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the Libyan High Court jurisdiction

Ali Omar Ali Mesrati  
University of Wollongong

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**Faculty of Law**

**‘THE BEST INTERESTS OF THE CHILD’:  
INTERNATIONAL CHILD LAW AS INTERPRETED  
IN THE LIBYAN HIGH COURT JURISDICTION**

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This thesis is presented as part of the requirements for the award of the  
Degree of Doctor of Philosophy from the University of Wollongong

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## ABSTRACT

The intent of this thesis is to examine how local cultures affect the interpretation of international human rights law. By exploring the Islamic legal system in its approach to the concept of ‘the best interests of the child’ and, more specifically, the approach of the Libyan legal system through a study of existing legislation and Libyan High Court (LHC) interpretation as revealed in its decisions, this thesis aims to show how the cultural background affects the interpretation of international human rights in domestic legal systems.

The approach adopted in studying the Convention on the Rights of the Child (CROC), Libyan law and Islamic law, has been to examine: CROC and its official implementation body, the Committee on the Rights of the Child (CRC), and its responses to the reports of the State party (Libya); Libyan legislation, specifically the provisions of the *Law of Marriage and Divorce Rules and their Effects (10/1984)* and its interpretation by the LHC regarding its guardianship jurisdiction; and an examination of guardianship (*Hadanah*) from the perspective of the Islamic schools of thought (*Mathhabs*), with the focus on the *Malikiyah Mathhab*, as the official and historical Islamic interpretation applying in Libya.

The main question addressed here is: ‘How is the international human rights concept of “the best interests of the child” being implemented in the Libyan legal system?’ Having examined relevant data and evidence for the research areas selected and the questions formulated, the thesis argues that the interpretation of international human rights in domestic legal systems will inevitably, understandably and legitimately be affected by local cultures. This process of ‘translation’ occurs when legislatures take

concepts outlined in international law and seek to integrate or restate them within domestic legislation. It is evident in the approach that Libya has taken to implementing ‘the best interests of the child’, where the influence of Islamic law is apparent. The ‘best interests of the child’ has also been an area of concern for, and a focus of interpretation by, the LHC in the implementation by Libyan law of the international law.

The CRC claims that Libyan law does not cater for the needs of the child.<sup>α</sup> This thesis has proven otherwise and shown examples and cases (representative of different situations) which illustrate how ‘the best interests of the child’ have been catered for.

There are cultural differences that exist among and within countries and among lawmakers of the various countries, and Libya is no exception. Yet legislation is in place to uphold and protect the rights of all citizens, including those of children. Although reasons may vary, as may beliefs, the underlying aim of most systems of law is to take into consideration ‘the best interests of the child’. The Libyan legal system has aimed to cater for the needs of the children and take into account ‘the best interests of the child’ according to the circumstances that pertain to each case. Thus, ‘the best interests of the child’ are clearly exercised and affected by the cultural values. This thesis has also shown that this area of research is, as a whole, one worthy of further development and examination.

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<sup>α</sup> Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*. 04/07/2003 [7]–[8], UN Doc CRC/C/15/Add.209 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/8ea5ea3ba95829a1c1256daa002dbd01?OpenDocument>> at 18 April 2008.

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## **ABBREVIATIONS LIST**

CRC:	the Committee on the Rights of the Child
CROC:	Convention on the Rights of the Child
DEAP:	Declaration on the Establishment of the Authority of the People
BPC:	Basic People's Congress
GPC:	General People's Congress
Legislation (10/1984):	Law of Marriage and Divorce Rules and their Effects (10/1984)
LHC:	Libyan High Court
LHC-GJ:	Libyan High Court Guardianship Jurisdiction
ND:	No Date
NGOs:	Non-Governmental Organisations
PBUH:	Peace Be Upon Him
RCC:	Revolutionary Command Council
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
WWII:	World War II

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# 1 INTRODUCTION

## 1.1 Background

Early attempts of international law in identifying the rights of children can be traced to the 1924 *Geneva Declaration of the Rights of the Child*<sup>1</sup> and the 1959 *Declaration on the Rights of the Child*.<sup>2</sup> However, it was the adoption of the *Convention on the Rights of the Child* (CROC)<sup>3</sup> by the United Nations General Assembly on 20 November 1989 that constituted a major development in the identification of and support for children's rights by the international community.<sup>4</sup> CROC has 193 State parties, 'far more than for any other human rights treaty'.<sup>5</sup> The adoption of CROC was followed one year later (29–30 September 1990) by the first World Summit for Children, during which the *World Declaration on the Survival, Protection and Development of Children* was signed and a Plan of Action adopted for its implementation in the 1990s.<sup>6</sup> World leaders made a commitment to the protection of children's rights to guarantee their survival and development. The Plan of Action was to become the guiding framework around which international organisations,

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<sup>1</sup> *Geneva Declaration of the Rights of the Child*, adopted 26 September 1924, League of Nations OJ Spec Supp 21, at 43 <<http://www.un-documents.net/gdrc1924.htm>> at 11 May 2004.

<sup>2</sup> *Declaration of the Rights of the Child*, GA res 1386 (XIV), 20 November 1959, 14 UN GAOR Supp. 16, at 19, UN Doc A/4354 (1959).

<sup>3</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>4</sup> Munyae M Mulinge, 'Implementing the 1989 United Nations' Convention on the Rights of the Child in sub-Saharan Africa: The overlooked socioeconomic and political dilemmas' (2002) 26(11) *Child Abuse & Neglect* 1117.

<sup>5</sup> Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *United Nations Convention on the Rights of the Child* (1998) 17th Report [1.34] 10.

<sup>6</sup> UN GA 55<sup>th</sup> sess, Agenda Item 151 [Presentation of the texts to the GA by the UN Sec Gen], 18 October 1990, UN Doc A/45/625 (1990). Text of the *World Declaration on the Survival, Protection and Development of Children*, Annex 1–5; *Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s*, Annex 7–23.

national governments, non-government organisations (NGOs) and individuals would style their own programs of activities.<sup>7</sup>

One of the abstract concepts, which has been established in both international and national legal systems, is ‘the best interests of the child’.<sup>8</sup> Today, this concept is embedded in international treaties such as the *Convention on the Rights of the Child* (CROC), where an example of the use of this principle can be found in article 3(1):

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests of the child* shall be a primary consideration.<sup>9</sup>

This same principal is also emphasised within the *Hague Convention on Protection of Children and Co-operation in Respect of International Adoption*, article 1 of which includes in its objects:

To establish safeguards to ensure that inter-country adoption take place in the *best interest of the child* and with respect for his or her fundamental rights as recognized in international law.<sup>10</sup>

It is also part of the *African Charter on the Rights and Welfare of the Child*, which was ratified by Libya on 23 September 2000 and which provides that ‘in all actions

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<sup>7</sup> Mulinge, above n 4.

<sup>8</sup> For some trial definitions see: Harvey R Sorkow, ‘Best Interests of the Child: By Whose Definition?’ (1990–1991) 18 *Pepperdine Law Review* 383.

<sup>9</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 3(1) (entered into force 2 September 1990) (emphasis added).

<sup>10</sup> *Hague [Hague Conference on Private International Law] Convention on the Protection of Children and Co-operation in Respect of International Adoption*, opened for signature 29 May 1993, art 1(a) (entered into force 1 May 1995) (emphasis added). For text, see <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> at 10 August 2009.

concerning the child undertaken by any person or authority the *best interests of the child* shall be the primary consideration'.<sup>11</sup>

As a result, modern domestic legal systems adopted the 'best interests' concept into their jurisdictions.<sup>12</sup> Consequently, Acts relating to child welfare were altered accordingly and obligations imposed on courts to make judgements in accordance with 'the best interests of the child'. Furthermore, many non-government organisations started working in this field and advocated on behalf of children in order to protect their best interests.

In terms of Libya's participation in international conventions regarding the rights of the children, the Libyan Arab Jamahiriya signed the Convention on the Rights of the Child (CROC) without any reservations in 15 April 1993. The Convention entered into force for Libya on 15 May 1993.<sup>13</sup> Libya's initial report to the Committee on the Rights of the Child (as required under Article 44) was submitted on 26 September 1996, signalling the beginning of a period of written correspondence and face-to-face interviews between the Committee and national representatives, culminating in the Committee issuing its first Concluding Observations (containing both praise and criticism) on 4 February 1998 (see further, below). This process was repeated when Libya reported a second time to the Committee on 8 August 2000, with the Committee issuing its Concluding Observations on 4 July 2003. Again, while

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<sup>11</sup> Organisation for African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, opened for signature 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990) art 4 (entered into force 29 November 1999) (emphasis added) <<http://www.unhcr.org/refworld/docid/3ae6b38c18.html>> at 5 December 2008.

<sup>12</sup> Amanda Barratt and Sandra Burman, 'Deciding the Best Interests of the Child: An International Perspective on Custody Decision-making' (2001) 118 *The South African Law Journal* 556.

<sup>13</sup> Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1995: Libyan Arab Jamahiriya*. 26/09/1996 [4] UN Doc CRC/C/28/Add.6 (1996) ('First Periodic Report') <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.28.Add.6.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.28.Add.6.En?Opendocument)> at 1 March 2010.

praising progress in a number of areas, the Committee went on to note what it considered a number of shortcomings in terms of implementation (see further, below). Libya was due to submit its combined 3rd and 4th reports to the Committee on 14 November 2008.<sup>14</sup> A preliminary Report (in Arabic)<sup>15</sup> dated 1 September 2009 had been received by the Committee on 1 September 2009 but as at 23 March 2010 meetings had yet to be scheduled. Unfortunately this submission was too late to be considered by this thesis.<sup>16</sup>

Libya's willingness to participate in international and supranational on a number of broad-ranging issues related to the rights of children is indicated in its being a signatory to additional protocols and instruments. Libya ratified the African Charter on the Rights and Welfare of the Child on 23 September 2000. Libya also ratified two optional protocols to the Convention on the Rights of the Child, namely the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (on 18 June 2004), and the Optional Protocol on the Involvement of Children in Armed Conflict (on 29 October 2004). However, it has yet to submit its initial reports to the Committee on the Rights of the Child on the implementation of either protocol.

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<sup>14</sup> The Second Periodic Report (due 14 May 2000) was submitted 8 August 2000 (in Arabic). The consolidated Third and Fourth reports are due to be submitted 14 November 2008 (no Third Report having been submitted by the due date of 14 May 2005): Committee on the Rights of the Child, *Submission of Reports by States Parties*, 26/11/2008, Annex 1, pp 7, 15, 26, 38, UN Doc CRC/C/50/2 (2008) avail <<http://www.un.org/Docs/journal/asp/ws.asp?m=CRC/C/50/2>> at 12 August 2009.

<sup>15</sup> Information obtained Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child, Future Sessions website <<http://www2.ohchr.org/english/bodies/crc/future.htm>> at 23 March 2010.

<sup>16</sup> <<http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.LBY.3-4.doc>> at 23 March 2010.



## 1.2 Setting the scene for the present study: Dialogue between Libya and the CRC

### 1.2.1 Libya's First Periodic Report

Libya is one country that has attempted to implement this obligation in its domestic laws. Libyan law does not explicitly accommodate the 'best interests' principle. However, the *Law of Marriage and Divorce Rules and their Effects (10/1984)* (hereafter *Legislation 10/1984*) explicitly makes mention that where a void exists in any legal area, Islamic law needs to be the final adjudicator. Such legal voids exist in relation to issues such as responsibility for a child's living expenses, establishing a child's religion when his/her parents' religions differ, and guardianship/custodianship of a child after parental divorce.

As part of its obligations under article 44 of CROC, the Libyan Government prepared a report addressing a number of principles and submitted it to the Committee on the Rights of the Child (CRC) in 1996.<sup>17</sup>

In its initial report regarding the 'best interests' principle Libya stated that: 'The Libyan Arab Jamahiriya has introduced the Child Protection and Welfare Ordinance, which demonstrates that the interests of the child in the Libyan Jamahiriya are given the highest respect'.<sup>18</sup> This was a poor report on Libya's part. It was very general and did not highlight how, when, or where the principle of 'the best interests of the child'

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid [50].

was being implemented, nor who was responsible for its implementation. The content of the principle was not even mentioned.

In October 1997, the CRC prepared a ‘List of issues to be taken up in connection with the consideration of the initial report of the Libyan Arab Jamahiriya’.<sup>19</sup> One of the issues was the concept of ‘the best interests of the child’ and how the Libyan legal system implemented this in its law. The questions from the CRC clearly express their concern by emphasising just how important this concept is and asking for examples of implementation both in the courts and by administrative authorities.<sup>20</sup> The CRC’s resulting 1998 report (below) shows that one its main reservations was in relation to the ‘the best interests of the child’ concept: particularly how Libya had interpreted it domestically and the degree to which it had been implemented.<sup>21</sup> It is on the basis of this interpretation – as it appeared in Libya’s First Periodic Report and as it was mentioned in the debated sessions – that the CRC had responded negatively towards Libya’s implementation. However, the Libyan representatives did not accept the CRC’s conclusion. They claimed that, even before CROC came into existence, the Libyan legal system implemented the concept of ‘the best interests of the child’ through its adoption of Islamic legal rulings relating to

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<sup>19</sup> Where it is stated: ‘How are the principles of the “best interests of the child” and the “respect for the views of the child” (arts. 3 and 12 of the Convention) reflected in legislation, or actions undertaken by social welfare institutions, courts of law and administrative authorities? Please provide some examples of implementation of these principle[s] by courts and/or administrative bodies. What concrete measures have been taken to sensitize public opinion to encourage children to exercise their participatory rights?’: Committee on the Rights of the Child, *Implementation of the Convention of the Rights of the Child – List of Issues to be taken up in connection with the consideration of the initial report of the Libyan Arab Jamahiriya* (October 1997) [18], UN Doc CRC/C/Q/LIBYA.1 (1997) <[http://www.bayefsky.com/issues/libya\\_crc\\_c\\_q\\_libya\\_1\\_1997.pdf](http://www.bayefsky.com/issues/libya_crc_c_q_libya_1_1997.pdf)> at 11 August 2009. See also a request for disaggregated data: at [4].

<sup>20</sup> Ibid [16], [18].

<sup>21</sup> Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya. 04/02/1998* [10], UN Doc CRC/C/15/Add.84 (1998) <<http://www.unhchr.ch/tbs/doc.nsf/0/2108c29b83220dab8025659f0052567d?Opendocument>> at 18 April 2008.

personal status, which include children's rights.<sup>22</sup> Libya claimed that Islamic law understands and interprets this concept, and that it had convincingly implemented any obligations it had under CROC.<sup>23</sup> Hence, the discrepancy between the position of the CRC and that of the Libyan Government is a result of differing expectations regarding 'implementation vis-à-vis interpretation'.

During meetings with the CRC in relation to the First Periodic Report, and highlighting the role of the *Convention* in the Libyan legal system, a Libyan government representative stated:

Once ratified, the Convention had acquired the status of domestic law in Libya and was thus binding on all citizens and bodies, both public and private. The provisions of the Convention took precedence over those of domestic law before the Libyan courts.<sup>24</sup>

Another member of the Libyan representation went further, explaining that:

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<sup>22</sup> Eg, 'The Libyan Arab Jamahiriya, in submitting this report, wishes to emphasize that it has consistently championed the protection and enforcement of human rights for every individual, child and adult, male and female, through its fundamental legislation, which draws on the Holy Qur'an as its source of law and the Green Book as its guide': The First Periodic Report, above n 13, [6].

<sup>23</sup> The claim that any court ruling that failed to do so was invalid was an interesting one and a strong statement that reflected the representatives' belief that Libya had fulfilled its obligations. See, eg, Committee on the Rights of the Child, *Summary Record of the 432nd Meeting: Libyan Arab Jamahiriya. 12/01/98* UN Doc CRC/C/SR.432 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.432.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.432.En?Opendocument)> at 18 April 2008.

Mr. Quateen of the Libyan Arab Jamahiriya said there was 'no conflict between the terms of the Convention and those of Libyan domestic legislation: the Convention was law and was enforced accordingly. If a contradiction had existed between the Convention and domestic legislation, Libya would not have chosen to ratify the instrument, even in part' at [51]; and 'while unable to quote specific cases of the Convention being invoked before the Libyan courts. At all events, judges invariably ascertained that the judgements they handed down were compatible with the provisions of the Convention, since they would otherwise be considered null and void': at [54]. See also [35] and [39] (Mr Quateen).

<sup>24</sup> Committee on the Rights of the Child, *Summary Record of the 432nd Meeting: Libyan Arab Jamahiriya. 12/01/98* [35] (Mr Quateen), UN Doc CRC/C/SR.432 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.432.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.432.En?Opendocument)> at 18 April 2008.

There was no contradiction between custom and law because Libyan social laws were based on custom and tradition. Although conflicts might arise in the implementation of legislation, they were never based on the spirit of the law. The Libyan courts endeavoured to use the best legislation available. If the provisions of a domestic law provided better protection than did those of an international instrument, *a Libyan judge would choose to invoke the domestic law*. Children were thus always well protected.<sup>25</sup>

As shown in the above quote, the Libyan representative portrayed the Libyan legal system as a ‘safety net’, able to ensure that the aims and objectives of the *Convention* were met, or even exceeded where domestic legislation provided superior protection.

Although the initial report does not mention the above details, the Libyan representation in their discussions with the CRC tried to show the significance of the values of the *Convention* which are embedded in the Libyan legal system. A Libyan representative went on to say that:

there was no conflict between the terms of the *Convention* and those of Libyan domestic legislation: the *Convention* was law and was enforced accordingly. If a contradiction had existed between the Convention and domestic legislation, Libya would not have chosen to ratify the instrument, even in part.<sup>26</sup>

The spirit of each of the two quotes conforms with the other. Flexibility is allowed in cases where domestic law is to be invoked by a judge when he/she deems necessary if it would give the child better protection. To confirm Libya’s commitment to the *Convention*, the Libyan representative emphasised that any judgement that did not uphold the provisions of the *Convention* would be rejected.

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<sup>25</sup> Ibid [39] (Mr Al Awad) (emphasis added).

<sup>26</sup> Ibid [51] (Mr Quateen).

At all events, judges invariably ascertained that the judgements they handed down were compatible with the provisions of the Convention, since they would otherwise be considered null and void.<sup>27</sup>

The Libyan submission to the CRC was met with many reservations regarding the general ‘best interests’ principle. Some concerns raised by the CRC will be explored, the approach taken by the two parties analysed and observations made on how cultural relativism affected this debate.

### 1.2.2 The CRC’s response to Libya’s First Periodic Report

A number of specific issues were raised in the CRC response, querying the Libyan implementation of the ‘best interests’ principle. One of the CRC’s concerns was the age of the child under the marriage contract under *Legislation 10/1984* and how it appears to conflict with the ‘best interests’ principle. A member of the CRC pressed the Libyan representatives in relation to marriage. An important question raised concerned the reasons for the minimum age of marriage without consent being 20, while the age of majority is 18.<sup>28</sup>

In addressing this question, one needs to understand the influence of Shari’a law on the Libyan legal system, in particular on the age of marriage, where adulthood is defined as the general age of puberty (13–15 years of age). Therefore, in the Libyan legal system three important ages are defined:

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<sup>27</sup> Ibid [54] (Mr Quateen).

<sup>28</sup> Ibid [61] (Mrs Ouedraogo).

- i. 15 years: minimum age of marriage, conditional upon parent/ guardian consent;<sup>29</sup>
- ii. 18 years: general age of majority;<sup>30</sup> and
- iii. 20 years: specific age whereby marriage is not conditional on parent/guardian consent.<sup>31</sup>

As will be discussed later, the sole influence on the definition of these ages is the Islamic culture.

Further, a member of the CRC made an incorrect assumption, that

as the report did not indicate whether or not there was a minimum age of sexual consent but, since it stated that sexual acts with a child under 14 years of age were punishable, the age of consent was presumably 14.<sup>32</sup>

Such an assumption did not consider the minimum age of marriage as mentioned above nor that extra-marital sexual intercourse was a crime in itself under the *Libyan Penal Code*.<sup>33</sup>

In response to the CRC member's remarks, the Libyan representative confirmed that 20 was the minimum age required for an independent contract of marriage while

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<sup>29</sup> *Legislation 10/1984*, art 6(C), *Al-Jarida Al-Rasmiya*, 16/1984.

<sup>30</sup> *Legislation 17/1992*, art 9, *Al-Jarida Al-Rasmiya*, 36/1992.

<sup>31</sup> *Legislation 10/1984*, art 6(B), *Al-Jarida Al-Rasmiya*, 16/1984.

<sup>32</sup> Committee on the Rights of the Child, *Summary Record of the 432nd Meeting: Libyan Arab Jamahiriya. 12/01/98* [62] (Mrs Ouedraogo), UN Doc CRC/C/SR.432 (1998).

<sup>33</sup> *Libyan Penal Code* (1953), art 407: Libyan Government website [Arabic]. <<http://www.aladel.gov.ly/main/modules/sections/item.php?itemid=68>> at 11 August 2009.

between the ages of 15 and 20, marriage could be authorised by a court,<sup>34</sup> in conjunction with parental/guardian consent. It is clearly evident that the court in this situation has final authority to ensure the ‘best interests of the child’ principle is being upheld.

Further, the CRC was concerned to know whether, that if a child were to marry under the age of consent (20 years), that child still have the protection accorded those with the status of minors or would s/he be classed as an adult. For example, in the case of a 16 year old who marries, does she ‘lose her rights as a child?’ Also, does the general consent for this girl (who is below the age of majority) transfer to her husband or will it continue as per the status quo?<sup>35</sup>

The CRC member continued to question

whether the best interests of the child were served in cases where a court was empowered to authorize marriage at an earlier age than 20 years if it deemed such a step beneficial or necessary and the guardian’s approval was secured.<sup>36</sup>

The member here was ‘thinking in particular of the case of a girl who did not wish to marry’.<sup>37</sup>

It must be highlighted at this point that the primary reason for including these concerns raised by CRC in this thesis is to emphasise the cultural influence that

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<sup>34</sup> Committee on the Rights of the Child, *Summary Record of the 432nd Meeting: Libyan Arab Jamahiriya*. 12/01/98 [64] (Mr Quateen), UN Doc CRC/C/SR.432 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.432.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.432.En?Opendocument)> at 18 April 2008.

<sup>35</sup> Ibid [69] (Mrs Mboi).

<sup>36</sup> Ibid [70] (Mrs Mboi).

<sup>37</sup> Ibid.

exists within the Libyan legal system but at the same time highlight the fact that the country's legal system aims for a balance which satisfies both the 'best interests' principle and the expectations of the local culture. This is supported by the Libyan representative who provided the following answers to questions raised earlier:

[A]ny financial and legal consequences of acts by a child under the age of discernment could on no account be imputed to the child. Beyond the age of discernment [7 years of age], the consequences of such acts were legally valid if their effects were beneficial to the child but invalid if they were harmful. The consequences of neutral behaviour could be invalidated by a court in the interests of the child. It was only on reaching the age of majority that a young person was held fully responsible for his or her acts.<sup>38</sup>

And further protections are in place for, as the representative noted,

Marriage at the age of 15 years [does] not confer majority. The legislation relating to the rights of minors applie[s] equally to any married person under the age of majority.<sup>39</sup>

Even though the age of 'adulthood' in Islamic law is defined as puberty (that is, the age of 15 at most), the Libyan legal system through its obligations under the *Convention* has raised the age of majority to 18 years, to provide the protection necessary in 'the best interests of the child'.

Another example of the influence of culture that this thesis wishes to highlight is the topic of a child's right to privacy. In this area of child law, Libya subscribes to a welfare-based approach, where the rights of a child are under the control of the parents. This approach allows parents to supervise their child's right to privacy as

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<sup>38</sup> Ibid [74] (Mr Quateen).

<sup>39</sup> Ibid [75] (Mr Quateen).



this is perceived to be in the child's best interests. Parents practice this under the watch of the courts as it is the courts who ultimately decide whether the parent's actions in such cases were done with the child's best interests as the primary consideration. In this regard the Libyan representative stated that

it was the responsibility of the parents to regulate their children's right to privacy, with due regard to their best interests. Those interests did not necessarily coincide with the child's own wishes, particularly in early childhood, when he or she was lacking in judgement. Even older children still needed guidance, protection, and, occasionally, correction. Consequently, he could not assert that Libyan children were automatically granted complete privacy in their early years. Their privacy was respected, but it had to be subject to some restrictions.<sup>40</sup>

An analogous situation to that of the court is the role of a company owner who employs a manager to run the company's daily affairs. Similarly, the Libyan court watches over the parents who control the child's privacy.

The welfare approach is also employed in relation to decisions concerning a child's education. It is the parents' duty under Libyan legislation to guarantee a child's right to education and make the relevant decisions pertaining to the education of their child.<sup>41</sup>

Furthermore, in cases where parents are separated or divorced, the welfare approach is utilised regarding child maintenance. It is the responsibility of both parents, or guardians, to maintain the child so as to ensure both the education and the protection of that child. The rules and regulations are stipulated in article 62 of *Legislation*

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<sup>40</sup> Committee on the Rights of the Child, *Summary Record of the 434th Meeting: Libyan Arab Jamahiriya*. 13/01/98 [2] (Mr Quateen), UN Doc CRC/C/SR.434 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.434.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.434.En?Opendocument)> at 18 April 2008.

<sup>41</sup> Ibid [4] (Mr Quateen).

10/1984 which ensures that the maintenance of any male child/ren will continue until they reach adulthood, and for any female child/ren until they are married.<sup>42</sup> One may at first consider age discrimination to prevail. However, in this circumstance such ‘discrimination’ is believed to be in the children’s best interests. It is believed that the male child is able to maintain himself once he reaches puberty, yet the female child needs to be maintained until a husband is able to fulfil such duties. This is a reflection of the social values and traditions in Libya.

In a further analysis of the Libyan response, it should be noted that the representatives have defended their own interpretation of the ‘best interests’ principle by highlighting the effects of globalisation. They stated that:

Globalization had given rise to a number of social transformations. The world had, indeed, become an interdependent place, but there was still room for social diversity. Globalization should not constitute a threat to a country’s religious and cultural values.<sup>43</sup>

Although globalisation has made the world into one interconnected village, there must still be room for diversity; differences will always exist. As long as people can take into account these differences, the establishment of globally shared values, such as those included in the *Convention*, can be guaranteed to occur. For this reason, the current *Convention* was established in general terms and with general principles, so that all nations are able to implement the requirements yet not contravene their local culture.

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid [52] (Mr Al Awad).

In relation to the Libyan implementation of the *Convention*, the Chairperson of the CRC stated that

the Committee wished to draw attention to a number of areas of concern including the desirability of establishing a mechanism to assist the various ministries in coordinating the implementation of the *Convention*. The delegation might also wish to review its opinion that a mechanism for addressing children's complaints was not required.<sup>44</sup>

One of the main recommendations of the CRC was to establish a special 'children's code'. The Libyan representative claimed that the Libyan Government had already embedded the *Convention* in domestic (local) law, a point acknowledged by one CRC member, yet the CRC said that this was not enough and that Libya needed to be more specific in relation to laws, rules and regulations and so forth. Therefore, 'A special children's code was needed, even though the *Convention* had been made a part of domestic legislation, and that required additional thought and discussion by the Government.'<sup>45</sup>

In his reply to the CRC, a Libyan representative stated that the Libyan Government did not reject the comments made by the CRC but he added that the implementation would take place through the Libyan understanding of values such as 'the best interests of the child' and it would be implemented in and through the Libyan way of life. Having an assurance – due to an examination of the text of any international agreement – that this general approach is acceptable prior to its signing or ratification is the traditional approach taken by the Libyan legal system. The aim is to ensure transparency in regard to international obligations and local principles. Furthermore,

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<sup>44</sup> Ibid [60] (Miss Mason).

<sup>45</sup> Ibid [67] (Mr Kolosov).

this would ensure that when principles within such agreements were to be implemented, they would be welcomed by the Libyan legislative authority and the Libyan society in general because the principles accorded with their cultural perspectives. This was confirmed by the Libyan representative when he stated that:

there was full agreement concerning the provisions and objectives of the Convention. His country had ratified the instrument precisely because his Government believed in its importance. However, although States must group themselves around internationally accepted principles, it must not be forgotten that different societies espoused different ideas and different religions, and that they could not always see an issue from the same perspective. Objectives could be agreed upon but mechanisms for implementation and coordination should not be imposed. Each country had its own values and customs, and any attempt to make all countries fit into the same mould would inevitably be counter-productive.<sup>46</sup>

The Libyan representative stressed that ‘no legislation or moral principles based on Islam could be changed. Conventions and laws could be modified, but religion could not, since it formed the very foundation of Libyan society’.<sup>47</sup> This point is highlighted by Lopatka:

[T]he universality of the rights of the child does not mean that those rights should be interpreted and implemented abstracted from their context. Due account must also be taken generally of the importance of the traditions and cultural values of each specific people for the protection and harmonious development of the child.<sup>48</sup>

The Chairperson of the CRC was in agreement with what the Libyan representative had explained and stated that:

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<sup>46</sup> Ibid [70] (Mr Quateen).

<sup>47</sup> Ibid [71] (Mr Quateen).

<sup>48</sup> Adam Lopatka, ‘The Rights of the Child are Universal: The Perspective of the UN Convention on the Rights of the Child’ in Michael Freeman and Philip Veerman (eds), *International Studies in Human Rights* (1992) vol 23, 48.

the Convention had been carefully drafted to be applicable to the diversity of the world's religious and legal systems. The Committee thus looked forward to receiving details in the Jamahiriya's second periodic report of its continued commitment to ameliorating the situation of children in the country.<sup>49</sup>

Nevertheless, by the end of the first review, Libya, according to the CRC, had been unable to fulfil its duty to implement the *Convention*, particularly in relation to the concept of 'the best interests of the child'. In its concluding observations the Committee on the Rights of the Child expressed 'its general concern' that the State party did not appear to have 'fully taken into account the provisions of the *Convention*, especially its general principles, as reflected in ... [article] 3 (best interests of the child'.<sup>50</sup> However, not all comments were negative and the CRC was very encouraging in its comments towards Libya continuing its progress regarding children's rights.<sup>51</sup>

### 1.2.3 Libya's Second Periodic Report

Libya submitted its second report to the CRC in 2000.<sup>52</sup> In highlighting its implementation of the 'best interests of the child' principle, Libya stated that:

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<sup>49</sup> Committee on the Rights of the Child, *Summary Record of the 434th Meeting: Libyan Arab Jamahiriya*, 13/01/98 [74] (Miss Mason), UN Doc CRC/C/SR.434 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.434.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.434.En?Opendocument)> at 18 April 2008.

<sup>50</sup> Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, 04/02/1998 [10], UN Doc CRC/C/15/Add.84 (1998) <<http://www.unhchr.ch/tbs/doc.nsf/0/2108c29b83220dab8025659f0052567d?Opendocument>> at 11 August 2009.

<sup>51</sup> Ibid [3], [4].

<sup>52</sup> The Second Periodic Report was due 14 May 2000 and was submitted 8 August 2000 (in Arabic). The consolidated Third and Fourth reports are due to be submitted 20 July 2011, no Third Report having been submitted by the due date of 14 July 2005: Committee on the Rights of the Child, *Submission of Reports by States Parties*, 26/11/2008, Annex 15, 26, 38, UN Doc CRC/C/50/2 (2008) avail <<http://www.un.org/Docs/journal/asp/ws.asp?m=CRC/C/50/2>> at 12 August 2009.

Legislation No. 17 of 1992 regulating the situation of minors and those of equivalent [status] was then promulgated. Article 82 stipulates that: “The most appropriate principles of Islamic law shall apply in matters of guardianship, trusteeship and custodianship in cases where this Legislation makes no special provision.” The Act therefore implements the most appropriate principles of Islamic law in the best interests of the child. The Child Protection Act No. 5 of 1997 provides for the protection and rights of the child, as well as for the consideration of his or her best interests.<sup>53</sup>

The above statement should have been more definitive in relation to Libya’s implementation of the *Convention*. It was by any measure far short of the mark of clearly declaring the finer details of how the ‘best interests’ principle had been implemented in the domestic legal system. Rather than just informing the CRC that the principles had been upheld through the application of Islamic law and the introduction of the *Child Protection Act (No. 5 of 1997)*,<sup>54</sup> the Libyan report should have included specific details of the relevant laws and cases which uphold the principles. Whether or not the local culture and social values will impede the full implementation of the principle will be examined in this thesis.

In its report Libya confirmed that the courts take into consideration ‘the best interests of the child’ in matters of custody and maintenance. The courts do this through

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<sup>53</sup> Committee on the Rights of the Child, *Second Periodic Reports of States Parties due in 2000: Libyan Arab Jamahiriya*, 19/09/2002 [60] UN Doc CRC/C/93/Add.1 (2002) (‘Second Periodic Report’) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.93.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.93.Add.1.En?Opendocument)> at 18 April 2008.

<sup>54</sup> It is the same legislation that is referenced as ‘the Child Protection and Welfare Ordinance’ in the Libya’s First Periodic Report (above n 13, [11]) as well as later under ‘best interests principle’ section (at [50]); and in Libya’s Second Periodic Report as *Child Protection Act (No. 5 of 1997)* (Second Periodic Report, above n 48, [11]).

considering three different rights: the rights of the child, the rights of the parents, and the rights of the extended family.<sup>55</sup> This point will be discussed in Chapter four.

A Libyan representative reaffirmed the role that Shari'a principles play in regards to 'the best interests of the child', particularly in divorce and separation cases. Couples are encouraged to reconcile, but if such an option is not possible, decisions will be made in relation to custody and maintenance.<sup>56</sup> These issues will also be discussed in detail in Chapter four.

#### 1.2.4 The CRC's response to Libya's Second Periodic Report

Similar to its response to Libya's initial report, the CRC found that its concerns were by no means alleviated by Libya's Second Periodic Report:

The Committee regrets that many of the concerns expressed and recommendations (see CRC/C/15/Add.84), made following consideration of the State party's initial report (CRC/C/28/Add.6) have been insufficiently addressed, and notes that many of the same concerns and recommendations appear in the present document. The Committee urges the State party to make every effort to address those recommendations contained in the concluding observations on the initial report that have not yet been implemented and to address the list of concerns contained in the present concluding observations on the second periodic report.<sup>57</sup>

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<sup>55</sup> Committee on the Rights of the Child, *Second Periodic Reports of States Parties due in 2000: Libyan Arab Jamahiriya*, 19/09/2002 [7], [8], [61] UN Doc CRC/C/93/Add.1 (2002) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.93.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.93.Add.1.En?Opendocument)> at 18 April 2008.

<sup>56</sup> Committee on the Rights of the Child, *Summary Record of the 876th Meeting: Libyan Arab Jamahiriya*, 03/07/2003 [11] UN Doc CRC/C/SR.876 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/11e33c8c9db100b2c1256d63005585c1?OpenDocument>> at 18 April 2008.

<sup>57</sup> Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, 04/07/2003 [5]–[6], UN Doc CRC/C/15/Add.209 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/8ea5ea3ba95829a1c1256daa002dbd01?OpenDocument>> at 18 April 2008.

The CRC had a particular concern with the implementation, or lack thereof, of the principle of ‘the best interests of the child’, generally and, more especially, in relation to custody arrangements for children. The Committee stated that:

The Committee is concerned that the general principle of the best interests of the child contained in article 3 of the Convention is not explicitly incorporated in all legislation concerning children and is not always considered in practice. In particular, the Committee is not persuaded that a rigid custodial line of mother, maternal grandmother and father and the exclusion from custodial arrangements of foreign parents outside the State party necessarily give effect to this principle. The Committee recommends that the State party refer to, and fully incorporate in legislation and practice, article 3 of the *Convention*, including in the area of custody of children.<sup>58</sup>

In submitting its list of issues (to be taken up during discussion of Libya’s Second Periodic Report) to the Libyan representatives, the CRC had listed ‘Implementation of the general principles of the *Convention*, such as ... the best interests of the child (article 3)’ as a major issue.<sup>59</sup> In its response to Libya’s Second Periodic Report, the CRC clearly expressed the view that there was a failure on the part of the Libyan Government to implement a number of the principles of the *Convention*, among them ‘the best interests of the child’.

The Libyan Government had continued to claim that this principle is already embedded in the Libyan social values and way of life and consequently in its legislation.<sup>60</sup> It continues to do so. The CRC, however, is looking for concrete

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<sup>58</sup> Ibid [27]–[28].

<sup>59</sup> Committee on the Rights of the Child, *List of Issues: Libyan Arab Jamahiriya*, 07/02/2003 [IV.1], UN Doc CRC/C/Q/LBY/2 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/c020e2d72cf43249c1256ce9005a9d1f?OpenDocument>> at 18 April 2008.

<sup>60</sup> See, eg, ‘Libyan court rulings abound in principles designed to achieve justice for children. They also apply the principles and provisions of the Convention, particularly in custody and maintenance cases, as well as the principles of Shari’ah law, numerous provisions of which are



evidence that this is part of legislation and that the principles are being put into place by the Government and relevant governmental bodies. According to the CRC, Libya has not been able to clearly show them that it has fulfilled its duty in implementing this principle.

The CRC looks to governments to provide evidence of implementation, for cases which demonstrate that the best interests of children are considered in policy formulation. It has consequently promoted the concept of child impact assessment.<sup>61</sup> In this thesis, cases from the Libyan High Court (LHC) will be analysed to discuss to what degree the Libyan legal system has applied this concept.

Hodgkin and Newell provide details of how a state is able to incorporate and implement this value at a local and national level:

the Committee on the Rights of the Child has emphasized that consideration of the best interests of the child should be built into national plans and policies for children and into the working of parliaments and government, nationally and locally, including, in particular, in relation to budgeting and allocation of resources at all levels. The assessment of child impact and building the results into the development of law, policy and practice thus become an obligation.<sup>62</sup>

It can be argued that the dialogue between the Libyan representatives and the CRC members illustrates that the *implementation* of the concept was not the issue, but

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replicated in the Convention. Such rulings, however, are not governed by the provision or form of the articles in the Convention but by their substance, as prescribed by the Islamic Shari'ah, the Civil Code and local legislation, with which the Convention is in keeping: Committee on the Rights of the Child, *Second Periodic Reports of States Parties due in 2000: Libyan Arab Jamahiriya*. 19/09/2002 [7] UN Doc CRC/C/93/Add.1 (2002) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.93.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.93.Add.1.En?Opendocument)> at 18 April 2008.

<sup>61</sup> Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (2002) 44.

<sup>62</sup> Ibid 42.

rather the *interpretation* of the concept and its application into domestic law. The CRC clearly emphasised that ‘the best interests of the child’ must be embedded in the Libyan legal system and concluded that Libya did not provide any evidence as such. The Libyan representatives disagreed with this, and expressed their appreciation of the ‘best interests’ principle. However, they claimed that the principle has already been included in their legal system but that the differences lay in the interpretation of this principle. They clarified this view by claiming that the principle has been interpreted through their own culture which is based on Islamic law.<sup>63</sup>

Therefore, the dialogue between two parties has resulted in two different answers to two different questions. The CRC’s focus is on ‘where’ the Libyan Government has implemented its obligation regarding the ‘best interests’ concept. In the case of the Libyan response, their focus was on ‘how’ they implemented this concept. This was clearly expressed as being moulded by the nation’s cultural background, hence by Islamic law. By selecting cases related to custodianship and guardianship in Libyan law and practice, this thesis will address these concerns accordingly. It will clarify the matter as to ‘where’ or ‘how’ to implement ‘the best interests of the child’ in the context of guardianship and custodianship.

In response to the CRC’s remarks and reservations expressed in regard to both the First and Second Periodic Reports, this thesis will examine the ‘best interests of the child’ concept in respect to how Libya implements it, and will examine Libya’s attempts to fulfil its obligations under CROC through its local culture, which is

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<sup>63</sup> Committee on the Rights of the Child, *Summary Record of the 434th Meeting: Libyan Arab Jamahiriya*. 13/01/98 [70] (Mr Quateen), UN Doc CRC/C/SR.434 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.434.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.434.En?Opendocument)> at 18 April 2008.

derived from a mix of Islamic, Arab, North African and tribal influences. By the conclusion of this thesis, an attempt will be made to bridge the divide between the views presented by the CRC and the Libyan Government.

In its concluding observations and comments on the Second Periodic Report, the Committee did welcome the establishment of the Higher Committee for Children (1997), the adoption of the *Child Protection Act (Legislation 5/1997)*<sup>64</sup>, achievements in the areas of education (for example, raising enrolment and literacy rates) and health, and the establishment in March 2002 of a Secretariat for Legal Affairs and Human Rights.<sup>65</sup> The Secretariat monitors and investigates violations of children's rights to ensure respect for human rights in public and private life.

Despite these and other positive comments, the CRC expressed two major concerns with Libya's submission. The first is that the Libyan legal system was mainly concerned with a welfare-based, rather than a rights-based, approach. The failure of Libyan legislation, especially *Legislation (10/1984)*, to sufficiently reflect 'the best interests of the child' was the second major concern expressed by the CRC.<sup>66</sup>

Although there were many valuable and important comments from the CRC to the Libyan Government regarding children's rights, this thesis focuses on only one concept mentioned, that is, 'the best interests of the child'. This is not in any way disregarding other points made. Rather, there needed to be a limit to this research,

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<sup>64</sup> See: Libyan Government website [Arabic]: <<http://www.aladel.gov.ly/main/modules/sections/item.php?itemid=95>> at 11 August 2009.

<sup>65</sup> Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, 04/07/2003 [3], [7], [13] and [39] UN Doc CRC/C/15/Add.209 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/8ea5ea3ba95829a1c1256daa002dbd01?OpenDocument>> at 18 April 2008.

<sup>66</sup> Ibid [7], [8].

and by focusing on one topic, a more in-depth discussion can occur and all points regarding this topic can be covered thoroughly. Even though it may seem that this concept is small, it carries great significance. When it comes to how to interpret it in any legal system or how to interpret it in any court, it is not an easy task and needs to be clearly discussed, especially when other factors such as local cultures and existing international and domestic laws also affect the situation.

The CRC in one of its comments remarked ‘that the general principle of the best interests of the child contained in article 3 of the *Convention* is not explicitly incorporated in all legislation concerning children and is not always considered in *practice*’.<sup>67</sup> In response to this comment by CRC, this thesis will select a number of cases in order to discuss to what extent the LHC has applied this principle.

For example, one of the cases adjudicated by the LHC will specifically address the concern outlined by the following CRC comment. ‘In particular, the Committee is not persuaded that a rigid *custodial line of mother, maternal grandmother and father and the exclusion from custodial arrangements of foreign parents outside the State party* necessarily give effect to this principle’.<sup>68</sup>

Therefore, ‘the Committee recommends that the State party refer to, and fully incorporate in *legislation and practice*, article 3 of the *Convention*, including in the area of *custody of children*’.<sup>69</sup> From this invaluable recommendation, the general concept known as ‘the best interest of the child’ has now become a significant area in Libyan legislation, particularly *Legislation 10/1984*, which this thesis will research

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<sup>67</sup> Ibid [27] (emphasis added).

<sup>68</sup> Ibid (emphasis added).

