

Interpreting a Child's Right to an Identity in Context of Islamic Principles on Adoption

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The basis of this article is essentially the subject of a child's right to an identity in context of the Islamic practice of "adopting" children, known as "Kafalah". An analysis will be made of Islamic principles regarding this area along with a discussion as to whether these principles can be interpreted in light of the right to identity, in conjunction with the most recent attempt by the international community for the protection of children i.e. Convention on the Rights of the Child (1989). This analysis shall also consider this right with particular reference to illegitimacy and inheritance related issues that present serious repercussions for such children. An argument shall further be presented as to whether any protection can be afforded to children who have been placed in "Kafalah", particularly in regards to maintaining a child's sense of being. The main issue of this article will essentially revolve around the importance of surnames and the role these play, not only in context of history and culture but also in regards to the social reality of children in their particular environment. It shall further be argued that when considering issues of identity concerning children, one has to be mindful of core values, which are universal and thus can provide a window into dialogue with the ultimate aim of protecting the child.

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I.

INTRODUCTION

In the realm of human rights such issues as genocide, torture, rights of refugees and women's rights are projected far more vigorously in comparison with other extremely important areas, which impact upon the core of how a human being perceives him/herself. This is apparent when one considers such an area as the right to an identity and discovers its uniqueness in giving rise to several interrelated human rights concerns. These interrelated concerns refer to such matters as a person knowing his/her origins, based on which he/she plans the future alongside making sense of the present. Human identity is thus not an issue to be taken lightly, particularly since it has acquired even a criminal dimension in the form of identity theft¹. This article focuses specifically upon the protection of a child's identity, since arguably, the formation of one's personal history begins in childhood, thus the right to having the knowledge of one's historical background requires protection from the period of childhood.

Presently the primary source of protection for the rights of children is that of the Convention on the Rights of the Child (1989)² (hereinafter "Convention"). It "contains a number of human rights, which have never before been protected in an international treaty, including a child's right to

¹ According to the British Home Office Identity Frauds Steering Committee, identity theft involves criminals taking someone else's personal information and using it to obtain documents like passports and driving licenses along with bank accounts and credit facilities for their own use. However, identity theft took on a unique face in Bosnia, where documents containing personal information of those communities being targeted were destroyed in order to remove any traceable link to their presence in the area. This was primarily an act that assisted in the genocide being perpetrated in Bosnia. In recognition of the importance of personal data, the Law on the Protection of Personal Data was passed by the Parliamentary Assembly of Bosnia and Herzegovina in 2001, Article 1 of which states that the objective of this law was "to secure in the territory of Bosnia and Herzegovina for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to the processing of personal data relating to him".

² *Convention on the Rights of the Child, General Assembly Resolution. 44/25, U.N. Doc. A/44/736 (1989).*

an identity”³, particularly in regards to name and nationality in Articles 7, 8, 9, 14, 20 and 21⁴ of the Convention. This article focuses primarily upon those particular obligations of the state regarding the protection of a child’s right to the various facets of his/her identity, in particular the name, that are stipulated in Articles 7 and 8 of the Convention. Though, a right to an identity was also recognised in the Human Rights Charter of the United Nations however, this did not refer to children but rather to adults. This unique child centred development in human rights has tended to be viewed as an encroachment upon certain social, cultural and religious practices of signatory nations⁵.

There were Articles of the Convention that had reservations placed upon them from several Muslim countries. The emphasis upon religious injunctions within Muslim societies was stressed by the Pakistani representative in its children’s rights report, stating that “a country had the right to interpret provisions in the light of domestic factors, especially religion.”⁶ Such a stand taken by the Muslim countries conflict with those

³ George A. Stewart, *Interpreting the Child’s Right to Identity in the U.N. Convention on the Rights of the Child*, 26 FAMILY LAW QUARTERLY 221 (1992-1993).

⁴ Article 7 of the Convention states that “the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents”, Article 8 of the Convention states that “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”, which was included into the Convention on the insistence of Argentina, which was at the time facing the issue of disappearance of large number of Argentinean children during the upheavals of the 1970s and 1980s. Article 9 refers to protection of children from illegal separation from parents, Article 14 concerns the right of a child to profess his/her religion, Article 18 refers to the state assisting legal guardians and parents to fulfil their responsibilities towards the upbringing of children, Articles 20 and 21 concern specifically the state’s responsibility towards provision of alternative care for children such as that of fostering, *kafalah* or adoption, which is to be conducted by taking into account the continuity of the background of such children.

⁵ This is evident in the concerns shown by China in regards to children being given the right to privacy, which was pointed by the Chinese delegation to be unnecessary in view of children not having acquired the particular mental standard necessary for such a right.

⁶See Mower 1997. Such was also the case with Egypt, which placed its reservations on the basis that the “Islamic Sharia’h is one of the fundamental sources of legislation in Egyptian positive law and because Sharia’h, in enjoining the provision of every means of protection and care for children by numerous ways and means,

supporters of the Convention who stress upon the argument that “considerations of culture should not be permitted to override the children’s rights norms established in the CRC.”⁷

The Committee on the Rights of the Child (Committee) has also taken a stand against the arguments given by Muslim countries like those of Jordan by stating that “Islamic customs and traditions clearly had an adverse impact on the lives of women and children.”⁸ This “stand off” between the Islamic countries and said Committee concerns what Harris-Short⁹ describes as “CRC’s overwhelmingly negative view of non-western culture and tradition”. Such an argument reflects what Ya’ir Ronen¹⁰ argues as “bias against culture as a context of personal meaning for the child”, particularly when it seems that such a culture is not the mainstream western culture.

What I shall be attempting in this paper will be to consider a child’s right to an identity, particularly as to his/her full name, in context of the Islamic principles on adoption. The importance of this analysis is evident when one considers that there are over fifty Islamic countries in existence and these predominantly hold the view that all laws governing their societies should be reflective of the principles of Islamic laws and injunctions¹¹. The analysis and the arguments presented shall reflect on the fact that a children’s sense of being are based upon what Hassall¹² argues to be their need for a “familial and communal environment, which they feel is theirs and which affords them a clear understanding of who they are and helps to

does not include among those ways and means the system of adoption existing in certain other bodies of positive law. The Government of the Arab Republic of Egypt expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention, and in particular with respect to the provisions governing adoption in articles 20 and 21 of the Convention”

⁷ S. Detrick, *United Nations Convention on the Rights of the Child: a guide to the travaux preparatoires*, COMMON WEALTH LAW BULLETIN 19:4, 1621-1623 (1994).

⁸ Committee on the Rights of the Child: 33rd Session (2000).

⁹ Harris-Short, *Listening to the Other- The Convention on the Rights of the Child*, MELBOURNE JOURNAL OF INTERNATIONAL LAW, Vol.2(2), 304 (2001).

¹⁰ Ya’ir Ronen, *Redefining the Child's Right to Identity*, 18 INTERNATIONAL JOURNAL OF LAW, POLICY AND FAMILY 147 (2004).

¹¹ This is quite clear from the reservation placed upon the Convention by Iran, which stated that “The Islamic Republic of Iran is making reservation to the articles and provisions which may be contrary to the Islamic Sharia’h, and preserves the right to make such particular declaration, upon its ratification.”

¹² I. Hassall, *The Child's Right to place. but whose place?* (1994), Wellington, Office of the Commissioner for Children.

give meaning to their lives”¹³. This essentially requires an approach based on cultural considerations and that is precisely the argument put forth by Muslim countries, whose dominant cultures are also to a large extent reflective of religious beliefs.

In order to discover whether Islamic principles on adoption are in line with the Convention’s provision concerning the right of a child to a name and hence an identity, it is essential to begin this paper with a consideration of the concept of identity and Islamic views upon this. As a right to an identity is also a human right, an introduction will also be made as to the concept of human rights in Islam. Thereafter, a comparison shall be attempted between the traditional western practice of adoption with that of *Kafalah*¹⁴ along with the rationale upon which each bases the concept of identity. In context of this a consideration shall also be made as to whether the Islamic practice of *Kafalah* provides adequate or an alternative if not better protection of a child’s right to a name, in particular that of a family name by which he/she is able to form the basis upon which to build an identity. Further, certain related contentious issues, such as illegitimacy and rights of inheritance, will also be addressed in context of their relation and impact upon the right to an identity.

¹³ See Ronen, *supra* note 10 at page 5.

¹⁴ *Kafalah* is basically a practice that has been sanctioned by Islamic injunctions for the care of children who were either orphans, destitute, or abandoned. It can also be available for children who are taken up by childless couples from orphanages or even biological children of other family members or friends. This practice is a combination of obligations that arise under fostering and adoption but not in the same sense as these are practiced in western countries. A Kafil, who takes parental responsibility within the mechanism of *Kafalah*, is essentially a guardian but a guardian whose responsibilities are far more onerous to the ones that foster or adoptive parents in their western tradition may be under. It has a deeper and sacred basis, which provides guardianship, shelter and care to children within a family without changing a child’s identity or absorbing his/her assets into that of the family providing the care. This form of child care unlike legal adoptions also do not give such a child right of inheritance in the assets of the Kafil, rather his/her property rights are associated with those of his/her biological parents. Essentially such a child’s identity and property rights do not get absorbed in the identity and property rights of his/her Kafil. Thus the primary objective of the practice of *Kafalah* is to provide nurturing and protection to a child who is in need of it.

II.

WHAT IS AN IDENTITY?

An identity has a variety of meanings which can be divided into two specific spheres. Firstly the way in which one is recognised within the society one lives in and secondly there is a personal sense of identity, without which “we fear ourselves to be lost, or empty, unable to live life to the full, perhaps even unable to live it at all”¹⁵. The personal identity is the one, which holds meaning to an individual as it contains his/her “lived experiences”¹⁶. Whatever the form an identity takes, it is generally agreed in most literature on the subject, that the development of an identity is an essential component of a person's personality and standing within the society he/she lives in.

Further, the importance of identity in contributing to the psychological wellbeing of an individual was emphasised upon by such psychoanalytic psychologists as Erikson¹⁷, who viewed the development of an identity as being a major factor in mental health. In this regards Psychologists have viewed identity as developing during infancy, through adolescence and into adulthood, but never really being free from the struggle against an “identity crisis”. According to Erikson for a person to feel a sense of identity there must be “a sense of inner continuity and social sameness, which will bridge what he was as a child and what he is about to become”¹⁸. This sense of identity contributes towards the feeling of uniqueness along with feeling of belonging to a larger group. A person, who is comfortable in his /her individual capacity and still is able to relate to the collective society, is described by psychologist as having a secure identity.

