Recognition of Kafala in the Italian Law System from a Comparative Perspective

Recognition of Kafala in the Italian Law System from a Comparative Perspective

By

Adele Pastena

Cambridge
Scholars
Publishing

Recognition of Kafala in the Italian Law System from a Comparative Perspective

By Adele Pastena

This book first published 2020

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-5275-5508-9
ISBN (13): 978-1-5275-5508-2

TABLE OF CONTENTS

INTRODUCTION

In the legal panorama of modern societies there are several areas where the dynamics of identity intersect. Jurists, then, are often called upon to deal with legal models and tools deriving from different cultural contexts which sometimes need to be recognised within our own political structures. In this sense, a particularly interesting case is that of kafala, which is typical of the Islamic world, though with few, very rare exceptions. This is a form of protection for the child but without formal adoption or the recognition of a status equal to that of a legitimate child, and falls at some distance from the legal coding of secularized legal systems.

The study of this particular institution cannot, however, be simplistically reduced to a relationship between private rules of sovereign and independent state systems and/or the norms of private international law alone. Given that kafala gives rise to a number of concrete problems in Western society, arising principally to the fear of circumventing legislation on family reunification and the strict criteria established in terms of international adoptions, kafala cannot be parameterized solely with respect to the principles of respect for international public order.

An analysis of kafala in comparison with our own legal and cultural systems reveals a sort of legal short-circuit when laws of a religious nature (which imply the respect and observance of a divine law) come up against the rules of secular law and its associated rights recognized to all, regardless of any private, religious conviction. In addition, the rules governing kafala are known to be part of a particular category of norms which refer to 'personal status' and thus go beyond national boundaries, affecting all Muslims (who adhere to the majority of interpretative legal schools) and requiring public recognition in the host countries. This way then, a sound methodological approach entails considering the culture of the recipients of legal rules as a technical variable rather than a neutral parameter. This implies that the cultural norms used by the protagonists of any legal relationship must be increasingly taken into account, and at the same time law must be evaluated as a cultural product by adopting an appropriate perspective of legal analysis.

The use of religiously determined normative systems may create obvious systemic differences, with a number of consequences affecting the

life of the individual and might sometimes lead to a limitation of rights as recognized in our legal systems. Being unable to analyze the multi-centric Islamic universe in its universality, we have thus focused our attention on a particular territorial area, the Maghreb, which is close to Italy's borders, and is particularly interesting in the case of Tunisia since the latter attempted to use the Italian legal system within the specific religious context of Islam.

Italy's non-ratification of the 1996 Hague Convention where it relates to kafala does highlight the legal difficulties of implementing this regulatory model in our own legal context, which is based on secularism and is profoundly respectful of the right to enjoy religious freedom and adhere to any religious faith (which can be freely accepted and changed). It is also important to underline the impossibility of using legal frameworks which were formerly present in our own legal system (consider kafala's affinity with the institution of 'affiliation' created under Fascist law in Italy), but which have been superseded by social and, above all, legal developments regarding non-biological parenting and the rights of legitimate children. It is not easy to contemplate suppressing or limiting those hard-won rights in the name of respect for religious dictates.

It is necessary, therefore, to carefully evaluate how a democratic legal system, largely secularized, if not non-religious, can accept the respect of religious rule which translates into law and deeply affects the absolute rights of the subjects involved. The risk is that the adoption of a dogmatic approach based on cultural relativism may impede a correct balance between respect for cultural identities and measures to safeguard individuals. Adopting this hermeneutical perspective would mean placing all different cultures on equal footing, but it would also mean placing individuals in a position of inequality, favouring collective protection. In the current phase of conceptual elaboration on issues of human rights it would no longer be possible, for example, to accept any discrimination towards natural / legitimate and adoptive children on the basis of religious precepts alone, and the fundamental right to religious freedom should be considered as an inalienable right in respect of the person and his / her rights.

A rethinking of these issues from the perspective of religious freedom of individuals and the necessary neutrality of legal rules might therefore be particularly significant for the protection of fundamental human rights, which must be perceived as right and necessary by the individuals concerned in order to be effective.

In this sense, therefore, a correct hermeneutical viewpoint cannot be simplistically addressed to the identification of possible 'universal' legal

principles falling upon the institutions of law, nor should it be oriented towards studying the various systems with a mere comparative approach. What is needed, instead, is a focus on the connections between the various areas of cultural experience in order to analyze the regulatory instruments within a broader theoretical framework, and ultimately strike a difficult balance between the different fields of experience and the recognition of complex cultures. This is the main thrust of this book presented in four important chapters.

The Author
May 2020

CHAPTER ONE

THE PROTECTION OF CHILDREN IN THE ISLAMIC ORDER OF MAGHREB: RELIGIOUS IDENTITY AND CIVIL LEGISLATION

1. Non-biological Parental Construction in Religiously Oriented Contexts

Kafala is a form of family construction typical of the Islamic world that involves the particularly sensitive sector of parenting and 'non-biological' kinship. It is coupled with an important juridical operation which manages to develop a synthesis between religiously oriented and other largely secularized regulatory systems of law by applying the fundamental principle of axiological neutrality.[1]

---

[1] Human rights organizations increasingly report a distortion of this institution, used improperly as a tool for exploiting child labour, although in this study the focus is on kafala as an alternative tool to foster-adoption. In contractual terms, this term designates an important control system for immigrant workers established by the oil companies of the Arabian Gulf countries and has become a *conditio sine qua non* for residing and working in these states. All workers must have the legal guarantee of the kafil/employer, who acts as an intermediary with the company. In this way through kafala the State delegates a part of the control and regulation of foreign workers to civil society: I.L.O., *Tricked and trapped, Human trafficking in the Middle East,* 2013, in http://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_211214.pdf; G. BEAUGÉ, *La kafala: un système de gestion transitoire de la main-d'oeuvre et du capital dans les pays du Gulfe,* in *Revue Européenne des Migrations Internationales*, vol. 2, n. 1, 1986, pp. 109-122; A.N. LONGVA, *Keeping Migrant Workers in Check: The Kafala System in the Gulf*, in *Middle East Report,* n. 211, 1999, p. 22 *et seq*.; C. JEANGEY, *Il sistema della kafala e la tutela dei lavoratori migranti nella penisola arabica,* in *Studi in onore di Claudio Zanghì,* L.PANELLA, E. SPATAFORA (eds.), Turin, Giappichelli, 2012, p. 397 *et seq*.. On the usual meaning of kafala cf. *Islam and European legal systems*, S. FERRARI, A. BRADNEY (ed.), Aldershot, Ashgate and Dartmouth, 2000; M.L. LO GIACCO, *Religione e cultura nell'adozione internazionale*, in *Diritto e*

In recent years, Italy and other European countries have been increasingly forced to deal with the transfer of values due to growing migration, and the spatial-temporal shift linked to this has given impetus to a dynamic of redefining membership in contexts where religion, or a particular confession, is no longer the only key to reading cultural norms. In the search for a healthy balance in a liberal and democratic society, a multicultural/intercultural perspective is needed, which cannot be guaranteed by stigmatization of otherness, but through inclusive forms of diverse cultural models that respect our fundamental and mandatory rights.[2] The current and unavoidable demands of multiculturalism affect the consolidated order of the construction and codification of filiation relationships, giving rise to the problem of parenting separated from the concept of family, as traditionally structured.

