



Kent Academic Repository

Shariff, Salahudin Hidayat (2018) *The Application of the Best Interests of the Child Principle as a Criterion for Fulfilling Malaysia's Convention on the Rights of the Child Obligations: A Comparative Study Between Malaysia's Child Act 2001 and the English Children's Act 1989 Including the Common Law and Shari'ah Law Applications in the Respective Jurisdictions.* Doctor of Philosophy (PhD) thesis, University of Kent,.

Downloaded from

<https://kar.kent.ac.uk/66815/> The University of Kent's Academic Repository KAR

The version of record is available from

This document version

Publisher pdf

DOI for this version

Licence for this version

UNSPECIFIED

Additional information

Versions of research works

Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal*, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

Enquiries

If you have questions about this document contact ResearchSupport@kent.ac.uk. Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

UNIVERSITY OF KENT

THESIS FOR DEGREE OF Ph.D

(Ph.D)

**THE APPLICATION OF THE BEST INTERESTS OF THE
CHILD PRINCIPLE AS A CRITERION FOR FULFILLING
MALAYSIA'S CONVENTION ON THE RIGHTS OF THE CHILD
OBLIGATIONS: A COMPARATIVE STUDY BETWEEN
MALAYSIA'S CHILD ACT 2001 AND THE ENGLISH
CHILDREN'S ACT 1989 INCLUDING THE COMMON LAW
AND *SHARI'AH* LAW APPLICATIONS IN THE RESPECTIVE
JURISDICTIONS**

By

**SALAHUDIN BIN HIDAYAT SHARIFF, LL.M Nottingham,
LL.B (Hons) IIUM**

January 2018

Kent School Law, University of Kent
.....

Word Count : 80083

Contents

	Page
Title	i
Contents	ii
List of Abbreviations	v
Glossary	vi
Abstract	vii
1. Introduction	1
Introduction	1
Brief History	7
Background	13
- The Asian Influence	14
- Defining Law in Malaysia	15
- Differences Between East and West Malaysia	19
- Racial Disharmony	21
- <i>Shari'ah</i>	23
- Drafting in Malaysia	25
- The Child: Definitions	26
- Making the Child Act 2001 more CRC Friendly	28
Methodology: A Comparative Approach	29
The Chapter Outlines	40
2. The principle of the best interests of the child in the Convention on the Rights of the Child	44
Introduction	44
Brief History	46
Article 3: Best Interests of the Child in the Convention	54
- Definition	54
- <i>Travaux Préparatoires</i>	57
Critiques of Article 3	65
- Definition of Child in Islam	65
- Horses for Courses	72
Conclusion	76
3. The best interests of the child principle in England	80
Introduction	80
Background	82
Origins of the Welfare Principle	83
Is the Welfare (or Paramountcy) Principle in the Children Act 1989 Similar to the best interests of the child Principle in the CRC?	87
The Law in England	93
Other Legal Influences on the English Courts	96
The consideration of the Best interests of the Child Principle	105

	Current English Position	110
	Best Interests of the Child Principle – rights-based or welfare-based	113
	Conclusion	117
4.	The Child Act 2001: The CRC and Malaysian Law	120
	Introduction	120
	Demography of Malaysia	121
	Malaysia's Legal History	123
	Child laws and its sources of power	130
	An Introduction to the Child Act 2001	133
	The Child Act 2001 in Operation	136
	The best interest of the child principle in Malaysia	141
	A) Part V – Children in need of Care and Protection	141
	B) Part VI – Children in need of Protection and Rehabilitation	146
	C) Part IX - Institutions	148
	D) Part X – Criminal Procedure in Court for Children	148
	E) The Application of the test in decided cases	152
	The Different Application in England and Malaysia	157
	The CRC Committee's Views on Malaysia's Implementation of the Principle	160
	Conclusion	162
5.	The CRC and <i>Shari'ah</i>: The Rights of Children in Islam	164
	Introduction	164
	The Current Situation of Islam in Malaysia	165
	Islam's significance in Malaysia	166
	Arrival of Islam into Malaysia	169
	Source of jurisdiction of the <i>Shari'ah</i> in Malaysia	177
	The child in Islam	180
	How <i>Shari'ah</i> is implemented on Children	184
	The best interest of the child in Islam	190
	The <i>Shari'ah</i> in Malaysia and its implication for Child laws	195
	The <i>Shari'ah</i> is closer to the CRC	199
	Incorporating the <i>Shari'ah</i> into the Child Act 2001	204
	Conclusion	209
6.	Conclusion	211
	Introduction	211
	Compatibility of the <i>Shari'ah</i> and the CRC	216
	The Research Inference	219
	The Necessity of the best interests of the child principle in Malaysia	222
	The Impact on Malaysia	228
	The Way Forward and Recommendations	231
7.	Bibliography	237

List of Abbreviations

BTN	National Civics Bureau
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DAP	Democratic Action Party
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRA	Human Rights Act 1998
ISESCO	Islamic Educational, Scientific and Cultural Organization
JAIS	Selangor Religious Department
JKM	Department of Social Welfare
JKSM	Malaysian <i>Shari'ah</i> Judicial Department
MAIK	Kelantan Malay Ceremony and Islamic Religious Council
MWFCD	Ministry of Women, Family and Community Development
NGO	non-governmental organisation
OIC	Organization of Islamic Cooperation
pbuh	peace be upon him (used after the Holy Prophet Muhammad pbuh)
PDRM	Royal Malaysian Police
PKR	National Justice Party
UMNO	United Malay National Organisation
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees

Glossary

Amanah	trust
Aqil	sane
Baligh	age of majority
Da'I	missionary
Diyah	compensation or damages
Fiqh	the study of <i>Shari'ah</i>
Hadith	the sayings of the Holy Prophet (pbuh)
Hazz al-walad	good fortune of the child
Hudud	Punishments expressed in the <i>Qur'an</i>
Huquq Allah	Rights owed to Allah
Huquq Al-insan	Rights owed to other men
Ibadah Khususiah	Specific acts of worship
Ijma'	consensus
Ijtihad	reasoning
Imam	Muslim priest
Istihsan	juristic preference
Jahilliyyah	Dark Ages
Khalifah	Caliph
Madrassah	Islamic school
Manfaat al-wala	benefit of the child
Maslahat al-walad	welfare of the child
Maslahat at-tifl	best interest of the child
Maslahah mursalah	jurisprudential interest
Mufti	Islamic Cleric
Nikah	marriage
Nikah muta'ah	contract marriage
Mukhtar	free choice
Qadhi	Judge in the <i>Shari'ah</i> Court
Qiyas	analogy
Qur'an	Muslim revelation
Sunnah	the actions and teachings of the Holy Prophet (pbuh)
Ta'zir	deterrent punishment
'urf	custom in Arabic
Ustaz	religious teacher
Adat	Customs in Malay
Bendahara	Prime Minister in the Sultanate
Dayaks	A class or category of native tribe in Sarawak
Harta sepencarian	jointly acquired property
Orang Asli	Native people in Peninsular Malaysia
Penghulu	Village headman
Yang Di-Pertuan Agong	King of Malaysia

ABSTRACT

The Child Act 2001 (Act 611) was Malaysia's response to incorporate the principles of the Convention on the Rights of the Child (CRC) into Malaysian law. The CRC, like all international human rights instruments, is a rights based convention providing for child rights. This thesis is a study of whether the current standards on the best interests of the child principle is sufficiently applied in Malaysia in order to fulfil her obligations under the CRC. In order to answer this question, a deeper understanding of Malaysia's unique socio-legal complexities and background is needed so as to be able to analyse how far Malaysia has fulfilled her obligations.

The research utilises a doctrinal and black-letter law approach since the data for analysis were documents and articles on the CRC, the Children Act 1989 and the Child Act 2001. The research methodology chosen is a comparative study England and Malaysia because of the strong historical and legal relationships.

The research will use the literature available which is voluminous in England and try to understand the principle as applied in England. This thesis will compare the principle applied in England with that applied in Malaysia. This would include the English and Malaysian civil law (under the relevant Acts), the international law (CRC) and the Islamic Law (*Shari'ah*). The research will also analyse the principle as applied in England and how it compares to the CRC. This thesis will also show that the best interests of the child principle as envisioned under the CRC is closer to the *Shari'ah* approach and Malaysia should utilise it as a means to move forward and apply the best interests of the child principle as required under the CRC. Once the application has been done, Malaysia will be able to fulfil her obligations fully under the CRC.

Chapter One

Introduction

“The history of childhood is a nightmare from which we have only recently begun to awaken.”

De Mause¹

Introduction

The statement above was the first sentence in the seminal paper by Lloyd De Mause, written in 1974. The life of the child from childhood to adulthood was fraught with trials and tribulations in the past² and sadly this all too often remains the case today. There have been many positive developments in most parts of the developed world, such as the right of the child to be heard in cases involving them as well as the prohibition of child marriages.³ Unfortunately the same could not be said of the less developed nations in Africa, Asia,⁴ and Latin and South America. Although Asia is one of the fastest developing regions economically, this is not reflected in social development and specifically in children's rights. Malaysia epitomises the archetypical Asian state because it professes to practise a certain format of governance but with adaptations or modifications it claims are essential due to the ethnic/religious make-up of the population. Added to that Malaysia's dual/plural legal system is quite common for the region. As such, it will provide a good example of an Asian perspective on children's rights under the Convention on the Rights of the Child (CRC).

¹ de Mause, Lloyd. *The Evolution of Childhood*. Northvale, New Jersey and London. Jason Aronson Inc, 1974. Print.

² Some examples are provided in Chapter 2 whilst the bulk of the proof is provided in Lloyd De Mause's paper in footnote 1.

³ This was highlighted in an article celebrating 25 years of child rights at the following website, <https://www.sos-childrensvillages.org/publications/news/uncrc-25-year-anniversary>. 20 Nov 2017. Online.

⁴ Australia, Japan and New Zealand should be exempted from this grouping.

Looking at Lloyd De Mause's statement above, which paints a grim picture of what children faced in the past, and comparing it with the current situation in Malaysia, there are a number of reasons why I would suggest that in some respects the nightmare may still be occurring here. When this research began, Malaysia was facing issues on the rising volume of cases involving child neglect, abuse, abandoned babies and child abductions. For example, in a statement issued by the Royal Malaysia Police (PDRM) in 2016 it was reported that up to 10,000 children have gone missing since 2011.⁵ Prior to 2011, the cases of missing children averaged 500 per year.⁶ Just recently, there have been a number of cases involving violence towards children by parents⁷, teachers⁸ and peers⁹ alike. As a result, I would suggest that there is insufficient emphasis on children and their rights in Malaysia and more needs to be done.

The CRC came into force in 1989 and is one of the nine main human rights treaties. Malaysia became a party to the CRC in 1995 and enacted the Child Act 2001 [*Act 611*] as part of her commitment to the CRC.¹⁰ It is important that the principles of the CRC are implemented not only to ensure that the rights of the child are protected but to ensure that the child is allowed or given the opportunity to develop to their full potential. Malaysia as a state

⁵ The statement was reported in several local newspapers one of which is the Malay Mail, which can be seen at <http://www.themalaymailonline.com/projekmmo/berita/article/polis-10000-hilang-659-kanak-kanak-masih-gagal-ditemui> 4 January 2016. Online. In a recent report the number has increased to four children a day as seen in this newspaper article. <https://www.thestar.com.my/news/in-other-media/2017/11/02/four-children-reported-missing-in-malaysia-every-day/>. 2 November 2017. Online.

⁶ This was provided for in the PDRM website prior to 2011, which listed the missing persons annually but it is no longer available.

⁷ An article reporting the comments of the Minister of the MWFCDC after a case of abuse by parents, <http://www.freemalaysiatoday.com/category/nation/2017/10/08/parents-in-child-abuse-cases-may-be-compelled-to-attend-counselling/>. 19 November 2017. Online.

⁸ An article highlighting the issues related to the abuse by school teachers and how the Ministry of Education treats these cases, <http://www.themalaymailonline.com/opinion/boo-su-lyn/article/suspend-teachers-accused-of-child-sexual-abuse#324svqjBQMrq0hg0.97>. 21 November 2017. Online.

⁹ Some cases of bullying involving peers or other children have been highlighted in this newspaper article - <https://www.nst.com.my/news/exclusive/2017/05/240656/mrsm-bully-case-mum-seeks-justice-son>. 22 November 2017. Online.

¹⁰ Malaysia has yet to ratify the 2 optional protocols namely the Optional Protocol to the CRC on the involvement of children in armed conflicts and the Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography.

ought to be able to fulfil her commitments as required under the CRC. However, becoming a party to, and fulfilling the commitments are two different things. There is, arguably, no Member State that can claim to fulfil all the obligations required of the CRC, as it is a statement of principles that can be, and is, seen from different perspectives and angles. This is particularly the case in relation to the best interests of the child principle, which forms the focus of this thesis: I examine its imperfect implementation in the UK in Chapter Three. However, implementation is particularly complicated in Muslim and Islamic States¹¹ such as Malaysia, with dual legal systems in which civil and *Shari'ah* law share jurisdiction on certain issues. As such, this thesis explores the following question: How should Malaysia best comply with the obligations imposed by the CRC, given its unique socio-legal context?

In answering this question, I will consider how far Malaysia has progressed since it ratified the CRC on 17 February 1995. The CRC Committee's report on Malaysia in 2007 found that it was complying with the CRC in some ways.¹² For example the Committee commended the Government of Malaysia for adopting the Child Act 2001 and other laws that affect the child, and the creation of child protection teams under the Child Act 2001. Other positive aspects include the expansion of the Ministry of Women and Family Development to the Ministry of Women, Family and Community Development (MWFCD) in 2001 and MWFCD's responsibilities including gender equality, family well-being, child issues and social development in general.

However, it also had concerns about non-compliance. Specifically, the perceived conflict between civil and *Shari'ah* law, differences in the definition of child in the various

¹¹ In the context of this research Muslim States refers to countries where the population is majority Muslim or ruled by predominantly Muslims rulers, whilst Islamic State refers to States that implement the Islamic Law or *Shari'ah* in full. Malaysia is an example of the former whilst Saudi Arabia is an example of the latter.

¹² Concluding Observations: Malaysia Consideration of Reports Submitted by States Parties under Article 44 of the Convention. CRC/C/MYS/CO/1

laws of Malaysia,¹³ non-discrimination of all children¹⁴, the application of the best interests of the child principle which is still not a primary concern in administrative and judicial decisions, programmes, policies and several other issues on child rights and development. It made a number of recommendations regarding Malaysia's dual legal system and its application to family-law disputes:¹⁵

“The Committee recommends that the State party conduct an international comparative study on the implications of the dual legal system of civil law and *Syariah* [*sic*] law and, based on the results of this assessment, take necessary measures to reform this dual system with a view to removing inconsistencies between the two legal systems in order to create a more harmonious legal framework that could provide consistent solutions, for example, to family-law disputes between Muslims and non-Muslims. The Committee also recommends that the State party undertake a comprehensive review of the national legal framework with a view to ensuring its full compatibility with the principles and provisions of the Convention. The Committee further recommends that the State party take all necessary measures to expedite the process of necessary law reforms.”¹⁶

This thesis does not claim to address all of these issues, but rather seeks to explore the ways in which Malaysia's dual legal system could better comply with the CRC principles in one specific area: the best interests of the child. This is one of the pillars of child rights in

¹³ This does not include the differences between civil and *Shari'ah* laws.

¹⁴ Notwithstanding their race, religion or gender.

¹⁵ The most recent case on family-law dispute between Muslim and non-Muslim is related with the Indira Gandhi case or *Pathmanathan Krishnan V. Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911, which is currently under appeal at the Supreme Court. This case will be discussed in detail in Chapter Four but briefly the case revolves around family that has been divided by one of the parents converting to Islam, and the Civil High Courts and *Shari'ah* Courts gave contradicting decisions on custody of the couple's children.

¹⁶ Concluding Observations: Malaysia Item No. 16, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. CRC/C/MYS/CO/1

the CRC and therefore is an ideal subject for analysis to ascertain how Malaysia has fared in her application of the principles of CRC as a party. While it may be assumed that the existence of *Shari'ah* law for Muslim families in Malaysia could be a barrier to compliance, I will argue to the contrary that incorporating some of its principles could positively influence civil law towards better compliance. Reforming civil law to incorporate some elements of *Shari'ah* law would also go some way towards providing greater harmony between the two legal systems that the Committee seeks, in order to provide consistent solutions to disputes between Muslim and non-Muslim parents.

This research is important for two reasons. First, because it seeks to contribute to establishing a bridge between western scholarly thought and *Shari'ah* law with regard to child rights in general and the best interests of the child in particular.¹⁷ There is no scholarship in this area from the Malaysian perspective and very little, if any, which considers this crucial issue from other starting points. The question of the compatibility of *Shari'ah* law with the CRC is very pertinent because Malaysia is just one of several Muslim Nations and Islamic States, which either uses *Shari'ah* law exclusively or in tandem with a secular common/civil law code. The question is whether *Shari'ah* law principles negate the possibility of co-existence with the international human rights regime in general and the CRC in particular. Thus this research seeks to make an original contribution, which will assist scholars and policy-makers in Malaysia and other countries that are similarly affected with the application of a dual legal system.

¹⁷ Recently a symposium was held, the First Max Planck Symposium on Child Law in Muslim Countries. It serves to showcase some of the contributions to the workshop "Parental Care and the Best Interests of the Child in Muslim Countries," which, under the auspices of the Max Planck Institute for Comparative and International Private Law, was convened at the Centre Jacques Berque in Rabat, Morocco, April 1-5, 2015. The articles collected here aim to introduce readers to the larger project of the Max Planck Working Group on Child Law in Muslim Countries, which was established in the summer of 2014 and held its inaugural meeting at the workshop in Rabat. However, in the list of attendees Malaysia was not present, which is disheartening because Malaysia sits at the forefront of *Shari'ah* law application. More of this will be discussed in Chapters Four and Five.

Second, this research is important because there is a serious need for a review of Malaysia's Child Act 2001, particularly in relation to the application of the best interests of the child principle. This became evident from my experience in working at the International Criminal Matters Unit and the Human Rights and International Organisations Unit, both in the Attorney General's Chambers Malaysia, and subsequently I became the Legal Advisor of the MWFCDC which also contributed to my understanding of international law and international human rights regime as well as the issues faced in implementing the human rights treaties in Malaysia. I discovered that there was a lack of understanding of the application of the basic principles of child rights by those enforcing the law. The enforcers were unsure about what their powers entitled them to do and what was defined as the best interests of the child. They could not distinguish between child rights and the requirements of religion and customs. Furthermore, the Government had difficulty in drafting replies that were required to be submitted to the CRC Committee, causing unreasonable delays.¹⁸ These delays were partly due to the Government trying to demarcate the scope of the CRC, domestic common law and *Shari'ah* law. Therefore, this research is both timely and necessary for Malaysia and other Muslim Nations or Islamic States.

I will argue that there is a need for Malaysia to amend the existing Child Act 2001 to better comply with the CRC principles. The Committee, as noted above, have suggested that reform should also include harmonising civil and *Shari'ah* law. Contrary to what I would have expected prior to conducting this research, the dual goals of harmonisation and compliance would not necessarily require making the *Shari'ah* law closer to civil law: in fact I will demonstrate in this thesis that *Shari'ah* law does not conflict with the major pillars of

¹⁸ As of 2017, Malaysia still owes the CRC Committee three country reports since 2006.

the CRC and that in some respects - including issues relating to the best interests of the child principle - it is closer than the civil law in compliance with it.

Brief History

As mentioned earlier, there is a necessity to illustrate Malaysia's rather chequered history. This history allows an appreciation of some of the peculiarities of the Malaysian method of governance¹⁹. It will briefly map out the most pivotal points in Malaysia's history, in order to provide an insight to the Malaysian legal paradigm. One of the best and most complete historical references is a book by Barbara Watson Andaya and Leonard Y. Andaya called "A History of Malaysia,"²⁰ and this is where most of this information is extracted from although other sources are also referred to.

Malaysia's geographic position has also contributed to its history as Malaysia rests in the middle of one large region strategically nestled in between India and China. In the 14th Century, the region was known as the Malay Archipelago and covers an area that is known today to include Southern Thailand, Indonesia, Malaysia, Brunei, the Philippines, Singapore, Timor Leste and Papua New Guinea. The Malay Archipelago predominantly consisted of Malays but the Malays in turn consisted of several sub races like the Acehnese, Bugis, Javanese and Malays and many others that were scattered around the archipelago.

The Malay Archipelago was not ruled as one state or empire, but was ruled as several kingdoms. These kingdoms peacefully coexisted with one another until an issue arose and war broke out. They were however, constantly at war with bordering kingdoms and vassal

¹⁹ Andaya, Barbara Watson, and Leonard Y. Andaya. *A history of Malaysia*. Third Edition, Palgrave Macmillan, 2017. Pg. 2.

²⁰ Andaya, Barbara Watson and Leonard Y. Andaya. *A History of Malaysia*. First Edition London: Macmillan Press Ltd, 1982. Print. At the time the initial research was submitted the latest edition had not been in print. Nonetheless, the information in the older edition is still valid.

states; the largest of these was Siam.²¹ This division made these states vulnerable and allowed the colonial powers easier access to the states in the Malay Archipelago. In a way the position of the Malays was similar to that of the 18th and 19th Century Arabs who were subsequently divided up after wars and colonialism.

Most historical accounts of Malaysia began in the early 15th Century around 1400-1402 AD with the establishment one of the most prominent kingdoms at the time, which was known as the Kingdom of Malacca, initially a Hindu based kingdom. The significance of this Kingdom was due to the fact that at a time when the predominant religion in the archipelago was Hinduism, Malacca became the first of all the Malay based kingdoms to adopt Islam. There are accounts of other Muslim kingdoms in Indonesia like Aceh, Pasai and Jambi that were established before Malacca but the Malaysian history books have not placed too much emphasis on those states.

Malacca became more prominent when it adopted Islam,²² and Muslim and Arab traders made Malacca their preferred port of call and base of operations in the region. Another reason for Malacca's importance was the fact that it was situated right in the middle of the sea trade route between India and China. The weather played a crucial part in that the eastern and western monsoons swept through periodically. The easterly winds were common from November to April whilst the westerly winds from May to October. The traders from India (west) and China (east) were subject to these winds. Thus, all these traders had to pass Malacca and through the longest channel in the world, the Straits of Malacca. The traders no longer had to sail all the way to India or China but instead sailed halfway to Malacca and did their trade there. These straits were also notorious for piracy, thus adding to the importance of Malacca which provided a safe haven from pirate attacks.

²¹ Modern day Thailand

²² This event is explained in detail in Chapter Five.

Malacca became rich and prominent, as traders were willing to pay the taxes for protection and other services. It was also this prominence that attracted the neighbouring kingdoms and colonial powers. Siam was the most powerful but could not move against Malacca directly because Malacca had become a Chinese protectorate state.²³ All this changed when the Western colonials came; it was then that Malacca fell.

The first colonial power was Portugal which conquered Malacca from 1511 to 1641. After that the Dutch took over Malacca with the assistance of the new Malay kingdom of Johor.²⁴ The Dutch ruled from 1641 to 1824. By this time Malacca's prominence had waned due to the increasing destabilisation of the area as well as the emergence of other ports in the region. The Dutch were there until an agreement was signed between the Dutch and English known as the Anglo-Dutch Treaty or the Treaty of London in 1824.²⁵

The English then took over Malacca and further solidified their presence in the Malay Archipelago with an agreement with Siam known as the Treaty of Bangkok of 1826. The objective of the Agreement was the Siamese recognition of the English presence on the island of Penang. Subsequently the English signed another treaty with Siam known as the Anglo-Siamese Treaty 1909. This subsequent agreement acknowledged the King of Siam's sovereignty over Pattani²⁶ (today, Southern Thailand) but Siam relinquished claim over the northern states of the Malay Peninsula, namely Perlis, Kedah, Perak, Terengganu and Kelantan.²⁷ This merely served to divide the Malay Archipelago further as it consolidated the

²³ This fact is rather controversial as there was never any written evidence of any arrangement between Malacca and China. However, China has always remained close and even sent emissaries to Malacca. One of the Sultans of Malacca also married a princess from China. The Chinese Admiral Cheng Ho (who was of Turkish descent or probably Uighur) was a Muslim and that swayed in favour of Malacca. Siam never posed a threat to Malacca after the Admiral visited the Sultanate. The visit was a show of force by the Chinese over States in the region.

²⁴ Johor was setup by the survivors of the Malacca Sultanate.

²⁵ Op. Cit., n. 19, at pg 124.

²⁶ Pattani was a border state of Malacca and later Johor Kingdoms. Due to its distance from Malacca and Johor it was continuously harassed and most of the time occupied by the Siamese.

²⁷ These states were in continuous struggle with Siam, each with its own various methods of maintaining power.

English and Dutch forces against other colonial powers such as the Portuguese and Spanish²⁸ and to some extent the French.²⁹ It also marked the beginning of the active and direct English intervention into the Malay States.

The British settled in Penang first and later Singapore both in the late 18th century. This led to acrimony with the Dutch, which led to the 1824 agreement between them. In that agreement the Dutch agreed to relinquish all claims in what is now Malaysia and the British relinquished all claims to what is today Indonesia. The Dutch surrendered Malacca to the British whilst the British surrendered Batavia (located on the island of Sumatera, Indonesia) to the Dutch. With the transferring of Malacca, Britain consolidated the administration of its colonies and collectively formed the Straits Settlements in 1824, consisting of Malacca, Penang and Singapore.

Initially, the British had no specific intention to colonise or intervene in the other states in Peninsular Malaysia but once they began to obtain power in one state, the others fell one after the other. This can be seen in the statement below:

“In 1600 the English East India Company was formed and received a Royal Charter for fifteen years from the English Crown. Its principal objective was to trade. Thus, from the date of its first presence in these shores until 1684, the Company’s connection with Malaya was entirely non-political. However, as of 1684 onwards until 1762 political considerations had become part of the overall objective.”³⁰

When the Sir Francis Light first landed in Penang in 1789, there was a significant shift in the policies of the British East India Company but it was not apparent at first. At that

²⁸ The Spanish were the first colonials of the Philippines.

²⁹ The French had colonies in Indo-china, later Vietnam.

³⁰ Buang, Salleh. “Malaysian Legal History: Cases and Materials.” *Dewan Bahasa dan Pustaka*, Kuala Lumpur. 1993. Print.

time, there were already nine states with Johor being the most powerful. Johor had the only standing army, whilst the other states were either vassal states or relied on Johor as protectorate states.³¹ Johor itself was a protectorate state of the Turkish Ottoman Empire.³² The actual date of active British intervention in the Malay states varied and was in stages. The final act of colonisation coincided with the deterioration of the power of the Ottoman Empire and its final collapse after the First World War (WWI) and with the Kamal Ataturk led revolution cum modernisation in Turkey.

The British expanded their influence on the weaker Malay states when a new British Governor took over India. The first four states that took a British Resident were collectively known as the Federated Malay States – consisting of Pahang, Selangor, Perak and Negeri Sembilan. The British administered these states through a federal system with one central authority over the states. This was established in 1896, but the four states came under British influence spatially from 1874 to 1895. The last five states that took an advisor or Resident were collectively known as the Unfederated Malay States – Johor, Kelantan, Terengganu, Perlis and Kedah. According to some scholars, the British, contrary to popular belief, did not use the divide and conquer policy but rather a ‘to unite and administer policy’.³³

This was the basic establishment until they were all integrated³⁴ after the Second World War (WWII). After the Japanese Occupation during the WWII, the first British to arrive were the military and they set up the British Military Administration. This was

³¹ Again another contentious issue because there was no written agreement, but these outlying states always paid stipends to Johor and to this day Johor is the only state with its own military unit. It was incorporated in the agreement to formulate the Federal Constitution to allow Johor to maintain its military unit.

³² This was based on the concept that there can only be one ruler for Muslims in this world so all the states were acting in concert to the Ottoman Empire being the most powerful Islamic state thus giving it the title of *Khalifah* or Caliph.

³³ Soviee. *From Malayan Union to Singapore Separation*. Penerbit Universiti Malaya Sdn Bhd, (1974): 1.

³⁴ The exception was Singapore which has always been part of the Johor Kingdom.

followed by the infamous Malayan Union³⁵ and was followed subsequently by the Federation of Malaya. Then, finally in 1957 the Federation of Malaya obtained her independence.

Meanwhile, the inclusion of Sabah and Sarawak into Malaysia has a slightly different and more complicated history. Originally both were part of the Sultanate of Brunei.³⁶ The Sultanate of Brunei grew in parallel with the Sultanate of Malacca and they became close allies.³⁷ However, the Sultanate of Brunei lost control of its provinces and literally gave both of them away. This happened with the emergence of rival kingdoms in the Philippines specifically from Sulu and Mindanao. There was also the intervention from colonial powers such as the Spaniards.

In Sarawak, James Brooke, a former English officer who served in India negotiated with the Sultan of Brunei to quell the rebellions of the natives in Sarawak. In 1841, in recognition of the efforts of James Brooke Sarawak was ceded to James Brooke by the Sultan of Brunei³⁸. In the mid-19th century, Sarawak became a kingdom ruled by the White Rajah or Rajah Brooke³⁹. The Brookes ruled Sarawak for 157 years until after WWII when they handed Sarawak over to the British.

³⁵ The Malayan Union was a political reformation of Malaya into a republic where the Malay Rulers renounced all or most of their rights and that of the Malays for equal rights for all races. This move was extremely unpopular with the Malays and subsequently there were demonstrations that lasted for several days. Ultimately the Malayan Union failed because the Malay Rulers collectively sought the British to review the entire system.

³⁶ The Brunei Sultanate was established about the same time as the Malacca Sultanate so the claim (in Malaysia) that Brunei Sultanate was established by the remnants of the Malacca Sultanate is inaccurate.

³⁷ There is some contention here. According to the *Sejarah Melayu* or the Malay Annals, Brunei actually gave homage to the Sultan of Malacca. The actual passage from the Annals states, "And the Raja of Brunei sent with them a letter to Malaka, which was worded as follows: - "The actual passage from the Annals states, "And the Raja of Brunei sent with them a letter to Malacca, which was worded as follows: - "our Highness' son sends obeisance to his royal father."

³⁸ Ibrahim, Ahmad, and Ahilemah Joned. *The Malaysian legal system*. Dewan Bahasa dan Pustaka, Kementerian Pendidikan Malaysia, 1987. Print. pgs 15-17.

³⁹ The name Rajah came from the Indian term used for rulers and, either white or Brooke from the colour of his skin and name.

Sabah is slightly different as there were overlapping claims from the neighbouring Sulu Sultanate. The Sulu Sultanate was a powerful Muslim kingdom that was constantly battling the Spaniards who were colonising the Philippines. This significantly weakened the Sulu Sultanate and thus prevented it from making a forceful claim over Sabah. Nevertheless, when the Brunei Sultanate leased Sabah to the British North Borneo Company, the company proceeded to pay stipends to the Sulu Sultanate so as to protect their interests.⁴⁰ It was on this very ground that one of the former Presidents of the Philippines claimed Sabah to be part of the Philippines.⁴¹ Similar to the British East India Company, the British North Borneo Company had a Royal Charter to conduct its business in Asia. The same fate befell it after WWII with Sabah being handed over to British Government Administration.

The brief historical information provided above would not be of significant value if it is not put into the proper context. This is assisted by some further background information that is also essential for research work Malaysia.

Background

In this section, I will highlight some of Malaysia's unique characteristics in order to better understand its relationship with the CRC. As mentioned earlier, after acceding to the CRC, Malaysia has tried to incorporate its principles, including the best interests of the child principle, into her laws through the Child Act 2001. The draft of this was based on the UK's Children Act 1989 after the drafters went to England in 1999 to study the Children Act 1989. This was deemed appropriate due to Malaysia's historical links with the UK, the latter having been one of the earliest countries to adopt the principles of the CRC. However, the Malaysian

⁴⁰ About 3 weeks before the 13th Malaysian General Elections on 5th May 2013, some 200-300 Sulu fighters conveniently "invaded" Sabah and made a claim towards Sabah. Various claims have sprung out from it being staged to outright invasion. Nothing has been proven and doubtful that it will ever be proven now that the election is over.

⁴¹ The late Ferdinand Marcos.

Act also took three existing statutes and merged them together,⁴² adding some CRC principles with the hope that this would be sufficient for Malaysia to fulfil her obligations as a member state. Although it was a milestone when the Act was passed, it still does not go far enough.

Generally the Child Act 2001 criminalises certain acts such as reporting and publication of children in the media,⁴³ ill-treatment, neglect, abandonment and abuse of children. In addition, it provides rehabilitation measures for children who have transgressed certain laws, but it does not provide specific rights that should be awarded to children. This gives the Child Act 2001 a semblance of a penal statute with offences for omission or commission of an act but does not seem to be in tandem with the CRC, which, like all other international human rights instruments, is a rights based Convention, only in this case providing for children's rights. While some rights have been incorporated through the Federal Constitution, they are not absolute.⁴⁴ The position or status of these rights and the application of the CRC, the Child Act 2001 and the Federal Constitution will be explained in more detail in Chapter Four. Now, the subtle influences on Malaysian law and society will be explained.

The Asian Influence

Asia is a melting pot of various cultures, people and a variety of ideologies that cut across politics and religion. There are political ideologies ranging from authoritarian, monarchies, democracy, dictatorship, communism and socialism. There are sub categories like Maoist, constitutional monarchies, military interventionism and differing models of

⁴² These were the Juvenile Courts Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991. The three Acts were all repealed once the Child Act 2001 was enacted.

⁴³ The first time such a thing has ever been criminalised in Malaysia.

⁴⁴ The Federal Constitution provides for fundamental liberties for all, including children. These liberties include the rights to life, freedom of speech, freedom of assembly, freedom of religion and other liberties and rights.

democracy. All the major religions⁴⁵ are practised here. This large melting pot has created a unique blend of government and laws. Most Asian countries (some notable exceptions are Japan and China) have been colonised by current and traditional superpowers such as France, Portugal, the Netherlands, Great Britain, Spain and the United States of America. These countries have adopted or merely continued the legal system and system of governance they inherited from their colonial masters.

Asian cultural values and systems contribute to the complexity of the situation in Malaysia. One distinct traditional Asian value that can illustrate this point is that of respect for elders. This custom does not allow younger ones to speak out against the elders, which hampers and prevents children from complaining or reporting acts against them (like abuse) or the omission of an action necessary to them (neglect). These children are affected and yet they find themselves powerless to act, thus creating a submissive environment - although there are positives aspects to this respect, such as caring for elderly parents rather than leaving them in an old folk's home⁴⁶. The peculiarity of the Asian culture is further entrenched in Malaysia through the legal system, which is now illustrated further.

Defining Law in Malaysia

In Malaysia, the definition of law includes both the common law and *Shari'ah* law. Clearly the latter incorporates the theological, but I would suggest that socio- political matters, socio- economic matters and customs are also important factors that must be considered in Malaysia. Furthermore, law reform has to be practical so that the proposals may be implemented. As such, based on personal experience of drafting laws that simply

⁴⁵ Except Judaism where there are small pockets in Australasia.

⁴⁶ Although the act of sending parents to live in old folks home is also on the rise based on the number of projected homes being built by the Department of Social Welfare or *Jabatan Kebajikan Masyarakat* (JKM).

import foreign laws and transplant them into another country, it is argued that they cannot work, especially in Malaysia.

It is true that parliamentary draftsmen refer to other laws from other jurisdictions but it is done with complete confidence that the laws would be compatible to the local environment and will not fall foul of existing laws. Besides that the law would usually be drafted with a distinct Malaysian theme as well as with both continuity and cohesiveness to ensure easy understanding of the law. There are examples of some contradictory provisions, but these are kept to a bare minimum. The basic rule of thumb given to drafters in Malaysia as instructed by the Parliamentary Draftsman is that incorporation of international law should take into account the context of Malaysian law, politics, sensitivities, religion and culture. It is understood that mistakes will happen but that will only help to develop the law as it is through these mistakes we learn what is practical, acceptable and workable.

The Malaysian Federal Constitution states as follows:

"Law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;⁴⁷

Based on the definition of the term "law", it encompasses not only written rules but also includes local customs that carry a legal intention. Exponentially this would include child law and rights. Currently, the best interests of the child principle is provided in the Child Act but it has not been able to sufficiently protect children's interests as expected in the CRC. The development of the right in Malaysia will be limited to the above definition.

⁴⁷ Article 160 Clause 2 Federal Constitution

The courts, legal practitioners and social welfare officers use the guidelines provided by the CRC and that of other jurisdictions but limited to the areas as mentioned in the law.

The terminology above stems from Malaysia's strict adherence to traditional values, reflecting a positivist approach that is the mainstream legal perspective in Malaysia. Legal positivism has been ingrained into the Common Law paradigm and its own position is quite rigid even before looking at the Malaysian version of it. Emile Durkheim provided a succinct description of positivism saying, "A legal rule is what it is and there are no two ways of perceiving it." Most law schools in Malaysia⁴⁸ adopt this concept of positivistic common law and there are no efforts to change it. There are some schools in Malaysia that are leaning towards some comparative work but it is still in the infancy stage. The judiciary and the legal fraternity are still based on mainstream positivist common law with some civil law⁴⁹ and human rights law influences creeping in. However, this might not be the most appropriate methodology for this thesis, as discussed in the next section.

Linguistics is also an important element in this research and this is the same for any comparative legal research examining jurisdictions that involve different languages. In this research, there are elements of English, Malay (in the native tongue, known as *Bahasa Melayu*) and Arabic. The Federal Constitution's authoritative text is still in English despite having an official Malay text⁵⁰. The Child Act 2001 has both a Malay and English text but the authoritative text is in Malay. Despite this, any reference to the Child Act 2001 will be taken from the officially translated text in English and not the Malay text. Should there be

⁴⁸ The International Islamic University Malaysia (the researcher's alma mater) is slightly different in that the Law School, whilst predominantly positivist, has a requirement that all students learn the basics of *Shari'ah* as well as some inter-disciplinary work in theology.

