



***Kafalah:
Recognition and enforcement in EU States***

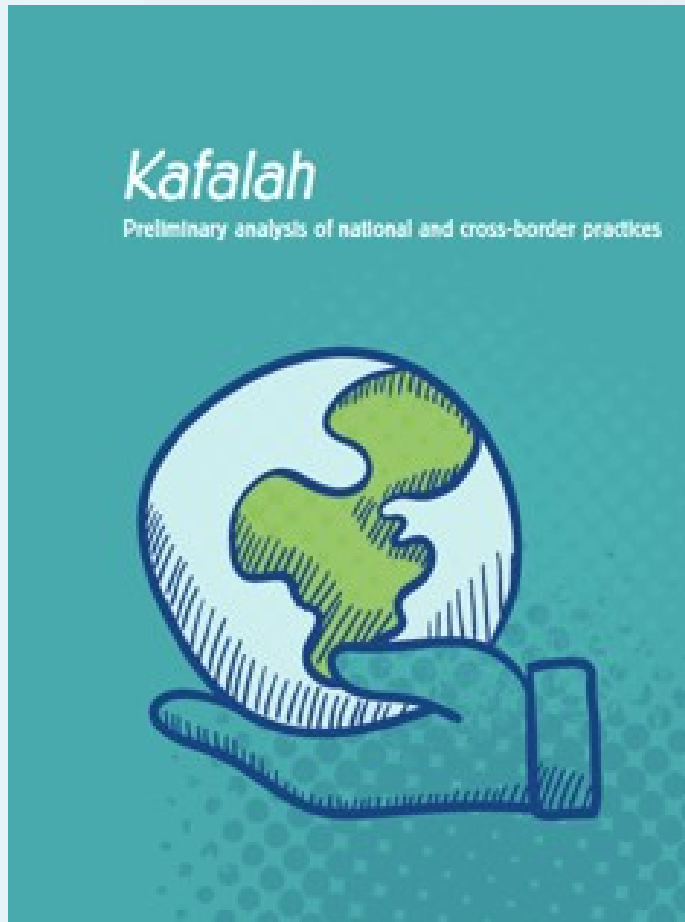
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Available in English and in French

(https://www.iss-ssi.org/images/Publications_ISS/ENG/ISS_Kafalah_ENG.pdf)

1. ISS/IRC *Kafalah* study of 2020

- **Increased interest**, especially on cross-border *kafalah*
- **Research period:** 2017-2020 (first study in 2008)
- **Main objectives:**
 - Analyse legal and religious sources of *kafalah*
 - Explore *kafalah* and its legal, political and practical implications (national)
 - Examine how *kafalah* is currently recognised and executed (cross-border)
 - Identify persistent challenges and possible solutions
- **Methodology:** ISS/IRC team and external (international and national) experts
- **Analyses of 11 States of origin and 11 receiving States**
- **Preliminary analysis** with limitations
- **Approach:**
 - Unique family-type care measure
 - Private International Law + International Public Law

What is *kafalah*?

Exclusive to countries subject to Sharia law; Generally known as a person's (*kafil*) commitment to voluntarily take care of the maintenance, education and protection of a child deprived of his/her family (*makfoul*).

2. Some key considerations

Legal and
religious
sources

- **Religious texts** + transformation into contemporary law
- **International recognition:** Article 20, CRC – UN Alternative Care Guidelines – 2019 UN GA Resolution - 1996 Hague Convention
- **International + regional case law:** ECtHR (2012 + 2014) ; CRC Committee decision in 2018; ECJ Decision of 2019


National
kafalah

- **Common characteristics**
- **Variety of forms + legal effects + terminology**
- **States examined:** Egypt, Djibouti, Jordan, Lebanon, Malaysia, Morocco, Iran, Iraq, Pakistan, Sudan and Tunisia.
- **Categories:**
 - Family-type child protection measure (*e.g.* Egypt, Morocco, Jordan)
 - *Kafalah* in mixed systems (*e.g.* Djibouti, Lebanon, Malaysia, Tunisia)
 - Form of sponsorship (*e.g.* Egypt, Lebanon, Pakistan)
- **Positive trends:** ongoing reforms + growing advocacy efforts (*e.g.* Iran, Jordan, Morocco, Tunisia)
- **Persistent challenges:** *e.g.* lack of /insufficient formal procedures, lack of data collection systems, family law provisions conveying unequal rights, stigma of children born out of wedlock; need to clarify legal effects.
- **3 key actions:**
 - Strengthen child protection systems;
 - Generate changes in professionals' attitudes;
 - Ensure minimum procedural safeguards.

