

2009

'The best interests of the child': international child law as interpreted in the Libyan High Court jurisdiction

Ali Omar Ali Mesrati
University of Wollongong

Follow this and additional works at: <https://ro.uow.edu.au/theses>

University of Wollongong

Copyright Warning

You may print or download ONE copy of this document for the purpose of your own research or study. The University does not authorise you to copy, communicate or otherwise make available electronically to any other person any copyright material contained on this site.

You are reminded of the following: This work is copyright. Apart from any use permitted under the Copyright Act 1968, no part of this work may be reproduced by any process, nor may any other exclusive right be exercised, without the permission of the author. Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. A court may impose penalties and award damages in relation to offences and infringements relating to copyright material.

Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.

Unless otherwise indicated, the views expressed in this thesis are those of the author and do not necessarily represent the views of the University of Wollongong.

Recommended Citation

Mesrati, Ali Omar Ali, 'The best interests of the child': international child law as interpreted in the Libyan High Court jurisdiction, Doctor of Philosophy thesis, Faculty of Law, University of Wollongong, 2009.
<https://ro.uow.edu.au/theses/3121>

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

NOTE

This online version of the thesis may have different page formatting and pagination from the paper copy held in the University of Wollongong Library.

UNIVERSITY OF WOLLONGONG

COPYRIGHT WARNING

You may print or download ONE copy of this document for the purpose of your own research or study. The University does not authorise you to copy, communicate or otherwise make available electronically to any other person any copyright material contained on this site. You are reminded of the following:

Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. A court may impose penalties and award damages in relation to offences and infringements relating to copyright material. Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.

Faculty of Law

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

Ali Omar Ali Mesrati

**LLB (UOG), LLM in Public Law (UOG) Libya,
LLM International & Comparative Law (UOW) Australia.**

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

August 2009

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.^α 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.

^α 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.

ACKNOWLEDGEMENTS

This study could not have been completed without the support and help of a number of people. First of all I would like to express my sincere gratitude to my supervisors: Dr Nadirsyah Hosen and Professor Luke McNamara for their excellent supervision, invaluable guidance, patience and encouragement throughout the course of this thesis. I acknowledge their valuable contribution to this thesis. Without their help and encouragement this thesis would not have been completed.

Gratitude is also extended to my previous supervisors: Professor Stuart Kaye and Professor Helen Gamble who shared with me the early ideas of this thesis in the first two years of its preparation.

I am indebted to all the people around me who gave me their support and encouragement. I would like to express my thanks to Dr Muhammad Al-Taher, Ms Rima Elhage and Dr Rick Mohr for their help and support. I would like also to express my appreciation to Mrs Elaine Newby, Editorial Assistant at University of Wollongong, Faculty of Law, for her wonderful job in editing the final draft of this thesis.

I am also grateful to the officers of the Libyan High Court Administration for their help and understanding of the importance of this research.

I wish to extend my warmest appreciation to the University of Wollongong, with special acknowledgement of the Faculty of Law and the Research Student Centre for their consideration of my personal circumstances.

Finally I would like to express my heartfelt gratitude to my family: my wife Naeima, my daughter Hager, my sons Aimen and Anas, for their unconditional love, endless encouragement and eternal support. I hope that this thesis will be a source of encouragement for you, and those who come after you, making your goals stronger in belief and easier to attain.

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

TABLE OF CONTENTS

Abstract.....	i
Acknowledgements.....	iii
Abbreviations List.....	v
Table of Contents.....	vi
1 Introduction.....	1
1.1 Background.....	1
1.2 Setting the scene for the present study: Dialogue between Libya and the CRC.....	5
1.2.1 Libya’s First Periodic Report.....	5
1.2.2 The CRC’s response to Libya’s First Periodic Report.....	9
1.2.3 Libya’s Second Periodic Report.....	17
1.2.4 The CRC’s response to Libya’s Second Periodic Report.....	19
1.3 The project.....	25
1.4 Scope and limitation of the study.....	27
1.5 The research problem.....	28
1.6 Relationship to the existing literature.....	31
1.7 The significance of the research.....	38
1.8 Research questions.....	40
1.8.1 The primary research question explored in this thesis is:.....	40
1.8.2 The sub-questions are:.....	40
1.9 Research methodology.....	41
1.10 Thesis statement.....	42
1.11 Chapter outline.....	43
2 The ‘best interests of the child’ under International Child Law.....	45
2.1 Historical overview of international child law.....	46
2.1.1 Development of the ‘best interests of the child’ principle.....	46
2.1.2 Is there a Western bias in international child law?.....	49
2.1.3 Do children have rights?.....	51
2.2 The Convention on the Rights of the Child (CROC) 1989.....	58
2.2.1 Significance of CROC.....	59
2.2.2 Core principles of CROC.....	61
2.2.3 Establishment of the Committee on the Rights of the Child (CRC)....	65

2.3	CROC special provisions (key concepts).....	69
2.3.1	Cultural relativism.....	69
2.3.2	Legal culture	76
2.3.3	The ‘best interests’ principle as defined under CROC.....	80
2.3.4	The ‘best interests’ principle: interpretation and implementation	82
2.4	‘The best interests of the child’ principle under CROC.....	83
2.4.1	Main expectation of State parties to CROC.....	83
2.4.2	Main considerations outlined in CROC	85
2.5	Conclusion	93
3	‘The best interests of the child’ under Islamic Law.....	95
3.1	Introduction.....	95
3.1.1	Children protection in Holy <i>Qur’an</i> and Sunnah.....	101
3.1.2	Guardianship definition.....	108
3.1.3	Guardianship and the child’s well-being	110
3.2	Guardianship: A right or obligation	112
3.2.1	Hierarchy for guardianship	115
3.2.2	The priority of the mother as a guardian.....	118
3.2.3	Difference of religion between guardian and child.....	122
3.3	Conditions of guardianship	125
3.3.1	General conditions	125
3.3.2	Conditions for the female guardian.....	127
3.3.3	Conditions for the male guardian.....	130
3.4	Losing guardianship.....	131
3.4.1	Duration of guardianship	136
3.4.2	Child access during custody.....	140
3.5	Child and guardian maintenance.....	142
3.6	Conclusion	145
4	‘The best interests of the child’ under the Libyan legal system.....	147
4.1	Introduction.....	147
4.1.1	Political history	149
4.1.2	Legal History.....	151
4.1.3	Court system	152
4.2	Guardianship: General principles.....	155
4.2.1	Definition and the ordering of guardians	155

4.2.2	Is the right of guardianship a right of the child or a right of the guardian?	164
4. 3	Guardianship conditions	170
4. 4	Upholding guardianship	193
4.4.1	The place of guardianship	193
4.4.2	Visitation rights.....	199
4.4.3	Discretion of the High Court.....	200
4.4.4	Reinstating the right of guardianship	205
4. 5	Maintaining child and guardian	207
4.5.1	Who pays the expenses for maintaining the child and the guardian?	207
4.5.2	Accommodation of the guardian.....	210
4. 6	Conclusion	212
5	Conclusion	215
5. 1	Summary	215
5. 2	Findings.....	221
5. 3	Recommendations.....	228
	Glossary of Arabic Terms	231
	Transliteration	234
	Bibliography.....	235