<sup>69</sup> Ibid [28] (emphasis added).

and hence critically analyse. Also, this thesis will focus on one major area defined under the ‘best interests’ concept: custodianship and guardianship. In arguing how the concept of ‘the best interests of the child’ is to be applied in relation to this area, the following issues will be discussed in detail:

- i. the definition of ‘the child’
- ii. the nature of the ‘right of guardianship’
- iii. the hierarchical structure of guardianship
- iv. the effects where religious difference exists between a guardian and the child
- v. the conditions of guardianship
- vi. the conditions for the loss of guardianship
- vii. the duration of custody
- viii. the right of a non-custodian to gain access to the child
- ix. maintenance.

Taking this approach will eventually contribute to legal knowledge in Libya and the improvement of the Libyan legal system.

### **1.3 The project**

The guardianship jurisdiction within the Libyan legal system is shaped by two main factors: the pre-existing Islamic law as a societal or cultural background and the international obligations as a consequence of being a State party to CROC. By exploring the Islamic legal system in its approach to the ‘best interests’ concept, particularly in relation to existing legislation and LHC interpretations, this project

aims to illustrate how cultural background affects the translation of international human rights into domestic legal systems.

The approach taken will be to initially analyse CROC and then Islamic law. A detailed study will be conducted on Islamic jurisprudence by referring to the relevant verses of the Holy *Qur'an* and *Hadith*<sup>70</sup> which relate to children in disadvantaged and underprivileged situations to illustrate the attitude of Islamic law toward the 'best interests' principle. Finally, Libyan law will be the focus of analysis with particular reference to the *Law of Marriage and Divorce Rules and their Effects (10/1984)*, where it relates to the guardianship and custodianship of children. The analysis will be further supported by evidence of the attitudes held by the LHC as demonstrated by its approach to Libyan domestic legislation affecting children. LHC decisions provide the official interpretation of Libyan legislation because of its decreed authority. In *Legislation (6/1982)*, regarding the LHC, article 31 stipulates that 'all legal doctrines decided by the High Court and its judgements will be obligatory for all courts and administrations in Libya to follow'. This article makes all High Court decisions binding on all lower courts and agencies. Comments on their implications for child rights will also be used as supportive material in the argument of this thesis.

One of the main aims of this study is that it should be accessed and used as a resource to reform legislation on the rights of children within the Libyan legal system. Therefore, this thesis will place the substantive provisions of CROC within a cultural/religious framework. Undertaking an assessment of domestic and

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<sup>70</sup> Hadith (sing) / Ahadith: (pl): records of the Sayings of the Prophet (PBUH). These are a complementary source of law in Islam.

international law in the light of Islamic law highlights the differences between general international concepts (for example, CROC) and local interpretation as applied to specific cases. Thus, a solution can be attained in order to implement on a domestic basis the international standard of the child's best interests. The study focuses on decisions regarding custody and guardianship within *Legislation 10/1984*. These matters will be relied upon and will be used as a benchmark of how laws are implemented practically and how legal culture affects court trends in cases related to children.

#### **1.4 Scope and limitation of the study**

This research will focus on three levels of law:

- International human rights law limited to international child law (the *Convention on the Rights of the Child* (CROC));
- Islamic law (Shari'a) through its primary and secondary sources focusing on the *Malikiyah* school of thought (*Mathhab*) as this is officially adopted in Libyan society; and
- Libyan law regarding guardianship and custodianship jurisdiction, the *Law of Marriage and Divorce Rules and their Effects* (10/1984) and its official interpretation by the LHC.

This thesis will evaluate the High Court's interpretation of cases relating to guardianship, focusing on the conditions imposed in such cases. Such aspects include: when and how the guardian loses custody or guardianship; the duration of guardianship; who will pay the child's living expenses; the special needs of a new

born baby; the court's responsibility regarding the guardianship; the rights of a non-Muslim guardian; and, finally, travelling abroad with the child. That is, it will cover all matters affecting 'the best interests of the child' in relation to the guardianship and custodianship of the child. By covering these points, this thesis will endeavour to answer one of the questions posed by the CRC: 'How does the Libyan legal system apply the "best interests" principle when handing down decisions in guardianship and custodianship matters?' These cases will be discussed, as the CRC requested of the Libyan representatives, in the context of law and practice, with the aim of attempting to address the crux of the debate: *Is the cause of the argument an implementation or interpretation matter?*

## **1.5 The research problem**

Libya's interpretation of the rights of the child present particular challenges and difficulties. It requires respect for local norms and cultures when applying external obligations. In Libya there are Islamic guidelines which society generally follows. For example, under Islamic law the adoption of children, as understood in the West, is prohibited.<sup>71</sup> Children born of circumstances other than a recognised marriage (as well as orphans and foundlings) may become part of, and are dealt with by, a different system called *Kafalah* ('fostering'). *Kafalah* is when a family, who is not the child's immediate biological family, can raise a child by fulfilling their needs.

However the rights of this child in the new found family are limited when it comes to inheritance or adopting the family name. The use of the biological father's family name is compulsory for legitimate children (those begotten of a recognised

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<sup>71</sup> Based on the Holy Qur'an 33:4–6.



marriage). Hence the legitimate child is always aware of their true family name. This does not mean that Islamic and Libyan law refuse to acknowledge illegitimate children, but only that they are not recognised by the use of their biological father's family name. Other arrangements are in place for the naming of such children. Nor are their rights of inheritance the same.

Examples of children who may be cared for by other than their immediate biological family include an orphan, a relative and an illegitimate child. Article 20(3) of CROC takes into consideration this alternative Islamic system of *Kafalah* as another option for taking care of homeless children. This was the result of Islamic countries participating and preparing the draft for CROC. Recognition of cultural differences can be found also in article 5 of CROC which states that:

State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by *local custom*, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.<sup>72</sup>

The two articles mentioned confirm that CROC contains an unambiguous recognition of local influences when State parties implement the *Convention*. Unfortunately, these two articles were not even mentioned during the debate conducted between the CRC and Libyan government representatives over the Second Periodic Report.

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<sup>72</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 5 (entered into force 2 September 1990) (emphasis added).

It can be stated that the child's best interests are served by policies that emphasise autonomy and individuality to the greatest possible extent. In the Libyan culture, the links to family and the local community are considered to be of paramount importance and the principle that 'the best interests of the child' shall prevail will therefore be interpreted as requiring the sublimation of the individual child's preferences to the interests of the family or even the extended family.

Libya is a State party to CROC and upholds the Islamic interpretation advocated by the *Malikiyah Mathhab*. Thus, any legislation introduced must take into account any current applicable principles as understood by the *Malikiyah Mathhab*. International child law was introduced in Libya as part of its *own* legal system and therefore must be understood accordingly.

International child law principles can be understood in light of the child's culture. It may raise the cultural relativity banner to argue that universal child rights as expressed in the *Convention* are Eurocentric. However, it is important to examine the concept of 'the best interests of the child' in terms of the concept of 'cultural relativity', as it may impact children's rights and their protection afforded under international child law. As Goran *et al* stated: 'Two judges may have totally different ideas of what is actually in "the best interests of the child" in certain cases. This could have to do with their values and attitudes, but it could also depend on coincidence or prejudice'.<sup>73</sup> Therefore, the research will also focus on the relevance of cultural relativism to human rights, and in particular to children's rights.

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<sup>73</sup> Göran Lambertz, Anita Wickström and Patrik Örnsveld, *The Best Interests of the Child - Some Remarks from the Legislator's Point of View*, 4 <<http://www.familylawweb>

## 1.6 Relationship to the existing literature

This thesis acknowledges the contributions of other valuable work while claiming its originality with regards to its particular topic. One of the key elements missing from the literature is a combined analysis of the three types of legal systems: the international, Islamic, and Libyan legal system.

- **Wahba Al-Zohaily, *ḥuquq al-aṭfal wa al-musiniyyin*, 2002<sup>74</sup>**

This book focuses on the rights of children and elderly people in Islamic law. It is a good source of information about child rights in Islamic law and how the interests of the children have been taken as a primary consideration. The author is a professor and head of the Department of Islamic Fiqh (jurisprudence) and its schools at Dimashq (Damascus) University, Syria. The author's expertise in Islamic law is well presented in this book. He gives a clear and concise representation of the way Islamic law deals with human rights in general, but his detailed discussion which groups children and the elderly together made this volume a poor resource in this particular area. It seems the author's wisdom behind this grouping is to focus in detail on two of the most vulnerable groups in society, and how Islam aims to address their vulnerabilities. Since the focus was not on children alone, this text was used for nothing more than expanding the discussions that have been made on children's rights.

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guide.com.au/library/spca/docs/Best%20Interests%20Of%20The%20Child%20-%20From%20the%20Legislators%20view.pdf> at 11 January 2009.

<sup>74</sup> Wahba Al-Zohaily, *ḥuquq al-aṭfal wa al-musiniyyin* (2002).

- **Fatḥma Zydan, *Markaz alṭifl fīy alqanwn aldawly al'am*, 2004<sup>75</sup>**

Originally this book was a PhD thesis submitted to the Faculty of Law at Al-Eskandareya (Alexandria) University, Egypt. The topic of this thesis was broad. It discusses every article of CROC and its optional protocols. That this thesis went through all the issues relating to the rights of the child within 436 pages implies it did not involve critical analysis, and hence its contribution to the field is minor and reference to it in this thesis is rare. The thesis will only focus on one concept mentioned in CROC, allowing for detailed analysis. Nevertheless, Zydan's work played a very good role in the beginning of this thesis by providing information related to children's rights in the Arab World.

- **Al-ḥusayni Abdual-majid Hashim *et al*, *Almanhaj Alislamy fīy re'ayat Al-ṭifula*, 1985<sup>76</sup>**

This research was conducted by a special committee from Al-Azhar Islamic University in Egypt and a coordinator from UNICEF. This study focuses on the Islamic approach to child care. The importance of this study is that it was meant to be a source of Islamic perspectives of CROC during the drafting of the *Convention*. UNICEF secretary, Mr Lanret, had made a special request to the Shaykh (President) of Al-Azhar Islamic University to establish a Working Group to prepare this study. It covers all topics related to child care in Islam, even covering details related to the care of the child before it is born. Because it was not prepared

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<sup>75</sup> Fatḥma Zydan, *Markaz alṭifl fīy alqanwn aldawly al'am* (2004).

<sup>76</sup> Sa'd Abdulmaqsūd Zlam, Al-ḥusayni Abdual-majid Hashim, Abdulmu'z Al-jzaʿ, Muḥammad Abdul'alyḥ Husayn, Mahdy Abdul-hamyd and Shūbhi Mahram, *Almanhaj Alislamy fīy re'ayat Al-ṭifula* [Child Care in Islam] (1985).

as an academic study but rather as material to be used by the media, it is seen as being too general and without any significant analysis. Within 36 pages, under 5 headings and 37 subheadings, it explains the child's rights in Islam in a very superficial manner.

- **Shaheen Sardar Ali and Baela Jamil *The United Nations Convention on the Rights of the Child, Islamic Law and Pakistan Legislation: a Comparative Study*, 1994<sup>77</sup>**

This book was written as a comparative study of CROC, Islamic and Pakistani law. It is 'argued that although the language and construction of the CR[O]C may come across as a western or alien notion, yet on closer analysis we see negligible disparity between the Islamic concepts on the subject and those espoused in the CR[O]C'.<sup>78</sup>

Ali and Jamil further claim that 'Political expediency has dictated stands on human rights law such as rights of the child and States Parties invariably tend to hide behind religion and culture to cover up their inadequacies and lack of commitment'.<sup>79</sup> This study went through CROC article by article with three columns per page: one for CROC, the second for Pakistani law and the third showing the position of Islamic law. Although this method was easy to understand, clearly showing the differences and similarities, and embodied a more practical approach, this thesis does not adopt this approach. This thesis is meant to be more argumentative than descriptive, with the argument being built from the introductory chapter until the final one based on

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<sup>77</sup> Shaheen Sardar Ali and Baela Jamil, *The United Nations Convention on the Rights of the Child, Islamic Law and Pakistan Legislation: A comparative study* (1994).

<sup>78</sup> Ibid 4.

<sup>79</sup> Ibid.

the claim that the interpretation of international human rights in a domestic legal system will be affected by local cultures. The main difference between this thesis and the Ali and Jamil study is that the latter was conducted during the early stage of CROC and needed to be more general. On the other hand, this thesis concentrates on a very specific issue which is the concept of ‘the best interests of the child’. Another difference is that although Libya and Pakistan are both Islamic countries, they still have differences in terms of how they apply their culture. Libya and Pakistan are two nations which are located on different continents, the people are ethnically different and so is the Islamic *Mathhab* to which each population subscribes.

This thesis shares with Ali and Jamil’s conclusion that ‘practically no provision of the CR[O]C comes in direct conflict with any of the major precepts of Islam, barring the matter of adoption for which an appropriate provision has already been made in the CR[O]C’.<sup>80</sup> No doubt this thesis has benefited from the Ali and Jamil study and it is seen as a continuation from that. It is hoped that the work presented here will also be considered in the same chain of studies.

- **Abdullahi An-Na’im, *Islamic Family Law in a Changing World: A Global Resource Book*, 2002,<sup>81</sup> and ‘Cultural Transformation and Normative Consensus on ‘the Best Interests of the Child, 1994<sup>82</sup>**

An-Na’im’s work played a very significant role in this research, particularly his article ‘Culture Transformation and Normative Consensus on the Best Interests of the

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<sup>80</sup> Ibid 168.

<sup>81</sup> Abdullahi A An-Na’im, *Islamic Family Law in a Changing World: A Global Resource Book* (2002).

<sup>82</sup> Abdullahi Ahmed An-Nai’m, ‘Cultural Transformation and Normative Consensus on the Best Interests of the Child’ (1994) 8 *International Journal of Law and the Family* 62, 63.

Child'. In this article, after he mentions the content of article 19.1 (protection from physical or mental violence), article 28.2 (child's human dignity) and article 37.A (torture or other cruel, inhuman or degrading treatment or punishment), he asks:

How should these "universal norms" be interpreted and implemented in relation to certain types of corporal punishment which are routinely used by parents and school teachers in many parts of the world, with the complete approval of their local cultures?<sup>83</sup>

He states that

[t]his sort of tension between the requirements of contextual diversity and cultural specificity, on the one hand, and the dangers of normative ambiguity or confusion, on the other, is inherent to any project which purports to set truly universal norms, especially in relation to a subject like the rights of the child.<sup>84</sup>

He came to the conclusion that:

1. Translating internationally recognised human rights in the proper cultural context is of paramount importance. Similarly, an imposition of specific definitions on principles such as 'the best interests of the child' should not lead to normative indecision and confusion.<sup>85</sup>
2. Characterised by internal diversity and the ability to change through mutual influence, cultures can be used to 'promote normative consensus through a process of cultural transformation'.<sup>86</sup>

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

3. Definitions agreed upon for principles such as ‘the best interests of the child’ should not be perceived as carved in stone, but rather should be the focal point of ‘continual refinement and reformulation through internal discourse and cross-cultural dialogue’.<sup>87</sup>
4. The belief that through a re-iterative process of discourse and dialogue, agreed procedures will naturally be refined resulting in ‘a substantive common standard or level of achievement in relation to the best interests of the child without violating the integrity of local cultures or encroaching upon the sovereignty of the various peoples of the world’.<sup>88</sup>
5. Regardless of national agendas, participants all share the common goal of attaining international consensus in relation to the ‘best interests of the child’ principle.<sup>89</sup>

Although this thesis acknowledges the significance of the role of An-Na'im's work regarding its general principles on how human rights can be affected by local cultures, originality is still claimed for the investigation of a specific type of human rights principle, that of ‘the best interests of the child’ in relation to guardianship and custodianship jurisdiction, and its specific case study, the *Law of Marriage and Divorce Rules and their Effects*(10/1984). An-Na'im's work gives an idea of the general framework of this thesis but does not deal with the details of how Libyan law interpreted its international obligations through its local culture. Covering these details is the aim of this thesis.

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<sup>87</sup> Ibid 64.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.



- ‘Abdul’aziz ‘Abdulhadyi, *Huquq al-tifl bayna al-shari’a alislamiyah wa al-qanun al-wad’i dirasah muqaranah*, 1997<sup>90</sup>

This book is a comparative study of Islamic and international law dealing with the rights of the child. The author discusses many aspects of child rights in Islamic and international law to prove that those two systems have many points in common and share many perspectives. For instance, in the fourth chapter the author discusses the child’s rights after their birth in Islamic and international law. One of these rights is the right of guardianship which is common to both systems.

This thesis shares with the author of the book the view that the two legal systems work frequently together to provide for ‘the best interests of the child’, particularly in the guardianship jurisdiction, by taking into account different attitudes and perspectives. This book does not have the specific focus of the current study, which will discuss in detail the ‘best interests’ concept.

- ‘Abdusalam Al-‘alim, *Alzawaj wa Al-talaq fiy Al-qanwn Al-liybiy wa Asaniduhu Al-shar’ia*, 1998<sup>91</sup>

This book deals with the *Law of Marriage and Divorce Rules and their Effects* (10/1984). It is used as a text book by Libyan law students and researchers. This book played an important role in relation to its topic area for this thesis; especially useful was the final chapter which lists results after divorce. Here the author argues

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<sup>90</sup> ‘Abdul’aziz ‘Abdulhadyi, *Huquq al-tifl bayna al-shari’a alislamiyah wa al-qanun al-wad’i dirasah muqaranah* (1997).

<sup>91</sup> ‘Abdusalam Al-‘alim, *Alzawaj wa Al-talaq fiy Al-Qanun Al-Liybiy wa Asaniduhu Al-shar’ia* (3<sup>rd</sup> ed, 1998).

about the waiting period following divorce where the divorced woman has to wait to re-marry. The author then moves to children's rights which are one of the most important rights in relation to guardianship. It discusses in detail the right of guardianship, the hierarchy of guardians, cases relating to religious differences between guardian and child, and the expenses of guardianship. Within 40 pages of this book, the topic of guardianship is discussed. Meant to be used by university students and not for detailed research such as a PhD, it is nevertheless important and valuable in its topic area and has been used to evaluate the Libyan legal system and its interpretation of the guardianship of the child.

### **1.7 The significance of the research**

The aim of this thesis is to assess whether the LHC, in its handling of guardianship matters, is acting in accordance with Libya's obligations under CROC. The effectiveness of CROC in the Libyan legal systems will be examined and evaluated in detail to determine whether guardianship decisions are being made in accordance with the child's best interests. Examining the LHC's guardianship jurisdiction involves a review of the rights of parents, grandparents and others. This research will concentrate on the issue of parental guardianship. In other words, it will focus on the possible conflict between parental responsibility and children's rights in terms of the 'best interests' principle outlined by CROC, as interpreted by the Libyan courts. This thesis will identify whether changes may be needed to Legislation 10/1984 to enable Libya to meet its international obligations.

By focusing on the LHC's handling of guardianship cases, this thesis aims to enhance understanding of the relationship between international human rights law, Islamic law and domestic law.

This thesis will make an original contribution to the literature on the concept of 'the best interests of the child' as an international norm and as a reference point for domestic decision-making.

It will assist Libyan legislators to implement their international obligations under CROC in domestic law and help the Committee on the Rights of the Child (CRC) to understand the approach of Islamic countries (and of Libya in particular) in their fulfilment of international obligations in a manner that is culturally appropriate.

The findings of this study will also be of value in other Islamic countries that face the challenge of how best to implement their international obligations in a manner consistent with their cultural values.

This thesis will show that the concept of 'the best interest of the child' has long been implemented in Islamic countries and not only in the West. The principle of 'the best interests of the child' lies in the heart of all cultures. At the same time legitimate differences arise in the implementation of these principles.

## **1.8 Research questions**

1.8.1 The primary research question explored in this thesis is:

How is the international human rights concept of ‘the best interests of the child’ implemented in the Libyan legal system?

1.8.2 The sub-questions are:

- What does the concept of ‘the best interests of the child’ mean under International law, Islamic law and Libya’s Legislation 10/1984?
- By what means should the concept of ‘the best interests of the child’ be transferred from CROC to Libyan domestic law?
- Where does responsibility for authoritative interpretation of this elusive provision fall?
- How does the signing and ratifying of treaties affect Libyan domestic law?
- How do Libyan authorities implement Libya’s international obligation under CROC?
- What are the respective roles of international and national bodies when it comes to implementing the doctrine of ‘the best interests of the child’?
- How can we understand the inclusion of principles of international law in domestic law in terms of the universality of human rights and ‘cultural relativism’?

- What are the implications of the ‘best interests of the child’ principle for parents, and societal and state authorities, and in relation to the rights of parents?

## 1.9 Research methodology

This research will adopt a qualitative approach. Qualitative research as described by Creswell is

fundamentally interpretive. This means that the researcher makes an interpretation of the data. This includes developing a description of an individual or setting, analysing data for themes or categories, and finally making an interpretation or drawing conclusions about its meaning personally and theoretically, stating the lessons learned, and offering further questions to be asked.<sup>92</sup>

The main data that will be interpreted is the over 60 cases that were presented to the LHC between 1971 and 2001. These cases all relate to guardianship matters. The nominated period for the selection of cases is significant for this research because it identifies with the post Libyan Revolution era which resulted in the introduction of Islamic law as the foundation of the Libyan legal system.<sup>93</sup>

Other data on which this research will focus include documents provided by the United Nations. The main focus of this thesis is the *Convention* on the Rights of the Child (CROC). Therefore, the document specifying the details of the *Convention* supplies a solid foundation as a reference for this thesis.

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<sup>92</sup> John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (2<sup>nd</sup> ed, 2003) 182.

<sup>93</sup> Legislation 10/1984, *Al-Jarida Al-Rasmiya*, 16/1984.

Correspondence created by the Libyan Government through its periodic reporting obligations, responses made by the CRC, and all other dialogue sessions between the two parties contribute strongly to this thesis as an important source of reference.

Literature provided on Islamic law comprises predominantly primary source material. The Holy *Qur'an* and the *Ahadith*<sup>94</sup> are the prevailing texts of Islam. In addition, texts from other sources (including widely renowned scholars) provide a source for modern day interpretation of Islamic law.

Legislation 10/1984 is the primary focus when analysing the Libyan legal system in this thesis. Independent analysis of this law has been conducted by a number of contemporary Libyan scholars – their work is frequently referenced in this research. It must be emphasised that since the Libyan legal system with respect to guardianship matters has been founded on the *Malikiyah Mathhab*, these scholars have been selected because of their adherence to the same Mathhab.

## **1. 10 Thesis statement**

The interpretation of international human rights in domestic legal systems will inevitably, understandably and legitimately be affected by local cultures. This process of ‘translation’ is evident in the approach that Libya has taken to implementing ‘the best interests of the child’, where the influence of Islamic law is also apparent.

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<sup>94</sup> See n 66 above.

## 1. 11 Chapter outline

Following this introductory chapter, this thesis contains a further four chapters. Chapter Two focuses on international child law. It examines the history of international child rights, including the movement from the welfare approach to the rights approach. Furthermore, it considers the relevance of the concept of cultural relativism for the implementation of human rights in general and children's rights in particular.

Chapter Three explores Islamic law in relation to guardianship. It considers the relationship between applicable Islamic legal principles and the concept of 'the best interests of the child', including how and when is it implemented, and who is responsible for ensuring the implementation of this doctrine. Also, the differences between various Islamic schools of thought are investigated and explained, as relevant to this thesis. Furthermore, *Hadith* and Holy *Qur'anic* verses are included to highlight the approach and basis of Islamic law, its roots, its foundation, and its underlying logic. The chapter looks at the way Islam has observed the rights and 'the best interests of the child' for centuries and how such a concept is applied today. This chapter also examines the rights of the parents and extended family when it comes to issues of guardianship, and how this affects 'the best interests of the child'. This is necessary because it is believed that the child is essentially a member of a family. Hence, the child's rights need to be understood and implemented in light of the rights of their family, not only with reference to the child's rights as an individual.

Chapter Four examines the approach that the Libyan legal system has taken to the rights of children. Following an introduction to the Libyan political and legal system, the chapter analyses all aspects of the guardianship jurisdiction under the Libyan Legislation 10/1984. LHC decisions regarding ‘the best interests of the child’ are examined. This chapter also investigates the rights of the parents, and the relationships between them and their respective families, and the hierarchical order of guardian preferences. Furthermore, solutions that are in place to resolve conflicts of rights are assessed. Most importantly, the influence of Islamic law (specifically, that of the *Malikiyah Mathhab*) on the Libyan legal system, including its affect on the law in general as well as specific court decisions, is examined.

The final chapter (Chapter Five) presents the major findings of this thesis on the central question of how the domestic implementation of international human rights law with respect to children is shaped by local culture as revealed by the study of the Libyan guardianship jurisdiction.



## **2 THE ‘BEST INTERESTS OF THE CHILD’ UNDER INTERNATIONAL CHILD LAW**

As the title suggests, this chapter will detail ‘the best interests of the child’ under international law. To achieve this, one needs to understand how this concept came to fruition. An historical overview will initially be the focal point of this chapter. Detailing the development of international child rights over time will generate a balanced historical context of international child law which will be used as a strong foundation for this research.

Today, international child law has been reconfigured in the form of the *Convention on the Rights of the Child* (CROC). Under this *Convention*, State parties are obliged to ensure that the rights of children are protected. The Committee on the Rights of the Child (CRC), set up by the *Convention*, has been provided with the powers under the *Convention* to ensure State parties are made fully aware of their shortcomings with respect to local implementation of their obligations as outlined by CROC.

An analysis of the special provisions incorporated in CROC will be undertaken. In this part of the chapter, the general manner in which CROC has been worded will be examined. CROC’s generality results from an appreciation (expressed in the *Convention*) that such international law cannot be interpreted and subsequently implemented in a uniform manner. CROC has been drafted so as to ensure that State parties are not disadvantaged, nor coerced in any way to undermine their local cultures when upholding their obligations.

Finally, the ‘interests of the child’, in the context of international child law and as a discrete principle, will be examined. Scrutiny of this principle will be detailed, given

its importance to this thesis. The necessary emphasis will be placed on the main considerations as detailed in the ‘best interests’ principle. Detailing the priorities of the principle as set out under CROC will allow the reader to appreciate the *Convention*’s priorities.

## **2.1 Historical overview of international child law**

### **2.1.1 Development of the ‘best interests of the child’ principle**

Child rights as a notion can be traced to colonial times. They have come to fruition because of the realisation and appreciation by the Western world that such a vulnerable segment of society required protection.<sup>95</sup> This phenomenon resulted in the legitimisation, and consequently the liberalisation, of children’s rights.

Initially, governments took a ‘back seat’ approach to children’s rights. Governments emphasised that adults (and parents in particular) have the best interests of children at heart and aimed to adopt the *laissez-faire* attitude towards the family.<sup>96</sup> In this approach, the government or ruling authority gave the parents/guardians full responsibility as to how a child should be treated. The concept of children’s rights developed and the minimalist approach gave way to a slightly more interactive approach: the state would provide guiding principles as to the type of environment in which children should live and, if these conditions were not fulfilled, then the state had the right to remove a child from that environment. Such rights hovered around

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<sup>95</sup> Michael D A Freeman, ‘The Limits of Children’s Rights’ in Freeman and Veerman, (eds), *The Ideologies of Children’s Rights* (1992) 29.

<sup>96</sup> Ibid

the area of lifestyle and abuse. The state had made itself judge, jury and executioner in relation to proper parenting.

Freeman states that:

the children's rights movement, in some shape or form, has been with us for a century or more. An article with the title "*the rights of children*" appeared as early as June 1852. In France Jean Valles attempted to establish a league for the protection of the rights of children in the aftermath of the Paris Commune.<sup>97</sup>

In this early era of appreciating children's rights, the onus was placed on the parents to protect children. Post WWII came the legitimisation of rights, beginning an era which is still present today. Since the 1959 *Declaration of the Rights of the Child*, children were beginning to be viewed not as objects of any entity (that is, of the family) but rather as subjects who have their own individual rights. Under these rights, it was necessary for children's needs to be provided for not because of any obligation imposed on the carer but as a result of the attribution of rights to the child.

Much debate took place in the Working Group drafting the *Convention* on the Rights of the Child. Proposals were made that the *Convention* should refer to the child's best interests as 'the primary consideration'. This would mean that in a given case where there are parties other than the child involved, their interests would be a part of a

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<sup>97</sup> Ibid.

court's considerations. The child's interests must be considered in conjunction with all the other interests.<sup>98</sup>

Today, in what some have termed a 'liberation of rights',<sup>99</sup> a society within a society has been created. This sub-set of the community, that is children, with their own individual rights have been aggregated by the agreed *Convention* on the Rights of the Child. Through this *Convention*, children as special group, regardless of colour or creed have been given rights under which they can seek protection from abuse, whether it be physical or mental,<sup>100</sup> without the need for parent or carer consent.

Through the eyes of Western culture, this 'liberation of rights' has been perceived as the ideal foundation for true recognition of children's rights. Children, therefore, are no longer to be viewed as atoms in the family but rather a discrete entity. Some authors have questioned whether this development is compatible with Islam. Adda Bozeman, for instance, concludes that:

Islamic culture is not guided by notions of right or principle, as the West understands them. Instead, Islamic culture is characterized by the governance of personalism and pragmatism, where ruling authority is illegitimate and coercive almost by definition.<sup>101</sup>

Similarly, Max Stackhouse, author of a recent study on human rights in three cultures, has indicated that Islam is a religious tradition poorly suited to democratic

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<sup>98</sup> Amy B Levin, 'Child Witness of Domestic Violence: How should judges apply the best interests of the child standard in custody and visitation cases involving domestic violence?' (1999–2000) 47 *University of California (Los Angeles) Law Review* 813.

<sup>99</sup> See, eg, Robert Karolis, *The Convention on the Rights of the Child, The Making of a Deception*, < <http://www.biblebelievers.org.au/right2.htm>> at 11 August 2009.

<sup>100</sup> Zydan, above n 71, 73.

<sup>101</sup> Cited in David Little, John Kelsay and Abdulaziz A Sachedina, *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* Studies in Comparative Religion (1988) 33.

conceptions of society. It simply does not present the individual with those opportunities for freedom of action and association that are characteristic of Western Christianity ‘in certain cases’.<sup>102</sup> The statements made by Bozeman and Stackhouse in themselves highlight the fact that the views conveyed are influenced by their respective cultures, therefore supporting the main claim of this thesis that the application of international human rights will be affected by local culture. This thesis will discuss the views expressed above and determine whether Islamic culture does in fact appreciate the notions of rights and principles, contrary to the comments made by Bozeman and Stackhouse, but applies them through its own cultural context and interpretation.

The impact of international child law on the domestic implementation of the rights of the child presents particular challenges and difficulties. The dilemma is how international child law is to be interpreted within a local context? For this reason, the aim of any legal system should be to apply international child law that addresses both concerns ‘in a way that enhances rather than competes with existing cultural values’.<sup>103</sup>

#### 2.1.2 Is there a Western bias in international child law?

Since the ratification of CROC, it can be stated that the family as an institution is to be viewed in a novel way where parents are seen as figureheads, while the children

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<sup>102</sup> Cited in Little, Kelsay and Sachedina, above n 97, 33.

<sup>103</sup> Virginia Murphy-Berman, Helen L Levesque and John J Berman, ‘U.N. Convention on the Rights of the Child: A Cross-Cultural View’ (1996) 51(12) *American Psychologist* 1257, 1260.

have their own individual status other than that of being simply part of the family.<sup>104</sup> This fact alone has undoubtedly affected the interpretation of ‘the best interests of the child’. Specifically, where the West views child rights as those granted to young people as *individuals* in society.

Conversely, nations based on the Islamic culture, including Libya, perceive a child’s rights in the context of the family as a whole. Hence, these opposing views of children in the context of their respective social environments is accurately portrayed by Murphy-Berman *et al* who suggests that the ‘key dimension on which cultures vary is the degree to which they stress an independent versus an interdependent orientation’.<sup>105</sup>

Therefore international child’s rights have evolved over time in three main phases: the first being the child as the property of parents, being dictated to without any regards whatsoever to the child’s desires;<sup>106</sup> the second, the adoption of the welfare-based approach where parents now have obligations and responsibilities towards their children; and, finally, a situation where children have their own individual rights, widely considered to be the rights-based approach.

Although all stages have been significant in the development of child rights, it is the last stage that is the focus of this discussion. It is this final phase that has been confirmed by the development and institutionalisation of the *Convention* on the

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<sup>104</sup> Adam Lopatka, ‘An Introduction to the United Nations Convention on the Rights of the Child’ (1996) 6 *Transnational Law and Contemporary Problems* 251.

<sup>105</sup> Murphy-Berman *et al*, above n 99, 1259.

<sup>106</sup> Claire Breen, *The Standard of the Best Interests of the Child a Western Tradition in International and Comparative Law*, International Studies in Human Rights (2002) 3.

Rights of the Child 1989 (CROC). Prior to discussing the development of CROC, the capacity of children to possess rights will be discussed first.

### 2.1.3 Do children have rights?

What does it mean for a child to have rights? Can a court accept the wishes of a child to not attend school? What of a child's wish not to live? Therefore, the rights of a child do not directly relate to the individual wishes of a child but rather the obligations that have been imposed on those responsible for children. Feinberg, as quoted in Wolfson, claims that only one who has interests can have rights.<sup>107</sup> Thus, one can safely assume that a direct relationship exists between interests and rights.

However, in certain situations, one may not be able to claim their own rights. It may be up to government or welfare institutions to do so on behalf of individuals or groups. For example, in *Re Marion*,<sup>108</sup> the Department of Community Services in the Northern Territory (Australia) intervened to protect the interests of a disabled child. This intervention, opposing the parents' wishes to have their intellectually disabled daughter surgically sterilised (hysterectomy), was upheld by the court. Hence, children will continue to possess their rights even though there are other person/s or institutions that will be responsible for upholding them. As illustrated by *Re Marion*, the approach taken was that consistent with the rights-based philosophy, an attitude that is common in Western societies. Consequently, this attitude has been the driving force behind the development of CROC in general.

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<sup>107</sup> Joel Feinberg, 'The Rights of Animals and Unborn Generation' in W T Blackstone (ed), *Philosophy and Environmental Crisis* (1974) 51 cited in: Susan A Wolfson, 'Children's Rights: the Theroretical Underpinning of the "Best Interests of the Child"' in Michael D Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (1992) 7.

<sup>108</sup> *Re Marion* (1990) 175 CLR 218.

In the welfare-based approach, the authority adjudicating on ‘the best interests of the child’ will also be affected by the local communal standards and norms. In the case of a child requiring medical treatment for a condition, do doctors request permission from the child or from the carer? Undoubtedly, consent will be obtained from the latter. It is assumed that the action taken will be in ‘the best interests of the child’. However, the decision taken will most definitely be influenced by the corresponding cultural environment.

This is no guarantee that the view taken in the local context is consistent with the ‘best interests of the child’ principle as advocated by CROC. For instance, in the case of female genital mutilation, a common procedure performed on young girls in Africa and Asia,<sup>109</sup> ‘the best interests of the child’ are rarely fulfilled. However, it is the embodiment of this procedure within local culture<sup>110</sup> which allows it to be performed without any ramifications.<sup>111</sup> Therefore, opinions expressed on this controversial issue will be most definitely influenced by the local culture.

In summary, in the above cases relating to medical treatment and female genital mutilation, this thesis attempts to distinguish between the approaches taken by different cultures when attempting to fulfill ‘the best interests of the child’. Regardless of the approach/cultural mix, ‘the best interests of the child’ is not necessarily guaranteed.

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<sup>109</sup> Kevin Mark Smith, ‘The United Nations Convention on the Rights of the Child: the Sacrifice of American Children on the Altar of Third-World Activism’ (1998–1999) 38 *Washburn Law Journal* 111.

<sup>110</sup> Breen, above n 102, 5.

<sup>111</sup> Ian Patrick and Anne Markiewicz, ‘Female Genital Mutilation, Challenges for Child Welfare in an Australian Context’ (2000) 25(1) *Children Australia* 14.



However, governments try to effect ‘the best interests of the child’. Muslim nations apply the welfare-based approach from an Islamic cultural background to achieve ‘the best interests of the child’. Australia achieves the same objective through a rights-based approach and from a Western cultural background. The difference in approach/cultural mix illustrates that the ‘best interests’ principle can be upheld regardless of the cultural background of the respective environment. This is evident by the adoption of CROC itself by all but a few nations. To achieve ‘the best interests of the child’, each government in its cultural context needs to interpret CROC in a manner that upholds the principles as outlined by the *Convention*.

The question remains how can this be done? Van Bueren’s<sup>112</sup> assertion that the ‘*ascription of rights is controlled by a concept of community wellbeing*’ leads to the conclusion that everyone is ultimately obliged to further the communities’ best interests as communally perceived; so the individual’s rights exist and are pursued only as subordinate facets of the general duty. To put it in simpler terms, if we are buying into the concept of rights, are we in fact buying into the concept that rights are related to community wellbeing? And, if we are buying into these concepts, then would a child’s rights be essentially subordinate to the best interests of the community?<sup>113</sup>

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<sup>112</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child* (1995) 45-51.

<sup>113</sup> Ibid.

Murphy-Berman *et al* argue that different cultures mean different attitudes towards raising children. For example, in cultures that are characterised by individualism, people in general make their own decisions for their own reasons.

Laws, rules and regulations in individualistic cultures are institutionalized to protect individual rights, and people within the cultures are encouraged to be autonomous, self-directing, unique, and assertive and to value privacy and freedom of choice.<sup>114</sup>

In contrast, acting in societies ‘so-called collectivist cultures’ will be dependent on certain rules and statuses.

In such cultures, individuals are encouraged to put other people’s interests and the group’s interests before their own and to fulfil carefully prescribed duties and obligations. Institutions in such cultures could be described as more paternalistic. Collective welfare and social harmony are emphasized more than self-fulfilment and interdependency, nurturance and compliance are valued more than assertiveness and independence.<sup>115</sup>

In both examples, culture plays an important role when it comes to decision making regarding children’s interests. The question that should be addressed is whether international human rights instruments take into account these cultural variations, or ignore them resulting in a single universal standard?

Another question to be raised is whether children have rights? The above quotations argue that children can not act on their own and the one who will act on their behalf will be affected by his/her own culture. Does this mean that children cannot have rights but rather these are assumed by someone else on their behalf?

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<sup>114</sup> Murphy-Berman *et al*, above n 99, 1257, 1260.

<sup>115</sup> Ibid, 1260.

In the case of children's rights, the argument is not as straightforward. The person responsible for making choices for the child (that is, the determining decision maker) is the carer. Such decisions are made based on 'common knowledge' influenced by local and cultural standards or through intuition. The *Latimer case* from Canada<sup>116</sup> is one such example. The carer exercised deliberately caused the death of his severely disabled daughter and was then convicted of murder by a court.<sup>117</sup> Disregarding the overwhelming medical opinion that the child was suffering, it was the court's view that the child had a right to life. It can be concluded that children do 'own' their rights, regardless as to who is the adjudicator, defender or body that has been prescribed to uphold these rights.

Children possessing rights is a major issue in this discussion, but the interpretation and consequently the implementation of these rights is truly the essence of this thesis. Two methods are commonly regarded in the area of child's rights interpretation: the rights-based and welfare-based approaches which have been detailed earlier in this thesis. In the *Latimer case*, for example, the court upheld the decision that the child had a right to live, hence confirming the rights-based approach. But if the court had taken a welfare-based interpretation of the 'best interests' principle, an acquittal of the father could have been expected since the medical evidence presented to the court was that the child was suffering. Consequently, the father had taken a decision which he thought was in the child's best interests.

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<sup>116</sup> *R v Latimer* [2001] 1 SCR 3, 2001 SCC1 (18 January 2001).

<sup>117</sup> The accused was charged with first degree murder after he killed TL, his 12-year-old profoundly intellectually and physically disabled daughter. As a result of TL's severe and debilitating cerebral palsy, TL was a quadriplegic who suffered frequent and apparently painful seizures.

The Committee on the Rights of the Child (CRC) is the ultimate authority that determines whether CROC State parties have upheld the principles of the *Convention* in their respective legal systems. The interpretation by State parties with regard to the *Convention*'s principles needs to be consistent with that of the CRC, and not vice-versa. The CRC has explicitly encouraged State parties to adopt the rights-based rather than the welfare-based approach. In one of its observations the CRC has stated that:

The Committee, noting that the State party's general approach is more welfare oriented rather than child rights based, is concern[ed] that the principles of the best interests of the child (art. 3) and the right to life and development (r. 6) are not fully reflected in the State party's legislation, its administrative and judicial decisions, or its policies and programs relevant to children<sup>118</sup>

From the attitude in evidence here it appears that the CRC has linked its interpretation of CROC to an individualistic rather than collectivist philosophy. It can be argued that the attitudes of the Committee are, as in any collective institution (or any grouping or society), influenced by the predominant cultural paradigm – in this instance western individualism (and largely secularist or 'religious equivalence' views). This may give rise to criticisms of a society whose attitudes are not similarly culturally conditioned, but whose practices that society may argue are – according to its lights or understandings – able to fulfil the requirements of the Convention. However, such an analysis may be irrelevant, given that the ultimate authority for the

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<sup>118</sup> Committee on the Rights of the Child, *Concluding Observations: Marshall Islands*. 16/10/2000 [26], [27] UN Doc CRC/C/15/Add.139 (2000) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.139.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.139.En?Opendocument)> at 14 July 2009; Committee on the Rights of the Child, *Concluding Observations: Lebanon*. 07/06/96 [35], UN Doc CRC/C/15/Add.54 (1996) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.54.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.54.En?Opendocument)> at 14 July 2009; Committee on the Rights of the Child, *Concluding Observations: Zimbabwe*. 07/06/96 [29] UN Doc CRC/C/15/Add.55 (1996) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.55.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.55.En?Opendocument)> at 14 July 2009.

interpretation of fulfilment is the Committee. It may also be inadequate. For, as Badarin observes, society cannot be strictly categorised as either ‘collectivist’ or ‘individualistic’. In every society and culture one would find a mixture of both ‘individualist’ and ‘collectivist’ attitudes.<sup>119</sup> And such threads would find their way into the weave of legislation and practices. Societies (not unlike committees) are complex organisms. Thus one needs to not simply refer to the prevailing philosophical viewpoint/s (whether religious and/or secular) or the principles of societal organisation observed in a particular society or culture (and their derivation, ebbs and flows) but, more specifically, their *outcomes* for the child in that society.

And while it must be remembered that the ultimate authority as to whether the requirements of the Convention are being fulfilled remains the Committee appointed for that task, this is not to say that its findings cannot be subject to critical evaluation, both on its own terms or on those of its signatories. Nor, indeed, are Conventions themselves unchanging ‘holy writ’; rather they too are subject to criticism and change, even amendment on occasion, and certainly (as CROC clearly demonstrates) the addition of protocols as nations acknowledge a growing understanding of the implications of the principles being applied, and also in response to challenges that face them over time. Continuing robust debate and the maintenance of open communication can ensure that the Convention is an effective instrument of change.

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<sup>119</sup> Mashood A. Baderin, ‘Islam and the realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and two Divergent Perspectives’ (2007) 4 *Muslim World Journal of Human Rights* 1.