3. Recognition and enforcement of *kafalah* ('cross-border *kafalah*')

- **What is a cross-border *kafalah*?**
 - Scenario 1: Recognition of a national *kafalah* in a third country
 - Scenario 2: Establishment of a *kafalah* between two countries
 - Scenario 3: *Kafalah* “taking effect” in another country as a result of a private arrangement
- In the Best Interests of the Child? Respect of the principle of subsidiarity?
- **Existing cooperation and communication mechanism** leading to automatic recognition by operation of law (articles 33 + 23, 1996 HC)
- **Overall question:** How to strike a fair balance between respecting the nature of the measure and ensuring safeguards for the child in the receiving State without discrimination?
- **States examined:** Australia, Belgium, Denmark, France, Germany, Italy, New Zealand, Norway, Spain, Switzerland, United States
- **Country sheets:** applicable laws/policies, competent authorities, transposition of legal effects, status of the child, applicable procedures.

3.1. Practices in some EU States

- **No harmonised approach** → Impossibility to determine strict categories
 - **Diverse avenues in each country** (e.g. application of the 1996 HC, via adoption or family reunification schemes)
 - **Diversity of measures assimilated to *kafalah*:**
 - *Adoption-kafala* in Belgium
 - *Recueil légal* in France
 - Long-term foster care combined with guardianship in Germany
 - Guardianship or kinship care in Denmark
 - Guardianship or permanent foster care in Spain
 - Foster care in Norway
 - **Subsequent conversion into adoption**
 - Prohibition of automatic conversion into adoption (e.g. Denmark, France, Spain)
 - After a certain timeframe, possibility for the child's adoption (legal and practical issues around consent, etc.)
- 
- A faint, light blue silhouette of a woman and a child walking together. The woman is on the left, holding the child's hand. The child is on the right, carrying a backpack. The background is a light blue gradient.

3.2. Remaining challenges and positive trends

Remaining challenges

❖ Legal and policy framework

- Limited application of the 1996 HC:
 - Limited number of contracting States of origin
 - Lack of knowledge/experience in applying art. 33
 - Immigration rules? Recognition modalities? Procedural safeguards?
- Absence of a clear approach, applicable laws and policies

❖ Practical implementation

- Lack of data
- Difficulty for child to know/access his or her origins
- Lack of follow-up
- Private arrangements and *faits accomplis*
- Uncertain legal status of the child and limited access to basic rights and services

❖ Cooperation:

- Lack of internal co-operation and challenging coordination between immigration and child protection authorities
- Clear need to clarify roles and responsibilities

3.2. Remaining challenges and positive trends

Positive Trends

- Protocols to strengthen the coordination of all actors and implement the 1996 HC (*e.g. Spain, Switzerland*)
- Domestic legislation/regulations and case law requiring compulsory procedures under the 1996 HC (*e.g. Germany, Norway, Italy, Switzerland*)
- Existence of bilateral agreements (*e.g. France, Spain*)
- Awareness-raising efforts towards potential *kafil* parents and professionals regarding the applicable procedures (*e.g. Germany, USA*)
- Preparatory sessions for potential *kafil* parents (*e.g. City of Lyon in France*)

3.3. Possible avenues?

1. Strengthen the safeguards of the current systems

- Adopt a clear position and clear standards on cross-border *kafalah*
- Develop case management mechanisms and enhanced co-operation to address gaps
 - Handbook, country sheets
 - Bilateral agreement – template in study
 - Direct judicial communication

2. Implement a process for individual case management

Proposal in **four stages** which takes account the respective roles and responsibilities of competent authorities, immigration and material laws on the short, medium and long term.

- Phase 1: Pre-placement process
- Phase 2: Constitution of *kafalah*
- Phase 3: Transfer of the child and immigration considerations
- Phase 4: Implementation of the decision (at arrival, after the change of habitual residence)

Thank you for your attention!

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