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ARTICLE SYMPOSIUM

A STEP TOO FAR? THE JOURNEY FROM "BIOLOGICAL" TO "SOCIETAL" FILIATION IN THE CHILD'S RIGHT TO NAME AND IDENTITY IN ISLAMIC AND INTERNATIONAL LAW

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ABSTRACT

This socio-legal narrative investigates the journey from "biological" to "societal" filiation undertaken by Islamic and international law regimes in their endeavors to ensure a child's right to name and identity. Combining a discussion of filiation—a status-assigning process—with adoption and *kafāla* (fostering) as status-transferring mechanisms, it highlights a nuanced hierarchy relating to these processes within Muslim communities and Muslim state practices. It questions whether evolving conceptions of a child's rights to name and identity represent a paradigm shift from "no status" if born out of wedlock toward "full status" offered through national and international law and Muslim state and community practices. The article challenges the dominant (formal, legal) position within the Islamic legal traditions that *nasab* (filiation) is obtainable through marriage alone. Highlighting inherent plurality within the Islamic legal traditions, it demonstrates how Muslim state practice and actual practices of Muslim communities on the subject are neither uniform nor necessarily in accordance with stated doctrinal positions of the juristic schools to which they subscribe. Simultaneously, the paper challenges some exaggerated gaps between "Islamic" and "Western" conceptions of children's rights, arguing that child-centric resources in Islamic law tend to be suppressed by a "universalist" Western human-rights discourse. Tracing common threads through discourses within both legal traditions aimed at ensuring children a name and identity, it demonstrates that the rights values in the United Nations Convention on Rights of the Child resonate with preexisting values within the Islamic legal traditions.

KEYWORDS: child rights, filiation, Islamic law, Convention on the Rights of the Child, Muslim state practice

INTRODUCTION

This socio-legal narrative investigates the journey from "biological"[1] to "societal" filiation undertaken by Islamic and international law regimes in their endeavors to ensure a child's right to name

1 The term *biological* filiation is used to denote the relationship of a parent-child based on the assumption arising from the relationship between parents of the child. I use this term with caution bearing in mind that filiation was never based purely on biological grounds and still is not and is a rebuttable presumption.

and identity.[2] Combining a discussion of filiation—a status-assigning process—with adoption and *kafāla* (fostering) as status-transferring mechanisms, I highlight a nuanced hierarchy relating to these processes within Muslim communities and Muslim state practices. I question whether evolving conceptions of a child's rights to name and identity represent a paradigm shift from "no status" if born out of wedlock toward "full status" offered through national and international law and Muslim state and community practices? In addressing this question, I challenge the dominant (formal, legal) position within the Islamic legal traditions that *nasab* (filiation) is obtainable through marriage alone. Highlighting inherent plurality within the Islamic legal traditions, I demonstrate how Muslim state practice and actual practices of Muslim communities on the subject are neither uniform nor necessarily in accordance with stated doctrinal positions of the juristic schools to which they subscribe.

Simultaneously, I challenge some exaggerated gaps between "Islamic" and "Western" conceptions of children's rights, arguing that child-centric resources in Islamic law tend to be suppressed by a "universalist" Western human rights discourse. To this end, I trace common threads running through discourse within both legal traditions aimed at ensuring children a name and identity. I thus demonstrate that the rights values in the UN Convention on Rights of the Child (CRC) resonate with preexisting values within the Islamic legal traditions and this becomes evident from reports and responses of Muslim States Parties to the CRC Committee. But the most important conclusion that I draw is that, while a repertoire of shared values and approaches is emerging, tensions and fault lines, too, are visible and entrenched between Islamic and international law. In particular, giving a name and identity to children born out of wedlock and giving an adopted child the name of the adoptive parents are the two most difficult positions to negotiate in domestic legal systems of Muslim-majority jurisdictions. The child's right to name and identity therefore continues to remain in tension with the marital status of their parents in the way it is commonly realized in national legal systems of Muslim-majority jurisdictions.

FILIATION, *AL-RAQID*, ADOPTION, AND *KAFĀLA* PROCESSES: SOCIO-LEGAL STRATAGEMS ENSURING CHILDREN'S RIGHT TO NAME AND IDENTITY

Filiation denotes the legal relationship between parent and child. Others, such as adoption and *kafāla* relate to similar issues of power and belonging within a framework of what may be described as "societal" filiation. Filiation assigns status whereas adoption and *kafāla* transfer it. Although functionally different, I deal with them together in this article as they create similar legal fictions that operate to protect both women and children. In Muslim communities, there is an unspoken hierarchy of filiation closely linked to the marital status of parents. A child born out of wedlock remains at a disadvantage, as do children brought up under *kafāla* and adoption, unless their filiation is known.[3] A further reason for deploying filiation, *kafāla*, and adoption as a group is to highlight the diversity of perceptions and practice among Muslim communities and how these processes are sometimes at variance with formal laws on the subject in Muslim jurisdictions. Adoption

2 I use the term *societal* to describe filiation that is not based on biological relationships. For example, where children are nurtured by *kafeel* (carers or those in positions of parental responsibilities), or where children are adopted.

3 It is a commonly held assumption among Muslim communities that children under *kafāla* or those who have been adopted were born out of wedlock and have been given up for adoption or *kafāla* to avoid the stigmatization of mother and child. The only time this assumption may be rebutted is when childless couples adopt a child with a known filiation.

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(*tabanni*) and *kafāla* facilitate name and identity—and hence filiation—to parentless children or those born outside wedlock; it is therefore useful to highlight both the linkages between these processes and their distinguishing features.

In most societies, socio-legal identities of children have been, and remain, inextricably linked to the marital status of their parents, acting until fairly recently as the enabling medium for a child's access to a name and identity and a formal (legal) position in state and society. Children falling outside this safety net often led a vulnerable life on the margins of society and the law unless alternative means were employed to address this potential exclusion.[4] The Islamic legal traditions generated *hiyal* (legal fictions), including *tabanni* (adoption), *al-raqid* (the sleeping fetus), *kafāla*, liberal use of *shubha* (uncertainty or ambiguity raising presumption of marriage and filiation to children born to the couple), and *iqrar* (acknowledgment of paternity by the husband of the child's mother).[5]

In a similar vein, presumption of legitimacy of a child born within wedlock remained a principle in common law, and even where there was evidence to the contrary, a child—where possible—was ascribed to the husband of the birth mother.[6] These overlaps between Islamic family law and those in common and civil law jurisdictions are not always explicitly made during drafting processes of international instruments, resulting in lost opportunities for making international law truly inclusive and universal. The discussion of *al-raqid*, *kafāla*, and adoption below demonstrates how historical ruptures such as colonization and evolution of a so-called universal international law have destabilized the flexibility of enabling legal fictions available in the pre-modern Islamic legal traditions.

OF USE IS THE REMINDER: *AL-RAQID*, THE "SLEEPING FETUS," A FAST-DYING LEGAL FICTION[7]

In Islamic law, it is a criminal offense to conceive a child out of wedlock and serious consequences follow for parents and children;[8] hence the range of stratagems to broaden the safety net of filiation.

4 Filiation was denied to a child born out of wedlock, including name and identity, inheritance from the father, or access to any of his resources. This approach was shared by common and civil law systems as well as the Islamic legal traditions. In a concise historical account of children's rights, Rebeca Rios-Kohn observes that "English common law did not recognise a legal relationship between parent and child, only between those parents and their legitimate children." Rebeca Rios-Kohn, "A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries," in *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems*, ed. Savitri Goonesekere (Cambridge: Cambridge University Press, 2007), 34–99, at 41.

5 Some conditions must be met. For instance, the man claiming paternity must have had access to the mother of the child. The age difference between father and child must be such that it was within the realm of possibility for the man to have conceived the child.

6 It only became an issue when challenged and until the Family Law Reform Act of 1969, Section 26. It required proof beyond a reasonable doubt due to the stigma of illegitimate birth. See the discussion in Serio v. Serio [1983] FLR 756. It then changed to being rebuttable on the balance of probabilities. In the United Kingdom and continental Europe, there has been a move away from stigmatizing children born out of wedlock. English law abolished the term *illegitimacy* in the Family Law Reform Act of 1987.

7 There is limited English language scholarship on *Al-raqid*. A few studies mainly linked to Morocco are the exception, including the following: Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham: Rowman and Littlefield, 2002); Satyal K. Larson, "Bearing Knowledge: Law, Reproduction and the Female Body in Modern Morocco 1912–Present" (PhD diss., University of California, Berkley, 2002); Ellen J. Amster, *Medicine and the Saints: Science, Islam and the Colonial Encounter in Morocco 1877–1956* (Austin: University of Texas Press, 2013).