## 2.2 The Convention on the Rights of the Child (CROC) 1989

CROC is the most widely ratified *convention* in the history of the United Nations (UN), with every member country ratifying it with the exception of two.<sup>120</sup> However, CROC was not the first piece of international law related to children's rights.<sup>121</sup> There was the Declaration of Geneva, which was the basic charter for the rights of children or the care of children and following that there was the *Declaration on the Rights of the Child* in 1959. As Lopatka rightly observes, 'Both of these declarations are documents of moral and political nature and are not legally binding, but their inspirational value persists to the present day'.<sup>122</sup> So what is it about CROC that is so significant? What are the features of CROC that make it prominent in the area of international child law? Murphy-Berman *et al* highlight that 'the Convention on the Rights of the Child emphasizes the rights of the individual child rather than the rights of the child within a group or a family'.<sup>123</sup>

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<sup>120</sup> These being USA and Somalia: William A Schabas, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child' (1997) 3 *William and Mary Journal of Women and the Law* 79; Cynthia Price Cohen, 'The United Nations Convention on the Rights of the Child: A Feminist Landmark' (1997) 3 *Williams and Mary Journal of Women and the Law* 29; Susan Kilbourne, 'U.S. Failure to ratify the U. N. Convention on the Rights of the Child: Playing politics with children's rights' (1996) 6 *Transnational Law and Contemporary Problems* 437.

For more details on the reasons for the USA not having yet ratified CROC, see: Lawrence L Stentzel, 'Prospects for United States Ratification of the Convention on the Rights of the Child' (1991) 48 *Washington and Lee Law Review* 1285; Richard G Wilkins, Adam Becker, Jeremy Harris and Donlu Thayer, 'Why the United States Should Not Ratify the Convention on the Rights of the Child' (2003) 22 *Saint Louis University Public Law Review* 411.

Somalia cannot ratify it because it does not yet have an internationally recognised government, but nonetheless signed it in May 2002 as an indication of its willingness to ratify it. See Jaap E Doek, 'The U.N. Convention on the Rights of the Child: Some Observations on the Monitoring and the Social Context of its Implementation' (2002–2003) 14 *University of Florida Journal of Law and Public Policy* 125.

<sup>121</sup> Cynthia Price Cohen, 'Implementing the UN Convention on the Rights of the Child' (1999) 21 *Whittier Law Review* 95.

<sup>122</sup> Adam Lopatka, 'An Introduction to the United Nations Convention on the Rights of the Child' (1996) 6 *Transnational Law and Contemporary Problems* 251.

<sup>123</sup> Murphy-Berman *et al*, above n 99, 1260.

### 2.2.1 Significance of CROC

There are five main reasons why the CROC is so important.<sup>124</sup> The first reason is that it is extremely practical. Unlike what previously existed, it does not outline beliefs or wishes but rather concrete standards for and expectations of the governments that have ratified it.<sup>125</sup> What existed earlier was often structured as ‘here are the needs of children, here are the wants of children, and here is what children will require’.

The second reason why CROC is important is that the document is exhaustive. It goes beyond the basic needs that are outlined in other UN treaties, such as the need for food and shelter, and actually includes over 50 rights that every child has by virtue of being born, regardless of where in the world they may be born or under what circumstances.

Thirdly, CROC’s importance is due to the fact that it is the only UN document that really contains civil, political, social, economic and cultural rights all in one document.<sup>126</sup> With any other UN treaty, there might be an exception to the above categories of rights, or its provisions may only sit under one or two categories. For example, there is the *Convention Against Torture*,<sup>127</sup> which covers civil and political

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<sup>124</sup> A Glenn Mower Jr, *The Convention on the Rights of the Child, International Law Support for Children*, Studies in Human Rights (1997) 3.

<sup>125</sup> Stuart N Hart and Laura Thetaz-Bergman, ‘The Role of Nongovernmental Organizations in Implementing the Convention on the Rights of the Child’ (1996) 6 *Transnational Law and Contemporary Problems* 373.

<sup>126</sup> Doek, above n 114 125; Rebeca Rios-Kohn, ‘The Impact of the United Nations Convention on the Rights of the Child on UNICEF’s Mission’ (1996) 6 *Transnational Law and Contemporary Problems* 287.

<sup>127</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) <<http://www2.ohchr.org/english/law/cat.htm>> at 28 April 2008.

rights, and the *Convention on the Elimination of Racial Discrimination*,<sup>128</sup> again covering civil and political rights. The *Convention on the Elimination of Discrimination against Women*<sup>129</sup> also covers aspects related to political and civil rights. There are also others that focus more on social, economic and cultural rights but the *Convention on the Rights of the Child* includes all. Due to its encompassing all of these rights, it stands out against the others. As Cohen stated, ‘If one agrees that a basic tenet of feminism is equality, then the *Convention on the Rights of the Child* provides a perfect example of feminist principles. It is a landmark, because in its text, boys and girls are truly treated as equals’.<sup>130</sup>

CROC’s independence is the fourth main reason for its significance. No other document needs to be used when discussing child rights. The *Convention* can be relied on as a sole and complete reference. It defines what is meant by the term child so that there is no ambiguity in its meaning: ‘For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier’.<sup>131</sup>

Finally, the *Convention* makes reference to a child in the pre-birth stage. The implication was that some people would not call an entity before it is born a child.

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<sup>128</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) <<http://www2.ohchr.org/english/law/cerd.htm>> at 28 April 2008.

<sup>129</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) <<http://www2.ohchr.org/english/law/cedaw.htm>> at 28 April 2008.

<sup>130</sup> Price Cohen, ‘The United Nations Convention on the Rights of the Child: A Feminist Landmark’, above n 115.

<sup>131</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 1 (entered into force 2 September 1990). <<http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>> at 21 April 2004.



Although the *Convention*<sup>132</sup> does mention it, it is not binding so essentially the provisions of the *Convention* only apply once a child is actually born and alive. Another point of interest is that the *Convention* points to the necessity and requirement for international cooperation, suggesting that countries which are incapable of fulfilling the requirements articulated by CROC should be assisted by countries that could.

### 2.2.2 Core principles of CROC

The *Convention* contains a similar implementation system to the other UN human rights conventions.<sup>133</sup>

One of the arguments against establishing optional protocols for the *Convention* was that essentially it would be removing one of the main objectives to be achieved by CROC: a single unit of principles to be referred to when discussing international child rights.

The first part of the *Convention* is the Preamble, an introduction to the *Convention*. It mentions the goals and concerns of the *Convention*. CROC's preamble essentially defines the United Nation's concern for children.<sup>134</sup> Part of the Preamble is noteworthy. It identifies the need for interpretation in light of local traditions and

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<sup>132</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 1 (entered into force 2 September 1990). Preamble: 'Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Cf art 6.

<sup>133</sup> Hans-Joachim Heintze, 'The UN Convention and the Network of the International Human Rights Protection by the UN' in Freeman and Veerman, above n 44, 77; Murphy-Berman *et al*, above n 99.

<sup>134</sup> Adam Lopatka, 'The Convention on the Rights of the Child: Dilemmas, an essay' (1999) 21 *Whittier Law Review* 83.

values.<sup>135</sup> The role of the preamble is to influence the interpretation of the body of a *convention* or piece of legislation. This point is consistent with the aims and objectives of this research; interpretation of international child law is affected by local culture.

The Preamble is not binding. It mentions the necessity for global values (such as those expressed in the UN Charter, including ‘peace, dignity, tolerance, freedom, equality and solidarity’) and recognises the importance of each country’s values and traditions in interpreting the *Convention*. The Preamble mentions that all the *cultures should try to work together harmoniously to apply the principles mentioned in the Convention, as to achieve the best interests of the child*. Working together is necessary to achieve global human rights.<sup>136</sup> The Preamble states that the signatories have agreed to the *Convention* ‘taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child’, and ‘recognising the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries’.

The second core area of CROC is Part 1, describing ‘actions required’.<sup>137</sup> These are the operational articles and it is these that are the essence of the document. It sets the maximum age of a child at less than 18 and it describes in great detail the concept of non-discrimination. This definition is similar to that detailed in the *Universal*

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<sup>135</sup> ‘Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child’.

<sup>136</sup> Hart and Thetaz-Bergman, above n 120.

<sup>137</sup> Gertrud Lenzer, ‘Implementation of the UN Convention on the Rights of the Child and the Arts Sciences’ (1996) 6 *Transnational Law and Contemporary Problems* 293.

*Declaration of Human Rights* (UDHR).<sup>138</sup> With CROC however, the definition goes further, because it also includes non-discrimination on the basis of ethnic origin or on the basis of disability and neither is included in the UDHR. Most conventions of the United Nations discuss in terms of negative rights: the things that cannot be done (for example, a person cannot be tortured; a person cannot be detained without a warrant; a person cannot arbitrarily arrest someone else; a person cannot execute someone else). However, CROC not only includes negative, but positive rights as well. In summary, it includes the list of things that a state cannot do, but it also includes a list of actions that a state has to perform.

One example of the state requirements is that a state is to assist those who have traditionally been disadvantaged. It places an obligation on and an expectation of government that assistance will be rendered to those who have traditionally not been supported. As Lopatka confirms:

[T]he recognition of the traditions and cultural values of each people for the protection and harmonious development of the child does not mean that implementation of the rights granted to the child by the Convention should be relinquished if such traditions are inconsistent with the substance of those rights.<sup>139</sup>

Furthermore, it not only guarantees things like life, survival and development, but requires positive actions on the part of the state to fulfil those rights. For example, it

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<sup>138</sup> See, eg, (art 2): ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’. *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, suppl 13, at 71, UN Doc A/810 (1948) Text: <<http://www.un.org/en/documents/udhr/>> at 2 August 2009.

<sup>139</sup> Lopatka, ‘The Rights of the Child are Universal: The Perspective of the UN Convention on the Rights of the Child’, above n 44, 48.

is arguable that there is a requirement for immunisation if it is seen as promoting the development of children. Of course immunisation is not a right in the *Convention* but a positive obligation to extend the life, survival and the development of children is. Hence there might be an argument that services such as immunisations that promote the life of a child are necessitated by the *Convention*.

The second part of the *Convention* comprises enforcement of rights and obligations. Much emphasis is placed on this area of the *Convention*, while discussing at length the necessity of educating people about CROC.<sup>140</sup>

Provisions outlined in CROC do not place any obligations on children. Children have rights without any pre-conditions. These rights are protected by the state authority; allowing the possibility of intervention where the state deems necessary.<sup>141</sup> The active role of State parties is necessary to ensure that the principles of CROC are being upheld on a national level. Most significant of these principles is the protection of child rights globally regardless of location or background. Johnson reiterates this point:

Whatever the underlying reason may be, cross-cultural barriers have not proven to be a significant impediment to achieving consensus over the need for setting international standards to protect the interests and well-being of children globally.<sup>142</sup>

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<sup>140</sup> Price Cohen, 'Implementing the UN Convention on the Rights of the Child', above n 116.

<sup>141</sup> Zydan, above n 71.

<sup>142</sup> David Johnson, 'Cultural and Regional Pluralism in the Drafting of the UN Convention on the Rights of the Child' in Michael D Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (1992) 113.

### 2.2.3 Establishment of the Committee on the Rights of the Child (CRC)

It is clear that the *Convention* anticipated a need for a body to monitor the implementation or lack thereof, by State parties of the obligations as set out in the *Convention*. Establishing a committee is vital in ensuring universality and a consistent reviewing regime of the *Convention*. Lopatka emphasises this exact point: ‘the universality of the rights of the child is confirmed and consolidated by the system of review of the realization of the obligation undertaken in the *Convention*’.<sup>143</sup> Cohen evaluated the system of review by stating:

The committee uses pre-sessional meeting for two purposes. First, it makes an effort to gain as much information as possible about the honesty of the State Party’s report. It does this by obtaining information from such organizations as UNICEF, the International Labor Organization, the United Nations High Commissioner for Refugees, and the World Health Organization, as well as from international and national NGOs. Significantly, it is this latter group that frequently supplies the most important information.<sup>144</sup>

Article 43 of the *Convention* is based on the establishment of a committee (CRC) that will implement and monitor the guidelines stipulated in CROC.<sup>145</sup> The following are the main points that are included in article 43. It states that the Committee will be formed with the intention that it will examine the progress made by State parties in achieving the obligations of the *Convention*.<sup>146</sup>

CROC gives a clear definition of the type of person that would be chosen as a member of the CRC. It states:

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<sup>143</sup> Lopatka, ‘The Rights of the child are Universal: The Perspective of the UN Convention on the Rights of the Child’, above n 44, 48.

<sup>144</sup> Price Cohen, ‘Implementing the UN Convention on the Rights of the Child’, above n 116.

<sup>145</sup> Kilbourne, above n 115.

<sup>146</sup> Doek, above n 115.

The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

The members are chosen through secret ballot from a nominated list with each State party allowed to nominate one person from its own nation. The date of the initial election for the Committee would be held no later than six months after the entry/establishment of the *Convention* and every second year thereafter. The Secretary-General of the United Nations would give four months notice of the election so State parties could submit their nominations for members.<sup>147</sup> Elections of members to the CRC follows the ‘majority wins’ principle, with the elections held at meetings of the States parties convened by the Secretary-General at the UN Headquarters.

Article 43 also outlines the terms of elections and describes the procedures to be adopted if members were to die or be unable to carry out their duties. For example, members of the Committee are elected for a term of four years and would be eligible for re-election if re-nominated. Furthermore, if a member were unable to fulfil their duties then another expert from the same nation would serve the remaining time (with the approval of the Committee).

The Committee is able to establish its own rules and procedures, and elects its officers for two year terms. The CRC is to meet at the UN Headquarters or any such convenient place on an annual basis. Such meetings are to be reviewed by the State

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<sup>147</sup> Price Cohen, ‘Implementing the UN Convention on the Rights of the Child’, above n 116.

Parties. It is the duty of the Secretary-General of the UN to provide all necessary staff and facilities so as to allow the Committee to perform effectively. Finally, the article states that, with the approval of the General Assembly, the members of the Committee established under the present *Convention* will receive payment from United Nations resources on such terms and conditions decided by the Assembly.<sup>148</sup>

Article 44 outlines the authority granted to the CRC as the communicator on behalf of the UN with State parties to CROC. Article 44 also presents an explanation of the submission and review process between State parties and the CRC. An important facet of this process is the authority granted to the CRC to request further information that may be relevant to the implementation of the *Convention* from the State Parties.<sup>149</sup>

The CRC has the sole responsibility for reviewing submissions made to the Secretary-General by State parties regarding measures taken to fulfil their obligations under CROC. Flexibility is allowed in the interpretation of compliance since some State parties have a more limited regulatory style of government while other states place more weight on factors such as parental and family rights. Still other nations indicate preference for state authority.<sup>150</sup>

It should be noted that also detailed in article 44 is the explicit obligation placed on State parties to present in their submissions any issues which have impeded the fulfilment of their implementation of the obligations outlined in CROC. And finally,

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<sup>148</sup> Doek, above n 115.

<sup>149</sup> John Quigley, 'U. S. Ratification of the Convention on the Rights of the Child' (2003) 22 *Saint Louis University Public Law Review* 401.

<sup>150</sup> Murphy-Berman *et al*, above n 99.

it is a requirement under CROC that State parties make their submissions publicly available.

The following is a CRC guideline submitted to the States parties outlining the rules for their reports when submitting them to the Committee. These reports should be in accordance with article 44 and contain:

Relevant information, including the principal legislative, judicial, administrative or other measures in force or foreseen, factors and difficulties encountered and progress achieved in implementing the provisions of the Convention, and implementation priorities and specific goals for the future should be provided in respect of... (b) Best interests of the child (art. 3).<sup>151</sup>

This highlights once again that the concept of ‘the best interests of the child’ must be detailed within the State parties reports. It is clear that the CRC was established as the authority to trace the State parties implementation of their international obligations under CROC. Libya is one such State party, having submitted its initial report in 1996, and its second and latest report in 2000.

The two submissions made by Libya were analysed in the first chapter of this thesis. It appears that the disagreement had erupted between the CRC and the Libyan Government regarding the latter’s implementation of the ‘best interests’ principle. One of the points of discussion was local culture and its effects on the ‘best interests of the child’ principle. A discussion on international human rights in general, and

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<sup>151</sup> Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content under Article 44, Paragraph 1(a) of the Convention*. 30/10/1991 [13] UN Doc CRC/C/5 (1991) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.5.En?Opendocument)> at 18 April 2008.



international child law in particular, will now follow, detailing how State parties have interpreted these concepts in and through local culture.

### **2.3 CROC special provisions (key concepts)**

The competing demands of universalism and cultural relativism are clearly issues at the heart of CROC. The general way in which CROC has been defined confirms that the role of local cultures in the implementation of CROC is undoubtedly significant. With this in mind, this chapter will attempt to introduce the concepts of legal culture and cultural relativism in relation to CROC and the ‘best interests’ principle. As a consequence of the analysis of CROC, this thesis will attempt to emphasise the importance of two roles when a State party is upholding the principles stipulated in CROC — interpretation and implementation, as influenced by local culture. Such an approach is necessary to differentiate between the acceptance of CROC as an international law and its application within domestic jurisdictions. This evident influence of local culture will assist in building the argument for this research and more importantly, the thesis argument itself.

#### **2.3.1 Cultural relativism**

It can be argued that each nation’s laws usually reflect its respective local culture. However, can an international law be uniformly applied on a heterogenous global society? It seems not to be the case. One of the examples of how the global society is anything but homogenous is the way Libya, a nation founded on the Islamic faith, deals with adoption. Under Islamic law (Shari’a), the adoption of children as

understood in a Western context,<sup>152</sup> is prohibited, although a system of ‘fosterage’ (see below) does exist. The ‘simple’ issue of naming a child in such circumstances serves to highlight cultural differences. Under Islamic law the use of the natural (biological) father’s family name is compulsory for children born of a recognised marriage. Every such individual will always be aware of their natural father. In Australia, for example, and the West in general, adoption is an accepted aspect of the culture and children are likely to adopt the surname of the adoptive parent/s.<sup>153</sup> For instance, ‘John Taylor’ in a Western context would be identified as a member of the Taylor family, whether or not he was adopted, and whether or not his surname is that of his mother only. From the name, there is no necessarily direct link with the natural father and his family. Also, this name can be changed at any time. In Islam, the name of an individual born to a recognised marriage will always have reference to the father and the father’s family name. For example, ‘Isaac Jonas Adams’ identifies a person who is the son of Jonas and is from the Adams family. Even though there are provisions to change the given name, the use of the name of the natural father and family name are not negotiable. This example highlights that cultural differences do exist between CROC State parties. It is therefore to be expected that such parties will have differing understanding of CROC principles.

Another area that is noteworthy when discussing differences in culture is the roles and relationships of children with the rest of the family. In liberalised Western

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<sup>152</sup> Laura A Turbe, ‘Florida’s Inconsistent Use of the Best Interests of the Child Standard’ (2003–2004) 33 *Stetson Law Review* 369.

<sup>153</sup> Melanie B Lewis, ‘Inappropriate Application of the Best Interests of the Child Standard Leads to Worst Case Scenario: in Re C.C.R.S.’ (1997) 68 *University of Colorado Law Review* 259; David J Shuster, ‘The Best Interests of the Child Must Be Considered before Rebutting the Presumption of Legitimacy’ (1993) 23 *Baltimore Law Review* 645; Donald A Rea, ‘Family Law - Adoption: Do laws prohibiting reimbursement to a natural mother for reasonable expenses incurred during pregnancy truly serve the best interests of the child?’ (1992–1993) 22 *Baltimore Law Review* 133.

societies, ‘children are not portrayed as being solely under the authority of their families but as individuals with rights of their own’.<sup>154</sup> Independence and autonomy are highly valued principles in Western societies.<sup>155</sup>

In contrast, in a family-oriented society such as Libya, the links to family and the local community are considered to be of paramount importance. The principle that ‘the best interests of the child’ shall prevail would, therefore, be interpreted as requiring the synchronisation of the individual child’s interests with those of the immediate family and, in some cases, the wider community. Therefore, ‘the standard of the best interests of the child can be viewed as the practice of a tradition based upon a variety of beliefs and related practices that may ebb and flow in a given society as it evolves over time’.<sup>156</sup>

According to Thompson and Molloy,<sup>157</sup> when comparing Japanese and American cultures, the behaviours that may be valued in Japanese culture are the opposite of those valued in Western culture. Hence, what is considered to be appropriate in the two nations from the perspective of parental responsibility for children differs greatly. For example, the authors specifically mention that values such as dependency, emotional control, reluctance to interact with strangers, self-criticism and self-effacement are highly valued behaviours in Japan. Comparisons show that parents in the United States encourage and support children’s pursuit of their personal desires and autonomy, whereas parents in Japan are more tuned to children’s emotional development and place greater emphasis on control. For

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<sup>154</sup> Murphy-Berman *et al*, above n 99, 1258; Lewis, above n 148.

<sup>155</sup> Cited in Donald M Thomson and Susan E Molloy, ‘Assessing the best interests of the child’ (2001) 18(2) *The Australian Education and Development Psychologist* 5.

<sup>156</sup> Breen, above n 102, 2.

<sup>157</sup> Thomson and Molloy, above n 150.

example, Japanese mothers schedule their activities around the child. However in the US this type of maternal behaviour is perceived as encouraging dependency. Also, in the US, emotional openness is valued (such as expressing one's anger at someone) whilst in Japan, social harmony is valued more than emotional openness.<sup>158</sup> Hence, one can confidently assume that children's interests are nurtured and protected in the context of the local culture. Therefore, domestic legal systems will almost certainly interpret the 'best interests' principle from within the same context.

Some scholars claim that contemporary child rights law finds its base in positivist theory, where a broad international agreement on child rights and legal norms establishes a universal acceptance of their underlying principles.<sup>159</sup> It can be argued that local culture will be a major influence when implementing the 'best interests of the child' principle in a specific context. Therefore, a strong claim can be made that an international principle such as 'the best interests of the child' will be understood accordingly, resulting in a specific interpretation for a specific nation.

An important role when practising in the legal profession is to interpret and argue points of law. This can only be done when the basic foundations and frameworks are in place. These may come in the form of rules, regulations, legislation and constitutions. Similarly, the 'best interests' principle should guide the deliberations of parliaments as well as the policies of CROC State party governments.<sup>160</sup> However, it is the formation of these guiding principles which require investigation. Cultural relativism is a theory that plays a paramount role in relation to this aspect. Steiner *et al* highlights this concept, asserting that:

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<sup>158</sup> Ibid.

<sup>159</sup> Murphy-Berman *et al*, above n 99; Van Bueren, above n 108.

<sup>160</sup> Hodgkin and Newell, above n 57, 45.

advocates of cultural relativism claim that (most, some) rights and rules about morality are encoded in and thus depend on cultural context, the term “culture” often being used in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures.<sup>161</sup>

An example highlighting this view is the issue of same-sex marriages.<sup>162</sup> In previous eras, same-sex relationships were taboo in many countries. In some parts of the world, even today, participating in a same-sex relationship is a crime punishable by death. However, norms and values have changed significantly over time, especially in a number of non-conservative European nations where same-sex relationships have been made lawful.<sup>163</sup>

In relation to the rights of children, cultural relativism plays an important role. It is mandatory to ‘keep things in context’ and be culturally aware. Murphy-Berman *et al* take this approach in regards to the United Nations *Convention* on the Rights of the Child. They claim that having an understanding of various cultures and their differences would facilitate the success with which the *Convention* document could be used effectively to guide culturally sensitive child and family policies.<sup>164</sup>

An example of the importance of cultural relativism is evident in Islamic law. Islamic law has some values that are paramount to its success, yet these values may not be shared by Western law. For example, ‘Islamic law has developed a series of

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<sup>161</sup> Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3<sup>rd</sup> ed, 2008) 517.

<sup>162</sup> Bill Muehlenberg, ‘Same-Sex Marriage Arguments’ (2004) (July issue) *The Australian Family*; Gary Spitko, ‘Reclaiming the “Creatures of the State”’: Contracting for Child Custody. Decisionmaking in the best interests of the family’ (2000) 57 *Washington and Lee Law Review* 1139.

<sup>163</sup> Ontario Consultants on Religious Tolerance (ReligiousTolerance.org website), *Same-Sex Marriage in The Netherlands* (last updated 18 November 2001) <[http://www.religioustolerance.org/hom\\_marh.htm](http://www.religioustolerance.org/hom_marh.htm)> at 22 January 2009.

<sup>164</sup> Murphy-Berman *et al*, above n 99.

norms whereby the responsibility for the early [stages of the] life of a child is that of the mother and the later [stages of life is] that of the father'.<sup>165</sup> The age of custody (wardship) by the father (*wilaya*) will vary from one Islamic *Mathhab* to another, but ultimately the concept of *wilaya* is present in all Islamic schools.<sup>166</sup> Therefore, Islam emphasises that the female is a more appropriate guardian (*hadinah*) for a child in the earlier years whilst a male is more appropriate in the latter years. So, Islam encourages the quality of upbringing through mutual exclusivity when assigning guardianship. In contrast, as Pearl points out, the *Convention* emphasises equality of parenting as a norm.<sup>167</sup> Even though this thesis agrees with Pearl's comment in terms of equality as a principle, it will argue the principle of equality in parenting in light of cultural relativism. As has been mentioned above, Islam does not accept the concept of parenting equality as a '50/50' share in caring for a child but rather as the *Walii* and *Hadinah* each having mutually exclusive responsibilities.

Another example is the marriage of minors.<sup>168</sup> In Western culture, a person needs to be 18 years of age in order marry without parental consent.<sup>169</sup> The most noteworthy reason for setting the age at 18 is that the individual is defined as an adult who is capable of making individual decisions. However, in Islamic culture, a child may enter marriage at as early an age as 15 or 16, subject to the consent of both the child and their *Walii*. This condition is set for many reasons, most notable of these is that

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<sup>165</sup> D Pearl, 'Children's rights in Islamic law' in *Children's Rights and Traditional Values* (1989) 86–92, cited in: Sandra Burman, 'The Best Interests of the South African Child' (2003) 17(1) *International Journal of Law, Policy and the Family* 28, 32.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Sonja Grover, 'Children's Rights as Ground Zero in the Debate on the Universality of Human Rights: The Child Marriage Issue as a Case Example' (2006) 2(2) *Original Law Review* 72.

<sup>169</sup> Minors in the West may marry but under certain conditions, including parental and court consent, few do so. See, eg, 'Lismore Court gives permission for Lucinda, 16, to marry Glen, 26' *Sunday Telegraph* (Sydney) 14 December 2008 <<http://www.news.com.au/story/0,27574,24794692-1242,00.html>> at 2 August 2009.

the parties concerned, that is the individual and the *Walii*, have both agreed to this decision. This example highlights that although both cultures have different regulations, both cultures have ‘the best interest of the child’ at heart. So what is seen as good for one may not be as good for another. Murphy-Berman *et al* highlight, observing that ‘a great deal of parental control may be associated with warmth in one culture and parental rejection in another’.<sup>170</sup> While CROC encourages states to ensure necessary protection and care for the child, it also takes into account rights and duties of parents and other legally responsible persons (according to article 3(2)).<sup>171</sup> This enables two different rights to coexist instead of one taking precedence over the other.

In Western culture, the decision behind setting the legal age of marriage at 18 is embedded in the logic that the individual is classified as an adult and therefore capable to make decisions alone. Yet in the Islamic culture, the parents are expected to support their child even with expenses occurring both before and after marriage. It should be noted that when discussing issues related to cultures, no single right answer exists, simply because each one is unique. Undoubtedly, both cultures take into consideration the ‘best interests of the child’ but in different ways. The ‘best interest of the child’ from the West’s point of view in relation to marriage is for children to wait at least until adulthood because of the obligations and responsibilities the couple will have to face on their own. Within the Islamic culture, it is widely accepted that the individuals become engaged, marry and start their own family at a young age, which allows the couple to have ‘a head start’ in coming to know each other and rely on each other but with the support and assistance of both

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<sup>170</sup> Murphy-Berman *et al*, above n 99.

<sup>171</sup> Hodgkin and Newell, above n 57, 40.

families in contrast to those who marry later in life. This way of thinking is likely to effect the implementation of the principle of ‘the best interests of the child’ when it comes to forming a judgement, policy, regulation or even law itself.

In light of the examples mentioned above, culture plays an important and decisive role in every community. Norms of one community may be foreign to another. Laws can be similarly viewed. However, laws themselves are developed on the foundations present in a social context. It is the cultural background of a specific community which will ultimately be taken into consideration when interpreting law domestically.

### 2.3.2 Legal culture

It could be stated that every aspect of life is determined by values and norms. Some eat by hand, others utilise chop sticks or silverware. Similarly, values and norms, commonly known as culture and tradition, have a strong influence over legal institutions. Legal culture is defined as

the taken-granted values and behavioural patterns of the judiciary, and partly, of ordinary men and women’s knowledge of laws, but also of their attitude towards, and perception of, the judicial order in general and laws in particular. In that sense, legal culture is an integral part of the mainstream custom and tradition of a group of people.<sup>172</sup>

McNamara adds that legal culture also includes:

the values and practices of, and attitudes towards, the executive and legislative arms of government, particularly with reference to their law-making activities. In addition, the term legal culture encompasses the

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<sup>172</sup> Banakar, 2004, 165, cited in Luke McNamara, *Human Rights Controversies, The Impact of Legal Form* (2007) 16.



conventions and protocols that dictate the interplay between the different arms of government with respect to the resolution of policy controversies which have significant human rights implications – alongside the procedural dictates that can be attributed more directly to the prevailing legal form.<sup>173</sup>

Although clearly identifiable and distinguishable from each other, human cultures, unlike legal cultures are characterised by their own internal diversity, tendency to change and mutual influence. These characteristics can be used to promote normative consensus within and among culture through processes of cultural transformation.<sup>174</sup> The issue for each culture, and groups within cultures, becomes how to balance needs for self-sufficiency and rights with concerns for relatedness and duty in a way that makes sense within each cultural context and that enhances rather than competes with existing cultural values.<sup>175</sup>

Murphy-Berman *et al* have suggested that

being aware of and articulating areas of agreement and disagreement between international documents and specific cultural contexts can serve to facilitate the discussion that addresses issues pertaining to powerful trends toward globalization of human rights in the context of continuing cultural diversity.<sup>176</sup>

However, some commentators have questioned the validity and utility of the concept of legal culture on the basis that it is imprecise and conceptually vague.<sup>177</sup> It must be recognised, however, that it is the legal culture which is the driving force of law itself because it will be used to apply the law in practice.

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<sup>173</sup> Luke McNamara, *Human Rights Controversies, The Impact of Legal Form* (2007) 16.

<sup>174</sup> An-Nai'm, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child', above n 78.

<sup>175</sup> Murphy-Berman *et al*, above n 99, 1259.

<sup>176</sup> Ibid 1261.

<sup>177</sup> See McNamara, above n 168.

Steiner *et al* appropriately suggest that the term culture is ‘often being used in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures’.<sup>178</sup>

As Brennan J stated, ‘[I]t must be remembered that, in the absence of legal rules or a hierarchy of values, the “best interests” approach depends upon the value system of the decision-maker’.<sup>179</sup> Kagitcibasi asserts that this relatedness versus separation distinction is key to understanding family diversity throughout the world.<sup>180</sup> Therefore, as Skinner states, ‘[C]ultural difference embodies distinct values and expectations and may further insulate states from outside judgement’.<sup>181</sup>

An appreciation of cultural relativism and legal culture is mandatory in the context of an examination of ‘the best interests of the child’ and laws pertaining to children’s rights. What applies and is accepted as ‘the best interests of the child’ in one culture may not be in another. As highlighted by Murphy-Berman *et al*, general assumptions cannot be made when dealing with different cultures, since different understandings or interpretations and weightings are placed on different rights outlined by CROC.<sup>182</sup> Children’s rights coexist with other rights and, when issues arise, these rights need to be put into context. They cannot exist alone. The Australian Government understands this to be so. According to the Australian Joint Standing Committee on Treaties human rights are not absolute and must be taken in the context of society and

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<sup>178</sup> Steiner *et al*, above n 156, 517.

<sup>179</sup> *Department of Health and Community Services Secretary v JWB and SMB* [1992] FLC 92-293 at 79, 191.

<sup>180</sup> C Kagitcibasi, ‘Family and socialization in cross-cultural perspective: A model of change’ in J Berman (ed), *Cross-cultural Perspectives: Nebraska Symposium on Motivation*: vol 37 (1990) 135–200, cited in Murphy-Berman *et al*, above n 99, 1259.

<sup>181</sup> Michael Skinner, ‘Locating Indigenous Power: Cultural Relativism, Universalism and State Sovereignty’ (Preface) (2001) 7 *New England International and Comparative Law Annual* 69.

<sup>182</sup> Murphy-Berman *et al*, above n 99.

therefore children's rights should be seen in the context of the family within which these rights coexist.<sup>183</sup>

In structuring a legal culture that is harmonious with the local environment, 'the best interests of the child' can be achieved because it is the cultural and ideological considerations that play a significant role in establishing what constitutes 'the best interests of the child'.<sup>184</sup> An important component of any legal culture is seeking expert advice relevant to the sitting case. Such expert advice was criticised by Thomson and Molloy during their study on assessing 'the best interests of the child' on the basis of psychometric tests. Their view was that recommendations based on these types of examinations are fraught with difficulty because the cultural context must be taken into consideration. They appropriately concluded that psychometric tests 'may have little or no meaning outside the culture in which the concepts have their meaning, and the scales of most psychometric tests are norm-based'.<sup>185</sup> Each aspect of the child's life needs to be taken into consideration when the 'best interest' is being sought.

Interpreting child rights in general and the 'best interests' in particular can be undertaken on the basis of court decisions. So the following question needs to be answered: Are court decisions influenced by culture? This thesis will attempt to answer this question and specifically focus on the influence of culture on the domestic legal system.

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<sup>183</sup> Joint Standing Committee on Treaties, 'United Nations Convention on the Rights of the Child, 17th Report' (The Parliament of the Commonwealth of Australia, 1998) [9.70] 447.

<sup>184</sup> Thomson and Molloy, above n 150, 10.

<sup>185</sup> Ibid.

It follows that ‘the best interests of the child’, as a principle of law, will be affected by local legal culture. That is why the *Convention* has been developed in general terms, so that it is flexible enough to be accommodated with the cultural values of the various State parties.

### 2.3.3 The ‘best interests’ principle as defined under CROC

The formation of CROC places different levels of importance on various aspects outlined in the *Convention*. In actions and decisions concerning children, CROC obliges State parties to consider the ‘best interests’ principle at a bare minimum ‘a primary consideration’, and sometimes of ‘paramount’ importance.<sup>186</sup> The concept of ‘the best interests of the child’ is one of the fundamental principles outlined in CROC, underpinning the interpretation of all children’s rights and freedoms.<sup>187</sup> Generally, ‘the best interests of the child’ are a primary consideration in all actions concerning children. Article 3.1 states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration.
2. State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians or individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities,

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<sup>186</sup> See arts 3 and 21.

<sup>187</sup> Human Rights and Equal Opportunity Commission, *Human Rights Brief No. 1* (2008) <[http://www.humanrights.gov.au/human\\_rights/briefs/brief\\_1.html](http://www.humanrights.gov.au/human_rights/briefs/brief_1.html)> at 18 April 2008.

particularly in the area of safety, health, in the number and suitability of their staff as well as competent supervision.

As Hodgkin and Newell conclude that ‘article 3(1) emphasises that governments, public and private bodies must ascertain the impact on children of their actions, in order that the best interests of the child are a primary consideration, giving proper priority to children and building child-friendly societies’.<sup>188</sup>

As Alston stated that ‘the verb used to describe the [nature of] the obligation (‘to ensure’) is very strong and encompasses both passive and [pro]active obligations. The terms ‘protection and care’ must also be read expansively, since their objective is not stated in limited or negative terms ... but rather in relation to the comprehensive ideal of ensuring the child’s well-being’.<sup>189</sup> The obligation which is explicit in the undertaking ‘to ensure the child such protection and care as is necessary for his or her well-being is an unqualified one’.<sup>190</sup>

Article 3.1 does not ‘carve in stone’ anything relating to the guardian or child. Rather, it provides a general framework for consideration when making decisions which affect children.<sup>191</sup> Although it does not resolve the fundamental question as to who decides on the allocation of decision-making responsibilities on behalf of the child (the family or the state),<sup>192</sup> it does however provide a framework for consideration.

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<sup>188</sup> Hodgkin and Newell, above n 57, 39.

<sup>189</sup> Philip Alston, ‘The Legal Framework of the Convention on the Rights of the Child’ 91(2) *Bulletin of Human Rights* cited in Hodgkin and Newell, above n 57, 46.

<sup>190</sup> Hodgkin and Newell, above n 57, 46.

<sup>191</sup> Van Bueren, above n 108, 46.

<sup>192</sup> *Ibid* 49.

#### 2.3.4 The ‘best interests’ principle: interpretation and implementation

In the interpretation of international child law, the debate over universality versus cultural relativism is ongoing. This tension, and its relevance for the principle, and the importance and relativity of it in regards to ‘the best interests of the child’, is an important theme in this thesis. Given the inherent diversity and difference of cultural attitudes towards matters such as ‘the best interest of the child’, the meaning and implications claimed for this principle in a certain society at a given point in time should not be taken as final or conclusive. Instead, the meaning and implications of the ‘best interests’ principle in any society should be open to challenge, reformulation and refinement through the processes of internal discourse and cross-cultural dialogue. The accurate implementation of agreed procedures and processes for defining article 3(1) in various contexts will lead to a substantive common standard or level of achievement in relation to ‘the best interests of the child’ without violating the integrity of local cultures or infringing upon the sovereignty of the various peoples of the world.<sup>193</sup> The *Convention* represents a statement of values about children and families and their role in society, and it is certain that considerable cross-cultural differences exist within these values.<sup>194</sup>

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<sup>193</sup> An-Nai’m, ‘Cultural Transformation and Normative Consensus on the Best Interests of the Child’, above n 78.

<sup>194</sup> Murphy-Berman *et al*, above n 99, 1258.

## 2.4 ‘The best interests of the child’ principle under CROC

### 2.4.1 Main expectation of State parties to CROC

No single definition exists of ‘the best interests of the child’ and there has been a lot of discussion as to whether or not attempts should be made to produce such a definition.<sup>195</sup> The concept of ‘the best interests of the child’ has been the subject of more academic analysis than any other concept found in CROC.<sup>196</sup> In many cases, the core issues outlined in CROC have already been included in national legislation prior to the *Convention*’s ratification. Seeking agreement on an international scale was all the more difficult because of competing cultural expectations of State parties.<sup>197</sup> As a result, an important question was raised: Should there be one uniform understanding of ‘the best interests of the child’ or should such interpretation depend on the local culture?

The concept is by no means a new one to international human rights law.<sup>198</sup> In the 1959 *Declaration of the Rights of the Child*, Principle 2 states:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

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<sup>195</sup> Johanna Schiratski, ‘The Best Interests of the Child in the Swedish Aliens Act’ (2000) 14(3) *International Journal of Law, Policy and the Family* 206.

<sup>196</sup> Dominic McGoldrick, ‘The United Nation on the Rights of the Child’ 5(1991) *International Journal of Law and the Family* 132.

<sup>197</sup> Sandra Burman, ‘The Best Interests of the South African Child’ (2003) 17(1) *International Journal of Law, Policy and the Family* 28.

<sup>198</sup> Hodgkin and Newell, above n 57, 41.

In the case of CROC, the Working Group drafting it did not discuss any further definitions of ‘best interests’. The CRC has not as yet attempted to propose criteria by which ‘the best interests of the child’ should be judged in general or in relation to particular circumstances. It has emphasised that the general values and principles of the *Convention* should be applied in the context or cases in question.<sup>199</sup> The Committee has repeatedly stressed that the *Convention* should be considered as a whole concept and has emphasised its interrelationships. The Committee has indicated that it expects the ‘best interests’ principle to be written into legislation in a way that enables it to be invoked before the courts.

The Committee recommends that the State party strengthen its efforts to ensure that the general principle of the best interests of the child is understood, appropriately integrated and implemented in all legal provisions as well as in judicial and administrative decisions and in projects, programmes and services which have an impact on children.<sup>200</sup>

Furthermore, consideration of ‘best interests’ must contain consideration of both short and long term outcomes for the child. Any interpretation of ‘best interests’ must be consistent with the nature of the entire *Convention*, in particular its emphasis on the child as an individual with views and feelings and the child as the subject of civil and political rights and special protections:

The Committee recommends that special efforts should be made by the Government in order to fully harmonize the existing legislation with the provisions of the Convention and in the light of its general principles as well as to ensure that the best interests of the child, as stipulated in article

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<sup>199</sup> Ibid 42.

<sup>200</sup> Committee on the Rights of the Child, *Concluding Observations: Azerbaijan. 17/03/06* [28], UN Doc CRC/C/A2E/CO/2 (2006) <<http://www.universalhumanrightsindex.org/documents/829/925/document/en/pdf/text.pdf>> at 14 July 2009.



3 of the Convention, be a primary consideration in all actions concerning children, including those undertaken by Parliament.<sup>201</sup>

#### 2.4.2 Main considerations outlined in CROC

There are many bodies involved in monitoring the implementation of rights and laws relating to children. Such functions can not be performed by one single institution but rather, it is something that can only be achieved if groups of people work together. The CRC has emphasised the value of adopting a comprehensive approach to the implementation of the rights of the child which is both effective and consistent with the terms and general principles of the *Convention* (particularly ‘the best interests of the child’) which apply irrespective of budgetary resources.<sup>202</sup>

Article 3.1 instructs that all arms of government need to be involved in the application and enforcement of rights and laws concerning children, and that they too must be focusing on ‘the best interests of the child’. The CRC suggests that the general principles of article 3 relating to ‘the best interests of the child’ should guide the determination of policy-making at both the central and local levels of government.<sup>203</sup> It has been stated that:

Government decision-making relating to custody, residence, contact, care and protection must make children’s best interests the paramount

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<sup>201</sup> Committee on the Rights of the Child, *Concluding Observations: Chile*, 25/04/94 [14], UN Doc CRC/C/15/Add.22 (1994) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.22.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.22.En?Opendocument)> at 14 July 2009.

<sup>202</sup> Committee on the Rights of the Child, *Concluding Observations: France*, 25/04/94 [19] UN Doc CRC/C/15/Add.20 (1994) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.20.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.20.En?Opendocument)> at 14 July 2009.

<sup>203</sup> Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 15/02/95 [24], UN Doc CRC/C/15/Add.34 (1995) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.34.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.34.En?Opendocument)> at 14 July 2009.

consideration. In other decision-making the best interests of the child, or of children generally, must be a primary consideration'.<sup>204</sup>

'The indefinite article, 'a', was here substituted for the definite article, 'the', of earlier drafts to make clear that a child's best interest is not 'the overriding and only consideration'.<sup>205</sup>

This provides a clear guideline for governments and policy-making bodies. The CRC has made it clear that it is the responsibility of all relevant bodies to implement the rights of the *Convention*:

The Committee recommends that the State party take the principle of the best interests of the child as a primary consideration in all actions concerning children, including those undertaken by courts, public or private welfare institutions, administrative authorities or legislative bodies. The Committee encourages the State party to adopt appropriate measures to assist parents in the performance of their child-rearing responsibilities. The Committee further encourages the State party to consider appropriate alternatives to institutionalisation for children deprived of family environment, as well as special protection and assistance for child-headed families.<sup>206</sup>

When a 'best interests' principle is already reflected in national legislation, it is generally in relation to decision-making about individual children, such as in family proceedings following separation or divorce of parents, in adoption, and in state intervention to protect children from ill-treatment. Even within public services whose major purpose is children's development, such as education and health, the principle

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<sup>204</sup> Human Rights and Equal Opportunity Commission, *Human Rights Brief No. 1* (2008) 2 <[http://www.humanrights.gov.au/human\\_rights/briefs/brief\\_1.html](http://www.humanrights.gov.au/human_rights/briefs/brief_1.html)> at 18 April 2008.