⁴⁹ Singapore has actively referred to Civil Law jurisdictions and incorporates them in her latest statutes. The influence is therefore inevitable since some legal professionals practice in both Malaysia and Singapore and the preeminent law journal, MLJ (Malayan Law Journal) reports cases from both Malaysia and Singapore.

⁵⁰ The Federal Constitution has been translated into Malay but it has not been prescribed as the authoritative text by the *Yang di-Pertuan Agong* as stated/required in Article 160B.

any distinct differences, it will be highlighted. The *Qur'an* and *As-Sunnah* are in Arabic as well as their authoritative texts but the best and prevalent translation will be provided⁵¹.

Local customs would also play a part but again limited to the definition of law in the Federal Constitution as mentioned above. As stated earlier the customs mentioned must carry legal intent. An example of this is parental approval for surgical or medical operations on children. Currently, Malaysia practises parental consent for operations involving children aged below 18. This is practised throughout Malaysia both East and Peninsular. There are some exceptions since the approved marriage age for girls is 16. In such a case, if the parents are children or minors themselves at the time surgery is required, they will be authorised to give consent for surgical or medical operations of their child. The practice of the natives of East Malaysia who have local customs carrying the force of law has led to this.

These customs have been codified into State Enactments, which provide for children to be allowed to marry as young as eleven years old. This issue arose when the researcher was a legal advisor at the Ministry of Health, where doctors were unsure as to who would be able to give consent to operate on a child since the parents were both minors (below 18). The simple legal opinion was that the customs adopted by the natives were given the force of law and as such the marriage was legal. If the parents were married legally, therefore they are the child's legal parents and as such have parental responsibility. They would then have the authority to give consent for the surgery. However, in the full legal opinion there were other provisos such as that the parents must be able to understand what the operation was about before they are given the right to give informed consent. If the doctors or hospital administrators were not confident of the parents being able to give informed consent then the matter must be referred to the Department of Social Welfare or *Jabatan Kebajikan*

⁵¹ All three languages have their own idiosyncrasies that require more than a basic understanding of the language. I hold a Diploma in Translation of English to Malay from the *Dewan Bahasa dan Pustaka* or the national literary agency.

Masyarakat (JKM). JKM would act as the Protector under the Child Act 2001 and seek the Court's permission to do what is best for the child,⁵² notwithstanding the theological implication, as Chapters Four and Five will further illustrate.

The above is an illustration of how the law that is written and passed has taken account of several different aspects of Malaysian society, taking into consideration the perspectives from the different races, cultures and religions. After all the above has been done, the drafters must also ensure that the law drafted does not fall foul of *Shari'ah* law.

The law in this research will be limited to only the written and printed laws of Malaysia since these are compatible with the local laws. The Federal Constitution allows customs to be included in the definition of law as long as the custom has the force of law. Most, if not all customs that have a force in law have been codified so as to allow easier conformity and application by the authorities⁵³. As such there will be a very limited number of customs having a force in law that have yet to be codified.

Differences between East and West Malaysia

The international tourist or guest would see Malaysia as one country divided by a vast ocean, but it is divided by more than that⁵⁴. One must be aware that besides geography, East and Peninsular Malaysia have differences in law, albeit not absolute. It should be noted that during the formation of Malaysia certain privileges were accorded to both the East Malaysian

⁵² The general provisions are provided under Part V of the Child Act 2001, entitled "Children in Need of Care and Protection". Specifically, sections 20 to 27 of the Child Act 2001 contain the provisions that would allow the Protector to get the child examined by the medical personnel and the necessary medical treatment. If the parents object, then the Protector can go to court and seek the court's redress which is provided under section 30 of the Child Act 2001.

⁵³ Another reason for codification is to ensure that there are no claims of other customs that may or may not exist. The codification is also meant to limit the customs that are applicable.

⁵⁴ Factors include social and political as provided in this blog article quoting a Malaysian Chinese Daily and a Singapore News Channel as provided in the following link: <http://www.asiaone.com/malaysia/lack-common-values-between-east-and-west-malaysians>. 28 Dec 2017. Online.

states and these included privileges in the legal system.⁵⁵ The discrepancies in child law between Peninsular and East Malaysia may not be large but exist nonetheless. This has affected the Malaysian Legal System to such a level that the judiciary take active steps to ensure that the law is interpreted correctly based on the jurisdiction it serves. The Common Law, introduced by our colonial masters did not develop as progressively as that in England.

The Judiciary developed the Malaysian Common Law with a distinct Malaysian character, having a rather rigid and positivist form. This may be partly due to the judges' incapability of adopting English common law principles that were not introduced into Peninsular Malaysia before 1956⁵⁶ as well as overlooking or not respecting the status of *Shari'ah* law, the law of the land prior to British colonisation.⁵⁷ The judiciary could still refer to English cases after 1956⁵⁸ but they were merely of persuasive authority. Initially there were referrals to the Privy Council but that too came to an end when Malaysia created her own Supreme Court in 1989,⁵⁹ after which the development of the common law was purely localised. The principle of the best interests of the child was enacted in Federal Law through the Child Act and is thereby applicable to both Peninsular and East Malaysia, although there will be variations in interpreting the principle based on the customs of the said jurisdiction.⁶⁰

There is a rather more sensitive difference which is still evident. In a way it is reminiscent of the relationship between Scotland and England: the vast majority of East Malaysians look at West or Peninsular Malaysians as colonials.⁶¹ Similar to how the Scottish⁶² feel about England and the UK, some East Malaysians want to create their own

⁵⁵ This will be further discussed in Chapter Four.

⁵⁶ Section 3, Civil Law Act 1956 of Malaysia states that UK case law before 1956 is applicable in Malaysia. The cut off point for the States in East Malaysia is even earlier.

⁵⁷ This will be explained in Chapter Four.

⁵⁸ Earlier for East Malaysia.

⁵⁹ Malaysia's apex court now known as the Federal Court.

⁶⁰ Further explanation will be provided in Chapter Four.

⁶¹ I have served in Sarawak for two years and have personal experience of this.

⁶² Notwithstanding the majority had voted to stay in the Union.

state. Both Sabah and Sarawak feel that they would be better off on their own because most of the natural resources are in East Malaysia but the vast majority of the industry and companies are operating from Peninsular Malaysia, strikingly similar to the UK situation.

In Sabah on 19 March 1986, the parties that were part of the Federal ruling coalition lost control of the State in the General Elections. The opposition were rather aggressive on the anti-Federal rhetoric and stoked anti-Federal sentiment which equated to anti-Peninsular Malaysians. There were riots which resulted in five lives lost and a state of emergency and curfew was declared. Martial law was imposed in the state of Sabah for 39 days to quell the riots.⁶³ The subsequent peace deal created a tense period that lasted two decades until the ruling parties finally branched into the State of Sabah⁶⁴. The situation was amplified by the existence of racial discontent or undertones.

Racial Disharmony

Malaysia is a well-known for being a multi-racial country, but racial disharmony is well established. The breakdown of the races will be explained in greater detail in Chapter Four, suffice to say here that the Malays still have feelings of insecurity. Racial discontent exploded in Malaysia in 1969; 13th May is not only unlucky but it reminds Malaysians of their ugly past as it was the date the race riots erupted.⁶⁵ Such was the magnitude of the riots

⁶³ The Malaysian National Archive has some of the records and can be accessed in English on the following website. http://hids.arkib.gov.my/peristiwa/-/asset_publisher/WAhqbCYR9ww2/content/persetujuan-damai-di-sabah?_101_INSTANCE_WAhqbCYR9ww2_viewMode=view

⁶⁴ Part of the special privileges were that the Parties in Peninsular Malaysia were not allowed into Sabah and Sarawak. It was part of the negotiated items and never listed in the agreement or the 20-point plan (the position of Sabah and Sarawak were entrenched not only in the Federal Constitution but also an agreement). Nonetheless, in the decade that the Federal based parties entered Sabah there seems to be a softening of the tension. However, Sarawak is still resisting.

⁶⁵ A website that provides a more balanced view is the provided by the Peninsular Malaysia Lawyers Association or known as the Bar Council in the following link: http://www.malaysianbar.org.my/echoes_of_the_past/the_tragedy_of_may_13_1969.html. Till now the number of deaths is disputed from 196 provided by the Royal Malaysian Police Force to 600 as reported by some diplomats and foreign observers in websites. Another article refers to the official graveyard for the incidents for 114 bodies, almost all Chinese at: <https://www.themalaysianinsight.com/g/3014/>.

that they also occurred in the neighbouring country of Singapore, which had recently gained independence from Malaysia in 1965.

The riots have been attributed to several reasons amongst them a lengthy campaign period, and perceived bias in policies and laws⁶⁶. It is no secret that the Malaysian Federal Constitution had affirmative action principles embedded within it to protect the rights of the Malays, but the non-Malays had felt that the laws should be non-biased. The Malays felt that the non-Malays, specifically the Chinese had monopolised the economy creating a hugely unequal distribution of wealth in the population.⁶⁷ Both sides have reasons to blame the other but the intention here is to highlight the fact that despite it being almost half a century since the incident, it still resonates today. Politicians on both sides remind the voters at every election of the incident for different reasons.

The ruling coalition has not changed that much other than absorbing one of the parties that was in opposition in 1969. The opposition have developed to encompass a more holistic approach, and combined their strength. In the 2013 elections the opposition parties came together and formed their own coalition⁶⁸. The opposition also had a more multi-racial composition with a Malay-majority party in the coalition and no race-based party.

This leads to another aspect of Malaysian society that needs to be kept in the minds of any researcher - the position of Islam and *Shari'ah* law. Although Chapter Five will discuss *Shari'ah* law in more detail, this chapter will touch on basic areas that may not be

⁶⁶ A frank and more detailed account was published in a local newspaper online page the StarOnline at: <https://www.thestar.com.my/opinion/columnists/watching-the-world/2008/05/11/may-13-1969-truth-and-reconciliation/>. It also provides some of the background and events that led to the riots.

⁶⁷ Oddly enough, Indonesia recently had a race riot in May 1998 which resulted in 1000 deaths and more than 80 people raped, which was also due to the unequal distribution of wealth. A not so balanced report has been provided in the LA Times at the following link: <http://articles.latimes.com/2010/jul/04/world/la-fg-indonesia-chinese-20100704>.

⁶⁸ The Opposition parties first created the coalition in the 2008 elections and created what was deemed as a Political Tsunami when for the first time ever, the Opposition won five state governments. Before that election, the best results for the Opposition was two state governments.

directly related to the legal issues in Chapter Five, including its link with the current discussion of race. The Federal Constitution has defined the Malay race as follows:

“Malay” means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and—

- (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or
- (b) is the issue of such a person;⁶⁹

The above definition shows why race and religion in Malaysia plays a pivotal role. By definition, a Malay must be Muslim but this is slowly being changed⁷⁰. Therefore whenever race becomes an issue it becomes religious in nature and similarly when it is a religious issue it becomes a racial issue as well. There are other peculiarities regarding *Shari’ah* law that researchers need to consider, as discussed further below.

Shari’ah

One of the major concerns of this research was the perceived incompatibility of *Shari’ah* law with the best interests of the child principle in the CRC. There have been numerous cases and reports from the CRC Committee of Member States who are Muslim Nations or Islamic States that blatantly defy or unwittingly ignore, without any form of

⁶⁹ Article 160, Federal Constitution

⁷⁰ There are a lot of Malays that have converted to Christianity and Hinduism, the latter mostly through marriage. There was even a website run by these Malay Christians group but that website has been blocked in Malaysia.

reservation, various CRC principles based on the simple reason of it being against the *Shari'ah*.⁷¹ One scholar actually placed them in categories and said the following:

“...some Muslim states have entered reservations to the convention. These reservations are either to the whole Convention (General *Shari'ah* Based Reservation of GSR) or to its specific articles (Specific *Shari'ah* Based Reservation or SSR). ... As an example of GSRs, the reservation of Qatar states that it, “enter(s) a general reservation by the state of Qatar concerning provisions incompatible with Islamic Law.”⁷²

At this juncture, suffice to say that there are practices of some Muslim Nations and Islamic States that are unique. Malaysia, on her part, tries to observe the international legal regime with reservations being placed on certain provisions that it would not be reasonable to implement due to the application of the *Shari'ah* or - as stated in the earlier quote - Malaysia is an SSR.⁷³

Another issue is the seeming reluctance on the part of most western legal scholars to expand the spectrum of comparative study beyond the western legal spheres. There are hardly any western scholars who have provided literature dealing with child rights in relation to *Shari'ah* law. The literature, if any, has all been from Muslim scholars. It is perfectly understandable that non-Muslims would be wary of writing articles about child rights and the *Shari'ah*, but surely there must be some who have tried to bridge this divide. This has

⁷¹ Countries like Saudi Arabia, Iran, Jordan, Kuwait and Qatar have all put general reservations on the CRC and states that the CRC should never contradict the *Shari'ah*, Taken from UN CRC at www.ohchr.org

⁷² Hashemi, Kamran. “Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation”. *Human Rights Quarterly* 29 (2007):194-227. Print.

⁷³ The most obvious is Article 14, CRC regarding the freedom of religion. In Islam, the child will practise the religion of the family or, in a broken family the father, which is a violation of Art. 14, CRC. Hence Malaysia’s continued maintenance of this reservation. Malaysia has made the reservations despite the non-recognition of these reservations by some EU states. As an example there are two EU states which have filed the non-acceptance of Malaysia’s reservations - Belgium and Denmark. Available at this link: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en#43.

also created a scenario whereby most Muslims view the western based literature and treaties with some apprehension. Such considerations are also in the mind of the parliamentary draftsman whenever the drafting of a new law is required.

Drafting in Malaysia

The basic rule of thumb given to drafters in Malaysia as instructed by the Parliamentary Draftsman is that documents should be written in the context of Malaysian law, politics, sensitivities, religion and culture, including ensuring that the law drafted does not fall foul of *Shari'ah* law. A good example of how this complexity is managed in Malaysia can be seen in setting the age of marriage for the predominant races in Malaysia: the Malays, Chinese and Indians make up almost 80% of the entire population. Taking into consideration each of their respective customs and religions is difficult but since Malaysia became a party to the CRC and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) there was no option but to implement them. All these Asian cultures have a very low threshold for the age of marriage for both boys and girls. Despite this, Malaysia placed a relatively high marital age threshold of 16 years. Nevertheless to fulfil the requirements of both the culture and Islam specifically, exceptions were put in place to allow for marriages that did not fulfil the CRC and CEDAW requirements. However, it did place conditions to safeguard the interest of the children and women to avoid any abuse of the said system.

One example of this in practice was a case which occurred when the researcher was the Legal Advisor of the Ministry of Women, Family and Community Development in 2010. There were reports of girls being married off by their parents at the age of 11 in the northeast coastal state of Kelantan in Peninsular Malaysia. Upon further investigation it was found that

the case involved two fathers who had married their daughters off to each other⁷⁴. The authorities including the Department of Social Welfare and Kelantan Islam and Malay Customs Council or MAIK (the Malay acronym) tracked down the families and rescued the children.

Although the marriages were technically legal, the *Shari'ah* allows for the rulers/administrators to impose rules based on customs, and in this case any marriage of girls under the age of 16 years must be referred to MAIK. MAIK would then refer the matter to the Islamic *Shari'ah* Courts for the *Qadhi* or Muslim judge to decide whether the girl was mature enough to marry (usually referring to her mental capacity) and the reasons for the man wanting to marry the girl at such a young age. These are instances whereby the local customs, theological interpretations and international law regimes combined. This is testament to the work of parliamentary draftsmen that have been specifically trained for this task and adapted for the situation in Malaysia.

The Child: Definitions

Another effect of the diverse background that Malaysia has is found in the definition of the term child. Though (as a legacy of colonialism) Malaysia uses the English Common Law, it is not uniformly applied throughout Malaysia. Rather, different periods and methods of colonialism have created regional differences and there are also inconsistencies in how children are defined and treated for different purposes in federal law. This can be illustrated through the example of the age of maturity. The Malaysian Child Act 2001 defines a child as any person under the age of 18,⁷⁵ with the exception of those related to in criminal proceedings where the jurisdiction is governed by section 82 of the Penal Code. Section 82

⁷⁴ Technically in Islam the power to marry the daughter resides with the father and if he is no longer available there would be a list of other men that are closely related to the girl that is about to be married.

⁷⁵ Section 2, Child Act 2001

of the Penal Code provides that a child below 10 years of age will not be liable for any offence whilst section 83 provides that a child between 10-12 years old can be liable if there is sufficient evidence of the child's maturity. Section 376 of the Penal Code also provides that sexual intercourse involving any girl below 16 years of age is deemed statutory rape.⁷⁶

Meanwhile, the Children and Young Persons Act (Occupation) 1966 [Act 350] defines a child as being under 14 years old where the Act allows children above this age to work. Yet another definition is provided under the Adoption Act 1952 [Act 257] which defines a child as being unmarried and under 21 years, which is also the age of majority under the Age of Majority Act 1971 (Act 21).⁷⁷ The age of majority is also the legal age at which a person could validly enter into a contract under the Contracts Act 1950 [Act 136]⁷⁸. However, according to the Law Reform (Marriage and Divorce) Act 1976 [Act 164] no marriage can be solemnised if either party has not attained the age of 18 years.⁷⁹ However there is an exception for girls who have reached 16 years who may marry with the consent of the Chief Minister of the state.

Further complexity and inconsistency is found when we consider the regional laws within Malaysia. As mentioned earlier, Malaysia is divided geographically into two large territories, East Malaysia (Sabah and Sarawak) and West Malaysia (Peninsular Malaysia) in addition to political and jurisprudential divisions. Peninsular Malaysia was divided administratively and the law was enforced through legislated statutes enacted either by the Federated Malay States, Unfederated Malay States and Straits Settlements.⁸⁰ Sabah and

⁷⁶ Statutory rape simplified is that the girl's consent is not a defence against rape.

⁷⁷ This is mainly used for when voting rights are allowed and the age of entering into a contract.

⁷⁸ Section 11, Act 136. Although after the celebrated case of *Government of Malaysia v. Gucharan Singh* (1971) 1 MLJ 211 the Contracts Act 1956 was amended to make Scholarship Contracts an exception for competency for entering into an agreement. The case had determined that the scholarship contract between the Government of Malaysia and Gucharan Singh was void because the latter was a minor at the time of entering into the contract.

⁷⁹ Section 10, Act 164. This law is applicable to non-Muslims only.

⁸⁰ These are the first formulations of administration by the British in Peninsular Malaysia and will be clarified in Chapter Four.

Sarawak joined the Federation of Malaysia in 1963. Prior to that East Malaysia had implemented English Law directly as compared to Peninsular Malaysia, which adopted a more cautious approach by incorporating English Law into the law of the land.

Hence, the situation was more complicated in East Malaysia when the colonial masters there had to appease the majority of the indigenous or native people. As such, several native laws were enacted by the Sabah and Sarawak state legislatures.⁸¹ This had an effect on children as the native law in Sarawak allows the headsman of a village to conduct marriages of girls as young as 11 years of age. The marriage would be validated by the native laws and neither the federal nor state laws would be able to invalidate it. Upon acceding to the CRC, Malaysia knew that it had areas of concern that did not fulfil the CRC obligations. Therefore, the accession was merely the beginning of a process requiring further action to be taken in order to harmonise Malaysian laws and customs in accordance with the CRC.

Making the Child Act 2001 more CRC Friendly

Despite all the underlying factors above, Malaysia has always tried her best to fulfil her obligations. Based on the CRC Recommendations mentioned earlier, there was a need for change. After more than sixteen years of the implementation of the Child Act 2001, it became evident that the Act does not fully incorporate the CRC principles but efforts to amend the Act have proven futile. The Ministry of Women, Family and Community Development was tasked with reviewing the Act and the researcher was part of the team involved in this in 2009-2010. During the discussions it became evident that there are real areas of ambiguity and conflict between Malaysian practice and application of the Child Act 2001 when compared to the CRC. One key area that reflects this relates to the most

⁸¹ This was a method of protecting native laws from encroachment by other laws.

fundamental aspects of the CRC and the very basis of child rights: the best interests of the child principle. This is an oft-used phrase to declare that one's actions were in the best interests of a child. Yet the phrase itself, as will be seen in Chapter Three, is ambiguous.

Nonetheless, it has to be mentioned that the process of amending the Child Act 2001 has been arduous and time consuming. This has been further complicated by the lack of political will. The Ministries in Malaysia work well independently but do not work so well in cooperation with each other. Each Ministry becomes slightly defensive when it comes to amending the policies within their respective Ministries to accommodate the CRC. Referring to the definition of the child mentioned earlier, if there had been a strong political will, the requisite definitions would have been sorted long before now but so far the amendments are not forthcoming.

Methodology: A Comparative Approach

“The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history – war, revolution, colonisation, subjugation – religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes.”

The quotation above from Professor Dr Ernst Rabel, also known as the father of functionalist comparative law,⁸² sums up the reasons why functional comparative law was the adopted methodology for this thesis. There is a long history of comparative law dating

⁸² As stated in the book by Samuel, Geoffrey. *An Introduction to Comparative Law Theory and Method*. Oxford and Portland, Oregon: Hart Publishing, 2014 at pg. 76. Print.

back to Ancient Greece⁸³ and within the Islamic world, it was also said that Islamic scholars in Baghdad, Cairo and Damascus⁸⁴ had referred to works from other jurisdictions as a means of comparison⁸⁵. In Malaysia comparative law is also used albeit indirectly and subconsciously whenever a new law is to be drafted. The first reference would be other jurisdictions preferably with similar common law traditions.

As with any other methodology, there are many facets of comparative law and many different approaches. For the purpose of this thesis, the scope has been narrowed to some authors that it is felt are relevant to this research. These authors are Geoffrey Samuel, Matthias Siems and Sebastian McEvoy. Based on personal understanding of the literature, Samuel presents a rather traditional or classical perspective of comparative law whilst Siems presents a modern perspective. McEvoy, on the other hand, is a development from the classical perspective. The various methods of comparative law will be briefly explained to ascertain the most appropriate methodology to be used.

According to McEvoy, comparative law could be divided into four categories namely external comparative law (homogeneous), external comparative law (heterogeneous), internal comparative law and a hybrid category.⁸⁶ As the name suggests, the first two categories refer to comparisons with non-domestic sources, the difference being that for homogeneous the comparison is strictly with the legal systems whereas for heterogeneous the comparisons include other disciplines such as sciences and religion. Internal comparative law is also homogeneous and refers to comparisons within the legal systems such as common

⁸³Adenas, M. and Fairgrieve, D. "Intent on making mischief: Seven ways of Using Comparative Law" in the book by Monateri, P.Giuseppe and Edward Elgar. *Methods of Comparative Law*. MAG Group Cheltenham 2012 at pg. 25.

⁸⁴ Centres of the Islamic world after Mecca and Medina.

⁸⁵ One article that suggests this is by Bassiouni, M. Cherif. *Islamic Civilization*. Available at <http://www.mei.edu/content/islamic-civilization>, 28 Dec 2017. Online.

⁸⁶ McEvoy, Sebastian. "Descriptive and Purposive Categories of Comparative Law" in Monateri, Pier Giuseppe, ed. *Methods of comparative law*. Edward Elgar Publishing, 2012. Online. pgs 144-162.

law and equity for England. The hybrid category is basically a category that involves all the other categories.

The next perspective is provided by Professor Samuel who had stated that within comparative legal scholarship there are several schemes or paradigms that inter-relate with each other, or schemes of intelligibility adopted from the social sciences. According to Samuel, “In sociological thinking, a scheme of intelligibility is a term applied to the way natural or social facts are perceived and represented – the way they are ‘read’ by the observer...”.⁸⁷ The social sciences are complex because they are not an exact science. Unlike mathematics, there is no one formula or solution to the problem. In social sciences the observations are made on the subject matter and interpretation may differ between the various researchers, especially those with differing perspectives. It is, “...because of this complexity, the social sciences make use of a plurality of schemes and paradigms, each of which describes a particular kind of social reality. In other words, there is no single reality that is ‘out there’ waiting to be modelled. Instead, there are different schemes of intelligibility and levels of observation.”⁸⁸ For example, Samuels identified the functional approach and the structural approach as well as the hermeneutic approaches.⁸⁹

Another view has classified comparative research into other descriptions such as formants approach, legal positivism, constructivism or deconstructivism, descriptive, dialectical, purposive, external homogenous or heterogeneous, internal or hybrid, dimensional either vertical or horizontal, synchronic or contemporary and diachronic or historical.⁹⁰ For this research the best scheme of intelligibility to analyse the law is

⁸⁷ Op. Cit. n 82 at pg. 81

⁸⁸ Samuel, Geoffrey, “Taking Methods Seriously (Part One)” *Journal of Comparative Law* 2, (2007): 94. Print.

⁸⁹ Op. Cit. n 82 at pg. 81

⁹⁰ These were illustrated in the book edited by Monateri, Pier Giuseppe. *Methods of Comparative Law*. Cheltenham: Edward Elgar Publishing, 2012. Print.

functionalism. This is one of the more traditional methods of comparative law or as Konrad Wiegert put it, functionality is, “The basic principle of all comparative law”.⁹¹ It can be summed up as follows:

“In functionality the law analyst studies the law and the functions from two jurisdictions. The basic premise is that one must have a good understanding of the functions of the laws of both jurisdictions to do the comparison. One need not be an expert in the entire law but mainly in the law that is being compared to. As an example, if you want to compare the criminal law from England with France then the person should concentrate on criminal law only. The functional method can be broken down as follows. Identify the rule in the home system (of the researcher). Then understand the function of the rule in the home system. Subsequently understand how this function is fulfilled in the foreign system (the compared legal system). Next, identify the rule that fulfils the said function in the foreign system and finally draw up your comparative conclusion.”⁹²

Michaels goes further by saying that there are several concepts of functionalism: “(1) finalism, a neo-Aristotelian functionalism based on inherent teleology, (2) adaptionism, an evolutionary functionalism in a Darwinian tradition, (3) classical (Durkheimian) functionalism, explaining institutions through their usefulness for society, (4) instrumentalism, a normative theory of using law for social engineering, (5) refined functionalism, a functionalist method that replaces certain postulates of classical functionalism with empirically testable hypotheses, (6) epistemological functionalism, an epistemology that focuses on functional relations rather than on the ontology of things, and

⁹¹ Zweigert, Konrad and Hein Kotz. *An Introduction to Comparative Law*. Vol. 3. Oxford: Clarendon Press, 1998. 34. Translation by Tony Weir. Print.

⁹² Figure 4.1: Functional Method in n 82 above, at page 68.

(7) equivalence functionalism, building on these concepts but emphasizing the non-teleological, non-causal aspect of functional relations. Largely oblivious of incompatibilities, functionalist comparative law (8) uses all of these.”⁹³ Although Michaels proposes the concept of equivalence functionalism, for the reasons outlined below this research is more inclined towards number (8), which is basically all of the above.

Another classification makes further division within each category by firstly looking at the comparison either vertically or horizontally -vertically with entities that are higher or lower such as treaty bodies and conventions or horizontally with other states like Malaysia and the UK. Besides vertical and horizontal, there is another classification whereby the particular systems substantive findings as compared to method or procedural findings. Finally, there are subcategories within the categories, namely synchronic comparative law which is contemporary in nature and diachronic comparative law which is successive or subject to legal history.

There have been a number of criticisms of comparative law approaches that must be acknowledged. For example, some judges have spoken out against comparative law:

“The claim that courts should disregard comparative law was recently most clearly expressed by some judges of the US Supreme Court. In *Lawrence v Texas* Justices Scalia and Thomson disregarded all arguments based on foreign experiences because ‘this Court [...] should not impose foreign moods, fads, or fashions on Americans.’ Justice Scalia also referred to the ‘practices of the “world community”, whose notions of justice are (thankfully) not always those of our people.’ In another case, Justices Scalia, Thomson, Renquist criticised the use of comparative law as

⁹³ Michaels, Ralf. "The functional method of comparative law." Reimann, Mathias, and Reinhard Zimmermann, eds. *The Oxford handbook of comparative law*. OUP Oxford, 2006. Pgs 345-346. Online.

cherry picking: ‘to invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making.’⁹⁴

Siems argues that the “disregard of comparative insights is a general feature of contemporary US legal culture” but it is not limited to the US, being shared by many other legal cultures (both England and Malaysia would fall within this category too). The term cherry picking is rather harsh since the US falls within the common law family (albeit loosely) and the doctrine of judicial precedent is important, unlike the civil law systems. Surely the legal practitioners would have referred to US law first before referring to examples from other countries. Even then, reference would have been made to other common law jurisdictions such as the UK.⁹⁵

Besides that there are other pitfalls that have been highlighted by those critical of comparative law such as van Hoecke⁹⁶. Among the more frequent is the constant criticism that comparative law lacks sufficient depth for academic research. The criticism is based on the fact that most comparative law studies have concentrated on either finding the differences or similarities of the laws and jurisdiction, leading to research analysis based purely on why they are different and what or which is the better law.

In this research, the approach is to define the legal systems involved and identify the development of the legal principle. The analyses will look at why the law has been formed into the current situation based on the establishment of the systems. This is despite the fact that both the states involved should have a rather similar history due to the nexus of the law

⁹⁴ Siems, Mathias M. "The end of comparative law." *Journal of Comparative Law* 2 (2007): 133. At pgs 133-134. Print

⁹⁵ This point was alluded to by Basil Markesinis in his article entitled Comparative Law – A Subject in Search of an Audience, in Markesinis, Basil. "Comparative law—a subject in search of an audience." *The Modern Law Review* 53.1 (1990): 1-21. At page 1.

⁹⁶ Van Hoecke, Mark. "Is there now a comparative legal scholarship?." *The Journal of Comparative Law* 2017/1(2017).

in England and Malaysia. In this thesis, the goal is not to determine which is the better law, but rather, which law has adopted the best interests of the child as propagated by the CRC. It would be impossible to compare the entire Malaysian Child Act 2001. The research shall only focus on the application of the best interests of the child principle, as it is one of the pillars of child rights in the CRC, making it an ideal subject for analysis in order to ascertain how Malaysia has fared in her application of the principles of CRC as a party.

In the context of this research, a comparison between the law in England and Malaysia is useful, despite the critiques of comparative law. Although they are different, both jurisdictions apply the common law but, more significantly, Malaysia also studied the UK Children Act 1989 and drew on it, albeit not replicating it exactly, in drafting the Malaysian Child Act 2001. It is also necessary to look within Malaysia to compare civil and *Shari'ah* approaches to the best interests principle. In the context of her rich and diverse background (described above), Rabel's description of comparative law at the beginning of this section is reminiscent of the challenges and complexities faced by those doing research in law in Malaysia.

This research will compare three jurisdictions (England and Wales; Malaysian civil law; and *Shari'ah* law) each with its own set of procedures and systems. It is not the more common exercise of comparing common law and civil law, but rather it entails an exercise of analysing common law, international law (with a mixture of common law and civil law) and *Shari'ah* law. There are particular challenges arising due to the dearth of literature relating to the best interests principle in *Shari'ah* law. The comparison between the common law and *Shari'ah* law is essential for Malaysia; nevertheless the findings and application have to be operational. The application should be formatted to encourage the States to adopt the findings to allow for easier implementation of the said principles.

The comparisons of *Shari'ah* law in many Islamic states illustrate how the principles of the *Qur'an* and all other facets of Shari'ah law are carried out in practice, meaning that there is a functional aspect to this theological doctrine and it is not purely an abstract and theoretical concept. Besides that, *Shari'ah* law as applied in Malaysia is also enacted into statutes and bye-laws and, as such, is a written law. This would then form the basis for comparison between the two differing concepts of law. Therefore the comparative narrative in this research will be based on both traditional and contemporary applications of the *Shari'ah*. The main traditional facets of *Shari'ah* law are provided below.

The *Shari'ah* uses several methods or sources in interpreting the *Qur'an* for legal purposes. The two primary sources, accepted by all Muslims, are the *Qur'an* itself and the *Sunnah* or the teachings, actions and sayings of the Holy Prophet Muhammad (pbuh).⁹⁷ A simple example to illustrate the two *Shari'ah* sources in practice is the five mandatory daily prayers. The *Qur'an* mandates that we pray to *Allah* but is silent on how it is executed. It was Muhammad (pbuh) who showed Muslims how to pray. Today that is how Muslims (Sunnis or Shi'ites) pray, that is, *based* on the teachings of the Holy Prophet (pbuh).

There are other sources used such as *Ijma'*⁹⁸ or consensus and *Qiyas*⁹⁹ or analogical reasoning¹⁰⁰. Both are part of a larger field called *Ijtihad* or reasoning, considered as secondary sources¹⁰¹. Basically any sources other than the primary sources are deemed to be *Ijtihad*. In this category the main methods of *ijtihad* are *Ijma'* and *Qiyas*. Most Islamic

⁹⁷ The main contention between Sunnis and Shi'ites is this point. Sunnis place a lot of emphasis on the As Sunnah whilst the Shi'ites do not and some sects actually claiming that the Holy Prophet Muhammad (pbuh) was not the right man to be the Prophet but the right person was supposed to be his cousin 'Ali.

⁹⁸ Weeramantry, C.G. *Islamic Jurisprudence: An International Perspective*. Kuala Lumpur, The Other Press, (2000): 39. Print.

⁹⁹ Ibid at pg. 40. Print.

¹⁰⁰ All four Sunni schools of thought accept this.

¹⁰¹ Another differing view of the Sunnis and Shi'ites is the relative ease and speed that the Shi'ites would refer to *Ijtihad* when dealing with a legal problem without first trying to refer to the primary sources and the more prominent secondary sources like *Ijma'* and *Qiyas*.

scholars agree that there can be no more legal reasoning through *Ijma'*¹⁰². With *Qiyas* it is still possible, but due to the divided situation of Muslims around the world, other forms of *ijtihad* are used. The other types of *ijtihad* are subjected to some differing views amongst the four Sunni schools as to which should be considered more authoritative. These include '*urf* or local custom, *maslahah mursalah* or public interest/policy, *istihsan* or juristic discretion and *istishab* or for God's will - in no particular order. With the exception of the *Qur'an* and the *Sunnah* the other methodologies use human reasoning where no specific mention is made in either of these two main sources of the *Shari'ah*.

In Malaysia, the use of *ijtihad* is evident in the adoption of '*urf* or local custom in the *Shari'ah* Courts which has even been adopted as part of the civil law. In divorce proceedings the women are entitled to claim *harta sepencarian*,¹⁰³ whereby any property acquired after the marriage is deemed to be equally shared between the couple irrespective of whether or not both of them had financially contributed to that property. Previously, this was not even considered in the *Shari'ah* Courts' as it was not within the Islamic practices. However, after some debate and research it was decided that it did not contradict the teachings of Islam and was accepted. It has also been accepted in the civil courts. The case of *Roberts alias Kamarulzaman v. Ummi Kalthom*¹⁰⁴ illustrates the civil court accepting the principle as well as providing a legal definition for it. The presiding judge, Raja Azlan Shah J., who later became the Lord President,¹⁰⁵ said as follows:

¹⁰² The concept of consensus or *Ijma'*, is when all the *Qadhi* and *Mufti* have agreed on a specific rule and thence it is deemed law. However the scholars have conceded that this will never be achieved again because the Muslim Community is divided. Initially when all Muslims were under the Caliphate (the last being the Turkish Ottomans) it would have been easier because there was only one spiritual leader. That said, during the Ottoman Caliphate it was also difficult to issue an *Ijma'* because some Muslim and Islamic States did not want to be bound to the Turks.

¹⁰³ Malay legal terminology that has been legally translated to mean matrimonial property.

¹⁰⁴[1966] 1 MLJ 163

¹⁰⁵ Malaysia's highest judicial post at that time.

“The latest exposition of the law on *harta sapencharian*¹⁰⁶ was judicially considered by Briggs J. in 1950 in *Hujah Lijah bte Jamal v. Fatimah bte. Mat Diah [1950] MLJ 63*. He defined it as “acquired property during the subsistence of their marriage of a husband and wife out of their resources or their joint efforts”.¹⁰⁷

A principle gleaned from the case established that *harta sapencharian* is a matter of Malay ‘*adat*’¹⁰⁸ and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime. This is a rule of law based on local law that the Court must take Judicial Notice of and it is the duty of the Court to propound it, *Ramah v. Laton (1927)*^{109, 110}.

Clearly the common law in Malaysia has been through its own process of functional comparative law albeit inadvertently and within the same jurisdiction. It was done intermittently and sparingly because the parties involved tried their best not to introduce too many alien principles into the law for fear of the consequences and effects on the law in Malaysia. As such, Malaysia’s unique social context and history must play an important if not paramount role in whatever research is conducted.

Based on all the above, a comparison of the best interests of the child principle with the best equivalent in *Shari’ah* law is also made.¹¹¹ If no such concept exists or it is only remotely similar, thence Malaysia as a party to the CRC, would find it difficult to fulfil her obligations in the face of this obvious contradiction. However, there should not be a contradiction since the principle was incorporated to be applicable to the whole world and should have taken into consideration an array of international customs, not just setting a

¹⁰⁶ The old spelling of the phrase *harta sepencarian*.

¹⁰⁷ Roberts alias Kamarulzaman v. Umme Kalthom [1966] 1 MLJ 163 at 164

¹⁰⁸ Malay and Arabic term for local customs.

¹⁰⁹ 6 F.M.S.L.R. 116, 128; 15/1 J.M.B.R.A.S. 35

¹¹⁰ Roberts alias Kamarulzaman v. Umme Kalthom [1966] 1 MLJ 163 at 165.

¹¹¹ The detailed analysis will be in Chapter Five.

threshold unilaterally for all States has to abide by. This is the main objective of this research and it is hoped that there will some positive findings by the end of the process.

I will also analyse whether the best interests of the child principle functions in Malaysia in the same way as it does in England. The principle in both England and Malaysia was based on the CRC. The provision has been embedded in Article 3 of the CRC and is an essential principle in the recognition of child rights. This is another area for comparison within International Law, specifically through examining the international human rights instruments.