In context of international human rights, there exist diverse categories which constitute an identity, such as that of familial, tribal, biological and political. Whatever the category, as a concept, a right to an identity is recognised as a civil and human right in the articles of such international

¹⁵ IVOR GABER AND JANE ALDRIDGE, *CULTURE, IDENTITY AND TRANSRACIAL ADOPTION IN THE BEST INTERESTS OF THE CHILD*, (1994).

¹⁶ *Ibid.*

¹⁷ E. H. ERIKSON, *CHILDHOOD AND SOCIETY* (1950); E.H. ERIKSON, *IDENTITY, YOUTH AND CRISIS* (1968).

¹⁸ Quoted in J. M. MACINTYRE, *ADOLESCENCE, IDENTITY AND FOSTER FAMILY CARE* (1970).

conventions as the International Convention on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child. It is however the Convention on the Rights of the Child that categorically refers to the state's obligation to protect individual human identity right from childhood.

The Convention however, does not precisely define what constitutes identity, but rather its provisions present an incomplete list such as that of a name along with ones' nationality as components of identity requiring state protection. Since childhood is recognised as the foundation years for the development of an identity, the Convention specifically states in unequivocal terms that every child has the right to an identity consisting of name, nationality and family relations (Article 8.1). Further, the right to an identity is secured for the child in the Convention because it is in "the best interest of the child" to do so (Article 3.1)¹⁹.

The particular area of concern regarding development of an identity, by which according to all known customs, a person is known, is that of his/her full name, which includes the family or surname. It is after all this name which represents the "reinforcing of a child's continuity of identity and relationship with one's biological or psychological parents" and "often operates as a vehicle for transferring to a child the goodwill associated with a particular name in a community"²⁰. Its importance is apparent not only as a means of identification but also signifies something beyond.

This specific facet of an identity, known as a person's name, is that which defines several aspects of a person's history and standing within countries consisting of a Muslim majority populace. It is essentially a result of the emphasis these societies place upon the importance of a person's family background. Hence, the surname of a person or the family name is important in such societies and it is a source of pride, as it provides a person with a basis upon which to establish his/her history.

¹⁹ Article 3.1 of the Convention states that "in all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

²⁰ K.M. Sharma, *What's in a Name? Law, Religion and Islamic Names*, JOURNAL OF INTERNATIONAL LAW AND POLICY (1998).

Thus, it does seem that the family (which could even extend to one's tribe) is considered in such societies to be central in forming the background to one's identity. It was acknowledged in the Preamble of the Convention that the family is the "natural environment for growth and wellbeing" of "particularly children"²¹. Since the family is recognised as the best environment to nurture children, therefore, the right to a family name should not really appear odd when arguing for the right to an identity, since it is the family that provides a background to a child and one's family name is a source of discovering that background.

This importance of protecting names is also present within the Convention under Article 8.2, which requires the state to provide such tools as registration of a child at the time of his/her birth. Further, under Article 2²² of the Convention, this protection is to be provided indiscriminately, regardless of such issues as the birth status (e.g. legitimacy/illegitimacy) of the child. However, regardless of one's interpretations of these Articles, in the presence of other important facets that create a person's identity, a name still appears inconsequential. Nevertheless, its significance in the creation of an identity requires consideration in order to further argue its impact upon children who had their biological family identity taken away from them through practices allowed by the state within the process of legal adoptions.

A. *Significance of Names in the Creation of Identity*

It is arguably a universal custom for parents to give their children a name at birth, which, though not always, is a combination of a given first name and a family name. One has to be mindful that it is the significance of surnames or family names with which this article is concerned. A surname of a child has and continues to be held in great importance by not only the child but also by the parents, in particular the father. There exist very few

²¹ The importance of the family as the central figure in the lives of children was emphasised upon by Argentina (the proposing state for the right to identity and the country that was central in getting the inclusion of Article 7 and 8 into the Convention).

²² Article 2 of the Convention states that "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 origins, property, disability, birth or other status."

cultures around the world in which a child is not known by the name of his/her father.

The father's name is usually associated with that of the family name, which if traced through genealogical techniques can and does provide a child with details of his/her history and lineage²³. This common regard shown towards the relevance of a surname of a child was referred to by Ormrod L.J, who stated in his judgement²⁴ that "everyone understands that the question of the surname of a child is a matter of great emotional significance, particularly to fathers. If the name is lost in a sense a child is lost. That patrilineal feeling we all too some extent share". Although, this judgement of Ormrod L.J is referring to the significance of surnames of children for fathers nevertheless, he went on in this same judgement to state that the relevance of names only arises if "the child identifies with the father in human terms". It is arguable that what is meant by "human terms" is not necessarily whether there is an emotional link between the father and the child but rather that the child relates to the name.

A child may continue to identify with the father in several ways, particularly in cultures where a family name, derived from that of the father, holds information for the child as to his/her background. The link with the father through the surname may also be a mode of acceptance in a society that favours an identity, which can be traced in an unbroken chain of lineage. As Ya'ir Ronen²⁵ pointed out that even if a father has not contributed towards the upbringing of a child, nevertheless, "a child may see her father as emotionally belonging to her even if he does nothing intentional for her". Surely, such a situation would demand that "any dispute about a child's name be governed by the welfare principle"²⁶, particularly when one considers, as stated by Lord Jauncey²⁷ in a House of Lords

²³ Family trees, which are charts used in genealogy, usually begin with the original traceable male descendant and if they are married then their female spouses, female offspring and female spouses of their male offspring are shown. Whatever the case may be the starting point for a genealogical search is through the male bloodline rather than the female.

²⁴ *D v. B (Surname: Birth Registration)* 1979 I All ER 92, at pp 99-100.

²⁵ See Ronen, *supra* note 10.

²⁶ Mary Hayes, *What's in a Name? A Child by Any Other Name is Surely just as Sweet?* *Dawson v. Wearmouth*, CHILD AND FAMILY LAW QUARTERLY (December 1999).

²⁷ *Dawson v. Wearmouth* (1999) 1 FLR p 1175.

decision, a child's surname to "be a biological label which tells the world at large that the blood of the name flows in its veins".

The significance of a surname in the life of a child is further made evident where there is an attempt to change it. Whether this change is by the parents themselves or by the state, the impact of this act is profound²⁸ on the child's sense of being, particularly when he/she becomes aware of the importance society places on this "label". This has been recognised in several judicial decisions such as in the case of *L v. F*²⁹ in which Latey. J stated that "as they grew older, children were often greatly concerned with their biological origins. How then can one accept that change of the name was of little importance to the children"? Thus it is arguable that implications for the child, whose name is not that of his/her biological family, are significant considerations especially when taking into account a child's welfare.

Names have also been associated with a sense of continuity, as was the case in research conducted by Guardo and Bohan on childhood development of the self³⁰, which made certain observations concerning young children who stated in the study that if their names were taken away they would no longer be the same persons. Regardless of the fact that the same study also pointed towards older children showing less importance towards their names, it was nevertheless acknowledged in similar studies that "loss of one's name can be a great curtailment of the self"³¹. Further, as Syed Malik Khatib points out, anthropological studies have also acknowledged that the names people relate to "serve as a conceptual label for cultural consistency"³², which also impacts upon the significance of names in the historical, political, sociological and psychological context.

²⁸ The House of Lords in the case of *Dawson v. Wearmouth* had even taken the view that it didn't matter what the age of the child was, changing its surname had a profound impact.

²⁹ *The Times*, August 1 (1978).

³⁰ Carol J. Guardo and Janis Beebe Bohan, *Development of a Sense of Self-Identity in Children*, CHILD DEVELOPMENT, Vol. 42:6, December 1971.

³¹ Erving Goffman, *Asylums* (1961) cited in John Mitchell, *Changing the Names of Children*, NEW LAW JOURNAL (21 Dec. 2001).

³² Syed Malik Khatib, *Personal Names and Name Changes*, JOURNAL OF BLACK STUDIES, Vol. 25: 3, January 1995.

In considering surnames there are issues that arise out of a further argument that these should not necessarily arise from a paternal but also from a maternal source. This paper is not going to delve into this argument, except to the extent of considering in context of identity related concerns, regarding paternal or maternal source. Rather the focus shall be whether a child knows his/her biological kinship and its continuity³³. It is therefore, arguable on the basis of the said discussion that the significance of a family³⁴ name in the formation of an identity is not necessarily only for the purpose of developing an emotional link between the child and parents but it is an important aspect within a child's right, at the appropriate time, to be able to trace his/her parentage.

Based on the same rationale one has to further consider the point that though the formation of a stable personality and identity is difficult even when a child is brought up by his/her biological parents, however it is even more complicated where the child does not know his/her background. Issues that arise under such a situation can be viewed during the creation and impact of an adoptive identity, in which one of the issues a child faces is that of a change of his/her family name.

B. *Impact of an Adoptive Identity on a Child*

The object of discussion in this part of the paper is not whether adopted children regard their adopters as their true parents, as that is more likely to be the case than not, but rather what impact an adoptive identity³⁵ has on the child. In several countries the initial development of an adoptive identity starts with the changing of the surname of an adopted child to that of the adopted family. In societies such as Ireland, documents like an adoption certificate will show details of the child's date of birth, address at time of

³³ For further discussion as to the argument concerning the presumption in favour of the paternal surname, please refer to B.S.S., *Like Father, like Child: The Rights of Parents in Their Children's Surnames*, VIRGINIA LAW REVIEW, Vol. 70:6, September 1984.

³⁴ By family the author is referring specifically to the biological family of the child.

³⁵ By 'adoptive identity,' the author means the way in which an adopted person perceives his/her adoption. This may include the interaction between relationships an adopted person develops within his/her family and those beyond the family along with the individual effort in making sense of the prevailing situations.

adoption and the adoptee's new name³⁶. Such a practice is usually considered (particularly within closed adoptions) to be appropriate as it is meant for the benefit of the child. This benefit is associated with the general belief that such children will thus be able to relate more realistically, through the new surname, with the adopted family.

In regards to this practice of renaming an adopted child, it is relevant to consider that if the surname has no importance in how children feel about themselves and those who take care of them, then why should the need arise to rename the adopted child. Since a name does have a relevance to a sense of belonging, therefore a need arises to have adopted children to be known by their adopter's family name. However, whether the sense of belonging is heightened in an adopted child through this practice is not quite how it turns out in the end.

The practice of severing ties with the past through such acts as changing ones identity, particularly within state sponsored separation from parents, is not new and can be traced as far back as the period of Hammurabi's³⁷ rule. During this period an adoptee's past was completely erased and any attempt to search for biological parents by the adoptee or openly stating one's adopted status was punishable by blinding or cutting out of the tongue of such a person. Present day practices are not so severe but the methods applied do tend to have similar results in erasing the past of such children. In the existence of this situation it is a point of further concern that the fundamental right of adopted children to "a genuine identity is not recognised in treaties or other declarations of international law"³⁸. This absence of concern ignores the impact on children upon whom, as a consequence of keeping them unaware of their biological family origins, such practices as changing their surnames is quiet profound.