<sup>205</sup> Quigley, above n 144.

<sup>206</sup> Committee on the Rights of the Child, *Concluding Observations: Zimbabwe, 07/06/96* [29] UN Doc CRC/C/15/Add.55 (1996) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.55.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.55.En?Opendocument)> at 14 July 2009.

is often not written into the legislative framework. In its summary response to the United Kingdom's periodic report, the Committee noted that

the principles of the best interests of the child appear not to be reflected in legislation in such areas as health, education and social security which have a bearing on the respect for the rights of the child.<sup>207</sup>

The CRC welcomes decisions made by particular governments to submit reports to their own parliamentary assemblies on the implementation of the *Convention* and on its policies in relation to the situation of children throughout the world. France is one such State party that has taken up this initiative. The CRC responded to this by concluding that this would 'contribute to emphasising the importance of the principle of the best interests of the child, which is a primary consideration to be taken into account in all actions concerning children, including those undertaken by legislative bodies'.<sup>208</sup>

Article 18.1 clearly states that a child's parents have the responsibility and duty of decision making in regards to the up-bringing and development of their children and that they should have their child's best interests as a main concern whilst fulfilling this task. In cases where decisions are made affecting an individual child, 'it is the best interests of that individual child which must be taken into account'<sup>209</sup> when the

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<sup>207</sup> Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 15/02/95 [12], UN Doc CRC/C/15/Add.34 (1995) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.34.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.34.En?Opendocument)> at 14 July 2009.

<sup>208</sup> Committee on the Rights of the Child, *Concluding Observations: France*, 25/04/94 [6] CRC/C/15/Add.20 (1994) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.20.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.20.En?Opendocument)> at 14 July 2009.

<sup>209</sup> Human Rights and Equal Opportunity Commission, *Human Rights Brief No. 1* (2008) 3 <[http://www.humanrights.gov.au/human\\_rights/briefs/brief\\_1.html](http://www.humanrights.gov.au/human_rights/briefs/brief_1.html)> at 18 April 2008.

final decision is made. It is in every ‘child’s best interest to enjoy the rights and freedoms set out and stipulated in CROC’.<sup>210</sup>

For example, in the following articles outlined under CROC, guidelines were set for State parties to implement the ‘best interests’ principle within the local culture without destroying the predominant spirit of the principle. Article 29.1 states that it is in the children’s best interests to develop respect for human rights and for other cultures, while article 9.3 details that it is in a child’s best interests to maintain contact with both parents in most circumstances. Finally, article 12 states that a child capable of forming a view on his or her best interests must be able to give it freely and it must be taken into account.

It is obvious that the CRC takes the implementation of the articles of the *Convention* extremely seriously. To highlight this, the following is an example of a report made by the CRC commenting on the implementation, or lack thereof, of particular articles of the *Convention*, namely those mentioned above. If the Committee believes that an article is not implemented well enough, it will make it known to the State party and will advise of ways that it can be improved. In examining a report from a State party, the CRC expressed concern that in practice the general principles contained in articles 3 and 12 had not been respected by this particular government:

While the Committee notes that the principles of the ‘best interests of the child’ (art. 3) and ‘respect for the views of the child’ (art. 12) have been incorporated in domestic legislation, it remains concerned that in practice, as it is recognised in the report, these principles are not respected owing to the fact that children are not yet perceived as persons entitled to rights and that the rights of the child are undermined by adults’ interests. The Committee recommends that further efforts be made to

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<sup>210</sup> Ibid.

ensure the implementation of the principles of the ‘best interests of the child’, especially his or her rights to participate in the family, at school, within institutions and in society in general. These principles should also be reflected in all policies and programs relating to children. Awareness-raising among the public at large, including traditional communities and religious leaders, on the implementation of these principles should be reinforced.<sup>211</sup>

Other examples where CROC addresses the ‘best interests’ principle include articles 5, 9.1 and 18.1. Within these articles, it is mentioned that parents have primary decision-making responsibility on behalf of their children but, if they fail to make the child’s best interests a basic concern, the state must intervene to protect those interests.

CROC attempts to address ‘the best interests of the child’ from many perspectives. In articles 5, 8.2 and 30, children from an indigenous background are specifically mentioned. These articles emphasise that bringing up children from these communities in accordance with their culture is to be encouraged. It is clear that these examples illustrate CROC’s consideration of and emphasis on local culture and in particular the ‘best interests’ principle, inherently placing the onus on State parties to interpret the *Convention* according to their local social contexts. This has been acknowledged by the CRC: ‘the Convention had been carefully drafted to be applicable to the diversity of the world’s religious and legal systems’.<sup>212</sup> Therefore, the CRC is the body to determine whether State parties have upheld the principles outlined in CROC considering its explicit acknowledgement of local culture.

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<sup>211</sup> Committee on the Rights of the Child, *Concluding Observations: Bolivia*, 26/10/98 [18], CRC/C/15/Add.95 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.95.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.95.En?Opendocument)> at 14 July 2009.

<sup>212</sup> Committee on the Rights of the Child, *Summary Record of the 434th Meeting: Libyan Arab Jamahiriya*, 13/01/98 [74] (Miss Mason), CRC/C/SR.434 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.434.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.434.En?Opendocument)> at 18 April 2008.

The ‘best interests’ principle can also be influenced by historical factors. Some articles which make mention of this are articles 5, 8.2 and 30. These articles play an important and significant role in communities such as Australia where historically, the removal of Indigenous children was deemed to be in their best interest. However, over time it has become very clear that this was in fact quite the opposite. The removal of Indigenous children has been deemed as a sorry chapter in the history of Australia, severely affecting the development and livelihoods of the Indigenous Australian population. Thomson and Molloy confirm this view:

the children’s best interests have been promoted as the rationale for the removal of the child. Retrospectively, the removal of aboriginal children from their parents is now being judged as not in the best interests of the child.<sup>213</sup>

As mentioned earlier, if the CRC believes that any articles or principles of the *Convention* are not being fulfilled they will let the relevant State party know and advise them of how to resolve the problem. For example, in a report to the Jordanian Government, the CRC stated its concerns that in all actions ostensibly taken in the best interest of children, the general principles of ‘the best interests of the child’ contained in article 3 of the *Convention* was not a primary consideration. This included in matters relating to family law. A case mentioned in the report detailed how the duration of custody under the *Jordanian Personal Status Law* was determined by the child’s age, and how such an arrangement was discriminatory against the mother. In this particular case, the CRC made an explicit recommendation to the relevant State party ‘to review its legislation and

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<sup>213</sup> Thomson and Molloy, above n 150, 10.

administrative measures to ensure that article 3 of the *Convention* is duly reflected therein'.<sup>214</sup>

Further highlighting the debate relating to the level of importance assigned to the 'best interests' principle, during drafting of the *Convention* it was proposed that 'the best interests of the child' be assigned the status of 'paramount consideration', which was rejected. However, in its final draft, CROC settled with a 'primary consideration' status instead. In article 3(1), it is clear that CROC allows decision-makers to balance 'the best interests of the child' with 'equally weighty' primary considerations at their own discretion. Such considerations may be the situation where a sole parent is not of stable mind, resulting in a third party being assigned guardian to protect the child's interests.

Parkinson has commented in relation to the 'best interests' principle outlined in article 3(1) that it 'is obviously far less stringent than the requirement that the best interests, or welfare, of the child are the paramount consideration'.<sup>215</sup>

In situations where the CRC has reported to a State party of problems or issues relating to the implementation of the articles of the *Convention*, the relevant State party would have to provide a response to the Committee showing how the recommendations have been addressed. The CRC welcomes such reports and this is reflected in the following comments made to a State party:

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<sup>214</sup> Committee on the Rights of the Child, *Concluding Observations: Jordan*, 02/06/2000 [34], CRC/C/15/Add.125 (2000) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.125.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.125.En?Opendocument)> at 14 July 2009.

<sup>215</sup> Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (3<sup>rd</sup> ed, 2003) 809.

The Committee welcomes the information provided in the State party's answers to the list of issues concerning implementation of the best interests principle and encourages the State party to continue to integrate the principle into all legislative and administrative practices, and to reveal its decision-making and implementation produces so as to ensure that the best interests of the child are a primary consideration.<sup>216</sup>

The weight of the 'best interests of the child' appears to change across the *Convention*, as Hodgkin and Newell observe:

Where the phrase "best interests" is used elsewhere in the Convention, ...[where] the focus is on deciding appropriate action for individual children in particular circumstances and requires determination of the best interests of individual children. In such situations, the child's interests are *the paramount* consideration.<sup>217</sup>

In particular articles, 'the best interests of the child' is mentioned as more of a *paramount* consideration. For example, article 9.1 mentions that the child shall remain with the parents unless it is in their best interests to be moved. It states that 'a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine...that such separation is necessary for *the best interests of the child*'.

Another example is found in article 9.3. Mention is made of the need for contact with both parents unless it is against the child's best interests: 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations ... except if it is contrary to *the child's best interests*' (emphasis added).

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<sup>216</sup> Committee on the Rights of the Child, *Concluding Observations: The Former Yugoslav Republic of Macedonia*. 23/02/2000 [18] CRC/C/15/Add.118 (2000) <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.118.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.118.En?OpenDocument)> at 13 August 2009.

<sup>217</sup> Hodgkin and Newell, above n 57, 43.



In article 21, it explicitly states that when adoption takes place, it must be done with the child's best interests as the paramount consideration: '[T]he system of adoption shall ensure that *the best interests of the child* shall be the paramount consideration' (emphasis added).

The final example is article 18.1 which specifies that parents have responsibilities for the upbringing and maintenance of their children and that their concern as a parent should be their child's best interests: '[B]oth parents have common responsibilities for the upbringing and development of the child ... *The best interests of the child* will be their basic concern' (emphasis added).

This discussion illustrates that while 'the best interests of the child' is undoubtedly a fundamental principle in CROC, the level of importance placed on the 'best interests of the child' principle differs from one situation to another. Depending on the specific matter concerning the child, these levels of importance interchange from a basic concern, to paramount and even a primary consideration.

## **2.5 Conclusion**

Since the early 19<sup>th</sup> century, the concept of children's rights has developed to the point where today, it is accepted by almost every nation.

This chapter has introduced the motives and objectives behind CROC, and highlighted its main principles. A foundation has been laid for considering CROC's implications for the important question of how to define international child law in a manner that ensures consistent implementation throughout the world, while

recognising diverse cultures and traditions which are at the core of local social contexts. On this issue, An-Nai'm has observed that, 'while precluding random imposition of a specific definition of principles such as "the best interest of the child', respect for cultural and contextual diversity should not lead to normative indecision and confusion'.<sup>218</sup>

This chapter provides an important foundation for approaching the issues addressed in this thesis concerning Libya's implementation of the principle of 'the best interests of the child', which is a central feature of CROC.

The principles of international child law contained in CROC required examination because they underpin the views expressed by the CRC in its dialogue with Libya (discussed in Chapter 1). Similarly, principles of Islamic law relevant to decisions affecting children are a central influence on the positions adopted by Libya, and so will be examined in the next chapter.

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<sup>218</sup> An-Nai'm, 'Cultural Transformation and Normative Consensus on The Best Interests of the Child', above n 78.

### 3 'THE BEST INTERESTS OF THE CHILD' UNDER ISLAMIC LAW

#### 3.1 Introduction

Libya's initial report stated that: 'the Libyan Arab Jamahiriya has introduced the Child Protection and Welfare Ordinance, which demonstrated that the interests of the child in the Libyan Jamahiriya are given the highest respect'.<sup>219</sup> In its response, the Committee on the Rights of the Child (CRC) in one of its comments raised by Mrs Mboi regarding the situation of HIV/AIDS in Libya commented:

If the country was really entirely free of cases of HIV/AIDS, the Jamahiriya was to be congratulated. That situation could not, however, be attributed to Islam, since members of *many good Muslim families* throughout the world had contracted the disease not just through sexual intercourse but through drug abuse. It was very important that Governments should not deny the existence of HIV/AIDS for religious reasons.<sup>220</sup>

In light of this comment, this thesis will note the difference between Muslims as individuals, and Islam as a religion, and the lack of clarity the CRC appears to demonstrate in regard to the two. It seems that the CRC has developed a perception of Islam as a religion through the actions of Muslims who do not totally represent Islamic attitudes. The approach, which has been taken by this thesis, is to explore Islamic law from a theoretical perspective in this chapter, followed in the succeeding

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<sup>219</sup> Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1995: Libyan Arab Jamahiriya*. 26/09/1996 [50] UN Doc CRC/C/28/Add.6 (1996) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.28.Add.6.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.28.Add.6.En?Opendocument)> at 10 April 2008.

<sup>220</sup> Committee on the Rights of the Child, *Summary Record of the 434th Meeting: Libyan Arab Jamahiriya*. 13/01/98 [28], UN Doc CRC/C/SR.434 (1998) (emphasis added) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.434.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.434.En?Opendocument)> at 18 April 2008.

chapter by an exploration of Islamic culture and its influences in and through Libyan law.

One misconception of Islam is evident by the comment raised by Mrs Palme, a CRC member, who criticised a precept of Islam itself:

One concern was that, although there had been an enormous development in equality between boys and girls in the domain of health, there still appeared to be elements of difference in the treatment of two sexes, especially with regard to inheritance.<sup>221</sup>

This criticism is common among those who fail to understand and appreciate Islamic law. With regard to the same issue, some Muslim feminists argue in favour of the Islamic system of inheritance.

The justification of men's double share is on the basis of men's greater economic responsibility in the family system of Islam. This argument is valid to the extent that man's double share in inheritance is not based on gender; it is rather based on different economic roles of men and women in the family.<sup>222</sup>

Such comments made by the CRC indicate a failure to appreciate that the application of CROC to the Libyan legal system through its culture will necessarily involve the adoption of a culturally relativist approach. Representatives on behalf of the Libyan

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<sup>221</sup> Ibid [65].

<sup>222</sup> Niaz A Shah, *Women, the Koran and International Human Rights Law, The experience of Pakistan*, Studies in Religion, Secular beliefs and Human rights (2006) 55.

Government raised the issue of relativism to remind the CRC after affirming their commitment to the ‘best interests’ principle that

there was full agreement concerning the provisions and objectives of the Convention. [Libya] had ratified the instrument precisely because [the Libyan] Government believed in its importance. However, although States must group themselves around internationally accepted principles, it must not be forgotten that different societies espoused different ideas and different religions, and that they could not always see an issue from the same perspective. Objectives could be agreed upon but mechanisms for implementation and coordination should not be imposed. Each country had its own values and customs, and any attempt to make all countries fit into the same mould would inevitably be counter-productive.<sup>223</sup>

This statement is well justified because CROC itself explicitly recognises cultural relativism and the importance of diverse societies achieving the same objectives (yet not necessarily in an identical form) as has been discussed in Chapter 2 of this thesis. However, the evidence has still yet to be presented.

In the case of Libya, relativism is presented in the form of Islamic law. Islam is the official religion of Libya, and the implementation of Islamic law is derived from the *Malikiyah Mathhab*. Such a *Mathhab* can be viewed as a means of the interpretation to be adopted for implementation of Islamic law. It must be noted that Islam as a religion should not be perceived as liturgy alone, but rather a way of life, with rules and regulations transcending political and social divisions; Libya is a society that is influenced by Islamic law with religion inseparable from the state.

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<sup>223</sup> Committee on the Rights of the Child, *Summary Record of the 434th meeting: Libyan Arab Jamahiriya. 13/01/98 [70]* (Mr Quateen), UN Doc CRC/C/SR.434 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.434.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.434.En?Opendocument)> at 18 April 2008.

As Shah stated:

There is a strong belief among orthodox Muslims and some illinformed and misinformed non-muslims that Islamic law is monolithic whole and immutable. They believe it can not changed and it is its followers who have to confirm to the rules of Islamic law. [it has been] attempts to show how the myth of immutability of Islamic law can be dismantled. It is argued that Islamic law consists of various schools and sources, both divine and human, and that foreign/un-islamic elements have influenced the evolution of Islamic law over the centuries.<sup>224</sup>

In order to objectively and comprehensively analyse influences of Islam on Libyan law, specifically Legislation 10/1984, three important areas of Islamic law will be discussed. Strict or fixed rules in Islam which are unambiguously quoted from the Holy *Qur'an* or true *Hadith* represent the first area of analysis. Secondly, diverse views represented by the major schools of thought (*fiqh*) will be the target of scrutiny. This section of analysis will present the diverse understanding and disagreement among opinions in Islamic law. Finally, the ongoing debate on many differing issues, particularly more contemporary issues where no final opinion has yet been agreed upon, will be presented.

Therefore, when an aspect relating to guardianship is to be discussed throughout this chapter, this thesis will endeavour to present the argument by confirming the relevant issue as being in one of the three states of Islamic law: namely a fixed rule, or an understanding as presented in a specific or various schools of thought, or as a matter still under debate. With this in mind, the approach taken by Libya in its implementation of the 'best interests' principle will be surely affected by Islamic

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<sup>224</sup> Niaz A Shah, above n 217, 69.

interpretation in the form of one of these categories. Hence, the Libyan representatives reaffirmed their implementation of the ‘best interests’ principle:

Legislation No. 17 of 1992 regulating the situation of minors and those of equivalent similar was then promulgated. Article 82 stipulates that: “The most appropriate principles of Islamic law shall apply in matters of guardianship, trusteeship and custodianship in cases where this Legislation makes no special provision.” The Legislation therefore implements the most appropriate principles of Islamic law in the best interests of the child. The Child Protection Legislation No. 5 of 1997 provides for the protection and rights of the child, as well as for the consideration of his or her best interests.<sup>225</sup>

It should be noted that in the above statement, the specified legislation is the initial source for Libya’s implementation. Most importantly, it is ‘Islamic law’ which has been given explicit mention for the provision of a safety net when specific laws relating to the ‘guardianship, trusteeship and custodianship’ matters have not been defined.

In 2003, in its response to Libya’s Second Periodic Report under CROC, the CRC stated:

The Committee is concerned that the general principle of the best interests of the child contained in article 3 of the Convention is not explicitly incorporated in all legislation concerning children and is not always considered in practice.<sup>226</sup>

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<sup>225</sup> Committee on the Rights of the Child, *Second Periodic Reports of States Parties Due in 2000: Libyan Arab Jamahiriya*. 19/09/2002 [60] CRC/C/93/Add.1 (2002) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.93.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.93.Add.1.En?Opendocument)> at 18 April 2008.

<sup>226</sup> Committee on the Rights of the Child, *Concluding Observation: Libyan Arab Jamahiriya*. 04/07/2003 [27] UN Doc CRC/C/15/Add.209 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/8ea5ea3ba95829a1c1256daa002dbd01?OpenDocument>> at 18 April 2008.

Through its comment, the CRC has suggested that Libya's implementation falls short of putting the principle into practice as its explicit inclusion in all relevant legislation is lacking, and current practice fails to reflect its objects. The CRC also commented regarding a lack detailed statistical correlations or evidence regarding impacts of implementation. The CRC's response could objectively be viewed as accurate since there was limited evidence to prove otherwise.

In its conclusion, the CRC recommended that Libya 'fully incorporate in legislation and practice, article 3 of the *Convention*, including in the area of custody of children'.<sup>227</sup> Hence, this chapter will focus on the area of guardianship and custodianship through Islamic law, since Libya's justification of its implementation of the 'best interests' principle and the CRC's recommendation to Libya are both relevant to this core issue.

Within this chapter, the main sources of Islamic law will be introduced. A definition of guardianship from an Islamic perspective will be presented. Analysis of how Islam as a religion ensures the well-being of a child through guardianship will also be included in this chapter. A concept called the 'guardianship hierarchy' will be introduced as well as the implications of this hierarchy on the people affected and society more generally. Guardianship in Islam has strict conditions which differ from person to person, for example, according to one's relationship or kinship status, among other considerations. The most important of these conditions will be mentioned in this chapter. Finally, information relating to the duration of

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<sup>227</sup> Ibid [28].



guardianship, child access, and maintenance of the child and the guardian will be detailed.

The methodological approach adopted in compiling this chapter follows the priority of Islamic reference. In order, they are: the Holy *Qur'an*, the divine message that Muslims believe to be unaltered since its revelation; the *Sunnah*, the traditions of the Prophet Muhammad (PBUH); and, finally, texts compiled over 1400 years, including the jurisprudence of Imam Abu Hannifa (Hannafiya), Imam Al-Shafa'i (Shafa'iyah) and Imam Ahmad Ibn Hanbal (*Hanbaliyah*). Particular reference must be made to the jurisprudence presented by Imam Malik, referenced throughout this thesis as representative of the views advocated by the *Malikiyah Mathhab*. This reference is necessary because it is this interpretation of Islam that Libya advocates publicly and privately.

By presenting the necessary information regarding guardianship and custodianship under Islamic law, this chapter will be used as a solid foundation for the following chapter: the interpretation by the LHC of the Libyan Legislation 10/1984, which covers issues relating to guardianship and custodianship.

### 3.1.1 Children protection in Holy *Qur'an* and Sunnah

In Islam, the main sources of and references for the religion are the Holy *Qur'an* and Sunnah. They deal extensively with the issue of child protection, although there are areas where rights of the parents dominate. Examples include: the right of the father to give the child his religion; and custody and legal guardianship of a minor

(otherwise known as ‘*wilaya*’) lies with the father.<sup>228</sup> (This could otherwise be expressed that children have the right to have their religion, custody and legal guardianship guaranteed by the father.) The Holy *Qur’an* enjoins full protection of the child. For example Verse 17:31 states:

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ  
كَانَ خَطْئًا كَبِيرًا ﴿٣١﴾

31. Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin.<sup>229</sup>

This verse is in reference to the practices of the Khuza’ah tribe who lived in the time of the Prophet (PBUH). Male tribe members would bury their new born daughters alive due to ‘social humiliation’ and a fear that they would fall into a life of poverty. In this verse, Allah is saying that provisions shall be made for their daughters and burying/killing them is a tremendous sin which deserves severe punishment. Allah is saying to not fear poverty because He will provide for those who take care of their families.<sup>230</sup>

<sup>228</sup> Al-’alim, above n 87, 315.

<sup>229</sup> ‘Abdullah Yūsuf ‘Alī, *The Meaning of the Holy Qur’an* [trans ‘Abdullah Yūsuf ‘Alī, first published more than 100 years ago, ed 2005] (hereafter Yūsuf ‘Alī translation). Note: while the 2005 paperback copy of this volume uses the term ‘God’ for *Allah*, the latter form is here adopted as per the on-line version and traditional practice.

<sup>230</sup> Royal Aal al-Bayt Institute for Islamic Thought, *Tafsir Ibn’Abbas* (2006) avail <<http://www.aalalbayt.org>> at 12 August 2007. English parallel text [trans Mokrane Guezzou] <<http://www.altafsir.com/Ibn-Abbas.asp>> at 2 August 2009.

The following verse also makes reference to what is requested of us by Allah, including care of children and respecting all lives. Verse 6:151 says:

﴿ قُلْ تَعَالَوْا أَتْلُ مَا حَرَّمَ رَبُّكُمْ عَلَيْكُمْ ۖ أَلَّا تُشْرِكُوا بِهِ شَيْئًا ۚ وَبِالْوَالِدَيْنِ إِحْسَانًا ۖ وَلَا تَقْتُلُوا أَوْلَادَكُمْ مِمَّنْ إِمْلَقَ نَحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ ۖ وَلَا تَقْرَبُوا الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَنَ ۖ وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ۚ ذَٰلِكُمْ وَصَّيْتُكُمْ بِهِ ۚ لَعَلَّكُمْ تَعْقِلُونَ ﴾

- 151 Say: "Come, I will rehearse what Allah hath (really) prohibited you from": join not anything as equal with Him; be good to your parents; kill not your children on a plea of want:— We provide sustenance for you and for them;— come not nigh to shameful deeds, whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.<sup>231</sup>

According to the *Qur'anic* interpretation by Ibn Abass,<sup>232</sup> this verse reveals among other things, that Allah expects that humanity shall protect their children and has clearly commanded that one should not kill one's children from fear of poverty because Allah will supply the necessary provisions.<sup>233</sup>

Likewise in Verse 6:152 we find the following injunctions:

<sup>231</sup> Yūsuf 'Alī translation.

<sup>232</sup> Ibn Abass: respected companion and cousin of the Prophet Muhammad (PBUH). Widely respected in his interpretation of the Holy Qur'an, hence referred to in this thesis as the main source of Qur'anic interpretation.

<sup>233</sup> Royal Aal al-Bayt Institute for Islamic Thought, *Tafsir Ibn 'Abbas* (2006) avail <<http://www.aalabayt.org>> at 12 August 2007. English parallel text [trans Mokrane Guezzou] <<http://www.altafsir.com/Ibn-Abbas.asp>> at 2 August 2009.

وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ ۚ وَأَوْفُوا  
 الْكَيْلَ وَالْمِيزَانَ بِالْقِسْطِ ۚ لَا تَكْلِفُوا نَفْسًا إِلَّا وُسْعَهَا ۚ وَإِذَا قُلْتُمْ  
 فَاعْدِلُوا وَلَوْ كَانَ ذَا قُرْبَىٰ ۚ وَبِعَهْدِ اللَّهِ أَوْفُوا ۚ ذَٰلِكُمْ وَصَّيْتُكُمْ بِهِ ۚ  
 لَعَلَّكُمْ تَذَكَّرُونَ ﴿١٥٢﴾

152. And come not nigh to the orphan's property, except to improve it, until he attain the age of full strength; give measure and weight with (full) justice;- no burden do We place on any soul, but that which it can bear;- whenever ye speak, speak justly, even if a near relative is concerned; and fulfill the Covenant of Allah, thus doth He command you, that ye may remember.<sup>234</sup>

This verse is particularly important when looking at the rights of an orphan in the context of Islam, and what Allah has decreed. Ibn Abass interprets this verse to say that: ‘(And approach not the wealth of the orphan save with that which is better) through protecting it and making it grow; (till he reach maturity) legal age and shows righteousness in his character’.<sup>235</sup>

The emphasis placed on the welfare and protection of orphans and the needy reflects the concern in Islam for the rights of persons in a vulnerable position.

Verse 4:2 of the Holy *Qur'an* says:

وَعَاثُوا الْيَتَامَىٰ أَمْوَالَهُمْ ۚ وَلَا تَبَدَّلُوا الْخَيْرَ بِالْطَّيِّبِ ۚ وَلَا تَأْكُلُوا  
 أَمْوَالَهُمْ إِلَىٰ أَمْوَالِكُمْ ۚ إِنَّهُ كَانَ حُوبًا كَبِيرًا ﴿٢﴾

<sup>234</sup> Yūsuf ‘Alī translation.

<sup>235</sup> Royal Aal al-Bayt Institute for Islamic Thought, *Tafsir Ibn ‘Abbas* (2006) avail <<http://www.aalalbayt.org>> at 12 August 2007. English parallel text [trans Mokrane Guezzou] <<http://www.altafsir.com/Ibn-Abbas.asp>> at 2 August 2009.

2. To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin.<sup>236</sup>

Ibn Abbas understood this verse as:

(Give unto orphans their wealth) which is with you when they reach the legal age. (Exchange not the good for the bad (in your management)) do not consume their wealth which is prohibited for you while leaving your own wealth which is lawful for you (nor absorb their wealth into your own wealth) by mixing them. (Lo! That) wrongfully consuming the wealth of the orphan (would be a great sin) which will be met by Allah's punishment. This verse was revealed about a man from Ghatafan<sup>237</sup> who had in his possession a great amount of wealth that belonged to his orphaned nephew. When this verse was revealed he decided to separate the wealth of his nephew from his own for fear of committing a sin.<sup>238</sup>

These four *Qur'anic* verses reflect the importance that is placed on the lives and wellbeing of people, but more specifically the wellbeing of children. It emphasises and clearly demonstrates the high esteem in which children are held in Islamic law. Therefore, given the direct referencing from the Holy *Qur'an* on the matter, this issue is covered by the first group of Islamic law; that is fixed rules that symbolise an area of certainty without any ambiguity. It must be emphasised that this certainty is consistent with CROC and its explicit declaration of the 'best interests of the child' principle as the primary consideration.

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<sup>236</sup> Yūsuf 'Alī translation, See also: 2:83, 2:177, 2:215, 4:36, 2:220, 4:2, 4:6, 4:9, 4:10, 4:3, 4:127.

<sup>237</sup> Name of an Arabic tribe in that time.

<sup>238</sup> Royal Aal al-Bayt Institute for Islamic Thought, *Tafsir Ibn 'Abbas* (2006) avail <<http://www.aalabayt.org>> at 12 August 2007. English parallel text [trans Mokrane Guezzou] <<http://www.altafsir.com/Ibn-Abbas.asp>> at 2 August 2009.

By observing the Sunnah, which is the second source of Shari'a, examples can be shown that once again highlight the importance of 'the best interests of the child' in Islamic law. For example, Abu Hurairah (may Allah be pleased with him) reported:

Allah's Messenger (PBUH) observed; "Avoid the seven most grievous sins. (The hearers) asked: What are they, Allah's Messenger? He (the Holy Prophet) replied: Associating anything with Allah, magic, killing of one whom Allah has declared inviolate without a just cause, devouring the property of an orphan, dealing in usury, fleeing on the day of fighting, and calumniating the chaste, innocent, believing women".<sup>239</sup>

Here again there is a reference to orphans and their treatment. It highlights the concern that Islam shows for not only on children, but more generally for those who are in a vulnerable position.

There are more *Ahadith* (Sayings of the Prophet PBUH) related to this issue. For example:

A woman once complained to the Prophet (PBUH) that upon divorce, her husband wished to remove her young child from her custody. The Prophet (PBUH) commented: You have the first right [*Hadanah*] to the child as long as you do not marry.<sup>240</sup>

On a different occasion a woman again complained that her husband wanted to take her son away from her, although her son was a source of great comfort and warmth to her. Her husband simultaneously denied her claim over the child. The Prophet (PBUH) said: 'Child, here is your father and here is your mother; make a choice

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<sup>239</sup> Al-islam.com website, *Hadith number in Sahih Muslim [Arabic only]: 129* (2007) (Hadith 52 in English) <<http://hadith.al-islam.com/Bayan/Display.asp?Lang=eng&ID=52>> at 21 August 2007.

<sup>240</sup> Al-Imam Ahḥmed, Ibnu Hanbal, *Musnad Al-Imam Ahḥmed* (ND) 2, 37.

between the two as to whom you prefer'. The son took hold of his mother's hand and they dispersed.<sup>241</sup>

The *Ahadith* above highlights Islam's approach when dealing with custody (*Hadanah*) of a child after the parents have divorced. Islam takes into consideration which of the parents is most suitable for the child. Scholars in Shari'a understood this *Hadith* in the prophetic context: where the Prophet (PBUH) gained divine knowledge of the child's choice; hence allowing the child to nominate the parent with whom they wished to be. From this judgement the scholars made the rule of giving priority to mothers having custody (*Hadanah*) during a child's early age as it is believed to be in 'the best interests of the child'.<sup>242</sup>

In another *Hadith* narrated in Sahih Muslim (a book of *Ahadith*), an emphasis is placed on the kindness and maternal goodness. Aishah, the wife of the Prophet (may Allah be pleased with her) said:

A woman came to me along with her two daughters. She asked me for (charity) but she found nothing with me except one date, so I gave it to her. She accepted it and then divided it between her two daughters and she ate nothing of that. She then got up and went out, and so did her two daughters. When Allah's Messenger (may peace be upon him) came I narrated to him her story. Thereupon he (may peace be upon him) said: Whoever is destined with the responsibility of (bringing up) daughters,

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<sup>241</sup> Hisham M Ramadan, *Understanding Islamic Law from Classical to Contemporary*, Contemporary Issues in Islam (2006) 126; Muhammad Sharaf Al-Diyin Khatib, Al-Sayd Muhammad Al-Sayd and Sayd Ibrahiym Sadeq (eds), *Al-Mughniy Li Ibnu Qudamah* (1996) 296.

<sup>242</sup> 'Abdulkariym Zaydan, *Al-Mufassal Fi Ahkam Al-Marraa* (1993) 16.

and he accords benevolent treatment towards them, they will be protection for them against Hell-Fire.<sup>243</sup>

This highlights the importance of the care that a mother provides for her children and highlights that their best interests is a mother's priority. This *Hadith* reflects the importance that Islam places on the mother, and how she can provide for the child's well-being. These examples are to also be attributed to the main group of Islamic law, that is strict/fixed rules in Islam coming from true *Hadith* (Sunah).

Against this background this thesis will now introduce *Hadanah* (guardianship) from an Islamic perspective. This important concept in Islamic law will be thoroughly analysed. Many factors that can influence judgements, together with the conditions of *Hadanah*, will be detailed in the context of 'the best interests of the child'.

### 3.1.2 Guardianship definition

The literal meaning of *Hadanah* (guardianship) is care and protection.<sup>244</sup> Linguistically (in Arabic), *Hadanah* can be referred to as the act of 'cuddling'. When cuddling occurs, it happens in the lap, which is the area situated between the chest and the underarms of the person, or from the armpit to the waist.<sup>245</sup> The idea here is that when cuddling occurs between a woman and her child it is more than just physical contact, it is nurturing, care and love. To fully appreciate the term

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<sup>243</sup> Al-islam.com website, *Hadith number in Sahih Muslim [Arabic only]: 4763* (2007) (Hadith 1515 in English) <<http://hadith.al-islam.com/Bayan/Display.asp?Lang=eng&ID=1515>> at 21 August 2007.

<sup>244</sup> Al-Shikh I'alaish, *Sharah/Al-Jaliyā 'Ala Mukhtasār Khaliyā* (ND) 452.

<sup>245</sup> Sa'yid Muḥammad Al-Jlaydy, *Aḥkām Al-Ausra Fīy Al-Zawaj Wa Al-Tḥlaq Wa Atharuhuma* (2<sup>nd</sup> ed, 1998) 268; Al-'alim, above n 86, 307. Also Al-Sayd Sabiq, *Fiqh Al-Sunnah* (ND) 216; and Al-Sadiq Abdulrahman Al-Gheryani, *Mudawanat Alfīqh Al-Malikiy Wa Adelatuhu* (2002) 156.



‘*Hadanah*’ one needs to understand that it means more than just guardianship; it holds nurturing and maternal connotations. Therefore the Arabic word for guardianship has its origins in the Arabic word for lap (as in a mother’s lap). Legally, *Hadanah* is considered to mean custody with the obligation of caring for the well-being of the child and looking after the child’s interests.<sup>246</sup>

Scholars in Shari’a define guardianship as ‘taking care of [one] who can not be independent, and doing whatever is ... [to their] advantage and as a matter of protection as well, even if he/she was an insane adult’.<sup>247</sup> This definition is specialised for the custody of the child who needs protection and care. In addition, under the *Malikiyah Mathhab* ‘it is considered as protecting the incapable person and meeting their needs’.<sup>248</sup> This definition is general and it includes everyone who is unable to take care of themselves. The assumed reference is to youth, the clinically insane, and single women. However, an alternative definition by Ibn Taymiyah states: ‘It is the victory because it is hospitality and protection of the child’.<sup>249</sup> What Ibn Taymiyah means here by ‘victory’ is the social benefit that has been achieved when a child’s well-being has been addressed.

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<sup>246</sup> *Majallat Al-Mahkama Al-’Ulya* 7/2, decision 2/17, 03/01/1971, 65.

<sup>247</sup> Muhammad ‘Arafa Al-Dasuqi, *Hāshiyatu Al-Dasuqi ‘Ala Al-Sharh(Al-Kabir)* (ND) 2, 526. See also ‘Ala Al-Diyn Abi Bakr Ibn Mass’ud Al-Kasaniy, *Bdaya’ Al-Sūnaya’ Fiy Tartiyb Al-sharaya’* (ND) 202; Ahḥnad Ibnu Muḥammad Al-’adawiy Al-Dirdiy, *Hāshiyatu Al-Dasuqi ‘Ala Al-Sharh(Al-Kabir)* (ND) 508; I’alaish, above n 239, 452; Wahba Al-Zohaily, *ḥliq alafā’ wa almusiniyyin*, above n 70, 37; ‘Abdul’aziz ‘abdulhadyi, above n 86, 63.

<sup>248</sup> Muḥammad Ibnu ‘Abdullah Ibnu Rashid, *Lubab Al-Lubab* (ND) 126.

<sup>249</sup> Taqi Al-diyn Ahḥnad Ibnu Taymiyah Al-Hārraniy, *Majmu’at Al-Fatawah* (2<sup>nd</sup> ed, 2001) v34, 69.

All these definitions confirm the one underlying theme. Importance is not placed on facilities and material things, but rather on nurturing and protecting the child.<sup>250</sup>

### 3.1.3 Guardianship and the child's well-being

From an Islamic perspective, the conditions of guardianship are considered by many as a showcase of the relationship between Islamic legislation and the young, as it assures the child's physical and mental health, and most importantly moral stability.

The human condition dictates that human beings need care, protection and nurturing through childhood. The parents are the closest people to their child. They are the most compassionate towards their child. Generally, they are the best people to care of their child and they are held responsible by Allah and society for the child. As the Prophet Muhammad (PBUH) said: 'the man is the shepherd of his family and is responsible for his flock, and the woman is the shepherd in her husband's house and the responsible for her flock'.<sup>251</sup> This thesis interprets this *Hadith* in the context of Islam as advocating what is perceived to be a leadership approach<sup>252</sup> when dealing with families, rather than the shared responsibility approach.<sup>253</sup> Therefore, the thesis views the ultimate responsibility for the family to be with a male. This interpretation can also be attributed to the fixed rules within Islamic law.

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<sup>250</sup> 'Abdul'aziz 'abduhadyi, above n 86, 64.

<sup>251</sup> A Saying of the Prophet (PBUH) (Hadith) narrated by Al-Shakhan, Ahmed and Abu Dawood.

<sup>252</sup> In this decision making approach when undertaken in the family, one person, usually the man will have the final say in decisions for the family but would normally consult with other members of the family, even the extended family, to ensure the best decision is made.

<sup>253</sup> In this decision making approach when undertaken in the family, decisions will be made through a consultative process between the parents.

Under Islamic law, the man will be responsible for the wardship (*Wilaya*) and the woman will practice the guardianship (*Hadanah*) under the father's responsibility as a 'Walii'.<sup>254</sup> Pearl defines wardship when stating, 'the father, who has right over the child as the *Walii*, retains the overall rights and indeed powers of guardianship'.<sup>255</sup>

The parents are the most appropriate people to fulfil the responsibilities of wardship and *Hadanah* and this is why Islamic law places this duty on them. Islamic law considers the responsibilities of guardianship during the first stages of childhood to be placed on women<sup>256</sup> because this is the stage at which the child needs the mother's care and nurturing. During the early stages of childhood, the mother is considered to be more caring for the child, and she is considered to be more patient than others when dealing with her child's care. Therefore Islamic law gives the right of *Hadanah* to the woman because it is in 'the best interests of the child'.<sup>257</sup> This will only take place when the conditions placed on the guardian are upheld. Otherwise if the mother, for example, is not suitable for her child because of some valid reason/s, the court will then nominate the next person in the guardianship hierarchy to ensure that 'the best interests of the child' is upheld.

When the child is older, the responsibilities are then transferred to the father or male sponsor as they can protect the child and manage the child's needs more systematically. Islamic law gives the authority for the child's spiritual well-being,

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<sup>254</sup> Ibnu Qaiyim Al-jawziyah, *Zaad Al-Ma'ad Fiy Hady Khiyru Al-'Ibad* (1999) 164, 165; Al-Zohayli, *hhuquq alatafaal wa almusiniyyin*, above n 70, 23–33.

<sup>255</sup> David Pearl, *A Textbook on Muslim Personal Law* (2<sup>nd</sup> ed, 1987) 92.

<sup>256</sup> Al-Zohayli, *hhuquq alatafaal wa almusiniyyin*, above n 70, 23; 'Abdul'aziz 'abdulhadi, above n 86, 64.

<sup>257</sup> Sabiq, above n 240, 217.

decision-making and financial well-being to the father because of his assumed greater experience in practical life.<sup>258</sup>

### 3.2 Guardianship: A right or obligation

*Fuqaha* (Islamic legal experts) disagree on the rightful person to be granted the role of guardian.<sup>259</sup> For this reason, some Islamic schools have opposing opinions of who has the right of guardianship. Scholars that associate themselves with both the *Hanbaliyah* and *Hanafiyyah mathhab* have ruled that guardianship is a right of the nursing mother. They believe that there is no need to force guardianship on the mother because it is believed that she holds enough love and compassion to do it willingly.<sup>260</sup> Ibnu Al-Qaiyim stated ‘Islamic law stipulates that Allah’s will and that of his Prophet, is to give the mother priority in the custody of her child whether the father relocates or stays’.<sup>261</sup> However, if she is truly incapable of accepting this responsibility she has the right to refuse it. She cannot refuse simply for the sake of not wanting to care for the child, especially if she is fully capable.<sup>262</sup> On the other hand, *Hanafiyya* scholars consider guardianship as a right for the young child which the nursing mother is obliged to carry it out.<sup>263</sup>

Scholars from the *Malikiyah Mathhab* have also made their views well known on this issue. The first opinion is that they consider the nursing mother’s right above the

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<sup>258</sup> ‘Ali Jum’ah Muhāmmad and Muhāmmad Ahmād Sarraj (eds), *Kitab Al-Furuq Li-Shihab Al-Diyn Al-Sanhajiy Al-Qarafiyy*, (ND) 1006.

<sup>259</sup> ‘Abdul’aziz ‘abduhadiy, above n 86, 66.

<sup>260</sup> ‘Abdulkariym Zaydan, above n 237, 55, 56.

<sup>261</sup> Ibnu Qaiyim Al-jawziyyah, *I’alam Al-Muaq’iyn*, cited in *Majallat Al-Mahkama Al-’Ulya* 7/2, decision 2/17, 03/01/1971, 67.

<sup>262</sup> ‘Abdulkariym Zaydan, above n 237, 55–56.