8 Sexual intercourse outside marriage (*zina*) is a criminal offence attracting the *hudud* punishments prescribed in the Qur'an, which are said to be definitive and not open to discretion. At the same time, for these offenses to be proved

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Generous minimum and maximum periods of gestation are provided: thus, a child born within six months of its parents' marriage is ascribed to the father; likewise a child born within up to five years of the dissolution of the parents' marriage by death or divorce is assigned filiation on the basis of *al-raqid*.[9] All schools of juristic thought in Islam, particularly the Maliki, contributed to the construction of the *al-raqid* doctrine, drawing upon verses from the Qur'an and Sunna, *fatawa* (non-binding opinion), and *'urf* (practice of communities). The "sleeping fetus" is a doctrine whereby women have the medical authority not only to declare themselves pregnant but also decide the pregnancy's duration. This declaration cannot be challenged on the basis that

> [t]ime is under the command of God, not under the command of nature. . . . [T]he difference between divine time and natural time is important for a woman's body in its procreative activities, both in menstruation and gestation. A woman's body in these capacities partakes in both of these times. There is already an ambiguity as to the status of the woman's body—that is, whether, when and how it is a natural and a divine thing. Furthermore, in the Quran, for example, there are virgin births and births to parents one of whom is sterile or infertile. Those who hate God will be sterile, whereas the decrepit sexually impotent man and the barren woman can conceive when God wills.[10]

Generating a theological foundation on which to base the *al-raqid* doctrine, the archival research of Satyal Larson, Jamila Bargach, and Ellen Amster points to the fact that mainly widows and unattached women claimed to carry the sleeping fetus. This claim was invoked in courts to validate a range of rights, including filiation, inheritance rights, matrimonial maintenance (*nafaqa*), and to circumvent accusations of and penalties for *zina*. Evidence of *al-raqid* remained in the hands of women, be it the one carrying the "sleeping fetus" or the midwife presenting testimony in court.[11] Susan Gilson Miller reports that these "themes reappear in connection with the *raqid* in legal texts, in popular culture, and in fictional and ethnographic writing from medieval times to the present."[12] It was the colonial encounter and postcolonial state that took away these flexible spaces where women's testimonies about the sexual functions of their bodies remained unchallenged.[13] Most Muslim-majority jurisdictions have now confined the maximum gestation period to one to two years.[14]

Al-raqid was employed for centuries as a socio-legal stratagem enabling both child and mother (or father, if known) to avoid ostracism and punishment. It blurred the boundaries between the legal and social, moving reproduction beyond purely mechanistic biology, offering women elements

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beyond reasonable doubt the threshold of proof is very high. For further discussion on the subject, see Asifa Quraishi-Landes, "Her Honor: An Islamic Critique of Rape Laws in Pakistan from a Woman Sensitive Perspective," *Michigan Journal of International Law* 18, no. 2 (1997): 287–320; Shaheen Sardar Ali, "Interpretative Strategies for Women's Human Rights in a Plural Legal Framework: Exploring Judicial and State Responses to Hudood laws in Pakistan," in *Human Rights, Plural Legalities and Gendered Realities: Paths Are Made by Walking*, Anne Hellum, Shaheen Sardar Ali, Julie Stewart, and Amy Tsanga (Harare: Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe with Weaver Books, 2006), 381–406.

9 Diansh Farunji Mulla, *Principles of Mahamoden Law*, ed. M.A. Mannan (Lahore: PLD Publishers, 1995), 505–19.

10 Larson, "Bearing Knowledge," 5. Qur'an 9:36–37, 19:8–9, 19:19–21.

11 Larson, "Bearing Knowledge," 18.

12 Susan Gilson Miller, "Sleeping Fetus," in *Encyclopaedia of Women in Islamic Cultures*, vol. 5, *Practices, Interpretations and Representations*, ed. Suad Joseph (Leiden: Brill, 2007), 421–24.

13 Amster, *Medicine and the Saints*, chapter 5.

14 See David Pearl and Werner Menski, *Muslim Family Law*, 3rd ed. (London: Sweet & Maxwell, 1998), 399–408; Jamal J. Nasir, *The Islamic Law of Personal Status*, 2nd. ed. (London, Graham & Trotman, 1990) pp. 156–161; Mulla, *Principles of Mahamoden Law*, 505–19.

of autonomy over their bodies in aspects of reproduction. In this blurred space, societal norms acquiesced to women's statements regarding their reproductive time, thus acceding to the child, rights to a name and identity. Technology has, however, encroached on this humane space, offering definitive filiation in the form of DNA testing, an act that still meets with some resistance from courts in the Muslim world.

ADOPTION AND *KAFĀLA* AS LEGAL FICTIONS

While *al-raqid* is a form of societal filiation within the Islamic legal traditions, adoption and *kafāla* are examples of societal filiation through status-transfer. Populist perceptions mask commonalities between Islamic law and international provisions relating to adoption and *kafāla*, often leading to reservations about human rights instruments on the subject by Muslim states.[15] As one of the oldest legal fictions, adoption may be described as the process whereby parentage and filiation are permanently transferred to persons who are not the biological parents. The adopted child acquires the name of the adoptive parent, who becomes the parent in legal terms, thus cancelling out the child's biological identity.[16] Alongside this "closed" form, there is open adoption or "adoption simple," which is an old concept in civil law systems that does not annul the biological identity of the adopted child and is thus closer to the Islamic legal position.[17] "Open" adoption is a close relation of *kafāla* within the Islamic legal traditions and could be an area of convergence between the two traditions. As a status-transferring mechanism, *kafāla* denotes a child-parent relationship of nurturing and guardianship while the biological filiation of the child remains intact. Lack of awareness of similarities between *kafāla* and open adoption leads to the perceived gap between Islamic and international law on alternative care for children without families. Scholarship on these aspects is rare, possibly because the term *adoption* of any form is considered a nonstarter for comparative discourse from an Islamic legal perspective and hence ignored. A further reason for the scant discourse on this particular aspect of law has been the influence of Western law and languages on non-Western socio-legal systems. Since the frame of reference became Western law and language, only the bare bones of concepts such as *kafāla* remained, rather lost in translation. With closed adoption as defined in its Western sense not permitted, the term *kafāla* became synonymous instead with fostering, the literature on the subject trying then to equate the two.[18]

In Muslim states today there exists a plurality of approaches to adoption and *kafāla*. All of them emphasize the fact that *kafāla* is a system whereby orphans, abandoned children, and those from needy families are looked after in alternative family arrangements, the assumption being that

15 See reservations to the United Nations Convention on the Rights of the Child, accessed December 11, 2018, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

16 This refers only to closed adoption, which is the basis of the common law system. There is no obligation in English law for parents to inform their children that they are adopted. In a personal conversation with me, Dr. Maebh Harding said, "[a]lthough it is commonly considered best practice and encouraged to, birth parents are not forced by law to tell their children the genetic truth and as adoptive parents are given the same rights no such obligation is placed on them either."

17 This open adoption does not blot out the biological identity of the adopted child and is recognized by the Hague Convention on Inter-country Adoption 1993, accessed December 17, 2019, https://www.iss-ssi.org/2007/Resource_Centre/Tronc_CI/thcvloon.pdf. I am grateful to Dr. Maebh Harding for clarifying this point.

18 Shaheen Sardar Ali and Sajila Sohail Khan, "Evolving Conceptions of Children's Rights: Some Reflections on Muslim States' Engagement with the United Nations Convention on Rights of the Child," in *Parental Care and Best Interest of the Child in Muslim Countries*, ed. Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt (The Hague: Asser Press, 2017) 285–324.

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only children in need of alternative family arrangements are the subjects of *kafāla*.[19] What is not discussed or acknowledged in this discourse, is the category of childless couples who go to great lengths not only to take in children under *kafāla* but also to adopt a child, often keeping the action and the biological identity of the child a secret.

Kafāla, it is argued, is a pathway toward adoption as understood in the West.

As a process of societal filiation, adoption, too, has remained frozen in history and in the Muslim imagination. The popular perception on adoption in the Islamic legal traditions is that it is prohibited because the practice annuls the child's birth name and identity. Fossilized in history due to a literal understanding of the so-called adoption verses in the Qur'an, the subject did not attract close jurisprudential interpretation.[20] Succeeding generations of Muslims, both laity and scholars, reinforced the interpretation of this verse to mean a complete prohibition despite the fact that, arguably, it is susceptible to a variety of meanings.

English-language scholarship regarding adoption in the Islamic legal traditions has been rather limited, mainly for the reason that, because it is assumed to be prohibited in the Qur'an and in the family law of Muslim-majority jurisdictions, it does not lend itself to significant academic discussion. Yet since the CRC and the reservations entered by some Muslim states to the article on adoption, interest has increased, as has critical discourse on the subject within the Muslim world and the wider community.[21]

Investigating the context of *kafāla* and adoption in Muslim communities, it is evident that the processes are mainly driven by both parentlessness (a child is in need of a family and nurturing environment) and childlessness (persons strive to have children).[22] This is despite the blanket prohibition in statutes of most Muslim jurisdictions and over-simplistic statements such as "Islam prohibits adoption."[23] As a consequence, Western courts, too, generally refuse to recognize the adoption of a child (or any alternatives to adoption) which has taken place in a Muslim country.[24] This is mainly due to the lack of information about the realities of alternative arrangements of parenting and childcare among Muslim populations and the persistent refusal by Muslim states to acknowledge that doctrinal Islamic law and its actual application varies.[25]

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19 Ali and Khan, "Evolving Conceptions of Children's Rights," 316.

20 The Qur'an, 33:4–5. "Allah has not made for any man two hearts in his (one) body: nor has He made your wives whom ye divorce by Zihar your mothers: nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way." (All quotations and references are to the Yusef Ali translation of the Qur'an.)

