.html> (last accessed Jul 4, 2017) *See also* *The Kafala, an adoption that is not an adoption (2) available at* <http://eng.babelmed.net/cultura-e-societa/74-marocco/13063-la-kafala-an-adoption-that-is-not-an-adoption-1.html> (last accessed Jul 8, 2017)

<sup>586</sup> *Id.*

<sup>587</sup> *Id.*

As an example, to provide evidence that these inconsistent practices are indeed taking place, I can share an anecdote. A friend of mine from Morocco was abandoned as a child. Her biological mother left her in the hospital after she was delivered. Subsequently, a Moroccan Muslim family used adoption as a means to take custody of her, which by itself is obviously in violation of Islamic law. Additionally, she took the same last name of the adoptive family, which is also not a sanctioned practice of Islamic law. These inconsistencies represent how countries may practice *Kafala* in name only and the manner under which the practice of adoption took place may be concealed,<sup>588</sup> as happened in the case above. As evidence Bargach stated “And while historically there have been, and still continue to be, various intra-family exchanges of children outside legal frames and the practice of Islamic tutelage, *Kafala*, the Muslim world, as elsewhere, is experiencing the problem of abandoned children as a by-product of deep social permutations.”<sup>589</sup>

A further example is brought up in the case of X and Y,<sup>590</sup> discussed in Chapter 3. In this case, the Moroccan Court approved the transference of a family name as well as an order of inheritance for a child along with an order of *Kafala*. This case elucidates the fact that Islamic countries may practice *Kafala*, but the individual rulings of the courts may go contrary to Islamic law.

At the same time that these inconsistent practices are taking place, Morocco has legal articles under its family law that appear to follow Islamic principles, such as in Article 149 where it states, “Adoption has no legal value and does not result in any of the effects of legitimate

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<sup>588</sup> Bargach *supra* note 4 at 43.

<sup>589</sup> See Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption*, Vol. 11. 18, Law and Society ISIM, NEWSLETTER (2002) available at <https://openaccess.leidenuniv.nl/handle/1887/16830>. (last accessed Jan. 3, 2018).

<sup>590</sup> Ranger et al., *supra* note 400.

filiation. ‘Gratitude adoption’ (*jaza*) or ‘testamentary adoption’ (*tanzil*) cannot prove paternity, and are subject to the terms of the testament.”<sup>591</sup> This article shows that there is no legal permanent parent-child relationship created through adoption and would not allow for matters of inheritance.

In effect, it is contradictory for Morocco, as a Muslim country, to exercise these adoption practices as stated in the evidence above, even though Islamic law prohibits it. International adoption and notary-certified *Kafala* are not in line with tenets of Islamic law. Ultimately, these practices that are happening in Morocco demonstrate the kinds of departures taken by Islamic countries from applicable Islamic law regarding adoption and *Kafala* as designated by social religious principles. The differences in interpretation and application of *Kafala* between Muslim countries can create misunderstandings about what kinds of modifications would be needed to allow for this practice internationally.

#### **4.4 ISLAMIC COUNTRIES THAT PRACTICE ADOPTION EXPLICITLY**

The following countries are Muslim-majority nations, like the countries discussed above, but they practice adoption explicitly instead of *Kafala*: Tunisia, Indonesia, Malaysia, Somalia, and Turkey.<sup>592</sup> Some of the specific practices of each country will be presented here.

- Turkey

Turkey is a majority Muslim country with a parliamentary democracy with a Constitutional Court overseeing adherence to its 1982 Constitution. Turkish Civil Code has been influenced by

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<sup>591</sup> Moroccan Family Code (Moudawana) of February 5, 2004, Book Three: of Birth and Its Effects, Title One: Of Filiation and Paternity.

<sup>592</sup> Muslim Women’s Shura Council *supra* note 15.

European law.<sup>593</sup> Adoption has been instated since 2001 in Turkish Civil Code Article 305–320. After the enactment of the new law, the country also established cooperation with HCCH on intercountry adoption.<sup>594</sup>

- Tunisia

Tunisia is a republic employing civil law, and is founded based on a Constitution. Twenty-three zones make up the Republic, each having its own local government.<sup>595</sup> Tunisian law began using the practice of adoption of children on March 4, 1958 via Articles 8 and 16 of the Personal Status Code.<sup>596</sup> At the same time that Tunisia requires prospective adoptive parents to be nationals of the same religion as the child, it strays away from Islamic law by allowing for full adoptions with legal status and the resulting changes in filiation.<sup>597</sup> Additionally, they institutionalized *Kafala*. While some supporters suggest that it may help reduce social stigma, scholars are clear about the fact that the permitting of adoption is a break from Islamic law and note that other neighboring Muslim countries have not adopted this approach.<sup>598</sup>

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<sup>593</sup> Government and Legal System, Turkey at a Glance *available at* <http://www.columbia.edu/~sss31/Turkiye/gov-system.html> (last accessed Jun. 28, 2017).

*See also* Serap Yazici, A Guide to the Turkish Public Law Order and Legal Research (2006) *available at* [http://www.nyulawglobal.org/globalex/Turkey.html#\\_Legal\\_Sources\\_of\\_Turkish\\_Law](http://www.nyulawglobal.org/globalex/Turkey.html#_Legal_Sources_of_Turkish_Law) (last accessed Jun 28, 2017).

<sup>594</sup> Wendy Zeldin, *Adoption Law: Turkey*, (May 2013) *available at* Library of Congress [https://www.loc.gov/law/help/adoption-law/turkey.php#t\\*](https://www.loc.gov/law/help/adoption-law/turkey.php#t*) (last accessed Feb 10, 2017) *See also* Joseph *supra* note 174 at 5-6.

<sup>595</sup> Info-Prod Research (Middle East) Ltd, Tunisia, Legal review *available at* <http://www.infoprod.co.il/country/tunis2a.htm> (last accessed Feb 12, 2017).

<sup>596</sup> Committee on the Rights of the Child, *Initial reports of States parties due in 1994: Tunisia*, UN Doc. CRC/C/11/Add.2, paras. 22-23, 62, 64-65, 83-86, 129-138 (1 June 1994).

<sup>597</sup> *Supra* note 75 in chapter 2 International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC).

<sup>598</sup> LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY 148 (2007).

- Somalia

The basis for Somalia's government is a federal parliamentary republic.<sup>599</sup> As a Muslim majority country, parts of its legal system are sourced from Islamic law.<sup>600</sup> For this reason, it is common practice for people of Somalia to utilize the *Kafala* system to care for less fortunate children.<sup>601</sup> However, it is also domestically legal in Somalia to practice adoption as established by the Code of Personal Status of Somalia Articles 110-115.<sup>602</sup> However, in this situation, the practice of adoption is dependent on the prospective guardian's religion, given that under Islamic law, full adoption is prohibited.<sup>603</sup> The ambiguous nature of the situation is that the UNCRC was ratified in 2015, but with reservations about the potential for manipulation of the system based on freedom to choose one's religion, thereby allowing a prospective parent to forgo the Islamic law.<sup>604</sup>

- Malaysia

In Malaysia, the primary source of law is from the Federal Constitution, which is secularized.<sup>605</sup> A parliament and a judiciary comprise the federal government system. This serves as the supreme law of the land in Malaysia, but there is use of Islamic law on a personal level to be used by Muslim people for issues such as marriage, divorce, and other events of this nature.<sup>606</sup> Thus, its law is sourced from Islamic law and customary law.<sup>607</sup> Despite the fact that the majority of the population

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<sup>599</sup> The world Factbook, Central Intelligence Agency, Somalia *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last accessed Jun 28, 2017).

<sup>600</sup> Muslim Women's Shura Council, *supra* note 15.

<sup>601</sup> UNICEF. Situation Analysis of Children in Somalia 2016

<sup>602</sup> Atighetchi *supra* note 581.

<sup>603</sup> See Department of State, United States of America, Intercountry Adoption (2013).

<sup>604</sup> U.N. Security Council, *Report of the Secretary-General on Somalia January 2015*, 23 January 2015, S/2015/51 *available at* <http://www.refworld.org/docid/54d377d74.html> (last accessed 7 July 2017).

<sup>605</sup> Sharifah Suhanah Syed Ahmad, Introduction to the Sources of Law in Malaysia *GlobaLex* (February 2012), *available at* [http://www.nyulawglobal.org/globalex/Sources\\_Law\\_Malaysia.html](http://www.nyulawglobal.org/globalex/Sources_Law_Malaysia.html) (last accessed Jun 29, 2017).

<sup>606</sup> *Id.*

<sup>607</sup> UNCRC, *Committee on the Rights of the Child Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, Initial report of States parties due in 1997

in Malaysia is Muslim,<sup>608</sup> adoption is allowed and has developed legal provisions for use by its non-Muslim population,<sup>609</sup> while Muslims use *Kafala*. Through Act 257 and the Adoption Act of 1952, the right and processes for adoption in Malaysia were established.<sup>610</sup> However, the Act notes that this right does not extend to Muslims, due to restrictions of Islamic law on matters of adoption.<sup>611</sup> A second piece of legislation governs adoption for Muslim individuals called the Registration of Adoptions Act 1952. This Act has some key differences that make the adoption process more compatible with Islamic law, namely issues of lineage and inheritance. Adoptions have been made to accommodate and therefore allow for adoption of Muslim children to Muslim parents, such that the original lineage is preserved with documentation and the inheritance remains linked to the birth parents. In this case, the Malaysian legislation provides for the ability of adoptive parents to designate up to one-third of their estate to the adopted child in line with Islamic law.<sup>612</sup>

- Indonesia

Indonesia has both written laws and unwritten laws. The written laws include the constitution, acts and government regulations that take the place of acts, presidential decrees, and regional regulations. The unwritten laws of Indonesia include customs, Adat law, Syariah Law principles, doctrine, and jurisprudence.<sup>613</sup> There are several main legal instruments utilized in Indonesia to

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Malaysia, UN Doc. CRC/C/MYS/1 (22 December 2006) at 10 *available at* [http://www.bayefsky.com/reports/malaysia\\_crc\\_c\\_mys\\_1\\_2006.pdf](http://www.bayefsky.com/reports/malaysia_crc_c_mys_1_2006.pdf) (last accessed Mar 9, 2018).

<sup>608</sup> World Factbook *available at* <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html>

<sup>609</sup> Law of Malaysia Act no. 253, Registration of Adoptions ACT 1952, incorporating all amendments up to 1 January 2006.

<sup>610</sup> Laws of Malaysia Act 257 Adoption Act 1952, An Act to provide for the adoption of children, 25 June 1953, L.N. 319/1953 *available at* [http://www.jkm.gov.my/jkm/uploads/files/reg%20of%20adop%20act%20257\(1\).pdf](http://www.jkm.gov.my/jkm/uploads/files/reg%20of%20adop%20act%20257(1).pdf) (last accessed 7 July 2017).

<sup>611</sup> *Id* at. 28

<sup>612</sup> Malaysia Adoption *available at* <http://malaysiaadoption.org/adoption/muslim-adoptions/> (last accessed Jul 7, 2017) *See also supra* note 607 UNCRC at 27.

<sup>613</sup> Alamo D, Laiman et al., *The Indonesian Legal System and Legal Research* GlobaLex (July 2011), *available at* <http://www.nyulawglobal.org/globalex/Indonesia.html#sourcesoflaw> (last accessed Jul 7, 2017).

regulate adoption including Law No. 35/2014 on Child Protection, Regulation of the Minister of Social Affairs of the Republic of Indonesia 110/HUK/2009, concerning Eligibility Requirement for Adoption, Regulation of Director General of Social Rehabilitation No. 02/2012, on the Technical Guidance of Adoption Procedure.<sup>614</sup> Notably, another important regulation has been the Government Regulation No. 54/2007 on Implementation of Adoption, which controversially impacted the minority religions in Indonesia from adopting children of another religion.<sup>615</sup>

The Muslim population of the country follows Syariah law, while secular law exists for the rest of its population. In regard to its position on child placement, as with Tunisia, restrictions are in place for the national status and the religion of the applicant for adoption, but resulting adoptions incorporate legal changes in filiation that are not in line with Islamic law.<sup>616</sup>

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<sup>614</sup> General Understanding on Adoption in Indonesia, SAYAPIBUJAKARTA.ORG., <http://sayapibujakarta.org/prosedur-pengangkatan-anak-intercountry-oleh-warga-negara-asing/>.

<sup>615</sup> Andreas Harsono, *Laws Restrict Adoptions of Unknown Children to 'Religion of the Majority', Indonesia's Religious Minorities Denied Adoption Rights*, HUMAN RIGHTS WATCH (Oct. 23, 2017 4:28PM), <https://www.hrw.org/news/2017/10/23/indonesias-religious-minorities-denied-adoption-rights>. (last accessed Jan. 3, 2018).

<sup>616</sup> ISS/ IRC *Supra* note 97 in chapter 2.

**Table 4.** Selected Majority Muslim Countries and Recognition of *Kafala*

<b>Country</b>	<b>Percentage of Muslims</b>	<b>Recognize <i>Kafala</i></b>
Algeria	97.9	Yes, but in some cases, it is practiced inconsistently with Islamic law
Morocco	99.9	Same as Algeria
Turkey	98.0	No, just recognizes formal adoption and is party to HCCH (1993)
Tunisia	99.5	Recognizes both <i>Kafala</i> (as a formalized system) and formal adoption
Somalia	99.8	Practice <i>Kafala</i> but have laws to legalize formal adoption
Indonesia	87.2	Same as Somalia
Malaysia	63.7	Same as

According to Pew Research in 2010 that the percentage of Muslims takes 23.2% among the other religions.<sup>617</sup> In this chart, it can be noted that most of these countries above are estimated to have more than fifty percent of their population identify as Muslim. Yet, each of these countries (Turkey, Tunisia, Somalia, Indonesia, and Malaysia) provides a statutory form of adoption

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<sup>617</sup> The Global Religious Landscape, PEWFORUM.ORG. (December. 18, 2012), [hereinafter Pew Research Centre], <http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/> (last accessed Jan. 6, 2018).

domestically, and some internationally as detailed.<sup>618</sup> Despite the interests of their represented populations, such that each of these five countries has a significant majority of Muslim people and a legal influence by Islamic law, each provides a method to practice adoption.

#### **4.5 THE IMPACT OF INCONSISTENT PRACTICE OF *KAFALA* ON THE INTERNATIONAL PERSPECTIVE**

The understanding of this fostering system and its various versions in practice is essential for understanding how the law is applied throughout the Muslim world. Misconceptions abound about the use of *Kafala* for children based on the practices displayed in many Muslim nations, making it a very difficult subject to deal with, especially when this contradictory practice is presented as being a part of Islamic law. Due to the misuse of the term *Kafala*, many Western scholars have come to learn about this institution by observation of some Muslim nations, which may or may not be utilizing *Kafala* appropriately. For example, an observer might assume that *Kafala* may be used for children in general based on observations of some Islamic countries' practices (as some may disregard its specificity for orphans set out in Islamic texts), which would therefore be an incorrect conclusion.

Thus, in essence, many Muslim countries are using the term *Kafala* too broadly, (*i.e.*, not the exact practice from the *Qur'an* and *Sunna's* principles, which creates the possibility for ambiguity in the immigration laws of western countries.) The manipulation of the true practice of *Kafala* is occurring in some Islamic countries because it makes the immigration of children easier.

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<sup>618</sup> O'Halloran *supra* note 17 at 604.

As such, the best source of information on *Kafala*'s requirements would be original documents, such as Islamic texts and scholars, and countries that follow Islamic law directly. Consulting original sources and using countries adherence to Islamic law to allow the needs of *Kafala* to be understood and communicated more clearly so that proper accommodations can be made internationally. For example, Saudi Arabia's legal system may serve to demonstrate a Muslim nation whose legal system is well-suited for the protection of orphaned children. Given the fact some Muslim countries do not practice *Kafala* as outlined in Islamic law, as previously discussed, their legal systems intended to care for orphaned children more ambiguous and are therefore not suitable models.