The institution of kafala, the only legal instrument that guarantees abandoned Muslim children a childhood of sorts, comes into conflict with Western legislation. As is the case with Italian legislation, this raises problems as to its recognition as adoption, highlighting a dangerous legislative vacuum to the detriment of the minors themselves, whose very protection is at the heart of any liberal legal system. It is therefore particularly interesting to reflect on these institutions alongside their legal configuration and underlying rationale, in an attempt to implement the necessary regulatory connections that are indispensable in open societies.

Given the heterogeneity of the polycentric Islamic universe, it is more useful to limit the study to the Mediterranean area, closer to the Italian reality, and in particular to that of the Maghreb, on account of multiple factors. Firstly, for historical reasons, subjection to a common colonial dominion has long determined the imposition of a uniform Western legal model. Secondly, because of migratory flows, geographical proximity has also given rise to a considerable number of couples of mixed nationality. And, finally, the peculiarity of Tunisian legislation which recognises

---

Religione, 1, 2015, pp. 341-359; M.C. LE BOURSICOT, *La kafala ou recueil légal des mineurs en droit musulman: une adoption sans filiation*, in *Droit et Culture*, 2010, pp. 283-302; G. CAROBENE, *Kafala islamica e protezione dei minori in Italia dopo la ratifica della Convenzione dell'Aja,* in *Le proiezioni civili delle religioni tra libertà e bilateralità: modelli di disciplina giuridica,* A. FUCCILLO (ed.), Napoli, ESI, 2017, pp. 197-224.

[2] For a general overview of Islamic law cf. F. MILLOT, F.P. BLANC, *Introduction à l'étude du droit musulman,* Paris, Dalloz, 2001; on recent issues with particular attention on Egypt and Syria, B. BOTIVEAU, *Loi islamique et droit dans le société arabes,* Paris, Karthala, 2013.

adoption legally as it is based on a more modern conception of law and above all its interpretation.

Filiation is characterized by a principle of a social nature with which an identity is acquired and the transmission of kinship is codified; it is not only a private but above all a social act. Some anthropologists, moreover, prefer to use the term descent rather than filiation.[3] Functionally, adoption is a new model of representation of descent that consecrates a model of filiation built upon the desire to have a child. Each regulatory system is characterized by a specific model of parenting, a particular view of the family, precise childcare methods and the greater or lesser importance given to the child's best interests.

The tools for creating non-biological bonds in the family unit are strongly influenced by cultural background and allow us to identify different objectives in different social contexts, namely, demographic rebalance, ways of strengthening social ties, emotional or economic functions and compensation, and migratory phenomena. Sometimes, adoption is perceived as a legal institution aimed at the promotion and protection of abandoned children, therefore, as a tool of social policy.[4] In addition to these needs, kafala itself responds to a precise religious precept which prohibits adoption, and in this sense its regulatory translation should be evaluated in the light of the principles of religious freedom and secularism.

Recent studies on these issues in the fields of sociology and anthropology have pointed to the plurality of concepts of childhood and its socio-cultural foundations in the world that characterize and condition taking charge of a minor when the state of abandonment has been legally ascertained. It is generally known that in the African context the child does not belong to its biological parents alone but to the larger nucleus of the extended family, and sometimes, in rural contexts, to the whole village.[5]

---

[3] Cf. C. LÉVI-STRAUSS, *Les Structures élémentaires de la parenté,* Paris -La Haye, Mouton, 1949, and more recently M. VERDON, *Contre la culture. Fondements d'une anthropologie sociale opérationnelle,* Paris, Éd. des Archives contemporaines, 1991.

[4] Cf. G. PIZZOLANTE, *Le adozioni nel diritto internazionale privato,* Bari, Cacucci, 2008, in particol. p. 23; K. O'HALLORAN, *The politics of adoption. International prspectives on law, policy and practice²,* Dordrecht, Springer, 2009; G. CATTANEO, *Adozione,* in *Digesto discipline privatistiche,* Utet, Turin, vol. l, 1987, p. 98 *et seq*.; F. BOULANGER, *Enjeux et défis de l'adoption. Étude comparative et internationale,* Paris, Economica, 2001; P. MURAT, *L'évolution du droit de l'adoption en Europe,* in *Le statut juridique de l'en/ant dans l'espace européen,* Brussels, Bruylant, 2005, p. 121 *et seq*.

[5] Cf. V. DELAUNAY, *Abandon et prise en charge des enfants en Afrique: une problématique centrale pour la protection de l'enfant,* in *Mondes en*

It has also been observed that in Islamic societies (where the social context is closely linked to a specific religious view) filiation is not bound to a mere biological component – natural descent is not actually recognized – and the concept of son/*ibn* is conceived as a legal principle,[6] based on procreative ties whose legitimacy results only from marriage.[7] Thus, a family system has been built on alliance and consanguinity in which adoption, which distorts the legitimate filiation system, constitutes a form of transgression, first religious and subsequently social, since it calls into question the bonds of commitment and descent.

Adoption, then, is therefore prohibited coherently with the many precepts of a religious matrix that prevent the breaking of the natural bond underlying filiation.[8] What Islam expressly forbids, however, is not

---

développement, 146, 2, 2009, pp. 33-46 and at https://www.cairn.info/revue-mondes-en-developpement- 2009-2-page-33.htm which stresses that "*la question de la prise en charge de l'enfant et de son abandon, prend dès lors piace dans un contexte social et culturel caractérisé à la fois par cles systèmes de représentations et de normes dans lesquels les comportements de rejet, y compris extremes (infanticide), prennent leur signification et par des pratiques de circulation et de confiage des enfants, ou fosterage selon la terminologie adoptée par les anthropologues*" (p.34). it may be observed that "*le don d'enfants en Afrique n'a pas pour condition d'exiger l'instauration d'une distance entre donateurs et adoptants, et encore moins d'un secret*": N. JOURNET, *De l'abandon au don: l'adoption dans le monde,* in *Sciences Humaines,* Hors série *45,* L'enfant, 2004, pp. 64- 67 (qui p. 65). In general cf. D. BONNET, C. DE SUREMAIN, *Quelle place pour l'anthropologie de l'enfance dans le développement?* in *Sciences au Sud, 2008,* 44, p. 16 *et seq*.; *Enfants d'aujourd 'hui. Diversité des contextes, pluralité des parcours,* vol. l, AIDELF/INED, 2006; F. EZEMBÈ, *Don et abandon des enfants en Afrique,* in *Le bébé face à l'abandon, le bébé face à l'adoption,* M. SZEJER (ed.), Paris, Albin Michel, 2003, pp. 225-246; A. MARIE, *Les structures familiales à l'épreuve de l'individualisation,* in *Ménages et familles en Afrique. Approche des dynamiques contemporaines,* M. PILON, T. LOCOH, E. VIGNIKIN, P. VIMARD (eds.), Paris, Ceped, 1997, pp. 279-300.

[6] Under a law of 1998, further amended in 2003, the Tunisian code recognised natural filiation with the attribution of a patronymic name to abandoned children of unknown paternity. This allowed children to be given a complete social identity.

[7] On filiation within the legitimate marriage, cf. Surah LXX, *The Ways of Ascent* verses 9 and 29 - 31. On marriage cf. A. CILARDO, *Marriage: Islamic Law,* in *The Oxford International Encyclopedia of Legal History,* ed. Stanley N. Katz, vol. IV, 2009, pp. 163-169; D. PEARL – W. MENSKI, *Muslim Family Law,* London, Sweet & Maxwell, 1998.