21 Nadjma Yassari, "Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law," *American Journal of Comparative Law* 63, no. 4 (2015): 927–62; Ali and Khan, 'Evolving Conceptions of Children's Rights"; Muslim Women's Shura Council, *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child: The Digest* (New York: American Society for Muslim Advancement, 2011); Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham: Rowman & Littlefield, 2002); Eric Chaumont, "Tabannin" in *The Encyclopaedia of Islam*, 2nd. ed., ed. P. Bearman et al. (Leiden: Brill, 2012), https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/tabannin-SIM_8913; David S. Powers, "Adoption," in *Encyclopaedia of Islam*, 3rd ed., ed. Marc Gaborieau et al. (Leiden: Brill, 2008), https://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0226.xml; Marcia J. Bunge, ed., *Children, Adults and Shared Responsibilities: Jewish, Christian and Muslim Perspectives* (Cambridge: Cambridge University Press, 2012).

22 David S. Powers, "Adoption," in *Oxford Bibliographies in Islamic Studies*, ed. John O. Voll (New York: Oxford University Press, 2016), https://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0226.xml?rskey=Xc9hFq&result=5&q=adoption#firstMatch.

23 Yassari, "Adding by Choice," 927.

24 Yassari, 928.

25 This observation is the result of experience of the author when approached by immigration, asylum, and refugee organizations asking for expert guidance on the subject.

This confusion among concepts, including adoption, fostering, and acknowledgment of paternity, as well as actual practice in Muslim communities, is discussed in detail by Ella Landau-Tasseron.[26] She addresses at length the differences between adoption, acknowledgment of paternity, and false genealogical claims in pre-Islamic and Muslim communities, arguing that significant numbers of scholars on the subject tend to use these three terms interchangeably without making a distinction between them. While Landau-Tasseron's main aim is to challenge these confusions by presenting fine detail and evidence, I suggest that some of the ambiguity around these concepts and terms could be viewed differently. Could it be that this confusion and blurring of boundaries among the terms that are so critical to the rights of a child to a name and identity are deliberate—a stratagem to protect vulnerable mother and child?

The variations and variety of modes of filiation through adoption and other measures makes it impracticable to channel a common core of the concept into either public or private international law as a general principle.[27] Hence, the minimum common denominator of filiation is found in international human rights and other public international law documents, leaving a wide margin of appreciation to individual states and their domestic jurisdictions.

RECONCEPTUALIZING FILIATION THROUGH THE LENS OF CHILDREN'S RIGHTS: PARALLEL JOURNEYS OF ISLAMIC AND INTERNATIONAL LAW[28]

In this section I have two main objectives. The first is to demonstrate both commonalities and divergences between the Islam and international law regimes in according a child right to name and identity. The second is to demonstrate the fact that filiation is very broadly defined in international sources, probably due to the need to secure consensus across diverse legal systems, including the Islamic. While this approach tends to dilute the protection offered to children's rights to name and identity, it nevertheless opens spaces for the journey from biological to societal filiation.

The question I seek to answer is whether the once narrowly focused meaning of the term *filiation* —as linked to the marital status of parents—has arrived at a broader and more inclusive meaning through successive regional and international human rights instruments. And because, starting in the 1980s, parallel instruments on human and children's rights have also been adopted from an Islamic perspective, mostly under the auspices of the Organisation of Islamic Cooperation, whether any cross-fertilization of ideas is discernible in these instruments.

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26 Ella Landau-Tasseron, "Adoption, Acknowledgement of Paternity and False Genealogical Claims in Arabian and Islamic Societies," *Bulletin of School of Oriental and African Studies* 66, no. 2 (2003): 169–92.

27 It is beyond the scope of this article to engage with similar development in the field of private international law.

28 A burgeoning literature on Islamic law and the CRC is emerging, including the following: Imran Ahsan Nyazee, "Islamic Law and the CRC (Convention on the Rights of the Child)," *Islamabad Law Review* 1, nos. 1/2 (2003): 65–121; Shaheen Sardar Ali, "A Comparative Perspective of the United Nations Convention on Rights of the Child and the Principles of Islamic Law. Law Reform and Children's Rights in Muslim Jurisdictions," in Goonesekere, *Protecting the World's Children*, 142–208; Safir Syed, "The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child: The Plight of Non-marital Children under Shari'a," *International Journal of Children's Rights* 6, no. 4 (1998): 359–93; Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003). Some general works on children's rights also have a comparative element. See, for example, Geraldine van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff, 1998); Philip Alston, ed., *The Best Interests of the Child* (Oxford: Oxford University Press, 1994); Anver M. Emon, Mark S. Ellis, and Benjamin Glahn, eds., *Islamic Law and International Human Rights Law: Searching for Common Ground?* (Oxford: Oxford University Press, 2015).

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A child's right to name and identity, irrespective of the marital status of its parents, through biological or societal filiation made its appearance in international law through cautious use of the phrase "without distinction of any kind, such as … birth or other status."[29] It can be argued that its meaning and application in international texts has become increasingly expansive, and employed as a code for "whether born in or out of wedlock," in deference to sensitivities of diverse traditions. As national laws and courts in Europe and the Americas recognized modes of filiation beyond being born within marriage, the concept started filtering into regional and international law documents.

The League of Nations' 1924 Geneva Declaration on the Rights of the Child recognized and affirmed for the first time the existence of rights for all children. It also stated the responsibility of adults toward children: "By the present Declaration of the Rights of the Child … men and women of all nations, recognizing that mankind owes to the Child the best it has to give, declare and accept it as their duty … beyond and above all considerations of race, nationality or creed."[30] After the end of World War II and the formation of the United Nations, the Universal Declaration of Human Rights (UDHR) was adopted.

To date, one of the most explicitly worded documents embracing equality and nondiscrimination is Article 25 of the UDHR, which states, "All children, whether born in or out of wedlock, shall enjoy the same social protection." At the international level, this is the earliest iteration of the principle of equality and nondiscrimination with respect to children born out of wedlock.

But the narrative of the rights of such children has not progressed in chronological fashion, as is evident from the Child Rights Declaration adopted in 1959, eleven years after the UDHR.[31] Instead of repeating the wording of the UDHR's Article 25, the preamble to the Child Rights Declaration formulated the equality and nondiscrimination concept as follows: "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*."[32] From this point on, international law on human rights adopted a cautious and vague formulation to develop the principles of equality and nondiscrimination, employing key terms such as "without distinction" and "without exception." "[Irrespective of] birth or other status" is found in the Child Rights Declaration and in subsequent human rights instruments when referring to children's rights, but "whether in or out of wedlock" is noticeably avoided.

The 1966 International Covenant on Civil and Political Rights followed suit in employing similar language to safeguard children's rights to a name and identity. Article 2 obliges states parties "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognized in the Covenant, "without distinction of any kind." Its Article 24, specifically devoted to children, stipulates that "*every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth*, the right to such measures of protection

29 In the Universal Declaration of Human Rights, the Child Rights Declaration, the International Covenant on Civil and Political Rights, the United Nations Convention on the Rights of the Child, and elsewhere.

30 In 1946, the UN took over this document, developing it further as the Declaration on the Rights of the Child in 1959.

31 On November 20, 1959, the Declaration of the Rights of the Child (the Child Rights Declaration) was adopted unanimously by all the then 78 members of the UN General Assembly.

32 Emphasis added. This formulation is repeated in Principle I thus: "Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family." Principle III elaborates further by stating, "[t]he child shall be entitled from his birth to a name and nationality."

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as are required by his status as a minor, on the part of his family, society and the State."[33] Similarly, the UN's 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) affirms in its preamble the principle of nondiscrimination, stating "that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex."

For purposes of the present discussion of the evolutionary nature of the concept of filiation in international law, it can be observed that Article 16(d) of CEDAW contains the following wording: "the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount." After Article 25 of the UDHR, Article 16(d) of CEDAW became the second human rights instrument at the international level to make specific reference to nondiscrimination on the basis of marital status. Although this treaty has women's rights as its focus, this particular formulation demanding equality of status regarding children irrespective of marital status has clear implications for children. If parents have the "same rights and responsibilities" toward children "irrespective of their marital status," then nondiscrimination and equality for children follows naturally, as emphasis has been placed on the circumstances of their birth—that is, the marriage or otherwise of their parents. This formulation was an attempt to counter the suffering of children as a consequence of their parent's nonmarital status—despite exhortations to the contrary in both religious and secular rights traditions.

Another relevant document (and one little known in children's rights discourse and cross-cultural conversations) is the UN's rather cumbersomely titled 1986 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.[34] It is important as a document that acknowledges "different legal systems," in particular "recognizing that under the principal legal systems of the world, various valuable alternative institutions exist, such as the Kafala of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents." This inclusive language seems to be the earliest in international human rights regimes to specifically mention *kafāla* as an alternative care system to adoption.[35]

As a development in child rights within international human rights regimes, this Declaration stands out on two counts: firstly, it takes note of Islamic law and its institution of *kafāla*; and secondly, its explanation of adoption comes closest to Islamic conceptions.

33 Emphasis added. It further prescribes that every child must be registered immediately after birth and have a name and that every child has the right to acquire a nationality.