In its current form, the inconsistent practice allows for confusion from a global perspective. This can be seen in the variation of cooperation by nations around the world with the recognition of and practice of *Kafala*. Some Western nations might believe that applicants seeking recognition of their *Kafala* guardianship over a child want to have their rights converted into an adoption based on assumptions. Observations by outsiders of countries practicing *Kafala* inconsistently might even confirm such a precedent. However, this practice actually violates Islamic law and is therefore not the most desirable outcome.

Instead of a conversion, a better accommodation would for nations to allow and recognize guardianships such as this and to provide for specifically designed provisions regarding *Kafala* in their legal systems.<sup>619</sup> While there is debate over the best method of delivery for acknowledging *Kafala* through legal provisions,<sup>620</sup> I would say that necessary adaptations for proper practice can

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<sup>619</sup> See Durham *Supra* note 445 at 92 from the best solution idea.

<sup>620</sup> *Id.*

be developed by international bodies such as the HCCH, which might serve as the easiest route for international integration of the adoption system involving cases of *Kafala*.

## 5.0 CHAPTER 5: GENERAL CONCLUSION: RECOMMENDATIONS FOR ADDRESSING THE THESIS'S PROBLEM AND RESULTS OF ANALYSIS

### General Conclusion

This dissertation has examined numerous types of laws in domestic legal systems and international conventions; this includes the religious-based Islamic law of the KSA, the private international law of the HCCH, family law, and immigration law. This has examined with careful consideration of the fact that the majority of countries worldwide practice adoption, yet nonetheless there are a significant number of Muslim countries whose laws and ideologies do not allow for adoptions to be practiced due to religious causes that favor an alternative system known as *Kafala*. As such, three main arguments have been discussed as part of the problematic: first, the lack of study written in English regarding the practice of *Kafala* in KSA under Islamic law as it is set out in *Qur'an* and *Sunna*; second, the need for clarification of *Kafala* in international instruments, such as the HCCH; third, the consequences of the observation of varying practices of *Kafala* in Muslim nations, which may be misleading for Western nations. However, the core of this dissertation has aimed to compare the two systems of child placement, that of international adoption as under the HCCH and *Kafala* fostering as in the KSA.

During the analysis process, the differences have been outlined in the first chapter under the mechanisms. With this, inferences have been made within these discussions, and contrasts between these systems have been critically analyzed first separately and then compared. Unquestionably, child placement under Islamic or international law must be within the purview of the setout legal instruments. Obviously, according to Islamic laws, the recognition of descent is

only by blood or genetic ties. Consequently, there are different ways in which these two laws apply to a child's placement, such as who should adopt the child and the child's rights, among others.

In fact, a gray area still exists in the matter of understanding the rights of orphaned children regarding to the *Kafala* "fostering" under Islamic law. For that reason, this study is in the first to aim to well define these terms and concepts in regard to focusing on a single country's practice and mechanisms of *Kafala* via its legal system. While this proposals of this study does not aim to change the behavior of countries who would practice *Kafala* by all the exact specifications of Islamic law, it can advocate for the needs of *Kafala* using a case study of the KSA to help make clear the needs of international adoption alternatives, in the way that would be required by Muslim countries who require the most adjustments to adhere to the Islamic law in international child placements. In this way, the adaptation made by the HCCH will be sufficient to suit the needs of all Muslim countries in accordance with their following of Islamic law. To that end, the KSA in chapter 2 serves as a valid case study to allow the international community a chance to better understand the background of the system, as well as appropriate accommodations needed to integrate this alternative to adoption into current international child placement systems.

One of the global issues in this dissertation is the rate of immigration all over the world has grown tremendously. The increase is instigated by the high poverty prevalence, insecurity, and search for a better life. Nonetheless, immigration of Muslim people is on the rise for a multitude of reasons such as political asylum seekers, as well as civil unrest starting from 2010 in several Muslim nations, etc. Therefore, the orphaned children are suffering in their lives to get help and to seek foster services under Islamic law's principles internationally. Even with the recognition of *Kafala* under the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of

Children. The analysis clarified that reunification through immigration and other *Hijra* immigration guidelines have been the most difficult to interpret among HCCH's member states using this term *Kafala* (fostering). Consequently, the first result of this study's analysis would be to encourage the recognition of the *Kafala* system worldwide properly, so as to better assist Muslim people who are increasingly immigrating in general to western countries, most of whom are party to HCCH.

The treatment of *Kafala* by the HCCH and its member States has been examined in Chapter 3 are brought up to reinforcement this dissertation's decision to recommend the amendment of the articles of this 1993 Convention to specifically address *Kafala* and add mechanisms that will make it more comprehensible internationally. In essence, the arguments provide further cause to advocate for countries to not just acknowledge *Kafala* but to recognize it as a functional equivalent to adoption in countries where Islamic law prohibits traditional adoptions for reasons based on specific rights such as transfer of name and inheritance, etc. When language such as "falling short" or "falling outside the scope" is used in the HCCH documents, it insinuates that *Kafala* is somehow less legitimate than an adoption. *Kafala* should not be considered to be inferior to adoption, rather different but equal to given that it is the closest corresponding system in countries practicing Islamic law. Nevertheless, of course, Muslim societies are grateful for *Kafala* to be included as an important focal in the 1996 HCCH Convention because this represents a positive step towards recognition and inclusion. Still, it does not specifically outline how *Kafala* can be integrated with its current system, leaving some obstacles in the way of its full employment, specifically by using language that is not definitive and open to interpretation.

Further treatments of *Kafala* by some HCCH member States have been examined in depth in chapter 4. As such, these differences in acceptance can reveal misunderstandings about the institution based on some of the accommodations and language used in the country's position statements, such as the

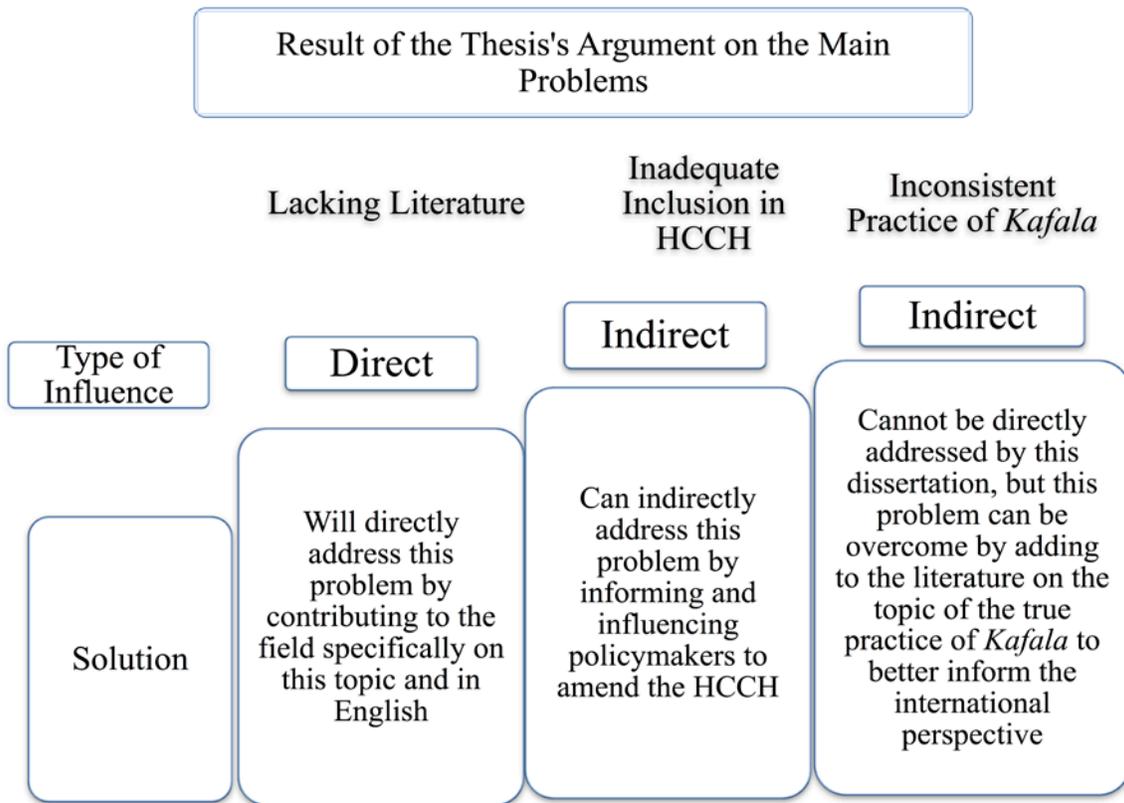
obligation to the HCCH. This may be in part due to the practices of some Muslim nations who have adopted the rules of *Kafala* to allow for the fostering children through adoption and practices contrary to Islamic provisions such as name change. Having the KSA as a case study allows us to focus the advocacy using one example rather than having to justify for the full variety that encompasses *Kafala* practice around the world.

As shown in this dissertation, a problem that comes up repeatedly is a failure to recognize that *Kafala* is intended only for orphaned children. For example, some adaptations in various countries' laws have attempted to make room for parental rights to be transferred in cases involving *Kafala* relationships, but many make mention of biological parent's rights or living family ties, such as referring to placements with aunts or uncles. However, *Kafala* in its truest form as it is practiced in Islamic law under the KSA translates most closely as a fostering "*Ehtidan*" and as a Charity "*Sadaqa*". *Ehtidan* serves as an equal cultural institution analogous to adoption in western countries, with the exception that it is reserved solely for orphaned children, those who no longer have living parents, as was discussed in Chapters 1 and 2. This misunderstanding of the fact that the children being cared for under this institution would not have parental rights to be terminated creates complications by introducing references to this process and extending normal adoption procedures to *Kafala*, without speaking specifically to adapting procedures for those without biological parents or relatives. To sum up this dissertation, the results of the legal analysis and recommendations have been elaborated below.

### **Results of Analysis**

The chart below depicts how the thesis influences the three main problems in regard to how it is able to provide a solution. The need of the main problem of not having enough literature in the field can be directly addressed by writing about this topic in English. The second issue requiring a changed to HCCH articles can only be addressed indirectly through influence over policymakers

who have the power to change the HCCH. In regard to the final issue of inconsistent practice of *Kafala* in various Muslim nations, a direct solution is not apparent, because global enforcement of adherence to this system is not likely. However, this issue can be overcome by continuing to add to the literature on this topic with specific focus on the true practice of *Kafala*, rather than individual practice within each country, so that it can be better understood internationally.



**Figure 6.** Result of the thesis's argument on the main problems

The analyses address the statement of problems in the following ways:

- Clarification of Islamic law in Saudi Arabia concerning “foster” rules and an exploration of the *Kafala*.
- Clarification of the impact of the lack of cooperation worldwide with regards to fostering under Muslim rules.

- Clarification of how some Muslim countries practice the rules of *Kafala* in different ways, resulting in misconceptions of the requirements of *Kafala* itself.

These methods help to illuminate the practice of *Kafala* so that it can be better understood and incorporated into western countries' adoption practices. Also, to focus the results of the analysis, this study concerns *Kafala* as it is practiced under the implementation of Islamic law in the KSA, which closely adheres to a strict interpretation of Islamic law. One issue is that not all Muslim countries practice *Kafala* under their jurisdictions. In fact, while some Muslim countries recognize the term *Kafala*, they do not practice it in a legal condition as it is set out in *Qur'an* and *Sunna*. As a result of these issues, in-depth discussion is necessary since the law of the KSA in regard to *Kafala* has been not been well documented academically or in scholarly sources.

Of course, the foremost analysis regarding the mechanisms of adoption as under HCCH and *Kafala* (fostering) under KSA are listed in the overview chapter. The results after analysis of the mechanisms illustrate that the two systems are not totally compatible in their current form. Indeed, the mechanism concerning the bond created between guardian and child makes up the primary obstacle between them.

The implication of the differential analysis is that there is a need to compare how effective Islamic and international laws are with respect to fostering orphaned children. Although a majority of countries worldwide recognize the practice of adoption, a significant number of countries in Asia and Africa do not recognize it and many of those countries may currently have a great need for displaced children due to conflicts and civil wars as happened in the Middle Eastern countries lately. This increased demand for child placement demonstrates why it is necessary to determine the effectiveness of international fostering and adoption options.

Examining this issue with consideration for the fact that many Muslim countries laws and ideologies do not allow for traditional adoptions, the importance of this dissertation's analysis is such that it encourages the proper recognition of the *Kafala* system worldwide. This in effect will assist Muslim people who are increasingly immigrating to western countries many of whom are party to HCCH. As such, challenges arise now where these migrants subsequently wish to care for orphaned children as they had previously.

In this regard, the articles of the HCCH that relate to adoption in this case were analyzed along with the individual members parties' acceptance and/or ignorance of the *Kafala*. In many cases, the analysis indicated proof of the conclusion that in order to satisfactorily change HCCH to accommodate *Kafala*, a clearer understanding of the requirements under Islamic law are necessary. Thus, the results corroborate the assertion that modification of HCCH articles concerning *Kafala* will be crucial to finding agreement with Islamic law.

Consequently, despite some efforts of international treaties on adoption to provide for methods of adoption of children from Muslim nations under *Kafala* rules, it has been without clarity on its exact rules in accordance with Islamic law. Indeed, it would be unfitting to refer such accommodations as *Kafala* because Islamic law designates that this institution is intended exclusively for orphaned children and requires that the guardian, the *kafil*, be Muslim in order to maintain religious values, avoid prohibited marriages, and to ensure preservation of the Islamic inheritance system. More specific mechanisms would need to be in place for the *Kafala* to truly work in conjunction with the international adoption system without going against Islamic law and cultural traditions.

It is appropriate now especially for the HCCH to reconsider its articles, especially with current events creating greater needs in Islamic countries due to displacement caused by political

unrest, wars, and conflicts. The current articles of the HCCH are not sufficient in creating guidance for fostering in Islamic countries because they do not give proper consideration for religious traditions and limitations. To this end, recommendations are necessary for the current system to adequately allow for *Kafala* to work with it systematically. As such, this dissertation has formulated several recommended adaptations for proposal that can be adopted by the HCCH.

### **Recommendations for addressing the thesis's problems:**

The recommendations stated are based on observations that the KSA and multiple other Islamic countries have not ratified or even signed any international adoption agreements, in particular the HCCH. For that reason, the HCCH would be wisely advised to adapt to better accommodate the *Kafala*. In order to do so, it would need to change some of the language in the treaty that proves to be problematic in reconciling the traditional adoption system with the needs of this Islamic alternative. Furthermore, the aims of the HCCH can benefit further by clarifying the terms and definitions regarding adoption requirements and its inclusion of *Kafala*. In its current form, although it states that it functions in conjunction with *Kafala*, Muslim people can plainly understand why it does not work in agreement with Islamic tenets. Accordingly, what specifically should be amended in the HCCH documents? Here is a brief overview of suggested amendments:

- Change its language regarding the terminologies of a “*permanent* parent-child relationship.”

WHY? Because this phrasing precludes fostering with countries following the *Kafala* as there is no bond or kinship ties created for the purpose of preserving biological lineage.

- Specifically address the terms “Orphan” and “Foundling” within the articles, with consideration for guidelines for these cases WHY? Because these groups are integral to *Kafala* and the goal of *Kafala* is to serve orphaned children including foundlings

- Specifically address the terms “Armed conflict” and “War”. Why? Because these terms represent

difficult crises that lead to increases in orphaned children, which may necessitate the need for intercountry adoption options.