<sup>263</sup> Al-’alim, above n 87, 310; Wahba Al-Zohaily, *Al-Fiqah Al-Islamiyy Wa Adilatuhu* (4<sup>th</sup> ed, 2002) 7312; ‘Abdulkariym Zaydan, above n 237, 40.

child's right to guardianship. Therefore it is believed that her right should be respected whether or not she chooses to take on this role of guardianship.<sup>264</sup> A second opinion from the *Malikiyah Mathhab* is from Al-Shaikh I'alaish:

Custody is a right of the child, and based on that, the mother cannot reject the custody of her child unless she has a valid reason such as an illness that prevents her from meeting her custodial duties, or she is bound to perform the Islamic pilgrimage to Mecca. In any case, custody is returned to the mother once the impeding reason has been removed.<sup>265</sup>

The third and most convincing opinion from the *Malikiyah Mathhab* is the view that guardianship is a right for both the mother and the child.<sup>266</sup> Both rights should be considered but it is argued that the right of the child is stronger.<sup>267</sup> This opinion is the most commonly followed. Therefore, if the adjudicator was to confirm that 'the best interests of the child' can only be upheld when the maternal mother is guardian, then the mother will be forced into such a role. Similarly, if there are no other close female relatives or appropriate females to take on this role, then the right of guardianship will be considered as the right of the child over the maternal mother, which means she will be obligated to take on this duty.<sup>268</sup> Otherwise, if there was an alternative female relative who was able to fulfil the role of guardian without diminishing 'the best interests of the child', then the mother has the option to take on the role of guardian or to relieve herself of such a role.

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<sup>264</sup> 'Ubid Allah Ibnu Al-Husayn Ibnu Al-Jalab, *Al-Tafri'a* (1987) 2, 71.

<sup>265</sup> I'alaish, above n 239, 458.

<sup>266</sup> Al-Gheryani, above n 240, 158.

<sup>267</sup> Ibnu Rashid, above n 243, 126.

<sup>268</sup> Muhāmmad Zakarya Al-Birdiciy, *Al-Aḥwāl Al-Shakhsīyah Fīy Al-Shrī'a Al-Islamiyah* (ND) 400. See also Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7312; *Law of Marriage and Divorce Rules and their Effects* (10/1984), M63/B; 'Abdul'aziz 'abdulhadyi, above n 86, 67.

Once the mother is relieved of her duty as guardian, there is difference in opinion between the various schools of thought as to who will have the right to be guardian. For example, the perspective from the *Malikiyah Mathhab* is that if the maternal grandmother (on the mother's side) is available to take on the role of guardian, she has the right to take the child into her custody before the father. The specific condition in this case is that the prospective guardian must not be married to a 'stranger',<sup>269</sup> otherwise her right to guardianship will be cancelled. Guardianship will automatically be transferred to the father as it is considered to be his duty as long as he establishes the right conditions<sup>270</sup> (an area to be discussed in the sub-topic 'Conditions for the male guardian').

In summary, all the *Mathhabs* regardless of definitions advocate that the priority of guardianship falls to the nursing mother as long as she is capable and willing to take on the role and responsibility. It is a theme common to all *Mathhabs*. However, if the mother is not capable of taking on this role, or if she failed to fulfil this role and leaves the child due to personal reasons (such as personal disputes, animosity or problems), her rights of guardianship will become void and will no longer be available. There is certainly a difference of opinion between the various schools of thought in terms of whether the right of guardianship is the right of the mother or of the child. This thesis acknowledges that both the parents' and child's right must be respected. However, the differing views on this issue illustrate that Islamic law does have flexibility for interpretation. Therefore, this issue can be associated with the

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<sup>269</sup> 'Stranger': in the context of the guardian, a stranger is defined to be a person who is prohibited from marrying the guarded subject due to blood or maternal relationship.

<sup>270</sup> Al-'alim, above n 87, 311.

second area of Islamic law, allowing for differing views from the various schools of thought.

### 3.2.1 Hierarchy for guardianship

In cases where female guardians have to be chosen, there is an order of preference. The belief is that there is a direct relationship between family relationship and care, that is, the stronger the relationship, the stronger the care. This applies to relatives from both the mother's and father's side. It must be made emphatically clear that these are general rules which courts abide by. However, in cases of extreme circumstances, adjudicators have the power to suspend persons in such preference lists from taking care of the child. Hence, the guardianship hierarchy is by no means 'carved in stone', but is most definitely a set of guiding principles which need to be taken into account when addressing 'the best interests of the child'.

At the top of this hierarchy is the mother. It is a holy right for the mother to have guardianship and this is confirmed by Allah's statement in the Holy *Qur'an*: 'a mother shall not be harmed through her child'.<sup>271</sup> In the interpretation of this verse, reference is made to the mother's right to guardianship and to being a mother regardless of the problems that may have occurred between herself and the child's father.

A secondary opinion, proposed by the Arab League under the Bill titled 'The United Arab Personal Status Law', considers guardianship as a right of the child over that of the mother. Therefore, whether a mother takes up guardianship is neither a matter of

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<sup>271</sup> Verse 2:233.

choice or request but rather an obligation on her part. In a situation where a father's condition for granting the mother a divorce<sup>272</sup> is based on the latter giving up her demand on guardianship, then the divorce is valid but the condition on which the divorce was undertaken is not.<sup>273</sup> This goes back to the principle of the mother having an obligation to care for the child, and that a child's custody by a mother is not an area for negotiation. Also, from the Islamic perspective, the mother's care for a child is in 'the best interests of the child'.<sup>274</sup>

Foundation of the above Bill relied upon a cited discussion between the Prophet Muhammad (PBUH) and a female companion. Her name was Khawlah Bint Tha'labah and from this discussion, the *Qur'anic* verses about '*Dihaar*'<sup>275</sup> (or '*Zihâr*') were revealed. Her complaint to the Prophet Muhammad (PBUH) was as follows: 'My husband Awas Bin Al-Samit has declared a state of *Dihaar* against me. I have children from him and if I leave him and take them with me they will starve, and if I leave them with him they will be lost'.<sup>276</sup> The *Qur'anic* verses that were revealed catered to her requests and provided the following answer: the *Dihaar* is not valid and will not be considered as a divorce, therefore the children will continue living with their parents. This story shows the need for both parents being with the child. If

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<sup>272</sup> In Islam, the husband is usually the party who issues a divorce. However, in extraordinary circumstances, the wife through the Islamic court system can obtain a divorce. Where there is proof of the wife being harmed, then the adjudicator can issue a divorce with all the conditions and rights in tact. Where there is no valid reason for a divorce, then the wife must appease her husband through compensation or otherwise (see, eg, verse 2:229), resulting in all the marriage contract conditions being waived (Khula').

<sup>273</sup> And the condition therefore cannot be enforced. Cited in Al-'alim, above n 87, 314.

<sup>274</sup> 'Abdulkariym Zaydan, above n 237, 16.

<sup>275</sup> *Dîhaar*, derived from the Arabic term '*Dâhar*', which means the back of a person. The term *Dîhaar* was used to identify a common statement made by men in pre-Islamic times that the relationship with the wife is like the back of the mother, i.e. sacred, hence the term means that the relationship between a couple has become void of physical relations (sexual intercourse): Abu Muhammad Abdulwahab Ibnu 'Ali Ibnu Nasîr Altha'laby Al-baghdadiy, *Altalqiyn Fiy Alfîqh Almaliykiy* (ND) 1, 134.

<sup>276</sup> Al-'alim, above n 87, 315.



parents argue and the interests of the child are endangered then this issue needs a judge to intervene to protect that interest. The relevant text is found in Verses 58: 1–2.

قَدْ سَمِعَ اللَّهُ قَوْلَ الَّتِي تُجَادِلُكَ فِي زَوْجِهَا وَتَشْتَكِي إِلَى اللَّهِ وَاللَّهُ  
يَسْمَعُ تَحَاوُرُكُمْ إِنَّ اللَّهَ سَمِيعٌ بَصِيرٌ ﴿١﴾

1. Allah has indeed heard (and accepted) the statement of the woman who pleads with thee concerning her husband and carries her complaint (in prayer) to Allah, and Allah (always) hears the arguments between both sides among you: for Allah hears and sees (all things).<sup>277</sup>

الَّذِينَ يُظَاهِرُونَ مِنْكُمْ نِسَاءَهُمْ مَا هُنَّ أُمَّهَاتُهُمْ إِنَّ أُمَّهَاتُهُمْ إِلَّا  
الَّتِي وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ مُنْكَرًا مِنَ الْقَوْلِ وَزُورًا وَإِنَّ اللَّهَ  
لَعَفُوٌّ غَفُورٌ ﴿٢﴾

2. if any men among you divorce their wives by Zihâr (calling them mothers), They cannot be their mothers: none can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is One that blots out (sins), and forgives (again and again).<sup>278</sup>

At this point, one very important clarification needs to be made. Under Islamic law, guardianship (*Hadanah*) does not involve decision-making for the child. Even when Shari'a scholars give the right of guardianship to the mother, the right and role of decision maker (*Walii*) will always be attributed to the male guardian (that is father, uncle, brother). The mother holds the right to make decisions on everyday issues whilst the father's decision-making should apply to the greater issues faced by the

<sup>277</sup> Yūsuf 'Alī translation.

<sup>278</sup> Yūsuf 'Alī translation.

family such as financial, marriage suitability and other issues deemed to be of great importance. Muslim feminists may not accept this approach guardianship but it can be viewed as another way of protecting the interests of the child. In this approach to caring, the role of decision-making is divided between the female (*hadinnah*) and male guardian (*Walii*) on the basis of the type of care and not the timing. So the child will be guarded by both parents even when they divorced through a cooperative system which provides each parent with a type and level of responsibility. The question this thesis attempts to answer is whether the interests of the child have been protected or not? The unambiguous answer thusfar is that the interests of the child are undoubtedly the main concern of the Islamic system of guardianship.

The ordering of preference for guardianship of the child exists because it is perceived to be in ‘the best interests of the child’. If such an ordering is in direct conflict with the interests of the child, then such a hierarchy will be re-arranged to meet ‘the best interests of the child’. This flexibility in ordering the guardianship hierarchy illustrates the conditions of the second category where Islamic law has provisions for differing in opinions as provided by the various Islamic schools of thought.

### 3.2.2 The priority of the mother as a guardian

Guardianship in an Islamic context is important because without it children will lack guidance and will not have someone to take care of them.<sup>279</sup> It is not only an Islamic idea but it can be found in the history of nations pre modern Islam.<sup>280</sup> The Holy *Qur’an* mentions the story of Prophet Moses (PBUH) when he was found in the river

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<sup>279</sup> ‘Abdul’aziz ‘abduhadyi, above n 86, 65.

<sup>280</sup> Modern Islam: The religion that was reinvigorated by the Prophet Muhammad (PBUH). Muslims believe that Islam is the universal religion on earth since its creation.

and taken to the Pharaoh. His sister told him how to look after Moses once he had been found in the river because he had special needs as a baby.<sup>281</sup> See Verse 28:12.

وَحَرَّمْنَا عَلَيْهِ الْمَرَاضِعَ مِنْ قَبْلُ فَقَالَتْ هَلْ أَدُلُّكُمْ عَلَىٰ أَهْلِ

بَيْتٍ يَكْفُلُونَهُ لَكُمْ وَهُمْ لَهُ نَصِيبٌ ﴿١٢﴾

12. and We ordained that he refused suck at first, until (his sister came up and) said: “Shall I point out to you the people of a house that will nourish and bring him up for you and be sincerely attached to him?”<sup>282</sup>

The Holy *Qur'an* also mentions the story of the Virgin Mary and Zachariah (PBUT) and this story also highlights that this happened long before modern Islam. Priests and other religious figures competed against each other to gain guardianship over Mary. It was Zachariah, who was married to her maternal aunt, who won the right to this role. Zachariah maintained and looked after Mary as she was growing up and was praised and rewarded by Allah for doing so. Before guardianship was granted to him though, a traditional challenge took place in which all those who wanted guardianship were to set quills into the river. It was the owner of the quill that lasted and floated the longest that would attain guardianship, and surely it was Zachariah's quill that lasted the longest and therefore allowed him to have guardianship of Mary.<sup>283</sup> The issue was not decided upon by a mere throw of quills into the river. Rather, Allah had control of the situation and ensured that Zachariah, the husband of Mary's aunt, was granted the role of guardian. Therefore, the importance of

<sup>281</sup> Al-Gheryani, above n 240, 156.

<sup>282</sup> Yūsuf 'Alī translation.

<sup>283</sup> Jalal Al-Diyn Al-Suotī, *Tafsir Al-Jalalayn* Arabic [and English translation by Feraz Hamsa] avail <<http://www.atafsir.com/Tafasir.asp?tMadhNo=1&tTafsirNo=74&tSoraNo=3&tAyahNo=37&tDisplay=yes&UserProfile=0>> at 27 November 2007.

guardianship is highlighted through the role of divine powers as narrated in the story above; it is a very serious matter in the Islamic faith.

The following are the direct quotations from the Holy *Qur'an* dealing with the story (that is, Verses 3:44 and 3:37).

ذَٰلِكَ مِنْ أَنْبَاءِ الْغَيْبِ نُوحِيهِ إِلَيْكَ ۚ وَمَا كُنْتَ لَدَيْهِمْ إِذْ يُلْقُونَ  
أَقْلَامَهُمْ أَيُّهُمْ يَكْفُلُ مَرْيَمَ وَمَا كُنْتَ لَدَيْهِمْ إِذْ يَخْتَصِمُونَ ﴿٤٤﴾

44. This is part of the tidings of the things unseen, which We reveal unto thee (o Messenger.) by inspiration: thou wast not with them when they cast lots with arrows, as to which of them should be charged with the care of Mary: nor wast thou with them when they disputed (the point).<sup>284</sup>

فَتَقَبَّلَهَا رَبُّهَا بِقَبُولٍ حَسَنٍ وَأَنْبَتَهَا نَبَاتًا حَسَنًا وَكَفَّلَهَا زَكَرِيَّا ۖ كُلَّمَا  
دَخَلَ عَلَيْهَا زَكَرِيَّا الْمِحْرَابَ وَجَدَ عِنْدَهَا رِزْقًا ۖ قَالَ يَمْرِئُؤُمَّ أَنْىٰ لَكَ  
هَٰذَا ۖ قَالَتْ هُوَ مِنْ عِنْدِ اللَّهِ ۖ إِنَّ اللَّهَ يَرْزُقُ مَنْ يَشَاءُ بِغَيْرِ حِسَابٍ ﴿٣٧﴾

37. Right graciously did her Lord accept her: He made her grow in purity and beauty; to the care of Zakariyyā was she assigned. Every time that he entered (her) chamber to see her, he found her supplied with sustenance. He said: “O Mary! whence (comes) this to you?” She said: “From Allah. for Allah provides sustenance to whom He pleases without measure”.<sup>285</sup>

A mother’s right to custody has been proven by the Sunnah and the agreement of Islamic scholars. The following supports a mother’s right to custody through the Sunnah. The *Hadith* states,

<sup>284</sup> Yūsuf ‘Alī translation.

<sup>285</sup> Yūsuf ‘Alī translation.

a woman came to the prophet Mohammad (PBUH) and she said to him; “this is my son, I carried him inside of me, embraced him in my lap, fed him from my breast, and his father divorced me, also he wants to take him away from me”, so the prophet (PBUH) answered; “you have the right to his custody until you get married”.<sup>286</sup>

Another incident occurred during the rule of Abubakr, a close follower and successor to the Prophet (PBUH). This case was between the Prophet’s (PBUH) companion, Omar Ibn Al-Khatab, and Omar’s ex-wife Jamila. Omar Ibn Al-Khatab divorced his wife Jamila after she gave birth to their son, A’assem. Disagreement occurred between Omar and his ex-wife about the custody of their newborn. They went to Abubakr to adjudicate on the issue. He ruled that the boy was to stay with his mother and he said to Omar ‘her smell, her touch and her spittle is better for him than your honeycomb’.<sup>287</sup> This judgement was declared in front of other companions of the Prophet (PBUH) and they all agreed with the decision (Ijma’ Sahabah). This decision has become the principle for Islamic scholars when adjudicating on similar cases.

As had been stated previously, early childhood is generally considered to be dependent on the mother’s nurturing and care. This is what Abubakr emphasises in his ruling. Sabeq confirms this view in his writings:

[W]omen are more entitled to guardianship than men, and the mother’s kinship is preferred over the father’s kinship. Also the judgment that

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<sup>286</sup> Al-Imam Ahmed, Ibnu Hanbal, above n 235, 2, 37. Narrated by Abu Dawuud, (1/693), Hadith No: 2276, cited in Al-Kasaniy, above n 242, 211.

<sup>287</sup> ‘Abdullah Ibnu Yusif Al-Zaila’iy, *Nasb Al-Rayyah Liyahdith Al-Hidayah* (2<sup>nd</sup> ed, ND) 266; Al-Kasaniy, above n 242, 211; Ibnu Qaiyim Al-jawziyah, *Zaad Al-Ma’ad Fiy Hady Khiyer Al-Ibad*, above n 249, 4, 123.

Abubakr ruled with was in front of a number of companions and none of them opposed that judgment so they were in agreement.<sup>288</sup>

In the opinion of Islamic scholars it is widely considered that the mother is more compassionate and gentler when caring for her child in their early stage. Similarly, a father's compassion is negligible when compared with the mother's. Even if the couple are separated and the father does not do the caring himself but has a female (such as a wife, sister, mother, nanny) to take on this role, the maternal mother of the child has the priority to look after her own child. So through the Sunnah and the agreement of scholars, it is clear that when seeking 'the best interests of the child', the mother is the preferred guardian of a child in their early stages of development.<sup>289</sup> It can be concluded that the priority of the mother as a guardian is considered as a fixed rule of Islamic law which cannot be contradicted.

### 3.2.3 Difference of religion between guardian and child

Being a Muslim is not a criteria for the mother to be granted custody of a Muslim child (that is, where the father is Muslim).<sup>290</sup> A woman, whether she is a Muslim or a person of the Book,<sup>291</sup> does not lose her rights to custody because of her religion.<sup>292</sup> This is because guardianship depends on compassion and love and catering to the child's best interests. The difference in belief or religion does not affect the relationship between the guardian and the child unless the child's religion is

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<sup>288</sup> Sabiq, above n 240, 218. See also, Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7298.

<sup>289</sup> 'Abdul'aziz 'abduhadyi, above n 86, 66.

<sup>290</sup> Jalal Al-Diyn 'Abdulah Ibnu Najm Ibnu Shas, '*Aqdu Al-Jwahir Al-Thaminah Fiy Mathab Ahli Al-Madinah*' (ND) 609.

<sup>291</sup> This generally refers to a Jew or a Christian.

<sup>292</sup> Al-Gheryani, above n 240, 161.

endangered.<sup>293</sup> So, if the mother was a person of the Book and her husband was a Muslim, she has the priority to custody until the child recognises the difference in religions.<sup>294</sup> This is accepted to be up until the child reaches the age of approximately 15 years, and starts to be affected by the mother's religion which is not the same as their father's. In the case where the guardian is not the mother and is not a Muslim, then she will lose the right of guardianship. For example if the child's maternal grandmother was not Muslim, she would lose her right to guardianship over the child. Unlike the instance of the maternal grandmother, Islamic scholars believe in the priority of the mother to be granted the right of guardianship regardless of religion. Also a condition of granting the right of guardianship is that the non-Muslim mother be among one of the revealed religions (that is, Jew or Christian). The opinion of this thesis is that in this case, the 'best interests' principle is not upheld because the focus and concern is on the religion of the female guardian and not the interests of the child.

The second concern this thesis wishes to highlight is the case where Islam grants the right of the father to raise his child according to his religion. As mentioned above, a prospective non-Muslim female guardian will not be granted the role of guardian where she is not the mother or a person of the Book. This thesis believes that any prospective female guardian should be granted the role regardless of religion on condition that the child's interests are being protected, most noteworthy being the protection of child's religion.

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<sup>293</sup> Al-Dirdiyr, above n 242, 2, 829.

<sup>294</sup> Al-Kasaniy, above n 242, 212.

However if the guardian of the child is a non-Muslim mother, and she argues that her custody over the child allows her to teach the Muslim child her religion, then a judge has the authority to place the child in another's custody, referring to the hierarchy.<sup>295</sup> From the Islamic perspective, the child's religion is believed to be endangered and a course of action to prevent this is necessary. The judge is responsible for solving this problem according to the facts and conditions on which the case is formed. If it is proven that the guardian is attempting to convert the child to her own religious beliefs and raising the child in them, the child will be taken from her because she has become unfaithful when it comes to maintaining the child's religion.<sup>296</sup> The prophet Muhammad (PBUH) explained; 'every newborn is born on *Alfetrrah* [that is, a Muslim], it is the parents that raise the child according to a different belief'.<sup>297</sup>

Contradictory to the above opinion which is accepted in the *Malikiyah Mathhab*, the view of the *Shafi'iyah* and *Hanbaliyah mathhabs* is that a non-Muslim mother does not have the right of custody over her Muslim child, because guardianship is a type of authority and she will not be able to guide the child properly in their religion.<sup>298</sup>

This issue illustrates that Islamic scholars do not have a clear and final opinion. The reason for that is there is no clear evidence from Holy *Qur'an* or *Sunnah* that prevents non-Muslim mothers of being a guardian. Therefore, different opinions can be adopted and no-one can refuse them. This thesis supports the view that guardianship should not be taken away from a mother due to her religious beliefs

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<sup>295</sup> See 3.2.1 above.

<sup>296</sup> Abu 'Umar Yusif Ibnu 'Abdulbarr Ibnu 'Asim Al-Nimry Al-Qurtūby, *Al-Kafy Fiy Fiqh Ahlu Al-Madiynah* (ND) 2, 626.

<sup>297</sup> Albukhariy, *Sahih Albukhariy* (ND). 1, 29. Hadith 2:441 Translation avail <[http://www.sacred-texts.com/isl/bukhari/bh2/bh2\\_442.htm](http://www.sacred-texts.com/isl/bukhari/bh2/bh2_442.htm)> at 2 August 2009.

<sup>298</sup> Al-'alim, above n 87, 316.



unless it is harming the child and is not in the child's best interests. As long as a mother can provide the child with the nurturing, care and resources that they need, then she should be able to keep her right as guardian.

### 3.3 Conditions of guardianship

Conditions of guardianship to be outlined below can be divided into three groups: firstly, those of general in nature (where the criteria not specific to any person or any gender); secondly, conditions relating to female guardians; and thirdly, conditions for male guardians.

#### 3.3.1 General conditions

Parents are in charge of their children and have an obligation to bring them up to the best of their capabilities. The custody and guardianship of the child lies with the parents.<sup>299</sup> Being granted the title of guardian is not automatic or a natural phenomenon but rather is granted under certain conditions.

##### 3.3.1.1 Adulthood and capability

The role of guardian requires a person who possesses a mature character.<sup>300</sup> The person needs to be able to take care of themselves and any who have been placed in

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<sup>299</sup> Ibid 313.

<sup>300</sup> Al-Jlaydy, above n 240, 275; Muḥammad Ibnu 'Abdullah Ibnu 'Ali Al-Khurashiy, *Hāshiyatu Al-Khurashiy 'Aala Mukhtāṣṣ Khaliyl* (ND) 241.

their care. Thus, maturity and the ability to make decisions in the interests of the child are examples of criteria in this area.<sup>301</sup>

#### 3.3.1.2 Good health and availability?

Islamic experts have stipulated further conditions for the guardian. One such condition is being in good health and having the ability to meet the needs of the child.<sup>302</sup> However, if the woman is working and her work stops her from meeting the duties of care, protection and maintenance of the child, then she is not eligible to be custodian of the child.<sup>303</sup> On the other hand, if her work does not stop her from meeting that goal, then custody will be granted.<sup>304</sup>

#### 3.3.1.3 Trustworthiness

A person who is not trustworthy cannot be entrusted with the interests, soul, religion, morality and manners of the child.<sup>305</sup> So, an adult who is seen to display actions which are not favourable, or has a history that is seen as unsuitable, will not receive custody of the child.<sup>306</sup> Personal history or attributes could range from criminal or unsafe behaviour, to daily issues that do not contribute the child's interests.<sup>307</sup> A common example is frequently leaving the child unattended at home or in a car. These actions convey the impression that the potential guardian cannot be trusted

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<sup>301</sup> Ibnu Qaiyim Al-jawziyah, *Zaad Al-Ma'ad Fiy Hady Khiyer Al-'Ibad*, above n 249, 4, 133; Muḥammad Amiyūn Ibnu 'Abiydiyā, *Rad Al-Muḥḥar 'Ala Al-Durr Al-Mukhtar Sharhu Tanwīr Al-Absār* (ND) 3, 555; Al-Khurashiy, above n 295, 241.

<sup>302</sup> Al-Khurashiy, above n 295, 242; Al-Dirdiy, above n 242, 2, 528.

<sup>303</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7305.

<sup>304</sup> Al-'alim, above n 87, 318.

<sup>305</sup> 'Abdulkariyūn Zaydan, above n 237, 36.

<sup>306</sup> Al-Khurashiy, above n 295, 242.

<sup>307</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7305.

with the child's moral development because the child imitates the person with whom they spend most of their time.<sup>308</sup>

It should be understood that this does not mean that guardianship will be cancelled over minor actions. As long as the actions of the guardian do not directly affect the child in an adverse manner, then guardianship will remain. However, if the guardian's actions prevent care from being given to the child then the right of custody will be cancelled<sup>309</sup> in 'the best interests of the child'. Given that clear evidence exists from the Holy *Qur'an* and Sunnah on this issue, this decision area is among the first category which doesn't allow any room for negotiation.

### 3.3.2 Conditions for the female guardian

Depending on the opinion of differing Islamic schools, guardianship is either the right or obligation of the mother regardless of whether she claims it or not. Guardianship is awarded to the mother after divorce or after the death of the father and it is maintained until the child reaches a certain stage in life. Definition of these stages differs between the various Islamic schools. These are defined as puberty for a boy and marriage for a girl.<sup>310</sup> The definition of puberty in Islam differs between genders for the various Islamic schools. Evidence of pubic hair and a girl's menses are unanimously agreed upon. However, if these signs are not convincing, then the various Islamic schools determine a specific age of between 15 and 18 years. The *Malikiyah* and *Hanafiyyah Mathhabs* have both defined this age for males to be 18 and for girls to be 18 and 17 respectively. Agreement by the *Shafi'iyah* and

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<sup>308</sup> 'Abdulkariym Zaydan, above n 237, 39.

<sup>309</sup> 'Abiydiya, above n 296, 5, 254.

<sup>310</sup> Khtab, Al-Sayd and Sadeq, above n 236, 282.

*Hanbaliyah Mathhabs* has defined the age to be 15 for both genders.<sup>311</sup> This variation in age definition is a clear example of the flexibility provided within Islamic law. Each Islamic school justifies their own definition according to their own conditions and circumstances which will best protect the interests of the child.

If the mother dies or marries a man who does not have the right to custody over the child, and the marriage is consummated, guardianship will be transferred to the maternal grandmother, even if the grandmother resides in a distant location.<sup>312</sup>

Abdullah Bin Amar Bin Al'ass stated that 'the mother has the right to the guardianship of her child if she did not remarry'.<sup>313</sup> The guardian should not be married to a 'stranger' of the child,<sup>314</sup> unless the adjudicator decides otherwise. This decision would be made with the interests of the child as priority.<sup>315</sup> So, if the woman is married to unmarriageable kin of the child, such as the uncle,<sup>316</sup> or she is yet to validate her contract of marriage through sexual intercourse,<sup>317</sup> then the court will declare the interest of the child to be the status quo.

Ibnu 'Abdiya, who is from the *Hanafiyyah mathhab*, commented:

you have known that the right of custody will be cancelled by getting married to a man who is a stranger to the child, in order to protect the child, then the judge should have a wide insight with regard to the child's interests, because he might have a kinship that hates him and wants him dead, and his step father has sympathy for him and it is hard on him to let

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<sup>311</sup> 'Abdulbasit A Al-Na'as, *Alwilayah Fiy Alqanunayn Al-Liybiy Wa Al-Mghribiy* Muhammad Al-khmis (2001) 90.

<sup>312</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7299.

<sup>313</sup> Khatib, Al-Sayd and Sadeq, above n 236, 283.

<sup>314</sup> Al-Dirdiyar, above n 242, 2, 529–530.

<sup>315</sup> 'Abdulkariym Zaydan, above n 237, 46.

<sup>316</sup> Ibnu 'Abidiya, above n 296, 3, 557.

<sup>317</sup> 'Abdulkariym Zaydan, above n 237, 46.

the child go, or his kinship wants to take him in order to hurt him and his mother, or to take his money, or his kinship may have a wife who would hurt him double than what his step father does, or he may have children that can not be trusted with the girl, so if the judge knew about any of these he can not cancel the mother's right in her child's custody, because the whole theme of guardianship is about the child's interests.<sup>318</sup>

The source clearly indicates that Islamic law focuses on 'the best interests of the child', and decisions on each individual case are based on its own facts and merits. In some cases, it may be decided that the child should remain with the mother and her husband if she has remarried because it may be in the child's best interests to do so.<sup>319</sup> Ibn Al-Qasim, a student from the *Malikiyah Mathhab*, asked Imam Malik what would occur if a man allocated guardianship of his children to his wife after he passed away in his will but she were to remarry after his death. Would the request of the will be honoured? Imam Malik replied that it would if she could provide a place for them to live.<sup>320</sup>

The opinion of the Ibn Hazm Al-Zahiri *Mathhab* and the renowned scholar Al-Hasan Al-Basry, both view that guardianship cannot be cancelled by marriage. The preference would be to leave the evaluation to the adjudicator if the husband was not of kin to the child. If the adjudicator accepts the situation he will not forbid the mother from caring for her child.<sup>321</sup>

The above examples highlight the flexibility of Islam and highlight that 'the best interests of the child' are paramount in each case. There is no fixed way of dealing with each case, but rather there is the notion that each case will be judged on its

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<sup>318</sup> Ibnu 'Abiydiya, above n 296, 5, 639.

<sup>319</sup> 'Abdulkariym Zaydan, above n 237, 47.

<sup>320</sup> 'Isa Ibnu 'Ali Al-Hāsaniy, *Kitab Al-Nawazil* (ND) 292.

<sup>321</sup> Al-'alim, above n 87, 319.

individual merits and that any decision made will be made based on ‘the best interests of the child’.

This thesis supports the opinion advocated by Al-Zahiri and Al-Basry which do not deny guardianship to mother that has re-married and the best interests of the child are protected. Decision to take the child away in such a circumstance can only be justified if the interests of the child are endangered.

### 3.3.3 Conditions for the male guardian

Legally, guardianship refers to caring for the child and fulfilling all of the child’s needs. It is considered as a lawful condition for the male to have a female who is going to care for the child and also that this should happen under the supervision of the father or the *Walii* so that the child will not lose out on growing up in the presence of two parents. It is believed that an Islamic legislator made this a priority in regards to the interest of the child because it is the child’s right to enjoy support and compassion.<sup>322</sup>

The main condition for a man who requests custody of a child is to have a woman living with him who fulfils the conditions of a female guardian. This could be his wife, his daughter or his sister.<sup>323</sup> This condition applies because, from an Islamic perspective, it is believed that a man does not have the maternal instincts that a woman possesses. So if he does not have a woman that is suitable to take on the role that is required of her, he will lose custody. This is particularly important in the early

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<sup>322</sup> *Majallat Al-Mahkama Al-’Ulya* 7/2, decision 2/17, 03/01/1971, 63.

<sup>323</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7309.

stages of a child's life. A further condition for the female in such a situation is that she must not be marriageable to the child.<sup>324</sup> This principle of not mixing people who are marriageable with each other is universal in Islam. So this type of condition is fixed under Shari'a law and is not to be modified in any way.

Therefore, these conditions, whether they are general or specific in nature, aim to achieve 'the best interests of the child'. As mentioned earlier in this chapter, these are basic guidelines which should be followed. But if 'the best interests of the child' will not be satisfied by these guidelines, the adjudicator will then have full authority in cases where the conditions do not conform to the fixed rules in Islam, to make a decision based on the merits of the case on hand.

### **3.4 Losing guardianship**

The role of guardian can be made void for a number of reasons. This situation can arise from conditions over which the person had no control or due to their failure to meet the conditions of guardianship. For example, if the mother falls ill and can no longer care for the child, her role as guardian will be annulled. However, she will be reinstated as guardian once she has reached an acceptable level of health according to the courts.<sup>325</sup> In such a situation, the adjudicator has authority to make a decision based on the facts presented on a case by case basis.

Guardianship, as has been mentioned earlier is, in the most considered opinion, the right of the child. Parents or whosoever has been entrusted with this role are obliged

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<sup>324</sup> Al-Khurashiy, above n 295, 245.

<sup>325</sup> *Majallat Al-Mahkama Al-'Ulya* 7/2, decision 2/17, 03/01/1971, 66.

to fulfil the requirements of this role. These duties on the guardian cannot be neglected in any way. If the guardian has not been performing their duties as requested by the court, then guardianship will be discontinued. This decision can be later reversed once the Islamic courts view that the difficulties have been rectified. Hence, guardianship should not be perceived as being permanent but rather under much scrutiny and continual monitoring.<sup>326</sup>

The duties of the female guardian will be cancelled if she chooses to live in a location that is difficult for the male sponsor (*Walii*) of the child to conduct regular visits and therefore render him unable to fulfil his duties towards the child.<sup>327</sup> Thus the objectives for granting guardianship should not oppose the sponsor's right to fulfill the child's emotional and mental needs. Furthermore, visitation is necessary because it is the *Walii*'s role to look after the child's needs regarding education and moral development. These two factors alone require constant interaction. This is a general Islamic point of view which stipulates that a child must be under the care of both parties. To ensure this will continue even after divorce, the father or the male sponsor is obligated to provide shelter and living expenses for the guarded child/children and their mother or female guardian during the period of guardianship. As a result of this responsibility, the *Walii* has the right to ask the female guardian to relocate with him if he decides to move somewhere else for a valid reason. In this situation the adjudicator has full authority to look at each case in terms of 'the best interests of the child' and to make sure the male guardian does not intend to harm the female guardian by his decision to relocate. Islam does not have a definitive answer

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<sup>326</sup> 'Abdulkariym Zaydan, above n 237, 53.

<sup>327</sup> Al-Khurashiy, above n 295, 249; Muḥammad Ibnu Aḥṣnad Ibnu Aby Aḥṣnad Abubkar 'Ala-Al-Diyn Al-Samarqandy, *Tuhfut Al-Fuqaha* (1994) 2, 232.



when attempting to address this area of concern. Therefore, given these grey areas in Islamic law the respective adjudicator is provided with the authority to make a final decision.

If the cause of a female losing her role as guardian (for example, sickness, relocating) were to vanish in less than a year,<sup>328</sup> she will be able regain custody.<sup>329</sup> After the term of one year is completed and no claim has been made to re-instate the role of guardian, the status-quo will be upheld.

As discussed earlier, scholars from the *Malikiyah Mathhab* decided that if the female guardian married a marriageable kin to the child and activated their marriage through intercourse, then her right to custody would be cancelled.<sup>330</sup>

This is another example where a difference in opinion is evident even within a single Islamic school, notably the *Malikiyah Mathhab*. Ibn Hamdoun, Ibn Arafa and Al-Kalshany all believe that the mother should not lose guardianship of the child if she were to remarry. The reason for this is because ‘the best interests of the child’ should be the focus, not the emotions of the parents.<sup>331</sup> This opinion is supported by Al-Zahiri and al Al-Basry as discussed earlier.

Other reasons may include her being sick then regaining health or moving away but then returning to where the child is located.<sup>332</sup> However, once she is aware of her

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<sup>328</sup> The term of one year in this situation begins at the conclusion of the cause of loss of custody.

<sup>329</sup> Al-’alim, above n 87, 321.

<sup>330</sup> ‘Abdulbaqiy Al-Zurqaniy, *Sharhu Al-Zurqaniy Ala Mukhtasir Khaliyl* (ND) 268.

<sup>331</sup> *Majallat Al-Mahkama Al-’Ulya* 7/2, decision 2/17, 03/01/1971, 66.

<sup>332</sup> Al-Khurashiy, above n 295, 245.

right and she decides not to claim her right due to a very difficult situation then she does not lose her right to custody.<sup>333</sup>

The overwhelming majority of the *Malikiyah* scholars have decided otherwise. In the situation where a female candidate becomes aware of her right to guardianship and yet marries a person that is considered to be a ‘stranger’ to the child, her custody right becomes void and she cannot claim right to custody even if she were to divorce within that year period. As has been mentioned, the year period starts from the date of knowledge of her right to claim. In this situation where the mother has activated her choice to marry, it is the issue of choice that has made her role as guardian negligible. This decision was made on the basis that the mother has taken the choice of being a wife over that of being a guardian. Moving the child back and forth between the mother and *Walii* depending on the former’s marriage situation is not perceived to be in ‘the best interests of the child’. The thesis advocates this view which is the overwhelming position of scholars from the *Malikiyah Mathhab* on this particular issue. The primary reason being, that even though a child requires love and compassion, the child still requires stability in its day to day life. This position undoubtedly provides such stability.

The above rule is highlighted in the explicit *Islamic General Rules (Ousul Alfiah)*: ‘if the barrier has vanished, the disqualified can return’,<sup>334</sup> and the rule that says ‘a direct relationship exists between the cause and effect, the two will or will not exist together’.<sup>335</sup> The conditions of guardianship evolve from day to day, so if the right of guardianship has been made void for some reason, then it will return once that reason

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<sup>333</sup> Al-’alim, above n 87, 321.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

exists no longer. So, for the female guardian who is unaware of her right to custody and has her right voided because of her marriage to a man who is marriageable to the child, the right to guardianship can be reinstated if she divorces or her husband dies. When her right to guardianship is made void because of an illness then this right will be returned as soon as her health recovers. Similarly, if she lives in a distant location then she returns to where the sponsor can fulfil his duties towards the child, this too will result in the mother regaining guardianship.

Ibn Al-Qayem commented on the following narration of the Prophet Muhammad (PBUH). The Prophet was reported to have told a mother that she has the first right in her child's custody as long as she does not re-marry.<sup>336</sup> When asked about whether the role of female guardian was still valid when the *Walii* has relocated, Ibn Al-Qaiyim stated that 'there is no text or mention backing such a claim'.<sup>337</sup> As has been discussed earlier, Islamic schools have different opinion on this issue which means in this area no strict rules exist but rather determining the interests of the child. Therefore it cannot be claimed that the mother's right to custody will be even conditional on the father living nearby. The statement by the Prophet Muhammad (PBUH), however, does not state that the right of custody for the female guardian fails on relocation of the *Walii*. According to Islamic law, the consideration of the *Walii* is considered to be an encompassing concern whilst the concern of the female guardian is viewed as narrow and strict. To conclude the above discussion, it is evident that the only strict rule regarding this issue is the priority of the mother to be the first guardian. Opinions related to the re-marrying of the female guardian and the relocation of the *Walii* present flexibility in Islamic law.

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<sup>336</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7307.

<sup>337</sup> Ibnu Qaiyim Al-jawziyah, *Zaad Al-Ma'ad Fiy Hady Khiyer Al-'Ibad*, above n 249, 181.

### 3.4.1 Duration of guardianship

A woman's custody of the child starts at birth. The end of this custody is not mentioned in the Holy *Qur'an* or in the Sunnah. Some experts decided that custody ends when the child is independent of the services of the parents or guardian, and this was evaluated as the seventh year for the male child<sup>338</sup> and the ninth year for the female child,<sup>339</sup> and the judge can extend this period to the ninth year for the boy and the eleventh year for the girl.

The Shaffiyya in the case of divorcing parents considers that after this age the child will be given a choice between their father and mother<sup>340</sup> or between those who are going to replace them in the roles of guardian. The Hanabilyah believe in giving the boy a choice after seven years of age and once the girl is nine years old, her father has the right to her custody.<sup>341</sup>

In the view of the *Malikiyah Mathhab*, custody remains until the boy reaches puberty<sup>342</sup> and for the girl until she has activated her marriage through intercourse.<sup>343</sup> However if the marriage has yet to be activated, then the status quo will exist.<sup>344</sup>

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<sup>338</sup> Al-Harraniy, above n 244, 72.

<sup>339</sup> Ibnu Qaiyim Al-jawziyah, *Zaad Al-Ma'ad Fiy Hady Khiyer Al-'Ibad*, above n 249, 183.

<sup>340</sup> Ibid.

<sup>341</sup> 'Abdulkariym Zaydan, above n 237, 72.

<sup>342</sup> Malik Ibnu Anas, *Al-Mudawanah* (ND) 2, 258.

<sup>343</sup> Al-Khurashiy, above n 294, 235; Al-Dirdiyr, above n 242, 508; 'Abdulkariym Zaydan, above n 237, 73; Al-Al-Gheryani, above n 240, 1, 101; Khaliyl Ibnu Ishāq Al-Jundi, *Mukhtasār Khaliyl* (ND) 1, 138; Abu 'Abdulalh Muhāmmad Ibnu Yusif Al-Abdariy Al-Mwaaq, *Al-taj Wa Al-Ikliyl Liy Mukhtasār Khaliyl* (ND) 6, 315; Salih{Ibnu 'Abdulasalam Al-Azhariy, *Al-Thamar Al-Daniy Fiy Taqriyb Al-Ma'aniy Sharah{Risalat Ibnn Abiy Zayid Al-Qayrawaniy* (ND) 1, 491.

<sup>344</sup> Al-Dirdiyr, above n 242, 2, 526.

This thesis maintains that it is the Islamic customs that dictate whether the girl stays with her mother or her grandmother, or with her maternal aunt depending upon the situation, until she reaches puberty. During custody, checks will take place on the maintenance and condition in which the girl is living. If it is seen that the girl is being maintained, cared for, living in a good environment and being protected, she will be able to continue living in the same environment until she gets married. If, however, these conditions are not upheld she will be removed from her mother's custody once she has reached an age where she is able to display independence. She will then be placed in her father's custody or in the custody of her *Walii*.<sup>345</sup> Independence here means the child is able to perform everyday tasks such as dress, eat, answer the call of nature and shower alone. This is usually between 6 and 9 years of age. Therefore, this thesis supports continual monitoring of the child during guardianship to ensure that 'the best interests of the child' are being upheld. Regardless of the child's age, the main concern, according to this thesis, is the well-being of the child.

Another view on the issue of custody is articulated through the work of Al-Jallab from the *Malikiyah Mathhab*: '[T]he custody of the boy continues until he reaches puberty, and it was said until he is more mature, and the custody of the girl remains until she reaches puberty, marries and activates her marriage through intercourse'.<sup>346</sup>

For a boy the conditions are different. Regardless of the conditions he is in with his mother, custody automatically transfers to the father once he reaches independence

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<sup>345</sup> Al-'alim, above n 87, 329.

<sup>346</sup> Ibid 328.

(as above). However, if the child wants to remain with his mother and his father agrees to this, then such custody is valid.<sup>347</sup>

Islamic scholars apply different rules depending on the child's gender due to the belief that the dissimilar rules are in 'the best interests of the child'. This view is confirmed by Ibn Al-Qaiyim who suggested that better protection will be provided by the *Walii*. This may not be the case in every situation. The general rule however will remain that every case will be evaluated on its merits by the adjudicator so that 'the best interests of the child' are achieved.<sup>348</sup> Once again the adjudicator has been given full authority to make the decision where 'the best interests of the child' will be the first consideration.

It is believed that decisions should be made on behalf of the children during guardianship because the relevant adults are able to think logically about 'the best interests of the child' and make decisions that will cater to this. It is believed that if the child is left to choose their own guardian, the child will base it on short-term desires without considering long-term consequences. Hence, the argument behind placing a boy in the custody of his father once he reaches an independent age (6–9 years) is that as the boy grows and matures, he needs a male to guide and teach him about manhood and the roles and responsibilities that a man holds. These range from the roles in the home to the roles that men are socially expected to maintain. In the case of girls, it is also believed in Islam that it is the mother's role is to provide her

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<sup>347</sup> 'Abdulkariym Zaydan, above n 237, 76–83.