The profound nature of this impact has been pointed out in writings that show an adopted child who is not allowed to have biological continuity becoming liable to what is referred to as "genealogical bewilderment"³⁹. This bewilderment may not arise in early childhood but an adolescent adoptee may mentally create what is known as a "family fantasy" and what

³⁶ T. Philpot, *Battle for Identity*, COMMUNITY CARE, Issue 1497, June 2003.

³⁷ CODE OF HAMMURABI- KING OF BABYLONIANS, §§ 192 and 193 (2285-2242 BC).

³⁸ See Stewart, *supra* note 3.

³⁹ P. Westwood, *Who Am I*, YOUTH STUDIES AUSTRALIA, Vol. 14:1, Autumn 1995.

has been referred to by those working with young adopted persons as the “adoption syndrome”⁴⁰. These conditions have been known to cause young persons to develop a fixation on their adoption, particularly when they are getting to grips with their identity. This is likely to raise certain situations that give rise to creation of a fictitious background or strong feelings of abandonment amongst adopted children.

Further, the taking on of the adopted family’s name does not appear to remove or even reduce an adopted person’s need to search for their birth parents. This need may not arise at an early age but it seems to be arising at the time of adolescence, when the question of “Who am I?” and “Where did I come from?” crops up far more frequently, as this is a period of growing up that is associated with experimentation with different lifestyles in order to discover what one wants to be known as.

As briefly touched upon earlier it is submitted that the need to know one’s background is related to the importance laid in most cultures on the family (particularly the biological form). Even in the absence of any international treaty recognising an adopted child’s right to an identity or even a child’s specific right to be raised by his/her biological family, there exists several case law decisions by national courts, which have asserted children’s rights in this regards. Such was a decision taken by the American Court of Appeal in *Nguyen Da Yen v. Kissinger*⁴¹ in which the fundamental rights of a large number of Vietnamese children in regards to being brought up by their biological parents were asserted and recognised in a manner, which was separate from the rights of their biological parents. It can be argued that such cases attempted to fill in the void left in regards to such issues concerning the identity of adopted children by international law.

Nevertheless, one must not be too critical of international law in this matter, since several treaties and the Convention itself have placed a great amount of importance on the institution of the family in the lives of children. In this context Stewart interprets the right of a child to be with his/her family and a right to a family identity to imply “the right to know one’s true identity”, which can provide an adopted child with a basis on which to “assert a right to know the facts of his true identity”⁴². If one is to

⁴⁰ See Philpot, *supra* note 35.

⁴¹ 528 F.2d 1194 (9th Cir. 1975).

⁴² See Stewart, *supra* note 3.

accept the argument that the true identity of a child is associated with that of his/her family then this could mean that the provisions within the Convention, regarding the best interest of the child, are also applicable to the right of the adoptee to search for this identity.

It needs to be reiterated at this point that the purpose of this paper is not to denigrate the practice of Adoption, since it is a practice that has provided for many years a solution for children who are in need of permanent homes. The issue of concern is that by denying knowledge of background to an adopted person has a negative impact on that person's identity formation, which has also been corroborated in the findings of several psychological and sociological studies⁴³. It is further arguable that denying of this knowledge starts from the day an adopted child's biological family name is changed to that of the adopter.

Nothing can be more profound in assessing the significance of family names to children than the views of those children who discovered that their surnames were actually not those with which their biological family was known. If one is to consider decisions regarding children on the basis of their welfare, then it is important to take into consideration the views of the same children. This may lead one to argue that children may view their names to be unimportant, then in such a case what would be the harm in changing them. This may be the case, however for as many children who do not regard their names to be important there are probably the same number, if not more children, who hold the opposite view and it is pertinent to state that the significance of their names impacts upon them at different stages of their lives in different ways⁴⁴. However it can be submitted that neither case

⁴³ See for e.g. JOHN TRISELIOTIS, IN SEARCH OF ORIGINS: THE EXPERIENCE OF ADOPTED PEOPLE (1973) (showing the detriment that arises out of a child being denied knowledge of his/her biological identity and showing further how an adopted child's need to search for this identity is a natural facet and the longer it is hidden the greater the damage to the adopted child occurs); See also Campbell, Silverman and Patti, *Reunions between Adoptees and Birth Parents: The Adoptees Experience*, SOCIAL WORK, Vol. 36:4 ((July 1991), which studies the responses of one hundred and fourteen adult adoptees who reunited with their birth parents. The study discovered that the adoptees that went out searching for their birth parents did so "by a need to get background information, and by their need to complete their sense of identity". As a consequence it was found that such adoptees were able to improve on their self esteem.

⁴⁴ As to adopted children's views concerning their family identity, See H. D. Grotevant, N. Dunbar, J. K. Kohler and A. M. Lash Esau, *Adoptive Identity: How*

has any bearing upon the child's right to know, since rights are not provided on the basis of how many persons use that right but rather they have the right to do so.

There exists a strong basis for the argument that there exists a psychological need for identity and when this is changed then the repercussions are not necessarily positive for the developing personality. The views of adopted children, in this regards, are an example of this when they speak of the importance of names in their identity, as was apparent from the statement made by such a child in a study by Wheeler born Sippel⁴⁵, "my name, my identity, had been legally changed without my consent". Such expression so vividly portrayed by adopted children lack a fixation on the good or bad nature of their biological backgrounds, but rather it shows a sense of having a right taken away from them without their consent. These feelings have now gained recognition, though reluctantly, through gradual shift in judicial decisions considering the importance of identifying both biological parents as being of "vital interest"⁴⁶ to children.

Therefore, even though the right to a familial identity may not be recognised as a fundamental right of adopted children in international or national laws, it does however exist as a fundamental value within several countries, which is something that has begun to permeate judicial decisions. This does not necessarily conflict with international law, as it is arguably in line with the emphasis international law places upon the status of family in the upbringing of children, referred to as being in the best interest of the child. However, the resistance to considering this issue in this context is further exasperated by the "child's multiple identities – social and

Contexts within and beyond the Family Shape Developmental Pathways, FAMILY RELATIONS, Vol.49:4 (October 2000).

⁴⁵ *The Secret is Out*, ADOPTION AND FOSTERING, Vol. 14 at 22, 23 (1990).

⁴⁶ Accepting the importance children attach towards identifying their biological parentage is quite a shift in judicial decisions of such international courts as the European Court of Human rights, which in its case laws has generally tended to promote the view that the right to know one's identity is not absolute. For the same courts acknowledgement of the existence of children's vital interest in identifying biological parents please refer to the decisions of the European Court of Human Rights in such cases as *Odievre v. France*, 42326/98 (2003) ECHR, para. 29 along with *Jaggi v. Switzerland*, 58757/00 (2006) ECHR, para. 38.

biological”⁴⁷ being placed against each other, not in a conciliatory sense but as rivals in the lives of adopted children.

Nevertheless, since the Convention has provided for the right of a child to an identity as well as emphasising upon state responsibility in regards to child care practices like adoption, therefore, maintaining an adopted child's identity should not give rise to any contravention of the Convention but rather should really be included within its provisions regarding the preservation of identity. However, the problem as to this may arise on the basis upon which traditional adoption laws rest i.e. the complete cutting of ties between the birth parents and their children, which as stated previously begins by changing the surname upon adoption.

So the question that arises from this discussion is as to what would be the harm if an adopted child, from an early age, is aware continuously through out his/her life of the true circumstances surrounding his/her family. This is a significant question particularly in contrast to recent attempts by states to open adoption records for viewing by adopted adults. One also questions as to why it is necessary to allow adopters to change the family name of the adoptee to that of theirs? If the purpose is to make such a child feel a part of the adopted family in the same sense as a biological child or to give the world a message that this child is actually a part of this particular family, then such an objective has not quite delivered.

This failure to develop a sense of belonging in adopted children is evident when upon discovering their adopted status they are more likely than not to seek the origins of their biological family, which points to the likelihood of the argument that such children consider themselves to be possessing incomplete identities unless they discover their origins⁴⁸. In this

⁴⁷ Samantha Besson, *Enforcing the Child's Right to know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights*, INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, August 2007.

⁴⁸ When the author refers to the adopted child's need to discover his/her origins she does not mean that the need also arises as to meeting and being with the biological parents. Knowledge and the right to it, does not necessarily mean swapping the adoptive parent with the biological one in importance. This view is evident from the results of such works as Triseliotis, *Obtaining Birth Certificates* in BEAN (ED), *ADOPTION: ESSAYS IN SOCIAL POLICY, LAW AND PSYCHOLOGY* (1984). In this work it was estimated that per year only 1.5 per cent per 1000 adoptees over the age of 17 sought information about their origins. Such an argument was also made by Ya'ir

regards it has to be born in mind that similar emotions are not as intense amongst natural born children when they are being brought up by their biological parents.

The changing of an adopted child's surname to that of the adopting family alongside other closed adoptive practices play an important role in the development of an adoptive identity. The secrecy involved in such acts does not necessarily benefit the relationship between the adoptee and the adopter, since it contributes towards creating a relationship not based upon reality but rather a portrayal of a blood connection. The discovery of this after years of being denied the reality can only contribute towards the detriment of identity related issues.

In regards to this an argument may be raised that a biological relation is not necessarily the only vital truth for a child, a social relationship such as one created in an adoptive situation, is as much an important aspect. Further, in the presence of such reproductive practices as surrogacy and artificial insemination there are at present arguments being presented for the "rethinking of parent-child relationships" in law and "broadening traditional paradigms of parenthood", where "filiation by blood"⁴⁹ is not the major criteria in deciding lineage. Though such issues are beyond the scope of this paper suffice it is to say that regardless of the development of various means of reproducing, knowledge of genetic history continues to be of importance to all humans and their right to know should not be related to issues concerning legal parentage.

From the preceding discussion one may perceive an adoptive identity and a biological identity to be different from one another. Even in the

Ronen (See text at *supra* note 7) who concluded that if there is recognition of a child's right to an identity that will not necessarily undermine the status of the adopter but will undermine the biological ties if such ties "do not correspond with ties that are meaningful to the child".