- Unify all the processes of immigration that would relate to the inclusion of *Kafala*: guidelines and processes for application for immigration status and visas that apply to all member countries
- Special Commission Meetings (SCM), that are held once every five years, should include more discussion about *Kafala*, as there are currently limited discussions on the matter
- Change this requirement of “**termination** of the legal relationship between the child and his or her family of origin” WHY? Because *Kafala* just serves for orphan or foundling children who therefore have no living biological parents.
- The final suggestion would be to a case study example to be added to the articles of the HCCH to clarify the fostering relationship of *Kafala, Ehtidan*.<sup>621</sup>

The foregoing facts mean that there is still a lot that needs to be done in order to embed the practice of *Kafala* into the international plane. One of the methods to realizing this outcome is to modify some articles of the HCCH to better fit with Islamic rules. Other general recommendations include adding articles relating to Islamic law, or even finally creating a new international convention in cooperation with Muslim scholars and the HCCH. Thus, the HCCH should make their standards toward *Kafala* more abundantly clear. Not only should the HCCH make changes to some existing articles. By providing clearer definitions of *Kafala* and its mechanisms the international community can make the necessary adaptations needed.

Perceptibly, there are actions that can be taken to better allow for international placement of children from Muslim nations. Through greater research on the topic and advocating for some amendments to an international treaty such as the HCCH, such a goal can be accomplished. This

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<sup>621</sup> See Annex (A) Executive Plan for Child Protection Code in KSA in this dissertation

would consequently allow for the placement of children internationally from Muslim countries, and in turn allow for better care of Muslim orphaned children worldwide. Eventually, this dissertation will hopefully help to fill in the gaps of lacking information on the topic and successfully help lead to a solution that is more inclusive.

The next sections are appendices and annexes, the appendices contain additional materials aimed to further develop the dissertation's ideas, *e.g.*, models for proposed amendments for HCCH, and interviews with organizations to assisting in elucidating policies.<sup>622</sup> The last section, the annexes, contains original materials, *i.e.* official documents, that are used in this dissertation, as either entire original documents or selections from original documents.

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<sup>622</sup> The Appendices section have done by the author of this dissertation for more discussions.

## APPENDIX A: MODEL TO ADD ARTICLE FOR CLARIFYING *KAFALA* IN HCCH

The following proposed amended model would first be added to the existing HCCH Convention on Intercountry Adoption of 1993. It would add one article as follows that illustrates the necessary provisions of *Kafala*.

### Proposed Article (#) Regarding *Kafala* Provisions

*Kafala* can be recognized before adoption process takes place. It is intended to assist only orphaned or abandoned children and requires operating under specific principals:

- 1) Make an exception for the requirement of a permanent parent-child relationship and the associated termination of the legal relationship of the child with biological parents and/or the family of origin in cases involving *Kafala*. Why? Under Islamic law, adoption is prohibited and *Kafala* is reserved for orphaned or abandoned children, meaning children would not have existing biological relationships with family or especially with parents to terminate. This prohibition on adoption exists to save biological lineage ties is important in preserving the best interests of the child by avoiding potential for mixing blood ties in the future.

- (a) Guardians would be forbidden from granting the foster child the adoptive family's surname. The name rules for abandoned children would dictate that a child is attributed some random names unassociated with the new adoptive family, e.g., for a girl, Fatima Ali, and for a boy, Abdullah Mohammed, and so on. All of these processes would be carried out by the State Authority to authenticate the name and other documents such as an identity card.

(b) Any case involving *Kafala* would have to specifically follow these rules of naming in the process of guardianship:

Guardians would be forbidden from granting the foster child the adoptive family's surname. The name rules for abandoned children would dictate that a child is attributed some random names unassociated with the new adoptive family, *e.g.*, for a girl, Fatima Ali, and for a boy, Abdullah Mohammed, and so on. All of these processes would be carried out by the State Authority to authenticate the name and other documents such as an identity card.

## APPENDIX B: QUESTIONS ASKED TO EXPLORE THE STANCE OF HCCH STATE

### PARTY<sup>623</sup>

(Q)- Suppose someone wants to ask about the *Kafala* system to adopt children from a Muslim country via this system and the child is an orphan of unknown parentage. If he/she brings the child with them to Canada and there is documentation that refers to the child as under his/her sponsorship through the *Kafala* system, is this permissible? However, I read that you do not recognize the *Kafala* system?

(A)- As you probably know, every country, which the legal system is based on Islamic law prohibits adoption. Like all countries that have such a legal system, the country knows other measures to protect children, like "*Kafala*" for example, which is like a tutorship or a guardianship. Guardianships or tutorships are generally defined as a voluntary commitment to take care of the needs, education and the protection of a minor child. This protection measure **does not create any legal relationship between the child and the owner of this right; it can't therefore be addressed as an adoption.** Since children under *Kafala* protection **cannot be adopted**, they also **cannot be sponsored for immigration purposes.** In addition, neither Canadian nor Québec legislation provides for the immigration of children who are under legal tutelage. This child will therefore not be able to reside permanently in Québec. Québec residents may only adopt children who are domiciled in, or habitually reside in, a State that recognizes adoption as defined in the Hague Convention. In matters of international adoption, Québec legislation specifically requires

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<sup>623</sup> E-mail from Annie-Claude Lalonde, Councilors in adoption international in Québec., (Jan. 26, 2016, 1:29 PM) (On file with author).

that the current legislation of the child's country of origin be taken into consideration. That makes it impossible to adopt children from countries that prohibit adoption, regardless of whether they are protected under a guardianship or other protection measures. Since children from those countries cannot be adopted, they also **cannot be sponsored for immigration purposes**. In addition, **neither Canadian nor Québec legislation provides for the immigration of children who are under legal tutelage**.

During this Q&A, I asked again for more specific information to be clear:

**(Q)-** Suppose someone just wants to enter Canada with a child of unknown parentage, but he/she does not know if the child's entry will be accepted in the country because the child's last name does not match the parents' last name due to the fact that the child was adopted under the *Kafala* system, as is the practice under Saudi Arabian law. Is there any problem when he/she enters Canada with this child, such as in the case of a student visa? I just want to make clear if you would accept the documentation for a child in this situation or not?

Then they answered again.

**(A)-** *Kafala* is NOT an adoption measure and it is not recognized either in Saudi Arabia or in Québec. Therefore, the only document the parents have for the child in this situation is of a tutelage/guardianship. This does NOT provide a status to the child here in Québec which means this child will never be able to access school or any social benefices such as medicare, social insurance number, nor will the child ever obtain a permanent status, etc.

Based on this response, it can be seen that the HCCH and its member States take the stance that a tutelage guardianship “falls outside the scope of adoption,” so the Canadian provincial government of Québec denies adoption and immigration status to children and families in this care situation. This policy affects families who have such a relationship with a child and would like to

emigrate to Québec. It would also adversely affect current residents of Québec who might want to take on a child through a *Kafala* relationship.

However, while this stance is based on a primary tenet of the HCCH, it is in a disagreement with its predecessor, the UNCRC. The UNCRC actually places the best interests of the child as the higher priority when making considerations for placement.<sup>624</sup> This means that based on the principles of the UN, to best honor to the rights of the child, a child should be put in an environment that fosters happiness, love, and understanding, regardless of whether this means placement with birth parents, government care, or *tutelary institutions*.<sup>625</sup> This suggests that the *Kafala* would serve as a satisfactory relationship to allow for legal recognition in attempts to best serve the rights of the child. If the UNCRC was the prevailing convention used worldwide rather than the HCCH, the acceptance of *Kafala* guardianships and understand its principals may be more widely accepted and integrated today.

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<sup>624</sup> Dillon *supra* note 390 at 49.

<sup>625</sup> *Id* 20-22.

**APPENDIX C: QUESTIONS ASKED FOR MORE CLARIFICATION ON THE RULES  
OF *KAFALA* IN KSA<sup>626</sup>**

**Q 1-** Does the *Kafala* include the foreign child's spouse if their family dies and they do not have any relatives in KSA?

**A -** *Kafala* (foster orphaned children) in KSA includes all children who are found on the land of the Kingdom and are of unknown parentage and do not have an identity.

**Q 2-** Is there a court to take care of the procedures of guardianship such as the *Kafala* system?

**A-** No, the Ministry of Social Affairs is who takes care of the procedures.

**Q 3-** What about children who face some family violence? Will the KSA sponsor them in the orphanage and revoke the parental custody? And if they do not have a relative, is it possible to give them a family who desires to guardian the children?

**A-** Regarding children who face some family violence, we can tackle this problem to terminate this violence by resorting to the Human Rights department to submit a complaint against them. However, the final solution is to withdraw the children from the parents and the Ministry of Social Affairs takes care of the best interests.

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<sup>626</sup> Interview by WhatsApp with Reem Ahmad, Deputy Director of The Nursery in The Kingdom of Saudi Arabia, in Jeddah City. (Jul.16, 2016) (On file with author).

**Q 4-** Does *Kafala* guardianship have specific rules from the Ministry of Social Affairs?

**A-** Yes, this system is taken care of by the Ministry of Social Affairs.

**Q 5-** Is it possible for unmarried men and women to guardian child under *Kafala* or are the conditions of the guardianship just for marital relationships of men and women? Waiting the document

**A-** There are exceptions depending on each case.

**Q 6-** How old must guardians for a child be?

**A-** 30 years old and older.

**APPENDIX D: QUESTION ASKED FOR MORE CLARIFICATION ON  
RECOGNITION OF *KAFALA* IN HCCH OF USA<sup>627</sup>**

**Q-** I want to ask you about the '*Kafala*' that is in use under Islamic law as an alternative system to adoption. Is it acceptable within in your system?

I wonder because I read in the outline in the 1996 Hague Convention on Child Protection “*Cross-frontier placements of children*: The Convention provides for co-operation between States in relation to the growing number of cases in which children are being placed in alternative care across frontiers, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of *Kafala*, which is a functional equivalent of adoption but falls outside the scope of the 1993 intercountry Adoption Convention.”

From that, I understand that you did not accept the institution of *Kafala* even though Hague Convention mentioned it in 1996 in article 3 at **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. Also, some cases in the countries who are members of Hague Adoption Convention ignored *Kafala* and did not accept it**

Does that mean that you would not have cooperation with countries practicing the *Kafala* system rather than adoption? Just I need the direct answered from you to proof that. Thank you in advance and for your valuable time.

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<sup>627</sup> E-mail from Immigration Services Officer Krost, National Benefits Center, Overland Park, Kansas, Adjudications Division 6, (Aug. 9, 2016, 7:27 PM) (On file with author). See Official Website of the Department of Homeland Security for more information at <https://www.uscis.gov/about-us/contact-us>, USCIS.

A- It is possible for United States citizens to adopt from countries, which practice *Islamic* law and do not recognize in-country adoptions through the non-Hague adoption process, which is shown in Form I-600, Petition to Classify Orphan as an Immediate Relative. While a petitioner will not be able to adopt the child in the *Islamic* law country, they are potentially able to obtain a *Kafala* guardianship from a competent authority in the country. ***This guardianship permits the adopting family to bring the adopted child back to the United States on an IR-4 visa, where the family may complete the adoption process using American domestic processes, if they so choose.***<sup>628</sup>

You may find the information on [adoptions.state.gov](http://adoptions.state.gov) helpful, if you choose to investigate various countries under *Islamic* law on this website. The Department of State has provided resources on adoption from these countries. The United States does, in many circumstances, cooperate with these countries to effectuate international adoptions.

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<sup>628</sup> This answer helps to facilitate how entering the USA without complexity to recognize *Kafala* for Muslim countries either they are citizens or migrants. This is I would say a manifest of cooperation between the US and the Muslim countries among other Western countries (*See* section 3.5. in this chapter, the treatment of *Kafala*) for the other western states treating.

## ANNEX A: EXECUTIVE PLAN FOR CHILD PROTECTION CODE IN KSA

### CHAPTER 1

#### Definitions, Objectives and Cases of Abuse and Neglect

##### Article 1

The following terms, wherever mentioned in this Code, shall have the meanings indicated below for the purpose of this Code unless otherwise required by the context.

1. **Child:** any human-being under the age of 18.
2. **Abuse:** all forms of child abuses, exploitation, or threats thereof, including:
  - **physical abuse:** the vulnerability of child to physical harm or injury,
  - **psychological abuse:** the vulnerability of child to maltreatment that may cause him / her psychological or health problems, and
  - **sexual abuse:** the vulnerability of child to any kind of sexual assault, harm or exploitation.
3. **Neglect:** failure or omission to provide for common needs by parent or caregiver including physical, medical, emotional, psychological, educational, pedagogical, intellectual, social, cultural and security.
4. **List:** Executive List for this Code.
5. **Relevant Authorities:** authorities and bodies pertinent to child protection as determined by this List.

The following terms, wherever mentioned in this List, shall have the meanings indicated below for the purpose of this List unless otherwise required by the context.

1. **Ministry:** the concerned ministry as required by context.
2. **Minister:** the concerned minister as required by the context.
3. **Code:** Child Protection Code.
4. **List:** Executive List for Child Protection Code.
5. **Child:** any human-being, male or female, under the age of 18, whose age shall be proved by Certificate of Birth, National ID, Family Record or any other official document, otherwise, age shall be estimated by any of the approved medical authorities.
6. **Threaten to abuse:** any act or utterance by a person to the child, which may make him / her feels afraid of harm to be inflicted upon his / her personality or money, and this person is thought to be most likely to inflict thereof, including threatening the child of any kind of physical, psychological or sexual abuse.
7. **Physical abuse:** any act, utterance, omission or intentional or recurrent neglect, which results in harming child's body.
8. **Exploitation:** the use of child by any person in legitimate or illegitimate acts taking advantage of his / her young age, recklessness, whims or inexperience or this person being unpenalized.
9. **Sexual exploitation:** exposure of child to prostitution acts, deals or any other illegitimate or illegal sexual practices, whether directly or indirectly, paid or unpaid, with or without the consent of child.
10. **Maltreatment:** any act or utterance, which may harm the child's psychological health growth, whether continuous or recurrent, which leads to prejudice to child's body, dignity or rights guaranteed by *Shara* (justice) or law.

11. **Negligence:** failure by parent or caregiver to provide for child common needs, to provide child monitoring, or to enable the child to exercise his / her rights guaranteed by *Shara* (justice) or law, including failure to maintain child's life or mental, psychological and physical safety.
12. **Physical needs of child:** everything necessary to maintain child's survival, protect his / her soul and body and provide his / her food, drink, clothing and home.
13. **Health needs:** everything necessary to provide care for child, including immunization by serums and preventive vaccines, prevention of epidemics and diseases and ensuring that he / she obtains the proper treatment.
14. **Emotional needs:** everything necessary to guarantee satisfaction of the emotional needs of the child, including keeping the child within the confines of his / her natural family, providing an alternative or a foster one, or enrolling the child in social care institutions or an equivalent.
15. **The Psychological needs:** everything necessary to guarantee the healthy psychological development of child, which contributes to the provision of the proper environment for warm and loving treatment of the child without making him / her feel threats or in constant fear, and to provide him / her the proper psychological treatment if necessary.
16. **Educational needs:** to supply the child with age-appropriate knowledge and experiences and to educate and socialize and prepare him / her pursuant to the right educational methods.
17. **Pedagogical needs:** everything necessary to provide the child with free basic education and to guarantee a pedagogical environment appropriate for his / her age and status.
18. **Intellectual needs:** to guarantee child's right to express his / her opinions and desires and to truly engage him / her in judicial, administrative, social or educational proceedings related to him / her and appropriate for his / her age and degree of maturity.
19. **Mental needs:** everything necessary for healthy growth of child's mind on health, intellectual, scientific, perceptual and linguistic levels.
20. **Social needs:** everything necessary to prepare the child physically, psychologically, culturally and morally consistent with community's religious and social values and to guarantee acquisition of new skills, formation of social relationships and friendships and cooperation and integration with others.
21. **Cultural needs:** to guarantee child's right to satisfy his / her cultural needs, including literature, arts, knowledge and information derived from his / her faith and society, and expansion of his / her mind through recognition of human tradition and contemporary scientific and technological progress.
22. **Security needs:** everything necessary to guarantee the child feels secure within his / her natural or alternative family and the surrounding environment and to protect him / her against all kinds and forms of violence, harm or inhuman treatment.
23. **Alternative or foster family:** the family entrusted with the provision of educational, social, psychological and health care of a child whose conditions has prevented him / her from being socialized within his / her natural family.
24. **Guardianship:** power established by *Shara* (justice) for the guardian to be vested with the authority to act and manage child's affairs on behalf of him / her in relation to his / her body, self and money to the advantage of the child.
25. **Power:** right established by *Shara* (justice) or law giving a person the authority to act and manage child affairs to his / her advantage.
26. **Responsibility:** a state in which a person is legitimately or legally responsible for consequences of the child's acts based upon a legitimate or legal relationship to the child.