34 A/RES/41/85.

35 The following excerpts from the Declaration are self-explanatory:

> Taking note with appreciation of the work done on this question in the Third and Sixth Committees, as well as the efforts made by Member States representing different legal systems, during the consultations held at Headquarters from 16 to 27 September 1985 and early in the forty-first session, to join in the common endeavour of completing the work on the draft Declaration. . . . Recognizing that under the principal legal systems of the world, various valuable alternative institutions exist, such as the Kafala of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents. . . . Recognizing further that only where a particular institution is recognized and regulated by the domestic law of a State would the provisions of this Declaration relating to that institution be relevant and that such provisions would in no way affect the existing alternative institutions in other legal systems. . . . Bearing in mind, however, that the principles set forth hereunder do not impose on States such legal institutions as foster placement or adoption. . . . Article 8: The child should at all times have a name, a nationality and a legal representative. The child should not, as a result of foster placement, adoption or any alternative regime, be deprived of his or her name, nationality or legal representative unless the child thereby acquires a new name, nationality or legal representative.

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The most significant development in international law on children's rights in the contemporary era is the adoption and near universal ratification of the UN's 1989 Convention on the Rights of the Child. The draft was mainly based on the 1959 Declaration on the Rights of the Child, yet, I argue, the evolutionary nature of rights means that concepts acquire new meanings, a fact that has led some states to observe that the draft "did not reflect the social, economic and cultural developments and changes that had taken place since then,"[36] and, further, that "a convention on the rights of the child should consist of timely, up-to-date and concrete provisions."[37] Starting from the preamble, which reiterates the principle of equality and nondiscrimination,[38] as do earlier human rights documents, a number of articles reinforce these principles as well as the "best interests" concept. These include Article 2 ("irrespective of birth or other status"), Article 7, and Article 8. Articles 20 and 21 then proceed to lay down obligations for alternative care systems for children deprived of their family environment. As in the 1986 Declaration, Article 20 of the CRC mentions expressly the institution of *kafāla* in the Islamic legal traditions as an alternative mechanism for children,[39] while Article 21 of the CRC sets out the details of adoption as an institution.[40]

36 Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff, 1999), 16.

37 Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 16.

38 "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."

39 Article 20 reads as follows:

> 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.

40 Article 21 reads as follows:

> 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.

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As regards children born out of wedlock and their right to filiation, the CRC did not go much further than the existing general treaties outlined above in requiring non-discrimination on the basis of, among other things, birth or other status. Safir Syed discusses this issue in an incisive and well-argued paper, making the point that it is questionable whether non-discrimination on the grounds of birth or other status actually implies an explicit protection for children born out of wedlock.[41] A perusal of the travaux preparatoires of the CRC supports the argument, advanced in this present paper, that international human rights treaties are adopted by consensus, with only the lowest common denominator accepted by all states finally included. Where there were demands by some states for a specific article on the rights of children born out of wedlock, resistance from some Muslim states resulted in this proposal's being dropped.[42]

REGIONAL ARRANGEMENTS[43]

Regional human rights regimes, despite being informed by overarching and supposedly international human rights principles and norms, in fact incorporate and reflect regional approaches. However, with the passage of time, evolving normative frameworks are incorporated through additional protocols to the main treaty, reflecting contemporary societal practices. The European human rights regime and the inter-American and African human rights systems are examples of this development.

The 1950 European Convention on Human Rights is the oldest of the regional human rights regimes and speaks of its time. Articles 8 (family life) and 14 (nondiscrimination) also refer to children, yet modes of filiation appear confined to the institution of marriage in the original iteration but increasingly affirmed through case law.[44] A major breakthrough in the explicit protection of rights of children born out of wedlock came in the form of the European Convention on the Legal Status of Children Born out of Wedlock, adopted in 1975. According to the Council of Europe, "The object of the rules embodied in this Convention is to bring the legal status of children born out of wedlock into line with that of children born in wedlock and thereby to contribute to the harmonisation of the relevant legislation of Parties."[45] Similarly, the 1969 American Convention on Human Rights (Pact of San José, Costa Rica) stipulates that provision must be made for the protection of children "solely on the basis of their own best interests" when a marriage is dissolved,

41 Syed, "The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child," 364.

42 Algeria, Iraq, and Morocco in particular recorded their objections to the proposals for inclusion of such an article. See Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"* (Dordrecht: Martinus Nijhoff, 1992), 149.

43 I do not discuss the Arab Charter on Human Rights here as it does not contain provisions specifically to child's right to name and identity. In the 1994 version of the Arab Charter, the only reference to children was in Article 38, which stated, "[t]he State shall ensure special care and protection for the family, mothers, children and the elderly." Arab Charter for Human Rights art. 38, Sept. 15, 1994, https://www.refworld.org/publisher,LAS,,,3ae6b38540,0.html. Additional provisions related to children were added in the 2004 revisions, but none related to a child's right to name and identity. See Articles 10, 17, 29, 30, 33, 34 at League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in *International Human Rights Reports* 12, no. 3 (2005): 893–904. The Charter entered into force March 15, 2008. The Asian region does not have a human rights regime.

44 Another convention relating to children's rights is the 1996 European Convention on the Exercise of Children's Rights, CETS No. 160, has a preamble and twenty-six articles. It was opened for signature on January 25, 1996, and entered into force on July 1, 2000.

45 Details of Treaty No. 085, European Convention on the Legal Status of Children born out of Wedlock, accessed July 28, 2018, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/085.

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and that equal rights must be recognized by law for children born in and out of wedlock (Article 17 (4)(5)); also, every child has the right to a given name and to the surnames of one or both parents (Article 18). The American regional system also adopted laws regulating the adoption of children, including the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors. And last (but certainly not least) is the 1981 African Charter on Human and People's Rights (the "Banjul Charter"), which in Article 18(4) provides that "[t]he State shall ensure the elimination of every discrimination against women and the child as stipulated in international declarations and conventions."

The Banjul Charter does not stipulate specifically in relation to children born out of wedlock, relying instead upon related international instruments to fill the vacuum. This rather unusual, indirect statement of protection does beg the question of whether states parties to the African Charter are bound by those other conventions.[46] Again, the African Charter on the Rights and Welfare of the Child,[47] the first regional treaty on children's rights, builds on the 1979 Declaration on the Rights and Welfare of the African Child, but most of its provisions are modeled after those of the CRC: "The main difference lies in the existence of provisions concerning children's duties towards their parents [in article 31], in line with the African Human Rights Charter."[48] The African Charter on the Rights and Welfare of the Child sets forth the principles of nondiscrimination and best interests, and it also provides that children have an inherent right to life, protected by law. Article 18(3) comes nearest in providing expressly for rights of children born out of wedlock: that "No child shall be deprived of maintenance by reference to the parents' marital status."[49]

What is highlighted by this brief survey of human rights instruments regarding a child's right to a name and identity beyond that ascribed as a result of birth within wedlock and to rights beyond biological filiation including adoption and *kafāla* is a slow and often reluctant journey toward complete equality and nondiscrimination between children. Only a handful of these instruments use the phrase "whether born within or out of wedlock" in ascribing rights equally and without discrimination, yet there is evidence from the case law of the European and inter-American system that nondiscrimination on the basis of birth or other status now includes birth outside wedlock. This process, however, is a recent one, confined to the European and American human rights regimes, where variations among member states led to the adoption of treaties collating and harmonizing the protections available in disparate pieces of legislation across those continents.[50] At the international level, the United Nations Human Rights Committee (UNHRC) has been proactive in stretching the meaning and scope of "birth or other status" to include children born out of wedlock by adopting General Comment 18.[51] Whether the principles of equality, nondiscrimination, and best interests

46 Van Bueren, *The International Law on the Rights of the Child*, 24.

47 African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/249/49 (entered into force on November 29, 1999), accessed on November 10, 2018, https://www.refworld.org/docid/3ae6b38c18.html.

48 United Nations, Department of Economic and Social Affairs, Division for Social Policy and Development, "International Norms and Standards Relating to Disability," part 3, paragraph 3.1, accessed December 19, 2019, https://www.un.org/esa/socdev/enable/comp303.htm.

49 African Charter on the Rights and Welfare of the Child art. 18(3).

50 Analysis of the various cases where judges have extended the scope and meaning of "birth or other status" to include children born outside marriage is beyond the scope of this article. For a sound analysis and survey (albeit now somewhat dated), see Syed, "The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child," 359–83.

51 United Nations Human Rights Committee (UNHRC), Committee on Civil and Political Rights (CCPR) General Comment No. 18: Non-discrimination, 10 November 1989.

have acquired new meanings that encapsulate the rights of children of both biological and societal filiation, as well as those born out of wedlock, remains as unclear as in the Islamic legal traditions. Both traditions are cautious in explicit textual formulations yet are open to bringing such children within a protective socio-legal safety net. One inference is that plurality of meanings and interpretations mars a common understanding and application of children's right to filiation. On the other hand, vagueness and general formulations at international regional levels work to achieve the aim of protecting children's right to name and identity without specifically mentioning wedlock—a controversial term in some legal traditions such as the Islamic. Finally, a major aim of international and regional legal regimes is to introduce standard-setting provisions and attract maximum signatories and general rather than specific provisions of the law are best placed to achieve it.

ISLAMIC HUMAN RIGHTS INSTRUMENTS AND THE CHILD'S RIGHT TO NAME AND IDENTITY: THE BEGINNINGS OF AN INTERCULTURAL DIALOGUE OR A PARALLEL HUMAN RIGHTS REGIME?