[8] Only Indonesia, Turkey and Tunisia among the Muslim countries, recognize the *adoption/Tabbani*. Turkey has a strong historical and institutional background in the protection of minors, which has its roots in the early twentieth century, with the

adoption itself, but its essential effects arising from the dominant model of adoption as currently accepted in countries of a Western cultural matrix, that is, expression of the constitution of an exclusive legal relationship of filiation between the adopted child and the adopting parent.

The Quran expressly prohibits equating biological children with adopted children, signifying that the family is an institution of divine origin so that it is not possible to determine the bonds of filiation independently. However, among the duties of a good Muslim there is undoubtedly also the duty to take care of the needy and in particular orphans; in this way, kafala is therefore the legal instrument through which protection to minors in need may be offered, without breaking any divine law.[9] Many Sunnah *hadiths* declare that the adoption of an individual of

---

creation of the 'Child Protection Organization' and the protection of minors and the care of children acquiring considerable cultural importance in society especially since 2005, when a broad 'Child Protection Law' (CPL) was adopted as part of the series of legislative reforms for EU membership. This law provides for a global system for the protection of minors, with a specialized judiciary (with public prosecutors for minors, special courts and social workers) capable of adopting the necessary protection/support measures. In 2013, Turkey launched a political and media campaign to recover the children of Turkish emigrants in Europe, adopted by foreigners to place them in families where they can preserve their cultural identity. Even Somalia, before the exhausting civil conflict, was an Islamic country that allowed adoption.

[9] References to the Quran are in the third verse of Surah XXXIII, *The Combined Forces,* which deals with elective kinship, and in particular in verses 4, 5 and 37. Verse 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." Verse 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." Verse 37: "And [remember, O Muhammad], when you said to the one on whom Allah bestowed favour and you bestowed favour, 'Keep your wife and fear Allah,' while you concealed within yourself that which Allah is to disclose. And you feared the people, while Allah has more right that you fear Him. So when Zayd had no longer any need for her, We married her to you in order that there not be upon the believers any discomfort concerning the wives of their adopted sons when they no longer have need of them. And ever is the command of Allah accomplished." at https://quran.com/ Cf. A. CILARDO, *Il minore nel diritto islamico. Il nuovo istituto della kafala*, in *La tutela dei minori di cultura islamica*

known parents would constitute an act of apostasy,[10] although some jurists prefer instead an interpretation aimed at regulating rather than prohibiting this practice.[11]

Kafala is legally definable as a 'delegation of parental authority' or 'legal protection'; it confers the *wilaya* which, in a broad sense, includes authority, power and representation. It indicates a guarantee, but also acceptance and care;[12] it is actually implemented through the appointment – judicial or by notarial deed – of a guardian, the *kafil*, with a view to providing assistance to a minor, the *makful*. As a way of superimposing parental functions and interpersonal relationships, this concept determines a legal and social relationship. Lawmakers chose the word kafala, which derived from the commercial sphere and was understood as a guarantee, a surety. The semantic field of the same was thus used to describe the behaviour of adults towards the child. The underlying rationale seems therefore to emphasize the essentially contractual nature of this type of obligation.

In the Quran itself, this term appears only twice in the sense of entrusting care, appointing someone as guardian.[13] From a legal point of view, it represents the commitment to take charge of a minor, but in no

---

nell'area mediterranea. Aspetti sociali, giuridici e medici, A. CILARDO (ed.), Naples, ESI, 2011, pp. 219-264.

[10] Cf. L. PRUVOST, *Intégration familiale de l'enfant sans généalogie en Algérie et en Tunisie: kafala ou adoption,* in *Studi arabo-islamici del* PISAI*,* 8, Rome, Pontificio istituto di studi Arabi e d'Islamistica (PISAI), p. 163 *et seq*.

[11] F. C. ZIDANI, *L'enfant né hors mariage en Algérie,* EAP, Alger, 1992, in particular p. 82.

[12] J. BARGACH, *Orphans of Islam. Family. Abandonment and secret Adoption in* Morocco, Boston, Rowman & Littlefield Publishers inc., 2002 stresses that "the etymology of the word kafala has two distinct meanings in classical Arabic: to guarantee (*damăn*) and to take care (from the root verb of ka-fa-la). In its former meaning of guaranteeing, the word kafala has been mainly employed in the realm of commerce and business transactions...the semantic field of kafala being diffused between these two realms - contract and a guarantee- is then employed to describe, in part, the behaviour of the adopting adults towards a minor" (p. 29).

[13] Surah XX, *Tâ- Hâ,* verse 39 "[Saying], 'Cast him into the chest and cast it into the river, and the river will throw it onto the bank; there will take him an enemy to Me and an enemy to him.' And I bestowed upon you love from Me that you would be brought up under My eye." And Surah III, *Family of Imrân,* verse 37 "So her Lord accepted her with good acceptance and caused her to grow in a good manner and put her in the care of Zechariah. Every time Zechariah entered upon her in the prayer chamber, he found with her provision. He said, 'O Mary, from where is this [coming] to you?' She said, 'It is from Allah. Indeed, Allah provides for whom He wills without account.'" at https://quran.com.

case is the *kafil-makful* bond recognised as filiation. The latter, in fact, does not take the name of the former nor does s/he have any inheritance rights (since the rules of succession, determined by the Quran and reproduced in positive legislation, are based exclusively on consanguinity and alliance). The child is not registered in the family status record and finds him/herself in a particular administrative position because s/he could be 'returned' by the *kafil* and again placed under the responsibility of the State. Kafala thus remains a temporary and revocable instrument. It also ends upon reaching the age of majority, except in the case of an unmarried girl or a disabled person; upon the death of the two parents or in the event of their being unable to take care of themselves. It may be annulled by the judge (in the event of a breach of obligations and always bearing in mind the interest of the minor) and, finally, it may be brought to an end if the Court finds that this measure is no longer founded.

Two forms of kafala are normally contemplated: judicial (emanating from the Juvenile Court) which applies to children of unknown parents, and notarial (a sort of contract drawn up before a notary), which is used for non-abandoned minors, of known parents and with their consent. Formed to protect endangered children, it subsequently extended to children who were not in a position of total abandonment, formalizing any transfer that took place within the circle of kinship as well. At an intra-family level, this system has also developed in migratory contexts and currently involves older children, sometimes entrusted by biological parents to emigrated relatives to allow their children a better level of education in Western countries or give better access to the job market. After some years or on reaching adulthood, the children might then decide to return to their family and country of origin.[14]

The Western adoption model, on the other hand, determines a definitive and irreversible change of identity and is based on the principle of exclusivity and an emphasis on the wishes of those involved. It tends to cancel the ties of origin of the adopted child as a precondition to the construction of exclusive filiation by substitution, from the legal point of view assimilated in all respects to the natural parent-child bond.[15]

---

[14] Cf. C. OPPONG, *Les systèmes familiaux et la crise économique*, in *La famille africaine. Politiques démographiques et développement*, A. ADEPODJU (ed.), Paris, Karthala, 1999, pp. 221-254; *Abandoned children*, C. PANTER-BRICK, M. SMITH (ed.), Cambridge, Cambridge University Press, 2000; M.VOORHOEVE, *Family Law in Islam, Divorce, Marriage and Women in the Muslim World*, London - New-York, I.B. Tauris, 2012.