27. **Sponsorship:** any kind of alternative childcare for the purpose of providing him / her with his / her basic needs and healthy socialization.
28. **Remaining without family support:** any case in which the child loses his / her natural family care.
29. **Person:** natural or legal person as required by the context.
30. **Sexual harassment:** vulnerability of child to any sexual arousal or activity aiming at satisfying sexual desire of harasser, including showing genitals, doing foreplay, embarking on penetration, exposing the child to watch pornographic movies or images or using the child in production or distribution thereof by any means.
31. **Relevant bodies:** any public or private body concerned with child protection and enabling him / her to exercise his / her rights, including but not limited to Ministry of Social Affairs, Ministry of Interior, Ministry of Education, Ministry of Health, Ministry of Justice, Ministry of Culture and Information, Ministry of Commerce and Industry, Ministry of Islamic Affairs, Endowments, Call and Guidance, Human Rights Organization, Investigation and Public Prosecution Authority, National Committee on Childhood, National Society for Human Rights, Family Security Program, Child Support Line, and any other relevant body.
32. **Military Works:** any works that require by nature to join any military body or regular or irregular armed forces.
33. **Homeless child:** child at risk due to unnatural existence in the street causing his / her moral, psychological, physical or educational safety to be at risk.
34. **Child in need of care:** any child whose parents are unknown or who is deprived of parental, relative or caregiver care due to parental death, separation, imprisonment or permanent mental or physical illness, including paralysis or any other incurable disease, and whose family fail to care about or treat him / her.
35. **Child vulnerable to delinquency:** any child who exists in an environment that presents risk to his / her moral, psychological, physical or educational safety.
36. **Child games:** products exclusively or non-exclusively designed or oriented for playing of children under the age of 18.
37. **Social institutions:** any public or private social care institution devoted for accommodating or hosting children in need for care or reformation.
38. **Reports Receiving Center:** center in Ministry of Social Affairs devoted to receive phone communications on abuse cases all over the Kingdom.

## Article 2

This Code aims at:

1. emphasizing upon determinations of Islamic law, laws and international conventions which the Kingdom is a party thereof, which maintain child's rights and protect child against all forms of abuse and neglect,
2. protecting the child against all abuse and neglect forms and manifestations, to which the child may be vulnerable within the surrounding environment (i.e., home, school, neighborhood, public places, care houses, educational centers, alternative family, governmental institutions, NGOs and his / her equivalents), whether inflicted by a person with guardianship, power, responsibility or whatever over the child or otherwise,
3. guaranteeing the rights of child who was vulnerable to abuse and neglect through providing him / her with necessary care, and

4. raising awareness of child rights and introducing thereof to him / her, especially when it comes to his / her protection against abuse and neglect.

In order to achieve the aims of this Code, relevant bodies, each in their own specialty, shall:

2-1 protect the child against all forms of abuse, neglect, discrimination and exploitation and enable him / her to exercise his / her rights as determined by Islamic law, provisions of Child Protection Code and its Executive List and other relevant laws and international conventions joined by the Kingdom,

2-2 guarantee that the surrounding environment of the child, whether at home, school, neighborhood, public places, care houses, social homes, alternative family, governmental institutions, NGOs and his / her equivalents, is an appropriate one for child protection against all threatens to his / her existence or physical, psychological, intellectual, educational or moral health,

2-3 provide care, attention and rehabilitation necessary for the child vulnerable to abuse or neglect in order to guarantee helping him / her to stabilize and cope with his / her family and social conditions,

2-4 guarantee commitment of institutions, administrations and facilities responsible for child care, education or protection to the admitted standards in the fields of safety, health and efficiency of employees entrusted with child protection against abuse and neglect and enabling him / her to exercise his / her rights,

2-5 take all appropriate administrative, social, educational and pedagogical measures that ensure child protection against all forms of discrimination, violence, harm, physical or mental abuse, neglect or any treatment that entails neglect, abuse, exploitation or inequality, whether within parental care or equivalent or within the care of any other person or educational, reformatory, accommodative, social or charitable institution,

2-6 attempt to care about child preferential interests in all proceedings related to him / her, whether taken by public or private social care institutions, courts, administrative authorities or any other bodies,

2-7 raise awareness of the importance of enabling the child to exercise his / her rights and protecting him / her against abuse and neglect through various media, educational and social institutions and other relevant bodies, to ensure raising the community awareness of the concept of child abuse and neglect and the danger it entails, illustrate its negative effects on individual and society, indicate the best ways for prevention and handling thereof, raise awareness of children and families of his / her legitimate and legal rights and duties, and intensify family counseling programs that help in treatment of behavioral phenomena that create an appropriate environment for abuse or neglect to occur. In order to achieve the above, Ministry of Social Affairs may coordinate with public or private relevant authorities,

2-8 support conducting scientific researches and specialized studies related to child protection against abuse or neglect and work to organize and implement specialized training programs for those involved in dealing with abuse cases including employees of relevant bodies, especially judges, arrest and investigation officers, doctors, specialists and other bodies concerned with protection of child and enabling him / her to exercise his / her rights,

2-9 observe, collect and document data and information related to child abuse, neglect or deprivation of rights all over the Kingdom through Ministry of Social Affairs and in coordination with Ministry of Interior, Ministry of Education, Ministry of Health and other public or private bodies involved in dealing with abuse and neglect cases, in order to provide precise, documented and unified statistics all over the country, which can be used to establish mechanisms for treating such phenomena and conduct scientific researches and studies specialized in that field,

2-10 coordinate among relevant bodies to secure the provision of accommodation and psychological, social, health and security support for children in general and for those who are vulnerable to abuse or neglect in particular,

2-11 work to achieve comprehensive and consistent growth of child through securing his / her socialization within a family environment and in an atmosphere of happiness, love and understanding,

2-12 provide integral preparation of child in order to lead a healthy life in the society and raise him / her up based upon values and ideals urged by Islamic law, authentic Arab norms, charters and conventions on child rights, which the Kingdom is a party thereof,

2-13 take all necessary measures to establish awareness and educational programs for individuals and society, which helps to provide necessary support for child and caregiver as well, and illustrate forms and methods of prevention of abuse and neglect cases and how to report such acts,

2-14 work to introduce anti-abuse and anti-violence concepts in pedagogical syllabuses and how to report such acts of violence and abuse, and

2-15 train relevant bodies on how to deal with child cases, the matter which contributes to sound application of the Code and its Executive List.

### **Article 3**

Child abuse or neglect is child's vulnerability to any of the following:

1. leaving the child without family support,
2. failure to, withholding of or failure to maintain child identity documents,
3. failure to complete child's obligatory health vaccination,
4. causing the child to dropout from education,
5. vulnerability of child to dangerous environment,
6. abusing the child,
7. sexually harassing the child or vulnerability to sexual exploitation,
8. exploiting the child financially or in crime or begging,
9. using abusive words that degrade child's dignity or insult him / her,
10. causing the child to watch indecent, criminal or age-inappropriate scenes,
11. discrimination against the child for racial, social or economic reasons,
12. continuous obvious failure to raise-up and care of the child,
13. allowing the child to drive a vehicle under the legal age, and
14. everything which threatens child's safety or physical or psychological health.

3-1 It is mandatory to keep the child within his / her family environment and not to separate him / her from parents unless required for his / her own favor. The child has the right to enjoy various life conditions appropriate for his / her needs and age, which commensurate with natural family environment.

3-2 The child shall be registered immediately after birth with full name and has the right to be named since his / her birth. Name shall neither entail any contempt or insult of his / her dignity nor contravene with Islamic law. Child shall have the right to know his / her parents and receive their cars as much as possible.

3-3 The child has the right to live, survive and grow-up within a coherent and combined family, to enjoy various preventive measures and to be protected against all forms of violence, harm, physical, emotional and sexual abuse, neglect, omission or any other forms of abuse and exploitation.

3-4 The child cannot be separated from his / her parents against their will except by virtue of adjudication or when the competent authorities deems it necessary for protection of child and maintaining his / her preferable interests, especially in case of child abuse or neglect by parents, or in case of parental separation, where a decision must be made to accommodate the child when parents are unable to care for him / her. The competent authority that makes the separation resolution shall immediately refer the subject to judiciary.

3-5 The child has the right to identity since his / her birth, especially care-needing children, including first name, last name, age, birthdate and nationality, which shall all be proved by birth certificate, family record, national ID card or any other official document approved by the concerned authority.

3-6 Child's parent, guardian or caregiver shall extract his / her identity documents and refer to relevant administrative authorities in order to complete thereof as necessary, which in turn shall provide assistance without delay in extracting all necessary ID documents for child or any other documents necessary for enabling him / her to continue his / her education even if one or both parents have problems regarding nationality or ID. In all cases, no child shall be deprived of education.

3-7 The identity documents of child shall not be withheld or omitted by any party or person even parents. In case of failure to obtain child's ID documents, the caregiver or relevant body shall extract alternative ones for the child.

3-8 The child shall be inoculated with vaccinations against diseases, which are mandatory as per competent health authorities, according to schedules thereof, which is the responsibility of parent, guardian or caregiver. The in-charge health authorities shall keep a folder for every child to record their mandatory vaccinations and health development. School health or its substitute relevant health authority shall perform periodic examination, at least once per year, for all children enrolled at schools during pre-university education.

3-9 Every child has the right to education, and all concerned parties shall take appropriate actions to facilitate thereof. No administrative proceeding shall prevent admission or enrollment of children at schools. Furthermore, it should be attempted to prevent child early dropouts and to encourage child regular attendance at school.

3-10 Child's parent, guardian or caregiver shall enroll the child at school and shall not cause him / her to dropout. Any dropout of child shall be questioned by the school administration that shall refer this matter to competent authorities, if necessary.

3-11 Schools as well as educational and pedagogical institutions shall not resort to disciplinary or behavioral sanctions on the child that would prevent or deprive him / her of education or cause him / her to dropout.

3-12 Schools, educational and pedagogical institutions and care and accommodation homes and houses concerned with childhood shall establish policies to secure protection of children existing within these places against any intentional abuse or unintentional harmful practices and shall set up supervisory procedures to prevent the occurrence of any harm or illegitimate practice against the child.

3-13 Relevant bodies shall ensure that the child would not be vulnerable to sexual exploitation or left without guardianship, supervisory authority or family care.

3-14 Relevant bodies shall prevent exploitation of children in commercial marketing, their engagement in organized or non-organized crimes or allowing them to practice begging and vagrancy.

3-15 Relevant bodies shall ensure that the child would not be vulnerable to continuous or recurrent psychological or social abuse through using profanity or harsh language or verbal violence, which may cause him / her harms on the psychological level especially on his / her self-image and respect.

3-16 Relevant bodies shall prevent child's direct or indirect exposure to immoral, criminal or age-inappropriate media materials or which risk his / her belief, thought or behavior.

3-17 Relevant bodies shall protect the child against all forms of discrimination due to place of birth, parents, gender, race, disability or any other conditions and shall secure actual equality among children in benefiting from all rights.

3-18 Parents or caregivers shall not allow the child to drive a vehicle under the legal driving age pursuant to applicable traffic laws or to be enabled to drive or rent any automatic vehicle until he / she obtains driving license.

#### **Article 4**

The child shall be deemed at risk of delinquency in any of the following cases:

1. practicing begging or any illegitimate act,
2. quitting the authority of parents or caregiver,
3. getting used to escape from home or educational or accommodation institutions,
4. getting used to sleep in places unfit for residency or housing,
5. frequenting morally or socially shady or age-inappropriate places or close contact with homeless and corrupt people, and
6. practicing acts related to prostitution, bawdiness, gambling, drugs and the like or serving those who practice thereof.

4-1 Child's parents or caregiver shall be prohibited from allowing him / her to beg or exploiting him / her in begging or any other illegitimate act.

4-2 Relevant bodies, which find out that a child is begging or being exploited by a third party in an illegitimate act, shall take appropriate procedures to protect him / her and secure the non-occurrence thereof. In case of non-Saudi child who has no family, his / her home country shall be coordinated with in order to be sent back to it, while assistance and support shall be provided until he / she leaves Saudi country.

4-3 If the child quits the authority of parents or caregiver, social and psychological status research shall be performed by the concerned authority at Ministry of Social Affairs, which shall listen to the child, invite his / her parent or caregiver to discuss the child's conditions and who is responsible for this, the child, parent, caregiver or the surrounding environment and then prepare appropriate recommendation for approval, implementation and follow-up.

4-4 If the child is getting used to escape from home or educational or accommodation institutions, sleep in places unfit for residency or housing, frequent morally or socially shady or age-inappropriate places or become in close contact with homeless and corrupt people, the following actions shall be taken:

- a. Any person that any of such cases come to his knowledge shall report thereof.
- b. Authorities concerned with receiving such communications shall contact the child and his / her parent or caregiver to know the reasons and determine their responsibility thereof.
- c. In case of failure or abuse by parent or caregiver, they shall be invited and discussed and they shall undertake not to neglect the child or fail to supervise and orient him / her. In case of recurrence, they shall be warned that the matter will be referred to Investigation and Public Prosecution Authority.

d. If causes are due to the child him / herself or the surrounding environment, social and psychological status research shall be performed by the concerned authority at Ministry of Social Affairs, which shall listen to the child and discuss the matter with him / her and then prepare appropriate recommendation for approval, implementation and follow-up.

e. If child's parents are separated and one of them is the guardian of the child, who is proved to be ineligible for maintaining the child, caring for him / her and correcting his / her behavior, the concerned authority at Ministry of Social Affairs shall temporarily decide to transfer child's guardianship, and then documents shall immediately be referred to the court that issued the guardianship verdict with point-of-view to make decision in terms of legitimacy.

f. If child's life is at risk or if the child undergoes sexual assault by parent or caregiver, alternative care shall be urgently and temporarily provided for him / her outside the family, until his position is determined.

4-5 If the child is found out to be practicing acts related to prostitution, bawdiness, gambling, drugs and the like or serving those who practice thereof, parent or caregiver shall be invited and questioned. If their knowledge and indifference is proved or if they are found to cause the child to practice thereof, appropriate care shall be provided for the child with one of his / her relatives, if any, otherwise he / she shall be accommodated at an alternative family or care institution. Necessary actions shall be taken against parent or caregiver, as per the case, so that the concerned authority shall interfere to close such shady places and complete statutory procedures against them.

4-6 If parent or caregiver's neglect or failure is proved, they shall undertake to maintain and care for the child.