⁴⁹ For further discussion on this area please refer to Angela Campbell, *Conceiving Parents through Law*, INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, 1 August 2007. The impact of reproductive technology in creating new family setups in which children can have several parents i.e. genetic, gestational and social. The effects of this on the status of children can be reviewed in Melanie Roberts, *A Right to Know for Children by Donation.....Any Assistance from down under?*, CHILD AND FAMILY LAW QUARTERLY, December 2000.

presence of the difference, there exists within the social/adoptive⁵⁰ identity a search also for the biological one. By denying the knowledge of both to the adopted child in order to “guarantee secure and uninterrupted parenting and family life”⁵¹ is damaging to say the least. In this regards it was aptly stated by Ya'ir Ronen⁵² that “protecting the child's right ‘to be’ primarily means ensuring that they will not be forced to disown their authentic familial and communal identity, to the detriment of their sense of self and of their human dignity in order to gain recognition of their normalcy by mainstream society”. This environment is apparent in traditional adoptions, in which changing of the family name contributes towards adoptive parents acting as though “their families shared biological connections”⁵³, thus creating a legal fiction for the adopted child to grow up in rather than a “coherent albeit truthful existence”.⁵⁴

Regardless of the circumstances surrounding adopted children, one may consider further that the impact on their adoptive identity does not necessarily have to be a negative one, so long as they are given the fundamental right to “preserve their biological family as well as their social family relations”⁵⁵. One must however bear in mind that this right extends to knowledge of the background and does not necessarily mean contacting or being with the biological family, which under certain circumstances, like the presence of abuse, may not be in the child's best interest. It is further arguable that the basis on which the argument regarding a child's right to know his/her identity is upon the possibility of separating the “biological childhood from social childhood”⁵⁶. This does not mean regarding social childhood, in the form of adoption, as some how lesser in importance to that

⁵⁰ Social childhood arises from developing relationship with delegated parents i.e. through adoption, fostering and the biological childhood refers to blood relations with biological parents. The adoptive childhood is of a social nature to that of the biological however, knowledge of both types of childhood identities, if in the best interest of the child, are equally important.

⁵¹ See Ronen, *supra* note 10.

⁵² *Ibid.*

⁵³ David Kirk cited in Frasch, Brooks and Barth, *Openness and Contact in Foster Care Adoptions: An Eight-Year Follow-Up*, FAMILY RELATIONS 2000, Vol. 49:4 at 380.

⁵⁴ See Besson, *supra* note 47.

⁵⁵ Geraldine Van Bueren, *Children's Access to Adoption Records: State Discretion or and Enforceable International Right?*, THE MODERN LAW REVIEW, Vol. 58:1 at 47 (January 1995).

⁵⁶ *Ibid.*

of biological childhood consisting of blood relations. Rather it means that an adoptive identity could develop with an acceptance of reality in the minds of concerned children and adults.

The identity related issues concerning children which have so far been covered were associated with the practice of Adoption. However, Adoption is not a universally accepted form of child care and the secrecy that is practiced in traditional Adoption is also not universally accepted⁵⁷. Islamic injunctions are an example of this and the next part of this paper will consider where Islam stands on such issues as an adopted child's right to an identity. Since this is a significant human rights issue, it requires an understanding of the sources of Islamic principles when considering the basis of identity related concerns.

III.

ISLAMIC PRINCIPLES OF HUMAN RIGHTS UNDERLYING IDENTITY RELATED CONCERNS

Since the purpose of this paper is not to delve extensively into Islamic law, therefore, the following may appear to be a simplistic explanation of the basis upon which human rights in Islam rest nevertheless, it does attempt to provide the reader with the essential source of such rights, which can then be further researched along with providing a starting point for the right of a child to an identity⁵⁸.

At the most elementary level one may consider the source of human rights in Islam to be broadly accepted as being what is known as the Sharia'h, which consists of laws deriving their authority from the provisions

⁵⁷ The Maoris in New Zealand place in their culture a great amount of value in the extended family that is responsible and preferred for the care of children. This is a consequence of the Maoris giving importance to genetic origins, which are not hidden from children being brought up by non-biological parents.

⁵⁸ The reader may consult such works as that of Javaid Rehman, *The Sharia'h, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY at 108 (April 2007), for further exposition on the subject of Sharia'h and International Human Rights Law.

of the Quran, the Sunnah (the practice of the Prophet), ijma or the consensus reached on the specific issue by religious-legal scholars (ulema) and ijtehad (“independent inquiry and judgment in legal matters as well as analogical reasoning, known as qiyas”⁵⁹). The Quran is the primary source of laws and the Sunnah provides descriptive examples of how a Muslim is to practice the Quranic injunctions as shown by the Prophet. These sources of Sharia’h constitute and regulate the relationship of human beings with the Divine and each other.

Islamic jurisprudence concerning the laws of Sharia’h has been developing over a period of fourteen centuries and continues to do so in this age. Although there are several interpretations of Islamic laws, however, the generally accepted schools of Islamic jurisprudence are known as Maleki, Hanafi, Shafi and Hanbali along with jurisprudence developed by jurists of the Shia sect known as Fiqa Jafaria. The various interpretations of Sharia’h by the said schools have great amount of influence upon the thinking and actions of Muslims in their everyday lives as well as on the political development of Muslim countries.

The reason for this influence of Sharia’h is because it is believed by Muslims to be divine law, therefore unquestionable⁶⁰, and it is to govern all aspects of their lives, not just the religious. According to Monshipouri⁶¹ an Islamic State on this basis is in fact duty bound to promulgate laws in line with the Sharia’h, and society is under an obligation to obey these laws. Since the laws are accepted to be of a divine nature therefore, they are considered generally by Muslims to be just and serve the purpose of guidance towards leading their lives in accordance with God’s will.

⁵⁹ M. Monshipouri, *The Muslim World Half a Century after the Universal Declaration of Human Rights: Progress and Obstacles*, NETHERLANDS QUARTERLY OF HUMAN RIGHTS Vol. 16:3 (1998).

⁶⁰ The notion of unquestionability regarding Sharia’h does not mean that the laws are not open to interpretation nevertheless; such interpretations have to be based upon the principles of the Quran and not to negate these same principles, in the same sense as the laws of a country are not permitted to contravene the constitution of that particular country.

⁶¹ See Monshipouri, *supra* note 59.

With regards to human rights, many writers on the subject such as Abdul Aziz Said⁶² have concluded that Islam is no different from other traditions in placing such rights in context of human dignity. However, the Islamic principles that give shape to the characteristics composing these rights have what is accepted to be a divine connection from where their authority is derived. Writers on the subject of human rights within Islam have further argued that these rights are not only governed by the Sharia'h but far more, their practice is considered equivalent to that of worshipping God. Such rights are also understood by several scholars on Islam "as part of the human heritage"⁶³.

One of the several aspects of Human rights, which are also considered within Islamic principles, is that of responsibility towards future generations. In this context, within issues such as those concerning the rights of the child, Muslim legal scholars and leaders in light of what they consider to be Islamic principles have questioned the "individualistic ethos and liberal ideological overtones"⁶⁴ of theories developed in regards to this area. In contrast with which, Islamic laws placed greater emphasis upon the collective rights of the community (Ummah) as being above those of the individual. Therefore, such laws as the protection of human dignity, freedom of conscience, protection of minorities, sanctity of life, seeking of knowledge, amongst many others, are not addressed by Islamic principles on an individualistic level but for the purpose of fulfilling a responsibility towards the greater good.

It would therefore follow that laws which have been formulated solely on the basis of secular rationale, in such matters as those concerning the rights of the child in having an identity, will cause problems of interpretation and implementation in Muslim countries where there exists a general acceptance of not only the Islamic personal law concerned with this specific area, but also acceptance of the divine wisdom behind these laws. Thus, keeping the situation concerning the influence of Islamic law in one's mind as well as the main purpose of the Convention to protect the best interest of the child, there follows an analysis of whether Islamic personal

⁶² Abdul Aziz Said, *Precept and Practice of Human Rights in Islam*, UNIVERSAL HUMAN RIGHTS, Vol. 1:1 at pp. 63-79 (Jan-Mar 1979).

⁶³ G. KRAMER, CROSS-LINKS AND DOUBLE TALK? ISLAMIST MOVEMENTS IN THE POLITICAL PROCESS (1995).

⁶⁴ See Stewart, *supra* note 3.

law, concerning particularly adopted children, actually fulfils the said purpose of the Convention in regards to protecting children's right to an identity. The specific environment concerning such children shall be considered even if it exists as an alternative to what is practiced in western "secular" societies. In order to discover whether there is a possibility of Islamic principles meeting the requirements of the Convention, there has to further be an explanation of what such principles are in regards to identity and the relevant injunctions concerning adoption.

A. *Importance of a Name within the Concept of Identity in Islam*

Identity within Islamic principles is a very important element, particularly in context of lineage or link with ones forefathers. According to Siraj Sait, "the Quran not only confers the basic rights of name, identity and paternity but reiterates a broad framework for the physical, material, emotional and spiritual rights of the child".⁶⁵ A Muslim adult in this process of identity formation is "under an important responsibility to bring up a new generation of Muslim believers, upholding religious values and social responsibilities".⁶⁶

Besides other facets of an identity, the name of a child is given great importance to the extent that according to one of the traditions associated with the Prophet of Islam a child actually has the right to a good name. Since the words and practice⁶⁷ of their Prophet "still serve as a guide in practices"⁶⁸ for Muslims, hence the process of naming a new born child within Muslim society is considered to be one of the most important parental duties towards a child. However, it must be born in mind that the importance given to a name is not only given to the first name of the child

⁶⁵ M. Siraj Sait, *Islamic Perspectives on the Rights of the Child* in D. FOTRELL, REVISITING CHILDRENS RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD (2000).

⁶⁶ See Leila S. Lababidy, *The Delivery of Early Childhood Services Egypt's National Case Study*, (1996) available at portal.unesco.org/education/en/file_download.php/64491a8c237c9d21dd029769614fbc75Egypt.pdf (last visited on 12 Oct, 2007).

⁶⁷ The practice of the Prophet has been referred to as "an idea as well as a memory, and it is an ideal for Muslim behaviour. As such it is an' ideal for pious Muslims and handed down by example and personal teaching." See F. M. DENNY, AN INTRODUCTION TO ISLAM at 159 (1994).

⁶⁸ J. H. Chamberlayne, *The Family in Islam* (1968), NUMEN, Vol. 15: 2 at 119-141.

but also to his/her surname or family name. It is generally the surname that primarily holds far more significance within Muslim societies in the formation of an identity, particularly in context of tracing one's lineage.