Based on McEvoy's categorisation or classification (above), this research is formulated as follows. Firstly, the research will definitely have a hybrid approach because it will encompass all three categories which are external, both homogeneous and heterogeneous, and internal comparative law. It will be looking at the UK Children Act 1989, the Malaysian Child Act 2001 and the CRC. A comparison involving the UK will involve the common law, statutory provisions, the European Convention on Human Rights and cases from the European Court of Human Rights. The current basis for comparisons in Malaysia include the common law, statutory provisions and *Shari'ah* law. Both jurisdictions will also have to include the CRC.

Secondly, the research involves three jurisdictions, therefore it will be both vertical and horizontal because it involves comparison on multiple levels. Malaysia will not only be compared with the UK but also with the CRC and other jurisdictions. The UK study will also include EU cases in the analysis.

Thirdly, the research would be mainly substantive and not in the procedural aspect. It is possible that the analysis may include procedural findings but that is not the main objective of this research. The final subcategorisation will be relatively complex since the analyses will involve contemporary situations as well as historical background. Therefore, it

will be both synchronic and diachronic depending on the issue that is being analysed.

These will be analysed in detail in the proceeding chapters.

This is the backdrop to deciding the methodology to be used and requires a comprehensive evaluation of not only the written law but the sociological aspects of the relevant society. The analyses of the information collated will be conducted based on the methodology provided above.

The Chapter Outlines

Chapter Two will describe the best interests of the child principle from the CRC perspective. This will include a description of the development of an idea that finally became a universal human rights and legal principle. The chapter will also delve into the history of the child and the development of child rights until they were formulated into a Convention. Furthermore I present a common definition of the best interests principle that could be used as a common denominator. The *travaux préparatoire* regarding the negotiations that led to the incorporation of the principle illustrate some key features of the principle, namely the degree or burden of proof required. A specific section is dedicated to describing the differences between “primary” and “paramount” considerations. This is important as it will lay the basis for another discussion in Chapter Three related to the English concept of the best interests of the child principle which will be discussed below.

The second chapter will also highlight the best interests of the child framework as understood by the CRC and the CRC Committee. This perspective will be provided by referring to Michael Freeman’s commentary as a basis. The best interests of the child principle in the commentary is comprehensive but with the drawback that no reference is made to the *Shari’ah*. The chapter will also discuss the definition of child in Islam and where the systems converged and diverged. The definition is important because it will provide the

basis of who is considered a child in Islam as well as a brief discussion as to why Islam is an important factor for Malaysia.

The discussion will then move to Chapter Three, whereby an analysis of the English perspective will be provided and consequentially the differences between the rights-based approach and the paramouncy principle. It will initially look at the development of the principle and how the rights of the child first came to fruition. It will also examine how the codification of the common law principle became a statute leading to the culmination of the Children Act 1989. The chapter will explain how England is an important factor in the comparison with Malaysia due to both the historical aspect (based on colonialism) and the legal aspect (the common law tradition adopted in Malaysia). It will also briefly discuss the differences of opinion within England regarding the principle and discuss the actual position in England regarding the best interests of the child.

Furthermore, the chapter will discuss the differences between the CRC concept of best interests of the child and the welfare principle in England. The Chapter will compare the English position of a welfare-based paramouncy principle approach and the rights-based approach of the best interests of the child principle in the CRC. It will also expressly analyse whether there is any difference between the welfare or paramouncy principle and the best interests of the child principle in the CRC, and ascertain the implications for Malaysia should it be confirmed that the actual best interests should not follow the English position but instead must stand guided by the CRC. It concludes that if England truly wants to be compliant with the CRC, then it has to amend the laws to mirror the CRC exactly so that the Judiciary in England will not misconstrue the meaning, scope and threshold of the best interests of the child principle. Alternatively, if the policy is to move away from the threshold as provided in the CRC best interests of the child principle, then it should do so clearly.

Chapter Four describes Malaysia's application of the CRC specifically on the best interests of the child principle as pronounced in Article 3, CRC. This non-compliance is partly influenced by Malaysia's socio-legal complexities but also the imprecise nature of the CRC Committee's interpretation of the best interests of the child principle. The chapter will begin by providing more detail on Malaysia's historical and legal background, specifically describing the development of the law and why the common law principles were accepted in Malaysia. However, it will also highlight where and how the law varies with that of England. It will be argued that the differences are affected by the social, cultural and political situation in Malaysia, which in turn is directly related to factors such as Malaysia's multi-ethnic populace among others. This partly stems from the background information that has been raised in this chapter.

Besides that, the different methods of acceptance of the common law may be seen as a factor in the varied development of the law in Malaysia. The chapter will further explain the difference in approaches in Malaysia as compared to England, where Malaysia has mainly followed a statutory approach whilst English law is based on the common law or precedents. Wherever possible, case law will be used to illustrate the point. It has to be reiterated that the researcher must bear in mind the background information mentioned earlier.

Chapter Five will deliberate on the *Shari'ah* and its effect on international law in general and specifically in Malaysia. The entry of Islam into Malaysia and the various modes of application will also be discussed to allow the reader to understand the magnitude of the importance of Islam and how it is interwoven into the cultural, societal and political aspects of Malaysia. It will also discuss the separation of federal and state powers as demarcated by the Federal Constitution. This demarcation attributes to the different and varied *Shari'ah* laws in the States. This will also touch on the seeming conflict between the common law courts and the *Shari'ah* courts.

After analysing the *Shari'ah* I then argue that *Shari'ah* law and the CRC are in fact compatible. This research will demonstrate that the *Shari'ah* does not conflict with the major pillars of the CRC especially in regards to the best interests of the child. Chapter Five will also provide examples of the best interests of the child in the *Shari'ah* context. It will then be suggested that the *Shari'ah* position is closer to the CRC than some would have thought, including the researcher.

The way forward for Malaysia in the CRC will be discussed in the final chapter. Ultimately, it will be argued that Malaysia has not yet fulfilled her obligations under the CRC by using the best interests of the child principle as a yardstick in other areas of the CRC. Malaysia needs to look again at the Child Act 2001 and not only make minor superficial amendments, but substantial amendments need to be made to actually fulfil the obligations.

These obligations could be easily met by utilising an area which has been largely undeveloped, that of *Shari'ah law* which - as seen in this research – is closer to the principles of the CRC than first thought. It will be seen that the importance of child development and rights within the family structure are essential in Islam and resonate well with the requirements of the CRC.

Chapter Two

The principle of the best interests of the child in the Convention On the Rights of the Child

“What, therefore, is meant by ‘the best interests of the child’? Is there a legally binding concept for the care and protection of children underlying this Convention? It seems that there might be three possible answers to the question raised. The first possibility is: yes, there is a legally binding concept to be defined in terms of the wording and the structure of the Convention. A second option is: no, a legally binding concept may be envisaged as a political aim but has not yet been elaborated within the framework of the Convention. The third possibility is: only to some extent may one speak of a coherent legal concept, shaped by contextual relations and different categories of individual human rights and different state obligations.”¹¹²

Introduction

The passage above succinctly encapsulates the legal issues relating to the best interests of the child principle. Joachim Wolf’s opinion illustrates three legal positions of the best interests of the child principle. The possibilities raised are firstly that the principle is binding. Secondly, that the best interests of the child principle has not been deemed binding but that is the ultimate aim of the CRC. Finally the third position is in his view, the most conducive of all the possibilities suggested as it seems to be a convergence of the first and second points, or the mutual concept.

The quote above may seem simplistic but this article was published in 1992, three years after the CRC was formalised, and the points he makes merit further analysis. Several decades later and after countless discussions, debates, interpretations, articles, case laws and even books have been written on the principle of best interests, there is still ambiguity in the definition of the actual principle as well as its degree, whether binding or non-binding, primary or paramount. The principle is widely accepted as one of the main pillars of the CRC.

¹¹² Joachim Wolf, quoted in: Freeman, Michael and Philip Veerman (eds). *The Ideologies of Children’s Rights*. Vol. 23 Martinus Nijhoff Publishers, 1992: 126. Print.

However, it is interesting to note that Wolf's opinion does not differ greatly from the current situation despite almost three decades having elapsed.

The status of the principle is important because it has become the basis of the State Parties adherence and commitment to the CRC. Most common law States have accepted that the principle is binding and this can be seen in both the UK and Malaysia. However, the degree of the application of the principle has varied and it is important to understand why the acceptance of the principle has varied and how it has affected the application of the said principle domestically. Malaysia is a party to the CRC and must adhere to its principles. Although the best interests of the child principle is binding in Malaysia, it is believed its application does not meet the standards set by other states. This research will look at the development of the principle and the definition to assist in understanding the differences.

This research agrees with Wolf on several aspects and the most salient point is that the CRC and its apparatus leads one to assume the same, that the principle is both binding and non-binding at the same time. It is this ambiguous form that has clouded the best interests of the child principle for not only Member States but it seems the CRC Committee as well. This Chapter will shed light on the ambiguity that is shrouding the best interests of the child principle especially that surrounding the CRC Committee.

Before that it is essential to clearly define the best interests of the child principle and in this Chapter the research will analyse the principle based on the drafting process of the CRC, taking into consideration the historical background of the treaty. The research will also venture into the *travaux préparatoires* of Article 3 of the CRC with the intention of understanding the purpose of the principle and hopefully how it should be defined. Besides the historical background of the principle, this chapter will also analyse the development of the principle based on all the above information and this will allow for ascertaining whether the principle as applied by the CRC Committee conforms to the CRC.

Brief History

The best interests of the child principle is an international human rights law principle with some historical significance. “The literature on ‘best interests’ is voluminous, and the criticisms of the concept are well-rehearsed. Robert Mnookin pointed out in 1975 that, ‘deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself’.”¹¹³ Based on this it is clear that any further debate on the matter would be a mere footnote to a long list of academic views. Nonetheless, the crux of this research is based on the definition of the said principle and for this reason, the most prevalent definition for the best interests of the child principle within the CRC will be provided. This will inevitably be in congruence with the comments made by the CRC Committee on Malaysia’s CRC Report. Using that as the foundation, the researcher proposes to provide the closest equivalent under the *Shari’ah*. The definition of the child in *Shari’ah* law will be outlined in this chapter whereas the other areas relating to the best interests of the child in the *Shari’ah* will be outlined in Chapter Five.

The best interests of the child principle may be viewed through various perspectives and in order to develop an understanding of the principle for the purposes of this thesis there are foundational precepts that have to be set out and then comparatively assessed based on the situation in Malaysia. This would mean that the principle needs to be defined in accordance with what was ideally referred to in the CRC and then practically by the member States; namely England and Malaysia for this thesis. In carrying out the comparative

¹¹³ Freeman, Michael. “Article 3. The Best Interests of the Child.” In A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.). *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden and Boston. Martinus Nijhoff Publishers, (2007): 1. Print.

assessment for Malaysia there would again be a theological element since it involves an analysis of *Shari'ah* law.

Clearly the *Shari'ah* aspect will be quite challenging because its position on child rights may not be reflected in the most recent articles and commentaries. This would be very intimidating, especially for the Muslim and Islamic States, and may lead to any report or discussion between them being seen as confrontational. This in turn would lead these States to be more apprehensive in accepting the CRC norms and specifically this principle. Nonetheless, this research broaches the topic as fairly as possible and from a neutral perspective and it is only through doing this that the conclusion will be able to provide an answer that is understood by all relevant parties.

The best interests of the child principle was first introduced into the human rights sphere in 1959 through the United Nations Declaration on the Rights of the Child, mentioned as follows:

“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.”¹¹⁴

This principle has been enshrined and superseded¹¹⁵ in the CRC through Article 3, the full text which reads as follows:

“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.

¹¹⁴ Principle 2, Geneva Declaration

¹¹⁵ Op. Cit. n 113 above, at pg. 15. Print.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

This forms the basis of the best interests of the child principle, but a more comprehensive background is required to understand the debate surrounding this particular principle. For the purposes of this thesis, the concentration would be specifically on Article 3 paragraph (1). The research proceeds on the assumption that paragraphs (2) and (3) are quite straight forward and need no further clarification. Besides that, it has been accepted by all Member States and binds them to enforce this principle. Therefore, the thesis focuses on paragraph (1) and a presentation of the history of the creation of the CRC will also be focused on paragraph (1) to enable the principle to be understood clearly.

The history of the CRC begins with the Geneva Declaration of the Rights of the Child, commonly known as the Geneva Declaration which was adopted by the League of Nations in 1924.¹¹⁶ The Geneva Declaration declares that mankind owes to the child the best that it has to give and accept that as its duty. The declaration also states that the duty goes beyond and above all consideration of race, nationality or creed, and that society has to provide the child with the means required for its normal development, both materially and spiritually. The Declaration also states that the child has the right to be fed when hungry, nursed when

¹¹⁶ Adopted on 26 September 1924, League of Nations O.J. Spec. Supp. 21, at 43(1924) available at <http://www1.umn.edu/humanrts/instree/childrights.html> (last visited 19 April 2008)

sick, helped if backward, reclaimed if delinquent, sheltered and supported if orphaned and homeless, provided with relief in times of distress, put in a position to earn a livelihood and protected from all forms of exploitation. However, no interpretation or contextualisation was ever given for any of the situations expressed above.

In 1948, the United Nations adopted the Universal Declaration of Human Rights,¹¹⁷ which among others, provided that the states of motherhood and childhood are entitled to special care and assistance. This led to the adoption of the Declaration of the Rights of the Child by the United Nations General Assembly in 1959¹¹⁸ that again declared that mankind owes to the child the best it has to give and calls upon parents, men and women as individuals, and voluntary organizations, local authorities and national Governments to recognize the rights and freedoms in the Declaration without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

The rights and freedoms included the enjoyment of special protection and opportunities and facilities to enable the child to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner. It included the entitlement to a name and nationality at birth, social security, adequate health care, nutrition and housing, special treatment for the handicapped, love and understanding of parents, particular care for children separated from their families, education and protection from all forms of neglect, cruelty, exploitation and discrimination.

The United Nations General Assembly celebrated its twentieth anniversary of the 1959 Declaration in 1979 and declared that year to be the International Year of the Child.

¹¹⁷ G.A res. 217A(III), U.N. Doc A/810 at 71(1948). Available at <http://www.un.org/Overview/rights.html> (last visited 11 May 2008)

¹¹⁸ Adopted as a non-binding resolution by the UN General Assembly on 20 November 1959 as G.A res. 1386(XIV), 14 U.N. GAOR Supp. (no. 16) at 19, U.N. Doc. A /4354 available at <http://www.unhchr.ch/html/menu3/b/25.htm> (last visited 11 May 2008); see also footnote 3 above.

The purpose, amongst others, was to draw people's attention to the problems that affected children throughout the world and to encourage countries to apply the rights and freedoms of the child as declared in the 1959 Declaration. A decade later, the rights and freedoms in the 1959 Declaration were transformed into a binding treaty which is known as the Convention on the Rights of the Child and was adopted by the United Nations General Assembly on 20 November 1989.

It should be noted that it was Poland that moved for a child rights treaty in the 1978 United Nations Commission on Human Rights (UNCHR) at the Thirty-fourth Session. In actual fact Poland had initially proposed a convention based on the 1959 Declaration but the world in general was not ready to consider child rights at that time.¹¹⁹ It was during the next session, the Thirty-fifth Session that the UNCHR decided to set up an open-ended Working Group on the Question of a Convention on the Rights of the Child¹²⁰. Poland was heavily involved in the drafting of the text submitted by the Working Group that had been established to draft provisions for a future treaty, and in fact it was Poland that submitted a substantive working draft¹²¹. This will be discussed later in the chapter under the discussion on the *travaux préparatoires*.

The CRC represents the first ever internationally recognised binding document that acknowledges child rights and subsequently the best interests of the child principle. However, this awareness did not suddenly appear due to the Polish initiative, the post-World War I situation or just prior to the Geneva Declaration 1924. It had begun much earlier. Some of the works or awareness date back to the first ever-recorded article in the west regarding child

¹¹⁹ Detrick, Sharon, Jakob Egbert Doek, and Nigel Cantwell, eds. *The United Nations Convention on the Rights of the Child: a guide to the "Travaux Préparatoires"*. Martinus Nijhoff Publishers, 1992. At pgs. 20-21. Online. 10 July 2017.

¹²⁰ Ibid.

¹²¹ Ibid.

rights - in June 1852- entitled "The Rights of the Child"¹²². Two other works followed this article on rights of children, namely Jean Valles in his novel *L'Enfant* in 1879 and Kate Douglas Wiggin's *Children's Rights* in 1892.¹²³

A common theme seen from this research was that a sense of guilt was simmering within society, amongst the enlightened at the very least, as to the treatment of children prior to and up until the end of the Nineteenth Century. In the age where human rights were being acknowledged and recognised, there was also an awareness that children too had rights. They were not mere property or sub-humans that existed to accommodate adults, as evidenced in the sufferings of children up to the time of the Paris Commune and the Victorian era.¹²⁴ At this time, children did not grow up in an environment that is so desperately sought and demanded in this day and age. Information is sparse but it seems that during these times compulsory education for children had not yet been implemented in England and France or for most parts of the Western world, perhaps contributing to the abuse suffered by children. There was evidence of Church or Church run schools but not a state system.¹²⁵

The status of children during ancient times was bleak. The following passage sums up early child history or experience the best.

"The early written histories which discuss children are characterised by children being considered as the raw material for successful adulthood in society rather than as individuals with interests separate from those of the adult population.

In Plato's dialogues children, or at least those who would become guardians of the

¹²² Freeman, Michael. *The Rights and Wrongs of Children*. Frances Pinter (Publishers), 1983: at pg. 18

¹²³ Ibid, at pg. 18

¹²⁴ Some authors and historians have highlighted both these incidents as the era that was the lowest ever for child rights based on the amount of neglect that was rampant. One of these authors include de Mause, Lloyd. "The evolution of childhood." *the Journal of Psychohistory* 1.4 (1974): 503

¹²⁵ There is no specific reference on this issue but the research based it on the readings in the following books that provided the background on the situation of children in de Mause, Lloyd. "The evolution of childhood." *the Journal of Psychohistory* 1.4 (1974): 503, Fortin, Jane. *Children's Rights and the Developing Law*. 3rd ed. Cambridge: Cambridge University Press, (2009); and MacDonald, Alistair. *The Rights of the Child: Law and Practice*. Bristol: Jordan Publishing Limited, 2011.

state or philosopher kings, are considered objects to be moulded by education rather than persons in their own right. The Aristotelian concept of child was likewise that the child is ‘important not for himself but his potential.’ Within this context, there are very few first-hand accounts of childhood and the place of children in the early historical record, which record contains only glimpses of the position of children in society. Gaius considered that ‘children have no intellect’ and were completely incapable under the law. The Emperor Hadrian sought to address the practice by which a father had the right under Roman law to kill his children by subjecting it to some form of judicial control.”¹²⁶

Historically the child was not deemed to be an individual that had rights in any shape or form. In fact, the child was a mere chattel in the eyes of society¹²⁷. It is not surprising that when the realisation occurred that a child had rights, it also came with a sense of guilt and determination to correct those mistakes. Recent centuries have seen great strides in developing the human psyche especially in consideration of human rights but whether or not it has succeeded remains to be seen. Despite the best endeavours of the vast majority of society, there will always be a small minority that will take advantage and manipulate others for their own personal gains. One example of this manifestation is slavery, supposedly abolished in the 19th Century but still existing today, albeit subsumed in a different form namely trafficking. This research is not stating that human trafficking is slavery *per se*. However the definition of trafficking in the Human Trafficking Protocol serves as a model definition by most States and overlaps with certain elements of slavery.¹²⁸

¹²⁶ MacDonald, Alistair. *The rights of the child: Law and practice*. Bristol: Jordan Publishing Limited, (2011). Print.

¹²⁷ As was seen in child labour throughout the years of the industrial revolution with little or no care for child welfare.

¹²⁸ This Protocol defines Trafficking to mean, the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Child rights are still in a period of infancy as compared to other facets of human rights¹²⁹. The women's rights and women's liberation movements have been fighting for more than a century and are only now making some headway and getting a degree of recognition. Yet, even the more recent rights based treaty, the Convention on the Rights of Persons with Disabilities (CRPD), which came into effect on 3 May 2008, seems to be gaining more prominence in the public sector than child rights.¹³⁰ Difficult as it seems, the efforts of the few in trying their utmost to ensure that child rights are protected is not only to be welcomed but indeed necessary from this researcher's point of view.

The CRC is the pivotal instrument for child rights and as with all pivotal instruments there are certain provisions that form the core or pillars of the entire treaty or instrument. Similarly, in the CRC there are several pillars or as stated by the United Nations Children Fund or UNICEF guiding principles¹³¹. According to UNICEF there are five guiding principles or pillars and particular attention is made of that relating to the best interests of the child.¹³²

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;"

Slavery falls within the definition of trafficking, illustrating that the problem has not been eradicated. Today human trafficking, in any form, is a multi-billion dollar industry controlled by the biggest and most powerful criminal organisations. The problem exists and everyone condemns it but no viable solution is in sight, in the foreseeable future at least. This problem has been lingering for centuries but despite the best efforts of society to eradicate this disease, it still lingers. One wonders whether it can be eradicated or whether it exists innately in the human psyche to act in such a way towards other humans. It could be questioned whether children face the same reality.

Malaysia has been classified as a source, transit and destination state by the United States of America Department of State annual country report. Malaysia has continuously lingered around the Tier 2 watch list and Tier 3.

¹²⁹ The exception is the CRPD and United Nations' Declaration on Indigenous People or UNDRIP.

¹³⁰ This observation is based on the practice and application of the convention in Malaysia whereby the government puts visibly more effort into protecting people with disabilities as compared to children.

¹³¹ As stated in their website at: https://www.unicef.org/crc/index_30177.html. 3 Jan 2018. Online.

¹³² The other four principles are non-discrimination; the right to life, survival and development; and the right to participate. All these rights have already been provided for in Malaysia albeit indirectly through the Federal Constitution though these rights may not be exactly as prescribed in the CRC.

Article 3: Best Interests of the Child in the Convention

The significance of the best interests of the child principle, as a pillar of the CRC cannot be taken lightly. The best way to acknowledge its importance is by understanding the principle. As seen through the brief history above, it is clear that the development has only recently gained momentum. Now to further understand its significance, one must truly understand the principle at the foundational level and the most basic foundational argument of any legal paper is the definition of the term or in this case, the principle.

Definition

In fact here is no clear definition of what is meant by ‘the best interests of the child’, either within the CRC or from the CRC Committee. However, the principle itself could be broken up to provide a general definition as a starting point. The first area that should be made clear is the scope of the term ‘child’. The layman might define a child as “a young human being below the age of puberty or below the legal age of majority,”¹³³ whilst another definition could be “a boy or girl from the time of birth until he or she is an adult, or a son or daughter of any age.”¹³⁴ It should be noted there is a discrepancy as to the beginning of the existence of a child, either within the womb or only after birth. This will be vital later when comparing the civil law and *Shari’ah* law. However, before that, some legal definitions are necessary. The CRC provides for the definition of a child in Article 1, which states as follows:

“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.”

¹³³ Oxford Online Dictionary at <https://en.oxforddictionaries.com/definition/child> as at 30 September 2016.

¹³⁴ Cambridge Online Dictionary at <http://dictionary.cambridge.org/dictionary/english/child> as at 30 September 2016.

The UNHCR guidelines also provide an extension to that definition, stating:

“A ‘child’ as defined in Article 1 of the Convention on the Rights of the Child (CRC), means ‘every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier’. In terms of actions by UNHCR, the word “child” refers to all children falling under the competence of the Office, including asylum-seeking children, refugee children, internally displaced children and returnee children assisted and protected by UNHCR and stateless children.”¹³⁵

In all probability, the definition was drafted to allow some flexibility for States to insert their own definition for ‘child’. Bearing that in mind, and for the purposes of this thesis, the common law and *Shari’ah* law definitions will be used where applicable. In addition to that, within the CRC the term “children” carries additional meaning in that it implies that children are also protected as a group and that there would be collective as well as individual rights.

Besides the word child, there are other key words and phrases in the principle that are open to different interpretations. On dissecting the principle into its basic components, the term ‘best interests’ is a combination of two words, each of which has a distinct meaning. Generally the word ‘best’ could be an adjective, adverb or a noun but in the context of the principle it is an adjective. The adjective here is, “a word naming an attribute of a noun, such as sweet, red, or technical.”¹³⁶ This adjective is used to enhance the noun, which in this case is the word ‘interests’. There are several definitions, but the most accurate definition for it is

¹³⁵ UNHCR Guidelines on Determining the Best Interests of the Child available at <http://www.unhcr.org/4566b16b2.pdf> as at 30 September 2016

¹³⁶ Oxford Online Dictionary available at <https://en.oxforddictionaries.com/definition/adjective> as at 30 September 2016.

“(usually interests) a group or organisation having a common concern, especially in politics or business.”¹³⁷ This description recognises a category as a whole and in this case ‘children’ are the category or group¹³⁸. Thus, the phrase ‘best interests’ can be loosely defined as the best and most *beneficial* things for the group.

However, for a more legally acceptable definition there must be more clarity especially when the group has no specific representative to express their interests. According to Michael Freeman the best definition is provided by John Eekelaar who stated that best interests,

“...revolve around children’s ‘basic’ interests (to physical, emotional and intellectual care); their ‘developmental’ interests (that their potential should be developed so that they enter adulthood as far as possible without disadvantage) and their ‘autonomy’ interests (the freedom to choose a lifestyle of their own).”¹³⁹

Most other interpretations are of similar ilk although some other explanations or descriptions regarding the best interests of the child have been arisen in different circumstances. The following definition was provided by the former EU Commissioner for Human Rights in a talk, who stated:

“...that it is in the best interests of the child to: receive education;¹⁴⁰ have family relations;¹⁴¹ know and be cared for by his or her parents;¹⁴² be heard in matters concerning him or her¹⁴³ and to be respected and seen as an individual person.”¹⁴⁴

¹³⁷ Op. Cit. n 136, as at 30 September 2016.

¹³⁸ General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, (art. 3, para. 1). Online. 19 July 2017. Available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf . para 23, pg. 7

¹³⁹Eekelaar, John. “The Importance of Thinking that Children have Rights”. *International Journal of Law and the Family*. 6 (1992): 221-235

¹⁴⁰ Article 28, CRC

¹⁴¹ Article 8, CRC

¹⁴² Article 7, CRC

¹⁴³ Article 12, CRC

¹⁴⁴ Article 16, CRC

In the same way, the CRC states what is not in the best interests of the child, for instance, to be exposed to any form of violence;¹⁴⁵ to be wrongly separated from his or her parents;¹⁴⁶ to be subjected to any traditional practices prejudicial to the child's health;¹⁴⁷ to perform any work that is hazardous or harmful,¹⁴⁸ or to be otherwise exploited or abused¹⁴⁹.”

In summary, the best legal definition for ‘the best interests of the child’ is achieved by providing an inclusive list of things that can be part of the definition and those specifically linked to child protection. It may not be as clear as most other legal definitions but one that allows a considerable amount of flexibility for member States to manoeuvre and on the positive side it creates parameters as to what the principle covers. There are other aspects within the principle that should be clarified but these will be better expressed whilst discussing the drafting process in the *travaux préparatoires*.

Travaux Préparatoires

The *travaux préparatoires* present a record of the discussion, debates and negotiations that States went through in order to finalise the CRC. In the *travaux préparatoires* one of the biggest disagreements amongst Member States was the usage of the seemingly innocuous article “a” or “the” before the phrase “primary consideration”. The basic working text - as adopted by the 1980 working group set up to formulate the provisions of the CRC - stated:

“...the best interests of the child shall be the paramount consideration.”¹⁵⁰

¹⁴⁵ Article 19, CRC

¹⁴⁶ Article 9, CRC

¹⁴⁷ Article 24, CRC

¹⁴⁸ Article 32, CRC

¹⁴⁹ Articles 33 – 36, CRC

¹⁵⁰ UN Documents E/CN.4/1349 available at <http://hr-travaux.law.virginia.edu/document/crc/ecn41349/nid-428> . Online.18 May 2017.

It was the United States of America that provided a counter proposal namely by replacing the article “the” with “a”¹⁵¹, which was not deliberated immediately. Later the revised Polish draft reverted back to the term “the” instead of “a”¹⁵² in the 1981 working group. Nonetheless the United States reintroduced its proposal of the article “a” instead of “the” on the grounds that the previous proposal had not had time to be debated during the same working group discussion.

Initially, a number of speakers agreed that the Polish draft was wider and provided the child with better protection. However, in the search for a compromise it was agreed to take as a basis for discussion the proposal of the US delegation and a debate ensued as to whether the best interests of the child should be the pre-eminent consideration in actions undertaken by those with any dealings with children.¹⁵³ Moreover, the word “paramount” used in the revised Polish draft to qualify the consideration to be given to the interests of the child was considered too broad by some delegations who felt that the best interests of the child should be “a primary consideration”.¹⁵⁴

Such was the intensity of the discussion that it was not easily resolved as can be seen in paragraph 24 of the minutes of the 1981 working group which describes the continuation of the debate from the above as follows:

“In the course of the discussion a speaker stated that the interests of the child should be a primary consideration in actions concerning children but were not the overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some cases (*e.g.* medical emergencies during

¹⁵¹ UN Documents E/CN.4/L.1542 available at <http://hr-travaux.law.virginia.edu/document/crc/ecn411542/nid-175> . Online. 18 May 2017.

¹⁵² UN Documents E/CN.4/L/1575 available at <http://hr-travaux.law.virginia.edu/document/crc/ecn411575/nid-176> . Online. 18 My2017.

¹⁵³ *Ibid*, at paragraph 22.

¹⁵⁴ *Ibid*, at paragraph 23.

childbirth). He also pointed out that his delegation did not attempt to regulate private family decisions but only official actions. The view was also expressed by some representatives that paragraph 1 [of Article 3 of the CRC] did not need to have a reference to specific obligations of States parties in respect of the best interests of the child; paragraph 1 enunciated general principles while the specific obligations of the State parties would be listed in the following provisions which would also take into consideration actions concerning children and undertaken by their parents or guardians.”¹⁵⁵

Based on the *travaux préparatoires*, the discussion did not end there but after further deliberation a consensus paragraph was accepted based on the proposal by the US delegation with the deletion of the word “official”.¹⁵⁶ The working group finally adopted the complete CRC text in 1987 at the first reading¹⁵⁷ and submitted it to the UN Economic and Social Council (ECOSOC) for further deliberation or approval. Despite this, the text was not finalised until the second reading at another session in 1989.¹⁵⁸ It was a compromise in that the word “a” was used. This has slightly diluted the force of the best interests of the child provision where instead of being the ultimate test it becomes merely *one* of the tests¹⁵⁹. Nonetheless, the discussion concluded based on consensus as seen through the following statement:

“In view of the strength of reservations voiced about making the interests of the child ‘the’ primary consideration in all situations and taking into account the fact

¹⁵⁵ Op. Cit, n. 152 at paragraph 24.

¹⁵⁶ Ibid, paragraphs 25 and 26.

¹⁵⁷ http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-1988-WG_1-WP_1.pdf?null

¹⁵⁸ UNECOSOC Report, “Question of a Convention on the rights of the Child: Report of the Working Group on the draft convention on the rights of the child.” http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-1989-48.pdf?null, at page 143. Online. 19 July 2017.

¹⁵⁹ However, a vast majority of scholars have agreed that instead of the watered down effect it has actually given it a wider berth.

that the delegations which felt that it should be did not insist on removing this revision, consensus was reached to make the interests of the child only ‘a’ primary consideration in all actions, as it had been in the text adopted during the first reading.”¹⁶⁰

The debate on primary and paramount was still ongoing. The CRC uses “primary” whilst the 1959 Declaration used the term “paramount.”¹⁶¹ This was evident in the *travaux préparatoires* when the representative from the Netherlands first proposed that the draft text of Article 3 paragraph 1 should be amended by replacing “primary” with “paramount”.¹⁶² However, as the records in the *travaux préparatoires* attest, the accepted terminology was “primary”. The differences in the terminologies and thresholds used for the principle directly affect the best interests of the child principle because both terms connote different meanings (to be elaborated below). The issue stems from something much deeper, and relates to the practice of other jurisdictions. In this case the UK position regarding the best interests of the child principle or as it is known in the UK the welfare or paramountcy principle forms part of the issue.

The welfare principle has a higher degree of application than the CRC where the principle is paramount and not primary, thus the term “paramountcy” principle. In the UK the paramountcy forms part of the common law and developed independently without any necessity for external encouragement¹⁶³. The English Courts have maintained that the paramountcy principle is the same as the requirement under the CRC and the European

¹⁶⁰ Op. Cit., n. 152, at paragraph 125.

¹⁶¹ In Chapter Three there will be a discussion on the application of the welfare/paramountcy principle in England which would include some reference to paramount vs primary, whilst the discussion in this chapter will focus on the difference of the paramount and primary consideration of the principle. This research will not overlap and instead cross-refer to the Chapters to avoid repetitive analysis and debate.

¹⁶² Op. Cit., n. 152, at paragraph 119.

¹⁶³ Whereas Malaysia needed an intervention from the CRC to persuade the authorities in Malaysia to apply the CRC principles in Malaysia.

Convention on Human Rights (ECHR) provisions but this position is one that this research neither supports nor could justify (see discussion in Chapter 3).

The debate is not limited to the judiciary but extends to academia. The literature has swung back and forth with no concrete end in sight. The situation is not helped by the fact that there are some who suggest that the CRC's primacy consideration is 'diluted' and that the UK should lead the way in developing a different or stronger standard. This could be true but this is not how international treaties operate. If the CRC is truly diluted any change ought to be made through amendments in the CRC. There has to be a discussion at the CRC, led by the UK, to amend the CRC to enable this development of the principle to be codified, otherwise the CRC remains the standard that has to be followed.

Furthermore, the CRC Committee seems to agree with the fact that there is a difference between "primary" and "paramount". This is illustrated through Article 21 of the CRC and the General comment No. 14 which states, "In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "a primary consideration" but "the paramount consideration".¹⁶⁴ There is clear evidence that the two terms are not the same and have specific uses in other parts of the CRC.

All the issues above have implications for Malaysia, especially with the CRC's and European Court of Human Right's (ECtHR) tacit approval of the degree of importance placed on the principle in the UK. Malaysia has tried its best in implementing the obligations placed by the principle, even before the *Shari'ah* is taken into consideration. The requirements have been implemented with the best interests of the child taken to be the primary consideration, as stated in the CRC. The issue of whether the principle is based on primacy or paramount consideration is one that Malaysia would probably not hesitate to define because of the

¹⁶⁴ Op. Cit. n. 138 at pg. 10

differences in the threshold. It is highly likely that, if given the discretion, Malaysia would have defined it based on the lower threshold, the reason due mainly to Malaysia's socio-legal complexities.

The socio-legal complexities in Malaysia have played a significant role. Malaysia is multi-racial but extremely conservative, notwithstanding the different races, cultures and customs that are being practised in both East and Peninsular Malaysia. If the principle is merely based on primary consideration then the privacy of the family institution would be protected. Taking into consideration the Malaysian context¹⁶⁵ where conservatism is the norm, the paramountcy principle would be almost impossible to enforce in Malaysia. When Malaysia acceded to the CRC, it was under the notion that the principle is of primary consideration and not paramount. This allows a gradual implementation of the principle on the family institution and the government authorities at an acceptable pace for Malaysia. It also allows the Government flexibility in the determining the degree of the test to be applied, when the child's best interest would be the primary consideration and when the interests of others may be considered without damaging the interests of the child.

What this implies is that any decision taken would still be for what constitutes the best interests of the child but the interests of others like siblings, parents and even close family members would also be considered before that decision was made. The concept that the EU practices that some call proportionality - and which Jonathan Herring refers to as balancing all interests -¹⁶⁶ provides that the child's are not the only interests to be considered. Under the paramountcy principle, the only consideration is that of the interests of the child in question, even at the cost of other children or members of the family.

¹⁶⁵ As highlighted in Chapter One under the heading "Background", there are a lot of idiosyncrasies whenever the subject matter is Malaysia.

¹⁶⁶ Herring, Jonathan. *Family Law*. Longman Law Series, Fifth Edition 2011. Print.

However, in summarising the discussion above, had the terms been more determinate it would have made the principle too rigid and probably impossible to be effected. Michael Freeman's statement perfectly illustrates the issue of a rigid approach as follows:

“The child's best interests are to be *the* paramount consideration. They are not therefore one factor among others. They are not even the first consideration. Under this test they are not merely the most important consideration. They are simply determinative.”¹⁶⁷

According to Michael Freeman the principle had to be drafted in such a way as to make it acceptable to all. Therefore a compromise was reached that made it acceptable to all and where each would have their own interpretation based on the Member State's situation. This is where the United States proposal during the *travaux preparatoires* was used as discussed above. Freeman continues as follows:

“The best interests concept is indeterminate. And there are different conceptions of what is in a child's best interests. Different societies, different historical periods will not agree. ... It may be that the decision one comes to, say in a disputed custody, or the policy a legislator adopts, will depend on which aspect of a child's welfare is dominant in the minds of the judge or legislator.”¹⁶⁸

This then begs the question as to why the CRC Committee continuously reminds States to follow other countries that they feel are more adaptive to the principle and where it

¹⁶⁷ Op. Cit., n 113 above, at pg. 25.

¹⁶⁸ Op. Cit. n. 113 at pgs. 27-28.

has been interpreted to the extreme or higher threshold. Surely, the States have accepted these principles and have interpreted them in their own way, bearing in mind the customs and historical background of their own country - that is unless the answer is that the CRC is heading towards a harmonised definitive principle. Legally, it makes sense to have a definitive principle to eradicate all ambiguity, however, this is not the situation in the international law or human rights forum.

The international law and human rights forum is a conundrum of layer upon layer of interpretive issues, exemptions, negotiations, and most importantly having an inability to be clear to ensure States are not bound or obligated to follow provisions which are deemed politically unviable for a specific state. To explain further, if states felt cornered or obligated to perform in a situation against their wishes, they would feel the need to withdraw from the said treaty or convention. Even worse, as the US has done before, they would unsign from a treaty or convention.¹⁶⁹ In an international instrument, whilst disagreements or disputes can be negotiated, the worst case scenario is a complete withdrawal. As long as the States remain within the treaty, the relevant committees and States would be able to negotiate a compromise.