## **Chapter 2** **Child's rights to protection**

### **Article 5**

The child, in all cases, shall have the priority of enjoying protection, care and relief.

5-1 Child's interests shall be considered by relevant bodies and he / she shall be given preference over any other person when it comes to provision of accommodation, assistance and psychological, social, health and security support.

5-2 Child shall have priority over any other person when it comes to prevention and relief in cases of natural disasters or wars and equivalents.

5-3 Relevant bodies shall secure special care and complete and dignified life to mentally or physically disabled children under conditions which ensure his / her dignity, reinforce his / her self-dependence, facilitate his / her actual participation in society and guarantee his / her education and training.

5-4 Relevant bodies shall secure providing disabled children with health-care, rehabilitation, preparation for job and recreational services, in such a way that achieves child social integration and individual development including cultural and mental growth.

5-5 Relevant bodies shall secure exchange of appropriate information among them, in the fields of preventive health care and medical, psychological and occupational treatment of children. They shall further work to disseminate information on rehabilitation methodology, professional services and their accessibility in order to improve their capabilities, skills and mechanisms of action and expand their expertise in such fields.

## **Article 6**

The child has the right to protection against all forms of abuse or neglect.

- 6-1 Relevant bodies shall secure child's right to life, attempt to protect him / her against all forms abuse and neglect and enable him / her to practice his / her rights secured by *Shara* (justice) and law.
- 6-2 Relevant bodies shall propose the appropriate preventive precautions for protection of child against abuse or neglect and shall work each in their specialty.
- 6-3 Subject to the provisions of this List, all bodies while dealing with child abuse or neglect shall take into consideration the following rules:
1. to take into account the interest of the child in all procedures taken to protect him / her against abuse and to enable him / her to practice his / her rights,
  2. to deal with child abuse or neglect cases in accordance with standards that allow for differentiation between serious abuse or neglect cases and everyday tolerable, usual or recurrent abuse or neglect, so that assistance, treatment, protection, accommodation or hosting may be provided, if necessary, as required by type of abuse inflicted upon the child, and
  3. to take into account that resorting to any treatment method shall not result in a greater harm to the child and shall not affect his / her family or living condition. The concerned authority at Ministry of Social Affairs shall be keen to find compromise solutions that protect the child, deter the source of abuse or harm and prevent the recurrence thereof.

## **Article 7**

For the child whom has not agreeable familial environment within which he may be exposed to panel punishment or negligence, he/she has right having alternate welfare as follows:

1. Foster family whose role is to take care of the child, this is according to *Ehtidan*.
2. Is entitled to be deposited in social organizations e.g., governmental, national or philanthropist ones in case of the foster family is not available, in compliance with the bylaw which determines the necessary norms and regulations.

7-1 Having welfare within the foster families, or social welfare agencies whether governmental, national, or philanthropist ones aiming at providing social, psychological, hygienic, and professional welfare for children whose circumstances prevented them to be brought up in their natural families for the purpose of bringing them up properly and compensating them with what they lost of impassion, tenderness particularly the children whom in need to such care.

7-2 Temporarily or permanent deprived child from its familial environment or support, or circumstances which prevent him from being existed in environment maintaining its utmost favorable interests including the right of protection, giving hand to him, shelter within providing social welfare agencies whether governmental, national, or philanthropist ones or within the foster families, furthermore non-availability of relevant or some documents has not to be an obstacle before accepting the child in case of the child is going to be existed without accepting him in foster or not receiving him.

7-3 Alternate environment to be provided receiving the children and to secure welfare life to them, making sure satisfying all rights in bringing up, education, therapy, and nutrition.

7-4 Foster families advantage is benefited from by those whom in need to such welfare and whom the competent authorities failed to find their parents or addresses.

7-5 It must be emphasized on that the foster families will not abuse the child physically, sexually, psychologically, or insulting, neglecting him, beside, assuring on giving him a hand within his interrelation society.

7-6 The competent authorities act on selecting the orphan child whom has not known their parents in early age according to applicable procedures of the ministry of social affairs in this respect.

7-7 Specialized training programs have to be prepared for all concerned, dealing with foster families in ministry of social affairs or social welfare organizations whether governmental, national, or philanthropist ones together with organizing symposiums, special meetings concerned with studying the problems, difficulties, which may hinder them within work, for the purpose of upgrading their performance.

7-8 In case of the child whom in need to welfare in foster family is exposed to panel, psychological abuse, negligence, misconduct, or depriving him from his rights then he will be taken by the ministry to join the foster home, moreover such family will be deprived from fostering or taking after any children so that such act will not violate questing the fosterers about their deeds implied in hurting or neglecting him.

7-9 Children welfare in foster families or social welfare organizations, whether the governmental, national, or philanthropist ones will last to the age of joining job for males or marriage for females in case of the competent authority in ministry of social affairs did not decide another.

7-10 The competent authority of foster families in ministry of social affairs will suggest a certain policy for acting on foster families system or supervising them together with executing, following up, evaluating their work together with considering the submitted demands, and following up the children conditions whom are under its care in addition submitting monthly reports in this respect.

7-11 The foster family is being selected in compliance with certain norms and regulations prepared by the competent authority in the ministry of social affairs with which it secures the child's safety and protection whether such was within the assignment stage, follow up or canceling fostering, to be taken into consideration the following:

- 1- Foster family place to be within environment for bringing up a good citizen with available educational, religious, medical, and sports organizations, together with availability of lodging hygienic conditions with acceptable hygienic level for family members.
- 2- Family income to be sufficient to fulfill its requirements and the compensation of welfare has not to be the main target of family, but as assisting element to achieve child care.
- 3- Foster family conditions and time have to allow taking care of child.
- 4- Foster family to accept the supervision of ministry of social affairs representatives, where such supervision to include paying visit to family home and meeting the child of caring concern, following up his conditions without violating the principle of maintaining its own particular life.
- 5- Foster family undertakes that the communication of child's affairs to be within the ministry of social affairs, as well as it is warned to hand him over to his parents or one of them even temporarily If any, or to any person.
- 6- The foster family to notify the ministry of social affairs at once with respect to change of social and financial conditions or main address of fostering such as the

place of work, adjoining new school, escaping from it or the child's death or girl marriage.

- 7- Foster family to commit itself not to travel abroad the kingdom with or without the child subject of welfare except for after having the acceptance of competent authority of the ministry of social affair.

7-12 The ministry of social affairs to take over the financial aspects respecting different payment disposal including fostering, temporary, permanent or canceling care fostering in compliance with bylaws, regulations, instructions governing this.

7-13 The foster family is entitled to do its assigned fostering duty against child free of charge, as well it is entitled to write its will for him or grant him from its property the amount which is decided by Islamic Sariah, as well it reserves right to retain amount for fostered child to be submitted periodically to ministry of social affairs, provided the ministry to add such amount to child's account in its own saving post besides it is not entitled spending deposited monies except for after clarifying rationalized reasons respecting this , approving it from the authorized official in the ministry of social affairs.

7-14 The child subject of fostering is entitled to be transferred from family to another family or from social agency to another in case of finding this in the interest of or child protection, in compliance with applicable bylaws, regulations, instructions of the ministry of social affairs.

7-15 Social welfare agencies whether the governmental, national, philanthropist or fostering families provide full caring, sheltering under the supervision of the ministry of social affairs with following up.

7-16 Social welfare agencies on its varieties and fostering families on dealing with children in need to foster to be committed with the rules of child's protection regulation, its executive bylaw, protection from panel hurting with relevant executive bylaw and the main social home bylaw with other relevant regulations.

### **Chapter 3**

#### **Prohibitions related to Child Protection**

##### **Article 8**

Without prejudice to the provisions of the Labor Act, it shall be prohibited to employ children under the age of 15. It shall further be prohibited to assign them for works that may harm their safety or physical or psychological health or to utilize them in military acts or armed conflicts.

8-1 The child has the right to rest, have spare time, play, practice age-appropriate recreational activities and participate freely in public life.

8-2 The child has the right to be protected against economic exploitation or performing any work that is likely to be dangerous, obstructive to his / her education or harmful to his / her health or physical, mental, moral or social growth.

8-3 Taking into account the provisions of the Labor Act, it shall be prohibited to employ children under the age of 15 whether in public or private sector. This shall exclude training on some ordinary and non-laborious works that are not likely to harm their health or growth or their regular education within the family or equivalent.

8-4 Without prejudice to the provisions of Paragraph 8-3 above, Minister of Labor may allow for employment of children between 13 – 15 years old in light works, which are not likely to harm to their health or growth, obstruct their education and engagement in vocational guidance or training programs or weaken their ability to benefit from the education they receive.

- 8-5 An appropriate system shall be established for children above the age of 15 to determine their work hours and their job conditions. A child shall not be employed for more than 6 hours per day punctuated by one or more rest times for food and rest totaling not less than one hour. Such rest duration(s) shall be determined so that the child shall not work for more than 4 consecutive hours.
- 8-6 The child shall undergo medical examination before any employment in order to ensure his / her health intelligibility and ability to work. He / she shall further be periodically re-examined at least once per year. In all cases, work shall neither cause the child any pains or physical or psychological harms nor prevent him / her from opportunity to education, recreation and development of his / her capabilities and talents. Employer shall further be obligated to insure upon the child and protect him / her against job harms during work.
- 8-7 It shall be prohibited to employ the child for additional work hours or on weekly days-off or official holidays. In all cases, it shall be prohibited to employ children at night for more than 12 consecutive hours except in cases determined by Minister of Labor.
- 8-8 It shall be prohibited to employ the child in works of nature or conditions that are likely to expose child's health, safety or morals to danger. It shall be especially prohibited to employ any children in the worst jobs as determined in relevant international conventions.
- 8-9 Any employer who employs a child shall give him / her an ID card with photo of the child.
- 8-10 Employers shall keep at work premises all official documents that prove the ages and health capacities of all their employed children to be submitted upon request. The employer shall be held responsible for verifying the ages of their employed children.
- 8-11 Employers shall provide all occupational health and safety precautions and shall train their employed children on the application thereof.
- 8-12 Employers shall deposit the salary, remuneration and all dues of a child at his / her bank account. In case of unavailability of a child's bank account, salary, remuneration and any other benefits shall be delivered to the child upon parent's knowledge.
- 8-13 All relevant bodies shall guarantee the priority of maintaining child's life, safety and secure socialization away from armed conflicts or engagement in hostilities. They shall further guarantee that his / her rights shall be respected in cases of emergency, disasters, wars and armed conflicts and shall take all measures to pursue and punish anyone who commits any war crime, genocide or anti-human crimes against children.
- 8-14 All relevant bodies shall take all feasible measures in order to guarantee not to directly engage any children under the age of 18 in wars. It shall further be prohibited to recruit any children under the age of 18 in military forces or equivalent unless their applicable codes provide otherwise.
- 8-15 It shall be prohibited to exploit children in gatherings and demonstrations contrary to codes and instructions.

## **Article 9**

It shall be prohibited to sexually exploit the child, expose him / her to any forms of sexual exploitation or traffic him in crime or begging.

- 9-1 The relevant bodies shall protect the child against all forms of sexual exploitation and especially inducing or compelling him / her to practice any illegal sexual activity and

exploiting or using him / her in prostitution or any other illegitimate sexual acts. Vulnerability of child, whether male or female, to prostitution acts, whether paid or unpaid, directly or indirectly, shall be deemed sexual exploitation.

- 9-2 It shall be prohibited to use or exploit the child in pornographic shows and materials.
- 9-3 The relevant bodies shall take all appropriate measures to prevent child kidnapping, selling, sale of organs or trafficking, in any form, or child usage in begging.
- 9-4 It shall be prohibited to use the child in various forms of organized and unorganized criminality, including implanting intolerance and hatred ideas in him / her or instigating him / her to perform violence, intimidation or terrorism acts.

### **Article 10**

It shall be prohibited to use the child in places for production of narcotics or psychoactive substances or trading thereof by any means.

- 10-1 The relevant bodies shall take all appropriate measures, including administrative, social and educational measures, in order to prevent child illegitimate use of narcotics and psychoactive substances, which are determined as per relevant rules of procedure and international conventions.
- 10-2 The relevant bodies shall take necessary measures and procedures that ensure the prevention of usage of children in production of narcotics or psychoactive substances or trafficking thereof.
- 10-3 Necessary preventive methods shall be taken to guarantee safety of children in all forms including cases of legitimate use of narcotics or psychoactive substances for educational, medical and other purposes.

### **Article 11**

1. It shall be prohibited to sell tobacco and its derivatives as well as other harmful substances to children. It shall further be prohibited to use children in purchasing such substances or in places for producing, selling or advertising thereof.
  2. It shall be prohibited to import and sell child toys or candy made in the form of cigarettes or any other smoking instruments.
  3. It shall be prohibited to show scenes that encourage children to smoke and further to smoke in his / her presence.
- 11-1 Shopkeepers and their employees shall be prohibited from selling tobacco or any of its derivatives to children, whether they are buying for themselves or otherwise.
- 11-2 Shopkeepers and their employees shall be under penalty of statutory accountability to ensure that the purchaser of such substances is not a child.
- 11-3 Regulatory authorities responsible for such stores shall monitor their commitment to prevention of selling tobacco and its derivatives to children. They shall further inspect commercial stores on a periodic basis in order to ensure that they do not include child toys or candy made in the form of cigarettes or any other smoking instruments.
- 11-4 Different media, whether print, audio or video, as well as websites, shall be prohibited from using children in advertising for selling tobacco or any of its derivatives or other substances harmful to safety or health of children.

- 11-5 Different media, whether print, audio or video, as well as websites, shall be prohibited from showing scenes that encourage or rationalize child smoking.
- 11-6 Child's relatives and close people, whether at home, school or public or private places, shall refrain from smoking in his / her presence.
- 11-7 Ministry of Commerce and Industry as well as Customs Authority shall prevent importation and selling of child toys or candy made in the form of cigarettes or any other smoking instruments and secure that such substances shall not enter the Kingdom.

### **Article 12**

It shall be prohibited to produce, disseminate, show, trade or possess any print, audio or video child-oriented materials, which address or arouse child's instincts to tempt him / her to behave against Islamic principles, public order or public morals, or which encourage his / her delinquency.

- 12-1 All public or private relevant bodies shall be prohibited from producing, disseminating, showing or possessing any child-oriented materials, which address or arouse child's instincts to tempt him / her to behave against Islamic principles or public morals.
- 12-2 Relevant bodies shall supervise child-oriented print, audio and video media production to ensure conformity with Islamic principles, applicable codes, public order and public morals.
- 12-3 Relevant bodies concerned with children shall determine the age category targeted by print, audio or video material, in such a way that contributes to maintaining intellectual and mental growth of children and prevent their delinquency.
- 12-4 Relevant bodies including various media shall disseminate programs, information and materials of social, cultural, intellectual, educational and pedagogical benefit of children.
- 12-5 Relevant bodies shall encourage the production and dissemination of useful books for children and the establishment of appropriate guidelines to protect the child against information and materials that are harmful to his / her education and health.
- 12-6 Authorities concerned with media production shall encourage the production of child-oriented TV programs that aim at reinforcing his / her education as well as sound Islamic and intellectual socialization and deepening his / her citizenship values.

### **Article 13**

It shall be prohibited to involve children in sport or recreational competitions and activities that put their safety or health at risk.

- 13-1 Relevant bodies shall take necessary measures to secure safety of children who participate in sport or recreational competitions and activities and to prevent any risk to their safety or health.
- 13-2 It shall be prohibited to involve children in sport or recreational competitions and activities that put their safety or health at risk, like horse races and the like.
- 13-3 Schools and educational institutions shall provide appropriate and secure places for children to practice age-appropriate games in their spare times.
- 13-4 Public and private relevant bodies shall place guiding instructions in places dedicated for practicing sport and recreational activities for children to secure their safety against abuse.