Alongside the approach toward human rights emanating from the UN, starting in the 1980s Muslim forums have adopted and introduced a number of alternative "Islamic" human rights instruments, including ones specifically addressing children's rights. What function and significance do such alternative instruments have, and are they perceived as equivalent to those adopted by the UN? Are these competing or complementary human rights regimes vying for recognition among diverse constituencies? These questions are difficult to answer definitively, but inferences may be drawn from the tone and tenor of these instruments and accompanying narratives.[52]

In an earlier work, I suggested that developing and adopting alternative 'Islamic' human rights instruments is tantamount to buying into the human rights discourse and evidence of an inclusionary approach to international human rights law in general.[53] That evidence is increasingly coming to the fore, as addressed in responses of Muslim states to the CRC, discussed below. Adoption of the United Nations-sponsored UDHR, followed by an increasing body of human rights instruments, led to varying responses by scholars and writers, the Muslim laity, and Muslim-majority states and governments. At the state level, there is evidence of engagement with these instruments at the drafting stage as well as adoption and accession and beyond, albeit with reservations in the name of Islam and Islamic law regarding their precise positions. In other constituencies, responses range from outright rejection of the UDHR and other instruments, branding them as "Western," "alien" articulations of human rights, to arguments that what the world is now receiving in the twentieth century through the broadly defined Western liberal tradition, Islam presented in a superior and more comprehensive version fourteen centuries ago. Sultanhussein Tabandeh's oft-cited commentary on the UDHR and Sayyid Abul A'la Maududi's critique in his prolific writings is an example of this rejection of what they believed were Western ideological impositions,

52 For discussion on some of these questions, see Masoud Rajabi-Ardeshiri, "The Rights of the Child in the Islamic Context: The Challenges of the Local and the Global," *International Journal of Children's Rights* 17, no. 3 (2009): 475–89; Kamran Hashemi, "Religious Legal Traditions, Muslim States, and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation," *Human Rights Quarterly* 29, no. 1 (2007): 194–227; Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law* (Cheltenham: Edward Elgar, 2018), in particular chapter 8.

53 Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* (The Hague: Kluwer Law International, 2000), chapter 6.

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simultaneously presenting Islamic human rights formulations.[54] In his widely publicized Human Rights in Islam, Maududi takes as his point of departure the human rights documents of the "West" and, more specifically, the UN. He criticizes them as inadequate and late entrants in a field where Islam had granted rights as early as the seventh century.[55] Sultanhussein Tabandeh, a Shia scholar who inherited the leadership of the mystical Nimatullahi Sufi order, authored *A Muslim Commentary on the Universal Declaration of Human Rights*,[56] presented to the representatives of Muslim countries who attended the 1968 International Conference on Human Rights in Tehran, as a response to the UDHR. Tabandeh, like Maududi, focused on the prior claim to human rights in the Islamic tradition. In his words, "[m]ost of [the UDHR's] provisions were already inherent in Islam, and were proclaimed by Islam's lawgivers and preceptors."[57]

In 1981, the Universal Islamic Declaration of Human Rights (UIDHR) was adopted by the Islamic Council. It consists of a preamble and twenty-three articles. Its foreword states that it "is based on the Quran and Sunnah and has been compiled by eminent Muslim scholars, jurists and representatives of Islamic movements and thought." The UIDHR does not take note of any other international human rights document, treaty, or convention in its preamble, only the Islamic tradition, and, although it mentions the principles of equality and non-discrimination in a number of provisions,[58] it has been pointed out that the relevant articles have been kept deliberately obscure to avoid criticism.[59] One highly problematic article, with a serious bearing on children born out of wedlock, is Article 3, which calls for the "right to equality and prohibition against impermissible discrimination"—implying that there prevails a category of "permissible" discrimination: since children are entitled to a name and identity only within marriage, those outside this protective framework may legitimately be subject to discrimination. Reference to law in the UIDHR is to the shari'a, as is made clear in the explanatory note clarifying that this Islamic human rights document has as its frame of reference Islamic law and shari'a and is hence restricted in application to those subscribing to this religious tradition. There is scant indication that this document is written to be of universal application.

Another example, the 1990 Cairo Declaration on Human Rights in Islam,[60] is the earliest human rights document emanating from an official Muslim platform—in this case, the Organisation of Islamic Cooperation. The Cairo Declaration consists of a preamble and 25 articles and is similar in tone and substance to the UIDHR. Article 1(a) lays down the principles of equality and non-discrimination:

54 Sayyid Abul A'la Maududi, *Human Rights in Islam*, trans. Khurshid Ahmad and Ahmed Said Khan (Leicester: Islamic Foundation, 1980).

55 Maududi, *Human Rights in Islam*, 15.

56 Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, trans. F. J. Goulding (Guildford: F. J. Goulding, 1970).

57 Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, 1.

58 From the preamble: "wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language." Similarly, Article 9 in providing a right to asylum also mentions nondiscrimination thus: "Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex." Universal Islamic Declaration of Human Rights, adopted by the Islamic Council of Europe on September 19, 1981, available at http://hrlibrary.umn.edu/instree/islamic_declaration_HR.html.

59 Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 2nd ed. (Boulder: Westview Press, 1995), 107.

60 This appears as an annex to resolution No. 49/19-P. Document A/45/421. S/21797.

> All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations.

Those "other considerations," however, do not extend to children born out of wedlock and, as is evident from the wording of the text, all rights are to be understood and interpreted within doctrinal Islamic law injunctions.

Compared to the divergent notions of children's rights evident in the UIDHR and the Cairo Declaration, the 1994 Declaration on the Rights and Care of the Child in Islam and the 2004 Rabat Declaration on Child's Issues are visibly more convergent with the CRC. But the 2004 Covenant on the Rights of the Child in Islam[61] is the only legally enforceable human rights document adopted by the Organisation of Islamic Cooperation that explicitly engages with and mentions the CRC. The preamble to this document declares that Islamic efforts on issues of childhood contributed to the development of the 1989 United Nations Convention on the Rights of the Child. Article 5 is the equality provision in the Covenant, and it declares that "States Parties shall guarantee equality of all children as required by law to enjoy their rights and freedoms stipulated in this covenant *regardless of sex, birth, race, religion, language, political affiliation, or any other consideration affecting the right of the child, the family, or his/her representative under the law or Shari'a*" (emphasis mine).

The similarity with international and regional human rights instruments in the terms used is visible in the italicized words above, making it possible to argue that this particular phraseology is a deliberate attempt to bring the Covenant into alignment with its international counterparts. Alternatively, it is possible to infer that meanings of these terms have simply undergone a metamorphosis in the dictionaries of lawmakers and drafters bringing Islamic and international law terminology closer? In the absence of an interpretative text, it is difficult to make any definitive conclusions in this regard.

Other articles in the Covenant on the Rights of the Child in Islam attract attention both for their content and the potential they offer for a child's right to name and identity. Thus Article 6 addresses the right to life in requiring that "[t]he child shall have the right to descent, ownership, inheritance and child support"; while Article 7 states that

> A child shall, from birth, have right to a good name, to be registered with authorities concerned, to have its nationality determined and to know his/her parents, all his/her relatives and foster mother. . . . States parties to the present Covenant shall safeguard the elements of the child's identity including his/her name, nationality, and family relations in accordance with their domestic laws. . . . The child of unknown descent who is legally assimilated to this status shall have the right to guardianship and care but without adoption. He shall have a right to name, title and nationality.

Both here and in similar articles of the CRC there appears to be a deliberate ambiguity to avoid conflict. How can the right of a child to a "good name" be ensured if the parents from whom this name is acquired are not considered "good" by the laws and societal norms under which they live? In fact, bearing a child out of wedlock is not 'good' at all but a criminal offence in many Muslim countries.

So, with this wide range of rather vague understandings, plural interpretations, and similarities and overlaps between international and Islamic human rights regimes in mind, I now turn to the Muslim state responses to the CRC.

61 OIC/9-IGGE/HRI/2004/Rep.Final.

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ENGAGEMENT WITH THE CRC AS MUSLIM STATE PRACTICE: EXAMPLES FROM RESERVATIONS AND COUNTRY REPORTS

As indicated above, recent Islamic human rights instruments, including the 2004 Covenant on the Rights of the Child in Islam, recall and acknowledge the CRC and universal human rights regimes, unlike earlier instruments emerging from a Muslim platform. This may be perceived as a positive signal of ownership and engagement by Muslim states with the international regime. An important indicator of this engagement lies in Muslim states parties' ratifications of the CRC and the content of any reservations entered alongside accession documents. I have elsewhere engaged in a detailed analysis of these reservations and there is a rich body of literature available on the subject, so it is not necessary to rehearse those discussions here. What is useful, however, is to highlight the responses of Muslim states to the substantive articles of the CRC through country reports submitted to the Committee on the Rights of the Child, so as to ascertain the fluidity and plurality of interpretations of *filiation* in the Islamic legal traditions today. Has filiation moved beyond its narrow meaning to include the societal relationships of *kafāla* and adoption? If so, can this be seen as the beginning of inclusivity for children born out of wedlock? Article 21 (adoption) is the obvious candidate for analysis. It talks of recognizing and/or permitting that a state's system of adoption "shall ensure that the best interests of the child shall be the paramount consideration," yet few questions in Islamic law evoke a more unequivocal and emphatically negative response than "does Islam permit adoption?" Closed adoption in the Western sense (non-biological parents taking a child as their own, giving it their name, and treating it the same as their biological children) is, as we have seen, not permissible in Islamic law. Because traditional Islamic law prohibits adoption, it is therefore assumed that, by extension, Muslim states and communities follow that prohibition.[62] This assumption is not confined to Muslim states and communities but is transferred to non-Muslim and Western counterparts who believe that there is a blanket prohibition on adoption, and hence filiation is confined to the biological kind. Since the frame of reference for these ideas became Western laws and languages, only the bare bones of concepts such as *kafāla* remained, rather lost in translation. With closed adoption as defined in its Western sense not permitted, the term *kafāla* became synonymous instead with *fostering*, the literature on the subject trying then to equate the two. In addition to reservations to Article 21 citing Islamic law and shari'a as reasons (as we have seen), country reports, too, raise this issue. The approaches here, however, are plural even between Muslim states as reflected in the range of positions adopted by Saudi Arabia, Indonesia, Malaysia, Bangladesh, and Pakistan.[63]