Nonetheless, the bar has been set whereby, the best interests of the child principle has been defined as above, and the principle is one of the main or “primary” considerations but not the definitive or absolute or “paramount” consideration. The *travaux préparatoires* have also illustrated the debate surrounding the principle, that it is not “*the* primary consideration” but “*a* primary consideration”. This is the principle as set out in the CRC, the one that should be accepted by all member states and also the position that this research supports.

¹⁶⁹ The US Government under the Clinton Administration had signed the Rome Statute and informed the incoming Bush Jr. administration. The Bush Jr. administration immediately, upon taking over the leadership unsigned the Rome Statute in 2002.

Critiques of Article 3

The best interests of the child principle encapsulated in Article 3 paragraph 1 is well drafted but it is by no means perfect. Based on the *travaux préparatoires* and articles from various scholars it is clear that the principle could have been more comprehensive and clearly expressed. In this research one of the most glaring issues in the drafting is the absence of referencing or discussion of the CRC to include the provisions of the *Shari'ah*. It is not the intention of this research to criticise any specific author or scholar but since Islam is one of the major world religions with its faith and beliefs being practised as part of daily life, so there ought to be some effort to study some of the salient provisions.

Moreover, the most comprehensive work on the best interests of the child principle in the CRC is that of Michael Freeman.¹⁷⁰ This is the most comprehensive study on the best interests of the child available, providing a complete background and the development of all the relevant treaties prior to the CRC. However, the commentary has one major flaw in that it has made no mention of *Shari'ah* law or any mention of the Islamic legal position on the rights of a child. In most of Freeman's articles there is a lack of citation on and reference to Islamic law and Islamic scholarship but it is argued here that there is much that a comparative study would have provided had *Shari'ah* law been included. Among points for discussion is the definition of the child in Islam which is significantly different from those definitions discussed previously.

The Definition of Child in Islam

A more detailed discussion on the Islamic views on the rights of the child is provided in Chapter Five. The definition of a child in Islam is different to that in the CRC and other

¹⁷⁰ Op. Cit., n 113. Above.

Western jurisdictions. The Organization of Islamic Conference (OIC) came together and drafted the Covenant on the Rights of the Child in Islam (the Covenant) seemingly in response to the CRC. The Covenant defines the child as, "...every human being who, according to the law applicable to him/her, has not attained maturity."¹⁷¹ The selection of the term maturity and not majority is significant.

The Cambridge online Dictionary defines majority as "the age when you legally become an adult." It connotes a specific point in time where everyone attains majority and, in the case of the CRC, is eighteen.¹⁷² However, the term *maturity* in the same dictionary is defined as "(mental development) the quality of behaving mentally and emotionally like an adult and (full growth) the state of being completely grown physically." The terminologies used indicate different meanings with the latter describing a person that becomes an adult both biologically and mentally. This best defines the adult in Islamic law. However, the phrase age of majority is still used in this research because Malaysia has her own Age of Majority Act 1971.¹⁷³

The difference with the above definition is that the cut-off point is the age of majority or in Islamic terms *baligh*. This term will be explained in detail in Chapter Five. What should be highlighted here is that the definition is generic enough for domestic legislation to make it more specific. The *Shari'ah* in Malaysia has not defined the child in any written law. However, there is an edict which states that the foetus is 'breathed life' at the age of 120 days and therefore includes a baby still in the mother's womb.

Therefore, the definition of a child in the context of the *Shari'ah* in Malaysia is from a 120-day old foetus until the child comes of age or *baligh*. Although the rights of the foetus

¹⁷¹ Article 1, the Covenant

¹⁷² The Western concept is determinate based on the age of the individual *i.e.* as stated in Article 1 of the CRC. Whereas in Islam the concept is flexible based on the biological clock and physiology of the individual as illustrated in this Chapter.

¹⁷³ More will be discussed on the Malaysian position in Chapter Four.

are not as developed as those of the child, the foetus still has rights.¹⁷⁴ Although this is not an ideal definition and could be termed a ‘divine based’ provision it cannot be specific since it includes the concept that different people come of age (or reach maturity) at differing ages. From some perspectives, including the Islamic perspective, a foetus’ right to life is subject to a woman’s right to an abortion.¹⁷⁵ Even in the definitions above, the beginning of the existence of the child has never been fully accepted by all. In Islam the issue is clear that the child¹⁷⁶ in the womb is an individual with every right to live.¹⁷⁷ The only exemption to the said maxim is if the bearing of the child endangers the life of the mother, and thence an abortion becomes a necessity or when the child has no chance of survival, for example an encephalic baby.¹⁷⁸ This is basically the definition of a child in Islam.

The difficulty for researchers that do not know Arabic in order to have access to the *Shari’ah* material is understood, particularly since material in English is very limited. The researcher himself faced the same problems because the discussions within the Islamic scholarly circles were more often than not in Arabic. The difficulty for a non-Muslim and non-Arabic reader or researcher to study the *Shari’ah* is considerable because the Arabic language does not have exact equivalence with English¹⁷⁹. Furthermore if it was difficult

¹⁷⁴ The rights of an unborn child is not a complete right. It has the right to life during the time they are in their mother’s womb and even the right to be considered for *faraidh* or succession. For further reading see Majdah Zawawi, *Assisted Reproductive Technologies in Malaysia: Balancing Rights and Responsibilities*. Unpublished PhD Thesis. Kuala Lumpur: International Islamic University, Malaysia, (2007) p. 303. See also Yasein Mohamed, “*Filrah* and Its Bearing on the Principles of Psychology”, *The American Theories of Islamic Law Journal of Islamic Social Sciences*, 12: 1, (1995): 12. Print.

¹⁷⁵ This thesis will not debate on a person’s right to have an abortion because it is not part of this thesis and is subject to the laws of the relevant State. The abortion law in Malaysia is very strict but this in turn has given rise to “illegal” abortion clinics being run by medical professionals. In a meeting with the representatives of the Malaysia Medical Council, the medical professionals feel that the woman’s right not to be burdened/humiliated by the presence of the child supersedes the law. The section 315, Malaysian Penal Code specifically states that an abortion is illegal unless it is to save the mother (there are more explanations and exceptions).

¹⁷⁶ This issue will be described in more detail in Chapter Five.

¹⁷⁷ At the very least, from when the foetus is 120 days old.

¹⁷⁸ In Malaysia, most medical practitioners have ruled that the child has no chance of survival; although in the western civilisations there have been cases of successful birth and survival after medical surgery.

¹⁷⁹ The Arabic language does have similarities with the French language.

enough to find material on the child's environment in the west, while it is nearly impossible to find it for the Muslim world, especially in English¹⁸⁰. The language barrier is therefore significant. Arabic is not an easy language to learn and for juristic interpretation one must have a strong command of the Arabic language. The mere fact of being a practising Muslim does not entitle or allow a person to make interpretations of the *Quran*.

The fear is that without the necessary training and education in the Arabic literature, the interpretation may be awry. Therefore for the untrained scholar one has to accept the approved texts either from one of the branches of the Sunni schools or from one of the Muslim scholars. It comes as no surprise therefore that there is an absence in Western literature of any reference to Islamic thinking and thought in this area. However the concern is that in developing and progressing the principle there might be challenges and obstacles arising from differences in the understanding and interpretation of the principle. Also, any progress or development made without input from the Muslim perspective may give the wrong impression to the Muslim world.

Some other examples of the application of best interests of the child in Islam will now be looked at, first going back to the birth of the child and the issue of the rights of a woman to have an abortion mentioned earlier. The life of a child begins at the foetal age of 120 days old for Muslims, at least in Malaysia. The protection of the life of the child falls within the definition of the best interests of the child principle. However, the question remains as to how one would enforce it if it contradicts a woman's right to have an abortion¹⁸¹.

Basically the question is whether the rights of the child or the rights of the woman prevail. In fact, in Malaysia there is no choice as things stand, despite calls from women's advocate groups, and this situation will continue until the Penal Code is amended and there

¹⁸⁰ The literature in Arabic is quite extensive.

¹⁸¹ The argument in footnote 174-178 above.

is the notion that the Government might be inclined to side with women. However, this may not be happening in the foreseeable future on the grounds that the current Malaysian Government cannot be seen to be contradicting Islamic teachings or the *Shari'ah*. Therefore abortion would never be legal in Malaysia, especially for foetuses above 120 days old and therefore on this debate, the rights of the child would probably prevail over the rights of the woman.

Another difficulty that arises in interpreting the definition of the best interests of the child, is the right of the child not to be subjected to any traditional practices prejudicial the child's health or Article 24 of the CRC. The most obvious example is the issue of circumcision in Islam, which is mandatory for boys.¹⁸² There have been cases in England whereby the judge has ruled that male circumcision for boys (under the age of 18) is deemed to be not in the child's best interests based on Articles 3 and 24 of the CRC.¹⁸³ The practice is to have the circumcision at a young age before the boy has reached five years old. However, some have even argued that circumcision at a young age is a human rights violation.¹⁸⁴ It is interesting to note that the author of the article claiming that circumcision is a human rights violation is also the Executive Director, Attorneys for the Rights of the Child and was referring to a German case on the matter.¹⁸⁵

¹⁸² Despite it being quite rampant in Muslim countries, female circumcision or female genital mutilation is not compulsory and some jurists have levelled it as merely recommended. However, it has to be stated that the practice of female circumcision in Malaysia is not the same as practiced in Africa. In Malaysia, for those who want to be circumcised, it can only be done by medical professionals or midwives who have had proper medical training. It should also be noted that in Islam there are also exceptions to the rule but it *is* mandatory for men especially when they want to attend congregational prayers or lead the said prayers.

¹⁸³ *Re J (Child's Religious Upbringing and Circumcision)* [2000] 1 Fam (CA) 307 at para 32 and *Re S (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam)

¹⁸⁴ J Steven Svoboda, "Circumcision of male infants as a human rights violation" *J Med Ethics* 2013; 39: 469-474

¹⁸⁵ *Landgericht Cologne Judgment 7 May 2012 – Docket no. 151 Ns 169/11 – final*

There are some cases where it has been argued to be a human rights violation, such as *SS (Malaysia) v Secretary of State for the Home Department*¹⁸⁶ and *Re B and G*.¹⁸⁷ Although the researcher understands the judges' perspective, the fact remains that the procedure is medically safe with modern technology being used¹⁸⁸ and the procedure is mandatory for Muslim men. This also illustrates another facet of Islam that may be contradictory to the western sphere of thought in that the reason a Muslim child is circumcised is to bear witness that the parents have fulfilled their duty to ensure that their children are Muslims. However, in western civilization, a child should be free to decide for himself when he or she comes of age, usually at 18 or 21 depending on their upbringing.

This illustrates both the positive and negative aspects of a theological approach to the best interests of the child principle. In the *Shari'ah* this principle is applied for religious reasons. None of those reasons can be questioned. Muslims accept them as they are and are unlikely to amend the provisions at all. However, there are some Muslim scholars who question this rigidity in Islam, especially those of Shi'ite denomination.

The Shi'ites believe that this rigidity in the Sunnis is hindering the progression of Islam. Taking for example the *Shari'ah* itself, according to some Shi'ite scholars, the *Shari'ah* law is not divinely ordained and as such more flexibility should be allowed. Despite there being some truth regarding the so-called rigidity,¹⁸⁹ the truth is there is still room for innovation when the need arises and as long as it does not constitute a violation of the *Shari'ah*. Some of these arguments have been mentioned in Chapter Five, but let us take one example to try and negate this argument.

¹⁸⁶ [2013] EWCA Civ 888, Case No: C5/2013/3057 Court of Appeal (Civil Division) 18 July 2013 2013 WL 3550456

¹⁸⁷ [2015] EWFC 3

¹⁸⁸ A common practice in Malaysia is to use laser cutters for more hygienic procedures.

¹⁸⁹ The term Sunni comes from the Arabic phrase *Ahlul Sunnah Wal Jamaah* which is literally translated into 'the people following practices of the society' and refers to the teachings of the Holy Prophet Muhammad (pbuh).

To take the example of a girl going to a boarding school in some faraway place,¹⁹⁰ according to the *Sunnah*, a girl or woman can only leave the house with a *muhrim* or a person related; or someone she cannot marry. This is a mandatory provision in the *Sunnah*. However, the Muslim scholars have agreed, including the Sunnis, that a girl who wants to stay in a boarding school has been deemed to fulfil that requirement once she has obtained her parents approval to register in the said school. The same applies to a woman heading off to work. Technically, she has to meet the said requirement or obtain her husband's or parents' approval everyday she wants to go to work. The Muslims scholars have agreed that the initial permission is sufficient until the husband or parents expressly state otherwise.

Therefore there is innovation within the *Shari'ah* and it is not so rigid in situations that it becomes stagnant. There can be interpretation of the *Shari'ah* in certain circumstances but it must fulfil certain elements. This then leads to the next issue of whether there is an ulterior motive to these so-called human rights instruments. In a meeting to draft Malaysia's next CEDAW and CRC Reports within the Ministry of Women, Family and Community Development it was raised by the then Law Lecturer, Professor Dato' Dr. Zaleha Kamaruddin¹⁹¹ that when Malaysia is preparing reports it has to ensure that it does not fall into the trap of becoming too western-centric, thereby foregoing all our Asian values. There is an awareness within Asian academia that there should be some safeguards in place to check this phenomenon¹⁹².

In summary, the best interest of the child principle is an acceptable principle to all, be it the common law or the *Shari'ah*. Acceptance itself is not a problem as proven by the fact that all the Islamic States have accepted Article 3 of the CRC in the current form whereby

¹⁹⁰ Most of the top academic schools in Malaysia either secular or religious are boarding schools.

¹⁹¹ Now the Rector of the International Islamic University Malaysia

¹⁹² The shortage of material in Malaysia affects several other Asian jurisdictions. However, there are now literatures from Pakistan and Iran in trying to clarify *Shari'ah* law for western consumption. There are also other theoretical perspectives, such as post-colonialism, highlighting Asian-centric thinking.

the threshold is a primary consideration without any reservations. The issue however is the understanding of the said principle and working with the same interpretation.

Horses for Courses

Another area that should be highlighted relates to the primary versus paramount debate. That debate is specific but it illustrates the general feeling that surrounded the drafting of the CRC and lingers today within the CRC Committee. The *travaux préparatoires* clearly indicated that compromise was necessary to ensure the smooth passage of the CRC and in the case of this research included the best interests of the child principle. Besides the lack of *Shari'ah* reference, the interpretation of the provisions of the treaty differs on a case-by-case basis. This should not be the case for a treaty that has to apply to all the Member States.

The degree involved in Article 3 paragraph 1, was drafted specifically to allow for flexibility giving all States room to comply. The importance here is that the application “shall be a primary consideration” and not “shall be the paramount consideration”. This thesis agrees that the meaning of “primary” as first or main but it is not the only consideration. This research is of the view that if the intention of the drafters was for the best interests of the child to be the only consideration then Article 3 paragraph 1 would have read differently.

Looking at the *travaux préparatoires* above, it was not a coincidence that the US proposal was chosen over the Polish proposal despite the latter being a more popular choice¹⁹³ but despite this the CRC Committee seems reluctant to abide by the consensus. The principle is accepted but *what* is applicable and how it is to be defined in order to apply it in practical terms, acceptable to all parties, remains unclear. The principle was defined loosely but the application has been narrowed through the comments made by the CRC Committee

¹⁹³ Refer to the discussion above in footnote n. 150-154.

on States that have used their own interpretation on the said principle. The problem arises when the CRC Committee insists on it being harmonised into what they deem acceptable with the result that the principle becomes rigid again.

The researcher deduced the above based on the CRC Committee's own publications. The first is in General Comment No. 14 where it describes, "shall be a primary consideration" as follows:

“36. The best interests of a child shall be a primary consideration in the adoption of all measures of implementation. The words “shall be” place a strong legal obligation on States and mean that States may not exercise discretion as to whether children’s best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.

37. The expression “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

38. In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be “a primary consideration” but “the paramount consideration”. Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues.

39. However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other

interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

40. Viewing the best interests of the child as “primary” requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.”¹⁹⁴

Based on the above, specifically paragraphs 36 and 37, the CRC describes the importance of “a primary consideration”. However, the level described does not reconcile with the description in paragraphs 38 and 39. In paragraph 38, the principle is described as important but if it is to be the determining factor then it should be “the paramount consideration”, as described earlier in this chapter. Therefore, it is natural to conclude that there have to be differing levels of application based on the terminologies used.

Furthermore, in paragraph 39, the CRC describes possible conflicts if the best interests of the child principle is applied in isolation. The application should look at the facts

¹⁹⁴ Op. Cit., n. 138, paragraphs 36-40, pg 10.

of the case as well as other factors that are also principles existing within the CRC albeit not having the same status as the best interests of the child, but important nonetheless. This research is of the view that if consideration is to be given to other elements and aspects of the CRC then the best interests of the child are not the paramount considerations because there will be conflict between the different considerations.

This research reaffirms this position based on the understanding that if the best interests of the child principle is to be applied it must consider all factors before any decision is made. It does not matter whether the consideration is based on an individual child or a group of children; it has to be done completely. The fact that the child's issues must be studied on a case-by-case basis is agreed, after which the other factors must be reviewed. The elements that have to be considered have already been provided by the CRC and are further entrenched by the CRC Committee¹⁹⁵ including: the child's view,¹⁹⁶ protection of the child's identity,¹⁹⁷ the preservation of the family environment and maintaining relations,¹⁹⁸ care, protection and safety of the child,¹⁹⁹ situation of vulnerability, the child's right to health²⁰⁰ and the child's right to education, all of which must be considered based on the best interests of the child.

The principle has been clarified but there are still implementation issues that remain ambiguous. This research is mindful that the CRC is an international treaty that was built on consensus, but it is binding. There should not be different standards applied to different States because there is only one treaty. The principle was drafted loosely for a purpose, nonetheless it has to be followed.

¹⁹⁵ Op. Cit., n. 27. At pgs 12-17.

¹⁹⁶ Article 12, CRC

¹⁹⁷ Article 8, CRC

¹⁹⁸ Articles 9, 18 and 20, CRC

¹⁹⁹ Articles, 3 (2), 19 and 32-39, CRC.

²⁰⁰ Article 24, CRC

Conclusion

This chapter has tried to convey the debate surrounding the best interests of the child principle with a more practical appreciation. The theoretical aspect is still being debated and shows little sign of abating. What the discussion proves is that the CRC has determined the scope of the best interests of the child principle and the threshold. However, there seems to be a move to enhance the threshold beyond the mandate. This factor can be seen in the application of the best interests of the child principle in certain States that have gone above what has been set by the CRC.

If the development were universally accepted then this development would be a natural progression and should be acceptable to all Member States. However, the fact that some States are still lagging behind in implementing the most basic of all the pillars of the CRC is clearly not a sign that progress and development is the next step for the CRC. Instead it should still be seeking to understand and maintain the current position.

This chapter reiterates the position that the best interests of the child principle is legally binding on all Member States and the principle has been specifically stated in Article 3 paragraph 1. The principle also states that the best interests of the child principle is “a primary consideration” and not “the paramount consideration”. This entails an approach involving greater compromise whereby the rights of the child are still the main and most important interests to be protected but will be balanced out with other interests. This may not be the same approach taken to the principle as in one of the States used for comparison in this research, namely the UK. In Chapter Three, the research will look at the best interests of the child principle in the UK and its application.

Besides the above, this Chapter has also offered another critique towards the best interests of the child principle, namely that the CRC does not view the *Shari'ah* as a valid

source. Despite some referral to the *Shari'ah* in articles 14 and 20, there is no record of any relevant discussion on this in the drafting of Article 3 paragraph 1. Although some of the blame could have been laid on the Muslim countries themselves for not seeking involvement in the earlier sessions or Working Group discussions, this should not be an excuse to marginalise the views of about twenty percent of the world population²⁰¹. In Chapter Five, this research will delve into the *Shari'ah* realm to compare the best interests of the child and the *Shari'ah* equivalent.

The CRC is the treaty for child rights and should be representative of all the best principles available and therefore the absence of the *Shari'ah* principles in Article 3 is not ideal. This should not have been the case since the CRC was debated in a friendlier environment as compared to other conventions. The following quotation elucidates that fact:

“The Working Group operated on the basis of consensus. At no time during its work, in other words, was a proposal taken to a vote. Besides being important to the spirit of the drafting exercise, this had three important ramifications.

Firstly, it contributed to the fact that the drafting process was so lengthy, since it meant that every text and proposed modification had to be debated until all members of the Working Group could agree or at least agree not to disagree.

Secondly, the consensus system resulted in the abandonment of certain proposals, notwithstanding the support of a clear majority. One casualty was a proposal to include a provision explicitly placing severe limitations on medical experimentation on children: there was general agreement on the principle, but no formulation could be found that satisfied all delegations, so the issue was quite simply dropped.

²⁰¹ Based on a study carried out by Pew Research Center in 2015 and available at the following website, <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>

Another major factor which affected the functioning of the Working Group, more especially in its early years, was the political climate. The change in the atmosphere of the meetings as of 1985, when East-West relations began to thaw in earnest, was remarkable. It contributed greatly to the Working Group being able gradually to move into top gear from then on, since it reduced to a minimum the purely political statements and negotiation that had previously been a hallmark of the discussion.”²⁰²

The quotation describes an environment that was initially tedious but ended in being very affable. The Working Group should have invited experts or NGOs that had a background in *Shari’ah* law to assist them or at the very least provide some input. Nonetheless, this research will hopefully provide more insights into the *Shari’ah* in Chapter Five.

The situation that currently exists should not be a blueprint for the way forward for the best interests of the child principle. This is the standard and level that exists today but it need not be the future for the best interests of the child principle. In the proceeding chapters, the best interests of the child principle in the CRC will be analysed comparing England and Malaysia’s implementation in the CRC, by analysing the UK Children Act 1989 and the Malaysian Child Act 2001 as well as the *Shari’ah*. This will entail comparisons of the UK equivalent of the best interests of the child principle namely the welfare or paramountcy principle, and the best interests of the child principle in Malaysia with the influence of the *Shari’ah* on Malaysian law. The next chapter will first introduce how the best interests of the child principle developed in England, with a brief historical segment. The chapter will then look at the law today.

²⁰² Op. Cit., n. 119, pg. 22

Finally, the best interests of the child principle has been applied throughout the world and in concluding this chapter, this quote from 1994 illustrates the principle quite accurately:

“...although the principle has often been recognized in international instruments it has yet to acquire much specific content or to be the subject of any sustained analysis designed to shed light on its precise meaning. The most important formulation is clearly that contained in Article 3(1) of the Convention on the Rights of the Child. ...

Yet despite its very limited jurisprudential origins, the principle has come to be known in one form or another to many national legal systems and has important analogues in diverse cultural, religious and other traditions. This apparent commonality contrasts sharply, however, and potentially very revealingly, with the very diverse interpretations that may be given to the principle in different settings. Thus, to take one example, it might be argued that, in some highly industrialized countries, the child’s best interests are ‘obviously’ best served by policies that emphasize autonomy and individuality to the greatest possible extent. In more traditional societies, the links to the family and the local community might be 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.”²⁰³

²⁰³ Alston, Philip. “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” *International Journal of Law and the Family* 8.1 (1994): 1-25. Print.

Chapter Three

The best interests of the child principle in England

Introduction

In the previous chapter, it was established that the best interests of the child principle was formalised after a series of declarations which finally led to the negotiated convention. It established the necessary requirements that States must abide by in order to fulfil the best interests of the child principle. Initially, the chapter looked at the *travaux préparatoires* and the definition of the best interests of the child principle in order to understand the historical background of the principle with the hope of further understanding it. The historical aspect is important because it provides some of the answers as to why the principle was drafted in its current form.

As stated in the previous chapter the importance of the principle is such that it is acknowledged as one of the five main pillars of the CRC²⁰⁴. Some of the salient features of the principle include: when the principle should be applied, who should apply it and how States should enforce it. Even at sentence structure level, the difference of a definite and indefinite article (“a” and “the”) had led to the best interests of the child principle being construed as either the *sole* criteria or merely *one of the criteria* to be considered whenever the interests of the child are raised. The discussion regarding the level of consideration to be given to the principle was further debated as to whether it should be construed as paramount or primary, which must be read together with the previous factor of the definite and indefinite article. Read together, this meant that the principle either attained an absolute status - where

²⁰⁴ Freeman, Michael. “Article 3. The Best Interests of the Child.” In A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.). *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden and Boston. Martinus Nijhoff Publishers, (2007): 1. Print.

no other consideration was remotely as important - or it had to be considered together with other factors or interests.

Among the issues that will be looked into in this chapter is the UK application of the welfare or paramountcy principle and if it fulfils UK's requirements under the CRC. This is important because the central issue to be deliberated in this chapter regards the debate between the rights-based perspective of the CRC and the primary consideration it gives to the best interests of the child principle, as opposed to the welfare principle or paramountcy principle enunciated in the English jurisprudence, which is a welfare-based approach. The best interests of the child principle has been applied in England since the late nineteenth century, as part of the common law.

This chapter begins with a brief historical overview of the principle as applied in the common law of England. This is important for this thesis because the crux of this research is the comparison of two States, England and Malaysia, who are both parties to the CRC and share an almost identical legal system. The similarity extends to the application of the law within both legal systems. Innately, the application of the principle should be similar no matter which country is involved but Article 3 paragraph 1 has not been applied uniformly throughout. This occurs because the principle has been interpreted differently in Malaysia, which sees it as an international human rights principle²⁰⁵, as compared to England which applies it as a family law principle²⁰⁶. However to have any semblance of understanding the application of the principle in England one needs to look at the history and development of the principle.

Following this, the welfare principle in English law is considered in the context of the CRC. Referring to the literature mentioned above, it is shown how the application of the

²⁰⁵ This is how Malaysia looks at the principle.

²⁰⁶ This is how England looks at the principle.

principle is influenced by the fact that England's domestic law also has issues within itself that require specific interpretation. In the UK it is known as the welfare or paramountcy principle. This chapter also looks at the possible future direction of the principle, including not only the academic perspectives, but also the practical aspects of the principle. The implications for Malaysia will be discussed in Chapter Four

Background

The Common Law has been developed over centuries, some records putting it as early as the middle of the 12th Century. Therefore, before the best interests of the child principle was introduced in England there were other maxims and norms applicable or exercised. The earliest known child law principle was in the pre-Common Law era when the British Isles were ruled by the Holy Roman Empire. Emperor Hadrian, who happened to be the first ruler to attempt making a law for children, tried to curb the absolute power of parents over children. The Roman maxim then was known as *patria potestas* or power that the male head of a family exercised over his children and his more remote descendants in the male line, whatever their age, as well as over those brought into the family by adoption²⁰⁷. This was the norm and the state tried its best not to intervene with internal family matters. The issue of child protection and upbringing was essentially therefore an internal family matter; and for the most part untouchable by the State.

However, there were exceptions to the rule which alludes to another maxim and that is *parens patriae*²⁰⁸. In cases where the child's parents were deemed to be unfit to care for

²⁰⁷ MacDonald, Alistair. *The rights of the child: Law and practice*. Bristol: Jordan Publishing Limited, (2011). Print and also in the Oxford online dictionaries defined as "The absolute legal authority of the male head of a Roman family or household over its members; the authority of a Roman paterfamilias" at https://en.oxforddictionaries.com/definition/patria_potestas as at 1 October 2016.

²⁰⁸ *Parens patriae* is Latin for "parent of the nation." In law, it refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. For example, some children, incapacitated individuals, and disabled individuals lack parents who are able and willing to render adequate care, requiring state

the child, the courts would then order the government to take intervening action. Initially, this was only done in cases where the parents were deemed to be of unsound mind. This development came in the late 16th and early 17th Century²⁰⁹. So far this is the earliest known record of any form of rights or norm on children *per se* in the English legal system. Ironically from this maxim there are traces of the best interests of the child principle and it is possible that it was developed from this. Although the courts and the government did not declare it as such, their actions were taken in the best interests of the child to ensure that children were cared for and not left in the hands of an incapacitated person.²¹⁰ Initially it began as rights for the child.

Origins of the Welfare Principle

This chapter continues by focusing on the law relating to the welfare of the child principle itself whilst tracing the legal origins of the principle. According to Eekelaar, the origins of the welfare principle originated from the case of *R. v De Manneville*.²¹¹ It was in this case that the Court had to consider whether a father who would put his child in bodily danger should be allowed to claim possession of his child. The Court decided that it was for the welfare of the child that custody was not awarded to his father if to do so would put him in bodily danger. This was the origin of the ‘welfare principle’ of the Chancery courts.²¹²

intervention. The Oxford online dictionary defines it as “The monarch, or any other authority, regarded as the legal protector of citizens unable to protect themselves.” At https://en.oxforddictionaries.com/definition/parens_patriae as at 1 October 2016.

²⁰⁹ Again information gathered from several sources such as readings in the following books that provided the background on the situation of children in de Mause, Lloyd. "The evolution of childhood." *the Journal of Psychohistory* 1.4 (1974): 503, Fortin, Jane. *Children's Rights and the Developing Law*. 3rd ed. Cambridge: Cambridge University Press, (2009); and MacDonald, Alistair. *The Rights of the Child: Law and Practice*. Bristol: Jordan Publishing Limited, 2011.

²¹⁰ Although at that time the justification was for totally different reasons and perhaps even more sinister based on the articles and material on the history of children.

²¹¹ (1804) 5 East 221

²¹² Eekelaar, John. “The Emergence of Children’s Rights.” *Oxford Journal of Legal Studies* 6.2 (1986): 161. Print.

However, the principle as it was practised then was not the same as the principle that is being practised in England today. The welfare principle today is child-orientated or child-friendly whereas the principle then was totally different, being more patriarchal. One need only compare the principle by looking at some of the decisions taken in cases that illustrate the application of the principle as it was first understood in the nineteenth century. They show that the principle was directly linked to the parents or as another stated, "...the private family sphere English Law continued to view children as the property of their father."²¹³

These following cases were referred to both by Eekelaar²¹⁴ and MacDonald²¹⁵ to illustrate the welfare principle in its infancy. In *Wellesley v Duke of Beaufort*²¹⁶ the "...filial affection and duty towards their father operate the utmost." So the child's interests were best met by showing duty to the father. Then in *Symington v Symington*,²¹⁷ Selborne LC said, (it is) "in the material and moral interest of boys to leave them in the care of their natural and legal guardian." It is assumed that the position is the same for girls. The best case to sum up the principle as it was then is the case of *re Agar-Ellis*.²¹⁸ It was stated that, "...when by birth the child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interests of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father but leave it to him the responsibility of exercising that power which nature has given him by birth of the child." This could be said to be a naturalist view of the status of children at that time and

²¹³ Alistair MacDonald, *The Rights of the Child: Law and Practice*, Family Law Jordan Publishing Limited 2011, at pg 9 quoting Clarke Hall, W *The Queen's Reign for Children* (1897) Fisher Unwin

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ (1827) 2 Russ 22

²¹⁷ (1875) L.R. 2 Sc & Div 415

²¹⁸ (1883) 4 ChD 317

seems to ignore the need to acknowledge the role of the mother or wider familial care. The extremity referred to was not defined but could be seen on a case-by-case basis.

Nonetheless, despite this initial approach taken by the Courts and the Government to leave the welfare of the child purely in the hands of their father or legal guardian this situation did not last. It was during the late nineteenth century that the child protectionist movement gained momentum in Europe (as mentioned in Chapter Two). Similarly, in England a new law was passed to that effect, namely the Prevention of Cruelty to, and Protection of, Children Act 1889. Section 1 provided that it would be an offence to ill-treat and neglect children.

“Any person over sixteen years of age who, having the custody, control, or charge of a child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health, shall be guilty of a misdemeanour, and, on conviction thereof on indictment, shall be liable, at the discretion of the court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition to payment thereof, to imprisonment, with or without hard labour, for any term not exceeding two years, and on conviction thereof by a court of summary jurisdiction, in manner provided by the Summary Jurisdiction Acts, shall be liable, at the discretion of the court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.”

It is interesting to note that the Act above created an offence for any person above 16 years old, against boys under 14 and girls under 16; while no definition of child was provided for in the said Act. It is assumed that childhood ended at the age of sixteen in the late

nineteenth century.²¹⁹ This shows that childhood ended earlier then, before the developments in the late nineteenth century. There is no evidence as to whether the age of majority was by design or the necessity of getting more people into the labour force, but that was the age of majority in the 1889 Act. This also shows that the current generation is accorded more time to mature and develop than their ancestors.

The above provision also listed the categories of offences namely that one, “ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health”. This was clearly a paradigm shift from leaving the care, protection and development of the child entirely to the child’s parents and legal guardian. The shift from the extreme cases scenario before state intervention was quite clear although it took time before the implementation was completed by all interested parties, both administrators and Courts.

The Courts also began leaning more closely to a welfare principle that was more child-centric. For example, in *re McGrath*²²⁰ Lindley J held that:

“The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical wellbeing, nor can ties of affection be disregarded.”

Subsequently, not only was the welfare principle established, there was also an enhanced level or importance of the principle since the welfare of the child had to be the paramount consideration in the case. The case of *F v F*,²²¹ Farwell J. held that, “The court in

²¹⁹ There are other legislations that uses 16 years as the cut off period. Subsection 8(1) Family Law Reform Act 1969 states that 16 year old can give consent for any surgical, medical or dental treatment without obtaining consent from their parents or legal guardians.

²²⁰ [1893] 1 Ch 143

²²¹ [1902] 1 Ch 688

considering the question of guardianship has regard before all things to the infant's welfare; it has regard, of course, to the rights of the father and the mother, but the essential requirements of the infant are paramount." This case followed an earlier American case that had coined the phrase that everyone knows today. The Kansas Supreme Court held that the courts *paramount* consideration was to be the child's welfare.²²²

Despite Eekelaar stating that the Courts' motives may not be purely for the child's best interest,²²³ the enactment of the 1889 Act and the Courts actions marked the advent of the welfare principle in England. This sowed the seeds of the welfare principle espoused in the English Courts to this day, in cases involving children. Although other aspects may be considered, it is the welfare of the child that must be given the paramount consideration. While the principle did not begin with that express intention, it has developed into that condition. The paramouncy principle basically means that in cases involving aspects of the child that are listed in Section 1 of the 1889 Act, the most important consideration must be the welfare of the child.

Is the Welfare (or Paramouncy) Principle in the Children Act 1989 Similar to the Best Interests of the Child Principle in the CRC?

Now that it has been established that the welfare principle is embedded in the English common law, the main question is whether the welfare principle is equivalent or fulfils England's obligations under Article 3 of the CRC which speaks of the best interests of the child principle. The best interests of the child principle is not expressly stated in the English Children Act 1989. This is so despite the fact that the UK and England are parties to the CRC.

²²² *Chapsky v Wood* (1881) 26 Kan 650 per Justice Brewer.

²²³ Op. Cit. n 213 above at pg 169 paragraphs 2-3.

In England the best interests of the child principle has been construed as part of its well established welfare principle, which is enshrined in the Children Act 1989. The welfare principle has been defined in case law to be as follows:

“...a process whereby, when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because of its first importance and the paramount consideration because it rules upon or determines the course to be followed.”²²⁴

This is also why the welfare principle is also called the paramountcy principle. The historical reasoning behind this has been discussed above. In addition to that, an event closer in time could be studied, that is the repealed Act of 1971 which used the term “first and paramount consideration”; numerous case laws that have interpreted this term. The welfare of the child is the first and ultimately only consideration that the Courts should entertain when dealing with the child’s best interests. The drafting of the 1971 Act was probably on the above quoted case, thereby codifying the common law ratio at the time.

Nonetheless, the welfare or paramountcy principle is a rather ambiguous term since the literature on the matter is divided, even in England. Some claim that the principle follows the principle as laid down in the CRC²²⁵ however others claim that it is the main and only

²²⁴ J v C [1970] AC 688 at 710-711

²²⁵ Hoggett, Brenda, Richard White, Paul Carr and Nigel Lowe. *Clarke Hall & Morrison on Children: Law Relating to Children and Young Person Special Bulletin A Guide to the Children Act 1989*. London: Butterworths, (1990):2. Print.

test to be administered in cases involving children.²²⁶ This has led to it being deemed contradictory with another English Law, the Human Rights Act that will be explained further in this chapter.

The welfare or paramountcy principle is not only ingrained in the English common law but according to case law, it is part of the Court's inherent powers. This inherent power of the Court was there even before the welfare or paramountcy principle was expressed in the Children Act 1989. The welfare principle takes the child's welfare as its paramount consideration and therefore this is also the child's best interest. The welfare principle is provided for in section 1 of the Children Act 1989, which states as follows-

“1. Welfare of the child.

(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

²²⁶ Choudhry, Shazia and Helen Fenwick. “Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act”. *Oxford Journal of Legal Studies*, 25.3 (2005): 453-492. Print.

- (b) his physical, emotional and educational needs;
 - (c) the likely effect on him of any change in his circumstances;
 - (d) his age, sex, background and any characteristics of his which the court considers relevant;
 - (e) any harm which he has suffered or is at risk of suffering;
 - (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
 - (g) the range of powers available to the court under this Act in the proceedings in question.
- (4) The circumstances are that—
- (a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
 - (b) the court is considering whether to make, vary or discharge a special guardianship order or an order under Part IV.
- (5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.”

[emphasis added]

Section 1 has been interpreted to include the best interests of the child principle in that it considers the child’s welfare as the primary concern in determining what is best for the child. This section goes on to explain when and how to use the principle. The elements that form the welfare principle have been provided for in paragraphs (a) to (g) of subsection 3. There is no mention of referring to the parents or guardians of the child in question.

Similarly there is no referencing to siblings in the provisions. There is a glaring propensity for supporting the child and the child's needs only.