[15] J. LONG, *Ordinamenti giuridici occidentali, kafalah e divieto di adozione: un'occasione per riflettere sull'adozione legittimante*, in *Nuova giur. civ. comm.,* II,

The legal need to allow the entry of sub-kafala minors or the use of this tool by Western citizens for the construction of a parental bond with a child of an Islamic country in legal cultures such as our own, largely secularized, culture thus brings about a mismatch with the legal system that Italy's recent ratification of the 1996 Hague Convention aims to resolve.[16]

Law no. 101 of 2015 finally incorporated this fundamental international document in Italy, but faced with the evident difficulties of adapting kafala's rules to the Italian legal system, Italian legislation scrapped the rules referring to the Islamic kafala that will have to be the subject of separate regulation to avoid the risk of legal discrimination towards 'invisible' children. Although the removed section regards essentially the procedures to be followed for the placement of the foreign minor who is not in a position of abandonment, it is clear that this important legal institution needs to be regulated. It is increasingly used not only in migratory contexts, but also to facilitate the path of international adoptions towards new geographical areas, as already implemented in other European countries. The urgency to intervene in these matters has been underlined by the many organizations and institutions dedicated to children that complain of the impossibility of monitoring the effective

2003, p. 175 *et seq*. and *La kafalah come banco di prova per un diritto "interculturale",* in *Minori e giustizia*, n. 2, 2012, p. 254 *et seq*.; T. TOMEO, *La kafala*, in *Comparazione e diritto civile*, 2013, www.comparazionedirittocivile. it/prova/files/ncr_tomeo_kafala .pdf; R. CLERICI, *La compatibilità del diritto di famiglia mussulmano con l'ordine pubblico internazionale*, in *Fam. Dir* ., 2009, p. 208 *et seq*.; M. ORLANDI, *La Kafala islamica e la sua riconoscibilità quale adozione*, in *Dir. fam. Pers*. 2005, p. 635 *et seq*.; P. STEFANÌ, *Kafalah islamica e uguaglianza religiosa: laicità e società multiculturale*, in *Diritto e Religione. L'evoluzione di un settore della scienza giuridica attraverso il confronto fra quattro libri,* G. MACRÌ, M. PARISI, V. TOZZI (eds.), Salerno, Plectica, 2012, pp. 433- 447; P. DIAGO, *La Kafala islamica en España*, in *Cuad. der. tran.*, vol. 2, n. 1 2010 p. 140.

[16] This law came into force on Jan. 1. 2016, but was ratified with L. 8 Jun. 2015, n. 101. Having delayed this ratification considerably (the Council of the European Union, with Decision 2008 / 43l / CE, had imposed the deadline of 2010 on the member countries), Italy ratified urgently and, considering that on kafala there are divergences of views and complications related to the different legal systems, Parliament chose to approve for ratification a text of the law that would exclude the legislation of kafala, postponed to a later date. Cf. Il Rapporto CRC, *I diritti dell'infanzia e dell'adolescenza in Italia.* 9° Rapporto di aggiornamento sul monitoraggio della Convenzione sui diritti dell'infanzia e dell'adolescenza in Italia, anno 2015-2016 http:://www.gruppocrc.net/IMG/pdf/ixrapportocrc2016.pdf, esp. p. 95 *et seq*.

presence of sub-kafala minors in our social fabric without any regulatory protection.

For a definition of kafala, the *Lisan Al Arab* - the quintessential Arabic dictionary - refers to a verse of the Quran, roughly translatable as: "And her Lord accepted her with full acceptance and vouchsafed to her a goodly growth; and made Zachariah her guardian. Whenever Zachariah went into the sanctuary where she was, he found that she had food."[17] Interestingly, many interpretations have been given of this verse. According to current editions of the Quran, Zachariah is the second direct object and designates the person subjected to the action of God, but who is responsible for enforcing the action with regard to Mary. This implies that God gave Mary to Zachariah to be his guarantor; he was therefore selected to guarantee his protection/*hadana*. O the contrary, another reading considers Zachariah the subject so that the sentence would mean '*Zachariah* is the guarantor of Mary': this would allow the person to consider him / herself free and voluntarily accept to guarantee for someone. The *Lisan Al Arab* seems to reinforce this interpretation of kafala on the basis of a *hadith* of the Prophet narrated by Sahl Ben Sa'd: In Heaven, I and the one who took charge of an orphan will be like this and showed his two fingers together, forefinger and middle finger, which in the familiar language of Arabs meant that they would be together, united. In another *hadith* it emerges that the best example of care is that of the Prophet: "You are the best of those who have been supported / taken care of since childhood, nurtured, educated to the point of becoming great".[18] In this text, therefore, meanings and definitions revolve around three main semantic axes: protection, guarantee and fulfilment of promises.

In the traditional exegetical reading, it is also customary to quote the episode of Zayd ibn Haritha, formally known as Zayd ibn Muhammad: "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. 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

[17] Il *Lisan Al Arab* di I. MANZŪR è. Reference is to Surah III, verse 37, cit.
[18] N. AÏT ZAÏ, *La kafala en droit algérien,* in *Les institutions traditionnelles dans le monde arabe*, H. BLEUCHOT (ed.), Paris, Karthala, 1996, pp. 95-105.

brothers in religion and those entrusted to you."[19] These statements have been interpreted as an explicit declaration against adoption.

In order to explain these verses, however, it is necessary to tie them in more properly to the circumstances of the time[20] and to take into account underlying events.[21] To this end, it is necessary to read these words carefully and to emphasize that in the commentary to the Quran it is clear that they draw attention to the unnatural state of certain situations: a woman cannot be the mother and wife of a man at the same time; a man cannot have two hearts, and a man cannot be a father if he is not so naturally. The parent-child relationship can only derive from a biological link and not from a series of linguistic ties. The symbols of these bonds - marriage and adoption - must then be reworked to adapt to the visions of a particular culture in which cohesion was essentially built on the parameters of loyalty, or based on common religious faith.

The Quran's revelation does not therefore seem to deny the possibility of accepting a child who cannot claim paternal recognition or agnatic filiation, but affirms the pre-eminence of blood kinship and kinship rights

---

[19] Cf. Surah XXXIII, vv. 4-5, cit. on their interpretation Cf. M. REZIG, *Les aspirations conflictueles du droit à l'adoption: étude comparative*, in *Arab Law Quarterly*, vol. 19, nn. 1-4, 2004, pp. 147-168, esp. p. 153.

[20] M. ARKOUN, *Lectures du Coran*, Paris, Editions Maisonneuv e et Larose, 1982: "*lier les versets a la circonstance, c'est accrediter, comme on l'a fait, l'idée positiviste d'un e Revelation opportuniste, d'un prophete appelant Dieu au secours dans les moments utiles; c'est figer dans la contingence la portée d'un texte dont l'intention premiere et le résultat effectif est d'activer l'histoire. C'est le temps de reviser cette attitude mortelle de la theologie essentialiste developpée au Moyen Age*" (p. 26). The ban must therefore be framed in the social framework of the time and connected with Muhammad's revolutionary message of social renewal, of brotherhood in Islam regardless of personal and social conditions. This message helped to determine the crisis in the tribal system on which pre-Islamic society was founded, where adoption was frequently used to allow childless individuals to pass on their names and property.