Saudi Arabia entered a general reservation to the CRC, making ratification subject to shari'a, and this is the premise upon which its country reports are based. All three reports turn straight to the local operation of *kafāla*, with the first noting that Saudi Arabia applies the *kafāla* of Islamic law, which secures the child's right to life in conditions that guarantee freedom and dignity, promote the child's development, and enable the child to manifest his or her talents in the future. The state has laid down, in compliance with Islamic law, the conditions governing *kafāla* and alternative families in a manner consistent with the best interests of the child as it requires that a woman or family wishes to assume a *kafāla* should be of good reputation and health and sound social and financial standing.[64]

62 Yassari, "Adding by Choice," 927.

63 A further layer of plurality is also demonstrated in these examples in that there is diversity even among the same juristic school. For example, Pakistan and Bangladesh mainly subscribe to the Hanafi Sunni tradition, yet their responses to the CRC differ.

64 Initial Report of Saudi Arabia due in 1998, CRC/C/61/Add.2, at 43–44 (2000).

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The following reports make similar points and go into further detail on, for example, funding and quality assurance with regard to *kafāla* arrangements. All of them emphasize the fact that *kafāla* is a system whereby orphans, abandoned children, and those from needy families are looked after in alternative family arrangements, the assumption being that only children in need of alternative family arrangements are the subjects of *kafāla*.

Unlike the Saudi country reports, which do not engage with adoption but simply replace it with *kafāla* as enunciated in Islamic law, Indonesia acknowledges adoption as stated in the CRC. In its first country report on Article 21, Indonesia noted that

> [a]lthough a special law on adoption does not at the present exist in Indonesia, because of tradition and religion beliefs the adoption process has been carried out smoothly. To some extent, Indonesia has faced problems in inter-country adoption. To overcome this, a special regulation had been circulated under Supreme Court Circular No. 6, 1987. To prevent child abuse carried out though adoption, the minister of Social Affairs has appointed certain foundations and given them authority to handle inter-country adoption. To give assurance to children adopted abroad, Indonesia welcomes the European Convention on the Adoption of Children. However, the implementation of inter-country adoption will be carried out in accordance with the Indonesian Supreme Court Circular.[65]

In its second report, however, it had the following to say:

> Based on observations by the Indonesian Supreme Court, there has been a change/shift in the practice of adoption in Indonesia. In the past, adoption of children was carried out in a traditional way, in order to obtain a child or for other reasons. According to Islam, if a child is adopted, the links between the child and his biological parents must not be broken. However, it is not uncommon that when a child is adopted, his adoptive parents keep the identity of the parents a secret from the child in order to make him believe that his adoptive parents are his biological parents. But, in general, this could be counterproductive, particularly once the child becomes an adult and learns about his real situation. As a consequence of Government Regulation No. 7 of 1997 concerning Civil Servant Salaries, which provides for benefits for civil servants adopting children through a court ruling, the practice of adoption with a court ruling has become more common.[66]

Indonesia's second country report also refers to the European Convention on the Adoption of Children as a source of "inspiration" for Indonesian action in anticipation of the possibility of inter-country adoption. Yet such intercountry adoption and the acknowledgment of European laws on adoption is a notable departure from the general trend of Muslim states, which have displayed a reticence in joining the Hague Convention. Unlike Saudi Arabia, and indeed most Muslim states parties to the CRC, the Indonesian reports do not discuss *kafāla* but confine their discussion and reporting to adoption.

Responding to questioning by the CRC committee, Indonesia has recognized that the "not uncommon" practice of raising a child without telling him about his biological background can be counterproductive—an acceptance of how adoption is actually practiced in Muslim jurisdictions rather than how it appears on paper.[67] And an active engagement with and progressive implementation of Article 21 is evident in Indonesia's Country Reports: in the first, in 1993, no laws

65 Committee on the Rights of the Child, Initial Reports of State Parties due in 1992: Indonesia, CRC/C/3/Add.10, ¶ 73 (1993) [hereafter, Indonesia First Periodic Report].

66 Second Periodic Report of States Parties due in 1997: Indonesia, CRC/C/65/Add.23, ¶¶ 206–08 (2003) [hereafter, Indonesia Second Periodic Report].

67 Indonesia Second Periodic Report, ¶ 207.

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regulating adoption were available; whereas by the second, in 2012, laws had been developed at a national level, guided by the "best interests of the child and in accordance with local customs and tradition and applicable to law."[68]

Another Southeast Asian Muslim-majority country, Malaysia, discusses adoption as well as *kafāla* in its reports: "Adoption is allowed in Malaysia, and the legislations pertaining to adoption are aimed to protect the welfare and best interests of the child."[69] It goes on to state that formal adoptions are monitored by the Department of Social Welfare but admits that there are many cases of informal adoptions arranged between adoptive and natural parents. This is an important point, indicating that the actual practices of Muslim communities go well beyond doctrinal Islamic law and are often unreported and unacknowledged. The Malaysian reports also refer to *kafāla* as a Muslim practice recognized and implemented in Malaysian society. However, a distinction between adoption and *kafāla* is made:

> Kafalah is not adoption and creates no effect of "parent-child" relationship. The child remains the obligation of the biological parent who remains the legal guardian. Kafalah does not make any child to become a family member of the custodian or appointed guardian (kafil). The child retains his natural parent's name, not affiliated to the foster father or mother and he is still able to inherit from his biological father or mother.[70]

The Malaysian report also states that "[t]he fostered Muslim child is given the same rights as a natural child and may be entitled to benefit from the foster parents' property by way of gift (hibah) or the foster parents may devise not more than one third of their property by will (wasiat) to the child."[71]

The Indonesian and Malaysian reports on adoption and *kafāla*, then, present a more progressive and open approach to interpreting and applying Islamic law, besides being more accepting of Islamic law as practiced on the ground. Both countries' reports present their cultures in a positive and inclusive light. Indonesia aptly describes Indonesian perspectives on its multi-ethnic and multireligious polity by stating, "[t]he majority of the population (about 87 per cent[)] is Moslem; however, the Indonesian Constitution recognizes freedom of religion as specified in the first principle of the Pancasila state philosophy, being Belief in one Supreme God. Churches, Hindu and Buddhist temples are found throughout the country as are mosques of the [M]oslem faith."[72]

This openness to other religious communities and cultures within their borders is certainly not replicated in Muslim countries such as Pakistan, however. There, reporting on Article 21 in successive reports, the prohibition on adoption in its Western sense is explicit: "Foster placement is not recognized in Pakistan under any law. Adoption is also not permitted in Pakistan under Islamic law. Courts have given a ruling that there is nothing in Islamic law that is similar to adoption as recognized under Roman legal systems. Yet the concept of guardianship assures protection of family life. Guardianship ensures that the child knows his/her paternity."[73]

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68 Third and Fourth Periodic Reports of the State Party 2007: Indonesia, CRC/C/IDN/3-4, ¶ 103 (2012).

69 Initial Report of States Parties due in 1997: Malaysia, CRC/MYS/1, ¶ 229 (2006) [hereafter, Malaysia First Periodic Report].

70 Malaysia First Periodic Report, ¶ 232.

71 Malaysia First Periodic Report, ¶ 97.

72 Indonesia First Periodic Report, ¶ 23.

73 Periodic Reports of States Parties Due in 1997: Pakistan, CRC/C/65/Add.21, ¶ 203 (2001) [hereafter, Pakistan Second Periodic Report]. Paragraphs 204–05 of this report propose guardianship as an Islamic alternative to adoption. The initial Pakistan report presented to the CRC Committee in 1993 alluded to the fact that state-run orphanages and institutions were open to childless couples taking on fostering and guardianship of these children. See Initial Reports of States Parties Due in 1993: Pakistan, CRC/C/3/Add.13, ¶ 141 (1993).

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In Pakistan's combined third and fourth reports, at least, some slight evolution is visible regarding the long-term care of children in alternative family arrangements: "The N[ational] C[omission] for C[hild] W[elfare] and D[evelopment] is reviewing legal provisions for the long term care of children including adoption, kafala, foster care and guardianship, but that any provision must achieve the best interests of the child within sharia law."[74]

Interestingly, Bangladesh (which until 1971 was part of Pakistan) adopted a different stance in its reservations and reports: while Pakistan initially cited religion as a factor inspiring its general reservation, Bangladesh justified its opposition to intercountry adoption with reference not to shari'a but instead to the widespread abuse of the law in the wake of the country's 1971 War of Independence, which left many orphans.