- 13-5 An adult observer or escort shall accompany the child in sport or recreational competitions and activities that are neither harmful nor risky.
- 13-6 It shall be required to provide safety belts for seats of swings and other games if necessary in amusement parks to prevent child falling.
- 13-7 Owners of recreational places and those who are responsible thereof shall provide appropriate barriers on high games to prevent child falling.
- 13-8 It shall be required to train workers on recreational places on how to face accidents resulting from usage of child games and playgrounds and how to handle security and safety requirements in such places.
- 13-9 Games shall be appropriate for age and capabilities of children who are using them. A board shall be placed next to each game to indicate its appropriate age, number of children to use it at a time and any other necessary information as well as how to play if possible.
- 13-10 It shall be required to provide first-aids box in playgrounds and recreational places frequented by children, which shall be placed in an accessible place. Phone shall further be provided for easy calling of emergency or police.
- 13-11 Child games shall be supported, if possible, with safety accessories, e.g., additional wheels on sides of bicycles, helmets and knee and elbow supports.
- 13-12 It shall be considered to find safe roads and crossings for child's safe accessibility of playgrounds and recreational places, whether on foot or by bicycles, and to keep playgrounds away from traffic and accident causes.
- 13-13 Relevant bodies shall encourage construction of child's playgrounds and recreational places in neighborhoods, schools and their concerned centers.
- 13-14 No children under the age of 12 shall drive any bicycles on public road, otherwise parent or caregiver shall be responsible for resulting damages.
- 13-5 Lessors of child bicycles shall not less any bikes to children under the age of 12, otherwise they shall be responsible for resulting damages to children and other parties.

#### **Article 14**

Without prejudice to the provisions of other codes, it shall be prohibited to perform any medical intervention or procedure to fetus unless for medical necessity or benefit.

- 14-1 It shall be prohibited to perform any medical intervention or procedure to fetus unless for medical necessity or benefit as per the provisions of Health Professions Code and its Executive Regulation as well as Fertilization, Embryos and Infertility Treatment Units Code.
- 14-2 The relevant health authorities shall provide support to pregnant mothers to secure fetus care and protection against diseases before, during and after delivery.

### **Chapter 4**

#### **The Child's Right to Care and Responsibility for Him / Her**

#### **Article 15**

1. Child's parent(s) or caregiver shall be responsible, within the limitations of their financial resources and their ability, for raising-up the child, securing his / her rights, providing him / her with care and protecting him / her against abuse and neglect.

2. The relevant bodies shall take necessary measures to secure commitment of parent(s) or caregiver to be responsible for him / her, maintain his / her rights and protect him / her against abuse and neglect.
  3. In case of parent separation, the child shall be given the right to visit and contact either of them, unless his / her benefit requires otherwise.
- 15-1 The child has the right to live within the confines of a coherent and united family, to receive family care and to know his / her parents. Adoption and mixing of lineages shall be prohibited. Parents shall both bear joint responsibility for child rearing and growth. Parents or their substitute, as per the case, shall bear the first responsibility for child rearing, growth and highest interests. The relevant bodies shall take all measures necessary to secure commitment of parent or caregiver to their assigned joint responsibility and duties of child rearing, care, guidance and growth to the fullest.
  - 15-2 If the child is in the custody of one parent, father or equivalent shall afford him / her and facilitate his / her education, feeding, curing and extracting ID documents, who shall bear basic responsibility for this within the limits of his financial resources and abilities to secure living conditions necessary for child growth.
  - 15-3 Taking into account the provisions of Paragraph 3-4 of this List, the relevant bodies shall secure child's contact with his / her parents and visiting them. No child shall be forced to separate from his / her parents unless by virtue of court ruling that deprives one parent or both of the child. Authorities concerned with child protection may temporarily prevent direct contact between the child and a parent or equivalent in case of accusation of abuse or torture of the child until a final court ruling is issued or the judge permits such deprivation for child's benefit.
  - 15-4 The relevant bodies shall provide appropriate assistance to parents or their equivalent in order to enable them to carry out their responsibility for child rearing through sponsoring the development of child care institutions, facilities and services.
  - 15-5 The relevant bodies shall take all necessary measures in order to provide childhood care services and facilities in child's mother workplace.
  - 15-6 The relevant bodies shall sponsor the right of every poor child to benefit from social security services including granting of subsidies and aids pursuant to the provisions of Social Security Code.
  - 15-7 The relevant bodies shall sponsor the right of every child to a living standard appropriate for his / her physical, mental, emotional and social growth.
  - 15-8 The relevant bodies shall take all appropriate measures to secure collection of child payments from the legitimately responsible party and to secure the continuity and unceasing thereof.
  - 15-9 Taking into account child's highest benefit, the child separated from one or both parents shall have the right to keep personal relations and direct contact with both parents on a regular basis. The relevant bodies shall secure child's contact with parents and remind separated parents that it is necessary not to distort the image of any of them by the other in child's eyes. It shall further be prohibited to determine to see the child at police stations.
  - 15-10 The child shall have the right to sponsorship, vision or visit by a parent at the other parent's house at certain times. In case of disagreement of parents or equivalents on the place of visit, a ruling shall be issued for sponsored child to be visited at the social

centers dedicated for that purpose. Ministry of Social Affairs and other concerned bodies shall encourage and support the construction of family meeting centers and units at their branches or their affiliate or supervised associations in order to secure child psychological and social security.

- 15-11 In case of custodian refusal of child's visit by the other parent, or in case the child is not returned back after the visit or vision to custodian or legal caregiver, the authority concerned with child protection at Ministry of Social Affairs shall interfere the police to require for compliance. In case of insistence, the matter shall be referred to the competent court for ruling and penalty as per applicable execution codes in this regard. In all cases, no infant shall be taken off from other except upon court ruling or in case abuse or torture of infant by mother is proved by conclusive evidence.

### **Article 16**

All authorities shall take into account the benefit of child in all procedures taken with regard to him / her and shall accelerate the accomplishment thereof and take into account child's mental, psychological, physical, educational and pedagogical needs in consistence with his / her age, health and so on.

- 16-1 The relevant bodies shall secure the right of every child to a standard of living appropriate for his / her physical, psychological, emotional and social growth. Such bodies shall supervise the extent to which the child satisfies his / her various needs, e.g., physical, psychological, educational and pedagogical needs, whether in his / her original family, alternative family, social care institutions, schools and other places frequented or dealt with by the child. The relevant bodies shall further take all measures and procedures to secure meeting various needs of children.
- 16-2 The relevant bodies shall issue instructions for their employees emphasizing giving priority to children over any other person in all judiciary, administrative, health, educational and other deals and procedures. The protection of child and his / her best and highest interests shall be given the priority in all decisions and procedures related to childhood, which are issued or followed-up by whatever authority.
- 16-3 Before entering into marriage contract, it shall be ensured that the marriage of children under 18 shall not be harmful to him / her and shall achieve his / her best interests.
- 16-4 No natural or corporate person dealing with children shall act in such a way that is likely to negatively affect child's mental, psychological, physical, educational or pedagogical capabilities. Parent or equivalent shall report any act against the child that does not consider his / her mental, psychological, physical, educational or pedagogical needs or his / her age, health or benefit. All relevant bodies, each in their specialty, shall take appropriate measures to prevent such acts or to treat their consequences.
- 16-5 Child's proof of ID shall not be delayed. In case of problems with ID documents of parent(s), child shall be given a proof to be able to proceed upon education, treatment and other rights.
- 16-6 Child under the care of Ministry of Social Affairs or institutions or associations under Ministry's supervision or alternative or custodian families, who does not have any ID documents, shall be enabled to practice his / her rights to education, treatment and so ever, by virtue of a letter from the Ministry addressing the relevant body enabling the child to practice his / her rights.

## **Article 17**

The relevant bodies shall promptly take appropriate treatment and reformation measures for children within an environment that puts his / her mental, psychological, physical or educational safety to delinquency risk.

17-1 The relevant bodies shall take all measures and procedures necessary for protection of child against delinquency that puts his / her mental, psychological, physical or educational safety at risk. Child shall be vulnerable to delinquency risk if he / she is found in any of the following cases that threaten his / her socialization:

1. If his / her security, morality, health or life is put at risk.
2. If his / her rearing conditions within the family, school, care institutions and so on are likely to put him / her at risk or if he / she is vulnerable to neglect, abuse, violence, exploitation or vagrancy.
3. If the child is unjustly deprived of his / her right, whether wholly or partially, to custody or vision of a parent or equivalent.
4. If the child is given-up by his / her provider or if parent(s) is lost or if the responsibility for the child is given-up by the caregiver.
5. The child is deprived of basic education.
6. If the child within family, school, care institutions and so on is vulnerable to incitement to violence, immoral acts, pornographic acts, commercial exploitation, harassment or illegitimate usage for alcohols, narcotics or psychoactive substances.
7. If the child is found begging, including offering trivial goods or services, performing age-inappropriate acrobatic acts or practicing collection of waste, trash and the like.
8. If the child has no stable place of residence or usually lives on street or any other places unfit for residency or housing.
9. If the child contacts with delinquents, suspected people or people with bad reputation.
10. Misconduct of children and quittance from the authority of parent, guardian or caregiver or in case of death, absence or ineligibility of parent or caregiver.
11. If there is nobody who secures to the child a legitimate way to earn a living or if the child has no trustee.
12. If the child is sick with a physical, mental, psychological or other disease that affects his / her ability to perceive or make decision, which may risk the safety of him / herself or other people.

17-2 The relevant bodies shall promptly take appropriate measures of care and reform for children in any of the above cases in order to receive care within family or alternative or concerned social care homes and institutions.

## **Article 18**

The relevant bodies shall take all appropriate measures:

1. To play an efficient and positive role in the field of prevention, health counseling and raising awareness of child rights, especially in relation to his / her health, nutrition, breastfeeding benefits, mental safety and prevention of accidents and smoking harms especially during pregnancy, and illustrate the rights of children through various media.
  2. To support school health system to perform its complete role in the field of prevention and health counseling.
  3. To secure the right of child to receive age-appropriate education.
  4. To prevent child infectious and dangerous diseases.
  5. To secure the child against injuries resulting from motor accidents and the like.
  6. To protect the child against environmental pollution.
  7. To relief the suffering of children who live in hard conditions, e.g., disputed children, street and homeless children and disaster and war victimized children.
- 18-1 Ministry of Health and other relevant bodies shall take all measures and procedures necessary for child healthcare in order to enable the child to enjoy the highest attainable health level through provision of appropriate health facilities for treatment of diseases and rehabilitation for children, and to guarantee that no child shall be deprived of his / her right to receive any healthcare services.
- 18-2 Every child shall have his / her own health card and data shall be registered in the concerned healthcare center. This health card shall be received by parent or caregiver and shall be submitted at each medical examination of child in initial healthcare centers, health units and the like. The child's health status as well as vaccinations and their dates shall be also registered on the card.
- 18-3 The health card on which vaccinations are registered shall be attached to child's school enrollment documents in the primary stage, whenever possible, in order to register the results of child's periodic medical check-up and any developments to his / her health status, including diseases or injuries, which shall be kept in the school file.
- 18-4 The health authorities shall issue a decree on procedures of periodic medical examination for school children and dates thereof pursuant to instructions and regulations thereon.
- 18-5 No color or preservative substances or any other nutrition additions shall be added to foods and child feeding products unless they comply with conditions and specifications approved by competent authorities.
- 18-6 No advertisement on foods and child feeding products shall be made until they are registered and licensed by competent authorities, especially breast milk substitutes.
- 18-7 Schools as well as concerned educational authorities shall not allow for entry or selling of inappropriate foods to schools. Such authorities shall coordinate with other relevant bodies and health authorities to determine the type of meals and foods sold on school canteens or provided by suppliers or contractors to schools. Selling of soft drinks, energy drinks and other beverages unhealthy for children shall be prohibited.

- 18-8 The child shall have the right to prevention of infectious diseases and provision of treatment for emergency cases in hospitals and governmental centers.
- 18-9 Couples who want to get married shall undergo medical examination to ensure that they have no genetic or infectious diseases for the sake of child protection.
- 18-10 children who live in hard conditions, like disputed, street and homeless children, as well as victims of disasters and wars, shall be helped in such a way to alleviate their suffering, through provision of financial, accommodation, therapeutic, educational and rehabilitation Support, according to the requirements of each case. Street or homeless children, who are found out by investigations to be vulnerable to neglect, lack families or family support and suffer from mental or psychological diseases, must be admitted at a specialized governmental hospital, by virtue of a letter from Ministry of Social Affairs or police. In the latter case, police shall notify the Ministry with the case to be visited and followed-up.
- 18-11 The relevant health authorities shall take appropriate measures to:
- a. decrease mortality of infants and children,
  - b. guarantee the provision of medical assistance and healthcare necessary for mothers and children,
  - c. combat child diseases, care for and develop initial healthcare and secure child's right to provision of healthcare free-of-charge at hospitals and governmental centers,
  - d. guarantee appropriate healthcare to mothers during pregnancy and during and after delivery and provide periodic check-up services to mothers and children to ensure that they are free from genetic and dangerous diseases and to guarantee healthy child development and growth,
  - e. disseminate health education in various media, schools and educational institutions and raise parent awareness of basic information related to child health and nutrition, advantages of breastfeeding, principles of hygiene and environmental sanitation and prevention of accidents,
  - f. develop preventive healthcare and counseling provided to parents, educational facilities and services related to family planning, and
  - g. take all appropriate effective measures aiming at revocation of traditional practices that are harmful to child health.
- 18-12 All media shall play a positive and effective role in the field of health prevention and counseling, especially in relation to fields of child health and nutrition, advantages of breastfeeding, prevention of accidents and harms of smoking and energy drinks.
- 18-3 Education is a right for all children at schools of the country free-of-charge. Educational trustee of child shall be his / her parent, custodian or equivalent who shall consider child's benefit. The relevant bodies shall further provide the child with age-appropriate education, and shall especially:
- a. make basic education mandatory, available and free-of-charge for all, so that no child shall be deprived of his / her right to education,

- b. encourage the development of all forms of general and vocational education, which shall be provided and made available to all children, and provide financial help when necessary,
  - c. take necessary measures for encouraging regular attendance at schools and reduce dropout rates,
  - d. make available all information and educational and vocational guidelines to all children and those who take their affairs,
  - e. take all appropriate measures to guarantee discipline management at schools in such a way that goes in line with child's human dignity and complies with orders and regulations in the Kingdom,
  - f. make available higher education by all appropriate means based upon capabilities, and
  - g. to cause child education to be oriented to:
    1. developing child adherence to his / her environment, pride in his / her home country and respect of his / her identity, culture, language and national values,
    2. develop child's personality, talents and mental and physical capabilities to the highest possible extent,
    3. develop child's respect of human rights and basic freedoms pursuant to relevant codes, regulations and agreements applicable in the Kingdom, and
    4. prepare the child for a life that detects responsibility in an enlightened community with a spirit of understanding, peace, tolerance, equity and justice.
- 18-14 Ministry of Health shall take all appropriate measures in order to develop its capacity in the field of preventive and therapeutic healthcare and health counseling related to health and nutrition of children.
- 18-5 The relevant bodies shall take all necessary measures to secure that the child receipt of social security in case of need, as well as health insurance pursuant to codes and regulations applicable in the Kingdom.
- 18-16 In case of admitting the child for the purpose of care, protection or treatment of his / her physical or mental health, the relevant bodies shall recognize his / her right to periodic review of treatment presented to him / her and of all other conditions related to his / her admission.
- 18-17 Ministry of Education and its subordinate administrations shall take all appropriate measures to secure management of discipline at schools and educational institutions in such a way that goes in line with child's dignity, maintains his / her rights and protects him against abuse or neglect.
- 18-18 It is mandatory to care about child education in order to secure elimination of ignorance and illiteracy all over the Kingdom and facilitate child's access to scientific and technical knowledge as well as modern educational methods. Needs of children in remote areas shall be particularly considered.