A child is usually recognised as being Muslim by his/her name, which usually has an Islamic origin from the Quran or derived from names of characters from Islamic history. The importance given to the process of naming is apparent in such rituals as an "*aqiqa*"⁶⁹, which has a symbolic nature in that it is meant to develop the new born child into a "social being"⁷⁰. Such intricacies involved in the creation of a name within Muslim societies according to Sharma⁷¹ show how important this matter is to them. For instance an Arabic name can signify several elements of an identity, such as that of "*kunya*" or surname of relationship, "*ism*" or the personal name, "*nasab*" or the lineage, "*nisba*" or the region of birth and "*laqab*" or nickname. This naming pattern became even more complex with the spread of Islam into other cultures, but it did not lose the original significance. A name is therefore very much central to the identity of a Muslim child. It's very aptly described as "the simplest, most literal and most obvious of all symbols of identity"⁷²

Besides the given first name, within a Muslim society the importance and value of a family name (paternal rather than maternal) is so much as to not be given to a child unless he/she was conceived within a marriage or if the father acknowledged paternity⁷³. Although presently, on the basis of what is considered to be the best interest of the child, such a belief may appear to contravene human rights, nevertheless, arguably such beliefs may

⁶⁹ *Aqiqa'* refers to the goat or ram which is sacrificed on behalf of a new-born child on usually the seventh day after birth. It is a practice attributed to the Prophet who is reported to have said that "On the seventh day a name should be prescribed for the child. Its hair and all filth should be removed and sacrifice should be performed on his behalf". This practice of the Prophet is followed by those who are able to afford the expense and thus is not compulsory for those who are poor.

⁷⁰ J. BARGACH, ORPHANS OF ISLAM: FAMILY, ABANDONMENT, AND SECRET ADOPTION IN MOROCCO (2002).

⁷¹ See Sharma, *supra* note 20.

⁷² H. R. Isaacs, *Basic Group Identity: The Idols of the Tribe*, in "NATHAN GLAZER AND DANIEL MOYNIHAN (EDS.), ETHNICITY, THEORY AND EXPERIENCE (1976) at 29, 46.

⁷³ The issue concerning paternity has a significant impact beyond awarding of surnames. This also has repercussions upon the right of inheritance, which shall be considered in the later part of this article.

also be interpreted as contributing towards the protection of a child's right to an identity. Though I shall be considering the contentious issue concerning children born out of wedlock at a later stage of this paper, nevertheless, at this point of the discussion it has to be kept in mind that in Islam a child conceived and born within any situation is not denied a given name as well as a family name, however the question of whether the surname is to be derived from the child's paternal or maternal family is a matter which is governed by the principles of Sharia'h, such as in the case of adopted children.

B. *The Identity of an "Adopted" Child in Islam*

Before one considers how Islamic principles address identity of an adopted child, there should be presented the basis upon which care of children rests within Islam. One method of doing this is through considering how the Prophet dealt with this issue. According to writers on the subject, such as Chamberlayne⁷⁴, the practice of the Prophet towards children of both genders was rather unique for his time and the emphasis placed by him upon the right to life for every child along with the care of orphans was based upon the desire "that his Community should be renowned for the care of children". This concern towards children was further reiterated by the Prophet as he referred to those persons showing unkindness towards children and disrespect towards the elderly as not being members of his community. Such an attitude towards the care of children was particularly focussed upon those requiring protection, such as orphans, whose economic interests in particular were more likely to be usurped in Pre-Islamic society.

Alongside the practice and words of the Prophet, Quranic verses also reinforced the rules concerning the care of vulnerable children and made it mandatory on the guardians of such children to protect their financial assets in the form of a trust. Breaching this duty is referred to under Quranic provisions to be punishable with the ultimate punishment for a Muslim, hell fire. Islamic injunctions went even further in transforming other practices concerning children in Pre-Islamic tribal Arabia, such as those concerning adoption.

⁷⁴ See Denny, *supra* note 67.

The concept of adoption or “*tabnia*”⁷⁵, as recognised in pre-Islamic tribal and present day western societies, is unacceptable within rules of Sharia’h, which do not allow the adopted child to be considered in any way related, by name or otherwise to the blood line of the adopting family. Consequently, if one considers an adoptive child’s identity in context of his/her name, in most Muslim countries according to Sharma “there is very limited law of adoption” therefore, “question of naming such a child is at best only hypothetical in most Muslim countries”⁷⁶. In contrast to these principles the type of adoption practiced in Pre-Islamic society was explained in the following narration attributed to Aisha⁷⁷, in which she is reported to have stated that:

“Abu Hudhaifa, one of those who fought the battle of Badr, with Allah’s Apostle adopted Salim as his son and married his niece Hind bint Al-Wahd bin ‘Utba to him’ and Salim was a freed slave of an Ansari woman. Allah’s Apostle also adopted Zayd⁷⁸ as his son. In the Pre-Islamic period of ignorance the custom was that if one adopted a son, the people would call him by the name of the adopted father from whom he could inherit as well.”

The break with adoptive practices, as the ones narrated above by Aisha, derived its authority from the following verse of the Quran⁷⁹, which revealed to the Prophet that blood ties were the primary source of determining parentage and lineage rather than adoption. It stated:

“nor has He made your adopted sons your (real) sons; that is simply a saying of your mouths. But Allah speaks the truth, and He

⁷⁵ *Tabnia* refers to the pre-Islamic equivalent of western form of adoption in which an adopted child was considered legally to be equivalent to a natural born child.

⁷⁶ See Sharma, *supra* note 20.

⁷⁷ This narration also includes the persons of Abu Hudaifah ibn Utbah and Salim mawla Abu Hudaifa. Aisha was one of the wives of the Prophet to whom the most number of narrations are attributed in regards to the Prophet’s life i.e. Hadith.

⁷⁸ Zayd is said to have been captured in a war and sold as a slave. The Prophet was given Zayd as a present by his first wife Khadijah but was later freed by them and adopted as their son. Before the Quranic verses were revealed he was known as Zayd ibn Muhammad or Zayd son of Muhammad and after the verse was revealed he changed his name to Zayd ibn Harithah. He has the distinction of being the only one of the Prophets companions to be mentioned by name in the Quran (Quranic verse 33:37).

⁷⁹ Al-Quran, chapter known as “Al-Ahzab” (33:4 – 5).

guides you to the (right way). Call them by (the names of their fathers; that is more just in the sight of Allah. But if you do not know their fathers, they are your brothers – in – faith and your wards”

Besides the fact that the stated verse came at a time when an issue arose concerning the marriage between the Prophet and ex-wife of his adopted son Zayd ibn Harithah⁸⁰, it nevertheless became clear from this specific verse that the Quran prohibited the type of adoption practiced in Pre-Islamic (and present day western) society in which a child was accepted as a legal member of the adopters' family, at par with a natural biological child, particularly in regards to inheritance and other legal rights associated with being a child of the family.

The said prohibition however did not discourage the care of children in need, in fact alongside children such weaker members of society as freed slaves and prisoners of war were known to be given protection within a particular family's household. However, this practise was not in the traditional form of “*Tabnia*”, rather the Quran provided an alternative method of care in such situations, which was far closer in regards to certain characteristics to the present day practice of fostering but unlike fostering it is not a temporary arrangement until the child is placed with an adoptive family. It can perhaps be described more as a form of guardianship.

The principles of Sharia'h, instead of adoption provided rules for the care of orphans and other needy children as a form of religious duty. This is known as *Kafalah*⁸¹ or in its literal meaning “sponsorship or to feed”⁸² or a

⁸⁰ Zayd had married Zaynab bint Jahsh, who was a cousin of the Prophet and the marriage, was encouraged by the Prophet. At the time Zayd was the adopted son of the Prophet and thus Zaynab, under the prevailing traditions, was the Prophets daughter in law. Upon the divorce of Zaynab, marriage took place between her and the Prophet, after the revelation of the Quran, which defined the relation between the adoptee and the adopter as not that of blood ties.

⁸¹ *Kafalah* allows children to be cared for by others when they cannot be cared for by their biological parents. It does not alter the kinship or genealogy of such a child as he/she continues to use the biological family name and cannot inherit from the family taking care of him/her. Even though under the Shiah school of law a *Kafalah* child is allowed to be known by the guardian's family name, however such a child will have to be called by its fathers' name upon getting married and upon death.

system of guardianship⁸³, which according to Pearl⁸⁴ “enables a child to be brought up in another family but without inheritance rights”. This simplistic meaning provided by Pearl however does not explain the rationale for such an act as *Kafalah*. When one considers the practice of *Kafalah* in context of the Quran and Sunnah of the Prophet, it becomes evident that besides providing a moral force, these same sources present *Kafalah* as an act of piety for a Muslim bringing up an orphan⁸⁵ and providing for his/her needs in the same way as raising one’s own children.

The importance of *Kafalah* is further evident from a reported saying of the Prophet who is reported to have said that “I and the one who raises an orphan, will be like these two in the Garden”, and he pointed to his middle and index fingers with a slight gap between the two. Thus the care of children who do not have a family or have been abandoned for other reasons⁸⁶ is considered by Muslims to be one of their most important religious obligations. However, the persons taking the child in *Kafalah* cannot attribute the child to themselves, nor can they give the child the rights that the Sharia’h reserves for their natural children, which includes the right to a family name.

There are reasons as to why a *Kafalah* child cannot be given the name of the family that takes upon itself the upbringing of such a child and these same reasons are connected to the aspect of a child’s identity. According to the Sharia’h if the name of the *Kafalah* child’s biological father is known, then his/her lineage is known and that cannot be taken away from him/her by replacing it with the lineage of the family, which acts as his/her guardian. If the *Kafalah* child’s lineage is not known even then he/she is not to be

⁸² Imad-ad-Dean Ahmed, *The Islamic View of Adoption and Caring for Homeless Children*, available on <http://www.islamfortoday.com/adoption.htm> (last visited on October 3, 2007)

⁸³ MASHOOD BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (2003) at 155.

⁸⁴ David Pearl, *A Note on Children’s Rights in Islamic Law* in G. DOUGLAS AND L. SEBBA, *CHILDREN’S RIGHTS AND TRADITIONAL VALUES* (1998).

⁸⁵ Losing one’s parents in tribal Arabia was the primary circumstance that gave rise to a child requiring care particularly since the tribal identity was a major source of protection for its members. A child losing his/her parents, in particular the father, left such a child without a protector unless his/her tribe or members of the extended family took on the responsibility of his/her care. Such was also the experience the Prophet had encountered since he was left an orphan in early childhood.

⁸⁶ Foundlings are known by the word “*laqeet*” and are also regarded as orphans.

given the family name of the guardian, rather he/she is to be considered as a brother/sister in faith i.e. Islam⁸⁷. The orphan is never to be denied his/her original identity, as this is considered to be a right of every child. By hiding the lineage of the *Kafalah* child through fictive paternity denies the child the right to know the biological parents and the choice to maintain a relationship with them. According to Nasir⁸⁸ “a child’s first right is to establish parentage”, thus it would seem that by taking away the name of the biological parent and replacing it with the adopted parents name would breach this right.