Syria, by contrast, presents an interesting example of a Muslim-majority country that initially entered reservations to Article 21 yet subsequently withdrew them. Reporting on Article 21, it observes that it

> withdrew its reservations to articles 20 and 21 ... [in] 2007. The only remaining reservation concerns article 14 .... The reasons for this reservation are related to the religious teachings of Islam. The religion provides for the system of kafalah (guardianship) and placement in foster families, on condition that the filiation of the children concerned is not altered to prevent them from enjoying the right to know who their natural parents are (if their identity subsequently comes to light) and to rejoin them. It should be noted in this connection that adoption is permitted in Christian communities under their separate personal status codes.[75]

In its initial report, however, Syria stated that

> [a]doption is not recognized in the Syrian legal system, and the Syrian Arab Republic expressed reservations concerning the right of adoption, which conflicts not only with the provisions of the Islamic Shari'a which prevail in the country but also with the provisions of national legislation for which Islamic legislation constitutes one of the principal sources, as stipulated in article 3, paragraph 2, of the Constitution. Although adoption is not recognized, Syrian legislation permits filiation. The concept of filiation is similar to the system of adoption, the difference between them lying in the fact that, under the adoption system, one or both of the parents must be known whereas, under the filiation system, the filiated child must be of unknown parentage or the offspring of an unlawful marriage.[76]

As I discuss below, responses from Muslim states to Article 21 have highlighted once again a plurality of positions. This leads one to the understanding that, while some continue to use Islamic law as the reason for not recognizing adoption as a mode of affiliation, others do nevertheless recognize it. The reason for this plurality in approach is difficult to pin down with certainty, and the answers may be more than one. The nation-state and its policies are today driven by contemporary demands and informed increasingly by international law and policies. Some Muslim states are courageously accepting the fact that adoption (in every sense of the term) exists, is practiced in their communities, and merits recognition. Policy makers, lawmakers, and scholars are giving closer scrutiny to classical conceptions of Islamic law on adoption, including the Qur'anic verse on the subject, and are able to differentiate its essence. The evidence leads one to believe that it

74 Third and Fourth Periodic Reports of States Parties Due in 2007: Pakistan, CRC/C/PAK/3-4, ¶ 237 (2009).

75 Third and Fourth Periodic Reports of States Parties Due in 2009: Syrian Arab Republic, CRC/C/SYR/3-4, ¶ 171 (2010).

76 Initial Reports of States Parties Due in 1995: Syrian Arab Republic, CRC/C/28/Add.2, ¶ 124 (1996).

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might be all of these factors, or simply the random repetition of historical and fossilized conceptions on adoption, that brings any given state to the position it holds.

The very detailed analysis of some Muslim countries' reports to the CRC on adoption reflects the fact that biological filiation appears to be the default position up to the present day. Wherever adoption and *kafāla* are mentioned, it is with the proviso that birth name and identity may not be hidden or denied. As to the rights of children to a name and identity irrespective of the marital status of their parents, there is a long journey ahead. Islamic human rights documents are very clear that these rights are available only when children are born within wedlock; the situation within international and regional human rights regimes is less categorical but not unanimous. While some regional human rights instruments adopt an explicit position, the CRC and other human rights treaty regimes are less so.

CONCLUDING REFLECTIONS

I set out to explore the directions taken by Islamic and international human rights regimes to remove social and legal discrimination against children born out of wedlock, as well as those within alternative family arrangements, including adoption and *kafāla*. Tracing historical antecedents within both traditions, I engaged with both legal fiction and legal developments in the area to argue that filiation is more expansively understood today across diverse legal systems. Simultaneously, contestation is also alive and well in this area, and variation and diversity among legal systems means that only the lowest common denominator finds a place in a multilateral treaty. In instruments relating to filiation, attempts at inclusivity imply deference to national laws and alternative institutional and individual arrangements. In view of the wide margin of appreciation extended to domestic laws, international law instruments mainly acquire a standard-setting function. In the chaos of competing hierarchies—the domestic versus the international, the religious versus the customary—one tends to lose sight of how blurred the boundaries between legal systems actually are.

I draw on these competing legal traditions to highlight commonalities and cross-fertilization of ideas across these traditions arguing for an inclusive evolution of children's right to name and identity (as well as other aspects of rights). I argue for an inclusive, shared civilizational heritage, refuting binaries of "West" and "Islamic" in the realm of children's rights by deploying historical evidence to argue that both traditions evolved through cross-fertilization of ideas. Parallel and unconnected as they may appear to some, these traditions have benefited from each other.

Historical ruptures, continuities, and discontinuities, such as the emergence of the modern nation state, colonization, globalization, the evolution of international law, and advances in the biomedical sciences have destabilized some of the protective tools and spaces available within pre-modern Islamic legal traditions. For instance, *al-raqid* has been displaced by distinct and limited gestation periods, and DNA testing to ascertain parentage has been introduced into the family codes of Muslim-majority jurisdictions. Artificial insemination, surrogacy, and other biomedical methods of parenting too, have extended the scope of filiation from purely biological grounds to "societal" filiation.[77]

In weaving this socio-legal narrative, I have highlighted the Muslim intellectual contribution to human rights by recalling critical observations of writers on the subject. These include references to

77 I note it even although it is outside the scope of this article.

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children and childhood in medieval Islamic sources;[78] among them, renowned children's rights scholar Geraldine van Bueren, who observes, "the very concept that children possess rights has a far older tradition in Islamic law than in international law, where the notion did not emerge until the twentieth century,"[79] and contemporary writings on the subject.[80] Sevda Clark's groundbreaking scholarship on the autonomous child devises a new frame for understanding the cross cultural conceptions of human rights itself in the work of the twelfth-century Muslim philosopher Ibn Tufayl.[81] In the compelling twelfth-century philosophical tale *Hayy ibn Yaqzān*, a boy named Hayy grows up alone on an island. Predating Jean Jacques Rousseau's *Emilie* and Daniel Defoe's *Robinson Crusoe* by centuries, the story has been highlighted as an example of an autonomous child, of childhood and self-learning. My interest in Hayy is, however, the manner in which at one point Ibn Tufayl describes his "birth" as "spontaneous generation," moving beyond filiation as necessarily within wedlock:[82] I am aware that the majority of Ibn Tufayl's readership may not have noted the implications of this, as the tale's most obvious focus remains advocacy for the autonomous human being, self-educated and self-reliant. I suggest that this is a work amenable to varying readings, and my particular one is that Ibn Tufayl deliberately blurred the boundary between permissible (procreation within wedlock) and prohibited (giving birth outside marriage), thus opening up spaces for children to be brought within the safety net of a name and identity.[83]

Although references to Hayy Ibn Yaqzan were made in Western scholarship through Latin and English translations, they dropped off the intellectual radar over time and Ibn Tufayl's contribution to childhood and children's rights scholarship remains largely unrecognized. The main drawback of this amnesia lies in weakening the common foundations for the universality of human rights, including those of the child. Had this common heritage been more visible when formulating human and children's rights instruments at domestic and international levels, the argumentation of "non-Western" origins of human rights, leading to some Muslim majority jurisdictions' entering reservations, would have lost legitimacy.[84] Fabio López Lázaro sums up this failure of recognition of the cross-cultural nature of ideas and political philosophy thus:

> World historians now accept that the period 1100–1300 is a critical global watershed, "an age of cross-cultural interaction" that "set the stage for a modern era," but we still underestimate the politico-cultural

78 Anver Gil'adi, *Children of Islam: Concepts of Childhood in Medieval Muslim Society* (Basingstoke: Macmillan, 1992).

79 Geraldine van Bueren, *The Best Interests of the Child: International Cooperation on Child Abduction* (London: British Institute of Human Rights, n.d.), 51.

80 See, for instance, Muslim Women's Shura Council, *Adoption and the Care of Orphan Children*; Department of Economic and Social Affairs, Population Division, *Child Adoption: Trends and Policies* (New York: United Nations, 2009); UNICEF, *Children in Islam: Their Care, Development, and Protection* (Cairo: Al-Azhar University, 2005).

81 Sevda Clark, "The Child Subject. An Intertextual Reconstruction of Liberal Subjectivity" (PhD diss., Oslo University, 2018), 38–39.

82 Ibn Tufayl says, "I bring it to your attention solely by way of corroborating the alleged possibility of a man's being engendered in this place without father or mother, since many insist with assurance and conviction that Hayy Ibn Yaqzan was one such person who came into being on that island by spontaneous generation. Others, however, deny it and relate a different version of his origin." Muḥammad ibn 'Abd al-Malik Ibn Ṭufayl, *Ibn Tufayl's Hayy ibn Yaqẓān: A Philosophical Tale*, trans. Lenn Evan Goodman, 5th. ed. (Chicago: University of Chicago Press, 2009), 105.

83 I am grateful to Professor Maurits Berger for highlighting the originality of this point.

84 Ali and Khan, "Evolving Conceptions of Children's Rights." I am grateful to Sevda Clark for making this connection with my earlier work.