As with any other general principles of law or maxims there are of course exemptions to the said principle. These exemptions are provided for in subsections (4) and (5). This law and the exemptions are part of the welfare and paramountcy principle, but the main question is whether it also falls within the ambit of the best interests of the child principle provided for in the CRC.

England of course, has an obligation to ensure that the provisions of the CRC are fulfilled especially those that are deemed to be the general principles of the CRC.²²⁷ However, since the Children Act 1989 came into force before the CRC, the Courts have taken the role of incorporating the principles of the CRC into English law since Parliament itself has not done so. Again, the question arises as to whether that meets the requirements of the CRC. The last CRC Committee Recommendations to the UK do not really answer this but they do seem to show that the Committee feels that whatever the rule that has been placed to fulfil these obligations has not been executed completely. The Committee's recommendations regarding the best interests principle in the UK, was as follows:

“Best interests of the child

26. The Committee regrets that the principle of the best interests of the child is still not reflected as a primary consideration in all legislative and policy matters affecting children, especially in the area of juvenile justice, immigration and freedom of movement and peaceful assembly.

²²⁷ Fortin, Jane. *Children's Rights and the Developing Law*. 3rd Edition Cambridge University Press, (2009). Print.

27. The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of criminal justice and immigration.”²²⁸

The paragraph above has been emphasised in bold type exactly as done by the CRC Committee in their recommendation report. It should be pointed that the report above is for the UK as a whole and includes the position of Scotland, Northern Ireland and Wales²²⁹. This research will limit the focus on England as mentioned in Chapter One.

The recommendation stated that the UK has not fully incorporated the best interests of the child principle in all legislative and policy matters involving children. The CRC Committee illustrated three areas of concern, namely criminal justice, immigration and freedom of movement and assembly. However the CRC Committee recommended that the best interests of the child should be more integrated especially in specific areas, namely criminal justice and immigration. The CRC Committee did not elaborate further than that and one can assume that the transgressions were not major ones.²³⁰ It merely mentioned that the UK should address and integrate the principle into UK policies and law.

²²⁸ Concluding Observations: United Kingdom of Great Britain and Northern Ireland 2008

²²⁹ The point of variance between Scotland and England is quite clear and that is the youth justice system, as stated by Arthur, Raymond. “Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland”. *International Journal of Children’s Rights* 18 (2010): 217-231 who stated as follows. “Although section 1 of the Children Act 1989 requires that when a court determines any question with respect to the upbringing of a child ‘the child’s welfare shall be the court’s paramount consideration’, statutory *Guidance* states that this welfare principle only applies to proceedings under the 1989 Act. Thus the overarching welfare principle of the 1989 Act does not extend to provisions dealing with young offenders. ... In Scotland, the overriding and paramount principle is the welfare of the child and all decisions must be made in the interests of safeguarding that welfare. ... The advantages of the Scottish youth justice system include its child-centeredness and its focus on welfare. The Scottish system adopts a holistic approach, looking beyond the deeds of young offenders and provides a multi-disciplinary assessment of children under the age of 16 years.” Therefore Scotland has been absolved from a large portion of the comments made by the CRC Recommendation for UK.

²³⁰ This is compared to Malaysia’s Recommendations and not with other states.

In the current global climate the issue of immigration is a sensitive one,²³¹ especially for this current government with all the election campaigns revolving around the issue of immigration.²³² The fact that the Courts have tended to allow the Secretary of State considerable discretion in dealing with immigration cases, even those involving children has not helped matters.²³³ Nonetheless, the CRC Committee had specifically mentioned the immigration policies of the UK as a specific area of concern and clearly some effort needs to be made to address the recommendation, such as reviewing the said policies.

Despite the above, one cannot but notice the difference both in the phrases and the level of proof applied (either as the only inference or as one of the inferences). This will be considered later in the chapter, suffice to say at this stage that the matter is far from being resolved and extremely ambiguous. Let us now look at the law in general in England regarding child welfare.

The Law in England

The principle has developed and evolved within the English legal system without much international exposure until recently. The evolution could be seen through the development of the principle on a rights-based and welfare-based approach. As mentioned earlier, the law in England on child rights began through a recognition of some form of basic rights for children. This later developed into welfare-based rights since the wordings of the Children Act 1989 and the precedent of the Courts had interpreted them in such a manner. Currently, there seems to be a return to a rights-based concept, although with a more

²³¹ The US Presidential Election 2016 and the current US Government's policies on immigration and migrant workforce is referred.

²³² Referring to the 2015 UK General Election which had a very aggressive immigration theme with two 'major' Westminster parties, namely the Conservatives and UKIP, supporting a stop to immigration and withdrawal from the EU.

²³³ Op. Cit. n 226 above, at pg. 481

expansive set of rights. The excerpt below illustrates how the law in England has developed and evolved encapsulating the issue concisely.

“A brief chronological overview of judicial pronouncements reveals a gradual shift not only from ‘rights’ to ‘welfare’ within the last century, but also a steadily increasing resistance to ‘rights-talk’ in the family law context. In *S v S*,²³⁴ Wilmer LJ described contact as ‘no more than the basic right of any parent’. However, this characterisation of contact was rejected subsequently by Ormrod LJ in *A v C*.²³⁵ He found, that, ‘So far as access to a child is concerned, there are no rights in the sense in which lawyers understand the word. It is a matter to be decided always entirely on the footing of the best interests of the child’. This shift from ‘rights’ to ‘principle’ was further affirmed by Lord Oliver in *Re K D (Minor) (Ward: Termination of Access)*²³⁶ a pre-HRA wardship case. He specifically considered the mother’s appeal that the right of access was a parental right protected by Article 8 ECHR and that to terminate access with her child would result in breach of her Article 8 rights.”²³⁷

The relevant portion of Lord Oliver’s decision was as follows:

“Parenthood [confers] ... on the parents the exclusive privilege of ordering ... the upbringing of children of tender age ... That is a privilege which ... is circumscribed by many limitations ... When the jurisdiction of the courts is invoked for the protection of the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration- ... the welfare of the child.”²³⁸

²³⁴ [1962] 1 WLR 445 at 448

²³⁵ [1985] FLR 445

²³⁶ [1988] 1 All ER 577 at 588

²³⁷ Op. Cit n 226 above.

²³⁸ Op. Cit n 236 above, at 825

Therefore, although the CRC declares that rights are important and should be upheld in all Member States, some are still apprehensive. Referring to the above statement there seems to be a reluctance on the part of the English Courts to allow rights to other categories of persons other than children due to the paramountcy principle in cases falling within the ambit of section 1 of the Children Act 1989. Nonetheless, this has actually allowed the Courts to develop a more balanced interpretation of the principle which is closer to the CRC.

Furthermore the English Courts are also bound by other laws when interpreting the welfare principle and the best interests of the child principle under the CRC. These include both domestic and international law. The first law is the Human Rights Act 1998, which was enacted after both the Children Act 1989 and the CRC; whilst the second is the European Convention on Human Rights (ECHR) and its cases decided under the relevant provision of the ECHR by the European Court on Human Rights. This was the legal provision, Article 8 of the ECHR, referred to in the *Re K D (Minor) (Ward: Termination of Access)*²³⁹ mentioned above. Therefore, in looking at the current development of the English principle one must look at the major influences on the principle.

The above is just some of the legislation that has some manner of influence on the application of the principle. The next part of the chapter deals with the extent to which the influence of these laws has on the application of the welfare and the best interests of the child principle in England and if this list is truly exhaustive.

²³⁹ Op. Cit, n 236 at 588

Other Legal Influences on the English Courts

As stated earlier, the English Courts have to take into account various other laws in interpreting the welfare principle as well as the best interests of the child principle. These influences are both domestic and international.

The English courts are free to interpret domestic laws based on how the common law has led them. In other words the variation would be minimal as the justification and rationale would be based on their understanding of the law based on their training in the common law. The international influence is of a different kind. Most international instruments are structured and drafted in the civil law method and this would require a different mind-set to interpret. The issue here would be whether England has adopted and accepted the principle appropriately, as envisaged by the CRC, or has it adopted a different path.

The influence discussed here is limited to the issue of the best interests of the child. Looking at the main issue at hand, it is an amalgamation of international and domestic laws. The most prominent law is the Human Rights Act 1998, specifically Article 8, which states as follows:

“Article 8 Right to respect for private and family life;

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Although the above cited provision does not specifically touch on the best interests of the child or the welfare principle, it is related to it. The provision above relates to family freedom from government interference or how the family unit may bring up their child as they seem fit. The provision has an inevitable effect because when the courts make their decision it is not based purely on what is in the best interests of the child or his welfare but instead on the balance of all interested parties, according to case law. The English courts have construed the above provision to include the welfare principle and therefore the law has not changed.

The influence of the Human Rights Act should also be read together with the ECHR whereby the Human Rights Act incorporated the provisions of the ECHR making it part of UK law.²⁴⁰ This can be seen in the introduction to the Human Rights Act 1998 which states as follows:

“An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.”

Therefore, Article 8 above is literally the provision in the ECHR. If we were to take the interpretation of the words literally, the emphasis of the courts would no longer be the best interests of the child or the welfare of the child being paramount but would be only one of the interests or be based on proportionality. The dicta of Hirst LJ in *R v Secretary of State*

²⁴⁰ “The Human Rights Act 1998 does not strictly ‘incorporate’ the ECHR into domestic law and the ECHR is not part of substantive law. Rather, the 1998 Act creates domestic rights in the same terms as those expressed by the ECHR. Those rights are domestic and not international and their interpretation and enforcement is a matter for the domestic courts not the European Court of Human Rights” footnote 337 from MacDonald, Alistair. *Rights of the Child: Law and Practice*. Jordan Publishing Limited, 2011. Print.

for Home Department, *ex parte Gangadeen and Khan*,²⁴¹ “stated that, in his view, the Convention case law cited to him:

“...demonstrates quite clearly that, in their interpretation of Article 8 in the present context, the human rights court and the Commission approach the problem as a straightforward balancing exercise, in which the scales start even, and where the weight to be given to the considerations on each side of the balance is to be assessed according to the individual circumstances of the case; thus they do not support the notion that paramouncy should be given to the interests of the child.”²⁴²

However, the courts when applying the interpretation have taken a rather narrow and “minimalist approach”²⁴³ in interpreting Article 8. In fact, in construing the provisions and looking at the ECHR case law, the Courts have actually stated that there is absolutely no difference in the welfare principles applied in England and those of the laws of the ECHR through its incorporation via the Human Rights Act. There may be a reason to this since initially most have argued that the ECHR did not incorporate the best interests formula.

“A far more fundamental reason, however, must be the way in which the ECtHR²⁴⁴ deals with the fact that the Convention contains no formula referring to the child’s best interests. Unlike the paramouncy principle that governs decision making in our domestic courts, none of the Convention’s articles indicates that a child’s position commands a paramount place. In children’s cases which normally involve a conflict between the rights of several individuals, the ECtHR sees its job as to balance

²⁴¹ [1998] 1 FLR 762, CA.

²⁴² Op. Cit., n 226 above at pg. 480.

²⁴³ Herring, Jonathan. *Family Law*. 5th Edition, Longman (2011): at pg 36. Print.

²⁴⁴ European Court of Human Rights

one set of rights against another, without any *initial* presumption favouring one over the other.”²⁴⁵

Initially, there was apprehension on the acceptability on the ECHR Convention especially after England became a party to the CRC. “... there is a long-standing suspicion of rights among family law lawyers, especially because the notion of parental rights might be used to usurp the fundamental principle that the welfare of the child should be the law’s paramount concern.”²⁴⁶ Parental rights have been one of the maxims used by the European courts within the concept of balancing of rights of those involved.

There seems to be a major difference between the English and European positions, one that revolves around the paramountcy principle. This then relates to the earlier discussion on the definition of the best interests of the child principle in Chapter Two. The issue has been discussed in Chapter Two, regarding the different thresholds of consideration and later in this Chapter the rights versus principle or welfare approach will be examined. At this juncture the explanation by Michael Freeman is relevant, whereby the words in the CRC were purposely drafted to allow flexibility and not to be paramount but of primary only. If that is the stand then the following commentary regarding the ECHR illustrates the matter clearly.

“Thus, the approach of the ECHR must be distinguished from the application of the paramountcy principle *simpliciter* for this reason: in a choice between two outcomes for a child, the application of the principle would require that if one option would be even slightly preferable from the child’s perspective compared to that of a parent, that outcome should be chosen even though it would cause a substantial

²⁴⁵ Op. Cit., n. 227 above, at pg 69

²⁴⁶ Op. Cit., n. 243 above, at pg 36

infringement of parental rights, where the other one would not. Hence, if it is accepted that the European Court of Human Right's approach is influenced by the CRC, as discussed above, then it also has to be accepted that the Court is responding to a Convention that clearly refers to the child's interests as 'primary', not 'paramount'. Thus, by approaching the issue of 'fair balance' as an opportunity to weigh *all* interests in the scales, the European Convention is still intrinsically opposed to the UK paramountcy approach, which rejects any notion of balance, since interests *other* than those of the child appear not to weigh in the scales at all. In contact disputes the Strasbourg approach may indirectly benefit fathers since their interests are – to a greater extent than those of the mother – prone to be viewed by domestic courts as opposed to those of the child since the father tends to be the non-residential parent.”²⁴⁷

The article above relates to a case of rights of access to the child, it nonetheless shows the tendency of the European Courts to view the matter based on proportionality. This chapter does not wish to highlight the shortcomings of the ECHR but merely illustrates the law that England is bound to follow. However, it does show that the ECHR and its Courts, whilst acknowledging the best interests of the child, may have placed the best interests of the child at too low a level to begin with.²⁴⁸ Suffice it to say, the English law and that of the ECHR are not in parallel concerning the best interests of the child.

Moreover, the English courts have also been influenced by the Immigration Act 1971. As mentioned earlier the English courts have accorded the government some leverage especially involving deportation cases. This leverage can be seen as follows:

“..., the Secretary of State's broad discretion to deport – traditionally respected by the courts under the *Wednesbury* grounds of review - ...”²⁴⁹

²⁴⁷ Op. Cit., n. 226 above, at pgs. 478-479.

²⁴⁸ Op. Cit., n. 227 above, at pg 71.

²⁴⁹ Op. Cit. n. 226 above.

This allowance has clearly influenced the courts' judgments especially in cases involving immigration and deportation. This seems not to be in line with the requirements or conditions of the welfare principle or the CRC. However, the Courts may have begun to shift their stand, as Baroness Hale opined, in relation to the question of weight for the best interests of the child. This can be seen in the case of *ZH v (Tanzania) (FC) v Secretary of State for the Home Department*.²⁵⁰ It was held as follows:

“For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC: ‘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.’ This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. ... The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions ‘are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom’...”

²⁵⁰ [2011] UKSC 4

Another law that used to influence the position is the repealed Adoption Act 1976.

There is a specific part of the Act entitled Welfare of the Children containing sections 6 and 7 that states as below.

“6. Duty to promote welfare of child.

In reaching any decision relating to the adoption of a child a court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.

7. Religious upbringing of adopted child.

An adoption agency shall in placing a child for adoption have regard (so far as is practicable) to any wishes of a child’s parents and guardians as to the religious upbringing of the child.”

Note the language used in section 6, whereby the provision states clearly that the welfare of the children is the first consideration. It is not the paramount consideration as stated in the Children Act 1989. This provision clearly means that the welfare of the child is *one* of the considerations and not the *ultimate* consideration that shaped the way the English Courts approached the welfare principle. This would make it compatible to the CRC, ECHR and HRA. It is also in line with the balancing of rights theory espoused by the European Court of Human Rights. However, that interpretation does not sit well with some,²⁵¹ who

²⁵¹ Those who argue for maintaining the paramountcy principle such as Fortin, Jane. *Children’s Rights and the Developing Law*. 3rd ed. Cambridge: Cambridge University Press, 2009.

argue that it degrades the status of child rights to lower than it should be or in other words lowering the threshold.

The law that repealed it is the Adoption and Children Act 2002 and the words used reverted back to the position in the Children Act 1989. Currently, the specific part which related to the welfare of the children is no longer there. Instead the principle has been distributed within the Act, where and when it is applicable. The references are as follows:

1. Considerations applying to the exercise of powers

(1) This section applies whenever a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.

(3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.

...

52. Parental etc. consent

(1) The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—

(a) the parent or guardian cannot be found or is incapable of giving consent, or

(b) the welfare of the child requires the consent to be dispensed with.

The two provisions have differing levels of proof. Whilst section 1 is clearly in line with the Children Act 1989 together with an adherence to the paramountcy principle, the same cannot be said for section 52 where the Court is accorded discretion to interpret what amounts to the welfare of the child. The principle is applied based on the Court's understanding of the law and how it is interpreted. This is also influenced by precedents in place from near similar situations and interpretations, resulting in the law being applied based on what the Courts are used too.

There are other laws related to this matter that have been mentioned in case law such as the Borders, Citizenship and Immigration Act 2009. This was referred to in the *ZH* case mentioned earlier. The law was amended to accommodate the CRC provisions. The amended laws are as follows:

“55. Duty regarding the welfare of children

- (1) The Secretary of State must make arrangements for ensuring that—
 - (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
 - (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
- (2) The functions referred to in subsection (1) are—
 - (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
 - (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

- (c) any general customs function of the Secretary of State;
- (d) any customs function conferred on a designated customs official...”

The law initially allowed the Government to exempt itself from using the welfare principle for children in asylum and immigration cases. This was due to several immigration cases which invoked the welfare of the child to support their cases for asylum, such as the *ZH* case. However, this changed when UK lifted the reservation made on the CRC concerning immigration matters.

Aside from the above legislations, there are also several other laws that did not mention the welfare principle directly but indirectly affected the welfare principle by placing exemptions on the application of the principle. These laws include the Sexual Offences Act 2003 and the Equality Act 2010 neither of which have been considered in this research.

The consideration for the Best Interests of the Child Principle

Before looking at the current law in England, it would be clearer to concisely group the various theories and possible developments relating to the best interests of the child principle and consider the direction in which the law could or should be heading. These theories are based on the consideration placed on the best interests of the child principle, whether it should be a paramount or primary consideration. There have been numerous theories espoused by various scholars and authors, but Jonathan Herring²⁵² has managed to encapsulate them into five categories or groups which are listed below. Each has their own merit but again quite distinct from the other and some would probably not be in conformity with the CRC.

²⁵² Op. Cit., n. 243 above, at pg 422

The first is the welfare principle as practised by the English courts and as stated in the Children Act 1989. Herring states that it should be practised as it is, without any influence from any other law or convention. This would mean that the principle is the sole consideration in cases involving children and the interests of other parties are deemed not applicable by the Courts. However, when those interests include other children, then the Court is willing to balance the interests between the children to a certain degree.²⁵³ Nevertheless, the balancing of rights between two children with conflicting interests is more difficult to adjudicate as seen in the case of *Re A (Conjoined Twins: Medical Treatment)*.²⁵⁴ The judge had to decide whether the life of one of the twins should be sacrificed for the survival of the other. The judge decided that the right to survival of one twin - who had a better chance of survival - outweighed the interests of the other twin who would have had a lesser chance of survival, had her life not been terminated.

The second category is what Bainham calls the primary and secondary interests, which Herring quotes as follows: "...the answer is to categorise parents' and children's interests as either primary or secondary interests. A child's secondary interests would have to give way to a parent's primary interests and similarly a parent's secondary interests must give way to a child's primary interests. In addition, the court should consider the 'collective family interest'."²⁵⁵ The key point in this second category is that recognition is given to the interests of both the child and the parents or legal guardians. This would mean that the Court must consider the child's relationship with the family as significant in ascertaining the child's best interests. The collective family interest is therefore an added factor that the court must also consider. It is argued here that this category, despite being well balanced and well thought out, may seem the most difficult category to implement as it is the furthest from

²⁵³ *Re T and E* [1995] 3 FCR 260

²⁵⁴ [2001] 1 FLR 1, [2000] 3 FCR 577

²⁵⁵ Op. Cit., n. 243 above, at pg 423

the welfare principle in the English Children Act and may even be too extreme for best interests of the child in the CRC.

The third category is a relationship-based welfare category proposed by Herring, based on the child being brought up in a suitable environment that allows him/her to develop positively. This concept seeks to teach the child positive social skills and obligations so as to enable him/her to fit into society. According to Herring,

“It is beneficial for a child to be brought up in a family that is based on relationships which are fair and just. A relationship based on unacceptable demands on a parent is not furthering a child’s welfare. Indeed, it is impossible to construct an approach to looking at a child’s welfare which ignores the web of relationships within which the child is brought up. Supporting the child means supporting the caregiver and supporting the caregiver means supporting the child.”²⁵⁶

The second and third categories have some similarities whereby, they seem to share a societal and familial theme, the difference being the degree of preference given to the two, with the second category placing importance on the varying interests of the child and parents or guardians. The third category places importance on the family as a collective unit whereby the family must benefit for the child to benefit. This third category is probably aligned less with the CRC and more with the ECHR or Strasbourg.

The fourth category is the modified and least detrimental alternative suggested by Eekelaar. He summarises his theory as follows:

“The best solution is to surely adopt the course that avoids inflicting the most damage on the well-being of any interested individual. ...if the choice was between a

²⁵⁶ Op. Cit., n. 243 above, at pg 423

solution that advanced a child's well-being a great deal, but also damaged the interests of one parent a great deal, and a different solution under which the child's well-being was diminished, but damaged the parent to a far lesser degree, one should choose the second option, even though it was not the least detrimental alternative for the child."²⁵⁷

Eekelaar based his theory on the 'least detrimental theory' advocated by Goldstein, Freud and Solnit through their work in 1973²⁵⁸ where child rights, interests and welfare were still being developed and well before the inception of the CRC. This theory merges several categories into one. It tries to balance as many values as possible whilst retaining the best interests of the child principle. Eekelaar's modified theory differs from the original best interests principle because instead of focusing more on the child's interests, the main concern is how the child will benefit without significantly damaging the interests of others. Basically, the child will benefit but maybe not as much as he would have benefitted had they used the original theory. Furthermore, in Eekelaar's modified theory the interests of the parents or guardians will be given more import if compared to the original best interests of the child principle in England.

The fifth category is balancing all interests²⁵⁹ which, according to Herring "simply requires the courts to weigh up the interests of each party. There would be no particular

²⁵⁷ Eekelaar, John. "Beyond the Welfare Principle." *Child and Family Law Quarterly*, Vol 14:3, (2002): pgs 243-244. Print.

²⁵⁸ Goldstein, J., A. Freud and A. J. Solnit. *Beyond the Best Interests of the Child*. The Free Press, (1973). Print.

²⁵⁹ According to Herring this category appears to be supported by Reece. Reece is highly critical of the paramouncy principle but argues more along the lines of a feminist view and how the principle has subverted women's rights. Reece (in her article Reece, Helen. "The Paramouncy Principle: Consensus or Construct?" *Current Legal Problems* 49.1 (1996): 267) is of the view that as the century was developing the Courts were more inclined to give women (specifically mothers) the benefit of the doubt in family matters. In custody matters, the child was more often than not awarded to the mother and his included all the child's interests protected through the mother. (According to Reece mothers obtained full parental authority in 1989 in divorce proceedings by virtue of the abolition of the rule that the father is the sole guardian of his legitimate child –

preference for the interests of each of the parties. This approach would suggest that the court should make the order which would produce the most benefit and least detriment for the parties equally thereby creating an equilibrium of interest.

The fifth category does seem to be in accordance with the ECHR position whereby the European Courts of Human Rights have always balanced the interests of all the parties in the family in custody and family cases. Again, in this instance, the interests of the child may even be overlooked or not given enough priority if it was felt that was in the interests of the whole family, according to Article 8 of the ECHR. This fifth category is more about equality of interests of all the parties involved, notwithstanding whether it is in the best interests of the child. If this fifth category is equilibrium of interests then it may fall short of the threshold that is required by the CRC.

These are the main clusters of theories that Herring has concisely identified and are considered relevant to this thesis. They represent part of the variations that were alluded to in the earlier part of this chapter. These seem to be the main theories raised as possible ways forward for the welfare principle in England. However, they remain theories and have not been accepted as the law or practice as yet. On the face of it, the closest to the ideal CRC threshold would be the one espoused by Eekelaar. His position encompasses a rather balanced approach, while always ensuring that the child benefits. This could also be the way forward for the CRC to look past the best interests of the child policy and use the one most beneficial to the child.

However, the above remains theoretical and as stated several times, this research has to be based closer to practical applications than theory. Before concluding discussion on the

subsection 2(4) Children Act 1989). She was of the view that the principle was given paramountcy purely to focus on the interests of the child above all, so both parents would not benefit. Nonetheless, Reece's opinion is probably based on her own words in the same article where she said, "The paramountcy principle must be abandoned, and replaced with a framework which recognizes that the child is merely one participant in a process in which the interests of all participants count."

best interest of the child policy, we should focus on the best that this principle could offer.

Looking at the actual law or current practice in England much depends on the Court's interpretation of the law; therefore an attempt is now made to ascertain which of the above theories is in use in England.

Current English Position

The above represents the background to most of the development of the English law pertaining to the welfare/paramountcy principle or best interests of the child. Despite all the influences mentioned earlier and the binding Conventions above, the English Courts have maintained their position in upholding the paramountcy principle. The current position is best described by Baroness Hale in *Re G (Children) (Residence: Same Sex Partner)*²⁶⁰ where she stated:

“The statutory position is plain: the welfare of the child is the paramount consideration. As Lord McDermott explained in *J v C* [1970] AC 668, 711, this means that it rules upon or determines the course to be followed. There is no question of a parental right.”

Concise and true, the Courts are bound by the law and section 3 clearly states that the welfare of children is the paramount consideration. Clearly there has been no shift from the Courts position since 1970, when Lord McDermott stated the above and in 2006, where Baroness Hale reiterated the said ratio. This is despite the intervention of the CRC in 1989 and the ECHR via the Human Rights Act in 1998. Recently however, there seems to be a slight softening of the said stance. This can be seen through the statement of Baroness Hale

²⁶⁰ [2006] UKHL 43, [2006] 1 WLR 2305

herself in the case of *ZH v (Tanzania) (FC) v Secretary of State for the Home Department*²⁶¹ that was quoted earlier in this chapter²⁶².

This is clearly a departure from the earlier case of *Re G*, whereby a clearly worded ratio that the burden of proof to be used for the best interests of the child is “a primary consideration” and not “the primary consideration” or “the paramount consideration”. Then Munby LJ in his decision in *Re G (Children) (religious upbringing: education)*²⁶³ stated that:

“The well-being of a child cannot be assessed in isolation. Human beings live within a network of relationships. Men and women are sociable beings. As John Donne famously remarked, “No man is an Island...” Blackstone observed that “Man was formed for society”. And long ago Aristotle said that “He who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god.” As Herring and Foster comment, relationships are central to our sense and understanding of ourselves and from the earliest days are charted by reference to our relationships, both within and without the family, are always relevant to the child’s interests; often they will be determinative.”

His Lordship acknowledges the fact that man, as an individual, needs to be supported by his surrounding environment. This includes a family unit for a child, both created naturally by birth or adopted through the relevant adoption schemes. He went so far as to say that the environment that the child is in might prove to be even more important than what the child as an individual requires, when he used the words “often they will be determinative.” He then went on to pose questions on the duty of a judge in exercising the welfare principle.

²⁶¹ [2011] UKSC 4

²⁶² Op. Cit. n. 249

²⁶³ [2012] EWCA Civ 1233, [2012] 3 FCR 524

“At this point a fundamental issue has to be grappled with. What in our society today, looking to the approach of parents generally in 2012, is the task of the ordinary reasonable parent? What is the task of a judge, acting as a 'judicial reasonable parent' and approaching things by reference to the views of reasonable parents on the proper treatment and methods of bringing up children? What are their aims and objectives? These are questions which, in the forensic forum, do not often need to be asked or answered. But in a case such as this they are perhaps unavoidable.

In the conditions of current society there are, as it seems to me, three answers to this question. First, we must recognise that equality of opportunity is a fundamental value of our society: equality as between different communities, social groupings and creeds, and equality as between men and women, boys and girls. Second, we foster, encourage and facilitate aspiration: both aspiration as a virtue in itself and, to the extent that it is practical and reasonable, the child's own aspirations. Far too many lives in our community are blighted, even today by lack of aspiration. Third, our objective must be to bring the child to adulthood in such a way that the child is best equipped both to decide what kind of life they want to lead – what kind of person they want to be – and to give effect so far as practicable to their aspirations. Put shortly, our objective must be to maximise the child's opportunities in every sphere of life as they enter adulthood.”²⁶⁴

The objectives mentioned above illustrate that the Courts are aware that they must adapt to the times. This flexibility could be a way for the Courts to consider other factors that treat the best interests of the child holistically, in other words on a primary and not paramount

²⁶⁴ *Re G (Children) (religious upbringing: education)* [2012] EWCA 1233, [2012] 3 FCR 524

consideration. Once a child's interests are not paramount and merely primary there could be other considerations such as those of the family and other children. The child's interests would be harmonised with those of the family instead of being concentrated purely on the individual child's interests.

It can be argued that the above case reinforces the case of *ZH*. However, as of today it has not been referred to in the welfare or paramountcy principle issue. So far it has been cited in three different cases regarding adoption matters. In all three cases the reference was to a quote from another case whereby the judge stated - in applying a paramount consideration for the welfare principle – that it has to be for long term and not short term.²⁶⁵ Nonetheless, the above cases show the current position in England and it is to be hoped that it will lead to a more harmonised position with the CRC.

Best Interests of the Child Principle – rights-based or welfare-based

A recurring issue, especially when discussing the best interests of the child principle, concerns whether the provisions in the CRC - a rights-based treaty - are rights-based as opposed to welfare-based as prevalent in England. This issue is also related to the debate on the primacy and paramountcy principle because of the fact that the UK - which is practising the paramountcy or welfare principle - approaches the best interests of the child as welfare-based.²⁶⁶ The welfare principle is based on a paramount consideration so that any notion of a primacy consideration reduces the significance or importance of the best interests to a lesser consideration.²⁶⁷

²⁶⁵ Refer to *In Re B-S (Children)* [CA] [2013] WLR (D) 348, *In the Matter of S (Children)* [2014] EWCA Civ 1283, *Prospective Adopters (Applicants) v SA (father)(1st Respondent) TB (mother)(By the Official Solicitor)(2nd Respondent) A London Borough (3rd Respondent) SSM (child) (By his children's Guardian)(4th Respondent)* [2015] EWHC 327 (Fam)

²⁶⁶ See the discussion on the primary versus paramountcy principle in Chapter Two.

²⁶⁷ The minutiae of this specific debate falls outside the focus of this thesis, but for more detailed debate reference could be made to some of these works, Choudhry, Shazia and Jonathan Herring. *European Human Rights and Family Law*. Oxford and Portland, Oregon: Hart Publishing, 2010; Eekelaar, John. "Family Law and

Nonetheless, this issue is important because it directly relates to the comparisons that are being made and is one of the reasons that the jurisdictions in question have tended to maintain their positions as will be seen in Chapter Four when discussing the Malaysian jurisdiction. Historically the best interests of the child principle also began as a rights-based principle within the common law. The need was perceived for the State to intervene to protect children from an environment that was not child-friendly (in some cases from their own fathers). As the case laws and statutory provisions illustrate, the debate and the law have evolved from the rights-based principle.

The debate in England has leaned towards a more welfare-based concept. This could stem from the fact that the rights-based arguments are seen as abstract when compared to the welfare-based concept. Eekelaar stated that there are two senses of rights; namely moral rights and rights recognized through social and institutional mechanisms.²⁶⁸ Moral rights are generic rights such as that every man has the right to life and so on, whereas rights derived from social and institutional mechanisms are rights that are enforced by social instruments. The latter could also be described as a legal right. Hart describes it as follows:

“‘a legal right’: (1) A statement of the form ‘X has a right’ is true if the following conditions are satisfied:

- (a) There is in existence a legal system.
- (b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.
- (c) This obligation is made by law dependent on the choice either of X or some other person authorized to act on his behalf so that either Y is bound to

Personal Life” Oxford: Oxford University Press, 2007. Eekelaar, John. “Beyond the Welfare Principle” *Child and Family Law Quarterly*, Vol. 14, No. 3, 2002 pp. 237-249. Fortin, Jane. *Children’s Rights and the Developing Law*. 3rd ed. Cambridge: Cambridge University Press, 2009. Freeman, Michael. “Taking Children’s Rights More Seriously” *International Journal of Law and the Family*, 6 (1992) 52-71. Print.

²⁶⁸ See Eekelaar, J. *Family Law and Personal Life*. Oxford University Press. (2007): 134. Print.

do or abstain from some action only if X (or some authorized person) so chooses or alternatively only until X (or such person) chooses otherwise.

(2) A statement of the form 'X has a right' is used to draw a conclusion of law in a particular case which falls under such rules."²⁶⁹

The purpose of the above is to illustrate that not all rights are enforceable by law. Similarly, in this situation, the CRC cannot 'enforce' any of the provisions.²⁷⁰ This appears to corroborate the fact that the CRC is a rights-based instrument because it affirms more of a moral right as compared to a legal right.

Does the welfare-based concept then equate to a legal right? The evidence would suggest that the welfare-based concept is the same as the paramountcy principle. The paramountcy principle dictates an obligation upon the executing institution to enforce it in a specific method. This seeming inflexibility forms an obligation and a duty that is enforceable by law. In other words it is a legal right because it has the force of law.

The position that the UK has moved on to - from rights - is further strengthened by the Supreme Court case of *Re B (A Child)*²⁷¹ who stated the following:

"To talk in terms of child's rights – as opposed to his or her best interests – diverts from the focus that the child's welfare should occupy in the minds of those called on to make decisions as to their residence."²⁷²

All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best

²⁶⁹ Hart, Herbert Lionel Adolphus. "Definition and theory in jurisprudence." *Law Quarterly Review* 70.277 (1954): 37-60. Web.

²⁷⁰ In theory the CRC could seek to enforce, however the process would have to go to the UN General Assembly, which will then make a resolution. After this resolution is passed then action may be taken through the UN Security Council, so theoretically possible but highly improbable.

²⁷¹ [2009] UKSC 5

²⁷² *Ibid*, at para 19.

interests. This is the paramount consideration. ... It is only as a contributor to the child's welfare that parenthood assumes any significance. In common with all other factors bearing on what is in the best interests of the child, it must be examined for its potential to fulfil that aim.²⁷³

Despite the fact that the decision above relates to a custody battle between the grandparents and the biological father, the decision in that case is clear. The apex court has decided that child rights are not synonymous with the best interests of the child principle. This would indicate that the court's view is that the best interests of the child have a higher threshold of than child rights.²⁷⁴

This conclusion is arrived at based on the suggestions made in available literature on the above subject. However the CRC is a rights-based treaty, as any other international human rights instrument. It cannot be construed otherwise and it should not be interpreted otherwise. Based on this fact, this research submits that the best interests of the child principle is a rights-based provision. States should therefore change these treaty rights into legal rights in domestic law to allow for better application and enforcement. However, this should not change the nature or form of that right otherwise the objective and purpose of the right would be lost.

Currently, the position of the best interests of the child principle in England is not clear-cut. Although the English Courts are slowly leaning towards using the same concept that is being set by the CRC and the ECHR, it is still ambiguous as to when they will fully comply with the same levels as mentioned above. This position is not helped by the

²⁷³ Op. Cit., n. 68 at para 37.

²⁷⁴ The most recent case on the welfare principle, *M v F* [2016] EWHC 3194 (Fam), the Court of Appeal confirmed that the welfare of the child is the paramount consideration.

legislative's omission to amend the Children Act 1989. The phrase below summarises the position in England quite succinctly.

“Whilst the inestimable value of the concept of the child’s ‘best interests’ is arguably beyond dispute, the tension between the ‘paramount’ position of best interests in the domestic jurisdiction and the ‘best interests’ formulations of the international and regional human rights instruments and jurisprudence constitute more than theoretical difficulties. The prevailing and quite possibly mistaken domestic view that the ‘paramountcy’ principle is compatible with the rights based approach of Art 8(2) of the ECHR has potentially detrimental consequences for both children and parents.”²⁷⁵

Although the cases of *ZH* and *Re G* should have negated the above statement, the law remains the same. The necessary solution is the amendment of section 1 Children Act 1989. Until that day arrives, the ambiguity will continue and perhaps complicate matters even more.

Conclusion

Therefore, the answer to some of the questions raised earlier is that the paramountcy principle is not the same as the best interests of the child as set out in the CRC. This is despite the best efforts of the English Courts in trying to equate the welfare and paramountcy principle with the best interests of the child. The problem is not one of semantics but a deeper underlying issue. The negative aspect of the welfare principle is the use of a higher threshold than the CRC, namely the ‘paramount consideration’ instead of the ‘primary consideration’. This higher threshold points the welfare principle towards having a different meaning as

²⁷⁵ Op. Cit., n. 213 above, at pg 206

highlighted by the numerous authors and articles referred to earlier. Clearly, the English position is neither similar nor the same as the CRC. In fact, it sets a different standard altogether and one which some would state is the way forward for the CRC.

Although some have argued that the threshold provided for by the CRC is too low and that England should lead the way forward, the threshold is nonetheless binding. Therefore, the law and application of the welfare principle or the best interests of the child has to be treated as a primary consideration. This means that besides the interests of the child, the authorities must consider other factors to ensure that any decision made is not only in the child's interests but others around him as well. However, if England has made a conscious decision to proceed along the lines where the consideration is paramount, it should state so especially when submitting its Reports to the CRC. This would be difficult considering the fact that England is a party to the CRC and ECHR. Nonetheless, as a sovereign state, England may want to head in that direction.

It is likely that the CRC would encourage this line since it reflects a progressive interpretation of the CRC. However, it is one that not many Member States would approve, including Malaysia which could never reach that level of consideration, not in the foreseeable future at the least. As it stands now, Malaysia is having enough problems trying to fulfil the requirements of the best interests of the child with it being merely 'a primary consideration'. Besides that, the application of the principle in Malaysia is specifically limited to care and protection matters and some criminal matters. Only recently has it considered custody matters and this area is still developing; therefore any comparison would be meaningless at the initial stage.