There are several other grounds upon which one may argue to be the purpose behind an adoptive child’s right to information concerning its identity. These include the need to trace one’s genetic lineage for medical purpose and related to this is a further reason that underlies such children keeping a name that is different to that of the adopter, which is the concern associated with the possibility of incestuous marriages. As stated earlier, since lineage is considered to be what Bargach⁸⁹ states “the backbone and most fundamental organising principle in and of Muslim society”, arguably the knowledge of one’s lineage will contribute towards the prevention of incestuous relationships accidentally developing with a biological sibling, particularly if one didn’t know of the existence of such a relationship.

However, unlike the sanctity of a relationship between biological siblings, under Sharia’h there is no restriction upon marriages between the *Kafalah* child and the natural children of the guardian family⁹⁰, unlike in

⁸⁷ This concept is similar to the Christian/Biblical tradition of becoming a member of the family of God.

⁸⁸ J. Nasir, *The Islamic Law of Personal Status* cited in Douglas and Sebba, *supra* note 84.

⁸⁹ See *supra* note 70.

⁹⁰ This has to be contrasted with the unique concept of fosterage within Islam. Fosterage in Islam, known as *Riza*, means “a child suckling milk from the breast of a woman for a certain time, which is termed the period of fosterage,” CHARLES HAMILTON, HEDAYA at 67-72 (1870). This form of fosterage was well established within tribal Arabia. Where this act of child care existed, Islamic principles lay prohibition on marriage between the suckled child, the woman suckling and the woman’s relations within the prohibited degrees. Thus what is prohibited by consanguinity is also prohibited by fosterage. Islamic principles, as interpreted by Shafi School of law, state that this relationship will only be established if such a child has suckled on at least five different occasions on the breast of the same woman. According to Hanafi School the period of fosterage is thirty months. Whatever is the period of suckling, this act would mean that a stranger, not related

Pre-Islamic societies where adoption created the same prohibitions on marriage as those between biological siblings. Thus protection from future problems arising from physical relationships for the *Kafalah* child could arguably be viewed as protecting the interest of the child. In recognising the potential of such relationships arising, a *Kafalah* child is not considered as a child of the family in the same sense as is considered within the western concept of adoption. In contrast to this even if physical relationship between adoptive “siblings”⁹¹ in the western model of adoption may not be considered wrong in the legal sense, nevertheless such a relationship is more likely to be considered a social taboo since such “siblings” having been brought up together in the same household are considered to be children of the family in the same sense as biological siblings. This fictive blood relationship, partially developed through labelling such children with the family name of the adopter, thus is more likely to be socially considered to be at par with a biological one.

Upon the basis of the preceding discussion it does seem that one cannot understand adoptive identity without considering the attitude a particular society has towards kinship. Therefore, if one considers adoptive identity in context of one’s society then it is not just Muslim dominated societies that regard kinship on the basis of blood relations. It is further arguable that cultural evidence of maintaining a child’s biological identity is linked to societal influences, which are likely to give rise to repercussions from an act of hiding one’s kinship. Such repercussions are not necessarily positive for the development of a child’s identity; rather they are more likely to go against the best interest of the child.

Besides, when one is considering the best interest of the child, issues concerning the development of an adoptive identity within the context of Islamic principles need to be understood also with regards to the wider cultural as well as historical influences. Within tribal Arabia, the best interest of the child was not only associated with the importance of lineage

by blood, can become related to a child in the same sense as a biological relation as what can be referred to as “milk mother”. However, this relation went as far as prohibiting marriage and did not go as far as giving inheritance rights to either party in the estates of each other.

⁹¹ When the author refers to adoptive “siblings”, this does not mean that such children are siblings in the generally accepted idea of biological brothers and sisters. Rather adoptive “siblings” refers to a social relationship developed out of the process of adoption.

and kinship as a source of pride but also provided individual members of the tribe with a sense of security within the collective. The strength of one's tribe provided a greater opportunity of not only physical survival within a society, which was based on a rigid hierarchical system, but also a means to avoid slavery. This protection was extended to only members of the tribe, whose relationship was based upon kinship and blood relations, thus the best interest of the adopted child in such a society were served through making such a child a legal member of the adopter's tribe. Islamic principles did not refute this importance associated with kinship but rather expressed the interests of adopted children in a different manner, which were argued to only be served through maintaining their biological kinship rather than assimilating their bloodline with the adopted family. In this regards whether one accepts or not the divine nature of such Islamic principles, it is worth noting that the concept of maintaining the biological identity of an adoptive child, is not wholly alien to the developments concerning this area in western countries, particularly the fairly recent arguments regarding the practice of open⁹² as opposed to closed adoptions.

Despite the preceding discussion and attempts at understanding Islamic principles concerning *Kafalah*, there are certain contentious issues regarding alleged inconsistencies that arguably arise between these same principles and human right laws. These issues are associated with the aspect of illegitimacy of children and the concerns associated with inheritance rights, which have been argued by critics to be rights that have been denied to a *Kafalah* child under Islamic principles. This denial has been presented by such authors as Van Bueren⁹³ to be a form of resistance towards giving property rights to such children under Islamic law and thus is a discriminatory practice. From this it is apparent that the act of *Kafalah* not only concerns issues regarding the identity of such children as already discussed, but also raises issues about their financial rights. One must address these "contentious issues" before one can present or even conclude whether Islamic principles concerning *Kafalah* are in line with the

⁹² With regards to open adoptions there are arguments that the biological identity of a child should not be hidden but rather contact should be allowed between such children and their biological parents. Historical adoptive practices that emphasised upon secrecy have been challenged by such studies on the area as the California Long Range Adoption Study by Berry (1991), which presented data from 1,296 adoptive families and concluded that the behaviour of children in open adoptions was more positive than children in closed adoptions.

⁹³ See text with *supra* note 56.

Convention and thus International Human Rights Law and whether it can be viewed as a viable alternative to the traditional forms of adoption.

IV.

CONTENTIOUS ISSUES

A. *Identity of an Illegitimate Child in Islam*

The issue of legitimacy of a child within Islam is a fairly important matter to the extent that a particular period of gestation is emphasised upon by Sharia'h when deciding whether a child is legitimate or not. The act of *Kafalah* has wider repercussions beyond the issue of retaining a family name, particularly where a *Kafalah* child is originally a product of an out of wedlock relationship i.e. illegitimate rather than one whose parents were married at the time of his/her conception i.e. legitimate.

When one begins to consider the underlying rationale of Islamic principles concerning the rights of illegitimate children, it becomes evident that in practice "the actions of Muslims are seldom Islamic as the actions of Jews and Christians are seldom consistent with Jewish and Christian doctrines"⁹⁴. Such an observation thus becomes an apt basis for issues concerning the identity of an illegitimate child within Islamic principles, which are of a different nature to those of a legitimate child taken into *Kafalah*. If one is to search for the identity of an illegitimate child, this search must include "the question of what is the proper relationship of the individual to society as a whole."⁹⁵

In Islam a child has the right to be born to a married couple and therefore to have the right to legitimacy. Sharia'h regards a legitimate heterosexual marriage as the basis upon which a family is to be established. Islam according to Esposito⁹⁶ "considers marriage to be incumbent on every Muslim man and woman" and prohibits sexual relations outside wedlock.

⁹⁴ See Said, *supra* note 63.

⁹⁵ Baumeister (1986) cited in Grotevant, Dunbar, Kohler and Esau, *Adoptive Identity: How Contexts within and beyond the family shape developmental pathways*, FAMILY RELATIONS 49:4 at 379 (2000).

⁹⁶ J. L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW (1982).

Although the issue of marriage in Islam is essentially a “religio-moral principle”⁹⁷ however its importance is evident when one considers the fact that extramarital sex is a crime punishable under the laws of Sharia’h.

The importance given to marriage within Islamic principles consequently extends to regarding a child born outside of marriage⁹⁸ to be “child of fornication/adultery”⁹⁹, and according to the Sunni fiqa he/she will not bear the name of the father but that of the mothers’ family name. Under the same rules such a child will also only inherit from the mothers’ side of the family and not that of the father¹⁰⁰. The denial of such rights to illegitimate children in contrast to legitimate children is a matter of concern to the Committee on the Rights of the Child (Committee) as it could act as a “potential for stigmatization of a woman or couple who decide to keep a child born out of wedlock, and the impact of this stigmatization on the enjoyment by such children of their rights”¹⁰¹.

Under circumstances existing where an illegitimate child is taken into *Kafalah*, it would appear that such a child is not to have a family name that is the same as his/her biological father. The emphasis placed upon a *Kafalah* child being known by his/her fathers’ name therefore does not apply to an illegitimate child. So why is such a child being denied a right to the name of his/her father and consequently being stigmatised as a “bastard”? It may appear that such an injunction removes the responsibility of the father towards providing for such a child by giving him the option of denying paternity and it would also seem that this injunction is in contravention to the following Quranic verses which states that:

⁹⁷ See Ahmed, *supra* note 82.

⁹⁸ This provision according to Baderin is based upon the Sunnah of the Prophet rather than a Quranic injunction.

⁹⁹ Abd Al 'Ati, *The Family structure in Islam* (1977) in Baderin, *supra* note 83.

¹⁰⁰ These principles concerning illegitimacy are even more stringent within the Shiah school of law, which Syed Ameer Ali in his work *Mahommedan Law* (1884) considers a bar to succession. In this regards a distinction is made between an illegitimate child (*walad-uz-zina*) and a child that is denied paternity by the father (*walad-ul-Malainah*). Under such principles an illegitimate child is to be considered as *nullus filius*, thus having no *nasab* to either parent and consequently cannot inherit from either of them. In contrast a child that is denied paternity by the father (who is married at the time to the mother) can inherit from its mothers’ family.

¹⁰¹ Committee on the Rights of the Child: Kuwait (1998) UN Doc. CRC/C/15/Add.96 and ESCR Committee: Morocco (2000) UN Doc. E/C.12/1/Add.55

“no bearer of burdens (in this case the child) shall bare the burden of another” (in this case the acts of the parents)¹⁰².

Such a “contradiction” requires to be addressed in its historical context. Though the Sharia’h does prevent an illegitimate child from inheriting the biological fathers name, however, according to Islamic scholars like Abd Al’ Ati¹⁰³, the injunction was not suppose to hurt the child but rather the father who was being reprimanded for having an extramarital affair. Such an injunction would have been detrimental for a father in Pre-Islamic society where the number of children one had was considered to be a sign of wealth, regardless of the fact whether such children were born within wedlock or not. Nevertheless, it is arguable that in fact it is not the father who will within the particular society be known as illegitimate, and it is this stigma alongside its negative consequences upon the child that primarily concerns the Committee when considering such issues in context of the Convention.