[21] "This incident being that on one of the Prophet's visits, Zaynab bint Jahsh (his patemal cousin and wife of his then adopted son Zayd) hurriedly opened the door in her eagerness not to let the Prophet wait while she was still inappropriately dressed. Upon seeing her, the Prophet hastily left, declining her invitation to enter and wait for Zayd. When Zaynab reported the incident of the Prophet's hasty leaving to her husband, the latter went to his adopted father saying that he was ready to divorce Zaynab if the Prophet wanted to marry her. The Prophet declined Zayd's offer. Revelation then came in which a divine sanction was given to his marriage with Zaynab": J. BARGACH, *Adoption and wardship (kafala) in Morocco*, in *Rect van de Islam*, 18, 2001 pp. 77-98, esp. p. 87.

over elective ties.[22] What is more, prohibiting adoption can be interpreted as a way of defending the bonds of descent and protecting a specific family model.[23] The kafala system is the result of a compromise since it does not question the legal mechanism of inheritance, patronymic or property, but allows a social need to be met in terms of the reality of children without families and couples who cannot bear offspring, without prejudice to laws and morals. This prohibition, justified by the Quran and the life of the Prophet himself (who married the wife of his adopted son),

---

[22] As explicitly stated in verse six of Surah XXXIII, cit.: "The Prophet is more worthy of the believers than themselves, and his wives are [in the position of] their mothers. And those of [blood] relationship are more entitled [to inheritance] in the decree of Allah than the [other] believers and the emigrants, except that you may do to your close associates a kindness [through bequest]. That was in the Book inscribed."

[23] This prohibition is present in most Muslim countries with some exceptions. There are: "*Countries with strict application of a 'non international kafala'*: Iran, Mauritania, Egypt. They reject kafala at the international level, based on a strict interpretation of the Sharia and rejecting all equivalence between kafala and adoption. Thus, abandoned children only have limited possibilities to leave their country in order to benefit from a placement abroad, except by relatives. At national level, child placements in non-biological families exist, but remain very limited or outside the legal framework (for example, traditional family placements). *Countries with a 'case-by-case' solution:* Morocco, Algeria, Jordan and Pakistan. They estimate that the situation of children deprived of family and the lack of national applicants for kafala is such that it may be necessary to allow international kafala, as long as the applicants respect some of the procedural conditions for a kafala (for example, the conversion to Islam). Morocco allows for international placements of abandoned children, in favour of nationals living abroad, but also by foreigners. In Pakistan, according to law, non-Muslim children may be adopted by non-Muslim applicants, whether nationals or foreigners. However, it is very difficult to find evidence of this practice and to know how the procedures are dealt with. Algeria and Jordan have systems which privilege national candidates, but both countries allow for the placement of children abroad, either with nationals or with foreigners, under the condition that they have the same religion as the child, meaning that they are Muslim. However, international placements remain rare and documented to a limited extent. It is to be noted that in Jordan, the word kafala refers to the monthly financial support granted to children living with a single parent (for the greater part the mother). *Countries having legislation on adoption or on the 'conversion' of kafala:* Tunisia and Indonesia. Even though they are very much attached to Islamic values, these countries allow for adoption, with full legal consequences in relation to filiation. However, by law (in Indonesia) or by practice (in Tunisia), adoption is limited to national applicants, living in the country or abroad, but of the same religion as the child.": http://www.crin.org/en/docs/Kafalah.BCN.doc.

should be read as a founding element of societies characterized by a well-structured kinship system and a specific normative model of the family.

In Arabic, the notion of kinship is reflected in the term *qarâba*/affinity, blood ties, and has three aspects: *nasab* (descent), *musâhara* (alliance) and *ridâ'a* (milk kinship). In general, *nasab* refers to the origin and defines the family in terms of descent.[24] The North African system is unilineal and patrilineal, it fits into a context of cultural anthropology and is established on the basis of kinship groups, from father to son, in which the entire social structure is based on the genealogy of the male line and is not simply dependant on blood ties, but on the status and power of the group.[25]

The male *nasab* is, in actual fact, linked to a tribal logic and has a specific political meaning: it allows men to think of themselves as 'peers' and this equality guarantees social stability. The rule in Muslim law requires that each individual take the patronymic name from the legitimate father and this constitutes the guarantee of the origins of the family.[26]

It is thus necessary to consider also the particular value that the name holds in Arab societies: it is made up of various elements, each indicating a trace of the family history.[27] Here, the crux of the matter is *nasab*, meaning lineage.[28] This places the individual in the male line of the family, with the list of the names of the male ascendants and may be

---

[24] C. HAMES, *La filiation généalogique (nasab) dans la societé d'Ibn Khaldoun*, in *Rév.de l'homme*, 1987, vol. 27, 102, p. 99 *et seq*.

[25] *Quaraba* in Arabic refers to kinship but etymologically speaking means closeness/proximity and is not related to procreation. Cf. C. FORTIER, *Le droit musulman en pratique: genre, filiation et bioétique*, in *Droit et Cultures*, 59, 2010, p. 1 *et seq*.; C. LACOSTE- DUJARDIN Au Maghreb, *l'enfance innomable. in Autrement (Abandon et Adoption)*, 1986 96, pp. 85-90; S. LALLEMAND, *La circulation des enfants en société traditionnelle. Pret, don, échange*, Paris, L'Harmattan, 1993; M. PILON, K. VIGNIKIN, *Ménages et famil les en Afrique subsaharienne*, Paris, Ed. des archives contemporaines/AUF, Savoirs francophones, 2006.

[26] Surah XXXIII v. 5, cit. though these principles are also emphasised in the *Sunnah*.

[27] The first is called *ism*: it is a name attributed at birth, then comes the *nasab*, genealogical name placing the individual in the male line of the family, the list of names of male ascendants; the third element, the *laqab*, is a sort of honorific nickname that underlines the individual's qualities and can become a patronymic name; this is followed by the *kunya* as a sign of friendship and respect and the *nisba* or 'name of relationship' which places the individual in the fabric of social relationships.

[28] Filiation is also called 'history of the name': Cf. N. SAADI, *Le nom, le sang ou la filiation exhortée par le droit*, in *Rev. alger. sciences ju ridiques économiques et politiques*, 29, n. 1-2, 1991, p. 55-64.

known or not.[29] To protect the honour of minors, in many Islamic countries the term 'parents unknown' (a shameful and deeply damaging term socially speaking) is no longer included in the birth certificate, but is replaced by the names of a father and a mother of Arab tradition, fictitiously assigned by the registrar.