<sup>348</sup> Ibnu Qaiyim Al-jawziyah, *Zaad Al-Ma'ad Fiy Hady Khiyer Al-'Ibad*, above n 249, 4, 138.

with guidance and skills that she needs in her life regarding family, domestic and maternal responsibilities.<sup>349</sup>

During the custody of the child, it is the responsibility of the court to keep track and monitor the situations in which the children are placed. Therefore, if at any stage it is seen that ‘the best interests of the child’ are not met or are being maintained, the court is then able to re-evaluate custodianship and make another decision that meets ‘the best interests of the child’.<sup>350</sup>

When the court is required to end the matter of custody, the court must put the interests of the child first. The role of the court therefore is to investigate precisely what the interests of the child are.

There is clear evidence that the major Islamic schools differ in opinion relating to the issue of duration during guardianship. Such varied opinions are a clear example of the flexibility that exists within Islamic law. This thesis adopts the opinion of providing this authority to the relevant court for evaluation on a case by case basis because it is believed to be the most appropriate institution that will protect the interests of the child.

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<sup>349</sup> Khtab, Al-Sayd and Sadeq, above n 236, 296.

<sup>350</sup> Al-’alim, above n 87, 321.

### 3.4.2 Child access during custody

It is proven legally in Islamic law that the mother cannot forbid the father from seeing his child during her custody and vice-versa.<sup>351</sup> Allah has commanded that

لَا تُضَارَّ وَالِدَةُ بَوْلِدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ ۚ

No mother shall be treated unfairly on account of her child. Nor father on account of his child...<sup>352</sup>

so, a mother must not be harmed by her child, and neither a child by his mother. In this commandment, Allah has conveyed the importance of a mother being granted access to her child and the father similarly to have access.

It is very important for the children to keep in touch with their parents, even if they are separated. Without a doubt there may be situations where the separation of parents may result in tension, conflict and ill feeling and this may result in the ceasing of visitations. This may affect the child emotionally and cause moral and spiritual disturbance. It is believed that this would occur for the child if he or she were transferred from one parent to another, especially where the child was not familiar with them.

The originator of this view was the *Hanafiyyah mathhab*. The scholars derived this rule from another decision they made where a wife had the right to visit either or

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<sup>351</sup> ‘Abdulkariym Zaydan, above n 237, 74.

<sup>352</sup> Verse 2.233.



both her parents once a week, even without her husband's permission.<sup>353</sup> This rule also encompassed visitation to her unmarriageable kin once a year. Her husband therefore cannot forbid her doing this. Hence, the scholars decided that if it is the right of a woman to visit her family, it is also the right of the children to visit their parents as well.<sup>354</sup>

It must be acknowledged that during custody, the mother cannot be obliged to send her child to the father and vice versa. Whoever wants to see or visit the child should go to the child's place of residence. What should happen is that the parents should agree on one place where the visits will take place. However, if they cannot mutually decide, the court will decide the time, place and the conditions of child access. As Al-'alim stated:

it is not appropriate for police stations or welfare organisations for example to be turned into such locations. This is in order to protect the emotions of the child and prevent the psychological effects which could be created by visiting such places. When no place can be found it is preferred to establish a proper place in the court that is a suitable facility.<sup>355</sup>

Regarding the issue of child access, no strict rules exist in Islam except for the general principle which ensures the right of the child to enjoy both parents. The adjudicator has plenty of leverage to set out the necessary arrangements to achieve 'the best interests of the child'. Therefore, the issue of child access can be viewed as being a grey area with room for flexibility in decision making.

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<sup>353</sup> Muhammad 'Aala Al-Diyn Ibnu 'Ali Al-Hāskafiy, *Al-Durr Al-Mukhtar Sharh Tanwiyr Al-Absar Fiy Fiqh Al-Imam Abiy Hāniyfah* (ND) 3, 159.

<sup>354</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7320.

<sup>355</sup> Al-'alim, above n 87, 331.

### 3.5 Child and guardian maintenance

It is common knowledge that everyone who performs a certain job should be paid for it unless they volunteer. Guardianship from an Islamic perspective is perceived as a job so it is believed that the guardian deserves to be paid. A mother, who is in a valid marriage, has her expenses paid for by her husband. These expenses are obligations placed on the husband and are not negotiable from an Islamic perspective.<sup>356</sup> It is the husband's responsibility also to maintain and pay for all the child's needs.<sup>357</sup> If the couple were to divorce, the mother is still entitled to her expenses being paid for during the three months separation period. Also, the father is still expected to pay for all the child's needs. Once the three months separation is over and the couple is officially divorced, the mother is no longer entitled to have her expenses paid for. However, she will receive payment for all the child's needs and for her role as being a guardian. The money may come from different sources such as the father or even the child's wealth if it already exists.<sup>358</sup> Wealth here means *any* money or assets that the child may have in their name.

In the situation where a female guardian was to be granted custody of the child, she is entitled to an immediate payment from the *Walii*. The allowance should be paid to the female guardian because if she has taken on the responsibility of custody, then she may have to sacrifice her employment and therefore not be able to receive an

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<sup>356</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7314.

<sup>357</sup> 'Abdulkariym Zaydan, above n 237, 58; Al-baghdadiy, above n 270, 1, 138.

<sup>358</sup> Al-Mahdiy Al-Wazaniy, *Al-Mi'yar Al-Jadiyd Al-Mu'rib 'An Fatawi'y Al-Mutaakhiriyin Min 'Aulama Al-Maghrib* (1997) 579; 'Abdulkariym Zaydan, above n 237, 57.

income. Therefore, an allowance is mandatory so that she can maintain herself and the child.<sup>359</sup>

Such payment differs depending upon whether the female guardian is the mother or other guardian. The difference is not in the amount that is paid but rather the activation of payments. The mother will receive her guardianship allowance once the three month separation period from her husband has ended. If the female guardian is not the mother then she will receive the allowance immediately after the guardianship decision has been made. If she had been taking care of the child before she had been given custody, she will not be paid for this time. If the mother does not receive the allowance as soon as the three month separation ends, she will be back paid to that date.<sup>360</sup>

The issue of deciding the source of payments differs considerably within Islamic law. Some schools of thought believe that the money should be paid from the child's wealth (if the child has any), otherwise it is the father's responsibility.<sup>361</sup> The majority of the Islamic schools of thought do not think that this should be so and believe that payment should come from the father alone regardless of whether he is financially able or not. If the father is not able to pay, it will be considered as a debt which will be monitored by the court.<sup>362</sup>

Such a ruling seems to go against the interests of the child when the father cannot financially fulfil his obligations. The question needs to be raised that if this situation

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<sup>359</sup> Al-Khurashiy, above n 250, 255.

<sup>360</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7316.

<sup>361</sup> 'Abdulkariym Zaydan, above n 237, 58.

<sup>362</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7316.

arises, how is the child supposed to survive on a day to day basis? Thus it is in the interest of the child to source such payments from the next person on the *Walii* hierarchy to guarantee the child's welfare. This is the opinion of the *Hanafiyah*, *Shafi'iyah* and *Hanbaliyah mathhab*, who believe that the father has to pay the allowance only if he is financially able. The majority also believe that if the father is unable to make the payments then the payment must come from the father's kinship defined by the *Walii* hierarchy<sup>363</sup> (that is, the male component of the guardianship hierarchy).

These payments do not expire. If the father were to die, then there is a priority of sourcing the funds. Firstly, assets that are left as inheritance need to make primary consideration for these payments prior to family distribution. If this source is not sufficient, then the *Walii* hierarchy will be the source of funding.

In a situation where the female guardian has passed away but had yet to receive a payment for her role as guardian, these amounts should be included in her overall assets during distribution of wealth. If the child were to die, then the female guardian is still entitled to her payments over the period in which the child was still alive and in her custody.<sup>364</sup> Therefore, with regard to maintenance payments to child and guardian, there is universal agreement among all the Islamic schools that such payments are required to be made. However, the arrangements by which maintenance payments are to be made are in no way definitive, but rather at the discretion of the respective adjudicator. In categorising the view of Islamic law on maintenance payments, a mix of fixed and flexible rules prevails.

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<sup>363</sup> Al-'alim, above n 87, 332.

<sup>364</sup> Ibid.

### 3.6 Conclusion

Throughout this chapter, a solid context has been built to present the approach taken by Islamic law when dealing with the issues of guardianship and custodianship of children. Whether the references have been the divine message available in the Holy *Qur'an*, the traditions of the Prophet Muhammad (PBUH), or the evidential commentary by the founders and notable students of the various schools of thought, a consistent theme has been advocated on this issue.

This thesis has presented many aspects related to guardianship rules and conditions in Islamic law. Some of these aspects have been categorised as fixed rules that cannot be altered. These rules in all cases uphold the 'best interests' principle. However, this thesis has also presented aspects in Islamic law where there is no definitive answer or approach when addressing an issue. Therefore, one can confidently state that there is plenty of room for flexibility to ensure that such rules and conditions can be adopted regardless of differing culture, location and time. Where there is flexibility in decision making, the relevant adjudicator must ensure that the interests of the child are protected.

From the discussion contained in this chapter, it is quite obvious that 'the best interests of the child' as a discrete and independent area within Islamic law does not exist. However, the examples and commentary in this chapter unambiguously illustrate that 'the best interests of the child' must be paramount in dealing with guardianship and custody issues.<sup>365</sup> Furthermore, it works in conjunction with other

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<sup>365</sup> Nazeem Goolam Hafiz, 'Interpretation of the Best Interests Principle in Islamic Family Law' (Paper presented at the World Congress on Family Law and Children's Rights, Cape Town,

individual and collective rights of parents and the extended family. In conclusion, the ‘best interests of the child’ principle is by no means alien to Islam, but to the contrary has always been embedded in the religion.

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20–23 2005) 9; South African Law Reform Commission, ‘Islamic Marriage and Related Matters’ (July 2003), <[http://www.doj.gov.za/salrc/reports/r\\_prj59\\_2003jul.pdf](http://www.doj.gov.za/salrc/reports/r_prj59_2003jul.pdf)> at 15 August 2009.

## 4 'THE BEST INTERESTS OF THE CHILD' UNDER THE LIBYAN LEGAL SYSTEM

### 4.1 Introduction

The primary concern raised by the Committee on the Rights of the Child (CRC) in its 2003 response to Libya's Second Periodic Report forms the basis of this chapter. In its response, the CRC concluded that Libya does not 'fully incorporate in legislation and practice, article 3 of the *Convention*, including in the area of custody of children'.<sup>366</sup> The perceived discrepancy between the Libyan Government's interpretation and consequent implementation of the 'best interests of the child' principle, and the CRC's expectation of Libya's fulfilment as a State party to the *Convention on the Rights of the Child* (CROC) is at the heart of the concerns of this thesis.

This chapter aims to critically analyse Libyan Legislation 10/1984 and cases adjudicated by the LHC – Guardianship Jurisdiction (LHC-GJ) in order to determine whether the CRC's concerns are well founded. In order to achieve this goal, a systematic approach will be undertaken. At the outset, detailing the foundations of the Libyan political and legal system will be necessary. This will provide the reader with the necessary context for understanding Libyan law and its influences.

As presented in Chapter 3, all laws and cases referred to will be related to the LHC-GJ. The specific issues to be discussed include: the ordering of potential guardians;

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<sup>366</sup> Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya. 04/07/2003* [28], UN Doc CRC/C/15/Add.209 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/8ea5ea3ba95829a1c1256daa002dbd01?OpenDocument>> at 18 April 2008.

the conditions upon which guardianship can be granted; how to uphold the role of guardian; and the discretion of the High Court in protecting ‘the best interests of the child’. The conditions upon which guardianship can be reinstated and, finally, how the LHC ensures financial support of the guardian and the child will also be considered.

Prior to performing an analysis of cases adjudicated by the LHC-GJ, the relevant articles in the *Law of Marriage and Divorce Rules and their Effects* (10/1984), will be outlined. This will provide important context for understanding the basis on which decisions are made. Summaries of cases or groups of similar cases will be accompanied by commentary which takes all these factors into consideration, ultimately relating the case analysis to the concerns expressed by the CRC.

Three factors have determined the selection of cases for analysis in this chapter. Firstly, the cases have been adjudicated by the LHC-GJ, which is the ultimate authority in interpreting Libyan laws. Secondly, cases have been selected to ensure coverage of a broad range of issues within the guardianship jurisdiction. Finally, the analysis focuses on cases which resulted in authoritative interpretations of relevant articles within the Legislation 10/1984, in cases that were subsequently adjudicated on the basis of the same principles.

Applying these factors has resulted in the selection of over 60 cases decided in the 30 year period between 1971 and 2001. The starting date for this time frame is significant, given that the current structure of Libyan Legislation 10/1984 has been influenced by Shari’a which was introduced to the Libyan System in the early 1970s. This will make it possible to comment on whether the Libyan legal system is truly



influenced by its culture, being Islam, and in particular the interpretation of Islam by the *Malikiyah* school of jurisprudence.

#### 4.1.1 Political history

The official name of Libya is ‘The Great Socialist People’s Libyan Arab Jamahiriya’ with Tripoli the capital city and the largest metropolitan centre. *Jamahiriya* means ‘state of the masses’, referring to the idea of a government ruled by the people.<sup>367</sup> Libya’s population in 2006 was 5,323,991. In 2006, 32.4 per cent of the population was under the age of 15.<sup>368</sup> Over one third of the population can therefore be considered the subject of this thesis.

Historically, in 1551 Libya became part of the Ottoman Empire and remained part of it for nearly four centuries until the Italian invasion of 1911.<sup>369</sup> In 1934 following the Italian-Turkish war, Libya was under Italian occupation. During the period following World War II France and Britain shared control of the country. Libya gained independence from them in 1951. It became a republic in 1969 following the end of the monarchy in what is known as the ‘First of September Revolution’ (‘the Revolution’). Shari’a law was declared the principle source of legislation by the Revolutionary Command Council (RCC). A High Commission was established to ensure existing legislation worked with Shari’a values. The sources of laws are

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<sup>367</sup> Paul A Rozario (ed), *Libya*, Countries of the World (2004) 16.

<sup>368</sup> General Authority for Information, *Statistics Book* (2007) 44. See also: Encyclopedia of the Nations, *Libya Population* (2007) <<http://www.nationsencyclopedia.com/Africa/Libya-POPULATION.html>> at 02 January 2008.

<sup>369</sup> Amal Obeidi, *The Shaping of Libya’s Contemporary Political Culture* (2001) 30.

identified in article 1 of the Civil Code as being legislative provisions, principles of Islamic law, customs, the principles of natural law, and the rules of equity.<sup>370</sup>

On the 11<sup>th</sup> of December 1969, article 2 of the *Constitution Proclamation* declared that ‘Islam is the official state religion’. In 1973 Libya moved away from the dual civil/Shari’a courts system to a single civil courts arrangement.<sup>371</sup> The result of this amalgamation was nothing but a change in title to the court system.

The political system of government in Libya is run by the Basic People’s Congresses (BPC). All Libyans over the age of 18 years can attend the BPC. The BPC as a political instrument puts forward ideas to the General People’s Congress (GPC) (whose members are elected by the BPCs), the highest political body in the country, to make into, or reject as law.<sup>372</sup> The GPC appoints Popular Committees, or what can be perceived to be various layers of government, to implement decisions confirmed by the GPC. This system was introduced in Libya in 1977.<sup>373</sup>

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<sup>370</sup> An-Na’im, *Islamic Family Law in a Changing World: A Global Resource Book*, above n 77, 174, 175.

<sup>371</sup> Ibid 175.

<sup>372</sup> Rozario, above n 362, 16.

<sup>373</sup> Bureau of Near Eastern Affairs US Department of State, *Background Note: Libya* (March 2009) <<http://www.state.gov/r/pa/ei/bgn/5425.htm>> at 19 March 2009.

In March of 1977 the *Declaration on the Establishment of the Authority of the People* (DEAP) amended the *Libyan Constitution*. Article 2 of DEAP stated that '[t]he Holy *Qur'an* is the Constitution of the Socialist People's Libyan Arab Jamahiriya'. The LHC applied the following as a general guideline to the legislative body (that is, the GPC).

Prior to the proclamation by the public authority, there were influential pieces of legislation that were in force at that time. However, some of this legislation included stipulations that are contrary to the current law. This court has based its judgment on the proclamation by the public authority on the second of March 1977, which includes two important standards: (1) The first considers the public authority as the basis of the political system of the republic; and (2) the second considers the Holy Quran as the law of the community, and it addresses all people, especially the legislator. Thus, the prior legislation cannot be rejected unless the legislating authority acts to change the current legislation in such a way that removes the contradictions that the legislation has with Islamic law.<sup>374</sup>

Subsequent to the changes, Shari'a judges were employed in civil courts and took part in regular court appeals and took on a specialised role in Shari'a appeals cases.

#### 4.1.2 Legal History

The Libyan legal system is comprised of Islamic, French and Italian elements of law.<sup>375</sup> In the early years following the Revolution, a special committee was established by the RCC to amend personal status laws in order to make them consistent with Islamic law.<sup>376</sup> The RCC issued a declaration recognising Shari'a as

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<sup>374</sup> *Al-Mahkama Al-'Ulya*, decision 197/39, 03/11/1997, GM.

<sup>375</sup> An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, above n 77, 174; The Law and Religion Program of Emory University website, *Islamic Family Law: Possibilities of Reform Through Internal Initiatives* (September 1998 to July 1999) <<http://www.law.emory.edu/ifl/index2.html>> at 02 January 2008.

<sup>376</sup> Rozario, above n 362, 17.

the main source of legislation and establishing a high commission to ensure that all legislation is consistent with Shari'a principles, based on the local custom and usage where the *Malikiya Mathhab* is predominant.<sup>377</sup>

Amendments were made to the 1953 penal code in the early 1970s. Several laws were revised while some new laws based on Shari'a were introduced.<sup>378</sup> In 1984 a new family law was ratified.<sup>379</sup> The legal age of marriage was set at 20 years. Polygamy was restricted. Divorce was conditional, and child guardianship was introduced. In article 72 of Legislation 10/1984, Shari'a law was recognised as the abiding source of law in the absence of explicit provisions in the legislation.

#### 4.1.3 Court system

There are four levels of courts within the Libyan legal system: summary courts, courts of first instance, appeal courts, and the High Court.<sup>380</sup> Courts of first instance are comprised of several divisions; noteworthy is the personal status division. Both the appeals court and the first instance court are comprised of three-judge panels with final judgements based on a majority decision ruling. Previously, Shari'a courts of

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<sup>377</sup> An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, above n 77, 175; The Law and Religion Program of Emory University, *Islamic Family Law: Possibilities of Reform Through Internal Initiatives* (September 1998 to July 1999) <<http://www.law.emory.edu/ifl/index2.html>> at 02 January 2008.

<sup>378</sup> Related Laws are:  
*Law on Protection of Women's Right to Inheritance* 1959; *Law on Women's Rights in Marriage and Divorce* 1972 (Law No. 176 of 1972); *Law No. 87 of 1973* (merging civil and shari'a courts); *Law No. 22 of 1991* (amending law relating to polygamy); *Law No. 9 of 1994* (amending law relating to polygamy); *Wills Act* 1994 (Law No. 7 of 1994. See also: *Law forming committee to Islamize Libyan legislation* 28/10/1970; *Law on Offences against Property* 1972 (first amendment to Penal Code 1953); *Law on Artificial Insemination* 1972 (Law No. 175/1972, introducing penalties); *Law on Sexual Offences* 1973 (Law No. 70/1973, relating to zina); *Law on Sexual Slander* 1973 (Law No. 52/1973, relating to qadhaf); *Law on Prohibition* 1973 (relating to alcohol consumption); *Law on Homicide* 1973 (relating to qisas, diya and kaffara).

<sup>379</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984).

<sup>380</sup> Rozario, above n 362, 17.

appeal were comprised of Shari'a judges. However currently, Shari'a judges sit in regular courts of appeal, specialising in Shari'a appeals cases. The High Court has five chambers: civil and commercial, criminal, administrative, constitutional, and Shari'a.<sup>381</sup>

*Al-Jarida Al-Rasmiya* is the official journal in which law reports are published. Furthermore decisions made in the LHC are published in *Majallat Al-Mahkama Al-Ulya*.<sup>382</sup>

A thorough analysis of the relevant laws and other legal material is required to determine whether the LHC has upheld the requirements stipulated by law and to address the thesis statement:

The interpretation of international human rights in municipal legal systems will inevitably, understandably and legitimately be affected by local cultures. This process of 'translation' is evident in the approach that Libya has taken to implementing 'the best interests of the child', where the influence of Islamic law is also apparent.

Interpretation in a very practical and policy-oriented area of socio-legal research has been adopted in this thesis along with a qualitative research style which involves a more explicit judgment and interpretation.

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<sup>381</sup> An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, above n 77, 176; The Law and Religion Program of Emory University website, *Islamic Family Law: Possibilities of Reform Through Internal Initiatives* (September 1998 to July 1999) <<http://www.law.emory.edu/ifl/index2.html>> at 02 January 2008.

<sup>382</sup> An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, above n 77, 177; The Law and Religion Program of Emory University website, *Islamic Family Law: Possibilities of Reform Through Internal Initiatives* (September 1998 to July 1999) <<http://www.law.emory.edu/ifl/index2.html>> at 02 January 2008.

As stated earlier, over 60 LHC cases have been selected in a timeframe of 30 years ending in 2001. This timeframe represents a span able to demonstrate the effect of Shari'a law on the Libyan legal system as it was introduced after the '1969 First of September Revolution'. Topics to be discussed in the context of Libyan law and LHC interpretations of 'the best interests of the child' are as follows: the definition of a child; the definition and ordering of potential guardians; whether the right of guardianship is that of the child or the guardian; guardianship conditions; the place and time of guardianship; the court's responsibility with relation to guardianship issues; how and when guardianship is to be reinstated; and the issue of child and guardian maintenance.

Articles 62–70 of Legislation 10/1984 will be introduced, followed by presentation of LHC decisions prior to and subsequent to the introduction of Legislation 10/1984. Some of the high level cases will be presented in depth and support the thesis argument. However, a number of key cases will be analysed in detail in terms of how lower courts and the LHC implement the 'best interests' principle when adjudicating on guardianship issues. Following each issue presented in this chapter, a commentary section will examine whether the theoretical and practical sides of Libyan law are consistent with the thesis statement.

## 4.2 Guardianship: General principles

### 4.2.1 Definition and the ordering of guardians

#### 4.2.1.1 Definition of the child

In accordance with article 1 of CROC, article 3 of Legislation 17/1992, which is an amendment to the Libyan Civil Code, defines a child as follows:

A child is a person who has not attained the age of majority. He is either capable or incapable of discernment.

- (a) A child incapable of discernment is a child under seven years of age;
- (b) A child capable of discernment is a child who has attained the age of seven years.<sup>383</sup>

Article 9 of the same legislation stipulates: 'The age of majority is 18 years'. Article 17 also stipulates: 'A minor is a person who has not attained the age of majority or who is insane or simpleminded'.

This definition is the Libyan legislature's response to CROC. Prior to this amendment, the Libyan Civil Code had set the age of majority at 21 years. Under this article, it is clear that the Libyan legislature acted in opposition to its own culture because the age of majority under Islamic law is the age of puberty which is around the age of 15. This attitude can be viewed positively in the context of the 'best interests' principle, since the age extension from 15 to 18 years will inevitably provide further protection to the individual.

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<sup>383</sup> *Al-Jrida Al-Rasmiya* (1992) 36/30.

#### 4.2.1.2 Definition of guardianship

##### 4.2.1.2.1 Libyan Legislation 10/1984

Libya's *Law of Marriage and Divorce Rules and their Effects* (Legislation 10/1984) addresses all aspects of guardianship. Article M62F.A states that: '[C]ustody is a shelter for the child to be nurtured, and cared for, and looked after from their birth until the boy is a man and the girl gets married and sexually interacts with her husband, and all of this is without opposing the right of the sponsor'.

Article M62F.B states 'during marriage the right of the child's custody is for both parents'. However if separation occurs, then a woman's right to guardianship remains as a wife, in the three month waiting period after a divorce is declared, and any time after a divorce.<sup>384</sup>

Article M62F.C states that 'the court does not have to be restricted by the order that was mentioned in the last paragraph (except for the child's mother and her mother and the child's father and his mother) and that is in order to fulfil the needs of the child'.

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<sup>384</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984), art M63A.



#### 4.2.1.2.2 LHC Decisions

In 1971, in accordance with the definition of guardianship, the LHC observed that ‘Legally (according to Islamic law) guardianship is rearing the child and taking care of him/her and meeting all of the child’s needs until a certain age’.<sup>385</sup>

The central legal issue in this case was to clarify the relationship between the rights of the child and the rights of their parents. It created a very significant legal precedent in how these rights can be evaluated. In Case 1/18, 1971, the court elaborated:

according to Islamic law experts, there are three rights: the right of the child being guarded, the right of the mother or female guardian, and the right of the father or the sponsor; and if all these rights coincide and were capable of being in agreement then the child’s rights should be accommodated, and if these rights contradict each other then the right of the child comes first because the aim of guardianship is to benefit, teach, educate and care for the child.<sup>386</sup>

Three years later the court in decision 2/21, 1974, confirmed its understanding of the legal principles governing custody and guardianship. The LHC reiterated this as follows:

The aim of custody is to provide a caring environment for the child and to be able to meet the child’s needs. The provision of such an environment is mainly assigned to a woman, because a woman typically has more sympathy for the child and is more capable of meeting the child’s needs (here the child being referred to is an infant). That is why

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<sup>385</sup> *Majallat Al-Mahkama Al-'Ulya* 8/1, decision 1/18, 06/06/1971, 93.

<sup>386</sup> *Majallat Al-Mahkama Al-'Ulya* 8/1, decision 1/18, 06/06/1971, 93. See also Wahba Al-Zohaily, *Al-Fiqah Al-Islamiy Wa Adilatuhu*, above n 258, 7297; Al-Jlaydy, above n 240, 271.

the mother is given first priority when assigning the custody of the child, as long as there are no impediments to that assignment.<sup>387</sup>

In decision 3/37, 1990, the LHC explained the application of these principles when clearly differentiating between guardianship and sponsorship (*Kafalah*). In this particular case, the father of a girl, who left his daughter in the care of his brother before travelling overseas did not give him any right as a guardian but rather as a sponsor for a limited time:

the child staying with the appellant for a period of time with consent from her father ... [the appellant] is considered as a sponsor and [the father] does not give him any of the criteria needed for guardianship that is mentioned in the stated law.<sup>388</sup>

Prior to Legislation 10/1984 coming in to force, the LHC reaffirmed that, according to the *Malikiyah Mathhab*, precedence to the role of guardian is as follows: the mother, maternal grandmother, maternal full aunt, maternal half aunt, maternal aunt of the child's mother, paternal aunt of the child's mother, child's paternal grandmother then the paternal great grandmother. The kinships of the child also have priority over foreigners, while relatives from the mother's side have priority over those on the father's side.<sup>389</sup>

The LHC has confirmed this on many occasions. For example in one of its decisions, the LHC stated:

Guardianship is the period of nurturing the child through which the availability of a woman who has a right to raise the child in according to

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<sup>387</sup> *Majallat Al-Mahkama Al-'Ulya* 2/11, decision 2/21, 07/11/1974, 20.

<sup>388</sup> *Majallat Al-Mahkama Al-'Ulya* 3/26, decision 3/37, 22/11/1990, 9.

<sup>389</sup> *Majallat Al-Mahkama Al-'Ulya* 1/8, decision 18/1, 06/06/1971, 93.

the *Malikiyah Mathhab*, the right of the mother has priority to that of the father and then to his blood relative women as well. So, the measures that were used to consider are that the mother has priority over the father and the mother's kinship has priority over the father's such that the mother of the mother, even if she chose not to accept, has the priority in custody after the child's mother and before the mother of the father. The foundation of guardianship should be compassion, and bloodline kinships are consistent with compassion, so the mother and her parents are the most compassionate towards the child.<sup>390</sup>

#### 4.2.1.3 Commentary

Libyan Legislation 10/1984 considers guardianship as a right for the child above that of the the parents. If the parents are married and living together it is the responsibility of both the parents to take on the role of guardianship and as long as they are settled together as a social unit (family) they can cooperate and share the caring duty that is given to them.<sup>391</sup>

Libyan Legislation 10/1984 relies upon Ibn Rushd's opinion relating to the issue of guardianship which states that the majority of scholars agree that if the father divorces the mother while the child is still at a young age, then the role of guardian is assigned to the mother. Such opinion is based on the teachings of the Prophet Muhammad (PBUH) when he said 'whosoever separates a mother from her child Allah shall separate him from his beloved on judgment day'.<sup>392</sup> Furthermore, Ibn

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<sup>390</sup> *Majallat Al-Mahkama Al-'Ulya* 10/2, decision 3/20, 01/11/1973, 25. Twelve years after Libya's *Law of Marriage and Divorce Rules and their Effects* (10/1984) was issued where LHC confirmed that 'the guardianship is for the parent during marriage, followed by mother after divorce and then by the maternal grandmother': *Majallat Al-Mahkama Al-'Ulya* 2-1/29, decision 26/42, 04/07/1996, 16.

<sup>391</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984), art M62FB.

<sup>392</sup> Saying of the Prophet (PBUH) narrated by Al-Termethee, Al-Islam.com website, *Hadith No 1204* (2007) <<http://hadith.al-islam.com/Display/Display.asp?Doc=11&ID=22600&SearchText=ام20%بين20%فرق20%من&SearchType=root&Scope=all&Offset=0&SearchLevel=QBE>> at 21 August 2007.

Rushd added, ‘the ability to transfer guardianship from the mother to someone other than the father is unproven in any way’.<sup>393</sup>

If the circumstance should arise that the mother, father or any of the female blood relatives cannot take on the role and responsibility of guardian, the male relatives are then considered in the following order. First to be considered is the child’s brother if he is an adult and capable of taking on the role. If this option is not feasible, then the paternal grandfather is considered, followed by the child’s paternal uncle, if he is an adult and capable of taking on this role. The child’s nephew is the last to be considered from the child’s male blood relatives for the role of guardian. If the situation arises that the father has passed away and has decreed in his will a specific male relative from those mentioned above to become the guardian, then this request will be respected and granted as long as the request has been made for his sons. If the request has been made for his daughters, the choice of guardian will be considered by a judge first because it is preferred that she be placed in the care of a male relative that she is prohibited to marry. In the circumstance that the requested guardian is not seen as being suitable, the father’s request will be overturned.<sup>394</sup>

In all Islamic schools of thought, the mother of a child has the responsibility of care and control of the child for the first few years of the child’s life. This is based on the widespread belief that it is beneficial for a small child to remain with its mother. Care in the early years is termed ‘*Hadanah*’. The age at which *Hadanah* ceases varies between the schools of thought and the gender of the child. For example, in

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<sup>393</sup> Muḥammad Ibnu Aḥmad Ibnu Rushid, *Bidayat Al-Mujtahid Wa Nihayatu Al-Muqtasid* (ND) 2, 42.

<sup>394</sup> Al-’alim, above n 87, 313.

the *Malikiyah Mathhab*, ‘the right of Hadanah in relation to a daughter lasts until she is married’.<sup>395</sup>

As quoted above, article M62F.C provides that the court does not have to be restricted by the order that was mentioned in article M62F.A (except for the child’s mother and her mother and the child’s father and his mother) when making decisions on guardianship to fulfil the needs of the child.<sup>396</sup> It is appropriate to emphasise that Libyan law does not take a completely rigid approach in terms of priority and does consider the specific circumstances of the children in question except in the first four prospective guardians. This is not inconsistent with Islamic law because there is no strong evidence to apply the priority of these four over the others except in the case of the mother. This notion of flexibility is in total agreement with CROC which demands that the factor of ‘the best interests of the child’ have a greater importance than any other factor, including the guardianship hierarchy. To reiterate, the thesis opinion on this matter is that the adjudicator should be assigned greater authority to evaluate the matter on a case by case basis to meet the ‘best interests’ principle as outlined in CROC.

This highlights the importance the LHC places on the character and lifestyle of the guardian of the child. The court aims to place children in the care of adults whom it deems will care, maintain and cater for ‘the best interests of the child’.

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<sup>395</sup> That what has been discussed in detail in Chapter Three of this thesis. See also Jamila Hussain, *Islam Its Law and Society* (2<sup>nd</sup> ed, 2004) 95.

<sup>396</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984) art M62F.C ‘The court does not have to be restricted by the order that was mentioned in the last paragraph (except for the child’s mother and her mother and the child’s father and his mother) and that is in order to fulfil the needs of the child’.

Under the interpretations advocated by the *Malikiyah Mathhab*, preferences to the role of guardian continue well beyond the first four outlined above. As mentioned earlier, the priority to guardian will be initially be assigned to the child's mother and then to her mother. The father is considered after the maternal grandmother according to Legislation 10/1984. This opinion comes from Hanabiliya *Mathhab* and Ibn Rushd from the *Malikiyah Mathhab*. If the grandmother and the father are not able to take on this duty or the maternal grandmother did not request it, guardianship will then be assigned to the paternal grandmother.

After this order of preference, the law provides the adjudicator with full authority to nominate from the available relatives, with preference given to the closest female relative over relatives that are male. According to the *Malikiyah Mathhab*, the first female in line after the mother and maternal grandmother is the mother's sister but only if she is her full sister (that is, they have the same mother and father). This condition is based on the teaching of the Prophet Muhammad (PBUH) when he said: 'the mother's sister is like a mother'.<sup>397</sup> If the aunt is not capable of taking on this role then the great-aunt of the child will be considered for this role and responsibility. Next in line is the child's full sister (that is, they have the same mother and father) if she is an adult and capable of taking on the role. However, if the child's sister is only a half sister then consideration must be given to which side the siblings are connected on. A half sister from the same mother has priority over a half sister from the same father. If the child's sister is not capable then the father's full sister is considered, that being the paternal aunt. Then the father's niece is the last person

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<sup>397</sup> Saying of the Prophet (PBUH) narrated by Al-Termethee, Al-Islam.com website, *Hadith No 1826* (2007) <<http://hadith.al-islam.com/Display/Display.asp?Doc=11&ID=22766&SearchText=الخالة20%م&SearchType=root&Scope=all&Offset=0&SearchLevel=QBE>> at August 2007. See also, Al-Kasaniy, above n 242, 208.

from the female blood relative choices to be considered to take on the role of guardian.<sup>398</sup>

In summary, this ordering which presents the jurisprudence advocated by the *Malikiyah Mathhab* is only a guide. The only strict rules stated in this matter are those related to the first four prospective guardians. If a conflict arises between the mother's and father's side, the mother's blood relatives will have priority over the father's blood relatives.<sup>399</sup> This is because of the compassion found in the mother's kin, and the law has given the judge leverage to alter this ordering as was mentioned in article M62F.B.<sup>400</sup> However, the judge cannot alter the first four preferences (the mother, maternal grandmother, father and the paternal grandmother)<sup>401</sup> if the conditions for guardianship exist. These conditions include being an adult, capable, trustworthy, able to care for the child, and being free from transmittable diseases. These conditions will be discussed further under sub-heading 4.3: Guardianship conditions. In the case of other potential guardians, the ordering can be changed by the judge even if the conditions of guardianship exist. Such changes must still be justified on the grounds of 'the best interests of the child'.

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<sup>398</sup> Al-Jlaydy, above n 240, 272.

<sup>399</sup> Al-'alim, above n 87, 313.

<sup>400</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984).

<sup>401</sup> *Al-Mahkama Al-'Ulya*, decision 19/46, 25/11/1999, GM.

#### 4.2.2 Is the right of guardianship a right of the child or a right of the guardian?

##### 4.2.2.1 Libyan Legislation 10/1984

According to article M62, guardianship is a right of the child, distinct from and above the rights of the parents. If the parents are not considered to be appropriate guardians, then custody will be transferred to the child's unmarriageable kin in the ordering outlined above. If none of them accepts the role, then custody will be transferred to whomsoever the court nominates, whether it is an individual or organisation.<sup>402</sup>

Even though Libyan law grants the mother conditional priority as guardian, provisions are in place for the judge to grant the father custody of the child over the mother if this was viewed to be in the child's best interests. An example where this situation may occur is when a mother leaves her home due to some disagreement with her husband. This is stated in article M63F.A: 'if the mother leaves her husband's house over a disagreement with her husband, she has the right for her children's custody ... that is if the court does not see that as being against the children's interests'.<sup>403</sup>

The opinion of this thesis is that such provisions are against Islamic law because the priority of the mother as a guardian is evident through the Holy *Qur'an* and Sunah. It may be seen as consistent with CROC because choosing the guardian in this case will be according to 'the best interests of the child' as it will be evaluated by the

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<sup>402</sup> Al-'alim, above n 87, 314.

<sup>403</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984).



court. It is not clear why Libyan law in this particular case grants the authority to the court to override a mother's preference to guardian, while in the normal preferences line does not. It may be because a mother leaving her home is a sign of a careless mother who does not have the well-being of her child/ren at heart.

#### 4.2.2.2 The LHC Decisions

In determining whether the right of guardianship is that of the guardian or the child, the LHC-GJ, has clearly adopted the position, in a 1974 decision that the right of the child will be its first consideration:

According to the *Malikiyah Mathhab*, guardianship is incumbent upon three rights which are: the right of the child, the right of the mother/female guardian and the right of the father/male sponsor. If those rights coincided and it was easy to accord between those rights, that should be the path taken, otherwise if there is conflict between those rights, the right of the child becomes worthier than the other rights because it is the strongest.<sup>404</sup>

Since 1971 this approach has consistently been adopted by the LHC<sup>405</sup> except in its decision 15/48, 2001. In this case, the LHC accepted an application from a wife for a divorce from her husband and refused to grant her guardianship, not on the grounds of inability but rather due to her disagreement with her husband and her consequent attempts to emotionally blackmail him. The subsequent judgement clearly illustrates that the right of the father was preferred over the rights of the children.<sup>406</sup>

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<sup>404</sup> *Majallat Al-Mahkama Al-'Ulya* 3/10, decision 13/20, 07/02/1974, 28. See also *Al-Mahkama Al-'Ulya*, decision 9/42, 18/04/1996, GM.

<sup>405</sup> *Majallat Al-Mahkama Al-'Ulya* 1/8, decision 1/18, 06/06/1971, 93; *Majallat Al-Mahkama Al-'Ulya* 2/7, decision 2/17, 03/01/1971, 56.

<sup>406</sup> *Al-Mahkama Al-'Ulya*, decision 15/48, 14/06/2001, GM.

#### 4.2.2.3 Commentary

In the case presented above to the LHC (decision 13/20, 1974), the appellant (the father) requested cancellation of his daughter's guardianship by her maternal grandmother because his daughter was behind in her studies at the age of eight, her life with her grandmother was not favourable and he wanted his daughter to live with him in Tripoli instead of Bany Walyyed, a city that is more than 300 kilometres east of the capital. He was willing to provide a house for her and her grandmother and pay all expenses for them if they moved to Tripoli.

After the guardian refused the father's offer, he applied to the Bany Walyyed court to grant him guardianship of his daughter. The court complied with his request and cancelled the grandmother's guardianship.

The grandmother refused to move and went to the court of appeal and challenged this judgement on the ground that the father had been inconsiderate towards his daughter for eight years while he knew his daughter lived with her grandmother in Bany Walyyed.

The court of appeal revoked the first judgement because the father had been silent for a long time and had not made his request immediately after moving to Tripoli. The LHC agreed with the court of appeal decision on the ground that the father's silence for more than one year from the date of knowing of his eligibility meant he was not

sincerely concerned with the interests of his daughter. Therefore keeping the girl with her maternal grandmother was seen to be in her best interests.<sup>407</sup>

Shari'a scholars consider this principle as a precedent in all actions taken regarding a child. For example, when Ibn Qudamah discussed the rights of the child's guardianship, he stated that 'in order to choose the suitable person we have to choose the one who is most kind to the child because the best interests of the child must become the first consideration'.<sup>408</sup>

Therefore, it is clear that there are three interests to be considered when dealing with guardianship: the interests of the child, the father and the mother. These interests are considered in both Islamic and Libyan law. Libyan law seeks to find a solution that caters to the interests of all three parties. It is believed that the child's best interests will be met even further if the parent's interests are in harmony or protected. However, if the decision made does not cater to all three interests, then it is the child's interests which will be paramount.<sup>409</sup> Therefore, seeing to the interests of the child is undoubtedly consistent with the 'best interests' principle outlined in CROC.

The 'best interests' principle can also be observed in the case of the guardianship of a newborn baby. According to Libyan Legislation 10/1984, the mother is obliged to take custody and care for her newborn. Protection and care for the newborn by their mother are in 'the best interests of the child'. Libyan Legislation 10/1984 in article M63F.B states that: 'if the subject child was a baby then it needs its mother and can not manage without her, and the mother is obliged to be guardian'. This circumstance

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<sup>407</sup> *Majallat Al-Mahkama Al-'Ulya* 3/10, decision 13/20, 07/02/1974, 28.

<sup>408</sup> Ibnu Qudamah Almaqdisiy, *Alsharhu Alkabiyr* (ND) 291, 292.

<sup>409</sup> Wahba Al-Zohaily, *hiquq alafal wa almusiniyyin*, above n 70, 38.

cannot be exploited by a woman who wishes to disconcert her baby's father by leaving him and the baby as well since there is an obligation set out by law to care for the baby. This opinion is taken from the jurisprudence of the *Malikiyah*, who encourage the mother's obligation of guardianship in the case of a newborn. However the *Hanafiyyah mathhab* do not obligate the mother to accept custody unless there is no one else to do the job or if neither the father nor the child has sufficient funds.<sup>410</sup>

Another example which confirms that the right of guardianship belongs to the child under Libyan Legislation 10/1984 is the case where non-Muslim guardians exist. Custody is the right of the mother regardless of whether she is a Muslim or an adherent of another revealed religion.<sup>411</sup> Islam decrees that a child follows the father's religion. Article M64 explains this rule: '[T]he mother who happens to be a person of the book has a right to her Muslim children's guardianship, as long as she was not raising her child/ren on a religion different to their Muslim father'.<sup>412</sup> Granting a non-Muslim mother guardianship under Libyan law, clearly shows that it is believed that living with the mother is 'in the best interests of the child' regardless of her religion because she will give the child a mother's care, love and compassion. This illustrates that adherence to Islamic law does not result in Libyan law infringing the 'best interests of the child' principle. However, because Islamic law does not recognise the marriage between a Libyan Muslim and a person not from the revealed religions, cases involving such persons do not exist.

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<sup>410</sup> Ibnu Rashid, above 243, 126.

<sup>411</sup> As in a religion that is recognised under Islamic law as being from the revealed by the teachings of prophets as ordained by Allah.

<sup>412</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984).