However, if one considers such injunctions in their spirit, it does seem that regardless of how the child is treated in the community, under Islamic jurisprudence the illegitimate child’s rights as a full member of the Muslim community is not effected by the denial of paternity. Such a child under the Sharia’h is blameless and his/her parents are the ones considered to be at fault, it is they who are to bear the effects of the illegitimacy. The Sharia’h does not forbid a mother from keeping and caring for an illegitimate child and in order to protect children from the harm of such a stigma, arguably the state (as the implementer of Sharia’h) ultimately can step in and assist, without any discrimination, all children regardless of their birth status.

Nevertheless, the identity of an illegitimate child (particularly in context of ones’ family name) under Islamic principles continues to be a controversial area requiring an explanation, particularly when one takes into consideration how traumatic the consequences are for such a child. According to Baragach¹⁰⁴ “bastards are despised and believed to be profane, abject and harbinger of danger even when superficially one is told, at times, that they are not”. This view is particularly taken of abandoned children and the reason of their abandonment is thought to be their illegitimacy. Such

¹⁰² Al-Quran, verses 6:164, 17:15, 35:18, 39:7, 53:38.

¹⁰³ See Ati, *supra* note 83.

¹⁰⁴ See Baragach, *supra* note 70.

treatment of children is in complete contradiction with the Sharia'h, but the stigmatisation is perpetuated when birth certificates in countries like Morocco record the child to be a product of illegitimate sex ("zina"). Further since "legitimacy assumes a criminal dimension in Islamic law", since a mother of an illegitimately born child may be punished for "sexual liaisons (zina)"¹⁰⁵, thus the consequence is a growth in number of abandoned children in Muslim countries, never being accepted as "brethren in faith", but rather as social pariahs with no identity except that of illegitimacy¹⁰⁶. It is pertinent to state at this point that such a state of affairs is not reflective of Islamic laws but rather cultural prejudices which are not in line with religious edicts.

In view of the above scenario it is not a surprising occurrence for *Kafalah* not necessarily being practiced in its pure form, particularly where such children are illegitimate. Those providing care for such vulnerable children are more likely than not to change their family name to that of the guardians' family in order to hide the circumstances of their birth. This situation is not so different from the rationale used in explaining closed adoptions in western countries. One of the major reasons associated with the secrecy involved in closed adoption practices was due to protecting children from what Grotevant et al have argued to be the "stigma of illegitimacy or bad blood associated with born out of wedlock, being infertile or having a child out of wedlock"¹⁰⁷.

This aspect of withholding information concerning biological origins of a child under closed adoptions has been associated with the concept of privacy, which is a right generally associated with that of the adult rather

¹⁰⁵ See Sharma, *supra* note 20.

¹⁰⁶ See KHALID HOSSEINI, *A THOUSAND SPLENDID SUNS* (2007) at 3-4 (vividly expressing the attitude towards illegitimacy and its stigma within Muslim countries, the author writes: "Mariam was five years old the first time she heard the word *harami*.....Nana grabbed Mariam by the wrists, pulled her close, and, through gritted teeth, said, "You are a clumsy little *harami*. This is my reward for everything I've endured. An heirloom-breaking, clumsy little *harami*"at the time, Mariam did not know what this word *harami*-BASTARD-meant. Nor was she old enough to appreciate the injustice, to see that it is the creators of the *harami* who are culpable, not the *harami*, whose only sin is being born. Mariam did surmise, by the way Nana said the word, that it was an ugly, loathsome thing to be a *harami*, like an insect, like the scurrying cockroaches Nana was always cursing and sweeping out.....").

¹⁰⁷ See Grotevant et al, *supra* note 45 at 379.

than a child. It is thus arguable that the act of hiding the background of an illegitimate child is not necessarily to protect it but rather the reputation of the adults involved and in the case of Islamic principles such an act of withholding will protect the adults from criminal punishment associated with adultery or fornication. However, it has to be kept in mind that regardless of the social stigma attached to illegitimacy, life of such a child under Islamic principles is not endangered but rather its mother is not to be punished until after giving birth and a certain period after gestation.

On the basis of the preceding discussion surely in a society where a child's family name is associated with that of the father, which is also a source of legitimate status, then by referring to a child by the mother's family name would publicise the illegitimate birth circumstances of such a child. Since Islamic principles do not recognise the legitimisation of an illegitimate child by its biological parents, such a child is in a greater vulnerable position even if he/she is taken into *Kafalah*. The argument regarding the right of children to a family name thus appears not to be a minor concern but rather has greater repercussions when considering such a right in context of illegitimate children; however it is rather distressing to not have much literature available on the area particularly from the Islamic perspective. This sensitive area is thus open to much misinterpretations as well as concern in regards to its discriminatory nature. Another important repercussion arising from the issues concerning illegitimate or legitimate children taken into *Kafalah* is their rights of inheritance, which have also received criticisms as to not adhering with the non-discriminatory spirit of the Convention.

B. *Inheritance Rights of Kafalah Children*

Issues concerning inheritance form a major component of the critique of Islamic principles regarding the practice of *Kafalah*. Unlike the traditional western forms of adoption, Islamic law, whether based upon Sunni or Shiah fiqa, does not recognise the right of inheritance for a *Kafalah* child in the estate of its guardian (Kafil). Although this does have an appearance of discrimination; however it has to be understood in its proper context in order to gain an understanding.

One of the reasons for a child taken into *Kafalah* not being known by the name of the guardian is based upon Sharia'h allowing the right of

inheritance in the property of the guardian to only biological children and relatives by blood (including a spouse who is also considered an heir by affinity). The Islamic laws of inheritance are very specific in awarding a particular amount of share to the members of one's biological family¹⁰⁸. However, these laws do not prevent a person making a gift of around one third of his/her assets to anyone (related by blood or not) during his/her life time and they do not prevent a trust (wakf) being created out of one's assets for a specific purpose.

The laws of inheritance under Islamic principles have a basis in the prevention of disruption and ill feelings developing between members of a family. These laws are meant to maintain the solidarity of a family and thus a child taken into *Kafalah* in order to be accepted by the family members completely has to be seen not as a threat to their future rights of inheritance. Regardless of not being given the right to inherit from the guardian, the *Kafalah* child is to be loved and taken care of in the same way as the natural children of such a guardian but with the knowledge that he/she is of a different lineage.

According to Sait¹⁰⁹ the best interest of the child are protected in the act of *Kafalah*, as the child by keeping the biological fathers name is not denied inheritance rights in that parents estate. On the other hand the property of the child taken into *Kafalah* is denied to the guardian, who must separate such assets from his own. As pointed out earlier in this article the Sharia'h places the guardian in the position of a trustee, when handling the property of an orphaned child taken in *Kafalah*. Such injunctions under the Sharia'h have a religious and moral force, which is found in such verses of the Quran as:

“Hand over their property to the orphans and do not exchange the bad for the good, and do not devour their property mixing it with yours. Surely, that is a great sin”¹¹⁰

¹⁰⁸ According to Sunni Hanafi laws of inheritance “the three principles classes of heirs together comprise all the blood relations of the deceased”, See A.A. FAYZEE, *OUTLINES OF MUHAMMADAN LAW* 397 (OUP:1974). These classes are known as the Koranic, Agnatic and Uterine Heirs. Shiah laws concerning inheritance also base the main classes of heirs upon the blood relation between the deceased and the ones claiming a share in the estate.

¹⁰⁹ See Sait, *supra* note 65.

¹¹⁰ Al-Quran, IV: 3-5.

Therefore, regardless of the fact that a *Kafalah* child will not inherit from his/her guardian, Islamic principles do not prevent such a child from inheriting from the estate of his/her biological parents. It is pertinent to state as this point that this matter concerning inheritance rights of adopted children is not unique to Islam as in several American states like Louisiana, an adopted child continues to have the right to inherit property from the estate of his/her biological parents.

Within Islamic principles the right to inheritance arises not only from the parent towards the child but also from the child towards the parent¹¹¹. Thus, such traditional adoption practices, in which the adoptee is legally at par with a biological child and consequently the adopter is at par with biological parents, are likely to not only give the adoptee a right of inheritance in the estate of the adopter, it will also give the same right to the adopter in the estate of the adoptee. Such a situation is likely to provide an opportunity to an adopter to usurp an adoptees asset and assimilate them into his. This had been one of the motivating forces in Pre-Islamic Arabic society for adopting orphaned children, which was strongly disapproved of under Islamic principles through injunctions that stressed upon blood ties in regards to the right of inheritance.

Although, the *Kafalah* child is not denied rights in the property of his/her biological family, yet there are issues of concern regarding the right of inheritance concerning a *Kafalah* child who was a product of an out of wedlock relationship. A child, who was born to a married couple, will be able to claim rights to the property of such parents regardless of being cared for by a guardian under *Kafalah*. However, if such a child is illegitimate and is being cared for under *Kafalah*, he/she cannot claim in the estate of the guardian nor under Sunni Fiqa (particularly Hanafi school of thought) can such a right be exercised in regards to the estate of the biological father but rather it is permitted in regards to the estate of the biological mother¹¹².

¹¹¹ See Fyzee, *supra* note 108 at 422, in which the author refers to the Sunni rules regarding the paternal right of inheritance on the basis of being ascendants.

¹¹² This can be seen in such decisions as *Bafatun b. Bilaiti Khanum* (1903) 30 Cal. 683, in which a woman died leaving a husband and an illegitimate son of her sister. It was held that the husband along with the illegitimate son of the sister had the right to inherit from the estate of the woman. The illegitimate son was stated to also be an heir because he was related to the deceased woman through his mother.

The preceding principles concerning inheritance do not take into account the financial standing of the biological mother, who may be destitute and has very little if any assets to pass on to an illegitimate child. The situation becomes more disturbing when considering the principles under the Shiah Fiqa, which do not allow right of inheritance to such children from the estate of neither biological parents nor the guardian. This is arguably a point of contention concerning the principles on *Kafalah*, which disallow severance with ones background but depending upon the circumstances of birth, the past can provide little protection to inheritance rights if one is illegitimate. This area is a major aspect of *Kafalah* that arguably cannot be reconciled with provisions of the Convention.

There have been concerns raised amongst Muslim scholars that emphasize upon the laws of Shari'a requiring reform in order to "adapt and adjust to the circumstances and needs of cotemporary life"¹¹³. This adaptation however is not necessarily to be viewed as a process of westernization. If the rights of illegitimate children are to be considered in their historical context then surely An-Na'im's argument for "discarding or modifying certain aspects of historical Shari'a"¹¹⁴ are to an extent justified, particularly where such a child faces hardship as a consequence of his/her circumstances of birth. It should however be kept in mind that such re-examination of what An-Na'im refers to as "historical Sharia'h" is not a challenge to the accuracy of Quranic provisions but rather a method for addressing such issues as family law and inheritance. It is pertinent to state at this point that the denial of paternal identity to an illegitimate child is not specifically stated in the Quran; rather it is a practice which derives its source from the Sunnah or the sayings of the Prophet, thus it may be viewed as one of An-Na'im's historical Sharia'h, the provisions of which were in context of the time in which denying the child's paternal identity was a punishment for the parents. One may further raise an argument that such a child if acknowledged by the father may retain the paternal family name; however, this is a matter of debate as legitimising what is considered illegitimate is not provided for under Islamic injunctions.