It is understandable therefore how the fiction of adoption appears in opposition to this idea of the family, founded as it is on the truth of 'blood' ties. According to this kinship system, an essential principle of which is that the chain should not be broken, traditional Islamic society measures the importance of fertility and the highly social nature of the desire to have children, defined as a duty so that the necessary descendants can be guaranteed. It is thus easy to see how celibacy and sterility may be considered a threat to the social balance or an offense to the community itself. While fertility is one of the main concerns of those anxious to perpetuate their lineage, infertility is seen as a drama, a harbinger of rejection and shame. The barren woman has failed in her role, becoming worthless and the couple find themselves on the margins of society.[30]

In this sense the prohibitive rules of adoption have always been subtly sidestepped in Muslim countries, with diversified stratagems devised by families' intent on respecting this traditional social model. Although adoption has always been formally prohibited, there were in actual fact forms of 'cultural' adoption that are still widespread in rural contexts.[31]

The most widespread was *customary adoption*, which involved the gift of a child from one family to another. In general, a couple without children or with few males would ask a member of their own extended family for the gift of a child or a woman with multiple pregnancies would generously give one of her children to a close relative who was sterile. In North Africa, as was customary in Western countries at one time, a family member, more 'fortunate' in terms of the number of children or gender

---

[29] P. BORDIEU, *Sociologie de l'Algérie*, Paris, PUF, 2001 observed that Islam wished to create "*une communauté universelle fondée sur d'autres liens que ceux de la parenté ... a laissé subsister des communautés sociales telles que le clan et la tribu, en sorte que les liens du sang ont continué longtemps à l'emporter sur ceux qui découlent de l'appartenance à la communauté musulmane*" (p. 99). Article 2 of the Algerian code, for example, spells out that the family is the basic cell of society and is made up of people united by marriage or kinship ties, *nasab* or filiation, *musâhara* or alliance and *ridâ'a* or milk kinship); Article 142 of the Moroccan code specifies that filiation derives from procreation by the child's parents.

[30] C. LACOSTE-DUJARDIN, *Des mères contre les femmes, maternité et patriarcat au Maghreb*, Paris, La Découverte, 1985.

[31] J. BARGACH, *Orphans of Islam*, cit., esp. pp. 27-28.

distribution, would typically give up a part of his children. Nevertheless, it was simply the transfer of a minor to another family, that is, an informal transfer without legal consequences typical of a peasant culture in which the identity of the child remained unchanged and was the result of multiple parenting relationships; the child thus belonged to the extended parental group. While this practice still continues in isolated areas, modern and urbanized infertile couples currently rely on other methods such as adoption or kafala and medically assisted procreation.

A second form was the *secret adoption*, based on a secret agreement between two parties, in which a young woman, normally a single mother or an adulterous woman would give up her child - the 'fruits of her sin' - to a sterile couple. With the fraudulent complicity of some professional figures and the use of secrecy and various reuses (for example, simulating a pregnancy), the couple would then register the child as their own. In this way they would obtain the triple advantage of compensating for the three forms of dishonour or shame: that of the single mother, the sterile woman and the 'bastard' child.[32] It was and is an absolutely illegal measure which, by altering biological ties, also violated a precise religious dictate. This form was called *tabanni* in classical Arabic, a verbal noun derived from *ibn* / son, meaning the process by which a minor is transformed into a child.

With regard to international measures to protect children, the reference to a *Declaration sur les droits et la protection de l'enfant dans le monde islamique* of 1994 is important.[33]

2. Personal Status and Family Structure in the Islamic Legal Culture

As already mentioned, the legal development of kafala may be more broadly assessed within the context of individual and social relationships within the Muslim world. Any juridical analysis of kafala necessarily implies a reference to certain legal categories typical of the Islamic context where, first and foremost, the concept of Personal Status comes into play

[32] N. AÏT- ZAÏ, *L'enfant illégitime dans la société musulmane*, in *Rev. alger. sciences juridiques économiques et politiques*, 1990, pp. 229-239 and ID., *L'abandon d'enfant et la loi*, in *Rev. alger. sciences juridiques économiques et politiques*, 1991, p. 17 *et seq*.

[33] Article 4 of the *Déclaration*, adopted in Casablanca 15 Dec. 1994 by *O.C.I.*, *Organisation de la Conférence Islamique*. In the subsequent Convention, no mention was made of the issues surrounding filiation or adoption: Cf. *Convention des droits de l'enfant en Islam*, 2005, adopted in Sana'a (Yémen).

at least in the Maghreb. The indissolubility of the link between the spiritual and the temporal powers together with the undisputed authority of the Quran are the cornerstones of the Codes of Islamic countries where Personal Status is deeply involved. This phrase was not in use in classical Islamic law nor is there any documentation in European law of the modern day; its object is constituted by marriage, the dissolution of the conjugal bond, filiation, capacity and inheritance. Basically, these are the areas that concern the individual's development from birth to death, and are all treated by respecting religious dictates.

While the civil codification of the colonised Islamic world was carried out under the decisive influence of European legal systems, family law and Personal Status have their roots in the sacred law of Islam, in the *Sharia*, reformulated in codes and laws by various Arab states during the last century.[34] It is also important not to confuse Islam as a religion with classical Muslim law presented as a part of that. Part of the Islamic doctrine has sought to emphasize that Muslim law could be defined as secular, though this might give a particular meaning to the concept of secularism, at some remove from our own cultural parameters.[35] Others, instead, prefer to emphasize that Muslim law is a historical product, just as Roman law is for Latin countries; in other words, it is a set of legal rules

[34] The expression Personal Status arises from the recent evolution of Arab legal systems and did not belong to traditional legal vocabulary but was coined by the Egyptian jurist Muhammad Quadri Bàù. This expression does not refer to the subject matter of the rules, since in addition to issues of status and capacity of persons, marriage, personal and property relations between spouses, family relationships and related maintenance obligations, protection and care, filiation, etc, are included. It represents a characteristic position of Islamic legal systems and includes matters in which Sharia law has never ceased to be applied, and therefore represented the most conservative part of Islamic legal rules. Cf. I. GOLDRIHER, *Le dogme et la loi dans l'Islam,* Paris, Librarie orientaliste Paul Geythner, 2005; M. BENJEMIA, *Libertè de religion et statut personnel,* in *Rivista di Filosofia del Diritto e Cultura Giuridica*, 2009, 9, pp.91-106; D. SOURDEL, *Droit musulman et codification*, in *Revue française de théorie, de philosophie et de cultures juridiques*, n. 26, 199 , pp.33-50; J.F. RYCX , G. BLANCHI, *Références à l'Islam dans le droit public positif en pays arabes*, in *Pouvoirs*, 1980, n.12 ; S. PAPI, *L'influence juridique islamique au Maghreb*, Paris, L'Harmattan, 2009.

[35] It was developed by Muslim jurists in the first three centuries of Hegira and did not have distant or indirect relations with Islam, as a religion: Cf. C. CHEHATA, *Nature, structure et division du droit musulman*, in *Rev. alger. sciences juridiques économiques et politiques*, 1973, p. 555 *et seq*.; M. CLARET DE FLEURIEU, *L'Etat musulman, entre l'idéal islamique et les contraintes du monde temporel*, Paris, L.G.D.J, 2010; D. SOURDEL, *Droit musulman et codification, in Revue française de théorie, de philosophie et de cultures juridiques*, 26, 1998, pp.33-50.

that might serve as a base and explanation for the current regulatory developments, but which are essentially anachronistic.[36]

Another important cultural factor to take into consideration is the historical-political direction taken by Arab countries once freed from colonization. In contrast to the French revolutionaries of 1789, who strove to free secular power from its enslavement to religion, in the North African context Islam actually represented a conduit and catalyst during liberation from foreign invasion as a new national identity was being constructed.

The expression Personal Status / *al-ahwāl al-šaẖṣiyya* itself stems from the recent evolution of Arab legal systems and did not belong to the traditional legal vocabulary.[37] The personal character of the code does not only refer to the object of the rules and, in particular, it should not be understood in the sense given by private international law, but refers to the applicability, on a personal basis of this set of rules.[38] The concept of Personal Status derives from that of 'personality of law' that classical Islamic law took from pre-existing juridical traditions, presenting it as one of the foundations of its own doctrine.