In summary, according to the case details presented above, Libyan Legislation 10/1984 along with LHC interpretations recognise the right of guardianship based on ‘the best interests of the child’. As illustrated in the case brought forward by the father to the Bany Walyyed local court, the judgement was based on the father’s interests and the literal meaning of the conditions of guardianship. This judgement was overruled in the LHC since ‘the best interests of the child’ was to maintain the subject in the same environment as had been for the past eight years.

In a situation concerning a newborn, details in Libyan legislation were presented which unambiguously obligate the mother to be guardian of a child once she has separated from the husband.<sup>413</sup> Again the common theme of having the best guardian, in this case the mother, is firmly upheld as being in ‘the best interests of the child’.

Finally, if a situation arises where the mother is a non-Muslim, Libyan legislation clearly advises that custody of the child/ren will be granted to her. Emphasis is once again placed on the connection between child and mother, a common theme that ensures ‘the best interests of the child’.

In conclusion, the Bany Walyyed case coupled with the details of Libyan legislation outlining guardianship issues in the case of a newborn and a non-Muslim mother illustrate that the right of guardianship is the right of the child. This understanding is totally consistent with the ‘best interests’ principle outlined in CROC.

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<sup>413</sup> M63F.B, Legislation 10/1984.

### **4.3 Guardianship conditions**

#### **4.3.1.1 Libyan Legislation 10/1984**

As stipulated in article M65, general conditions along with those for individuals, whether they be male or female, need to exist when guardianship is granted. Article M65 states that ‘the guardian must be an adult, capable, trustworthy, able to bring up the child and free from transmittable diseases’.

The condition that is specific to a potential female guardian is that: ‘the nursing mother should not be married to a man who is considered to be marriageable to the child’ (article M65). It means that the nursing mother’s right to guardianship can be cancelled by her marriage, unless the man was unmarriageable to the child.

Conditions for a potential male guardian are also described by article M65: ‘and the guardian man should be unmarriageable to the girl, and should have a woman who will nurse the child’. The son of the uncle, for example, does not have the right to be a guardian of his female cousin, because he is considered to be of marriageable kin.

Article M66F.A states: ‘custody will fail if any of the mentioned conditions in article M65 were invalid’.

Article M66F.B clearly states how guardianship can also lapse: the right of guardianship will lapse by the act of silence on the part of the individual who had the right for it for a whole year counted from the date of his/her knowledge, unless it was impossible for the request to be made’. Noteworthy is the term the ‘whole year’,

because this is the defining criteria in this circumstance. Because in this situation, the issue of granting guardianship is totally dependent on the time when the individual who is requesting to be guardian gained knowledge of their eligibility. If the 'whole year' passes without a request being made, then the individual's eligibility will be deemed invalid in the future.

The law states in article M66F.C that: 'guardianship returns to its first owner when its cause disappears, unless the court decides otherwise in order to fulfil the needs of the child'. 'The best interests of the child' is implicit in this article because the priority is the needs of the child.

Article M67F.A states: '[T]he right of guardianship does not fail because the person who gained it is living with the person that lost it, unless it was harmful to the child'. Therefore, a prospective female guardian's right may be deemed ineligible if a previous female guardian, with whom she is living, was stripped of her role as guardian for a number of reasons. These reasons may be any of the following: illness, loss of trust, acts of dissipation, or marriage to a marriageable kinship to the child. It is believed that if the child is still living under the same roof as the previous guardian, the child may still be affected by the original cause of stripping the previous guardian of her role, defeating the purpose of taking the child from the previous carer in the first place. However, in the case of physical disability of the previous guardian, there will be no such affect on the child, and guardianship can be awarded to someone in the same household. Once again it can be seen that the court makes the child and their needs a priority.

#### 4.3.1.2 The LHC Decisions

In an early case heard by the LHC Case 1/2, 1956, the decision handed down by the sitting panel of judges broadly detailed the required conditions of a prospective guardian.

According to Islamic legislation, whoever the guardian is, whether it be a male or a female, they must have some required characteristics including; sense and capability to ... [meet] the needs of the guarded child/ren, the female guardian must have a safe place where she can protect a teenage girl, loyalty in religion and maturity, lack of transmittable diseases, and the female guardian should not be married ... [except] if she was married to a person who was unmarriageable to the guarded girl, or the person who has the right of guardian knew about it and did not ask for it for a whole year without an excuse, so that way his guardianship will be cancelled. However, if it was confirmed in the proceedings that the woman who was appealed against got married four years ago and the appellant did not object or [contradict] this statement, the judgment that has been agreed on which says that the appellant neglected requesting guardianship of his two young brothers from his mother after she got married until the legal period passed away is not against the law and is compatible with the *Malikiyah* school of jurisprudence.<sup>414</sup>

Since this case was presented to the LHC, there has been a continual emphasis on these guardianship conditions in many other cases. Such cases will be discussed in detail along with other cases due to their importance and relevance to this research.

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<sup>414</sup> *Majallat Al-Mahkama Al-'Ulya* G1/M, decision 1/2, 21/03/1956, 87.



#### 4.3.1.2.1 Key cases

In one of the key cases (2/17, 1971), the LHC declared the conditions of granting guardianship of a child for a man or woman and how these conditions must be in accord with the interests of the child.

According to Islamic legislation, guardianship is meeting the needs of the child in terms of providing food, clothes, ...[sleeping accommodation] and it is legally bestowed on women, with its transfer to the male conditional on him being accompanied by a woman who will take care of the child whether she is paid or not. It was debatable whether guardianship was the right of the mother or father in that guardianship is most commonly decided upon the basis of the benefit to the child without taking into account the feelings of either parent. The interest of the child is not to be forbidden ... the compassion and care of both parents, so if the child was taken from the mother for a legal excuse and was given to the father, and the father neglected his duties or the excuse disappeared the child will be returned to its divorced mother. If the judgment refused the request in returning the child in light of the most commonly held interpretations in this school of jurisprudence and after proof of the father's negligence, then an error has been committed in upholding the law and the judgment must be revoked.<sup>415</sup>

Case 2/17, 1971 as detailed above, was decided upon by the LHC after decisions in a number of lower courts prior to it being presented to the LHC for final adjudication. The court of first instance in Benghazi had previously granted guardianship to the mother of two sons after she and her husband divorced. The husband moved from Benghazi to Darnah, a city 300 km east of Benghazi. Once he had moved, he appealed the custody decision on the conditions that as the father, he can request guardianship of the children if he moves away permanently to a location that is considered to be a long distance from the female guardian. The court fulfilled his request and granted him guardianship of his sons.

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<sup>415</sup> *Majallat Al-Mahkama Al-'Ulya* 7/2, decision 2/17, 03/01/1971, 56.

The mother appealed this decision to the court in the city of Al-Baydah on the following grounds. Firstly, the father did not inform her about the move or ask her if she wanted to relocate. Secondly, the father's relocation was made under a false pretence and was just a ploy to take the children away from their mother. She also added that the condition that the female guardian must be not far from the *Walii* (for their protection and easy access) was not a valid argument due to modern transportation and technology, and given that people are able to move thousands of kilometres in a few hours. In a further argument made to advance her cause, the mother mentioned that she had already moved to a city called Al-Baydah which was only 100 km west of Darnah so the father's access to the children was made easier. The court rejected the mother's appeal because it decided that she must live in the same city as her ex-husband. The court however did grant her visitation rights of only once a month for the whole day at her ex-husband's expense.

Following her initial failure, the mother brought a new case before the Benghazi court of first instance claiming that her ex-husband had moved the children from Darnah to Alexandria in Egypt and left them there with his new wife before he moved back to Tripoli alone. The father claimed that this was in their best interests because they would receive better education. The court responded to this statement as not being true since both Libya and Egypt have the same education system. A report was submitted to the court, authored by the Libyan Counsel-General in Alexandria, Egypt. This report declared that the children were struggling, and that their health and emotional status were not good. Unfortunately, the court still refused the mother's request declaring that she had already lost guardianship and could not

regain it. The mother finally took her case to the LHC and based her argument on the following four grounds:

1. The father acquired her right of guardianship under a false pretence when he relocated the children to Darnah. He then moved them to Alexandria and left them under the supervision of his second wife who was not considered a close female guardian and they were without a father, which is against their interest. The mother claimed that he did this because he did not want to pay what he is obligated to pay her if they had remained in her custody.
2. The first decision of the court was made on the grounds that the father relocated his children to Egypt on the basis of enhancing their level of education, a claim which had already been rejected by the appeals court in the city of Al-Baydah. Furthermore, when the children were taken away from their mother, the father placed them in a school in Darnah where they were examined. Their examination results were good, which indicated that their education thus far had been fine. In addition, their mother was a teacher and had done much work with them educationally.
3. Guardianship is supposed to be granted on the basis of the best interests of the child, but unfortunately this principle had not been upheld in this case. The mother claimed that the father had demonstrated neglect; and as a consequence should not be deemed to be a suitable guardian.
4. The first decision was made on the grounds that when the father had moved to Darnah, the mother refused to move with him. This was not true as he had

not informed her of his relocation. Therefore, because of this untruth, he had not met the condition of a suitable guardian.

On the grounds detailed above, the LHC decided in favour of the mother and granted her guardianship status over the children. The main points in the judgement detailed the importance of a child's need for compassion from both parents along with the continued monitoring of guardianship conditions, in particular the issue of neglect. As a consequence, the children would return to Benghazi to live with their mother.<sup>416</sup>

This case highlights a number of issues. It details the conditions of the female guardian living nearby to the children's *Walii*. Another subject detailed is that of the male guardian who must provide a female to assist him in taking care of the children, and, finally, the location of guardianship. The details of this case clearly indicate that the father had made various statements to advance his cause. If the statements had been proven, they would have made his case quite plausible. However, in upholding the 'best interests of the child' principle, the LHC sought the facts of the children's current circumstances and made a decision on this basis.

This case is significant on two levels. Firstly, the lower courts had applied the law on a literal basis. Such an approach resulted in the upholding of guardianship conditions, viewed by this thesis as a narrow-sighted approach. The LHC on the other hand made its judgement on the complete context on which this case was presented. By this, the LHC had taken into consideration first and foremost 'the best interests of the child' from an Islamic perspective.

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<sup>416</sup> *Majallat Al-Mahkama Al-'Ulya* 2/7, decision 2/17, 03/01/1971, 56.

Another reason for the significance of this case is that even though the case judgement was handed down in 1971, the LHC had based its decision on the ‘best interests’ principle at the heart of CROC which was institutionalised many years later. Therefore, the view taken by this thesis is in total agreement with the decision made by the LHC. In its judgement, the LHC was unambiguous as to the reason why such a decision was sought, and more importantly highlighted the need to uphold ‘the best interests of the child’. In particular, the LHC decision supports the thesis statement in that the culture (that is, the *Malikiyah Mathhab*) affects the interpretation of the ‘best interests’ principle.

In Case 1/28, 1982, the LHC emphasised guardianship eligibility conditions:

According to the Imam Malik school of jurisprudence, the conditions of guardianship include: the person eligible for guardianship being conservative religiously and loyal, and if the person lacks those conditions that person can no longer be considered eligible.<sup>417</sup>

In 1985, the LHC had been consistent in stressing the necessity of guardianship conditions in its decision to Case 3/31, 1985:

The main purpose of guardianship is the protection of the child, whether the child is a boy or a girl. Guardianship is also about meeting the child’s needs, and guiding the child to the right path in life. It is very important for the guardian to be trustworthy and capable of protecting the child. Failing to protect the child encompasses exposing the child to corruption.<sup>418</sup>

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<sup>417</sup> *Majallat Al-Mahkama Al-'Ulya* 18/3-4, decision 1/28, 13/01/1982, 9.

<sup>418</sup> *Majallat Al-Mahkama Al-'Ulya* 1-2/25, decision 3/31, 22/05/1985, 9. See also *Al-Mahkama Al-'Ulya*, decision 26/45, 25/02/1999, GM; *Al-Mahkama Al-'Ulya*, decision 27/42, 04/01/1996, GM; *Al-Mahkama Al-'Ulya*, decision 38/47, 03/05/2001, GM.

In Case (3/31, 1985),<sup>419</sup> the appellant (the girl's father) requested that the court abort the mother's custody of their 13 year old daughter. The main argument for the appellant's request was that the daughter in question was tending her maternal grandfather's sheep on her own at a considerable distance from the mother's residence. Her father also claimed that she had failed her exams at school and he argued that this was due to neglect. It was argued that a teenage girl consistently away from home during the day may result in involving herself in acts of indecency or in her being abused. In handing down its decision, the court decided to approve the request and abort the mother's guardianship of the girl.

When the mother appealed the decision, the court of appeal re-instated the mother's custody of the girl. The reason for the decision was the court's belief that the child should not be deprived of her mother's love and care. However, the appeals court failed to see that the father was seeking protection for his daughter. The decision of the appeals court contradicted Islamic law because one of the purposes of guardianship in Islam is to protect the child from any type of harm. In this case the court of appeal had ignored a witness account of the girl having been seen tending to her grandfather's sheep away from her mother's residence and therefore being in a position where she may have been in harm's way.<sup>420</sup> This case illustrates that a court's implementation of guardianship conditions can have a negative affect on a child. This thesis rejects the appeals court opinion since 'the best interests of the child' would be best served by her remaining in an environment under continuous monitoring and not alone at a location far from any sort of supervision.

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<sup>419</sup> *Majallat Al-Mahkama Al-'Ulya* 1-2/25, decision 3/31, 22/05/1985, 9.

<sup>420</sup> *Majallat Al-Mahkama Al-'Ulya* 1-2/25, decision 3/31, 22/05/1985, 9.

#### 4.3.1.2.2 Other related cases

The following LHC decisions demonstrate the court's approach in upholding guardianship conditions with room for flexibility to ensure 'the best interests of the child'. In Case 24/20, 1974, the LHC declared:

The marriage of the divorced woman to a man ... who is not related to the child/ren under her guardianship, does not cancel her right in guardianship if only the contract of marriage has been agreed upon. If marriage was confirmed through sexual intercourse and the female guardian would be then pre-occupied with her newly wed husband, then it is obligatory to cancel her right in guardianship and take the child/ren away from her, *as long as the well-being of the child is not detrimentally affected or the child accepts another guardian.*<sup>421</sup>

Furthermore, the LHC decided in Case 7/20, 1974:

If a person has the right to custody and did not request it, that right will be cancelled if they were aware of their eligibility; but if they did not know and they did not ask for it, their right will not be eliminated regardless of the period of their silence.<sup>422</sup>

In the above two cases, it is clear that the court, even though emphasising the importance in upholding guardianship conditions, has allowed for these conditions to run secondary in situations where the guarded child is not negatively affected and 'the best interests of the child' are protected.

Unlike the above grouping of cases, the following group of LHC decisions have maintained other guardianship conditions as being non-negotiable when present in order to meet 'the best interests of the child'. If such conditions fail, the guarded

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<sup>421</sup> *Majallat Al-Mahkama Al-'Ulya* 3/10, decision 24/20, 28/02/1974, 36 (emphasis added).

<sup>422</sup> *Majallat Al-Mahkama Al-'Ulya* 10/3, decision 7/20, 31/01/1974, 13.

child/ren are perceived by the court to be endangered physically, emotionally or in any other undisclosed manner. Therefore such conditions need to be abided by on a strict basis.

In Case 2/21, 1974, the LHC clearly detailed strict potential guardian conditions:

The conditions that must be satisfied in awarding custody include the requirements that the custodian must be mature, faithful and have the ability to manage financial matters. Therefore custody cannot be awarded to someone who is a traitor or corrupt, or known to be a drinker of alcohol or commits fornication or illegally misleads.<sup>423</sup>

Case 14/23, 1977,<sup>424</sup> presented before the LHC, highlights a case where an important prospective guardian condition, namely health, had formed the basis of argument by a father to gain custody over his children. The children were being cared for by their maternal grandmother. He argued that the grandmother was medically unfit to take care of the children and that this may potentially harm his children. The grandmother had an artificial valve in her heart yet it was found that this did not prevent her from taking care of both children in her custody. The judge did not grant cancellation of her right to custody over the children because the father of the two children failed to point to a single event where the children were harmed or were neglected due to the grandmother's medical condition. Thus, the guardian was considered capable of taking care of the children and satisfied the health and capability conditions that are legal requirement.<sup>425</sup>

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<sup>423</sup> *Majallat Al-Mahkama Al-'Ulya* 2/11, decision 2/21, 07/11/1974, 20.

<sup>424</sup> *Majallat Al-Mahkama Al-'Ulya* 13/4, decision 14/23, 24/02/1977, 9.

<sup>425</sup> *Majallat Al-Mahkama Al-'Ulya* 13/4, decision 14/23, 24/02/1977, 9.



It should be noted that the grandmother in her own defence made mention of the fact that her two daughters were also living with her and the guarded children. In light of the law mentioned above relating to the guardian requiring assistance when they are not fully capable of fulfilling the child's needs, the court would have still made a judgement upholding the status quo on the basis of the aunties' presence.

In the Case 14/24, 1978, the LHC again expressed these conditions in one of its decisions when it stated that:

The whole purpose of guardianship is to care for the child, and part of that is protecting the child from corruption. Some of the conditions that must be satisfied for the establishment of custody is that the guardian must be mentally mature, be able to meet the needs of the child, ensure the safety of the child (especially for girls), be religiously faithful, and be rational. If the guardian was to be a man, then he must make available a woman to care for the child, for example, his wife or a nanny.<sup>426</sup>

Therefore, the above cases unambiguously illustrate the inflexible stance taken by the LHC in cases where failure of prospective guardians to meet the required conditions is deemed to place the guarded child/ren in some form of danger.

The LHC in the following two case decisions had been consistent in its judgement on issues related to prospective guardians being silent for more than a year. The aim of enforcing this guardian condition is to guarantee the stability of the guarded child/ren with respect to location, social environment and most importantly the guardian themselves. By achieving these goals, 'the best interests of the child' are best achieved.

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<sup>426</sup> *Majallat Al-Mahkama Al-'Ulya* 3/14, decision 14/24, 19/01/1978, 30.

In handing down its decision to Case 4/28, 1982, the LHC observed:

The silence that cancels guardianship ... is not effective from the day of its action, so that, if the person did not know that the silence could cancel their right, their silence would not eliminate their right, regardless of how long the period of silence has been. The *Walii* moved from one city to another and argued that the guardian did not claim her right to the children and kept silent for one year so should therefore miss her right to guardianship of the children. The court did not agree and decided that the one year had to start from the time she knew that the *Walii* moved. If she waited longer than that one year then her right would be cancelled.<sup>427</sup>

The LHC refused to grant custody to a legitimate guardian due to her silence for more than a period of one year because it was against the child's best interests.

Decision 7/30, 1985 stated that:

It has been confirmed that the right in either requesting custody or canceling it can be eliminated by being silent over a period of one year, counting from the date of knowledge about the existence of its cause. The facts of the legal proceeding were that the case was raised by a maternal grandmother seeking custody of her granddaughter after accusing the paternal grandfather of kidnapping the girl but the appellant argued that he is the guardian of the girl [by] ... the wishes of the girl's father who went overseas for treatment. So he enrolled her in a school after he found her neglected, and she stayed with him from May 80 till the date of raising the case in March 82. Over this period, the grandmother kept silent and did not request ... the child, nor her right in custody. However, the year long period that was called into question by the court of first instance was not achieved according to the rules of the Islamic legislation despite the fact that the appellant insists that the grandmother knew about the child being under his custody for a year and ten months, and by that way of judgment the court failed the rules of the Islamic legislation and was wrong in its practice by giving the child to her grandmother ... [therefore] it failed in practicing the law and upon that [appeal] must be revoked.<sup>428</sup>

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<sup>427</sup> *Majallat Al-Mahkama Al-'Ulya* 1/19, decision 4/28, 04/04/1982, 12. See also *Al-Mahkama Al-'Ulya*, decision 16/45, 25/02/1999, GM; *Al-Mahkama Al-'Ulya*, decision 10/47, 07/12/2000, GM.

<sup>428</sup> *Majallat Al-Mahkama Al-'Ulya* 22/1, decision 7/30, 17/01/1985, 14.

Case 4/28, 1982 presented to the LHC details a father's appeal against a ruling which granted custody of his children to the maternal grandmother. The case was based on the claim that the grandmother was too busy to care for the children. The court of appeal was not satisfied that a carer was provided for the children while the grandmother was at work, so the judge upheld the appeal and granted custody of the children to the father.<sup>429</sup>

As a consequence, the case was then appealed by the grandmother, who claimed that the ruling was against the law. She argued that the court of appeals made its ruling based on the petition of the father without considering the investigation that was performed by the court that heard the original case. In the original case, the judge had provided the father with two alternatives:

- i) to increase the alimony payment that the father was making to allow the grandmother to leave her job, which requires her to be away for half of every working day; or
- ii) to start paying the original amount that was being previously paid to the mother of the children.

Both choices were rejected by the father. The court of appeals had aborted the right of the grandmother to custody of the children despite having no legal reason for such action. The court of appeals had relied solely on the fact that the grandmother was working in a job that she needed desperately without considering the fact that there was someone else caring for the children whilst the grandmother was at work. That

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<sup>429</sup> *Majallat Al-Mahkama Al-'Ulya* 1/19, decision 4/28, 04/04/1982, 12.

person was the grandmother's maid. Furthermore, the grandmother was also willing to assign the role of carer to her other daughter (the children's maternal aunt). However, the role of guardian could not be interchanged amongst the carers as they pleased, therefore the grandmother could not just assign care to her other daughter. The aunt would have to make a claim for custody through the courts.<sup>430</sup>

The final decision handed down was in favour of the grandmother. Having two aunts living in the same house satisfied the LHC that there was enough care for the children whilst the grandmother was fulfilling her employment duties. Therefore it was the view of the LHC that the best interests of the children would be addressed by keeping them in the custody of their grandmother.

In light of the High Court's decision, a number of points are noteworthy. Firstly, the grandmother was and continues to be the guardian. The presence of the aunts does not eliminate or degrade the grandmother's role or importance in any way. However, it was viewed by the court as assistance to the guardian's role. Another significant factor is that being assigned guardian does not grant the ownership over the role of guardian itself. Therefore, the role is not transferable at the discretion of the guardian.

The decision made by the LHC is supported by this thesis. It should be emphasised that if the LHC had taken a strict approach to determine whether the guardian upheld guardianship conditions, the LHC could have judged in favour of the father's case on the sole basis of the grandmother's absence from the children due to work commitments. However, the LHC had adopted the flexible approach to decision

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<sup>430</sup> *Majallat Al-Mahkama Al-'Ulya* 1/19, decision 4/28, 04/04/1982, 12.

making as outlined in Libyan law which upholds the *Malikiyah* version of Islam. The judgement considered the children's current family environment context and made a decision based on the broader picture. Even though CROC was adopted 12 years later, this case is a clear example that the 'best interests' principle as defined by CROC was already embedded in Libyan law because of its inherent Islamic culture.

Therefore, as has been illustrated in the above cases, guardianship under Libyan law has been developed with the guarded child/ren as its primary concern, such that the child is to be served and cared for, and requires that the guardian be capable of taking care of and protecting the child. These requirements mean that the guardian must be completely dedicated to this role and as detailed in the case above. If dedication to other activities including employment lead to the neglect of the guardian's duties towards the child, then their right to custody will be forfeited.

Guardian conditions are not based on emotions but rather on rational grounds. For example if a mother harms her child/ren, she will lose custody of the child even if they are emotionally attached to her. Removing a child in this situation may be difficult emotionally, however it is perceived as being in 'the best interests of the child'. A similar judgement was handed down by the LHC in Case 3/31, 1985 where a teenage girl had been seen tending to her maternal grandfather's sheep away from her guardian mother. The LHC disagreed with the appeals court decision to return the child to the mother on the grounds of emotionally being attached to her. In its judgement, the LHC emphasised that the well-being of the child, specifically her

safety, determined what was in the child's best interests rather than the emotional attachment to her mother.<sup>431</sup>

Another example where the LHC was stringent in upholding the conditions of guardianship was in Case 14/23, 1977. If the guardian or anyone else in the household is proven to be diagnosed with a transmittable disease which could harm the guarded child (for example, leprosy) the right of the guardian will be cancelled even if the child's needs were met. If the guardian has a medical condition which is deemed to be non-infectious and not harmful to the child in any way, then guardianship will remain with the allocated female family member.<sup>432</sup>

According to CROC, the purpose of guardianship is to nurture, care for and to meet the child's needs for a specified period of time. In Case 7/28, 1982 a grandmother who had been granted custody of both her daughter's children. The uncle of the girls' father appealed, arguing that the grandmother's commitment to working by night and sleeping during the day exposed the guarded children to abnormal conditions. The judge rejected the appeal. This decision was based upon the argument that the assistance of two of the children's aunts would be sought when the grandmother was not available. This case was then taken to the High Court on the same grounds. In addition, the uncle argued that the assisting aunts were not mature enough to help with the responsibilities of guardianship without providing any evidence to support this claim. The LHC confirmed the appeals court decision.<sup>433</sup>

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<sup>431</sup> *Majallat Al-Mahkama Al-'Ulya* 1-2/25, decision 3/31, 22/05/1985, 9.

<sup>432</sup> *Majallat Al-Mahkama Al-'Ulya* 4/13, decision 14/23, 24/02/1977, 9.

<sup>433</sup> *Majallat Al-Mahkama Al-'Ulya* 19/1, decision 7/28, 04/04/1982, 16.

According to Libyan Legislation 10/1984, the court has a responsibility to ensure that the guardianship conditions are being fulfilled. One of these conditions is that a prospective guardian needs to be capable of fulfilling the guardianship duties. In light of this fact, this thesis maintains that in Case 7/28, 1982 the court failed to confirm the claim made by the plaintiff that the assisting aunts did not fulfil an important guardian condition that is, capability. The LHC played a passive role by making a judgement on the evidence presented to it. It should have been proactive in seeking whether the claims made by the plaintiff were true. It can be concluded that in this case, 'the best interests of the child' as understood by Libyan Legislation 10/1984 were not adequately addressed.

Case 14/24, 1978 presented to the LHC established that the plaintiff (mother) had been working in a government department in order to help her disabled mother meet living expenses. The plaintiff would leave the guarded child along with another daughter, who was 19 years old, during work hours. It was proven, through the testimony of an expert physician, that the mental capacity of the mentioned daughter was that of a seven year old child. It was also proven that she was ineligible to be a carer for the child even for a short period of time. In addition, the plaintiff did not deny her mother's disability. This disabled grandmother could not cope with the burden of supervising the child in question as well as the mentally immature 19 year old girl.<sup>434</sup> It was necessary, in the interests of the child, that the mother care for them. As her work commitments harmed the child's interests, the ruling to abort her guardianship is seen as proper under the law.<sup>435</sup>

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<sup>434</sup> *Majallat Al-Mahkama Al-'Ulya* 3,4/24, decision 2/35, 29/06/1985, 17.

<sup>435</sup> *Majallat Al-Mahkama Al-'Ulya* 3/14, decision 14/24, 19/01/1978, 30.

Although the mother had arranged for two guardians (her 19 year old daughter and the children's grandmother) to care for the child while she was at work, it was viewed that the two guardians were unable to maintain the children properly due to their own personal conditions. As a consequence, the mother's guardianship was made void because it was argued that 'the best interests of the child' were not being catered for under this arrangement. However, through its powers, the LHC should have activated the *Social Security Legislation*<sup>436</sup> that would have solved the financial needs of the mother and provided her with some sort of income to enable her to stay at home to take care of her dependents. The decision made here can be seen as being harmful to both parties involved. Both the mother and children would suffer emotionally. Furthermore, although it was based on logic the court failed to look at the personal interests of those involved.

In Case 1/18, 1971 the LHC confirmed that, 'legally, if the guardian of the child was a man, he must provide a woman to nurse the child, such as a wife, a woman who is of kin, or a nanny'.<sup>437</sup> The decision handed down in Case 14/24, 1978 confirms this point. An appellant declared in a submission to the court that the defendant, her ex-husband, did not have a female carer to take care of the children and therefore was ineligible for custody. However, it became clear that the father had remarried and was therefore eligible to regain custody because the assisting female carer was now available.<sup>438</sup> Therefore, the court ensured that 'the best interests of the child' were catered for because it made certain that there was a female carer with the father. In this case the second wife would care for the children under the supervision of the

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<sup>436</sup> *Social Security Legislation* (72/1973).

<sup>437</sup> *Majallat Al-Mahkama Al-'Ulya* 1/8, decision 1/18, 06/06/1971, 93.

<sup>438</sup> *Majallat Al-Mahkama Al-'Ulya* 3/14, decision 14/24, 19/01/1978, 31.



father. This case shows one of the Islamic cultural influences in guardianship aspects: in the case of a male guardian ‘the best interests of the child’ are met when there is a female assisting the male guardian.

The first paragraph of article 66 from the Legislation 10/1984 considers the failure of all or some of the conditions in section 65 as causing the termination of the custody. Case 19/42, 1996 highlights the importance that the LHC places on investigating the conditions of the eligible guardian. The original ruling gave the defendant the right to guardianship of her children, without establishing whether the right conditions for custody existed.<sup>439</sup> This is seen as not being fair to the plaintiff because the court should have investigated both sides of the case and made sure that all necessary steps had been taken. The LHC’s ruling that this decision was wrong represents an attempt on the part of the LHC to ensure that ‘the best interests of the child’ are taken into consideration, by insisting that the court should check the conditions of the guardian properly. Furthermore, the right of guardianship belongs to the child and not the guardian and, for this reason, the court should investigate whether a potential guardian is suitable.

As mentioned earlier, the law states in article M66F.C that ‘guardianship returns to its first owner when ... cause [for its initial loss] disappears, unless the court decided the opposite in order to establish the interests of the child’. What is meant by this is that if a reason arises which makes the guardian no longer eligible or renders them unable to fulfil the requirements of guardianship, then the role of guardian will become void. However, once the cause disappears, the right to guardianship will

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<sup>439</sup> *Majallat Al-Mahkama Al-'Ulya* 3-2/30, decision 19/42, 21/03/1996, 18.

return and the claim for guardianship can be made once again. This is to ensure that ‘the best interests of the child’ are maintained and that the child is under the care of the best guardian.

For example, if a mother were to fall sick during guardianship and can no longer care and maintain the child, the child will be taken from her care and placed with another suitable guardian (such as the father). Once she has regained full health, she becomes eligible for guardianship once again and will gain the right to guardianship again once/if she makes her claim.

As discussed in detail in Chapter 3, the *Malikiyah Mathhab* distinguishes between voidable and unavoidable conditions.<sup>440</sup> However, Libyan Legislation 10/1984 does not follow this interpretation and is therefore perceived to rule in contrast to the *Malikiyah* version of Islam because it believes this opinion is contrary to ‘the best interests of the child’. Under article M66F.C, if a woman was to marry a ‘stranger’, she will lose her right to guardianship. However, if she were to divorce this person her right to guardianship would return. The *Malikiyah Mathhab* does not take this approach and believes that because *the choice* was made to marry whilst being aware that as a consequence her guardianship would become void. Thus the right to guardianship does not return if divorce is sought. From the perspective of the *Malikiyah*, only on the basis of unavoidable conditions, such as sickness or necessary travel, can the right to guardianship be re-gained.

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<sup>440</sup> Avoidable conditions: where an action has been taken as a matter of choice e.g. remarry. An unavoidable conditions: an action that has occurred beyond one’s control e.g. sickness.

#### 4.3.1.3 Commentary

In cases of parental separation/divorce, the father is obliged to maintain his children during their stay with their mother. No one can remove a child from the custody of their parents unless circumstances demand otherwise. In such a case, the parents or guardians should agree upon a person/s who they believe can cater for ‘the best interests of the child’ until a court can adjudicate on the matter. A person who is an eligible guardian must be proactive in requesting custody of the child. Placing the onus on prospective guardians ensures that the child is not neglected for any length of time and that there is someone caring for them at all times.

During the course of litigation for guardianship of the child/ren, the primary concern should always be ‘the best interests of the child’. Such litigation should not be perceived as just a formality determining who the next in line on the guardianship hierarchy is, but rather an in depth examination of the next appropriate person deemed to be responsible and capable of taking care of the child and meeting their needs. Furthermore, an investigation of how the child’s best interests can be met should be the overriding concern of any guardianship litigation. It is this approach which was exemplified by the court cases presented to LHC which have been detailed above.

These cases highlight the LHC decisions based on factors that include desirable characteristics of the guardian, a safe place for the child/ren to reside and the time in which the claim was made for guardianship. These factors illustrate how ‘the best interests of the child’ were the main concerns for the LHC in its rulings.

In Case 7/30, 1985 detailed above, the grandmother, who was the most eligible guardian for the child according to the guardianship hierarchy, had her right to guardianship dismissed because she waited over one year to make her claim. As has been mentioned above, silence over a period of one year according to Islamic law and Libyan Legislation 10/1984 is grounds for making void the right to guardianship. It was the view of the LHC that it would be in the child's best interests to keep the child with the grandfather as he had taken care of the child for the whole period of time and taken care of the child's needs, enrolling her in school and caring for her well-being. It would have been unfavourable for the child to be removed from under the care of the grandfather, given that her environment had showed signs of stability.<sup>441</sup>

It is clear that the LHC decisions detailed under the sub-heading 'Guardianship conditions' have consistently been handed down with 'the best interests of the child' as the primary concern. Such a statement can be substantiated because of the 'the best interests of the child' has been a recurring theme in decisions handed down over a period of 30 years by the LHC.

In conclusion, in accordance with guardianship conditions discussed above, Libyan Legislation 10/1984 and its official interpretation through LHC decisions, the cases presented above are clearly consistent with CROC in terms of making 'the best interests of the child' a primary consideration.

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<sup>441</sup> *Majallat Al-Mahkama Al-'Ulya* 22/1, decision 7/30, 17/01/1985, 14.

## **4.4 Upholding guardianship**

### **4.4.1 The place of guardianship**

#### **4.4.1.1 Libyan Legislation 10/1984**

Article M67F.B states that ‘moving with the child inside the country will be allowed by a guardian if it does not harm the child’s interests’. Article M67F.C states that:

the female guardian cannot relocate with the child outside Libya except in the case where permission has been sought from the male sponsor (*Walii*). If permission was refused, then she can raise the matter to the relevant court.

#### **4.4.1.2 The LHC decisions**

In cases presented to the LHC concerning the issue relating to the place of guardianship, decisions handed down by the court have differed prior to and after the introduction of Legislation 10/1984. This legislation, unlike a strict *Malikiyah* approach, allowed for flexibility in judging cases relating to this matter. Prior to Legislation 10/1984, a strict 72 mile radius was enforced on the female guardian’s residence to that of the *Walii*. A 72 mile maximum was believed to be in the child’s best interests because it was feasible for both male and female guardians to share supervision of the child. With the introduction of Legislation 10/1984, movement by the female guardian to any location within Libya would not result in losing her right to guardianship. However relocation outside Libya would require the relevant court to decide on whether the female guardian would lose her right to guardianship to maintain ‘the best interests of the child’. Such an approach is consistent with the

argument advocated by this thesis because it is this flexibility granted to the relevant court which guarantees that ‘the best interests of the child’ are upheld. This movement from a strict framework to a more relaxed set of guidelines allows Libyan law in relation to guardianship to be more consistent with the ‘best interests’ principle set out in CROC.

In one of its decisions prior to the introduction of Legislation 10/1984, the LHC in Case 3/10, 1974 decided:

If the *Walii* moved to a location that is further than seventy two miles from the location of the child on a permanent basis, then this move obliges the relocation of the female guardian and the child that is under her custody to the location of the *Walii* in order to obtain the right care and supervision for the child, so if she did move, the child will stay with her and if she did not, her right in custody will be cancelled.<sup>442</sup>

Similarly, in Case 12/24, 1978 which was also decided upon prior to the advent of Legislation 10/1984, the LHC declared:

It is widely known in the Imam Malik School of jurisprudence...that the female carer of the child is not allowed to move with the child permanently to a location that is far from the sponsor of the child. Any distance beyond seventy two miles is considered far. The reason is to allow the sponsor of the child to supervise the raising of the child. This religious obligation must be practised, even with the existence of more accessible and faster modes of transportation ... The reason for aborting the mother’s right to custody in a case where she moves the mentioned distance away from the sponsor is that the sponsor is ultimately responsible for the supervision of the child’s upbringing. That is what the court decided in regards to appeal number k2–21. The ruling was based on the fact that the defendant, who is the *Walii*, has been living permanently in his village which is a distance of more than 72 miles from the residence of the appellant. Based on that, the ruling did enact the

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<sup>442</sup> *Majallat Al-Mahkama Al-'Ulya* 13/20, decision 3/10, 07/02/1974, 28.

correct sections of Islamic legislation according to the *Malikiyah* and it is wrong to claim that ruling to be illegal.<sup>443</sup>

Unlike the above two decisions, Case 6/37, 1990 was presented to the LHC after Legislation 10/1984 was introduced. In its decision, the LHC refused to cancel the mother's guardianship because she travelled outside Libya temporally to seek treatment for her son while leaving her other children with a friend.<sup>444</sup>

#### 4.4.1.3 Commentary

Prior to the introduction of Legislation 10/1984, the interpretation provided by the *Malikiyah Mathhab* on the issue of relocation was a dominant factor. Since its introduction, the legislation has provided the judge with flexibility to rule whether a parent can relocate with the child if it is perceived not to be harmful and therefore in 'the best interests of the child'. In the opinion of this thesis, the judge has applied the following criteria or guidelines to establish 'the best interests of the child' in handing down the respective judgements.

One of the conditions of custody is trustworthiness. If the guardian wishes to relocate, the guardian may not be allowed to relocate with the child unless they have shown that the relocation is permanent and that the guardian is trustworthy enough to care for the child as has been discussed in the case where the father moved to Darnah earlier in this chapter. According to what has been previously mentioned, it can be concluded that if the father does not have a permanent place of residence, he cannot

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<sup>443</sup> *Majallat Al-Mahkama Al-'Ulya* 3/14, decision 12/24, 05/01/1978, 9. See also *Majallat Al-Mahkama Al-'Ulya* 4/9, decision 17/19, 04/03/1973, 9; *Majallat Al-Mahkama Al-'Ulya* 2-1/18, decision 3/27, 25/03/1981, 9; *Majallat Al-Mahkama Al-'Ulya* 1/30, decision 5/41, 16/06/1994, 14.

<sup>444</sup> LHC decision 6/37, 21/12/1990, cited in Al-Jlaydy, above n 240, 287.

remove the children from their mother's custody if she satisfies the guardianship conditions. So, if the children have been placed in the custody of the father, who then relocates, the children are immediately returned to the custody of the mother.<sup>445</sup>

The law has a different perception to relocation within and outside Libya. If the female guardian decides to relocate permanently with a child outside the country, she will lose custody if such relocation is performed without permission from the *Walii*.

The mother has the right to see and visit her child even if she has lost her right to guardianship. Time spent with a child by both guardians is perceived to be in 'the best interests of the child'. Libyan law, in this situation, makes it a priority for both parents to think and reassess where they decide to live because they have to consider the other guardian's need to visit and spend time with the child and therefore meet 'the best interests of the child'.

In cases concerning relocation, Libyan law has been modified to be more flexible in its approach. The opinion adopted by this thesis is that Libyan law goes a step further in maintaining the 'best interests' principle as stipulated in CROC even though conflict may arise with the opinions advocated by the *Malikiyah Mathhab*. This does not mean that such flexibility is in conflict with Islam itself since this issue of flexibility and differences in opinion is widely accepted within Islamic jurisprudence.

Regarding relocation of a female guardian, Libyan Legislation 10/1984 does not discriminate on the basis of who the female guardian is. It provides that relocation

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<sup>445</sup> See Case 2/17 which has been discussed earlier: *Majallat Al-Mahkama Al-'Ulya* 7/2, decision 2/17, 03/01/1971, 56.



within the country of Libya, whether temporary or permanent, does not affect guardianship. This comes from the *Dahiriyah Mathhab* and is highlighted in the following statement by Ibn Hazm: ‘the mother has the first right to her son’s and daughter’s custody until they both reach maturity, whether the father has left the country the mother is living in or not, and similarly with the mother’.<sup>446</sup>

This view is against the *Malikiyah* and *Shafi’iyah Mathhab* because they do not allow the female guardian to move with the child to any place without the permission of the *Walii* on the basis that ‘the best interests of the child’ are best served by having a male guardian close by because of his obligated duty of care and maintenance of the child. It is considered to be difficult for the *Walii* to meet his obligations towards the child if they are distant from each other.<sup>447</sup> Although the *Malikiyah Mathhab* is the founding source of Legislation 10/1984, an alternate opinion from another *Mathhab* was used as a reference because it was viewed as being the better option in meeting ‘the best interests of the child’.

According to Libyan law, what needs to be considered during guardian relocation are the following three factors: the interests of the child, those of the father, and those of the mother. If the interests conflict with each other, then the priority is the child’s interests followed by those of the parents.<sup>448</sup> It is important to recognise the role of the *Walii* as decision maker and maintainer of the child, so when guardian relocation occurs, it is important that the *Walii* is still able to fulfil his duties.

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<sup>446</sup> ‘Ali Ibnu Ahmad Ibnu Hāzim Al-Zāhiriyy, *Al-Muhalla* (ND) 323.

<sup>447</sup> Wahba Al-Zohaily, *Al-Fiqah Al-Islamiyy Wa Adilatuhu*, above n 258, 7738.

<sup>448</sup> *Majallat Al-Mahkama Al-’Ulya* 30/1, decision 5/41, 16/06/1994, 14.

Legislation 10/1984 clearly forbids the female guardian from travelling with the child outside the country except with the *Walii*'s permission. The preference is that permission should be sought early as to prevent any type of conflict between the guardians.

The question to be asked is what can be done if the *Walii* refuses to grant permission? The answer is that the justice system is the exclusive authority for adjudication. The main focus in such a case should be the evidence presented by the female guardian when justifying the child's relocation. A secondary concern of the justice system is to determine why the *Walii* refused to grant permission when it was requested. If relocation outside the country goes ahead without permission, this will result in the forfeit of the female guardian's right to guardianship even if permanent settlement was not the intention.

This thesis has made it clear that with regards to relocation issues, Libyan law has adopted a flexible approach in decision making. Flexibility is in no way a cause of conflict with Islamic law but rather reflects the differences in opinion within Islamic jurisprudence allows for. Such an approach provides the respective adjudicator with full authority to assess the circumstances surrounding relocation to ensure that 'the best interests of the child' are being protected. Even though 'the best interests of the child' were being met prior to the introduction of Legislation 10/1984, the flexibility that is now inherent in the legislation ensures more than ever the implementation of Libya's obligations under CROC and in particular the 'best interests' principle.

#### 4.4.2 Visitation rights

##### 4.4.2.1 Legislation 10/1984

Article M68 of Legislation 10/1984 states: ‘if the child’s *Walii* and the guardian disagreed about child visitation rights, the judge has to decide the time and place for such visits, and the matter should be given priority for immediate judgement’.