The threshold also relates to the rights-based versus welfare-based principle, which in England is clearly the latter. However, this is not reflected in the CRC nor any other State for that matter. In fact as we shall see in the next Chapter, Malaysia will be hard pressed to

follow the English method. The CRC provision clearly states that the best interests of the child principle is of 'a primary consideration' and Malaysia has applied the CRC threshold. The CRC threshold should be the benchmark for the CRC best interests of the child.

In summary, the English position on this matter is ambiguous but continually developing. It has created an imperfect implementation of the best interests of the child principle as envisaged by the CRC. However, what is undeniable is that the starting point of the law for England is far better than in Malaysia. Therefore, at the very least England has a head start in implementing the best interests of the child principle in whatever shape or form.

The next chapter encompasses the next part of the comparison, which is the best interests of the child principle in Malaysia. In that discussion the socio-legal complexity previously referred to will be illustrated, and an in-depth comparison with the English Children Act 1989 made.

Chapter Four

The Child Act 2001: The CRC and Malaysian Law

Introduction

In the previous chapter the application of the best interests of the child principle in England was described, tracing its history and development. The difference between the English equivalent of the best interests of the child principle, namely the welfare or paramountcy principle, and the CRC was also explained. The differences between the best interests of the child principle envisaged in the CRC as compared to the welfare principle espoused in the Children Act 1989 of the UK are different based on the threshold at which it has to be implemented. This is despite the fact that several court decisions²⁷⁶ and leading scholars²⁷⁷ claim that the position in England is similar to that of the CRC. The chapter also illustrated the influences on the best interests of the child principle in English law and how these have either directly or indirectly affected the said principle.

This Chapter now highlights the application of the best interests of the child principle in Malaysia. It answers some of the prevailing questions that surround this research, namely how far Malaysia is compliant with the CRC specifically in fulfilling the best interests of the child principle. Therefore, this chapter will describe the application of the best interests of the child principle in Malaysia and analyse how compliant it is with the CRC. It is an important issue because the imprecise nature of the CRC requirements and Malaysia's socio-legal complexities will provide a unique contrast as compared with the more detailed and in-

²⁷⁶ The decision in *J v C* [1970] AC 688 and the dicta in *R v Secretary of State for Home Department, ex parte Gangadeen and Khan*, [1998] 1 FLR 762, CA.

²⁷⁷ Among the authors include Alistair MacDonald, *The Rights of the Child: Law and Practice*, Family Law Jordan Publishing Limited 2011, Fortin, Jane. “*Children’s Rights and the Developing Law*. 3rd Edition Cambridge University Press, (2009), and Hoggett, Brenda, Richard White, Paul Carr and Nigel Lowe. *Clarke Hall & Morrison on Children: Law Relating to Children and Young Person Special Bulletin A Guide to the Children Act 1989*. London: Butterworths, (1990):2

depth approach in England. This will be done through understanding some of the said socio-legal complexities, which will enable an understanding of Malaysia's legal system. Inevitably, an understanding of these complexities will hopefully shed light on the current standards applied on the best interests of the child principle.

Aside from the above, this chapter also addresses several of the areas of interest previously mentioned. Those include how the factors raised in this research impact upon the best interests of the child principle in Malaysia²⁷⁸ and why the application and interpretation of the Malaysian Child Act 2001 differs from that of the English Children Act 1989.²⁷⁹ This chapter also leads into an in-depth discussion of the implications of the welfare/paramountcy principle and the best interests of the child principle debate in both England and Malaysia.

Nonetheless, before looking into the crux of the issues above, it is necessary to first understand the socio-legal complexities of Malaysia, which is clarified through examining the historical background and current environment of Malaysia as well as taking into consideration the background provided in Chapter One. Understanding the complexities would require the researcher to absorb all the information in Chapter One²⁸⁰ and apply it to the information in this chapter to appreciate the enormity of the socio-legal complexities that were raised.

Demography of Malaysia

As mentioned in Chapter One, geographically Malaysia lies in the south east of Asia and comprises of two territories, that of Peninsular Malaysia in the west and the states on the

²⁷⁸ To be discussed in detail in the final chapter.

²⁷⁹ Discussed in Chapter Two.

²⁸⁰ The background information here refers to all raised such as the Asian influence, the method of defining the law in Malaysia, the differences between East and West Malaysia, the xenophobia or racial disharmony, the *Shari'ah* law, the unique drafting skills in Malaysia, the definition of the child and finally trying to make the Child Act 2001 more CRC friendly.

isle of Borneo in the east. It borders Brunei Darussalam, Indonesia and Thailand and lies just north of Singapore. Peninsular Malaysia consists of 11 states (Johor, Melaka, Negri Sembilan, Pahang, Selangor, Perak, Terengganu, Kelantan, Kedah, Perlis and Pulau Pinang) and two Federal Territories (Kuala Lumpur and Putrajaya). The eastern territory of Malaysia²⁸¹ consists of the states of Sabah, Sarawak and the Federal Territory of Labuan. The South China Sea separates Peninsular and East Malaysia. The Peninsular straddles the longest channel in the world, the Straits of Malacca, separating it from the island of Sumatra of Indonesia. To the north of Sabah lie the Sulu Sea and the Philippines.

Malaysia has a population of about 31.7 million²⁸² people of which the vast majority live in Peninsular Malaysia. There are three major races in Peninsular Malaysia namely the Malays, Chinese and Indians and other minority races including the *Orang Asli*.²⁸³ In Sabah and Sarawak these three races are there but the majority are the Natives²⁸⁴ of Sabah and Sarawak who are also known as the *Dayaks*²⁸⁵ who consist of many different tribes that spread across the two states. There are other races that have assimilated into the Malaysian society such as the Dutch and Portuguese descendants predominantly in Malacca, and over the years since independence a large Malay Kampuchean group known as Malay Khmers was also identified, and other races.

Politically, Malaysia is a constitutional monarchy that practises the Westminster-type of parliamentary government. It is a federation of 13 states and three federal territories. The states each have state legislative assemblies and enact laws within state powers. Members of

²⁸¹ Formerly known as East Malaysia in most federal laws but had been amended earlier from Borneo States in the Federal Constitution.

²⁸² As stated in Department of Statistics, Malaysia Official Website: www.statistics.gov.my as at 1 October 2016

²⁸³ Indigenous people of Peninsular Malaysia and defined in the Federal Constitution as Aborigines (Article 160).

²⁸⁴ The indigenous people of Sabah and Sarawak or East Malaysia as defined in the Federal Constitution (Article 160).

²⁸⁵ Loosely translated means “Red Indians” but officially the term is not used.

Parliament represent the Federal parliament from all the states and federal territories. The powers of the state and federal governments have been prescribed in the Federal Constitution.²⁸⁶ There are basically three lists that provide the jurisdiction and powers of both Federal and State governments. They are the Federal List, State List and the Concurrent List. Furthermore, nine states have sultans who are also state constitutional monarchies. The King or *Yang DiPertuan Agong*²⁸⁷ is chosen from these nine states on a rotation basis once in every five years or earlier if required.

From the religious perspective, Islam is the official religion of the Federation²⁸⁸ but other religions are free to be practised. The breakdown is roughly 65 per cent Muslim and the rest are made up of Buddhists, Hindus and Christians.²⁸⁹ However, Paganism is still practised amongst the *Orang Asli* and *Dayaks*. The official heads of Islam are the Sultans in their respective states. In the states (there are four states: Malacca, Penang, Sabah and Sarawak) that have no Sultan as well as all the Federal Territories the *Yang DiPertuan Agong* is the Islamic leader. It is important to highlight Malaysia's multicultural mix of people as it explains why there are different types of private laws applied in Malaysia based on racial and cultural lines. This is also true for children and child related laws.

Malaysia's Legal History

The brief history and background discussion in Chapter One as well as the discussion above must be considered whenever Malaysia is being discussed and especially in this and the preceding chapters.²⁹⁰ Briefly, Malaysia's socio-legal complexities stem from its unique

²⁸⁶ Chapter 1, Part VI, Federal Constitution

²⁸⁷ The Supreme Head of the Federation – Article 32, Federal Constitution

²⁸⁸ Article 3, Federal Constitution

²⁸⁹ The recent consensus by the Department of Statistics kept the actual amount in secret, however the estimate is based on the number of Malays provided in the website that states Malays constitute 68% of the general populace.

²⁹⁰ The importance of considering Malaysia's history in any analyses is supported by Andaya, Barbara Watson, and Leonard Y. Andaya. *A history of Malaysia*. Palgrave Macmillan, 2017. Pg. 2.

history, background information in Chapter One and demography. One important aspect that epitomises these complexities is how the Malays have maintained power by using history and all the related social issues to entrench their power²⁹¹. Besides the indigenous *Orang asli* in East and West Malaysia, the Malays are also indigenous. The other races such as the Chinese and Indians are not and this is always used as a reason to strengthen the Malay position including the legal aspect of the matter²⁹².

Before further examination of the topic, there is an aspect of Malaysia that has to be clarified especially in the field of law and its application in Malaysia. Currently Malaysia practises a dual legal system.²⁹³ The easiest method of division would probably be to identify it through private and public law. The private law or the individual aspect is largely influenced by religious laws, especially for the Muslims whilst the public law governing the state is based on common law and written law. The individual is still bound to all the state laws but for the Muslims in the country, the personal laws like those concerning inheritance, marriage, death and others are based on the *Shari'ah* law that has been codified.

This rather awkward arrangement has its roots in the judicial system that was introduced by the English. Prior to English intervention, the legal system in Peninsular Malaysia was basically a mixture of feudal, Hindu and Islamic law²⁹⁴. The Sultans and their administrators would make certain rules and decrees that were deemed law and enforceable by his enforcers. However, the Islamic scholars would provide advice on matters that involve

²⁹¹ This can also be gleaned from the writings in Andaya, Barbara Watson, and Leonard Y. Andaya. *A history of Malaysia*. Palgrave Macmillan, 2016. Pg. 5.

²⁹² The Chinese and Indians were brought in by the British during their colonial rule to work in specialised fields. The Chinese were brought in during the late nineteenth century to work the tin mines, whilst the Indians were brought in during the tail-end of the nineteenth century and early twentieth century to work predominantly as labourers and rubber tree estate workers.

²⁹³ Clause 121 (1A), Federal Constitution states that the High Courts of Malaya and Sabah and Sarawak (literally the Civil Courts) had no jurisdiction over the *Shari'ah* Courts.

²⁹⁴ Ibrahim, Ahmad, and Ahilemah Joned. *The Malaysian legal system*. Dewan Bahasa dan Pustaka, Kementerian Pendidikan Malaysia, 1987. Print. Pgs 21-22.

religion.²⁹⁵ For the purpose of this chapter, suffice to say that the *Shari'ah* had been the governing law for all the Malay states since the 14th century.

One of the earliest recorded cases on the position of the *Shari'ah* was the case of *Ramah binti Taat v Laton binti Malim Sutan*.²⁹⁶ An English Judge, Thorne J, recognised that Islamic law was the law of the land. What this basically infers is that should there be a lacuna in the law applied in Malaysia then the obvious reference ought to be made to the *Shari'ah*²⁹⁷. This does not prevent the authorities from enacting laws and several laws were passed without any reference to the *Shari'ah*.

This is especially so for the Straits Settlement colonies where the British control was absolute and without any interference from any of the Malay rulers. The English enacted the laws without any semblance of the *Shari'ah* and all the laws were enacted and construed based on English law²⁹⁸. As such the development of the law in this Straits Settlement rivalled that of India, Pakistan and Hong Kong²⁹⁹. However, the same could not be said for the other Malay states and East Malaysia since their background was different.

The Federated Malay States were coerced slowly into accepting British Residents who in turn introduced British laws to the people of these states³⁰⁰. The British Residents were not only advising the Malay rulers but took over the administration the states. The Sultans and rulers were left to become mere figureheads and only made decisions regarding Islamic issues³⁰¹. These British Residents reported to the British Governor stationed in

²⁹⁵ After the inception of Islam in Peninsular Malaysia in the early and middle of the 15th Century AD.

²⁹⁶ [1927] 6 FMSLR 128; [1927] 1 LNS 13

²⁹⁷ Op. Cit., n. 294 at pg 55.

²⁹⁸ Derived from the writings in Ibrahim, Ahmad, and Ahilemah Joned. *The Malaysian legal system*. Dewan Bahasa dan Pustaka, Kementerian Pendidikan Malaysia, 1987. Print. Pgs 21-22.

²⁹⁹ Ibid, pg 23.

³⁰⁰ A more complete view of the British influence in Peninsular Malaysia and the Residents system of governance can be obtained in the latest edition which is the 3rd Edition of the book by Andaya, Barbara Watson, and Leonard Y. Andaya. *A history of Malaysia*. Third Edition, Palgrave Macmillan, 2017. Pgs 165-182.

³⁰¹ Andaya, Barbara Watson, and Leonard Y. Andaya. *A history of Malaysia*. Third Edition, Palgrave Macmillan, 2017. Pg. 180.

Singapore who in turn reported to the Viceroy in India. Most of the law after the advent of the Residents was similar to that of the Straits Settlements. In fact, several laws were harmonised to allow a more uniform system. Nonetheless, the initial system was still in place with certain exceptions. Some facets of the law were incorporated through the judiciary who were distinctly English trained. One example is the case of *Motor Emporium v Arumugam*³⁰² where the Terrell Ag. C.J., in introducing the law of equity said as follows:

“It is said that the English rules of equity, as administered by the Court of Chancery, have no application in the Federated Malay States, as the Court has not been given the jurisdiction of the Court of Chancery, nor is there any Civil Law Enactment incorporating into the law of the Federated Malay States the equitable principles applied in England. This is perfectly true as far as it goes. But under section 49(1) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction is to be exercised, every court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the Community where the law is administered. Looked at in this way, it would hardly be reasonable to exclude in the Federated Malay States a principle of natural justice merely because a no less civilised community, namely England, has adopted such a principle as part of its recognized legal system. On the contrary, it is a cogent reason for adopting the same principle in the Federated Malay States.

³⁰² [1933] MLJ 276 at pg 278.

The Courts in the Federated Malay States have on occasions acted on equitable principles, not because English rules of equity apply, but because such rules happen to conform to the principles of natural justice.”

The Unfederated Malay States suffered a rather slower death when the British could only place a Resident who had an advisory role with the exception of foreign policy. Most matters, including the law were executed in the traditional Malay system³⁰³. It was only after the Residents were given more powers that the English law began to assimilate into the Malay legal system in these States. The introduction of the English law should be seen more as an intervention rather than assimilation. One case that was decided in the Unfederated Malay States illustrates how the judiciary acted as the agent provocateur to facilitate the inclusion of English law. The Johore case was the *Goh Chong Hin v Consolidated Malay Rubber Estate Ltd*³⁰⁴ that stated as follows:

- “(1) The legislature of Johore had by necessary implication declared as its policy the adoption of the English law on this point; for section 303 of the Civil Procedure Code in use in Johore introduced the law as to tenant’s fixtures, and that was only intelligible and applicable by introduction of the general English law of fixtures of which it formed a part;
- (2) In the definition of land in the Land Enactment, the draftsmen used such apt words for the introduction of the English law of fixtures as to make it appear likely that the legislature intended its adoption;
- (3) The balance of convenience and reason demanded that the Court of Johore should adopt, not a local hybrid system of its own, but the English law of

³⁰³ Op. Cit., n. 301, pg 178.

³⁰⁴ (1924) 5 F.M.S.L.R. 86. Oddly enough it was even reported in the Federated Malay States legal review.

fixtures which had prevailed in the neighbouring jurisdictions of the colony (Malacca, Penang and Singapore) and the Federated Malay States.”

Prior to the intervention the Malay Peninsular had its own legal system, as mentioned earlier, based on the *Shari'ah* and a feudal system. This research is not going to discuss the merits of the case but suffice to state that it introduced English law into Malaysia.

In the traditional Malay legal system the *Penghulu* or village headman was in charge of meting out judgment on behalf of the Sultan at the most fundamental level. The parties would present their cases before the village headman in what was known as the *Penghulu's* Court. Further up the jurisdictional hierarchy the nobleman in charge of several villages would decide on inter village matters. Bigger matters were handled by the Sultan's office specifically the *Bendahara* who in this modern day is equivalent to the Prime Minister. When the British intervened, they maintained some of the original establishment at the lower levels. To this date the *Penghulu's* Courts still exist in Malaysia.

Compared to Peninsular Malaysia, the development in East Malaysia is slightly different. When the British Government took control of North Borneo/Sabah after WWII it began to impose English law throughout the state. Prior to WWII, when it was under the British North Borneo Company, the state of Sabah became a protectorate state of England together with Brunei and Sarawak³⁰⁵. The Company had the responsibilities to abolish slavery and administer justice. This was done by adopting the legislation from India, the Straits Settlements and other British colonies³⁰⁶. Besides the above, the law in Sabah developed through the judiciary, similar to the Peninsular Malaysia.

Whilst in Sarawak, the first White Rajah (or Rajah Brookes) had initially codified a lot of the local customs and laws to become the State law³⁰⁷. The First White Rajah tried as

³⁰⁵ Op. Cit. n. 294, pg. 97

³⁰⁶ Ibid

³⁰⁷ Ibid, pg. 93.

much as possible not to disturb the native customs and laws of the locals. However, with the installing of the Second White Rajah, English style laws were beginning to be incorporated by adopting English and English Colony Laws. However by the Third and last White Rajah, the English laws were fully adopted into Sarawak. An example of the case law that confirmed the status of English law is the case of *Chan Bee Neo (f) and Ors. V Ee Siok Choo (f)*³⁰⁸ that stated as follows:

“The effect of the Laws of Sarawak Ordinance is that the law of England, in so far as it is not modified by Sarawak Ordinances, and in so far as it is applicable to Sarawak ‘having regard to native customs and local conditions’, is the law of Sarawak. The Supreme Court has interpreted this Ordinance, if not expressly at all events by implication, as meaning that, native law and custom will be respected and in a proper case must be applied. But ‘native custom’ means the custom of natives of Sarawak, and the natives of Sarawak must belong to one of the races considered indigenous to the Colony and enumerated in the schedule to the Interpretation Ordinance. The Chinese are not indigenous to this country and Chinese customary law is not ‘native custom’. The Law of Sarawak Ordinance uses the words ‘native customs and local conditions’, but I am not prepared to believe that it is the intention of the words ‘and local conditions’ to open the door wide for Chinese (or for that matter Hindu) customary law.”

Due to this diverse legal background it is not surprising that the Malaysian Judiciary has been divided into two, namely the High Court of Malaya and the High Court of Sabah and Sarawak; both these High Courts are known as Courts of Coordinate Jurisdiction.³⁰⁹ Above them are the Court of Appeal of Malaysia and the Federal Court of Malaysia. Both

³⁰⁸ (1947) S.C.R. 1 at pg. 3.

³⁰⁹ Clause 121 (1) of the Federal Constitution.

these courts preside in one place namely, Putrajaya, the Federal Administrative Centre, and hear appeals from both the High Courts. These Courts cater for both the Peninsular Malaysia and East Malaysia appellate cases, taking into consideration the differences in the law from both regions. There is also a quota system in that there have to be at least three - four Federal Court Judges from Sabah and Sarawak and about the same in the Court of Appeal³¹⁰.

All this pertains to administrative, criminal and civil law matters but excludes the private law spectrum, which is under the purview of the civil law courts for non-Muslim cases and *Shari'ah* Courts for Muslim cases. The determination of the jurisdictions of each court is designated in the Federal Constitution. This will be explained next in order to give a clearer picture of the sources of law for child rights.

Child law and its source of power

The general source of the law which governs the laws relating to children is found in the Federal Constitution whereby all international relations and obligations or external affairs for Malaysia fall within the ambit of Federal Government³¹¹ and not the states. This includes signing and implementing treaties and conventions. As mentioned earlier Malaysia became a party to the CRC in 1995. Becoming a party to the CRC was merely the first step for Malaysia because Malaysia practises a dualist system and this meant that the law has to be domesticated to become binding in Malaysia. This was clearly stated by the Malaysian Courts in the following cases.

In the case of *AirAsia Bhd v Rafizah Shima bt Mohamed Aris*³¹² the Court of Appeal had decided that international treaties do not form part of the law in Malaysia unless such

³¹⁰ There are no written rules on the quota but it is more of a convention that the practice exists.

³¹¹ Federal List or List I, Ninth Schedule, Federal Constitution

³¹² [2014] 5 MLJ 318

treaties have been incorporated into the municipal law. The Court of Appeal held, among others, as follows:

“[37] In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation.

[44] When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia, legislation passed by Parliament is a must.”

Although the case law refers to CEDAW, the following paragraph states that the position is applicable for all international instruments. This position is further entrenched when read with other case law. Malaysia’s apex court, the Federal Court had decided in the case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal*,³¹³ the position of international law in Malaysia and stated as follows:

“[180] On the issue whether this court should use "international norms" embodied in the UNDRIP to interpret arts. 5 and 13 of the Federal Constitution I have only this to say. **International treaties do not form part of our law, unless those provisions have been incorporated into our law.** We should not use international norms as a guide to interpret our Federal Constitution.”

[Emphasis added]

The position in Malaysian law is clear and this position was reiterated recently in the case of *Than Siew Beng & Anor V. Ketua Pengarah Jabatan Pendaftaran Negara & Ors*³¹⁴.

The High Court held that:

³¹³ [2011] 8 CLJ 766. *Kerajaan Negeri Sarawak* means the Sarawak State Government.

³¹⁴ [2016] 6 CLJ 934. *Ketua Pengarah Jabatan Pendaftaran Negara* means Director General, National Registration Department.

“[28] International treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law.”

The cases above illustrate that for Malaysia to accept international law or treaties that Malaysia is a party to, is a two-tier mechanism. The first step is becoming a party either by signing, ratifying or acceding to the said treaty. The second step is to domesticate the provisions of the said treaty. This was done through the Child Act 2001. There are however other sources of law based on the brief legal background that has been explained earlier. Initially we shall look at the main source of power for child related laws and agencies.

The federal agency tasked with the implementation of the CRC is the Department of Social Welfare (the Malay abbreviation of the Department is JKM) which is placed under the Ministry of Women, Family and Community Development (MWFCD). The MWFCD is also the lead agency for all human rights based treaties that Malaysia has become a party to. Legally, the CRC is implemented through the Child Act 2001, specifically enacted to ensure compliance with the CRC obligations. This seems straight forward enough but the issue is rather more complex due to Malaysia's complex history. The Child Act 2001 is not the only law involved in child matters in Malaysia nor is JKM the only agency involved.

The protection of women, children and young persons as well as social welfare falls within the Concurrent List.³¹⁵ This means that despite the fact that the agency involved is a Federal agency, there is some State³¹⁶ involvement in the implementation and general policy. This dynamic has been the root of much discomfort for JKM when exercising their role as protectors of children because the political differences of the federal and state governments

³¹⁵ List III, Ninth Schedule, Federal Constitution

³¹⁶ The term State here refers to the 11 States in Peninsular Malaysia and two States in East Malaysia and not the State as a country.

affect the objectivity of JKM officers.³¹⁷ Besides that, there is some overlap with other Federal agencies that have jurisdiction over children within certain fields such as employment and education.

Another area that needs to be highlighted here is the role of the *Shari'ah*. The *Shari'ah* is strictly a matter for the State³¹⁸ and will be discussed in greater detail in Chapter Five. Suffice to mention at this juncture that it too is involved in children's issues and affects this research profoundly. Moreover, this involvement includes the execution and implementation aspect of the law as well. It is however limited in the sense that it is confined to the private law sphere.

Based on this brief explanation there are at least three federal and state agencies from all the 14 states in Malaysia that are involved in implementing child laws. There is also the difference in the level of interference each state is prepared to invoke in child matters due to the sensitivity of the relevant state authorities. This would also include the religious authorities of these states, as they are not part of the federal agency. Therefore, the implementation and execution of child laws is ambiguous and this is without even mentioning the degree placed on the best interest of the child principle in these cases.

An Introduction to the Child Act 2001

The Child Act was enacted in 2001 but the debate in Parliament was protracted and therefore it did not receive the sufficient amount of concentration that was necessary. The first reading was tabled in 1999 but the second reading was delayed till 2000 because Parliament was dissolved for an election in October 1999. This resulted in some of the

³¹⁷ This has happened when the State Government of the Opposition held States had planned certain programmes under the CRC with JKM only for the programme being hampered by either the Federal Government interference or other methods used.

³¹⁸ State List or List II, Ninth Schedule, Federal Constitution

members of Parliament that were acquainted with the bill losing their seats and therefore no longer in Parliament. The Bill was passed without adequate debate to fully test it. The only issue agreed amongst the members of Parliament was that child issues should not be politicised. The result was a law that seemed comprehensive on the face of it but left many prevalent issues unresolved.

As mentioned earlier the Child Act 2001 was actually an amalgamation of three other Acts that have been mentioned in the introductory chapter. Despite that, the Child Act 2001 was supposed to have fulfilled Malaysia's obligation to the CRC, especially the underlying principles of the CRC. Besides these underlying principles, there is also an important test or principle in the CRC which is the best interest of the child principle. As mentioned in Chapter 3 earlier, it is one of the most important maxims or principles in the CRC and should be adopted by all member states. Malaysia has also incorporated the said principle. The research will provide a brief overview of the Child Act 2001 before analysing the best interests of the child principle.

The Child Act 2001 consists of 135 sections, which have been compartmentalised into 15 parts. The Long title states that it is, "An Act to consolidate and amend laws relating to the care, protection and rehabilitation of children and to provide for matters connected therewith and incidental thereto". It also has a preamble, which is not a common feature in Malaysian statutes. There are currently only four or five other acts with the preamble, all of which incorporate Malaysia's international obligations into the domestic law such as the Person with Disabilities Act 2008 (Act 685) or the Chemical Weapons Convention Act 2005 (Act 641). The Child Act 2001 could be subdivided into several Parts but the main substantive areas are as follows:

1. Courts for Children (Part IV);
2. Children in need of care and protection (Part V);

3. Children in need of protection and rehabilitation (Part VI);
4. Beyond control (Part VII);
5. Trafficking in and Abduction of children (Part VIII); and
6. Criminal Procedure in Court for Children (Part X).

The Child Act 2001 should have included all aspects required by the CRC on all member states, especially the basic principles and maxims. However, based on the list above of the areas covered, the Act did not fulfil its main objective. Was there a reason why the Malaysian drafters limited the scope of the Act to the above-mentioned areas? Clearly, the drafting was done with the specific intent to address the above aspects but the CRC is not merely confined to the above. The CRC covers a wider spectrum but it is still a rights-based treaty, which would be difficult to be translated into an Act or law, from a Malaysian perspective. This is especially so in the common law methodology whereby the maxim remains “where there is a remedy there is a wrong”.

Despite the above limitations the Child Act 2001 was enacted. Turning our attention to the principle specifically, where is the best interest of the child principle placed in the Act? It should be at the beginning of the Act applicable to all provisions in the Act (as in the UK), or at the very least the preamble to note the significance of the test and hopefully for the Courts to infer its significance. This is not the case for the Child Act 2001 whereby the principle was only mentioned in one part of the Act. Ordinarily, this would be sufficient for the courts to interpret the remainder of the Child Act 2001 with the same principle but the courts in Malaysia have always been conservative in its interpretation. Besides that, the CRC requires that the best interests of the child principle is applied as a primary consideration in all cases involving children. However, the application and execution of the Act did not have the desired effect.

The Child Act 2001 in Operation

Since its enactment the main enforcers of the Child Act 2001 have been the JKM whose officers are either gazetted or appointed as Protectors,³¹⁹ probation officers³²⁰ and Social Welfare Officers.³²¹ These officers had a small adjustment to make with the advent of the Child Act 2001 but otherwise it was business as usual. The reason for this was that the three Acts, the Juvenile Courts Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991, were also under their jurisdiction.

Besides JKM, the other agency heavily involved would be the Royal Malaysian Police (the Malay abbreviation is PDRM). There were cases where JKM had to refer matters to PDRM and others where the PDRM initiated some investigations on their own. In the latter cases, inevitably the matter would be referred to JKM. There have been cases whereby the police totally ignored reports regarding children.³²² JKM and the Ministry have tried to bridge the gap between itself and PDRM but it has only happened at the headquarters level of PDRM (Bukit Aman)³²³ and the same cooperation has not been witnessed at the operational level - the police stations. In fact, the bulk of the cases are handled by the JKM.

The Child Act 2001 was supposed to be the manual for all things related to children. However in reality JKM continued in their customary way and read the Child Act 2001 as three separate Acts that are not inter-related or connected. They reverted to what they were accustomed to and read the Act as the three separate Acts mentioned above. This practice continued unabated until it was questioned in 2009. In that year the Chairman of the Co-

³¹⁹ Subsection 8(1), Act 611

³²⁰ Subsection 10(1), Act 611

³²¹ Section 2, Act 611

³²² The reasons varied but it is mentioned here to illustrate the degree of seriousness placed on these types of cases and more often than not are not reported. The cases have been discussed in detail under the topic of best interests of the child in Malaysia later in this Chapter.

³²³ Malaysia's equivalent to UK's Scotland Yard.

ordinating Council for the Protection of Children,³²⁴ who was the Minister of the MWFC, raised issues at a meeting on the implementation of the Child Act 2001. The reply they received was that it was how they had been taught and instructed to execute.

Dissatisfied with the reply, an investigative committee was established under the Ministry to study the Child Act 2001 and to prepare proposals for amending it, if necessary, to bring it up to speed with the recent developments in society and children's welfare as well as referring to the CRC Committee's comments on Malaysia's country report. Among the findings of the committee was that the Child Act 2001 was in dire need of a revision and that the fundamental principles of the CRC had to be incorporated into the Child Act 2001. The implementation by JKM was not in the true spirit of the CRC but legally they were following the letter of the law of the Child Act 2001.

The findings were surprising to many politicians, policy makers and senior government officers but not to the non-governmental organizations (NGOs) and JKM. The NGOs have long and tirelessly fought for better rights for children and have been more receptive and adoptive of the CRC principles³²⁵. Their efforts fell on deaf ears, but despite this the NGOs continued to adopt a more cooperative approach especially with JKM. The JKM thought that they were following what they were instructed to do and followed the law³²⁶. They knew what the NGOs wanted but were powerless to assist as the decision was up to the policy makers. Nonetheless, JKM provided all the assistance requested by the NGOs.

³²⁴ Section 3, Act 611.

³²⁵ One of the most active Malaysian Child NGO is the Protect and Save the Children or better known as PS the Children, who have worked continuously with MWFC. There are other NGOs under the aegis of the Malaysian Council for Child Welfare.

³²⁶ This was the impression I gleaned from the Welfare Officers and Protectors (under the Malaysian Child Act 2001) during my research to amend the Child Act 2001. As mentioned earlier, the amendment was necessary to make the Child Act 2001 more CRC-friendly.

The politicians, policy makers and senior government officers were not too happy³²⁷ as they wanted the Child Act 2001 to be the benchmark for child rights in Malaysia as well as fulfil Malaysia's obligations under the CRC. The findings lowered their expectations but instead of accepting it, the blame was placed on JKM³²⁸. The grounds were that JKM did not understand the requirements of the Child Act 2001 and the CRC. Since 2006, when the initial and first country reports were submitted, it was hoped that Malaysia would make improvements to fulfil most of the recommendations that have been raised by the CRC Committee.³²⁹ The politicians, policy makers and senior government officers had wanted Malaysia to overcome the shortcomings mentioned in the CRC Committee's Comments on Malaysia's Country Report. Somehow the gap between the policy makers and those implementing the policies had never been bridged.

Despite the discontent from the politicians, policy makers and senior government officers, the legal opinion prevalent at that time was that JKM was correct in their interpretation of the Child Act 2001. This was because there was no commonality between the three amalgamated Acts. They all had separate functions but had some overlap in the method of redress.³³⁰ This was specifically concerning the places of refuge or rehabilitation centres for children with problems. The differences were minor enough to be disregarded until an unreported case came up in 2008.

In this case, the parents of an Indian girl felt that they could no longer control their teenage daughter and sought counselling from JKM. It was agreed that the child be placed

³²⁷ Based on the researchers meetings with the top management of the MWFC and the Minister recorded her dissatisfaction on the child issues and the lack of action being done to curtail the child issues. It was during this high level meeting that the Minister instructed a study to be conducted to identify the problems.

³²⁸ The findings of the study were never published but in the meeting held to discuss the problems, the blame was placed squarely on JKM. The study stated that JKM did not enforce the provisions of the Child Act 2001 and that was the main reason why several aspects of the CRC were not being practised.

³²⁹ Within the treaty bodies, the initial report is filed upon becoming a party which is within two years of becoming a member, whilst the 1st Country Report is five years after the initial report.

³³⁰ The term redress is used, as the concept of the Child Act 2001 was that children would not be punished.

under the protection of JKM under the provision of children beyond control³³¹ pursuant to section 46 Part VII of the Child Act 2001. The parents brought the child voluntarily to JKM and subsequently brought the matter to the Court for Children who issued an order pursuant to paragraphs 46(2) (aa) and (bb) of the Child Act 2001. This entails a supervision period of up to three years in one of JKM's institutions. This provision was taken from the abolished Women and Girls Protection Act 1973.

The problem arose when the case was compared with cases under children in need of care and protection (Part V), children in need of protection and rehabilitation (Part VI) and criminal procedure in court for children (Part X). These would involve children who were involved in more dangerous scenarios or even crime. Technically, most of them were caught and were involuntarily brought to court. Children that were given orders under these conditions had no specific term or provision regarding their term of rehabilitation. Therefore, they would be subject to the general provision under subsection 67(2), the Child Act 2001 where the term is also up to three years; the difference being that subsection 67(2) is also read with subsection 67(3) which states that the Board of Visitors³³² may shorten the period of detention.

In the case of the Indian girl above, she was so dejected with her detention that she sought her parents' forgiveness and pleaded to go home. Her parents requested JKM to release her but were told that they were unable to since detention under paragraphs 46(2) (aa) and (bb) of the Act had no provision for the shortening of her detention period. After hearing the news, the distraught girl ran away from the institution and was caught. The effect was worse for her, since running away from a JKM institution is an offence punishable as a

³³¹ Beyond control here means that the parents or guardians could no longer control the child within the reasonable means associated with the upbringing of the said child.

³³² Appointed by the Minister under section 82, the Child Act 2001

crime.³³³ She had unforeseeably added time to her incarceration³³⁴ or reformation since the crime was a separate matter from the control issues. She would have to be brought before the Court for Children for an order under the relevant provision in the Child Act 2001 based on the institution she was placed in.

The anomaly is that children detained for a criminal offence, for example stealing, would be eligible for the shortening of their time in the institutions. In the criminal cases that are definitely not voluntary; the Board of Visitors may review their cases. In the Indian girl's case she may only be allowed review for the order for running away from the institution but not for paragraphs 46(2) (aa) and (bb). The JKM had requested the politicians, or members of Parliament to amend the Child Act, 2001 to remedy the situation. They wanted the Board to have the power to review a matter where there was ample proof of support from the parents. JKM had foreseen this problem but without the approval to amend the Child Act 2001 they were powerless to act.

Clearly, the implementation of the Child Act 2001 leaves much to be desired. There should be mechanisms in place to correct these mistakes. This is merely regarding the general application or implementation of the Child Act 2001. Following on from this, and the main crux of this research, is how the method of implementation of the Child Act 2001 has hindered the development of child rights or more specifically the issues around or interpretation of the best interest of the child principle.

³³³ Although most child offences under the Child Act 2001 are not deemed to be criminal but in cases where there is a court order the offence is not the actual violation of the Child Act 2001 but the fact that she had disobeyed a court order therefore bringing her in contempt of the Court order. Based on that she was deemed to have committed a crime.

³³⁴ This term is used loosely since technically no child can be incarcerated under the Child Act 2001.

The best interest of the child principle in Malaysia

The best interest of the child principle has been provided for in the Child Act 2001 but, as stated earlier, it is not in the opening, closing, preamble, miscellaneous or general application provisions of the Act. Rather it is stated 13 times in different parts of the Child Act 2001; namely in Parts V, VI, IX and X. The relevant provisions are subsections 18 (a), 30 (5), 35 (3) and 37 (5), paragraphs 30 (6) (a) and (13) (aa) in Part V; subsection 40 (5) and paragraphs 40 (12) (aa), 42 (7) (a) and (b)³³⁵ in Part VI; section 80 in Part XI; and subsection 84 (3), section 89 and 90 (13) (a) in Part X. As mentioned earlier most of the Parts in the Child Act 2001 are read disjunctively so each of these parts are read separately and illustrate that since there is no universal application, it is only applicable in specific situations. The situations will be highlighted for a clearer illustration of the encumbrances placed on the Child Act 2001.

A) Part V – Children in need of Care and Protection

The circumstances for invoking the test are based on the particular situation. Looking at the provisions one at a time, it is clear that the test can only be used in specific situations. The first provisions are as follows:

“Taking a child into temporary custody

18. Any Protector or police officer who is satisfied on reasonable grounds that a child is in need of care and protection may take the child into temporary custody, unless the Protector or police officer is satisfied that—

(a) the taking of proceedings in relation to the child is undesirable in the best

³³⁵ Although paragraph 42 (7) (b) is not exactly worded “best interest” but it does involve the interests of the child.

interests of the child; or

- (b) the proceedings are about to be taken by some other person.”

Section 18 provides for the grounds when the Protector or police may take a child for temporary custody. This is usually in cases where the child is perceived to be in immediate danger or in danger of being absconded. However, the best interests of the child principle is used as an exemption - as when the child ought not to be taken - but this can be a double-edged sword. In another unreported case a teenage boy called JKM to ask for help because he alleged his mother was abusing him. When JKM arrived with PDRM, the mother called the husband, who happened to be a Dutch national and brought a lawyer. The lawyer used his presence to influence the PDRM to not take the child immediately. PDRM, worried that they might be sued, asked JKM to use another method.