The legal framework of Personal Status is a characteristic partition of these legal systems, which can be defined historically as the area of

---

[36] Cf. N. BERNARD-MAUGIRON, J.N. FERRIÉ, *Les architectures constitutionnelles: introduction*, in *Égypte/Monde arabe*, Troisième série, 2, 2005, in http://ema.revues.org/1049; Y. BEN ACHOUR, *Politique, religion et droit dans le monde arabe*, Tunis, Casablanca, Cerès- Eddif 1992; J. R. HENRY, *Droit et société au Maghreb: quelques nouveaux enjeux de la recherche juridique*, in *Politiques législatives: Égypte, Tunisie, Algérie, Maroc, Centre d'études et de documentation économiques, juridiques et sociales* e in http://books.openedition.org/cedej/398; H. SANSON, *Laïcité islmique en Algerie*, Paris, CRESM, 1983. Worth noting also that most countries declare Islam as the state religion but do not define themselves as Islamic states.

[37] Cf. A. CILARDO, *Personal Status Law: Personal Status Law in Islamic Countries*, in *The Oxford International Encyclopedia of Legal History*, S.N. KATZ (ed.), New York, Oxford University press, vol. IV, 2009, pp. 295-299; D. TECHOUAR, *Lacunes de la législation des lois de status personnel au Maghreb, la question de la filiation*, in *Rev. alger. sciences juridiques économiques et politique,* 39, l 2002, p. 147 *et seq*.; L. ASLAOUI, *Le statut juridique de l'enfant au Magreb*, in *Rev. alger. sciences juridiques économiques et politiques*, 1990, 28, 2, pp. 241-257, in http://biblio.univalger.dz/jspui/handle/1635/508.

[38] In addition to the status and capacity of the person there is also marriage, personal and property relationships between spouses, family relationships and related maintenance obligations, protection and care, donations, successions, last will and testament and in general acts after the subject's death and endowments to charitable causes (*waqf*).

maximum resistance opposed by Muslim law to modernization and above all westernization.[39] It is the area in which reference to Muslim law is stronger, relating as it does to the more intimate sphere of the individual and his or her social relations. At present, however, what we are observing is a phase of re-conceptualization of the Muslim family that aims to put an end to relationships of subjugation and subordination, in line with a more modern vision, more akin to our own. Only the adoption of a global perspective that is not simply juridical but also social and political, may bring about any significant changes.

The institution of marriage, like the family and filiation, is placed fully within those areas subject to *ius personae* or personal law, not only as essential institutions for the development of society, but also as a fundamental tool in the context of relations with other religious confessions. The principle of the 'personality of law' constitutes, as mentioned, the origin of the system of Personal Status since it affirms the submission of each individual to the laws emanated by the ethnic, religious, linguistic community to which the subject belongs rather than the state in which the subject resides or holds citizenship. The community to which the individual belongs is thus not necessarily religious; the essential nucleus of this principle, in fact, is not the definition of the characteristics of this group, but rather the provision of legislation that is not valid indiscriminately for all those who reside within the territorial boundaries of a state structure.[40] It is based on the personal rather than the territorial aspect of the law and has a dual autonomy: judicial and legislative. The first is realized through the existence of religious tribunals for all confessions present in the territory; the second in respect of the internal religious norms of the individual communities. It thus creates an exclusive right devoid of any external communication or interference, permanently linked to the reading of the religious text, which can be modified only through careful interpretation/*ijtihâd*. This pluralism of Personal Status, even within a common religious framework as in some multi-community Islamic States (e.g. Lebanon), leads to the coexistence of

[39] The attitude adopted by individual state legislation in codifying these norms is extremely diversified: while Egyptian legislation did not call into question the continuity of the formal validity of Sharia law and only amended individual rules, Tunisian reformism, supported by a strong desire to re-found and renew society led to such radical results that it is judged by some to be foreign to Muslim juridical tradition.

[40] Cf *Statut Personnel* in F. MESSNER, *Dictionnaire de droit des religions*, Paris, ed. CNRS, p. 666.

a multiplicity of legal forms within the same state structure, which are not always free from conflict.[41]

The Islamic conception of the *ius personae* is in any case based on religious belonging: the law applicable to a subject is determined solely by his or her faith. According to some *Surahs* or chapters of the Quran, it is Muhammad himself who invites the 'nation' of Christians and Jews to follow the prescriptions indicated by the Bible and the Torah and to indicate the divine origin of these norms, established by God for each 'nation'.[42] Sharia law is, in fact, applied to all Muslims by a Muslim judge, leaving non-Muslims to be governed by their own rules, administered by their respective denominational courts, and inspired by the legal principle of the privilege of religion. This, then, determines that the law applicable

---

[41] S. FERRARI, *Religioni, Diritto e Conflitti sociali*, in *An. Der. Ecl. Est*., 2007 states that "where there are conflicts between religions, the element that is most important today is the growth of their identity. In many parts of the world it was and still is frequent for people who, despite having a different religion, share the same culture and live together. This is the case, for example, of Christians and Muslims who live in Egypt, Syria and other Middle Eastern countries: though different in terms of religion, they are part of the same Arab cultural world. This situation did not raise particularly serious problems until the identity components of religion took over, accentuating the importance of belonging to a community, the symbols that express it and the boundaries that define it: at this point it became difficult to reconcile the difference of faith and cultural identity, since religion is perceived and experienced as a producer of cultural diversity. Religious alterity generates cultural extraneousness and makes the coexistence of different communities in the same territory more problematic, generating tensions that induce phenomena of ghettoization and marginalization or lead to open conflicts" (p. 46).

[42] Quran, Surah V, *Al Mâ'ida*, verses 51-54: "51 O you who have believed, do not take the Jews and the Christians as allies. They are [in fact] allies of one another. And whoever is an ally to them among you - then indeed, he is [one] of them. Indeed, Allah guides not the wrongdoing people; 52 So you see those in whose hearts is disease hastening into [association with] them, saying, 'We are afraid a misfortune may strike us.' But perhaps Allah will bring conquest or a decision from Him, and they will become, over what they have been concealing within themselves, regretful; 53 And those who believe will say, 'Are these the ones who swore by Allah their strongest oaths that indeed they were with you?' Their deeds have become worthless, and they have become losers; 54 O you who have believed, whoever of you should revert from his religion - Allah will bring forth [in place of them] a people He will love and who will love Him [who are] humble toward the believers, powerful against the disbelievers; they strive in the cause of Allah and do not fear the blame of a critic. That is the favour of Allah; He bestows it upon whom He wills. And Allah is all-Encompassing and Knowing."

must always be religious law. But after independence, this term indicated the law applicable across the territory, necessary to build a strong national identity.

With the birth and spread of Islam and its body of legislation in the conquered lands along with the juridical principle of *cuius religio, cuius lex* was formed: everyone had their religion, hence their law.[43] Thus, a close connection between the juridical norm and the religious command took root and, on the basis of the Quran's dictate, since the stipulation of the first pacts between the followers of Muhammad and the Christian and Jewish communities, the exclusive jurisdiction of the judge was recognized and appointed by each religious authority authorized by its own law to hear all cases concerning relations between the faithful of their own community, both in the religious and civil sphere. By contrast, in the cases of a dispute between parties of different religions, if one of the two belonged to the *Umma*/Islamic community, the judge would necessarily be Muslim. This system of relationships between legal systems remained unchanged over the centuries.