- 18-19 Administrations of schools, educational institutions, centers, commercial markets, playgrounds, public parks and recreational places shall work to take all necessary measures to protect children against injuries resulting from accidents in general and motor accidents in particular. This shall include placing signboards, activating the role of child observers and escorts and taking all necessary measures thereupon.
- 18-20 Any motor driver with a child on board shall allow him / her to sit in back seats and fasten safety belt, and shall place children under the age of 3 in child's special seat.
- 18-21 The child has the right to good, healthy and clean environment. All necessary effective measures shall be taken in order to terminate practices that are harmful to child's health. The child shall further be protected against environmental pollution, which shall be taken into account in the establishment or renting of schools. Children shall further be encouraged to respect and protect the environment.
- 18-22 Every child at school shall have the right to rest, have spare time, play, practice age-appropriate games and activities and participate in cultural and social life.
- 18-23 Child with special needs shall have the right to education and training at the same schools and centers of normal children if this is allowed by his / her condition. In case of child with exceptional disabilities, he / she shall be provided with education and training in special classrooms, schools or centers, which shall be connected with normal education system and appropriate to children with special needs. Education of all kinds and levels shall be provided to all such children in line with their needs, who shall be furnished with educationally qualified staff to educate and train them according to their disabilities.
- 18-24 The relevant bodies shall encourage the establishment of clubs and centers for children to secure their provision with social, educational and pedagogical care through occupying their spare times with sound educational means and aids, in order to achieve the following purposes:
1. social and educational care for children during their spare times on vacations and before and after the school day,
  2. completion of the mission of family and school towards the child and assistance of the working mother to protect the child against physical and educational neglect as well as against vulnerability to delinquency,
  3. creating an opportunity for the child to develop on all physical, mental and emotional levels, to acquire new experiences and skills and to develop his / her potentials to the fullest,
  4. assistance of children to increase their academic achievement,
  5. Strengthening links between club or center and child's family, and
  6. Preparing and providing the family with knowledge and awareness on child rearing and correct educational methods of child preparation and socialization.

## **Article 19**

The relevant bodies shall set up health, educational, pedagogical, psychological and social programs for rehabilitation of children who underwent an abuse or neglect case.

- 19-1 All relevant bodies, especially Ministry of Social Affairs and Ministry of Health, shall take all appropriate measures to encourage physical and psychological rehabilitation and social reintegration of children who are victims of any forms of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or humiliating treatment of punishment or armed conflicts. Such rehabilitation and reintegration shall take place within an environment that reinforces child's health, self-respect and dignity.
- 19-2 All necessary rehabilitation procedures shall be taken for children who underwent maltreatment and their families in order to secure their return back to the family in a normal condition, including psychological treatment and rehabilitation as well as educational courses, development of child's social and self-protection skills and treatment of an addict parent or caregiver if necessary.
- 19-3 Cases of child's vulnerability to abuse, neglect and maltreatment shall be studied on health, psychological, social, economic and disciplinary aspects so that appropriate procedures can be taken and follow-up can be made on a periodic basis in case of delivering the child back to parent or caregiver.

## **Article 20**

The relevant bodies shall set up comprehensive standards and quality for domestically manufactured or imported child toys, in order to comply with health, environmental and cultural specifications and standards as well as safety means and in compliance with Islamic controls.

- 20-1 Child toys, whether domestically manufactured or imported, shall be made of robust, rust resistant and anti-corrosive materials, in compliance with Saudi and GCC standard specifications in terms of general requirements of safety as well as requirements of site, installation, inspection and maintenance.
- 20-2 It shall be verified that child toys are free of any chemicals that are harmful to their health and safety and that they are made of materials that stand child's movement, work smoothly and comply with security conditions.
- 20-3 Toys or any parts thereof shall not contain any moving parts that are easy to be ingested by the children or any angles or sharp or tough ends that may injure them.
- 20-4 Toys shall be nonflammable and painted with fixed coating and shall not produce soft, toxic or irritating substances. In addition, toys made of plastics shall stand high temperatures.
- 20-5 Batteries of toys shall be put in an unseen place and toys shall not be powered directly by electricity.
- 20-6 Toys shall be a source of learning for children as much as possible.
- 20-7 Toys shall not entail any violation to Islamic principles.
- 20-8 Toy, bulletin or catalogue shall contain information on safe usage of the product and how to clean it before usage. They shall further illustrate storage method, appropriate age, potential risks and any other data that maintain child's safety in Arabic language and maybe in English. The phrases used for such purposes shall be short, easy and familiar.

## **Article 21**

The provisions and procedures stipulated in this List shall be without prejudice to:

1. commitments stipulated by other concerned bodies and authorities, each in their specialty, and
  2. any provision that secures better protection for child, which is stipulated by any other act, code or international convention which the Kingdom is a party thereof.
- 21-1 Other public and private bodies concerned with child protection shall continue to provide their services in order to protect and assist children pursuant to the provisions of the codes they are subject to and in such a way that achieves the aims of this Code and its Executive List.
- 21-2 The application of this Code and its Executive List shall not prevent the claim of any other better rights for child protection, which are guaranteed by other codes or international conventions which the Kingdom is a party thereof.

## **Chapter 5**

### **Reporting and Considering the Violation of this Code, its Executive List and Time of Applicability**

## **Article 22**

1. Anyone who has any knowledge of any abuse or neglect case shall immediately report it to the concerned bodies.
  2. The concerned bodies shall facilitate procedures for reporting of abuse and neglect cases, especially those communications reported by children.
  3. The List shall determine procedures for reporting any abuse or neglect cases and how to deal with them.
- 22-1 Anyone who is knowledgeable of any case that violates the provisions of this Code and its Executive List, especially child abuse or neglect cases, shall immediately report to the concerned authorities, which shall in turn facilitate reporting procedures.
- 22-2 Any public or private body shall inform Ministry of Social Affairs of the police on any case that violates the provisions of this Code and its Executive Regulations, especially child abuse or neglect as soon as they come to its knowledge or receives notification thereof.
- 22-3 If violation, abuse or neglect case requires urgent intervention, the concerned authority shall immediately report to the police. Informant's identity shall be confidential.
- 22-4 The employer to whom an employee reports the violation or child abuse or neglect case shall be responsible for consequences of his inaction and non-communication of the case. Such responsibility shall extend to natural persons who represent him at the time of the occurrence of violation or abuse. The fact that they no longer represent the employer at the time of reporting for whatever reason shall not exempt them from their responsibility thereof.
- 22-5 When any school or other educational institution discovers any child abuse or neglect case or any case of child deprivation of his / her rights, and when it is impossible for such educational institution to find out appropriate solutions, the school management or equivalent shall report to the concerned authority at Ministry of Social Affairs including

- a report on the case, and shall facilitate its accessibility by the Ministry delegate in order to meet the case and follow-up the situation thereof. In case of serious abuse or neglect, it shall further report to the police. And in all cases, education administrations and schools shall set up appropriate mechanisms for sending all statistics related to child abuse and neglect to Ministry of Social Affairs, including those cases that have been amicably solved or treated.
- 22-6 If a health authority or body discovers any child abuse or neglect case or deprivation of his / her rights, it shall provide treatment and medical care necessary for the case. It shall further shall report to the concerned authority at Ministry of Social Affairs including a report on the case, and shall facilitate its accessibility by the Ministry delegate in order to meet the case and follow-up the situation thereof. In case of serious abuse or neglect, it shall further report to the police. And in all cases, education administrations and schools shall set up appropriate mechanisms for sending all statistics related to child abuse and neglect to Ministry of Social Affairs, including those cases that have been amicably solved or treated
- 22-7 Report Receiving Center shall receive reports from all Kingdom regions on cases which violate the provisions of this Code and its Executive List, especially abuse or neglect cases, whether reported by individuals, police or any other public or private bodies. The Center shall then verify informant's identity and afterwards document the communication and list its attachments, if any. No anonymous reporting shall be acceptable.
- 22-8 The Report Receiving Center shall refer the report to the concerned Social Protection Unit in the region of dwelling of the reported case to perform its duties thereupon.
- 22-9 The Report Receiving Center shall prepare records and organizing forms for receiving reports. An electronic documentation system shall further be set up for all received communications related to children.
- 22-10 The Report Receiving Center shall record all phone calls received by it on the number dedicated for communications and shall maintain confidentiality thereof.
- 22-11 The Report Receiving Center shall prepare periodic statistical reports on communications and complaints received by it in relation to children and shall classify thereof according to type and seriousness of violation, abuse or neglect, gender of the child, nature of informants and number of cases handled by the Center.
- 22-12 General Administration of Protection in Ministry of Social Affairs shall handle any reports received by the Center from public or private authorities, without prejudice to duties and responsibilities of the Center, and shall refer thereof to the concerned Social Protection Unit for research, study and treatment thereof or to receive instructions thereupon.
- 22-13 No information shall be disclosed on identity of informant of violation, abuse or neglect case without his own written consent, except in the following cases:
- a. if the Social Protection Unit finds that the handling of abuse case requires disclosing the identity of the informant for fundamental reasons at its own discretion in very restrictive cases, and
  - b. if the Social Protection Unit receives causative official request from an official authority or if the disclosure requirement is issued by a judicial body, in which case the authorities or bodies to whom the identity of informant is disclosed shall maintain confidentiality

thereof and intolerance of disclosure thereof, and any authority or body that acts in violation thereon shall be subject to liability.

- 22-14 Informants of any violation to the provisions of this Code or its Executive List or any child abuse or neglect case shall be deemed bona fide unless evidence stating otherwise is available.
- 22-15 If the report or communication is proved incorrect, the affected party or any concerned party may punish the informant pursuant to applicable laws without prejudice to the right of the affected party to claim for compensation. The claimant shall be responsible to prove the bad faith.
- 22-16 Reports related to child abuse or neglect shall be immediately handled through contacting with the case to evaluate its seriousness, doing medical assessment for the case if necessary and taking all necessary and appropriate actions to handle the case. Admittance and handling of communication shall not require consent of parent or equivalent.
- 22-17 Upon handling child abuse or neglect cases, Social Protection Unit shall gradually take necessary measures for treatment of such cases. Priority of treatment shall be given to preventive, counseling and reformatory procedures among relevant parties in order to secure child's benefit.
- 22-18 If the Social Protection Unit finds that child's interest requires being satisfied with treatment of the case through the provision of psychological, family and social guidance and counseling, it shall ensure that such procedure shall not result in more serious harm to the child through taking necessary measures to maintain child's safety.
- 22-19 The Social Protection Unit shall provide the child with health and social care, including medical and psychological treatment and rehabilitation programs. This further involves the surrounding people who are in need of care due to abuse, neglect or any other violation of the provisions of this Code or its Executive List. Necessary care shall be provided through referral to competent authorities or bodies as per type of the required action or care. If the case is refused to be handled or treated by any authority or concerned body, Ministry of Social Affairs shall address the Administrative Governor to secure taking necessary actions thereupon.
- 22-20 In cases of non-serious abuse or neglect, Social Protection Unit may keep the child with his / her family, in which case parent or equivalent shall undertake to provide the child with necessary protection, enable him / her to contact directly with the Unit and enable specialized employees of the Unit to contact with the child and visit him / her at any time for follow-up if necessary. The abusive or neglecting party in this case shall undertake to stop all types of child abuse or neglect, to enable the child to practice all his / her legitimate rights, to perform his responsibilities and duties towards the child, to provide all his / her basic needs and to take complete responsibility in case of violation thereof.
- 22-21 If the breaching, abusive or neglecting party refuses to attend to the Social Protection Unit or respond to its instructions, the Unit shall require the police to arrest and bring him to its premises in order to examine the communication presented against him. This procedure shall be applicable to any in-compliant or non-responding party including relatives of the child victim of abuse, neglect or violation.
- 22-22 An abuse or neglect case shall be deemed serious if the abusive or neglecting act results in severe damage seen on the child that requires immediate intervention to be stopped

- or prevented, or if the severe abusive or neglecting act is documented by a medical report. Abuse or neglect case shall further be deemed serious if it is feared that the abusive or neglecting act shall result in vulnerability of child to a greater or continuous harm to his / her life, safety of health by the abusive or neglecting party. In such cases, the abuse or neglect case shall be reported to the Administrative governor and the concerned security authorities.
- 22-23 If seriousness or the case appears clear from the communication to Social Protection Unit, it shall report the abuse or neglect case to the police and other concerned security authorities and shall require them to take all necessary procedures to handle the case according to its seriousness.
- 22-24 Male and female specialists at Social Protection Unit shall meet with the child who is vulnerable to abuse, listen to him / her and offer him / her case-appropriate solutions and procedures that must be taken, which fall under the terms of reference of Ministry of Social Affairs for approval. In case the child refuses to be taken or accommodated, it shall be explained to him / her that the situation shall be followed-up and appropriate actions shall be taken against the abuser. It shall be taken into account the possibility to take the child without his / her consent if remaining shall endanger his / her safety and if it is not possible to relocate with any trusted relative.
- 22-25 The child shall be met with in the presence of male or female social or psychological specialist in Social Protection Unit and shall be questioned in an age-appropriate way. Anything that may terrorize the child or influence his / her will shall be avoided. The child may be listened to individually in the presence of a relative, if required for child's benefit.
- 22-26 If the child is a victim of abuse or neglect by one of separated parents, and if the child cannot be kept with the abusive party, the Social Protection Unit shall investigate the case, estimate better interest of child and order to deliver him / her immediately to the other parent or a relative who is able to provide temporary necessary care to the child until his / her position is handled. This action shall not be prevented by court ruling of child custody in favor of the abusive or neglecting party. In this case, the court that issued the custody ruling shall be immediately notified with the incident along with a case report in order to take action and review the validity of the custodian party. In all cases, objectors to this action shall resort to the court.
- 22-27 The child shall be accommodated or hosted as per the following conditions:
- a. Accommodation or hosting shall be limited to children under the age of 18.
  - b. The case must be a victim of abuse or neglect stipulated in Child Protection Code and its Executive List and it is impossible to accommodate the child with a relative or an alternative family.
  - c. Accommodation shall not require consent of parent or equivalent.
  - d. Accommodation shall be for 3 days, which may be extended as required by the case for further durations not exceeding 2 months. If treatment of the case requires longer durations, it can be extended for further durations by virtue of approval of the concerned Undersecretary of Ministry of Social Affairs.
- 22-28 The following procedures shall be taken by Social Protection Unit upon approval of receiving or accommodating the case:

- a. To verify from the police if there is any communication of absence or escape of the child. In all cases, the child shall not move to arrest or observation house unless he / she is proved to be accused of a crime that requires arrest or there is an accusation decree against him / her issued by any investigation authority, which requires arresting him / her at the disposal of the case or if there is a final arrest order issued against him / her.
  - b. To apply necessary medical examination upon the child, which if not available at that time, the child shall be temporarily accommodated in the place dedicated for receiving cases until the child undergoes examination and his / her safety is verified.
  - c. If the child suffers from chronic psychological diseases, he / she shall be referred to a specialized hospital of healthcare center for treatment. If such places apologize to admit or handle the case, this shall be referred to the Administrative Governor.
  - d. It shall be explained to the child and party responsible for his / her affairs that the accommodation or hosting shall be temporal until the problem is solved and appropriate alternatives are found, whether in relation to residency or returning back again to his / her family, after taking necessary actions to eliminate abuse or neglect inflicted upon him / her. The victim child may continue his / her education during accommodation or hosting. In all cases, no child shall be prevented from communication with his / her family under supervision and follow-up of the Unit.
  - e. No hosted or accommodated child shall be discharged until a social research is performed on his / her surroundings to ensure that he / she shall not be vulnerable to abuse or neglect that threatens his / her life or safety and coordination is made with a family member or relative to receive the child. The child shall be returned back to the accommodation or hospitality house as soon as a danger occurs to threaten his / her life or safety. During accommodation or hosting, child's family members shall be contacted from time to time to induce them to receive the child back. Enmities Reconciling Committee shall interfere in this regard if necessary.
- 22-29 The accommodated or hosted child, as allowed by his / her age, shall be enabled to exit and return back during the accommodation or hospitality duration, escorted by or under supervision of controllers, in order to continue his / her study, to practice recreational or sport activities or to market to secure his / her necessary personal needs or in case that the Unit finds it plausible to allow him / her to participate cultural or recreational events or activities outside the hospitality or accommodation house, provided that such exiting shall not result in harming his / her situation, and provided that the child shall adhere to instructions and guidelines of Social Protection Unit in this regard and that his / her exit and return back shall be pursuant to the procedures determined by the Unit thereupon. In case of absence or non-return of child, the Unit shall immediately report the police and exempt its responsibility for the case, and shall further inform his / her family if necessary. Such incident of absence or escape shall not prevent the Unit from hosting the same child again after questioning him / her on the incident and taking necessary actions for non-occurrence thereof.
- 22-30 If the violation or abuse or neglect incident is committed against a child who lives in one of Ministry of Social Affairs' houses or who lives in a house for an authority of body supervised by the Ministry, the Ministry shall perform internal investigation and shall

- report the case to the police to take necessary actions within its capacity, without prejudice to punishment of abuser or neglecting person with necessary disciplinary sanctions and child or family's right to compensation.
- 22-31 Ministry of Social Affairs shall coordinate with Ministry of Interior to provide necessary security guards to premises of social protection units, hospitality houses and other facilities for the Ministry whose nature of work in the field of protection against abuse or neglect requires provision of necessary security protection thereof.
- 22-32 Police and other concerned security authorities shall immediately respond to the request from Social Protection Unit to access any site and provide complete protection for specialists from Social Protection Unit.
- 22-33 Specialists from Social Protection Unit shall relocate to the case if the Unit finds it necessary for treatment. In all cases, the police and other concerned authorities shall bring parties of the case to Social Protection Unit's site upon request of specialists from the Unit.
- 22-34 In cases for which specialists from the Social Protection Unit decide to relocate, police shall be immediately informed to facilitate their entry to the site, secure their safety and remain with them during their work. Police shall access the sites in which people refuse entry of specialists of the Unit. In this case, police shall secure their safety and shall not involve them during attack and intrusion.

### **Article 23**

1. Without prejudice to the provisions of Article 22 Paragraph 3 of this Code, the Investigation and Public Prosecution Authority shall investigate violations of the provisions of this Code and file a claim before the competent court.
  2. Taking into account the provisions of other relevant codes, the competent court shall investigate violations of the provisions of this Code and shall decide appropriate penalty against the violating person.
- 23-1 Ministry of Social Affairs and police departments shall refer claims related to child abuse and neglect, as well as other violations of the provisions of this Code and its Executive List, which they find necessary to investigate, to the Investigation and Public Prosecution Authority.
- 23-2 The Investigation and Public Prosecution Authority shall investigate claims referred to it, which are related to the child, whether accused or victim, and shall require a report from Ministry of Social Affairs on his / her case and necessary actions thereupon. Such report shall be referred with the claim to the competent court unless the Investigation and Public Prosecution Authority decides to keep the claim as per order.
- 23-3 The child accused of committing any violation of codes and instruction shall be treated in such an age-appropriate way that maintains his / her dignity and self-respect and facilitates his / her reintegration in society.
- 23-4 Child's innocence is supposed during investigations and trial until otherwise is proved as per the law.
- 23-5 The child shall be immediately and directly notified with his accusations, if he/ she is able to understand what is said, at the presence or a parent, caregiver or equivalent, and shall be enabled to bring a lawyer and get appropriate legal assistance.

- 23-6 The child shall make use of judiciary capacity and procedures for juveniles in the Kingdom, whenever he / she has an interest in that. Child's age, status and surrounding conditions shall be taken into account when dealing with him / her.
- 23-7 Arrest and investigation authorities shall take into consideration the application of codes and instructions that determine a minimum age for criminal accountability of child, so that no child shall be held criminally accountable unless his / her age is above the minimum age determined by such codes and instructions.
- 23-8 The competent court investigating the violations of this Code and its Executive List shall take into account the provisions of Protection against Abuse Code and its Executive Regulation when it decides the appropriate penalty against the offender.
- 23-9 Necessary measures shall be taken into account, as much as possible, for treatment of child and modification of his / her behavior without resorting to punitive measures and imprisonment.
- 23-10 In case of housing the child in an accommodation or social care house, appropriate requirements shall be made available to him / her, including care, guidance, supervision, control, advice and the right of choice as long as there is no harm. He / she shall further be enabled to access educational and vocational training programs and other institutional care alternatives in order to secure child treatment in such a way that maintains his / her rights and commensurate with his / her age, prosperity, conditions and crime, if any.
- 23-11 In the stage of child investigation, there shall be a attendant male of female social specialist from the Protection Management, whenever possible.

#### **Article 24**

Minister of Social Affairs shall issue the List within 90 days from the date of publishing this Code in the official Gazette after coordination with Ministry of Interior, Ministry of Education, Ministry of Health, Human Rights Organization and other relevant bodies, each in their specialty, which shall be applicable from the date of applying this Code.

- 24-1 Minister of Social Affairs shall issue any detailed special practical rules, controls or mechanisms related to implementation of this List or any Article thereof.
- 24-2 Ministry Agency for Social Care and Family in Ministry of Social Affairs shall review and evaluate the application of the provisions of this List every 2 years from the date of issuance thereof or whenever necessary and shall further require videos of relevant bodies. It shall refer its suggestions to Minister of Social Affairs to take necessary actions thereupon.

#### **Article 25**

This Code shall be applicable after 90 days from the date of being published in the official Gazette.

- 25-2 The provisions of this List shall be applicable from the date of issuance thereof.

**ANNEX B: CONVENTION ON JURISDICTION, APPLICABLE LAW AND  
RECOGNITION OF DECREES RELATING TO ADOPTIONS (HCCH 1965)**

(Concluded November 15, 1965)

(In accordance with its Article 23, this Convention ceased to have effect on 23 October 2008)

The States signatory to the present Convention,  
Desiring to establish common provisions on jurisdiction, applicable law and recognition of decrees relating to adoption,  
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention applies to an adoption between:  
on the one hand, a person who, possessing the nationality of one of the Contracting States, has his habitual residence within one of these States, or spouses each of whom, possessing the nationality of one of the Contracting States, has his or her habitual residence within one of these States, and  
on the other hand, a child who has not attained the age of eighteen years at the time when the application for adoption is made and has not been married and who, possessing the nationality of one of the Contracting States, has his habitual residence within one of these States.

Article 2

The present Convention shall not apply where -

- a) the adopters neither possess the same nationality nor have their habitual residence in the same Contracting State;
- b) the adopter or adopters and the child, all possessing the same nationality, habitually reside in the State of which they are nationals;
- c) an adoption is not granted by an authority having jurisdiction under Article 3.

Article 3

Jurisdiction to grant an adoption is vested in -

- a) the authorities of the State where the adopter habitually resides or, in the case of an adoption by spouses, the authorities of the State in which both habitually reside;
- b) the authorities of the State of which the adopter is a national or, in the case of an adoption by spouses, the authorities of the State of which both are nationals.

The conditions relating to habitual residence and nationality must be fulfilled both at the time when the application for adoption is made and at the time when the adoption is granted.

#### Article 15

The provisions of the present Convention may be disregarded in Contracting States only when their observance would be manifestly contrary to public policy.

#### Article 18

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

#### Article 19

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 18.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

#### Article 23

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 19, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

**ANNEX C: CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION  
IN RESPECT OF INTERCOUNTRY ADOPTION (HCCH 1993)**

(Concluded 29 May 1993)

The States signatory to the present Convention,  
Recognising that the child, for the full and harmonious development of his or her personality,  
should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the  
child to remain in the care of his or her family of origin,  
Recognising that intercountry adoption may offer the advantage of a permanent family to a child  
for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the  
best interests of the child and with respect for his or her fundamental rights, and to prevent the  
abduction, the sale of, or traffic in children,

Desiring to establish common provisions to this effect, taking into account the principles set forth  
in international instruments, in particular the United Nations Convention on the Rights of the  
Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles  
relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and  
Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December  
1986), Have agreed upon the following provisions -

First paragraph.

**CHAPTER I - SCOPE OF THE CONVENTION**

**Article 1**

The objects of the present Convention are

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

**Article 2**

(1) The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually

resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

(2) The Convention covers only adoptions which create a permanent parent-child relationship.

### Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph c, have not been given before the child attains the age of eighteen years.

## CHAPTER II - REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

### Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -

a) have established that the child is adoptable;  
b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

c) have ensured that

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.

### Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State -

a) have determined that the prospective adoptive parents are eligible and suited to adopt;

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorised to enter and reside permanently in that State.

## CHAPTER III - CENTRAL AUTHORITIES AND ACCREDITED BODIES

### Article 6

- (1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
- (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

### Article 7

- (1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.
- (2) They shall take directly all appropriate measures to-
  - a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
  - b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

### Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

### Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to -

- a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c) promote the development of adoption counselling and post-adoption services in their States;
- d) provide each other with general evaluation reports about experience with intercountry adoption;
- e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

### Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

## Article 11

An accredited body shall -

- a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

## Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorised it to do so.

## Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

## CHAPTER IV - PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

### Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

### Article 15

- (1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.
- (2) It shall transmit the report to the Central Authority of the State of origin.

### Article 16

- (1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall -
  - a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

- b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
  - c) ensure that consents have been obtained in accordance with Article 4; and
  - d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.
- (2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

#### Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if -

- a) the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c) the Central Authorities of both States have agreed that the adoption may proceed; and
- d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

#### Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

#### Article 19

- (1) The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.
- (2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.
- (3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

#### Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

#### Article 21

- (1) Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the

prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular -

a) to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;

b) in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;

c) as a last resort, to arrange the return of the child, if his or her interests so require.

(2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

## Article 22

(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who-

a) meet the requirements of integrity, professional competence, experience and accountability of that State; and

b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

(3) A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

(5) Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

## CHAPTER V - RECOGNITION AND EFFECTS OF THE ADOPTION

### Article 23

(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given.

(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority

or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

#### Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

#### Article 25

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognise adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

#### Article 26

- (1) The recognition of an adoption includes recognition of
  - a) the legal parent-child relationship between the child and his or her adoptive parents;
  - b) parental responsibility of the adoptive parents for the child;
  - c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.
- (2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such State.
- (3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognises the adoption.

#### Article 27

- (1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognises the adoption under the Convention, be converted into an adoption having such an effect -
  - a) if the law of the receiving State so permits; and
  - b) if the consents referred to in Article 4, sub-paragraphs c and d, have been or are given for the purpose of such an adoption.
- (2) Article 23 applies to the decision converting the adoption.

### CHAPTER VI - GENERAL PROVISIONS

#### Article 28

The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

#### Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a) to c), and Article 5, sub-paragraph a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

#### Article 30

(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

#### Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

#### Article 32

(1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.

(2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.

(3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

#### Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

#### Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

#### Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

#### Article 36

In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units -

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b) any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;
- c) any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorised to act in the relevant territorial unit;
- d) any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

#### Article 37

In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

#### Article 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

#### Article 39

- (1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
- (2) Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

#### Article 40

No reservation to the Convention shall be permitted.

#### Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

#### Article 42

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

### CHAPTER VII - FINAL CLAUSES

#### Article 43

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

#### Article 44

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.

(2) The instrument of accession shall be deposited with the depositary.

(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b*) of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

#### Article 45

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

#### Article 46

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.

(2) Thereafter the Convention shall enter into force -

*a)* for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

*b)* for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

#### Article 47

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

#### Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following -

*a)* the signatures, ratifications, acceptances and approvals referred to in Article 43;

*b)* the accessions and objections raised to accessions referred to in Article 44;

*c)* the date on which the Convention enters into force in accordance with Article 46;

*d)* the declarations and designations referred to in Articles 22, 23, 25 and 45;

*e)* the agreements referred to in Article 39;

*f)* the denunciations referred to in Article 47.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention. Done at The Hague, on the 29th day of May 1993, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.

**ANNEX D: CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION,  
ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL  
RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN  
(HCCH 1996)**

(Concluded 19 October 1996)

The States signatory to the present Convention,  
Considering the need to improve the protection of children in international situations,  
Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law,  
recognition and enforcement of measures for the protection of children  
Recalling the importance of international co-operation for the protection of children,  
Confirming that the best interests of the child are to be a primary consideration,  
Noting that the Convention of 5 October 1961 concerning the powers of authorities and the law  
applicable in respect of the protection of minors is in need of revision,  
Desiring to establish common provisions to this effect, taking into account the United Nations  
Convention on the Rights of the Child of 20 November 1989,  
Have agreed on the following provisions –

**CHAPTER I - SCOPE OF THE CONVENTION**

Article 1

- (1) The objects of the present Convention are -
- a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
  - b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
  - c) to determine the law applicable to parental responsibility;
  - d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
  - e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
- (2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

### Article 3

The measures referred to in Article 1 may deal in particular with -

- a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- c) guardianship, curatorship and analogous institutions;
- d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;
- f) the supervision by a public authority of the care of a child by any person having charge of the child;
- g) the administration, conservation or disposal of the child's property.

## CHAPTER II - JURISDICTION

### Article 5

- (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
- (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

### Article 6

- (1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.
- (2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

### Article 7

- (1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
  - a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
  - b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the

whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

## Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a) a State of which the child is a national,

b) a State in which property of the child is located,

c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

## Article 9

(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

- request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or
- invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

- (2) The authorities concerned may proceed to an exchange of views.
- (3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

#### Article 10

- (1) Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if
- a)* at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and
- b)* the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.
- (2) The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

### CHAPTER V - CO-OPERATION

#### Article 33

- (1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.
- (2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

### CHAPTER VI - GENERAL PROVISIONS

#### Article 51

In relations between the Contracting States this Convention replaces the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, and the *Convention governing the guardianship of minors*, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

**ANNEX E: CONVENTION ON THE RIGHTS OF THE CHILD ADOPTED AND  
OPENED FOR SIGNATURE, RATIFICATION AND ACCESSION BY GENERAL  
ASSEMBLY**

(resolution 44/25 of 20 November 1989  
entry into force 2 September 1990, in accordance with article 49)

***Article 2***

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

***Article 3***

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

***Article 14***

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

### ***Article 20***

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

### ***Article 29***

1. States Parties agree that the education of the child shall be directed to:
  - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
  - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
  - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
  - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
  - (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

### ***Article 30***

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

## **LIST OF ABBREVIATIONS**

CJEU- Court of Justice European Union- (European Court of Justice)

EU- European Union

ECHR- European Convention on Human Rights

ECtHR- European Court of Human Rights

HCCH- Hague Conference/Conférence de la Haye

GCC- Gulf Cooperation Council

ICJ- International Court of Justice

KSA- Kingdom of Saudi Arabia

PCIJ- Permanent Court of International Justice

SC- Special Commission

US- United States of America

UK- United Kingdom

UN- United Nation

UNCRC- United Nation Children Rights Convention

USCIS- United States Citizenship and Immigration Services

UAE- United Arab Emirates

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