The inflexibility of the situation becomes even more evident when one considers that present day Islamic scholars have tended to steer clear of

¹¹³ ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION, Syracuse University Press (1990).

¹¹⁴ See Bafatun Khanum case, *supra* note 112.

acknowledging the use of DNA tests in proving paternity. Therefore, paternal responsibility towards financially providing for an offspring has not been allowed to develop to the extent of considering such repercussions upon the lives of illegitimate children. In order to see whether the complex nature of these contentious issues can be reconciled with the principles upon which the Convention rests, they have to be addressed in context of a child's right to an identity.

V.

ADDRESSING CONTENTIOUS ISSUES IN CONTEXT OF THE CHILD'S RIGHT TO IDENTITY

On the basis of the research conducted on this article, one discovers that there are interests of several parties, which are competing as well as conflicting with that of an adopted child's right to an identity. Such competing rights, primarily concerning the concept of privacy, are associated with adults like the biological parents, adoptive parents, step parents and those who donate gametes to infertile couples. A child's right has not generally received the same priority when it comes up against interests of such adults. This situation is far more evident in regards to an adopted child's right to know his/her background, which in several countries, is a right he/she can only obtain upon reaching adulthood.

Thus, it appears that though the Convention has been an admirable attempt by the international community to address the inequity of protection given to children in comparison with adults, it is also apparent from the provisions of the Convention that there remains silence over the issue of the right to identity specifically regarding adopted children. Advocates of the practice of secrecy involved in adoption consider withholding of information to children regarding their birth circumstances to be in the child's best interest. They have tended to decide that children under certain circumstances are better off not knowing their origins and in the long term this denial of knowledge is in their best interest, therefore in accordance with Article 3 of the Convention.

As observed in the preceding discussion one method of maintaining this secrecy is through changing the surname of an adopted child to that of

the adopter and keeping birth records out of the reach of such children. Such traditional adoption practices within western societies are considered as the best form of care for "unwanted" children who are legally provided with the same rights within the adopted family as biological children. The object of this article was to provide an insight into an alternative method of childcare that does not advocate secrecy and nor does it allow a child to exist in genealogical bewilderment but rather with knowledge of one's reality without being ostracised. It has to be kept in mind that even this right to one's familial background has to be provided in context of its wider impact and consequently the same can also be said of any parallel right of privacy. Once the core right of each party is acknowledged then one may attempt to balance the conflict that can arise between different interests. However, so far this balance has been tilted far more towards adults rather than children.

In contrast to traditional adoptive practices, Islamic principles place a significant amount of importance upon a child's identity; however, such importance is not just in an individual but also within a collective context. The rationale for these principles is to create an environment which causes as little disruption in human relationships as possible, so that society can maintain its foundation i.e. the family. The rules regarding such areas as *Kafalah* and related concerns like rights of inheritance may appear harsh in the sense that they prima facie do seem to deny a child a sense of belonging which is liable to cause him/her psychological and material loss.

It is nevertheless arguable from the Islamic perspective, that with regards to traditional adoption, by removing the name of the natural parents and replacing it with that of the adoptive one and making the social parentage appear to be a biological one, does not do away with reality nor does it diminish the psychological need of the child to know his/her origins. Although, it is debatable whether the child's interest is more taken care of in an adoptive or a *Kafalah* family, however, it could be argued that practices such as *Kafalah* are suppose to, in principle at least, provide a loving family environment to needy children and for this purpose to be served it is not necessary to also give these children the name of such a family nor false lineage. It is after all this knowledge of one's lineage that allows the protection of a *Kafalah* child's right of inheritance in his/her biological parents' estate.

It is primarily the issue regarding the taking in to *Kafalah* an illegitimate child that presents a wider impact of the right to identity. Though, principles concerning illegitimate children are meant to prevent disintegration of the institution of marriage along with promotion of morality, however the repercussions for the illegitimate child can be rather severe. Nearly every area associated with the child's right to identity, such as establishing one's identity, knowing one's parentage, having the right to a name and having the right to preserve one's identity, have a totally different context within Islamic principles, if a child is legitimate or illegitimate.

Nevertheless, in addressing such problems as abandonment of illegitimate children and inheritance rights of children taken in *Kafalah*, courts in Muslim countries have resisted applying Islamic injunctions in their strictest meaning so as to protect the interest of the child¹¹⁵. The re-examination of such matters has thus departed from the view that these issues are personal concerns of a family and they are being considered as also having constitutional and public law implications. Further, in light of an absence of any injunction within Islam, regardless of one's birth circumstance, that prevents a Kafil from providing financial assistance to a child taken into *Kafalah* or gifting a certain portion of his estate to such a child, such issues as those raised in this article concerning inheritance rights of illegitimate children can be addressed.

The provisions of the Convention have continuously advocated the role of the state in providing protection towards the rights of children, which is not in contradiction with Islamic principles. There should therefore be little hesitation by Muslim states in developing a legal mechanism protecting the financial rights of vulnerable children that acts as a pre-condition for taking such children into *Kafalah*. Overall, besides contentious issues concerning such children, the principles of *Kafalah* in regards to the right of a child to an identity do not contradict with the provisions of the Convention, rather the act of not changing the surname, whether paternal or maternal, allows such a child knowledge of his/her family background right from the period of childhood. At least this aspect of Islamic principles has a role to play when interpreting the provisions of the Convention concerning identity.

¹¹⁵ See Pakistani decisions in *Hamida Begum v. Murad Begum*, P.L.D. 1975 S.C. 624 and *Chuhar v. Ghulam Fatima*, P.L.D. 1984 Lah. 234, which reflect the reluctance of courts in stigmatizing children as illegitimate.

However, in regards to rights of children it is a matter of concern that a biological father has an option of denying paternity and even though, under at least the Sunni legal interpretation (particularly Hanafi School of law), such a child can be given the surname of his/her mothers' family that is more likely to be denied on the basis of the mother being stigmatised. In the absence of considering DNA tests as adequate evidence of paternity within Islamic principles, least possible protection is provided to children that are denied paternity, particularly in regards to inheritance. It must however still be born in mind that in Muslim countries the issues arising from a child's identity still require to be addressed in context of Islamic injunctions as these form the basis upon which Muslim society derives guidance on social matters like adoption and illegitimacy.

In the modern period the importance of addressing this matter is also apparent in regards to other practical implications for children and adults within Islamic countries. The practical issues arise from the importance placed in these countries on maintaining the biological identity, which is reflected in their procedural laws concerning the obtaining of documents like passports and identity cards.

The identity of one's biological parents forms the basis, in these countries, of applying for such documentation. This raises obstacles, in particular for those brought up under *Kafalah*, as the guardian is not legally considered in the same manner as a biological parent thus unless such a child is able to get the necessary identity documentation of his/her biological parent (usually the father) in order to apply for any of his/her own documents, he/she may not even be able to experience a simple act as international travel as a passport cannot be obtained with the use of the guardians documents. Though, any further analysis of the issue concerning documentation is beyond the scope of this article nevertheless, it makes it far more evident that the issue of a child's identity within Islamic principles requires to be reviewed at many different levels.

Thus any review of Islamic principles raises a need for interpreting principles concerning such matters as *Kafalah*, particularly in context of inheritance rights of illegitimate children, on the basis of the spirit upon which they were intended rather than continuing with practices that are best left to history. It is disconcerting to find that such voices that call out for re-examination of Islamic principles concerning certain aspects of family law

are few and their arguments may be misunderstood as an attack on the veracity of principles that are viewed as divine injunctions. One must be mindful that the intent of Islamic principles regarding *Kafalah* was to provide care for vulnerable children and when these begin to impact negatively upon these same children, and thus a diversion is taken from the original intent, then it is arguably not an un-Islamic argument to bring the principles back to their original spirit by re-examining them. This is perhaps what is required to bring these same principles in line with international law.

VI.

CONCLUSION

A child's right to discover his/her family background is undeniably protected within Islamic principles through a right to a name. This is evident where a child is being cared for under the mechanism of *Kafalah*. In context of the provision within the Convention concerning a child's right to an identity, the mechanism of *Kafalah* provides equal protection to *Kafalah* children as well as biological ones in regards to their right to a family name. This protection goes beyond the provisions of the Convention, which remains silent as to an adopted child's right to know his/her biological background. A family name of a child is protected since it is associated with several associated rights, such as those concerning inheritance. By emphasising upon maintaining a child's genealogical identity is not meant to compromise the care enjoined with Islam in regards to vulnerable children.

It does however ironically seems that a community, which its founder intended to be known as carers of children, adhere to principles that place substantial amount of emphasis upon property rather than providing protection to the best interests of vulnerable children. This is quite visible in regards to the issue of illegitimate children, whose rights under Islamic principles governing *Kafalah* as well as rights of inheritance are contradictory to the Convention provisions concerning identity, non-discrimination and best interest of the child. This does not however mean that there exists little room for reinterpreting and implementing such injunctions for protecting the rights of vulnerable children. It should be recognised that Islamic principles are open to differing interpretations and thus can adapt through a consensus ("ijma") to address the problems which

did not exist in their historical context. Further, regardless of the fact that for centuries the dominant voices within Muslim societies have claimed that the door to re-examination is closed, Sharia'h allows Ijtihad¹¹⁶ or independent search for remedies, which can contribute towards creating a religious based outlook that gives rise to social practices in the best interest of the child. In order to achieve this, Committee on the Rights of the Child shall have to open a dialogue with Islamic jurists and scholars to consider the issue of identity and its repercussion upon the lives of *Kafalah* children.

¹¹⁶ Ijtihad is derived from the Arabic verbal root of jimm-ha-daled (jahada, "struggle"), the same root as that of jihad. Both words refer to the same concept of struggle or effort. Ijtihad describes a process of making legal decisions through independent interpretation of legal sources like the Quran and Sunnah. The opposite of this process is called taqlid or imitation. This process cannot be undertaken by just anyone and such a person known as a mujtahid has to have significant knowledge as a scholar of Islamic law and meet certain standards of character.

Annexure

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

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing 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,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, '

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the 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; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

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.

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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 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall

further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the

child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

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 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety,

public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal

guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

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 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether

unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need

provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the

elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

General comment on its implementation

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 practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which

takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher

competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems. (amendment)
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of

votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have

adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of

their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.