##### 4.4.2.2 LHC decisions

In Case 5/41, 1994 the LHC declared that if a dispute occurs between male and female guardians about child visitation, the judge has full authority to decide the time and place of visitation in a manner that removes obstacles on the part of the father and to protect the interests of the child and his/her mother. The LHC stated:

According to the law, if the guardian and the *Walii* cannot agree on how to organise visits to see the child, then the judge will determine the time, location and duration of such visits. That ruling should be enforced by the power of the law, which ensures that the father of the child will not have any further problems in visiting the child, and further still, the interests of the child and the mother would have been protected.<sup>449</sup>

##### 4.4.2.3 Commentary

Visitation rights have always been a point of contention between opposing parties with relation to guardianship. The cause of the contention may be an attempt by one party to seek revenge against another. To settle such disputes, article M68, as stated above, declares that ‘the judge has to decide the time and place for such visits, and

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<sup>449</sup> *Majallat Al-Mahkama Al-'Ulya* 1/30, decision 5/41, 16/06/1994, 14.

the matter should be given priority for immediate judgement'. Therefore, the court is the only body that can decide the time and place of regular visits. A speedy decision is encouraged in order to prevent further damage and aggravation between the respective parties. The importance of a rapid decision cannot be underestimated because the duties that hinge upon kinship and which Islam obligates the faithful to observe, strongly encourage unmarriageable kin visitation rights to children and return visits from them. This is especially important when the parents of the child are deceased, lost, kidnapped, in jail, held captive, and so on. It is the right of the child's kinships, who are replacing the parents, to visit the child and make sure their needs are being catered for. In light of the abovementioned, this thesis encourages a proactive approach by both parties in being willing to grant visitation rights. Embedded in Libyan culture, visitation rights are extremely important from an Islamic perspective. Therefore, the concept of visitation rights is in total agreement with the 'best interests' principle outlined in CROC.

#### 4.4.3 Discretion of the High Court

##### 4.4.3.1 Legislation 10/1984

Article M63F.C states: '[I]f the one, who is eligible for guardianship, refused or he/she no longer become eligible, the right of guardianship will be transferred to the next person on the guardianship hierarchy. If one is not available, *the court will need to declare one*'.

#### 4.4.3.2 LHC decisions

In Case 2/11, 1974 the LHC referred to the Court of First Instance in Tripoli which has heard the case of a plaintiff to abort his sister-in-law's right to custody of her children (these being the children of the plaintiff's deceased brother). The plaintiff based his case on the mother's re-marriage to a man who was considered 'a stranger'<sup>450</sup> to the children. On this basis, the court ruled in favour of the plaintiff, consequently handing the plaintiff guardianship of the children.

The mother of the children then appealed this case in the Tripoli Court of Appeal, claiming that she had remarried on the condition that the children live with her and that the new husband pay their expenses and maintenance, and as a result this agreement was a condition recorded in the marriage contract. This marriage condition was explicitly sought by the mother because she did not have any female kin who could have been a prospective guardian and would therefore be granted guardianship. The mother also claimed that the incumbent guardian could not be trusted with the children. To back up her claim she reported that he took control of the compensation money paid by the driver who accidentally hit and killed her late husband. The mother added that it was better for the children to stay with her being married than to stay with their uncle's wife who is not related to them at all.<sup>451</sup>

However, in his own defence, the incumbent guardian rejected the claim that he received any payment related to his brother's death and that such an argument was used to undermine his case. He also offered to pay the expenses of the minors from

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<sup>450</sup> Means 'from marriageable kinship'.

<sup>451</sup> *Majallat Al-Mahkama Al-'Ulya* 2/11, decision 2/21, 07/11/1974, 13.

his own wealth. The court heard from trustworthy witnesses that the guardian was paid 700 dinars (Libyan currency) as compensation from his brother's killer. Thus, the court concluded from his denial of receiving any payment and the consequent testimony given by witnesses before the court that he was untrustworthy and dishonest. The court then ruled that it was better for the children to stay with their married mother than to stay with their uncle and his wife. Subsequently, the court of appeal disagreed with the judgement made in the court of first instance and as a consequence judged in favour of the mother.<sup>452</sup>

The uncle took the case further to the LHC. At this point, it should be noted that one of the conditions of a female guardian stated by *Malikiyah Mathhab* and confirmed later by Legislation 10/1984 is that marrying kin that are marriageable to the child will result in cancelling the guardianship status in the case of a female guardian. Therefore, it was on this basis; the mother being married to a 'stranger', that this case was presented to the LHC. The appellant also claimed that it was incorrect to claim that he, the uncle, was untrustworthy as he was still paying the mother 20 dinars per month as child maintenance and had helped the mother and the children receive help from charities. It was also claimed that if the mother was truly committed to her children's care and well-being, she would not have followed her instincts to seek marriage to a stranger.<sup>453</sup>

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<sup>452</sup> *Majallat Al-Mahkama Al-'Ulya*, 2/11, decision 2/21, 07/11/1974, 16.

<sup>453</sup> *Majallat Al-Mahkama Al-'Ulya* 2/11, decision 2/21, 07/11/1974, 17.

The important facts presented to the LHC in this case are as follows:

- i) The mother's husband, even though being a stranger to the children, declared that he was willing to care for the children and pay their expenses. The uncle argued that this was seen as wrong as it is in conflict with what is known in the *Malikiyah* school of jurisprudence, which holds that the mother's right to custody is aborted as soon as she consummates a marriage to a stranger to the children. The school's philosophy holds that the mother will be preoccupied with her husband, and that her husband will probably not tolerate her children and so it is not right to leave the children with someone who will not tolerate or be good to them.
- ii) The untrustworthiness of the appellant was determined based on the claims made by witnesses before the court in relation to the appellant actually receiving money from the killer of the father of the children in question.

#### 4.4.3.3 Commentary

In relation to guardianship issues, this is a case of major significance. Most noteworthy in this case is the conflict generated by the court of first instance in attempting to achieve 'the best interests of the child' through the literal implementation of the law. What is meant by this is that the court of first instance sought to uphold a guardianship condition (that is, marriage to a stranger) in its belief that 'the best interests of the child' would be protected.

The judgement handed down by the court of appeal reflected the belief that the interests of the children had not been protected. The appeal court revoked the decision made by the court of first instance on the basis that applying the law would ultimately protect the interests of the child/ren. Even though marriage to a stranger would usually cause a woman to forfeit her right to guardianship, in this particular case, the court of appeal believed the interests of the children would surely be protected by granting their mother guardianship because their step-father had accepted them and was willing to pay their living expenses.

Even though the LHC upheld the court of appeal's decision in favour of the mother, it did so on different grounds. It stated that the children should be left with their mother not because the court believed their interests would be better protected, but rather the next eligible guardian, who in this case is the uncle, forfeited his right as guardian due to his lack of trustworthiness. This case clearly shows that there is conflict between the 'best interests' principle which under CROC made it a primary consideration, and the *Malikiyah* understanding on this issue, which later contributed to the formation of Libyan Legislation 10/1984. According to both the *Malikiyah* interpretation of Islam and Libyan legislation, a mother's right to guardianship would be forfeited if she remarries a stranger. Even though the LHC tried to resolve this discrepancy through its discretion in interpreting guardianship conditions, the grounds on which the LHC made its judgement were not the 'best interests of the child' principle, but rather, on the basis that there was no alternative eligible guardian. According to the opinion of this thesis, the law should be amended to make all the guardianship conditions firmly linked with the 'best interests' principle rather than having discrete guidelines which legislation hopes will protect a child's



interests. With such legislative amendments, it would be up to the discretion of the respective court to ensure that guardianship conditions will protect ‘the best interests of the child’.

On a related issue, if a person who has the right to guardianship but backs down from this right, or is not able to fulfil the obligated duties, then the right of custody will be granted to whoever is nominated by the court.<sup>454</sup> The judge will choose the most appropriate person depending on the merits of the case. This decision will still be in accordance with the *Malikiyah* jurisprudence.

In light of the case details mentioned above, the discretion of the LHC to adjudicate on guardianship issues is not to be used separately, that is apart from Libyan legislation, but rather as a tool to reinforce the aims and objectives of the relevant law. From the understanding of this thesis, it is clear that the discretion utilised by the LHC has been done so in order to protect ‘the best interests of the child’.

#### 4.4.4 Reinstating the right of guardianship

##### 4.4.4.1 Libyan Legislation 10/1984

The law states in article M66F.C: ‘custody returns to its first owner when its cause disappears, unless the court decides otherwise, in order to establish the interests of the child’.

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<sup>454</sup> *Al-Mahkama Al-’Ulya*, decision 10/47, 07/12/2000, GM.

#### 4.4.4.2 LHC Decisions

The LHC in the Case 2/17, 1971 makes it unambiguous the difference between a mother's failure in her role as guardian and the cancellation of this right:

To declare that the right of guardian that was taken from the mother would not return at all is against the law (the *Malikiyah* school of jurisprudence) because the most accepted interpretation in that school is that failure is different to cancellation, so it would not be returned in the latter, but would in the former. Some of the reasons that may cause failure in guardianship and permit its return are: illness, leaving because of an obligatory trip to Hajj, the relocation of the father or the *Walii*.... So if the cause of guardianship failure disappears, guardianship returns to the mother and is upheld as long as the conditions for guardianship continue to be satisfied.<sup>455</sup>

The LHC confirmed this opinion on another occasion when it stated that: 'If the mother of the child had surrendered guardianship of the child to the father for a reason that is later removed, she can then ... [have] that child [returned] to her custody'.<sup>456</sup>

#### 4.4.4.3 Commentary

With respect to the LHC decision detailed above, if a mother rejected guardianship of her own child, the role of guardian will not return to her. However, if this right was annulled for a reason that was beyond her control then that right will return as soon as the reason for its annulment is removed. This opinion is derived from the *Malikiyah mathhab*, which is different from the other schools of Islamic jurisprudence, where no difference exists between failure and cancellation. This

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<sup>455</sup> *Majallat Al-Mahkama Al-'Ulya* 2/7, decision 2/17, 03/01/1971, 57.

<sup>456</sup> *Majallat Al-Mahkama Al-'Ulya* 3/10, decision 20/24, 28/02/1974, 36.

thesis supports the opinion advocated by the *Malikiyah mathhab* and, specifically, the relevant Libyan legislation which, as detailed above, has provisions for adjudicators to make ad-hoc decisions which are consistent with the ‘best interests’ principle as a primary consideration as outlined in CROC. ‘The best interests of the child’ are undoubtedly upheld with a return of the mother’s guardianship when reasons beyond her control previously eliminated this right. In the case where a mother neglected a child or chose to re-marry (that is, decisions made at the mother’s discretion), and the interests of the child/ren had run second to the mother’s decision, the mother would permanently lose her right to guardianship.

#### **4.5 Maintaining child and guardian**

##### **4.5.1 Who pays the expenses for maintaining the child and the guardian?**

###### **4.5.1.1 Libyan Legislation 10/1984**

Article M69 states:

the mother does not deserve to be paid for her child’s custody while she is still under the bond of marriage to his father, so if they separated, or the female guardian was not the mother, then she deserves to be paid for her care of the child with the child’s assets, else the duty of maintenance is placed on the *Walii*.

Article M70FA, B states: ‘the divorced woman deserves to live in suitable residence as long as her right in custody is still active. If her custody is terminated, then her right to such residence will fail’.

#### 4.5.1.2 LHC Decisions

In a case related to the maintenance payments during guardianship, a mediation hearing was held prior to the case being presented to the court of instance. An agreement between a man and his divorced wife was reached. Under this agreement, the husband would pay his ex-wife all expenses incurred in caring for the daughter. However, no explicit figure was suggested. Libyan Legislation 10/1984 defines costs of custody in article 22: 'Expenses of custody include the cost of residence, food, clothing, medication and any other expenditure required to maintain a normal life'.

When the case was heard in the appeals court, the father based his case on the fact that even though he agreed to pay for the costs of guardianship, he was not obliged to make any payments since there was no specific amount set under the terms of the mediation agreement. The appeal was rejected because the mediation agreement did not specifically mention any such payments.

Following the appeals court judgement, the mother took the case to the LHC. It ruled in favour of the mother, declaring that even though the existing agreement did not specify the costs of guardianship, such costs were obligated by law and not by any agreement which may have excluded such costs. Therefore the *Walii* was now obligated to pay extra to cover the expenses of guardianship. In its decision, the LHC declared that 'the mother who is performing the duties of a guardian deserves to have

her expenses paid by the child's father'.<sup>457</sup> In support of this decision, the LHC also stated:

The text in Article 69, Legislation (10/1984) is concerned with the rules of marriage, divorce and their affect. This section declares that the mother is ineligible for any payments in return for caring for the children as long as she is still married to their father. If, on the other hand, the mother was to be divorced from the father or if the carer of the children was not the mother then she has the right to be paid for the care provided to the children.<sup>458</sup>

#### 4.5.1.3 Commentary

Islamic law obligates the *Walii* to pay the expense of the supported child<sup>459</sup> whilst a female guardian is responsible for the child's daily needs. In doing so it upholds 'the best interests of the child' by distributing the duties of the child's care on both guardian and *Walii*.

Libyan Legislation 10/1984 considers that caring for the child is a role that must be shared by both parents. The law believes that the mother needs to care for and maintain the everyday needs of the child, whilst the father needs to support this financially. When both parties fulfil their responsibilities under this arrangement, 'the best interests of the child' are all but guaranteed.

The *Malikiyah Mathhab* emphasises that payments made to the female guardian should be sourced from the *Walii*. A decision as to how much should be paid is for the judge to decide, and that depends on the *Walii*'s financial situation. In summary,

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<sup>457</sup> *Majallat Al-Mahkama Al-'Ulya* 4-3/27, decision 40/18, 13/01/1994, 16; *Majallat Al-Mahkama Al-'Ulya* 4-3/27, decision 40/21, 13/01/1994, 16.

<sup>458</sup> *Al-Mahkama Al-'Ulya*, decision 29/45, 27/05/1999, GM.

<sup>459</sup> Wahba Al-Zohaily, *hikm al-faḥḥ wa al-musiniyyn*, above n 70, 38.

the issue of financial support is clear under Libyan legislation. Regardless of the terms of arrangement set out in a guardianship case, that the financial needs for the guarded child must be met is implicit and therefore the respective *Walii* is bound to fulfil that obligation. Such guarantee of financial resources means that the ‘best interests’ principle as defined in CROC is upheld by Libyan legislation which is based on *Malikiyah* jurisprudence.

#### 4.5.2 Accommodation of the guardian

##### 4.5.2.1 Libyan Legislation 10/1984

Article M70FA,B: ‘the divorced woman deserves to live in suitable residence as long as her right in custody is still active. If her guardianship is terminated, then her right to suitable residence will fail’.

##### 4.5.2.2 LHC Decisions

The LHC in the Case (1/38, 1991) stated that:

According to Article 70/A taken from legislation (10/1984), the sponsor of the guarded children has the duty to supply the suitable residence for the divorced (mother) in order [for her] to live with the guarded children for the period of her guardianship, and the court has no jurisdiction on this right and so cannot contradict it. The court that decided to mention this Article in its ... [ruling] did that in order to protect the divorced mother and the child under her guardianship.<sup>460</sup>

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<sup>460</sup> *Majallat Al-Mahkama Al-'Ulya* 1-2/26, decision 1/38, 08/05/1991, 15. See also *Majallat Al-Mahkama Al-'Ulya* 4-3/29, decision 8/40, 26/06/1993, 17; *Al-Mahkama Al-'Ulya*, decision 33/44, 29/06/2000, GM; *Al-Mahkama Al-'Ulya*, decision 47/45, 18/11/1999, GM; *Al-Mahkama*

#### 4.5.2.3 Commentary

If the female guardian does not have a place of residence, the father must provide such suitable shelter. Therefore, a divorcee who has custody of any children is entitled to suitable accommodation for as long as her right to guardianship stands and her entitlement to such accommodation terminates with the termination of guardianship. These rights continue until the child/ren complete their education and are able to earn a living.<sup>461</sup>

Some amendments were made to article M70FA, by Legislation 9/1994, which details that if a female guardian loses guardianship for one reason or another, she is still eligible to stay in the marital home until she remarries. The only time this will not apply is if the woman has been convicted of committing adultery.

Originally, article M70FA,B stated that the female guardian would lose her residency once she had lost her guardianship. It is clear that the change to this article is important for a number of reasons. The first reason is that the law is now protecting the mother post guardianship except in the instance mentioned. Secondly, the law highlights the continued link between the mother and child and ensures a safe place for the child when visitation rights are exercised by the mother. Finally, it can be seen that guaranteeing the place of residence keeps some sense of stability in what can be a very turbulent divorce process, thereby reducing the emotional scars on the child.

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*Al-'Ulya*, decision 52/45, 18/11/1999, GM; *Al-Mahkama Al-'Ulya*, decision 12/47, 07/12/2000, GM.

<sup>461</sup> *Law of Marriage and Divorce Rules and their Effects* (10/1984) art 70FA and B. 'Abdusalam Al-'alim, above n 87, 327-329.

With regard to accommodation provisions to both the female guardian and guarded child, this thesis argues that under Libyan legislation ‘the best interests of the child’ are protected. The provisions outlined regarding accommodation display a concern to maintain solid sense of stability, in particular for the child, in an extremely uncertain phase of their life. Such stability from an Islamic perspective is essential, and consequently ensures the ‘best interests’ principle defined in CROC.

#### **4.6 Conclusion**

This chapter has clearly identified the LHC as the supreme authority when implementing Libyan legislation and, most importantly, upholding the ‘best interests of the child’ principle. Many cases presented in this chapter have unambiguously demonstrated that the LHC is fulfilling its role as the ultimate safeguard of the law.

Also unequivocally established is that the ‘best interests of the child’ principle is embedded in Legislation 10/1984. Examples of articles proving this exact point include article M62F.C, nominating a guardian after the first four potential guardians in the guardianship hierarchy; article M66F.C, reinstating guardianship if in ‘the best interests of the child’; and article M63F.A, the mother will always be granted guardianship except in the case where it is not in ‘the best interests of the child’. These articles all aim to protect ‘the best interests of the child’, however, an explicit discrete article detailing the ‘best interests’ principle does not exist. This may have formed the basis of the concerns expressed by the CRC (discussed in chapter 1).

The success of the LHC has been proven in cases relating to guardianship matters where ‘the best interests of the child’ has been the primary consideration in the



decision making process. So successful, that in one particular case detailed in this chapter, the LHC utilised its discretion in interpreting the relevant legislation to uphold the ‘best interests’ principle instead of the legislation’s literal application, which would have otherwise prevented the interests of the child from being protected.

Libyan Legislation 10/1984 has clearly defined conditions that need to be met by a prospective guardian. These conditions provide the basic foundations in ensuring ‘the best interests of the child’. If any condition is not upheld, then the prospective guardian will forfeit their right to be a guardian, even if such guardian is the mother of the child. These conditions should be tightly coupled with the ‘best interests’ principle as the primary consideration.

In further highlighting the role of the LHC when dealing with guardianship issues, it has been made clearly evident that flexibility has been utilised to guarantee the child’s best interests. Libyan Legislation 10/1984 explicitly provides the court with leverage when determining the next appropriate carer provided that the conditions of guardianship have been upheld. The flexibility only exists after the first four prospective guardians defined by the guardianship hierarchy. That is, the mother, maternal grandmother, father, and paternal grandmother. A case which is representative of such an adjudication made by the High Court was presented in this chapter.

It has been demonstrated, after presenting the relevant articles in Legislation 10/1984 and relevant cases, that the official interpretation of the law is influenced by the local culture, specifically the *Malikiyah* ‘brand’ of Islam. In handing down its decisions,

the LHC has made frequent references to the *Malikiyah* interpretations, supporting the thesis statement that the interpretation of international human rights in municipal legal systems will inevitably, understandably, and legitimately be affected by local cultures.

## **5 CONCLUSION**

### **5.1 Summary**

Culture is undoubtedly a major factor in day to day life. Similarly, legal culture, as has been explained in this research, is also based on the local culture. This research has attempted to prove that the interpretation of international human rights in domestic legal systems will inevitably, understandably and legitimately be affected by local cultures. This process of ‘translation’ is evident in the approach that Libya has taken to implementing ‘the best interests of the child’, where the influence of Islamic law is also apparent.

In attempting to confirm the thesis statement, this research has analysed the concerns conveyed by the Committee on the Rights of the Child (CRC) to Libyan government representatives in their responses to the Libyan submissions made in accord with the nation’s responsibilities under the Convention. In doing so, this research needed to understand why such concerns were expressed by the CRC and whether such reservations are justified.

Concerns were expressed by the CRC in their response to Libya’s Second Periodic Report and followed a long debate as to whether the Libyan Government had fulfilled its international obligations as a State party to the Convention on the Rights of the Child (CROC). CRC stated:

The Committee recommends that the State party refer to, and fully incorporate in legislation and practice, article 3 of the Convention, including in the area of custody of children.<sup>462</sup>

Even though the Libyan government representatives made note of their full commitment to the principles detailed in CROC during the record of dialogues held between the CRC and Libyan representatives after Libya's First Periodic Report, they emphasised 'that different societies espoused different ideas and different religions'.<sup>463</sup> These beliefs are what are widely understood to be culture, and it is this factor that forms the basis of this research. CROC itself had explicitly recognised this factor because it anticipated the strong influence of locally held beliefs especially in cases relating to a very sensitive issue such as 'the interests of the child'.

This thesis has noted that the CRC and CROC itself have not outlined a standard for the 'best interests' principle. CROC has been developed with the necessary generality to make possible the necessary application to individual State parties. This generality is by no means a shortcoming of CROC, but rather it provides the flexibility required to avoid disadvantaging any State party in successfully meeting its obligations.

From the perspective of this thesis, the disagreement between CRC and the Libyan Government is a result of the former requesting tangible measures, including discrete unambiguous law upholding the principles outlined in CROC (that is,

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<sup>462</sup> Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, 04/07/2003 [28], [46] UN Doc CRC/C/15/Add.209 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/8ea5ea3ba95829a1c1256daa002dbd01?OpenDocument>> at 18 April 2008.

<sup>463</sup> Committee on the Rights of the Child, *Summary Record of the 434th Meeting: Libyan Arab Jamahiriya*, 13/01/98 [70] (Mr Quateen), UN Doc CRC/C/SR.434 (1998) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.SR.434.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.SR.434.En?Opendocument)> at 18 April 2008.

implementation), and the latter expressing their view that CROC principles are already embedded in Libyan Legislation (10/1984) (that is interpretation).

In building the argument of this research, a detailed understanding of a number of issues was required. These comprise CROC, the Libyan legal system, and culture. Firstly CROC, which is a static factor in this equation, defines the goals and objectives a State party needs to achieve. Second is the Libyan legal system, which is relatively dynamic because the local environment dictates how laws evolve; and finally culture, because it is this factor which is the driving force behind the domestic legal system. It needs to be emphasised that these three factors are not at all independent of one another, but rather interdependent since any one of these factors requires the recognition and appreciation of the other two.

A ‘funnel-type’ research approach was undertaken. International child rights law as a part of international human rights law, and more specifically CROC were analysed first. A study of these diverse aspects of law conveyed a general understanding of what is obligatory on a State party to the relevant Convention. Following this analysis, an understanding of Islamic law was presented. This is necessary because, as outlined above, it is this culture which is most prevalent in the country examined in this research.

Specifically, this research focussed on the area of guardianship under Libyan legislation. This is one of many areas of concern specified by the CRC. Furthermore, how the best interests of the child is interpreted in Libyan law and consequently applied by the Libyan court system was also detailed.

Placing the Libyan legal and court systems into an historical perspective was also necessary, to allow a context to be developed and to show how the Libyan legal system has evolved since gaining independence in 1951. At that time, Libya had no specific law related to personal status matters. However, a Shari'a court system was put in place to adjudicate on such matters. It had as its guiding principles those advocated by the *Malikiyah Mathhab* alone. The 'September 1<sup>st</sup> Revolution' in 1969 recognised Islam as the official religion of the state. As a consequence, a committee was set up in the following year to amend all existing legislation so that it was in accordance with Shari'a law. Within a year, the recommendations made by this committee were set into several pieces of legislation. A significant amendment to the Constitution was made in 1977: the Holy *Qur'an* is to be the main source of law.<sup>464</sup>

From a Libyan legal perspective, most significant to this research is Legislation 10/1984 which encompasses all personal status matters, including those relating to guardianship issues. A notable fact regarding this legislation is that it was not developed based on the teachings of the *Malikiyah mathhab* alone, but had taken into consideration the most appropriate opinions advocated by other schools of thought according to the local culture at that time.

Within five years, Libya had made itself a State party to CROC. As a signatory to an international convention, Libya had imposed on itself another set of obligations which could not be avoided.

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<sup>464</sup> Article 2 of the Declaration on the Establishment of the Authority of the People (1977) stated that: 'The Holy Koran is the Constitution of the Socialist People's Libyan Arab Jamahiriya', <[http://www.servat.unibe.ch/icl/ly01000\\_.html](http://www.servat.unibe.ch/icl/ly01000_.html)> at 15 August 2009.

A case of great significance presented to the Libyan High Court (LHC) in 1997 was detailed in this research. In its judgement, the court advised the legislating authority to amend any ‘legislation in such a way that removes the contradictions that the legislation has with Islamic law’.<sup>465</sup> Two conclusions can be derived from this statement. Firstly, it is clear that even though Islamic law had in this particular case not been explicitly incorporated into legislation, it is understood that Islam has a considerable influence on Libyan society. Secondly, and more importantly, if any part of Islamic opinion needs to be adopted by Libyan courts, then the legislator needs to create or amend the relevant legislation.

In addressing the CRC’s main concern detailed above, this thesis specifically identified and analysed the ‘legislative and practice’ aspects related to guardianship within the Libyan jurisdiction. Legislation 10/1984 is the legal doctrine by which guardianship is determined. This law is interpreted and applied through the Libyan High Court — Guardianship Jurisdiction (LHC-GJ). Analysis of these two legal institutions over a period of three decades, along with commentary from contemporary Libyan legal scholars allowed an objective and comprehensive examination of how the Libyan legal system interprets the ‘best interests of the child’ concept as defined in CROC. The decisions handed down by the LHC-GJ were examined against the backdrop of the respective legal culture which had developed quite considerably over the same period of time.

When examining each case, this research focused on two main issues: whether the judgement made by the relevant court was consistent with firstly, Islamic law, and

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<sup>465</sup> *Al-Mahkama Al-‘Ulya*, decision 197/39, 03/11/1997, GM.

secondly, with the ‘best interests’ principle as outlined in CROC. Therefore, through this process of case examination, this research was able to confirm whether the CRC’s concerns are justified and whether the interpretation of international human rights in domestic legal systems will inevitably, understandably and legitimately be affected by local cultures. The thesis examined whether this process of ‘translation’ is evident in the approach that Libya has taken to implementing ‘the best interests of the child’, and whether the influence of Islamic law is also apparent.

From the discussions here presented, it is quite obvious that ‘the best interests of the child’, as a discrete and independent area within Islamic Law, does not exist. However, the examples and commentary in this thesis unambiguously illustrate that ‘the best interests of the child’ must be paramount in Islamic legal tradition.<sup>466</sup> Furthermore, this works in conjunction with other individual and collective rights of parents and of the extended family. It is clear that the ‘best interests of the child’ principle is by no means alien to Islam, but on the contrary has always been embedded in Islamic law.

This thesis has clearly identified the LHC as the supreme authority when implementing Libyan legislation and, most importantly, upholding the ‘best interests of the child’ principle. Many cases presented in this thesis have unambiguously found the LHC fulfilling its role as ultimate guardian of the law.

Also unequivocally established is that the ‘best interests of the child’ principle is embedded in Legislation 10/1984. Examples of articles proving this exact point

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<sup>466</sup> Hafiz Nazeem Goolam, ‘Interpretation of the best interests principle in Islamic Family Law’ (Paper presented at the World Congress on Family Law and Children’s Rights, Cape Town, 20–23 March 2005) 9.



include article M62F.C: ‘nominating a guardian after the first four potential guardians in the guardianship hierarchy’; article M66F.C: ‘reinstating guardianship if in the best interests of the child’; and article M63F.A: ‘the mother will always be granted guardianship except in the case where it is not in the best interests of the child’. These articles all aim to protect the best interests of the child; however, as mentioned above, an explicit discrete article detailing the ‘best interests’ principle does not exist under Libyan legislation. It is this lack of explicit detail which may have formed the basis of the CRC’s concern.

The success of the LHC in safeguarding the best interests of the child has been proven in cases relating to guardianship matters where the best interests of the child has been the primary consideration in the decision making process. So successful, that in one particular case detailed in this thesis, the LHC utilised its discretion in interpreting the relevant legislation to uphold the ‘best interests’ principle instead of the legislation’s literal application, which would have prevented the interests of the child from being protected.

## **5.2 Findings**

The issue of cultural relativism in relation to international human rights law is in itself problematic. It is extremely difficult for an international body to determine what can be implemented in a specific environment. All State parties agree on all the principles defined in CROC. Each nation has its own view on implementation, influenced by culture which CROC has explicitly recognised as a major consideration.

Two main ideologies exist when addressing the issue of implementing international human rights on a local scale. The universal approach advocates a common standard to a heterogeneous audience, while the cultural relativist approach supports a unique implementation for the respective environment. These two approaches are detailed within CROC text. In regard to this thesis, the universal approach is recognised in setting the goals and objectives of the best interests of the child principle, while the cultural relativist approach is to be applied on a State party basis when interpreting the ‘best interests’ principle.

A wide divide exists between the CRC and the Libyan government representatives with relation to Libya’s implementation of ‘the best interests of the child’ as defined in CROC. The CRC comments on State party implementation of the principle itself while Libyan representatives concentrate on interpreting the best interests principle from an Islamic cultural perspective. The CRC’s attitude towards Libya’s approach has been formed as a result of the differing understanding of the local culture. Even though the CRC and Libya agree on the importance of the ‘best interests’ principle, major differences as to how this principle should be applied do exist.

For example, *kafalah* of Islamic law and adoption are two interchangeable concepts explicitly mentioned in CROC in a bid to recognise the differing cultures that exist globally. They are systems of alternative care for those children who are temporarily or permanently deprived of their family environment.<sup>467</sup> In article 20(2) the Convention explicitly notes that signatories ‘shall in accordance with their national ensure alternative care for such children. That CROC accommodates *kafalah* in such

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<sup>467</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 [20] UNTS 3 (entered into force 2 September 1990).

explicit terms is further evidence of the acceptance of the existence of the issue of cultural influence. However, the CRC's attitude towards Libya is not consistent with the cultural aspect as defined in CROC. No clear justification was made by the CRC when it rejected Libya's interpretation of the 'best interests of the child' principle with specific reference to the guardianship hierarchy.<sup>468</sup>

Islamic law recognises and accepts the 'best interests of the child' principle. The principle's importance can in no way be underestimated since it had been the basis of adjudication in cases relating to guardianship matters since the time of the Prophet Muhammad (PBUH). Even though the 'best interests' principle as detailed in CROC does not exist under Islamic law, practical examples to this effect have been enumerated in this thesis.

All Islamic schools of thought agree on the 'best interests of the child' principle as a guideline for decision-making relating to guardianship issues. However, differences on the detailed nature of the principle do exist from one school to another, for example, in the ordering in a guardianship hierarchy. All Islamic schools agree on the first prospective guardian, who is the mother if all guardianship conditions are confirmed. However, there is wide disagreement on the members of the hierarchy. For example, within the *Malikiyah Mathhab*, the maternal grandmother is placed second in the guardianship hierarchy before the father, unlike the other schools

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<sup>468</sup> It is stated that: 'In particular, the Committee is not persuaded that a rigid *custodial line of mother, maternal grandmother and father and the exclusion from custodial arrangements of foreign parents outside the State party* necessarily give effect to this principle'. See: Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, 04/07/2003 [27], UN Doc CRC/C/15/Add.209 (2003) <<http://www.unhchr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/8ea5ea3ba95829a1c1256daa002dbd01?OpenDocument>> at 18 April 2008.

which reverse the order. That is because the ordering of potential guardians after the mother is a flexible area in Islamic law where different opinions are accepted.

No discrete, independent law exists within Islam detailing the ‘best interests of the child’ principle. However, the Holy *Qur’an*, the *Ahadith* and literature presented by Islamic scholars clearly illustrate that laws covering all aspects of child guardianship do exist. Issues covered in Islam include the conditions for guardianship, period of guardianship, conditions for its loss and reinstatement, even travel during guardianship. In all these cases, the ‘best interests of the child’ principle is upheld. Unlike the general guidelines of the ‘best interests’ principle which is understood to be static in nature, the practical application is left for the legally appointed adjudicator at the time. Another reason for the lack of detailed reference in Islamic law may be related to the historical development of this principle. In other words, Islamic law has been developed during the last 1400 years while this principle has been confirmed in its final shape only in the last century.

Embedded in Islam is the necessary flexibility to allow the development of the ‘best interests’ principle depending on the time and place. It is obvious that this flexibility has created differences of opinion between the differing schools of thought and also among contemporary scholars. The flexibility of Islamic law is synonymous with the operation of CROC itself. CROC has been purposefully designed in general terms so that State party values and culture can be upheld when applying the principles outlined in CROC.

Islam views the ‘best interests’ principle on the basis of a family unit, rather than on purely individualistic needs. Therefore, the rights of family members are also

recognised in combination with those of the child as long as they are not in conflict with each other, in which case the rights of the child alone will take priority.

Islam delegates significant authority to the respective adjudicator to interpret Islamic law on a case by case basis. This authority is believed to protect the interests of the child when consideration is made of all the case facts at any particular time and in any place.

Libyan law does not explicitly make mention of the ‘best interests of the child’ principle as, for instance, Australia’s *Family Law Act 1975* (Cth)<sup>469</sup> does. However, many practical examples have been embedded in legislation and in court decisions, including those of the LHC.

Libya’s submissions were rightly criticised by the CRC because practical examples of the Libyan legal system were not included to justify how Libya, as a State party to CROC, interpreted its obligations.

No electronic database exists that contains Libyan law and court decisions. Such a database is necessary nowadays for researchers and international bodies alike, including the CRC. If such a database were in place, the CRC and other international bodies would be able to follow the developments in Libyan law and how international law has been implemented. These databases should be developed by all State parties as a part of their international cooperation.

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<sup>469</sup> *Australian Family Law Act 1975* (Cth) sections 63 E (3), 63 H (2), 65 E, 65 L (2), 65 LA (2), 67 L, 67 V, 67 ZC (2), 68 Q (ii), 70 NJ (5), 111 CD (3) (d), 111 CF (3) (d), 111 CI (2) (d), 111 CK (3) (d), 111 CM (3) (d), 111 CP (2) (d), 111 CS (8).

On a similar note, Libyan law and court decisions are not officially translated into the English language. Such translation of this material and other official legal documents would assist researchers and international bodies such as the CRC achieve their task more efficiently.

The LHC has used its authority to interpret laws to decide in favour of a plaintiff that ensures the ‘best interests of the child’ in a case where the plaintiff herself did not meet the explicit criteria of guardian under Libyan law. In this particular case, the LHC used its authority to ensure the best interests of the child as the first consideration, a decision with which this thesis is totally in agreement. Even though the decision made by the LHC was correct, the opinion of this thesis is that Libyan law should clarify in detail how an individual can gain and lose guardianship of a child. For example, in reference to the case mentioned, the law should state that if the mother remarries, she would lose guardianship over her child/ren unless such a move were not to be in the best interests of the child.

The relevant Libyan court does not have authority to nominate the most appropriate guardian from the first four members in the guardianship hierarchy (that is, mother, maternal grandmother, father, paternal grandmother) as long as guardianship conditions have been met. On this issue, Libyan law limited the authority of the relevant court to change the order of these four potential guardians as long as guardianship conditions have been met. As discussed in this thesis, there is no strong evidence in Islamic law that sets the priority of one potential guardian over another except for the mother. The viewpoint of this thesis is that this ordering may be in conflict with the ‘best interests’ principle in some circumstances. Therefore, an explicit link within Libyan law between this ordering and the best interests of the

child will be more consistent with Islamic law and more importantly with CROC itself.

In all but a few cases detailed in this thesis, the LHC has correctly adjudicated on the matters presented to it by achieving the best interests of the child. However, the process of adjudication was not based on any explicit detail available in Libyan law as to how the 'best interests' principle can be achieved. This fact by no way means that Libyan law does not fulfil its obligations as stipulated by CROC, but it does suggest a shortcoming on the part of the Libyan legal system in relation to guaranteeing that the 'best interests' principle will be achieved in all matters. To overcome this inadequacy, details of the 'best interests' principle must be included in Libyan legislation. Furthermore, the Libyan court system should have stringent guidelines and be delegated total authority to manoeuvre with the required flexibility on a case by case basis.

Libyan law is influenced by Islamic culture and more specifically the *Malikiyah* interpretation of Islam. The approach taken by the Libyan legal system in adjudicating on matters, including those relating to guardianship, can be almost totally attributed to this cultural background. This fact unambiguously confirms the thesis statement:

The interpretation of international human rights in domestic legal systems will inevitably, understandably and legitimately be affected by local cultures. This process of 'translation' is evident in the approach that Libya has taken to implementing 'the best interests of the child', where the influence of Islamic law is also apparent.

### 5.3 Recommendations

- 1) Libya needs to amend Legislation 10/1984 to incorporate the ‘best interests of the child’ principle in all aspects of guardianship. This amendment is necessary since the mentioned legislation has not been amended since its inception in 1984 in relation to guardianship matters.

As detailed above, the Libyan culture has evolved since independence in 1951, and since culture has been proven in this thesis to be a major contributor to the legal landscape, then this influence needs to be corroborated through legislative changes.

Finally, since becoming a State party to CROC, obligations imposed on it through this *Convention* requires Libya to analyse and modify accordingly its current legislation. With regard to guardianship matters, no such modification is evident. Therefore, amendment of legislation is necessary to explicitly meet the obligations set out in CROC.

- 2) Any legislative amendments need to explicitly mention ‘the best interests of the child’ as the primary consideration. This will be consistent with Libyan international obligations as specified in CROC, and the country’s Islamic cultural background. Such details will help the relevant court to ensure the best interests principle is upheld in all matters relating to children.
- 3) A database of cases adjudicated by Libyan courts, and in particular the Libyan High Court, should be developed. This electronic catalogue should be



accessible through the Internet so that bodies such as the CRC can continually monitor Libya's obligations stipulated by CROC.

- 4) The legal database should be officially translated in English. This will help recommendation (3) since the CRC's submissions have in all cases been translated to the English language and in an approved or certified reliable form. This would prevent poor translation and misunderstandings flowing from poor translations.

The analysis performed in this thesis has discerned the causes of disagreement between the CRC and the Libyan government representatives. In handing down its responses, the CRC justifiably stated its concerns regarding Libya's submissions due to the lack of evidence relating to law and practice. In such a situation, the CRC or any adjudicating body would not be expected to make a favourable decision on any case when the relevant evidence is not presented. Even though the CRC provided two opportunities for Libya to submit periodic reports, on both occasions the evidence had been considerably lacking. The type of evidence that should have been included in the periodic reports as noted by the CRC are any relevant legislation, regulations and policies, along with details of court decisions at all jurisdiction levels. Unfortunately, only article 82 of Legislation 17/1992 was mentioned. This law in itself is quite superficial because it just referred to Islamic law without any further detail.

On the other hand, this thesis concludes that the CRC does not justifiably reject Libya's claims that it had implemented the 'best interests' principle in law and in practice. The CRC does not in any way detail the shortcomings of Libya's

submissions except for its criticism of the guardianship hierarchy as ‘not necessarily’ upholding the ‘best interests’ principle. Even this criticism is not valid because the CRC does not provide any evidence as to how the guardianship hierarchy does not uphold the ‘best interests’ principle. This thesis unambiguously illustrates that this hierarchical guardianship is by no means ‘carved in stone’ and on all occasions, the best interests of the child shall be the primary consideration.

The analysis performed in this thesis illustrates that Libyan law and case judgements have been affected by Islamic culture, with specific impact by the *Malikiyah Mathhab*. It is this cultural influence that the CRC has failed to recognise and appreciate when making its response to Libya’s submissions.

Therefore, in light of the discussion provided, analysis performed and evidence presented in this thesis, the interpretation of international human rights in domestic legal systems will inevitably, understandably and legitimately be affected by local cultures. This process of ‘translation’ is evident in the approach that Libya has taken to implementing ‘the best interests of the child’, where the influence of Islamic law is also apparent.

## GLOSSARY OF ARABIC TERMS

<i>alatfal</i>	children
<i>Al-Jarida Al-Rasmiya</i>	The official journal in which law reports are published
<i>Allah</i>	God the Creator
<i>almusiniyyin</i>	elderly people
<i>al-qanun</i>	law
<i>Alqanwn al dawly al'am</i>	public international law
<i>Al-Shaikh</i>	scholar
<i>al-talaq</i>	divorce
<i>Al-Zahiriya</i>	The jurisprudence of Imam Ibn Hazm Al-Zahiri
<i>alzawaj</i>	marriage
<i>Dihaar</i>	Derived from the Arabic term 'Dahar', which means the back of a person. The term Dihaar was used to identify a common statement made by men in pre-Islamic times that the relationship with the wife is like the back of the mother i.e. sacred. Hence the term meaning a relationship between a couple has become void of physical relations i.e. intercourse
<i>Dimashq</i>	Damascus
<i>dirasah muqaranah</i>	comparative study
<i>Eskandareya</i>	Alexandria
<i>Fiqh</i>	jurisprudence
<i>Fuqaha</i>	Islamic legal experts

<i>ḥuquq</i>	rights
<i>Huquq</i>	rights
<i>Hadanah</i>	guardianship
<i>hadinah</i>	female guardian
<i>Hadith</i>	Prophetic sayings as a complementary source of law in Islam
<i>Hanbaliyah</i>	The jurisprudence of Imam Ahmad Ibn Hanbal
<i>Hannafiya</i>	The jurisprudence of Imam Abu Hannifa
<i>Ijma' Sahabi</i>	The agreement of the companions of the Prophet (PBUH)
<i>Jamahiriya</i>	State of masses
<i>Kafalah</i>	Islamic system of adoption
<i>Khuza'ah</i>	A tribe who lived at the time of the Prophet Muhammad (PBUH)
<i>Majallat Al-Mahkama Al-Ulya</i>	The official journal in which Libyan High Court decisions are published
<i>Malikiyah</i>	the jurisprudence presented by Imam Malik
<i>Markaz</i>	position
<i>Mathhab</i>	school of thought
<i>Ousul Alfiah</i>	The explicit Islamic General Rules
<i>Qur'an</i>	The holy book of Islam revealed by Allah to Prophet Muhammad (PBUH). Contains the divine message that Muslims believe to be unaltered since its revelation
<i>re'ayat</i>	care

<i>Sahih Muslim</i>	A book of <i>ahadith</i>
<i>Shafa'iyah</i>	The jurisprudence of Imam Al-Shafa'i
<i>Shari'ah</i>	Islamic Law
<i>Sunnah</i>	The traditions of the Prophet Muhammad (PBUH)
<i>Walii</i>	male guardian
<i>wilayah</i>	guardianship

## TRANSLITERATION

Table of the system of transliteration of Arabic words and names used by  
the Institute of Islamic Studies, McGill University.

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	s{ = ص	l = ل
h{ = ح	d{ = ض	m = م
kh = خ	t{ = ط	n = ن
d = د	z{ = ظ	h = هـ
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = يـ

Short: a = اَ ; i = اِ ; u = اُ

Long: a = آ ; i = إ ; ū = و

Diphthong: ay = آي ; aw = أ

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