At this stage the JKM sought the MWFCDC’s legal advisor for assistance. The legal advisor informed JKM and PDRM that PDRM had absolute power to take the child. However PDRM refused and JKM - who had no means of using force - instead decided it was in the best interests of the child to invoke another power to ask the parents to compulsorily surrender the child to the hospital for a check-up within 72 hours.³³⁶ The parents left the country with the child the next day, before the required date for the hospital check-up. This was indeed a sad state of affairs. The only resolution from that case was that JKM has had to build a better rapport with PDRM to ensure that something similar does not happen again. Nevertheless, that is not the only action that needs to be taken.³³⁷ The enforcement agencies and society at large need to understand the role played by the Protectors and the importance of listening to the child. The Protectors have a duty to listen to the child but the duty should

³³⁶ Pursuant to subsections 20 (3) and (4), Act 611.

³³⁷ Unfortunately the case is not reported and not recorded and based purely on experience of the researcher.

not be limited to only the Protectors, but to other adults as well especially those with authority.

The next provisions refer to the best interests of the child but the degree of proof is of paramount consideration.

“Powers of Court For Children

30. (5) In determining what order to be made under subsection (1), the Court For Children shall treat the best interests of a child as the paramount consideration.

(6) Before making an order under subsection (1) or (4), the Court For Children shall consider and take into account any report prepared by the Protector which—

(a) shall contain such information as to the family background, general conduct, home surrounding, school record and medical history of a child as may enable the Court For Children to deal with the case in the best interests of the child; and

(b) may include any written report of a Social Welfare Officer, a registered medical practitioner or any other person whom the Court For Children thinks fit to provide a report on the child.

(13) A Court For Children may, on the application of—

(a) a Protector;

(b) the person in charge of a place of safety; or

(c) the parent or guardian of a child,

amend, vary or revoke any order made under this section—

(aa) if the Court For Children is satisfied that it is in the best interests of the child to do so; or

(bb) upon proof that the circumstances under which the order was made have

changed after the making of the order.”

Section 30 provides the power to the Court for Children to issue orders should there be enough evidence to show that the child is in need of care and protection. A child is in need of care and protection if anything under section 17, the Child Act 2001 has been proven or met. This forms the bulk of the work regarding protective child-care carried out by JKM. A problem arises when the persons causing the reason for the child to be in need of care and protection are the parents or guardians. In this case, would it not be in the best interests of the child to separate them?

A case in point was a child abuse case that happened in the capital Kuala Lumpur in 2009, where a child was brought to a hospital with a broken hand and bruising all over his body. After JKM had conducted its investigation, it was deduced that the child’s own mother had abused him. The woman claimed that she was disciplining the child. Despite that, the son wanted to be with his mother when JKM intervened and took temporary custody of the boy. The case was highlighted in all the daily newspapers with the public demanding justice. There was much speculation but in the end the woman admitted to doing it because she said that is how the Chinese community discipline their children.

The woman is an educated Chinese Muslim lady, sole parent (husband believed to be a Malay Muslim drug addict) teaching the piano and earning a respectable RM3,000 to RM4,000,³³⁸ thus she is not a poor woman under duress bringing up her child. The boy went to school and ate regularly so there was no neglect on the mother’s part. The only issue was the method used to discipline her son. After a while the commotion died down, JKM had temporary custody, separated the mother and child to give them space and counselled both the mother and child. The mother visited the child regularly bringing him home-cooked meals

³³⁸ £1 is equivalent to about RM4.70 in 2012 now RM5.40

and the matter was amicably resolved.

The question here is the approach the Probation Officer would have to take in writing a report and proposing what would be in the best interests of the child. In the end, JKM wrote a report proposing that the mother and child be reunited but on the condition that the mother attended counselling sessions organised by JKM. The Court agreed and decided that it was in the best interests of the child that the parent and child be reunited but that both should attend regular periodic counselling to ascertain their progress. They have progressed well and no other issues came up between them.

The next provision where the best interests of the child principle is used is as follows:

“Notification of taking a child into care, custody or control

35. (3) If, after the inquiry referred to in subsection (2), the Protector deems it expedient to do so in the best interests of the child, he may either—

- (a) order that the child be returned to the care, custody or control of his parent or guardian or the person in whose care he was at the time of such taking; or
- (b) permit the taking of the child on such terms and conditions as the Protector may require.

Power of Protector to require child to be produced before him

37. (5) If, after the inquiry mentioned in subsection (4), the Protector deems it expedient in the best interests of the child, he may-

- (a) order that the child be returned to the care, custody or control of his parent or guardian or the person in whose care he was at the time of such taking; or
- (b) permit the taking of the child on such terms and conditions as the Protector may require.”

The above provisions have been grouped together because there are not many cases reported to JKM. There are a considerable amount of incidents that happen with unwanted babies being given to people, but most would only refer the matter to JKM when the children are about to enter school.³³⁹ This has caused a lot of problems with our migrant and refugee communities from Myanmar (Rohingyas), Filipinos, Acehnese and Malay Khmers, but that is another issue and not dealt with here. With reference to the issue at hand, JKM would not normally take the case further because policy dictates that if the child has a good family then it should not be disrupted.

B) Part VI – Children in need of Protection and Rehabilitation

The next part is pertaining to children requiring protection and rehabilitation as listed in section 38 of the Child Act 2001. The circumstances are limited to children that have been exposed to sexual abuse and its environment. Based on this research, there has never been a case referred to JKM regarding this Part. That is not to say that the situation does not exist but there is a lack of evidence to prove whether it is present or not in Malaysia. The situation is one where JKM has been unable to take any action because Malaysia's very conservative society has negative perceptions towards these children in the community. JKM has an unofficial programme with NGOs that provide food, shelter and informal education to children living in environments of the sex industry. The government cannot do this openly because of the fear of a backlash from the rest of society who would claim that the money would be better spent on other programmes.

The best interests of the child principle was also used with paramount consideration in the following provisions.

“Orders upon completion of an inquiry

³³⁹ The Malaysian schools would only accept children with the complete documentation to show that they are the actual parents and to confirm the nationality of the children.

40. (5) In determining what order to be made under subsection (3), the Court For Children shall treat the best interests of a child as the paramount consideration.

...

(12) Without prejudice to the powers of the Board of Visitors pursuant to subsection (6) the Court For Children may, on the application in writing made by—

- (a) a Protector;
- (b) the parent or guardian of the child to whom an order made under this section relates; or
- (c) the child,

amend, vary or revoke any order made under this section—

- (aa) if the Court For Children is satisfied that it is in the best interests of the child to do so; and
- (bb) upon proof that the circumstances under which the order was made have changed after the making of the order.

Inquiries and detention of a child who has been bought or acquired under false pretences, etc.

42. (7) If after considering the report submitted under subsection (6) the Court For Children is satisfied that a child brought before it is in need of protection and rehabilitation, the Court may—

- (a) order the child to be detained in a place of refuge for such period not exceeding three years from the date of the order as the Court may in the best interests of the child deem fit; or
- (b) make an order placing the child under the supervision of a Social Welfare Officer appointed by the Court for such period not exceeding

three years from the date of the order as the Court may in the interest of such child deem fit.”

The wordings above are almost identical to the wordings of the provisions in Part V. The procedure is the same but as mentioned earlier, the test has been rarely invoked for this part of the Child Act 2001. Thus it would be difficult to construe how the courts would interpret the test.

C) Part IX - Institutions

This provision is more of an administrative provision giving the Director General of JKM the authority to move children within the institutions under JKM in the best interests of the child. This decision does not entail legal issues but rather more sociological considerations, with the interest of the child and the relevant institution being weighed.

“Transfer of child from one place of safety or place of refuge to another place of safety or place of refuge.

80. Without prejudice to any written law relating to immigration, whenever an order has been made under this Act for the detention of a child in a place of safety or place of refuge and it appears to the Director General that in the best interests of the child it is expedient that he be transferred from that place of safety or place of refuge to another place of safety or place of refuge within Malaysia, it shall be lawful for the Director General to issue an order that the child shall be so transferred.”

D) Part X – Criminal Procedure in Court for Children

Of all the provisions cited above this is the most used by JKM. JKM has limited resources and manpower, so a rationalisation process has seen it mainly focused towards

reported cases, thus making it more reactive than proactive. This is not the best approach to the situation but it is the one that it has been accustomed to and changes would require a drastic policy shift. Coming back to the provisions at hand, these provisions basically address the conduct of criminal cases for children. One of the principles of the CRC is that children cannot be punished as criminals; this procedure seeks to provide alternative methods of punishment. Although there is no imprisonment, there is detention in JKM institutions.

“Bail

84. (3) The Court For Children before whom a child is brought shall inquire into the case and unless—

- (a) the charge is one of murder or other grave crime;
- (b) it is necessary in the best interests of the child arrested to remove him from association with any undesirable person; or
- (c) the Court For Children has reason to believe that the release of the child would defeat the ends of justice, the Court For Children shall release the child on a bond, with or without sureties, for such amount as will, in the opinion of the Court For Children, secure the attendance of that child upon the hearing of the charge, being executed by his parent or guardian or other responsible person.

Parents or guardian may be required to withdraw

89. If in any case the Court For Children considers it necessary in the best interests of the child, the Court may require his parents or guardian, as the case may be, to withdraw from the Court.

Procedure in Court For Children

90. (13) A probation report referred to in subsection (12) shall be prepared by a probation officer and the report-
- (a) shall contain such information as to the child's general conduct, home surroundings, school record and medical history as may enable the Court For Children to deal with the case in the best interests of the child; and may put to him any question arising out of the probation report; and
 - (b) may include any written report of a Social Welfare Officer, a registered medical practitioner or any other person whom the Court For Children thinks fit to provide a report on the child."

Currently, the above provisions are read in conjunction with the Criminal Procedure Code (Act 593). This is because they all pertain to criminal or pseudo-criminal matters. There was a proposal to amend the provisions regarding all procedures in cases where a child has committed a crime. The purpose was to erase any traces of criminal matters from child matters. This was one of the objectives of the Child Act 2001, that is, to distance the child from the crime. Based on the said proposals, all child arrests or detentions would then be subjected to the Child Act 2001 instead of the Criminal Procedure Code.

The PDRM was totally against this proposal. They insisted that the new procedures would be problematic as they would have to incur more costs. The costs involved in the recalling and re-training all their officers was too much for PDRM to absorb. Aside from that, the PDRM explained that they were already comfortable with the current procedure and any new procedures would be too troublesome. Due to this rejection, the MWFC had no alternative but to forgo the said proposals. It should be noted that the drafters had prepared

over 30 provisions for the said Child Criminal Procedures to be included into amendments to the Child Act 2001.

Coming back to the best interests of the child principle, all the above provisions are in the Child Act 2001 but are limited to specific situations. Even within the purview of the Child Act 2001, there are areas that would not be able to invoke the principle due to its specific nature. These areas include Part VII on children beyond control and Part XI on the care of fit and proper person. The Court would have no specific recourse to invoke the principle for other parts unless it is used as persuasive authority.

Before proceeding into the decided case relating to this issue, it is interesting to note that the Courts have always taken a rather unilateral approach in interpreting the best interests of the child in Part X. The exception is section 84 whereby the best interests of the child is a consideration in cases where the Court has to decide whether or not bail is to be granted to the child defendant or accused.³⁴⁰ However, the application of the principle in other provisions is purely at the court's discretion. The court would refer to the Probation Officer and his report and to the Court Advisors as well as the parents, but they rarely ask the child himself.

Generally the Court assumes that the best interests of the child is for the child to be disciplined and the best way to do that is to send him or her to an approved school under JKM. The probationary report would try to provide an in-depth report of the child's background. However, in practice the courts would ask the Probation Officer to summarize their findings. Usually these summaries are not complete and the Court will decide based on this summarised brief in which the child's view is not the paramount concern. In fact this runs contrary to the principles of CRC but the Malaysian judicial system accepts that the

³⁴⁰ The term accused is not used in the Child Act 2001.

children are offenders and need to be punished for their misdeeds.

The duty of both the Court and the Probation Officer is to ensure that the child has been given the best opportunity to change and develop into a proper citizen. The child may have been poorly educated or misguided, or perhaps the family was unable to provide a conducive environment, or there may be other reasons that have led the child down the path of crime. The child deserves a second chance in life to change for the better. Should the case warrant - or the family is truly unable to provide for the child - intervention is unavoidable. JKM would then be the child's appointed protector until they have reached adulthood which is generally at 18 years old.

This is only the criminal aspect of the best interest of the child principle but one that is the norm in Malaysia. Since the test is not of universal application, it can only be applied outside through judicial interpretation and stare decisis. However, even this is not accepted as a common law or accepted law and has only persuasive authority.

E) The Application of the test in decided cases

There are several instances where child matters arise in cases that have been decided by the Courts in Malaysia. Most of these cases are in custodial and divorce proceedings as well as instances of inheritance cases. Other than that, children are not involved directly in judicial proceedings. Looking at the cases involved, the Courts have not used the test universally as accepted by law but rather applied it only on a case-by-case basis and not in its truest form. In fact, in a seminar held in the Judicial and Legal Training Institute or ILKAP³⁴¹ for Judges of the High Court, one of the Judges claimed that the CRC is not a law as Malaysia is only a signatory and no laws have been passed to bring in the principles of the

³⁴¹ ILKAP is the Malay abbreviation of the institute, which stands for *Institut Latihan Kehakiman dan Perundangan*. The website of the institute is www.ilkap.gov.my and there is an English version.

CRC. This is pertinent bearing in mind that the seminar was in 2009 but Malaysia became a party to the CRC in 1996.

The Federal Constitution does not specifically mention the status of international law and conventions, thus giving them a merely persuasive authority. The Courts can only refer to these laws when there is a lacuna in the current law and when there are no other sources of law. The other method that was mentioned earlier is when the international law has been domesticated, that is, through an enabling act or a local law that adopts the international law into the domestic legal system. This is unlike some other countries where the acceptance of international law could be done through judicial notice of the same without the requirement of an enabling law. In a vibrant legal tradition this should not be too much of an obstacle. Malaysia has had the luxury of almost a century of practising and applying the common law.

Furthermore, the Malaysian Judiciary has always been rather conservative in its approach to interpreting the laws. This conservatism manifests itself in most decisions wherein the Courts are reluctant and unwilling to adopt international laws even if there is a lacuna in the local law. The best interest of the child principle is an example of such a situation. Article 3 of the CRC clearly states that the best interest of the child is a primary consideration in child matters. Malaysia has made no reservations to Article 3 and therefore it is mandatory for Malaysia to implement this principle. The Courts await the enactment of an enabling law to implement the provisions instead of adopting to apply the principle directly from the CRC.

Looking at certain cases on custodial matters, there are some judgments that have used the principle without actually referring to it as a specific and recognized test. One of the first reported cases of the introduction the best interests of the child principle was *Jeyasakthy*

Kumaranayagam v Kandiah Chandrakumaran.³⁴² The husband, a British citizen, and the wife, a Sri Lankan citizen had filed a joint petition for the dissolution of marriage in the Kuala Lumpur High Court. The family had moved to Malaysia in July 1991 with their two children. The High Court's full decision is not related to this research, however, this research wishes to highlight the fact that the Judge did mention in his judgment the principle of the best interests of the child when he stated as follows:

“Secondly, a duty is imposed on the courts by the Act to ensure that whatever terms which may have been agreed upon by the parties in the joint petition are fair to each of the parties, and more importantly to the welfare of the children (if any). The court has full powers under the Act to vary any of the terms which in the opinion of the court are not in the best interest of the wife or the children.

It is generally an accepted principle that children should not be separated from one another, and yet in many joint petitions, provisions are made for the 'distribution' of the children between the spouses without any consideration for their welfare. In such cases, it is important that the judge considers in detail these provisions, and be satisfied that in the best interest of the children, particularly their welfare, the agreed arrangement between the parties for the children are acceptable (see generally ss 88 and 89 of the Act³⁴³).”

Despite the case above, which was decided in 1996, very little development has taken place specifically on this matter. There is also a plethora of cases that make no inference or even try to make any inference whatsoever to the principle. These cases also include those that have gone all the way to the Federal Court, Malaysia's apex court. Amongst these is the

³⁴² [1996] 5 MLJ 612

³⁴³ Law Reform (Marriage and Divorce) Act 1976

case of *Sean O'Casey Paterson v Chan Hoong Poh and Ors.*³⁴⁴ This is a Federal Court case where the appellant was dissatisfied with the Court of Appeal decision. In the Court of Appeal, one of the reasons for their decision was, "(f) The granting of any other prayers requested by the plaintiff would not be in the best interest of the child concerned."

The Federal Court however did not go into the merits of this reasoning as they decided based on a technicality, and upheld the Court of Appeal's decision without mentioning the best interests of the child. If the Federal Court had referred to the test it would have been binding on all the courts in Malaysia. As it stands, the Court of Appeal decision is still binding on the lower courts so it is to be hoped that the application of the best interest of the child principle has been laid to rest. The Court of Appeal decision is as follows:

"[21] Having arrived at the aforesaid finding it should logically follow that all the prayers except for prayer (a) asked for by the appellant in his application before the High Court below are unsustainable, as granting of those orders, in our view would not be in the best interest of the child concerned. In this regard we quote a passage from the decision of Lindley LJ in *In Re McGrath* [1893] 1 Ch. 143, which states:

The duty of the Court is, in our judgment, to leave the child alone, unless he is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded... The Court

³⁴⁴ [2011] 3 CLJ 722

has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child.”³⁴⁵

The Court of Appeal above referred to the same case that introduced the welfare principle to western jurisdictions.³⁴⁶ The one referred to was a 19th century English case³⁴⁷ that was decided more than a century ago. Cases involving children were mainly decided based on the old concept of *parens patriae*.³⁴⁸

However, at the very least, there are Judges trying to bridge the divide. This is evident with numerous other cited cases regarding custody, which state that when deciding the custody of children, the welfare and best interests of the child are important factors. Although the added emphasis does seem to create two separate concepts, one being welfare and the second, the best interests of the child, as seen in Chapter Three, the best interests of the child principle has to be taken into consideration in all aspects relating to the child and encompasses welfare.

In fact, the principle was slowly being developed by the judiciary. This was shown in the cases of *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik*³⁴⁹ which acknowledged the best interest of the child principle. The case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*³⁵⁰ went further and

³⁴⁵ *Sean O'Casey Patterson V. Chan Hoong Poh & Ors And Another Appeal* [2010] 5 CLJ 409

³⁴⁶ Case quoted in Chapter Four of this thesis *In Re McGrath* [1893] 1 Ch. 143.

³⁴⁷ Based on Section 3 of the Civil Law Act 1956 (Revised 1972) Act 67, all laws applicable in England prior to 7 April 1956 shall be applicable to Malaysia.

³⁴⁸ Explained in detail in Chapter Three.

³⁴⁹ [2013] 4 MLJ 272

³⁵⁰ [2013] 5 MLJ 552. This is the High Court case. The Court of Appeal case was cited in Chapter One, *i.e. Pathmanathan Krishnan V. Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911, which amalgamated five other cases which were related. Initially this research wanted to analyse this case however the Federal Court had decided on 29 January 2018 of which overturned most of the Court of Appeal ruling. The Grounds

acknowledged not only the existence of the CRC but the guiding principles, as well as the fact that Malaysia is bound to the principles in that it has not made any reservation. Nonetheless, this development was achieved by case law and there is no standardisation through any of the written laws. Therefore the application, though a welcome development, is not uniform.

Nonetheless, the development has evolved a step further with more enlightened judges drawing direct inference from the CRC. They are still the minority and their cases are few and far between. One of those cases is the High Court case of *Lai Meng v Toh Chew Lian*.³⁵¹ This is one of the first ever cases where the presiding judge referred to the CRC. The judge stated in his judgment as follows:

“Both Articles 3 and 9 of the CRC state that the best interests of the child shall be the consideration for the matters provided therein. This is consistent with the welfare principle that I had earlier dealt with.”

The Court adopted the principle in 2012 but this is still only a High Court case and does not have the same precedent as compared to a Federal or Court of Appeal case. As such it still retains the status of persuasive authority to other later cases in Malaysia.

The Different Application in England and Malaysia

The application of the best interests of the child principle in England provided in Chapter Three differs considerably from the application in Malaysia as expressed in this Chapter. In particular, there are differences in how the principle has been implemented, the scope of the principle in the respective jurisdictions, the level of understanding within the

of the decision have been released but the full transcript are not published yet so will not be referred in this research.

³⁵¹ [2012] 8 MLJ 180

legislature and judiciary in both countries, and the possibility of change in the near future for both countries. These differences have been due to the different backgrounds and levels of understanding in these respective jurisdictions.

First, both jurisdictions used differing methods in the implementation of the principle. In England, it was applied through the provision of the Children Act 1989. This difference is not only limited to the instrument used in facilitating the application of the principle, as discussed in Chapter Three, but also the common law approach in England using the paramountcy or welfare principle well before the drafting of the CRC. It could be said that England was far more advanced in the field of child protection than others. However, despite this seeming advantage, England still has an issue specifically with the scope of the principle. The fact that the UK is still lagging in the fields of criminal justice and immigration should be more of a concern for UK authorities, especially since the UK had a head start in child issues.

The next issue is regarding the level of understanding of the principle. Since the principle is embedded in the common law, the appreciation of the legal fraternity is quite high. It is a legal maxim that is used in family law practice at the very least. In contrast Malaysia, despite supposedly adopting the same common law principles from England before 1956, did not use the principle as a rule that should be referred to in child matters. The Child Act 2001 was passed but the principle had limited scope and was not even applicable to the entire Act. The difference in scope between Malaysia and UK is so wide that it is surprising that the two jurisdictions have anything in common. In Malaysia, the legal fraternity did not use the principle as often as it should have done and it is this lacuna that is alarming. Meanwhile, the judiciary had to be informed of Malaysia's obligations under the CRC and other human rights instruments. This has brought about some changes as mentioned above with recent cases incorporating the said principle, but they reflect how slow the development

of child rights has been in Malaysia. Family law practices have begun to use the principle more often in custodial cases, so it is to be hoped that there will be further changes. These changes are necessary to ensure that Malaysia keeps abreast with the development of child rights globally.

The fundamental issue here is that the Malaysian policy makers missed a significant opportunity to draft a law that was conceivably more CRC compliant as compared to being merely CRC friendly. Instead of drafting an entirely new law with provisions mirroring the CRC and the English Children Act 1989, the MWFCDC took the relative safer option of using existing provisions and amalgamating them into one act, the Malaysian Child Act 2001. Although it was a momentous occasion because it was the first ever law to be enacted to fulfil Malaysia's obligations under an international human rights treaty, alas it did not meet most of the requirements of the CRC.

Merely comparing the Introductory Text³⁵² and the Long Title³⁵³ illustrates the difference. Despite being the enabling law for Malaysia, no reference is made to the CRC and it also refers to a narrower scope in child rights and law if compared to English law. Both have omitted criminal matters, although Malaysia has incorporated its criminal youth system into the act under the scope of the rehabilitation of the child. The English law covers all areas of custodial issues and civil law cases where the child is likely to be involved as well as local authorities' dealings involving children. The Malaysian law only covers care and protection, as well as rehabilitation³⁵⁴ whilst some other areas have yet to be tested. This directly affects the application of the principle in both jurisdictions.

Another important question is how far the tensions between the rights-based perspective of the CRC - where the best interests of the child are primary - and the best

³⁵² Children Act 1989

³⁵³ Child Act 2001

³⁵⁴ All discussed in Chapter Five.

interests jurisprudence in England - where the best interests of the child are paramount - been resolved, and what are the implications of this for Malaysia? The English position is at best similar but definitely not the same as that of the CRC. It is clearly based on the paramountcy principle and the differing thresholds between welfare principle and best interests principle applied in England and Malaysia. If it were limited to just the naming of the principle then the answer would be definitive, in that there is no difference.³⁵⁵ However, the issue stems from something much deeper, and that is the common law position regarding this issue, which is another research question. The Malaysian position clearly uses the rights-based approach and primary consideration. All this leads the researcher to hypothesize that the differences outnumber the similarities.

The CRC Committee's Views on Malaysia's Implementation of the Principle

Before concluding the chapter on Malaysia, one aspect that must be considered is how the CRC Committee views Malaysia's implementation of the principle. This is provided in the Concluding Observation: Malaysia.

"Best interests of the child

36. The Committee notes with appreciation the provisions of the Child Act 2001 (Act 611) which incorporate the principle of the best interests of the child, and takes note of many other national laws that enshrine this principle. However, it is concerned that this general principle is not fully applied and duly integrated in the implementation of the legislation, policies and programmes of the State party as well as in administrative and judicial decisions. For example, while the State party has expressed its firm intention not to separate migrant children from their migrant

³⁵⁵ See Lord Oliver's comments in *Re KD (A Minor)(Ward: Termination of Access)* [1998] AC 806 at 825.

parents to be deported, the implementation of current provisions of the Immigration Act 1959/63 (Act 155) has resulted in detaining and deporting migrant workers without effective efforts to prevent the separation of children from their parents. The Committee also notes that the Law Reform (Marriage and Divorce) Act 1976 (Act 164), as well as the Islamic Family Statutes, are based on a primary presumption that a mother is the best person to take care of a child, leaving the consideration of the best interests of the child as a secondary concern.

37. As regards article 3, paragraph 1, of the Convention, the Committee emphasizes that the Convention is indivisible, that its articles are interdependent and that the best interests of the child is a general principle of relevance to the implementation of the whole Convention. The State party should ensure that the best interests of the child is a primary concern, taken into account in all revisions of the legislation as well as in judicial and administrative decisions, and in projects, programmes and services that have an impact on children.³⁵⁶

The emphasis above is part of the format by the CRC Committee and has been quoted as is. The recommendation was based on Malaysia's only submission to date, in 2007.³⁵⁷ Clearly, the CRC Committee was concerned that Malaysia was not doing enough to implement the principle. The comments are rather blunt and seem to be more of an admonition than a recommendation, the CRC Committee basically telling Malaysia that a major review is necessary to fulfil her obligations regarding the implementation of the best interests of the child principle.

³⁵⁶ Concluding Observations: Malaysia Item No. 36 and 37, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. CRC/C/MYS/CO/1.

³⁵⁷ The report itself was submitted in early 2006 and the hearing was scheduled I January 2007 by the CRC Committee.

Since the report in 2006, significant steps have been taken but whether they fulfil the requirements remains to be seen. The discussion above has shown how the Malaysian Judiciary has slowly but surely implemented the best interests of the child principle, but as the discussion above also indicates, the change was done not through any amendments of the law. The recommendation also indicates that when Malaysia does submit the next report³⁵⁸, there have to be significant developments.

Conclusion

In this chapter, the general background of Malaysia and the legal system has been laid out. The geographic and political differences have played their part in contributing to the current state of affairs. However, one cannot but be mindful that history has played the most important factor for the development of the law and child rights in Malaysia. It is hoped that this basic understanding of Malaysia's socio-legal complexities has illustrated how difficult it was to implement the best interests of the child principle based on other jurisdictions. The differences in the law stem from a variety of sources and the customs are just part of the socio-legal issues. This will be further discussed in Chapters Five and Six.

The development of child rights in Malaysia is slow-moving. Since becoming a party to the CRC in 1995 it has taken the Courts seventeen years to officially recognize the CRC. The best interests of the child principle is one of the most basic principles of the CRC but Malaysia has not placed any reservation to date. It took a long time to be absorbed into the legal system which is tantamount to neglect, especially of the children that the Child Act 2001 was meant to protect in the first place.

Besides the Child Act 2001, the government should also utilise the Federal

³⁵⁸ Malaysia was supposed to submit the next report in 2010 but till today it has not done so. So this year, 2018, Malaysia has to submit her Third to Fifth Country Reports.

Constitution to further strengthen child rights advocacy. The rights are already enshrined in the Federal Constitution, but what is needed is better publicity of the rights and to make them accessible to all children. Until that has been done, the fear is that the recommendations from the next CRC Committee would be similar to the last.

There is definitely room for improvement. The question that begs an answer is, where must we begin to accelerate the changes relating to child rights in Malaysia? The researcher believes that the start should be through the acceptance of the most fundamental principle that is the best interests of the child principle. The whole purpose of this study is to highlight the importance of the principle and suggest methods that could significantly lead to a more positive and direct development in the law.

This chapter illustrates that the current standards applied to the best interests of the child principle in Malaysia may not be as sufficient as it was hoped, and definitely not as wide ranging as hoped. On a comparative note, clearly Malaysia's approach is still far from implementing the standards applied in England based on the paramountcy principle. Attempts must first be made to raise the standards to a primary consideration on all facets of the child's life.

In Chapter Five, the religious aspect of this predicament will be laid out. The minority group concerns are highlighted as well as international pressure groups seeking to impose their proposals on the Malaysian Government.

Chapter Five

The CRC and *Shari'ah*: The Rights of Children in Islam

Muslim jurisdictions recognize the best interests of the child as the most important factor for awarding custody. Nevertheless, according to traditional Islamic law, the interests of the child of a Muslim father are considered best met if the child remains Muslim. This assumption is not necessarily explained by the status of religion in each state's constitution but rather by the content of religious freedom in law, by its perception in society, and in the practice of state institutions.³⁵⁹

Introduction

The above quote summarizes the position of Islamic Law in general on the best interests of the child. The statement also puts the rights of the child in the perspective of the family unit.³⁶⁰ It sets the foundation of the principle in the *Shari'ah* and this chapter in general. In Chapter One and at the beginning of Chapter Four, Malaysia's political and legal history has been briefly explained illustrating Malaysia's diverse background and cultural heritage. This diverse cultural heritage has led to the socio-legal complexities that are always present whenever Malaysia intends to make policy or new laws. The application of child law and rights in Malaysia is affected not only by its complicated legal history but also by the fact that the family law in Malaysia consists of federal legislation for non-Muslims, and state legislation based on Islamic law for Muslims.

This complication is also reflected in the drafting of the Child Act 2001 where the best interests of the child principle was mentioned in several areas of the Act but not becoming an overarching principle for all child cases. This chapter will look into another aspect of what causes Malaysia's socio-legal complexity, namely the *Shari'ah*. The aim of this chapter is to provide some insights into the complexities of the application of *Shari'ah*

³⁵⁹ Gallala-Arndt, Imen. "The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches?" *American Journal of Comparative Law* 63.4 (2015): 829- 858. Print.

³⁶⁰ There are exceptions to the rule, which will be discussed further in this Chapter.

in Malaysia as well as how far the principles of the CRC and the *Shari'ah* are compatible.

In order to achieve that, this chapter looks briefly at the history of Islam in Malaysia, followed by the development of *Shari'ah* law in the Malaysian legal system. I will analyse how the *Shari'ah* law principles compare to the international human rights regime and the common/civil law, and whether the application of the *Shari'ah* in Malaysia has affected Malaysia's implementation of the CRC principles. Before proceeding further, a brief account of Islam in general is necessary to acclimatise the reader to the situation in Malaysia.

The Current Situation of Islam in Malaysia

There are many different sects in Islam but the Muslims in Malaysia are predominantly *Ahlul Sunnah wal Jamaah*³⁶¹ or Sunnis. Similarly, of the nine sultanate states, eight states are of the Syafi'e sect within the Sunnis. The other state, Perlis, follows the Wahhabi school, which is practised in Saudi Arabia³⁶². Some jurists claim that the Wahhabi school of thought is a sub-sect of the Hanafi School of the Sunnis.³⁶³ The rest of Malaysia follows the majority, the eight sultanate states, and practises the Syafi'e traditions.³⁶⁴ There are also small pockets of Hanafi and Maliki schools of Sunnis that exist predominantly within the Indian Muslim community and the expatriate community. Generally Sunnis from whatever sect accept each other openly without any reservation.

Returning to the development of the *Shari'ah* in Malaysia, again the division has to be made based on Peninsular Malaysia and East Malaysia. In Peninsular Malaysia there are

³⁶¹ Literally translated from Arabic means "the people of the *Sunnah* and the community".

³⁶² The *Mufti* of the State of Perlis has denounced this and counters that they are Sunnis as well.

³⁶³ The actual origin of the Wahhabi Sect is often debated but it is either a sub sect of the Hanafi or maybe the Hanbali schools of thought.

³⁶⁴ However, it should also be noted there are small pockets of deviant sects in Malaysia, which the Department of Islamic Development Malaysia - better known in its Malay abbreviation, JAKIM, is trying to re-educate. There is also a small yet increasing number of Shi'ite Muslims in Malaysia. It should be noted that the Sunnis accept all four schools as fellow Sunnis and are allowed to co-exist without any apprehension or intimidation.

basically two contexts, namely, the situation in the Straits Settlement and that in the Federated and Unfederated Malay States.³⁶⁵ Even within the Straits Settlements there are slight variations, with Malacca having a totally different circumstance to Penang. However, in East Malaysia, the two states of Sabah and Sarawak have totally different circumstances.³⁶⁶ These differing circumstances arise from when and how Islam came to the state as well as by whom and how they were governed. This history will also describe the significance of Islam and the role it plays in the socio-legal regime in Malaysia.

Islam's significance in Malaysia

Looking at some specific issues, one of main reasons the *Shari'ah* is so significant in Malaysia is the case mentioned in Chapter Four that of *Ramah v Laton*.³⁶⁷ The court, presided over by Thorne J, pronounced that the *Shari'ah* was the law of the land. The case was decided in 1927 in the Federated Malay States³⁶⁸ where the States had a recognised Sultan and accepted a British Resident to manage its affairs, beginning with international relations. The daily affairs of the state was conducted through the Resident following the arrival of the British, who slowly usurped the Sultan's power and took over most of the administrative affairs. The Sultan was left to manage Islamic and local customary matters. Nonetheless, the Courts had decided that the law of the land in these States was the *Shari'ah*.

This case is significant because there were other cases³⁶⁹ that said otherwise especially on the island of Penang which was said to be totally uninhabited before the arrival

³⁶⁵ For a more detailed read please see, Ismail Mohd@Abu Hassan et al, *Introduction to Malaysian Legal History*, Petaling Jaya, Ilmiah Publishers. (2004), p. 54 – p. 80.

³⁶⁶ For a more information see Wu Min Aun, *The Malaysian Legal System. Third Edition*. Petaling Jaya: Pearson Longman, Malaysia. (2005). p. 30 – 38.

³⁶⁷ [1927] 6 FMSLR 128; [1927] 1 LNS 13

³⁶⁸ Already described in Chapter Four meaning the case originated from either Negeri Sembilan, Pahang, Perak and Selangor.

³⁶⁹ Some of those cases were *Kamoo v. Thomas Turner Bassett* (1808) 1 Ky. 1, *In the Goods of Abdullah* (1835) 2 Ky. Ec. 8, *Reg. v. Willans* (1858) 3 Ky. 16 and *Ong Cheng Neo v. Yeap Cheah Neo* (1872) 1 Ky. 326, 337 PC

of the British and Sir Francis Light and where the British took possession of the land as a “settled” colony instead of a “ceded” colony. They were considered the first inhabitants and had the locus to apply English common law in Penang.³⁷⁰ One of those cases mentioned earlier highlighted the fact that before the English Crown granted the First Charter of Justice in 1807 there was no law in Penang³⁷¹.

This view would have questioned how the *Shari’ah* could be the law of the land when there had never been any execution of law for that island. However, the researcher is of the view that since it was never questioned that Kedah had jurisdiction over that island, it is only logical that the *Shari’ah* would also have been the law of the land for Penang before the coming of Francis Light³⁷² since Kedah was also using the same law. In fact, the case of *Ramah v. Laton* mentioned earlier also confirms my hypothesis.

Within the Straits Settlement States, Malacca was different because before the Colonial powers took Malacca, Malacca had a Sultan applying the Law of Malacca, which was local customary law with Islamic influence³⁷³. Clearly, the *Shari’ah* is part of the law of the land for Malacca. Similarly for almost all the states and their Sultans or Raja there is some history of Islam in that state. All the above is purely based on the fact that Islam came during the Malacca era or the 15th Century. As mentioned in Chapter Four, there is evidence that Islam came earlier, during the time that Islam was spreading throughout the Arabian Peninsula, around the 7th Century. In fact inside Malaysia’s National Museum there is a stone known as the *Batu Bersurat Terengganu* or the Terengganu Stone Inscription. The Stone dates back to the 14th Century, even before the Kingdom of Malacca was formed. The

³⁷⁰ This was the first ever direct contact between the English and the Malays.

³⁷¹ *Ong Cheng Neo v. Yeap Cheah Neo* (1872) 1 Ky. 326, 337 PC

³⁷² Ismail Mohd@Abu Hassan et al, *Introduction to Malaysian Legal History*, Petaling Jaya, Ilmiah Publishers. (2004), p. 80-88.

³⁷³ Ibrahim, Ahmad, and Ahilemah Joned. *The Malaysian legal system*. Dewan Bahasa dan Pustaka, Kementerian Pendidikan Malaysia, 1987. Print. pgs 15-17.

inscription listed the laws applicable in the area for all the people to take note of. The inscription also listed Islamic based laws, further strengthening the argument that the *Shari'ah* was the law of the land throughout Peninsular Malaysia.

There is also further evidence of this significance when we look deeper into the fabric of the Malay lands. The Malay states, with the exception of Perlis and Negri Sembilan, practised the same Islamic teachings as those of the Syafi'e School of the Sunnis. Perlis has chosen the Wahhabi³⁷⁴ or a different school of thought. Not much is known about how and why this happened but only that the formation of Perlis coincided with the advent of this sect in Saudi Arabia. However, Negri Sembilan generally practises the same as the Syafi'e School but has adopted a matriarchal approach as compared to the traditional patriarchal approach of the other states³⁷⁵. Despite this different approach the general provisions and teachings are similar.

East Malaysia is not so easy to understand. Both Sabah and Sarawak have had tumultuous pasts and both have large indigenous tribes under Islamic kingdoms. However, not all accepted the faith with Sabah having 55-65 percent Muslims whilst Sarawak is only 22-27 percent Muslim.³⁷⁶ Even then, the application was probably not standardised since Brunei and Sulu³⁷⁷ Sultanates did not interfere in the affairs of the local tribes and when they did they concentrated more on taxation issues than on religious administration. In Sabah there were some indigenous tribes or *Dayaks*³⁷⁸ that did convert such as the Bajaus, Dusun and Malays. Other than that the exposure of the local population of Sabah was quite limited. The

³⁷⁴ The same sect practised in Saudi Arabia. This teaching originated in the early 19th century and dates from about the same time as when Perlis was formed by Siam.