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role of the Maghrib-West in formulating the medieval Latin-West, and too often in the literature Islam seems a graft onto a tree of Occidentalism that temporarily fed into its growth instead of being—as it should be—an integral and integrated root and branch element in the overall structure.[85]

As my study with Sajila Sohail Khan demonstrates, the practices of most Muslim states reflect the evolving nature of the Islamic legal traditions and formal and informal processes of *kafāla* and guardianship as alternative care arrangements to adoption in the Western sense.[86] Of the large array of relevant international and regional instruments, only three mention *kafāla* as an alternative mode of looking after children who are not biological offspring; others restrict these arrangements to adoption in the Western sense. The reality belies the blanket prohibition as understood in popular conceptions regarding adoption: the plurality within Muslim countries demonstrates the evolutionary nature of alternative arrangements for parentless children. Modes of filiation are not simply about establishing a father-child relationship in order to open avenues for children's rights vis-à-vis the father; it is much more complex than that, since the socio-legal status of the parents' relationship is inextricably intertwined with how law and society has perceived and continues to perceive children born of relationships. Despite significant evolution in this area, as well as supportive laws, it may be argued that there persists a hierarchy within the various modes of filiation. Historically, a child's right to filiation was dependent upon whether their biological parents were in a formal legal relationship of husband and wife, and, if so, rights and entitlements followed both in society and state. But if born out of wedlock, filiation was not considered an inherent right of the child, resulting in discrimination, vulnerability, and ostracism. The child's mother was the point of reference for the child, with all the attendant ills that would befall the mother-child relationship created out of wedlock. For parentless children, those born out of wedlock and for those in a socio-legal relationship with nonbiological parents, such as in *kafāla* and adoption, equality and nondiscrimination remained a qualified right.

At the level of international law, filiation—necessarily an aspect of evolving family dynamics and structures—is in a state of flux and open to societal filiation. Equally so in the Muslim world, broadly defined, variants of the husband-wife-child typology are undergoing modification: alternatives are emerging to the generally held idea that children have access to filiation solely on the basis of the marital status of their parents. Simplistic literal readings of the religious text in Islam, as well as classical *fiqh*, are increasingly coming under pressure as war, internal strife, natural calamities such as earthquakes and drought, and other factors make ever more demands on states and societies where parentless and abandoned children require alternative families. Somalia, a Muslim majority jurisdiction, has formal laws on adoption, and, while this development may be linked to the civil war and breakdown of societal and governmental structures, it is an example of the move toward societal filiation among Muslim communities. Muslim countries have in the past practiced—and continued to do so—open adoption in the form of *kafāla* as well as, more discreetly, closed adoption. Examples from country reports to the CRC Committee by Indonesia, Malaysia, and others is evidence of this evolving dynamic. Likewise, in 2007 when a massive earthquake shook the northwest of Pakistan and children lost parents and extended families, government-level moves toward alternative family placements became a stated policy.[87]

85 Fabio López Lázaro, "The Rise and Global Significance of the First 'West': The Medieval Islamic Maghreb," *Journal of World History* 24, no. 2 (2013): 259–307, at 267.

86 Ali and Khan, "Evolving Conceptions of Children's Rights."

87 Reporting to the CRC Committee, the Pakistan country report acknowledged overlaps between the CRC and Islamic law and laws of Pakistan. In paragraph 204, it states, "[a]s a substitute to adoption, Islamic law provides

While actual practices and lived realities of Muslim communities reflect the evolving nature of the Islamic legal traditions at many levels, Muslim states, in their *formal responses to international forums*, nevertheless adopt inflexible and simplistic perspectives on this particular subject. The stated public position is that a child's right to name and identity follows from the marital status of their parents without exception; the many variations operating in practice are not acknowledged. This entrenched notion also spills over into academic discourse and has implications beyond Muslim jurisdictions when expert reports are sought by courts in Western jurisdictions who reinforce the view that filiation in the Islamic legal traditions is restricted to the biological. So, while social evolution and change in Western states, broadly defined, are reflected in human rights treaties, similar evolution in Muslim states is not equally apparent. To be truly reflective of the world's legal systems, international regimes need to look closer at practice of Muslim states and communities and tease out the changing patterns of law by delving into the case law and grassroots practices of Muslim communities.

I also explored evolving perceptions of children's rights as reflected in Muslim state party practice in light of responses to the CRC. The only human rights treaty making specific mention of Islam and ratified by all Muslim states, the CRC also enjoys near-universal ratification (the only exception being the United States). But this unanimous ratification by Muslim states is accompanied by reservations, some of which have been entered in the name of Islamic law and shari'a, raising questions of compatibility between the CRC and Muslims' perceptions of children's rights. Reservations to multilateral treaties such as the CRC are one of several indicators of Muslim state practice and of Islam's plural legal traditions in international law; others include but are not confined to country reports and a range of "Islamic" human rights instruments. Children's rights are an evolving concept with changing content and connotations in classical Islamic law, in Muslim state practice, and in regional and international child rights instruments. Vague and fluid formulations of various aspects of child rights both in the CRC and in classical conceptions of Islamic legal traditions make it a malleable concept that enables diverse cultures and traditions to implement it in their particular contexts.[88] Even to the casual observer of Islamic law, then, it should be clear that the manner in which law is generated within the Islamic legal traditions is most definitely pluralist, with the inherent capacity for alternative legitimate conceptions of what constitutes law and permissible action.

The CRC provides an example of the potential for transforming West-centric human rights to truly universal ones. By, for instance, acknowledging and protecting the rights to health, education, and clean drinking water, as well as protection from exploitation, the concerns of a truly universal constituency of children is addressed. After decades of wrangling over the question of whether or not Islam recognizes human rights, it would be more pertinent to pose the question thus: Do the rights of the child as enunciated in the CRC resonate with comparable values within the Islamic legal traditions? This then opens the way to related questions, such as whether a Muslim intra-community dialogue employing the moral and ethical framework of the Qur'an might arrive at a notion of children's rights that reflects contemporary understandings of the concept. Subsequent developments in human rights treaties and discourse more broadly have brought Islamic law

for a very strong system of guardianship through the immediate as well as the extended family." In paragraph 205, the report observes that "[t]he appointment of the court-guardian is similar in some cases to adoption and the recommendation of this article is not totally alien to the law in Pakistan." Pakistan Second Periodic Report, ¶¶ 204 & 205.

88 For example, Article 1 states, "[f]or 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."

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perceptions closer to those being canvassed at the international level. More and more Muslim jurisdictions are legislating for a higher minimum age in the fields of employment, marriage, and participation in armed conflict. Likewise, Western states are increasingly open to and making law acknowledging adopted children's right to know their biological parents.

Application of the CRC in Muslim jurisdictions reflects their varied and complex socio-legal landscapes. Although some recognition of the CRC formulation is increasingly reflected in national laws and policy, including the courts, translations of concepts into local parlance blurs an already ambiguous meaning. The socioeconomic, cultural, and political challenges of most Muslim jurisdictions cannot be separated from how children's rights are conceived and operationalized—hence the disparity between various countries. Simultaneously, and with increasing proactivity, "Islamic" human rights instruments, including some focused on children, have been adopted by Muslim forums and organizations.

To some these instruments appear as alternative human rights documents to those emanating from the UN and the international human rights regime. It may be argued, though, that these documents present an evolving Islamic human rights regime, reflective of converging rather than diverging conceptions of human rights. In fact, it may be that the beginning of a truly universal human rights regime is in the making—slowly but surely.

Another interesting observation has been the absence of correlation between states' positions and their dominant schools of juristic thought. Thus Malaysia and Indonesia, both Sunni and predominantly Shafi'i, have laws on the adoption of children—as does the predominantly Shia Azerbaijan. Iran on the other hand, with Shia Islam as its state religion, prohibits adoption, declaring it to be against the principles of Islamic law. Similarly, Sunni Hanafi Pakistan and Bangladesh have evoked quite distinct responses in their reservations to the CRC and in country reports. National interests, policies, and historical moments all play a role in determining these positions, with Bangladesh recalling its wartime situation in its country report on Article 21. The plurality of approaches to substantive provisions of the CRC by Muslim states is evidently mostly informed by national laws and societal practice. Although plurality within the Islamic legal traditions in the form of diverging schools of juristic thought may be a factor, this is not definitively verifiable, as subtle variations inevitably remain.

Societal filiation, including adoptive and *kafāla* modes, is mounting a challenge to biological filiation as the sole player in the field. There is evidence that international law on alternative care options for children, including adoption and *kafāla*, have become sufficiently inclusive and flexible to bring within its fold diverse perspectives, cultures, and traditions. The lived realities of people's lives and religious, national, and regional laws both influence the making of international law and are influenced by it. However, this two-way influence operates within a hierarchy where the first port of call and action remains the lived and living "law" followed by religious traditions, and then national, regional, and international law.[89]

Hierarchy of filiation is intertwined with the marital status of parents; delinking this lies at the heart of the discourse on filiation and children's rights. A cross-fertilization between national and local '*urf* and international '*urf* is discernible and is being employed in best interests of the child. On the basis of available evidence in the form of lived realities, of Muslim state practice domestically, and of international human rights regimes, it is clear that at a formal level a child's right to a name

89 Conversations with lawyers and judges in a number of countries support this position, with these arguing that what for them is closer to home, as it were, rings true when arguing or deciding cases. Reticence to defer to regional and international treaties is evident, the United Kingdom presenting one of several examples in the Western hemisphere.

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and identity, given the prohibition on taking on the name of adoptive parents, remains contested. On the basis that we can discern some movement towards societal filiation, is there appearing a discernible socio-legal space for a child's right to a name and identity to be unlinked from the marital status of its parents? Or is this at present a step too far?

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