Within the Islamic states, or at least the geographical area of the Maghreb, it is necessary to distinguish between a family comprising two non-Muslim foreigners and a family made up of a Muslim and a non-Muslim. In the first case, the system is extremely liberal and will allow the application of the couple's own laws, but in the second the notion of the privilege of religion will prevail since in Muslim law there is no distinction based on nationality, but only from belonging to the *Umma* / community of believers.[44] The unitary identity expressed in this concept is a basic social characteristic of Islam in which the individual defines his/her inclusion in the group, his/her identity and his/her humanity. It appears as an all-embracing process that places emphasis on the subject's position in relation to the *Umma* rather than on the application of internal rules, and this determines precise consequences in terms of belonging and organization.[45]

---

[43] Cf. A. FATTAL, *Statut légal des non-musulmans en pays d'Islam,* Beirut, ed. Imprimerie catholique, 1958, esp. p. 71.

[44] Cf. *Intercultural Relations and Religious Authorities: Muslims in the European Union*, W.A.R. SHADID, P.S. VAN KONINGVELD (eds.), Leuven, Peeters, 2002.

[45] Membership is structured starting from a public declaration of faith which consists of two affirmations, an individual declaration made to at least two Muslims from whom they obtain a social position and personal obligations. The declarations are "there is no divinity other than God" and "Muhammad is the messenger of God". The concept of *Umma*, the religious and social community, has a complex meaning, endowed with a strong emotional charge. It refers to pre-

It is particularly important to highlight how classical Islamic law, in outlining the material scope of the inapplicability of Islamic law to non-Muslim residents, did not actually arrive at an exhaustive list of matters falling under Personal Status, up to the first definition which dates back to 1875. While Islamic law was assigned a predominant position in some countries, the material scope of Personal Status was reduced and, importantly, religion fell under state authority. This allowed civil institutions to control and contain religion and promote the reforms necessary for modernization, as well as raising the possibility of legal adoption in some Muslim countries.

The code of Personal Status present in Arab states could, therefore, be applied in Europe when foreigners coming from these geographical areas require the application of their own legal rules, as indeed already occurs. What is necessary, then, is a study of the normative processes of conflicts of jurisdiction that might lead to the introduction of institutions which carry forward the value of diversity. This, though, could risk exacerbating the conflict between legal systems, especially in the delicate area of family law.[46]

Islamic Bedouin categories of community and solidarity and, at the same time, to the spirit of the body/*'asabijja*, one of the fundamental categories for understanding the socio-political organization of the Arab world that concerns solidarity. Another element that characterizes it is that it includes the concept of community. Cf. H. DAJAÏT, *La grande discorde. Religion et politique dans l'Islam des origines*, Paris, Folio, 2008; S. MERVIN, *L' Islam. Fondamenti e dottrine*, Milan, B. Mondadori- Paravia, 2001. The concept is based on a social contract "The *Umma* being founded on a universal belief system is non-territorial insofar as it is aimed to restoring the ideological unity of mankind (*Umma wāhida*). Being non-territorial, the *Umma* naturally cannot be equated with the territorial concepts of modern state and nationality": A. MANZOORUDDIN, *Umma: the idea of a universal community,* in *Islamic Studies*, vol. 14, n. l, 1975, pp. 27-54, qui p. 50. For an historical approach cf. O. BUCCI, *Le radici storiche della Shari'a islamica*, in *Iura Orientalia*, 6, 2010, pp. 232-259 and at http://www.iuraorientalia.net/IO/IO_06_2010/IV_01_Bucci.pdf.

[46] Cf. J. SCHACHT, *An introduction to Islamic law*, Oxford, Clarendon Press, 1964 (Italian translation by P. GUAZZETTI, E. LANFRANCHI, *Introduzione al diritto musulmano*, Turin, Fondazione G. Agnelli ed. 1995); F. CASTRO, *La codificazione del diritto privato negli stati arabi contemporanei*, in *Rivista di diritto civile*, XXXI 1985, l, pp. 387-447; F. CASTRO, *Il modello islamico*, Turin, Giappichelli, 2007; M. BORRMANS, *Statut personnel et famille au Maghreb de 1940 à nos jours,* Paris - La Haye, Mouton, 1977; M. BORRMANS, *Cours de Droit Familial musulman*, Rome, Pontificio Istituto di Studi arabi e d'Islamistica, 1977; M. BORRMANS, *Documents sur la famille au Maghreb de 1940 à nos jours (avec les textes législatifs marocain, algérien, tunisien, et égyptien en matière de Statut*

In migratory contexts, Islamic public order remains religiously characterised and the fundamental values to be defended are anchored in Sharia law. The sphere of private international law is limited by the preference accorded to the principle of the nationality / religion of the subject as a preponderant, if not exclusive, criterion. While European countries currently tend to anchor their rules to the criterion of domicile or residence, based on the presumption that foreign subjects will be more inclined towards integration and assimilation, in North Africa the principle of nationality prevails from a legislative/judicial point of view.[47]

Any analysis of the laws regarding the personal sphere as related to the family environment or the sensitive issue of the rights of minors within that environment, does bring to light a series of 'short-circuits' that may occur when Islamic and Western regulations meet, as they do for instance in regard to legal recognition of kafala. In this sense, the study of this instrument and its legal translation into Western legal systems could highlight the resilience of a political structure we like to think of as liberal and democratic.

The notion of public order must therefore be the normative parameter of reference, an indispensable tool for assessing the moment when foreign law does not affect the fundamental principles of our system and can therefore be applied.[48] It is clearly a particularly complex area especially because of the difficulty of defining such a notion, which is essentially of jurisprudential creation and subject to the mutability of space-time coordinates. However, it represents the only possible regulatory anchorage to refer to which is able to highlight a specific ideological conception of the national system.

Personnel), in *Oriente Moderno*, LIX, 1- 5, 1979; R. ALUFFI BECK-PECCOZ, *La modernizzazione del diritto di famiglia nei paesi arabi*, Milan, Giuffré, 1990; *Le leggi del diritto di famiglia negli stati arabi del Nord-Africa*, R. ALUFFI BECK - PECCOZ (ed.), Turin, Fondazione Giovanni Agnelli, 1997; *Tradizioni culturali, sistemi giuridici e diritti umani nell'area del Mediterraneo*, V. COLOMBO - G. GOZZI (eds.), Bologna, Il Mulino, 2004; G. VERCELLIN, *Istituzioni del mondo musulmano*, Turin, Einaudi, 2002; A. AL-NA'IM, *Islamic Family Law in a changing World*, London, Zed Books ed., 2002.

[47] Cf. *Ordre public et droit musulman de la famille en Europe et en Afrique du Nord*, N. BERNARD -MAUGIRON, B. DUPRET (ed.), Brussels, Bruylant, 2012, esp. p. 17; more generally Y. EN ACHOUR, *Politique, religion et droit dans le monde arabe*, Tunis, Cérès, 1992.

[48] *La famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia tra ordine pubblico e interesse del minore*, G.O. CESARO, P. LOVATI, G. MASTRANGELO (eds.), Milan, F. Angeli, 2014.