³⁷⁵ Op. Cit., n. 373 at pg. 3.

³⁷⁶ This is a rough estimate as there is no specific official data available online on the breakdown of the population.

³⁷⁷ Specifically for Sabah where there is evidence of overlapping claims between Brunei and Sulu.

³⁷⁸ Literally means pirate but that is due to the fact that most of the indigenous tribes in Malaysia were seafarers

law of the land should also have been settled because both the Brunei Sultanate and the Sulu Sultanate were Islamic Kingdoms and the law of the land should be the *Shari'ah*.

In Sarawak, most Muslims predominantly stayed on the coastal or riverine towns and had limited exchanges with the hinterland *Dayaks* like the Ibans, Bidayuhs, Bisayahs and several other native tribes. The Muslims in Sarawak are predominantly Malays and roughly half of the Melanaus.³⁷⁹ Besides occasional Bruneian intervention, the locals of Sarawak were mostly left to tend to their own affairs. This was especially helped by the fact that most of the hinterland was easily inaccessible. Until now, riverboats are the main means of transportation for Sarawak. As such, Islam remained mainly on the coast. Nevertheless, the fact that the Sultan of Brunei had the authority to surrender Sarawak to Sir James Brooke meant that again, Sarawak had to be under the Brunei Sultanate and as Brunei is an Islamic nation, the *Shari'ah* should have been the law of the land.

Arrival of Islam into Malaysia

As mentioned previously, one of the most significant historical events in Malaysia was the arrival of Islam. Before Islam, most of the inhabitants of Malaysia were either Hindus or Pagans³⁸⁰. The Hindus almost entirely converted to Islam whilst some Pagans converted others maintained their old ways. Local historians have debated the reason for such a complete upheaval and the time of its arrival for decades without any concrete conclusion. There were basically two predominant versions why the upheaval was so complete.

The first and rather more popular view was that the Sultan of Malacca converted and thereby all his subjects followed suit.³⁸¹ The reason for his conversion aside, there is more

³⁷⁹ A *Dayak* tribe that lived by the coasts wield a considerable amount of influence in the State till today. Oddly the tribe has an even split of half Muslim and the other half Christian.

³⁸⁰ *Op. Cit.*, n 373, at pg 7.

³⁸¹ This is the narrative in most of the history books such as those of Andaya, Barbara Watson and Leonard Y. Andaya. *A History of Malaysia*. London: Macmillan Press Ltd, 1982, Mohd., Ismail, Hakimah Haji Yaacob

strength in this argument looking at the attitude of Malays towards religion. Historically Malays had never been religious but when the Sultan became Muslim, they merely followed suit and were allowed to maintain most of their previous customs.³⁸² The conversion did not bother or disturb their way of life for a long time, although the attitude is recently changing.

The second version comes from a more traditional view of conversion. Based on this theory, Muslim traders came from the Middle East and India and made Malaysia their base of operations. Spending three to six months at a time (due to the monsoons) these traders would propagate Islam either directly or indirectly. Some would enter into marriages with locals and convert them through these marriages. This began even before the birth of the Kingdom of Malacca, as there is proof that Islam came to Malaysia in the 14th century.³⁸³ The proponents of this view refer to the incident of the third and fourth rulers of Malacca.

The third ruler of Malacca, Raja Ibrahim (who took the title Sri Parameswara Dewa Shah), was the younger son of Sri Maharaja (who allegedly converted on his own personal initiative and took the name Mohammed Shah) from Sri Maharaja's Hindu-Buddhist wife (who was of royal blood). He usurped his elder brother from Sri Maharaja's Muslim wife (a commoner), Raja Kassim (a Muslim), with the support of the Malay noblemen who were all Hindus and Buddhists. Raja Kassim was supported by the Indian Tamil Muslims and local Muslims of Arab descent, both groups being traders or their descendants. Raja Ibrahim mysteriously died a year after taking the throne and Raja Kassim became the fourth ruler of Malacca taking the title Sultan Muzaffar Shah.³⁸⁴ This is proof that there were two large

and Khairatul Akmar Ab Latif. *Introduction to Malaysian Legal History*. Ilmiah Publishers (2004), and Winstedt, Richard. *The Malays: A Cultural History*. 6th ed. Routledge & Kegan Paul Ltd, 1961

³⁸² Mainly these customs are Hindu based and until now a lot are still being practised.

³⁸³ The Terengganu Inscription Stone mentioned earlier is dated to either 1326 or 1386, with the second last digit being obscured in the inscription, and describes the laws that were practised there and that Islam was the official religion. Prof. Dr. Syed Muhammad Naquib Al-Attas in his research dates the stone to 22 February 1303AD.

³⁸⁴ There is much debate here and there has to be some clarification. Most historians do not agree with this finding. Of the various historical books on Malaysia there is only one entitled "A Short History of Malaysia, Singapore and Brunei" by C. Mary Turnbull published by Casell Australia in 1980 that supports this theory.

religious groups – the Muslims and Hindus. It cannot be said that these Muslims came into being after the Sultan³⁸⁵ converted since they were in existence before he converted.

The first version has been the accepted history and has been considered as the formal historical version for many Malaysians.³⁸⁶ The first theory is propagated through the history books written by several historians who had a western centric philosophy. However, a recent study carried out jointly by the University of Malaya and the Sultan Idris Education University has shown that Islam has been present even since the time of the Four Pious Caliphs³⁸⁷ and shows that the second theory to be more accurate. The study uses a mixture of doctrinal and scientific methodology whereby the historians and researchers used genealogy to trace the origins of Muslim families and back it with documentary evidence from historic journals. This research was mapped out based on the roots of the family and supported by whatever historical evidence could corroborate the findings. The research has shown that there were Malay Muslims³⁸⁸ since the dawn of Islam in the Seventh Century.

According to this research most of the Arab traders set up settlements along the coasts of Peninsular Malaysia on their way to trade with China and the Malay Archipelago. These settlements were not temporary as initially thought, and there is evidence that they had settled down with the local inhabitants on a more permanent basis. These settlements had existed even before the Arabs themselves became Muslims. The Arabs mainly came from Hadramaut (what is today Yemen). There is a *Hadith* that relates that Muhammad (pbuh) instructed Muadh ibn Jabal to be the Governor of Yemen and spread the faith of Islam. The *Hadith* is as follows:

Besides that there is another historian who tried to reconcile some of the facts - K. G. Tregonning in "A History of Modern Malaya" published by Eastern Universities Press Ltd.

³⁸⁵ The Sultan that converted to Islam was actually the second ruler of Malacca.

³⁸⁶ Thukiman, Kassim. *Malaysia Perspektif Sejarah dan Politik*. Penerbitan Universiti Teknologi Malaysia. (2002) at p. 29.

³⁸⁷ Refers to the four Muslim rulers that immediately succeeded the Holy Prophet Muhammad (pbuh).

³⁸⁸ In Peninsular Malaysia.

“Ibn Abbas reported: When the Messenger of Allah, peace and blessings be upon him, sent Mu’adh to Yemen, he said to him:

Verily, you are coming to a people among the people of the Book, so call them to testify there is no God but Allah and I am the Messenger of Allah. If they accept that, then teach them that Allah has obligated five prayers in each day and night. If they accept that, then teach them that Allah has obligated charity to be taken from the rich and given to the poor. If they accept that, beware not to take from the best of their wealth. Be on guard from the supplication of the oppressed, for there is no barrier between it and Allah.”³⁸⁹

The *Hadith* above is a reminder to Muadh that he is going to Yemen, where some of the people were either Christians or Jews³⁹⁰. He was instructed on how to set about attracting people to Islam. The Governor proceeded to convert almost the entire state of Yemen to Islam. The Yemenis then propagated the religion to the places that they travelled to and this included their settlements in Peninsular Malaysia. According to the research the Yemenis did not immediately become *da’i*³⁹¹ but rather spread Islam amongst their kin and in turn practised the religion as they were instructed. The religion then spread through marriage and propagation.³⁹² Therefore, Islam began spreading in the Malay Archipelago as early as the 7th Century.³⁹³

³⁸⁹ *Sahih Muslim* 19.

³⁹⁰ The phrase “... people of the book” is a *Qur’anic* reference to Christians and Jews.

³⁹¹ A person who is actively involved in preaching and propagating the word of Islam.

³⁹² It was claimed that the people from the region were established traders and used trade as a means of propagating Islam. According to some scholars the traders would trade in good faith and took the minimum profit to show the influence of Islam on them. It was said that this ploy worked well in Africa and most of Asia. However, all of these are uncorroborated.

³⁹³ Added to that, Yemen is to only part of the Arab world where the Sunnis are from the Syafi’*e* sect, which is the main sect practiced in Malaysia.

Whether we accept the Western or Asian centric version, the fact remains that Islam began to flourish in Peninsular Malaysia after the 14th Century with the establishment of the Malacca Sultanate.³⁹⁴ In East Malaysia, the Brunei Sultanate was also Muslim and based on most historians account, this was about the same time as the Malacca Sultanate, thus the 14th or 15th Century. In the 16th Century when Malacca fell, many Muslims fled to Brunei fearing persecution by the Portuguese.³⁹⁵ These included the rich, thinkers, administrators and others. Brunei became stronger and Islam expanded as a result³⁹⁶. It should be noted however, the Islamic faith has always been stronger in Brunei than in Malaysia. This can be seen from the approach each state has taken towards funding of religious programmes within each state,³⁹⁷ whereby in Brunei religious programmes are State funded whilst Malaysia has a mixture of both State and private funding. That, in brief, shows the degree of development of the *Shari'ah* in Brunei as compared to Malaysia.

Brunei's control over the hinterland of Borneo was never complete and so the spread of Islam was not as widespread as compared to Peninsular Malaysia³⁹⁸. This also led to Brunei's decreasing influence in the region, especially in Sarawak. As for Sabah there are two main groups, the mainstream Muslims that are passive and the outcasts or "migrants"³⁹⁹ who are more aggressive. The passive Muslims are probably locals that accepted the Islamic faith from Brunei. The migrants come mainly from the Philippines with a strong influence

³⁹⁴ Op. Cit. n. 372 above.

³⁹⁵ Although the heirs to the throne of Malacca and most of his followers went to Johor and established the Johor Sultanate and continued the fight against the Portuguese. Some also ran northwards to the state of Perak.

³⁹⁶ Andaya, Barbara Watson, and Leonard Y. Andaya. *A history of Malaysia*. Third Edition, Palgrave Macmillan, 2017. pg. 66.

³⁹⁷ Recently on 22 October 2013, the Sultan of Brunei decreed that *Hudud* punishment be implemented in Brunei in six months from to abovementioned date. Even before that, gambling and alcohol is strictly prohibited in Brunei and cannot be found in Brunei at all.

³⁹⁸ Op. Cit. n. 396, above.

³⁹⁹ Filipino Muslims who fled persecution in the Philippines and migrated to Sabah. The people of Sabah have never accepted them as part of their community and despite Federal backing the matter remains unresolved till this date.

from the Sulu Sultanate or Moro homeland. These migrants have either been isolated in North and West Sabah or assimilated subtly as has happened in East Sabah, where they are more vocal and aggressive in their practice of Islam and hence creating a rather sensitive powder keg that may erupt anytime.⁴⁰⁰

Clearly, the advent of Islam has similar tones to Malaysian history through different and varied models. All the above illustrates how the mainstream doctrine of Islam, which is the Sunni sect and more specifically of the Syafi'e school of thought, developed in Malaysia.

As mentioned earlier Perlis was different and this could be due to the fact that Perlis was established by Siam after Siam was tired of the Kedah's continued rebellions and uprisings. Siam took what is today Perlis from Kedah and created a buffer state to monitor Kedah's actions. The Raja of Perlis was also appointed by Siam who was also a Siamese official⁴⁰¹. Perlis set its own priorities and this is probably the main reason why Perlis has been different. It distanced itself from the other Malay States and what better way than to use a different school of thought. The Wahhabis tried their level best to show that they were different from the mainstream Sunnis and Shi'ites perhaps as a means to assimilate the two factions. However, today most deem the Wahhabis to be indirectly Sunnis as well⁴⁰². Coming back to Perlis, it is interesting to note that until now the ruler of Perlis is called Raja and not Sultan.

The term may seem insignificant to the uninitiated but it carries a huge significance in the broader scheme of things. The Malays discarded the use of "Raja" long ago as it was deemed to be a Hindu term and it meant the ruler of all people to a level similar to God. However, the term Sultan merely means a ruler acting with God's grace or some have called

⁴⁰⁰ The recent incursion at Lahad Datu by a small band of Sulu Sultanate followers just before Malaysia's 13th General Election was exactly the eruption that many administrators had feared but used by politicians for their own political mileage.

⁴⁰¹ Op. Cit. n. 396, at pg 131.

⁴⁰² The reasons have been mentioned in n. 5 above.

the Sultan as ruling in the shadow of God. In Islam there can only be one ruler of all Muslims in the world and that person will hold the title of Caliph or *Khalifah*. The Sultan is subordinate to the *Khalifah*. During the time Perlis was formed, the only Caliphate was that of the Turkish Ottoman Empire which was dismantled after World War I.

As mentioned earlier, there is a growing Shi'ite influence in Malaysia. This has appeared in Johor (the southern-most state in Peninsular Malaysia) and Selangor (the most urban state in Malaysia). The arrival is shrouded in mystery as the religious authorities have been trying to ascertain how this branch of Islam got a foothold in Malaysia.⁴⁰³ The obvious reason would be through trade as Iran has always been one of Malaysia's closest trading partners.

Interestingly there are no historic or current reports at all of direct Shi'ite or *Wahabbi* influences in East Malaysia. This is the main difference between East Malaysia and Peninsular Malaysia and has also led some historians to believe that the root of Islam in East Malaysia came from the east, namely China. The Chinese Muslims are predominantly, if not totally Sunnis of the *Syafi'e* Sect. It is too much of a coincidence that both China and Malaysia follow the same sect whereas the vast majority of the Sunni Muslims are predominantly of the *Hanafi* Sect. Nonetheless, this slightly more singular source of Islam can be seen in the development of the *Shari'ah* in East Malaysia which is not debated as much as in the the arrival in the Peninular Malaysia.

The development of *Shari'ah* in East Malaysia was by two distinct methods due to the different styles of administration prior to the independence of these States. In Sabah, where the administration of the State was more akin to a company running a business; there was not much in place of a religious or social infrastructure. A lot more emphasis was placed

⁴⁰³ Some have gone as far as saying that Shi'ites are heretics and not true Islam.

on economic infrastructure⁴⁰⁴ and how to ensure that there was enough to provide the workers with the basic necessities. The local development of the *Shari'ah* stagnated, allowing the British North Borneo Company to use the British Legal system as a form of legal governance without much effort. There was some *Shari'ah* law applied in Sabah but it was not systematic.⁴⁰⁵ The *Shari'ah* was never codified until after Sabah gained independence.⁴⁰⁶ Therefore its development is still in its infancy.

The development of the *Shari'ah* in Sarawak is different from Sabah. It is one of the few states in Malaysia where the Malays and Muslims are the minority and yet still maintain control of the State. There are historical reasons for this since the Brunei Sultanate maintained its control over Sarawak through superior forces and methods of war. As pointed out in Chapter Four, there is a multi-ethnic diversity in Sarawak where the Muslims make up approximately 27 percent of the population. There are the *Dayaks*, the collective name for all the native tribes in the Sarawak, who make up about 42 percent and the Chinese around 30 percent of the population. The problem is that the predominant *Dayaks*, the *Ibans* who number at around 31 percent were always fighting amongst themselves as well as the other 11 percent of the *Dayaks*. This enabled the 27 percent Malay Muslims to control the State.⁴⁰⁷ It was not until the White Rajah took over that this changed.

The coming to power of the White Rajahs in Sarawak totally changed the political, administrative and religious dynamics. One of the first casualties was Islam which lost its status as the main religion. During this time, many missionary groups set about educating and converting the *Dayaks* to Christianity. Sarawak could have been the only State with a

⁴⁰⁴ Sabah has the only railroads in East Malaysia and that too is limited to coastal towns.

⁴⁰⁵ Op. Cit., n. 373 at pg. 30.

⁴⁰⁶ Both Sabah and Sarawak gained independence from the UK on 16 September 1963 and became part of Malaysia.

⁴⁰⁷ A recent survey published in the local Sarawak newspaper Borneo Online Post available at www.theborneopost.com/2014/02/08state-statistics-malays-edge-past-chinese has stated that the Chinese have dropped below the Malays marginally with Malays at 23.21 percent whilst the Chinese at 23 percent. It has also marked the *Dayaks* at 32 percent. However the remaining 30 percent have been left as unidentifiable.

majority Christian population but the problem was that the vast majority of the older *Dayaks* who were converted, reverted to paganism although the reasons for this are still unclear. Nonetheless, it does illustrate the fact that Islam was not the main religion in Sarawak for a specific time frame. There is evidence that during this time the *Shari'ah* was also part of the law of the land⁴⁰⁸. Nonetheless codification in Sarawak began after independence⁴⁰⁹.

The development of the *Shari'ah* in East Malaysia was relatively slow if compared to Peninsular Malaysia. Hence, it took the relevant *Shari'ah* laws from other States in Peninsular Malaysia to leave an imprint on the position in both these states. The Islamic religious departments of both states usually adopted other State's bye-laws or enactments rather than drafting their own. This is no longer an issue since it has been decided that in the interest of the *Shari'ah* in Malaysia, all subsequent laws should be harmonised.

Source of jurisdiction of the *Shari'ah* in Malaysia

The source of jurisdiction for the *Shari'ah* is the Federal Constitution, which designates that the law making powers of Islamic law in specific areas, to the state Governments and not to the Federal Government. This power is more evident in the nine sultanate states in Peninsular Malaysia where specific powers with regards to religion are vested with the Sultan as being the head of Islam for his State. The provision in the Federal Constitution is as follows:

“1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and

⁴⁰⁸ Op. Cit., no. 393, at pg. 30.

⁴⁰⁹ The independence was also from the UK and joined Malaysia.

intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.”⁴¹⁰

As for the other four States and three Federal Territories, the head of Islam is the *Yang DiPertuan Agong* or King appointed through the Council of Rulers known as the Durbar. They are the official custodians of Islam in Malaysia. This authority cannot be usurped by anyone within Malaysia or the states thus protecting Islam’s position. The actual administration is rather more complicated. All the States have their own Islamic Religious Authorities. They all have their own powers derived from their own Islamic Law Enactments

⁴¹⁰ State List, Ninth Schedule, Federal Constitution

that are passed in the State Legislative Assemblies, with the exception of the three Federal Territories.⁴¹¹

The application of the *Shari'ah* in these States is done through the *Shari'ah* Courts. Each State has its own *Shari'ah* Court applying the interpretation of the *Shari'ah* without any reference to either State's jurisdiction. The *Shari'ah* Appellate Courts are also under the State purview but the usual practice is to refer to a select group of Judges that are not tied down to one particular post. There is a list of qualified judges that has been provided by the *Jabatan Kehakiman Shari'ah Malaysia* or Malaysian *Shari'ah* Judicial Department (JKSM)⁴¹² and usually most States use these judges.

This and the fact that the officers serving in these Courts, both the lower courts and the high courts, are from JKSM means they are actually federal officers serving the States and are subject to transfer to post in Malaysia at any time. This should have assisted the harmonisation of the *Shari'ah* but it did not proceed as planned. In actual fact, the *Shari'ah* applied in the States is not as harmonised as it should be.

Efforts are being continued to further harmonise the law through JKSM but it is slow. Nonetheless, up to 2011 most of the states have agreed to harmonise most of the laws but with varying degrees of success. Before the states can amend the law they have to obtain approval of the relevant Sultans and Rulers. For states without Sultans, the matter is referred to the *Yang Di Pertuan Agong*. In the states where the *Yang Di Pertuan Agong* is the Islamic leader, the matter is first approved in Parliament to have effect in the three Federal Territories, after which the other States in the same situation follow suit, namely Sabah, Sarawak, Penang and Malacca - through their State assemblies. The state that the *Yang Di Pertuan Agong* hails

⁴¹¹ The Islamic Law Enactments for the three Federal Territories are passed through the Federal Parliament.

⁴¹² A Federal service for all *Shari'ah* officers similar to the civil Judicial and Legal Service Commission,

from would be in the hands of a Regent (usually the heir apparent to the state sultanate) and the Regent approves the said laws.

The current methodology is for JKSM is to come up with a draft model law and have it approved for the three Federal Territories, from where it can move forward. However, the amendments law has not been passed as yet⁴¹³. Therefore, the process has been tried but is yet to be proven.

The child in Islam

Despite what has been portrayed by non-Muslim scholars or opponents of Islam the status of the child in Islam is protected and special. This status has been enshrined in the holy *Qur`an* as well as the *Sunnah*.⁴¹⁴ In Islam, the related general principle states that children are an *amanah* or trust that God has entrusted on the parents. This trust has been placed on the parents and they must do their best to ensure that the child receives all that is required for him/her to grow into a responsible and educated Muslim. This trust exists until both the parents and child are dead or upon the coming of age of that child. In the absence of the parents or a close relative, the Government would then have to take custody of the child and become the guardian ad litem for the said child. All the obligations of the parents are taken over by the State or the close relatives.

The child in Islam is seen from a different perspective than that envisioned in the CRC. Firstly, in Islam, a child ceases to be considered as a child when he has attained maturity/puberty or *baligh*.⁴¹⁵ The term *baligh* is rather wide and encompasses both maturity and puberty. The age differs as girls could attain maturity as young as nine⁴¹⁶ and boys as

⁴¹³ There are three draft bills that have been drafted and awaiting the States' approval.

⁴¹⁴ The actions, sayings and teachings of the Holy Prophet Muhammad (pbuh)

⁴¹⁵ This is further illustrated in Article One of the Organization of Islamic Congress's (OIC) Covenant on the Rights of the Child.

⁴¹⁶ The average age for girls is around 13 years old.

young as thirteen. Maturity is based on both biological and mental capacity, that is, intellectual and emotional. The age of maturity varies according to the child and his development. This differs from the CRC which states that, "...a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."⁴¹⁷ It would be very difficult to reconcile the two concepts with one being very fluid and flexible whilst the other is absolute and fixed.

The second difference relates to the individual as part of a whole (both adults and children) and not the child alone. The individual as seen from the western perspective is someone born free, with the will to decide his own future so long as it is in accordance with the law. The concept of the individual has been encapsulated in Articles 1-7 of the Universal Declaration of Human Rights (UDHR). In Islam, the individual is viewed the same as from the western perspective but subject to the individual's subservience to God. This is based on the following Qur'anic revelation-

"O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end."⁴¹⁸

There is also the concept in the Universal Islamic Declaration of Human Rights (UIDHR) or the Cairo Declaration which was the OIC's version of the Islamic UDHR. The Preamble states as follows:

"Therefore we, as Muslims, who believe

...

⁴¹⁷ Article 1, CRC.

⁴¹⁸ The Qur'an 4:59, translation by Muhammad Marmaduke Pickthall

f) that by the terms of our primeval covenant with God our duties and obligations have priority over our rights, and that each one of us is under a bounden duty to spread the teachings of Islam by word, deed, and indeed in all gentle ways, and to make them effective not only in our individual lives but also in the society around us;

g) in our obligation to establish an Islamic order:

...

vi) wherein obedience shall be rendered only to those commands that are in consonance with the Law;”

The provisions above indicate that there is no alternative for Muslims other than complete obedience to the *Shari'ah*. This simply means that any law, rule or directive for Muslims must adhere to the Islamic law. Similarly for child rights, it is subject to the overarching factor that it must adhere to the *Shari'ah*. Notwithstanding this, the *Shari'ah* does provide specific rights for children.

The *Qur'an* acknowledges that the child has rights and from this acknowledgement, child rights under the *Shari'ah* have been developed. It began during the advent of Islam, when the Arab world was experiencing its own version of the Dark Ages, known as *Jahiliyyah* or Ignorance, whereby girls and women were deemed to be chattel and a disgrace to the family. The practice among Arabs was to bury baby girls alive but the Holy Prophet Muhammad (pbuh) received the revelation.

“Say: Come, I will recite unto you that which your Lord hath made a sacred duty for you: That ye ascribe no thing as partner unto Him and that ye do good to

parents, and that ye slay not your children because of penury - We provide for you and for them - and that ye draw not nigh to lewd things whether open or concealed. And that ye slay not the life which Allah hath made sacred, save in the course of justice. This He hath commanded you, in order that ye may discern.”⁴¹⁹

The above revelation clearly prohibits the killing of children for any reason even if one could not afford to care for the child. According to the Muslim jurists, this is the beginning of rights for children in Islam as seen in the following:

“Traditionally, prohibition of female infanticide by Islam in early Islamic society (570 A.D.) is regarded as the landmark for the Islamic discourse on the Rights of the Child. It is believed that by doing so, Islam challenged the patriarchal social norms and values of the ancient Arab society.”⁴²⁰

Each child has the right to life and that right cannot be absolved by mere tradition.⁴²¹ The Holy Prophet (pbuh) is also known to have beseeched Muslims to be kind to children. It has been reported:

“The Prophet was fond of children and he expressed his conviction that the Muslim community would be noted among other communities for their kindness to children.”⁴²²

⁴¹⁹ The Qur`an 6:151, translation by Muhammad Marmaduke Pickthall

⁴²⁰ Rajabi-Ardeshiri, Masoud. "The rights of the child in the Islamic context: The challenges of the local and the global." *The International Journal of Children's Rights* 17.3 (2009): 475-489. Print.

⁴²¹ It was a practice in the years preceding Islam in Arabia that baby girls were to be buried alive as they were deemed to be unwanted and even an embarrassment by the Arabs at that time. This time was the Arabian equivalent of the Dark Ages.

⁴²² As cited in Ajijola, Adeleke Dirisu. *The Concept of Family in Islam*, p. 96. Adam Publishers, 2008.

Another Sunnah has also specifically addressed the need to protect and guard children.

The following Sunnah further illustrates this point:

“The Noble Prophet (peace be upon him) said: “Every one of you is a protector and guardian and responsible for your wards and things under your care and a man is a guardian of his family members, and is accountable for those placed under his charge.”⁴²³

Basically, the *Sunnah* states that a child has a right to protection either through their parents or their legal guardians. This general rule extends to the state should any mishap befall his carers. Thus, the child is protected not only at the family level but the obligation extends all the way up to the national level.

As mentioned in Chapter Two in the definition of the child in Islam, the child begins at the foetus stage. Should the foetus suffer a premature death, then the foetus must be given a proper burial with full religious rites performed. This includes a special prayer, a quick burial, a non-abused and intact body both internally and physically. The above and all the other sources of the *Shari'ah* provide rights as being divinely ordained. The application and implementation of the *Shari'ah* is executed by the authorities.

How the *Shari'ah* is implemented on Children

The differences in the *Shari'ah* in the various states in Malaysia provides for a rather complex reading of the *Shari'ah* overall. However, before proceeding to the position in

⁴²³ *Sahih* Bukhari 6719 and *Sahih* Muslim 1829

Malaysia, it is necessary to look at the position under the auspices of the Organisation of Islamic Cooperation.

The Organisation of Islamic Cooperation⁴²⁴ or OIC has tried to enhance the *Shari'ah* throughout the world. Instead of forcing the *Shari'ah* on its members, the OIC has instead used encouragement to try and bring its members to apply the *Shari'ah* in line with mainstream Islam. This may be difficult to materialise due to the complex rift between the Sunnis and Shi'ites. Nevertheless, what the OIC has managed to do positively for the Islamic world is to provide an outlet for Islam to be expressed and represented. While most western civilisations look at Islam as regressive towards its people, the OIC shows that Muslims are not oppressed and backward people.

The OIC also provides guidance and advice to member states upon request regarding Islamic matters including the *Shari'ah*, but is purely advisory in nature. It has brought Muslim states closer but the harmonisation of the *Shari'ah* is still a long way off. This can be illustrated through the work the OIC has done. On the issue of the rights of children, the OIC initiated the Covenant on the Rights of the Child in Islam (the OIC Covenant), which is basically a treaty which projects an Islamic version of the CRC.

Briefly, the OIC Covenant consists of twenty six articles and fifteen preamble paragraphs. It was signed and ratified by the member states and adopted by the Thirty Second Islamic Conference of Foreign Ministers in June 2005. Through its collective voice the OIC has tried to bridge the gap between the secular notion of child rights as propagated through the CRC with the theological version of child rights under the OIC Covenant. It is not the first as there are other covenants and treaties drafted by the OIC.⁴²⁵ The OIC tried hard to

⁴²⁴ Formerly the Organisation of Islamic Conference

⁴²⁵ According to some commentators, the human rights documents sponsored by the OIC take a restrictive position on human rights. For example, the OIC Declaration of Human Rights, Kayouglu says that, "the document provides only a subordinated status to religious minorities and also prohibits conversion from Islam. It also presents glaring evidence of discrimination against women, as it provides the right to freedom of

harmonise the differences between UN laws and the *Shari'ah*; with the OIC Covenant being one of the instruments used to justify that the CRC and the *Shari'ah* are compatible. There have been continuous collaborative projects between the UN and the OIC to try and bridge the divide. One of these collaborative works is a joint publication called “Investing in the Children in the Islamic World” published by UN and OIC through their related agencies namely UNICEF and ISESCO⁴²⁶. In this publication reference is made to the “Foreword: Children First” jointly issued by the Secretary General of the OIC, the Executive Director of UNICEF and Director General of ISESCO which stated as follows:

“As does the Convention, Islam establishes the best interests of the child as a primary consideration in actions and decisions concerning children; and the principles of sharia place corresponding obligations on the family, on society and on the state. These standards are used to guide laws, practices, budgets and policies. Governments, in particular, are encouraged to create an environment and provide the resources that ensure children receive the full benefits of their rights.”

The *Shari'ah* is compatible with the best interests of the child principle. Despite this claim there remains the fact that there is no specific provision to provide this as does Article 3 of the CRC. Besides this, it has to be highlighted that there is still the overriding position that despite the best interests of the child as a primary consideration, it could never overrule the *Shari'ah*. Therefore, the best interests of the child must always be viewed together with

movement or marriage only to men”. Hence he has called for a review of all OIC treaties and conventions so as to remain relevant today. The OIC has created a committee to discuss possibilities to make the Declaration more acceptable to certain parties. Comments by Turan Kayouglu, visiting Fellow of the Brookings Doha Center www.brookings.edu/research/opinions/2012/04/23-cairo-kayaoglu

⁴²⁶ Available at: https://www.unicef.org/publications/index_28182.html. Online.

the principles of the *Shari'ah*. This can be seen from one of the objectives of the OIC Covenant which states as follows:

“2. To ensure a balanced and safe childhood and ensure the raising of generations of Muslim children who believe in their creator, adhere to their faith, are loyal to their country, committed to the principles of truth and goodness in thoughts and in deeds, and to the sense of belonging to the Islamic civilization.”⁴²⁷

The best interests of the child principle does exist in Islam but not in the absolute manner as proposed by the CRC. There is no express provision as it has to be read or applied together with the *Shari'ah*. Apart from that there is another difference in that the principle is not expressly pronounced in any Islamic or *Shari'ah* literature or text. The Covenant is silent on the principle and the *Qur'an* itself does not contain any specific provision on it. The principle is accepted and understood to exist because it is what is expected of Muslims when applying the *Qur'an* and *Shari'ah* explicitly.

The principle is translated into the rights accorded to the child in Islam, which may seem basic but are similar to the rights accorded in the CRC. However, there are obligations imposed on the parents on how these rights are implemented. Take for example the right to life which is protected for both in Islam as well as the CRC.

Article 6 (CRC)

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

⁴²⁷ Article Two, the OIC Covenant

development of the child.

Article 6 (OIC Covenant) The Right to Life

1. The child shall have the right to life from when he is a fetus in his/her mother's womb or in the case of his/her mother's death; abortion should be prohibited except under necessity warranted by the interests of the mother, the foetus, or both of them. The child shall have the right to descent, ownership, inheritance, and child support.
2. State Parties to the Covenant shall guarantee the basics necessary for the survival and development of the child and for his/her protection from violence, abuse, exploitation, and deterioration of his/her living and health conditions.

The CRC recognises that the child has a right to life but this begins after the child is born, that is, when the baby leaves the mother's womb. The right of the child in Islam begins earlier, that is at the foetal stage. This is the main difference between the two documents. This difference is due to the recognition given to the rights of women in many Western countries to abort their child should they wish to do so, despite the continuing debate between the more conservative Christians who oppose abortion. The more liberal claim it should be the choice of the mother to choose.

Looking at the issue from the best interests of the child principle, which of the above would have been in the best interests of the child, abortion or birth? The CRC could not claim the best interests of the child in this situation since it would run afoul of another UN Human Rights treaty; namely CEDAW. The right of the mother should supersede the right of the unborn child. However, despite the OIC Covenant being silent on the best interests of the

child, it is inherent that its principles also provide for such an interest though without expressly mentioning it.

Looking at the issue from a different perspective there is another school of thought in the Islamic scholarly world that is slightly more “radical” and illustrated by Kamran Hashemi. In his article entitled “Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation,”⁴²⁸ he claims that in most cases the reservations entered by the Muslim States are not based on the *Shari’ah* but more due to culture, and that *Shari’ah* is not contradictory to the CRC. The majority of the reservations may be true but his suggestions are based purely on the fact that some Muslim States have said that certain provisions are not contradictory with the *Shari’ah*.

To illustrate this point we can take one highly debated area, pre-marital sex. Islam forbids it and there are no exceptions whatsoever. The CRC Committee expressed their concerns in their Comments to the relevant state⁴²⁹ that the State should not punish children (teenagers) who commit pre-marital sex. The author then cites the contract marriage or *nikah mut`ah*. As mentioned earlier, the Shi’ites have allowed this and based on the author’s background he is most probably to be a Shi’ite as well. Iran has provided that should there be a case of pre-marital sex then that couple should be allowed to marry each other or at the very least that couple should perform the contract marriage before conducting the pre-marital sex. As mentioned above, Sunnis have rejected contract marriage because it is deemed to take away the dignity of women and reduce them to mere sex objects. Therefore this concept is unacceptable and not allowed in Islam, and therefore it would be impossible to allow it.

⁴²⁸ Hashemi, Kamran. “Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation.” Johns Hopkins University Press *Human Rights Quarterly* 29 (2007): 194-227. Print.

⁴²⁹ In this case Pakistan.

The best interest of the child in Islam

There are many other differences in the rights propagated in Islam as compared to the rights accorded in the CRC but this thesis focuses on is the best interests of the child principle. Whilst the CRC places it in Article 3, there is no specific provision in Islam or in the OIC Covenant that uses the exact same principle as, “the best interests of the child”. Nevertheless, this research intends to show that despite no express provision on the best interests of the child, it is still factored in or inherently exists within the *Shari'ah*. One example can be seen from the *Sunnah* mentioned earlier, which expresses a similar need to protect and guard the rights of the child. The issue would then be how the rights of the child are best protected and guarded. If the *Sunnah* is carefully scrutinised, the issue relates closely with the responsibilities owed to the child from the parents and “those who are accountable for those placed under his charge”. The concept of accountability in Islam is an important concept which if understood correctly would be sufficient to ensure that the best interests of the child are always given priority.

In Islam, Muslims must ensure that they care for two main rights. First and foremost, there are the rights owed to Allah as the Creator of all beings and known as *Huquq Allah*. The fulfillment of these rights comes from fulfilling all religious duties ordained by Him in the form of *Ibadah Khususiah* or Specific Acts of Worship.⁴³⁰ However, it is not enough for a Muslim to only care for his personal relationship with Allah. There is also the need to care for the second type of rights, that is, the rights owed to other human beings or also known as *Huquq al-Insan*. This would include the responsibilities owed from a parent to his child or any person who has been awarded guardianship or care over the child. The effect of non-

⁴³⁰ This includes fulfilling the five main pillars of Islam - that is, saying the *Shahadah*, praying five times a day, fasting in the month of Ramadhan, paying zakat or alms and doing the Hajj or pilgrimage to Makkah if one has the means.

fulfillment of a duty owed is that the person will be answerable to Allah, both in this world and the Hereafter. Therefore, if a child is neglected this is considered as a crime in Islam and is punishable under *Ta'zir* crimes⁴³¹ whilst the perpetrator of the crime is personally liable for his actions in the Hereafter.

Aside from that the respect for a right and the fulfillment of a responsibility or duty also brings with it *barakah* which means blessings. This is the hidden reward given by Allah for fulfilling obligations which have been ordained by Him. It may be manifested through the feeling of felicity, calmness, satisfaction and peace of mind that relates closely to one's conscience. The responsibility owed to a child is then reciprocated with the duty owed by an adult child to care for his parents when they are old. This has basis in several Qur'anic verses that specifically mention the need to do good to one's parents.

Besides the general principles in Islam and the *Shari'ah* there are now moves towards understanding the *Shari'ah*. This was done through a seminar organised in Morocco in 2015 and is summed up as follows-

“The purpose of this symposium issue of the American Journal of Comparative Law is twofold. First, it serves to showcase some of the contributions to the workshop ‘Parental Care and the Best Interests of the Child in Muslim Countries,’ which, under the auspices of the Max Planck Institute for Comparative and International Private Law, was convened at the Centre Jacques Berque in Rabat, Morocco, April 1-5, 2015. Second, the articles collected here aim to introduce readers to the larger project of the

⁴³¹ *Ta'zir* is the lowest form of punishments within the *Shari'ah*. It can be defined as “Punishment for crime not measuring up to the strict requirements of hadd punishments, although they are of the same nature, or those for which specific punishments have not been fixed by the *Quran*. Punishments range from the death penalty for espionage and heresy to flagellation, imprisonment, local banishment, and a variety of fines. Determination of punishment is left to the judge or chief executive, who can vary the punishment according to a number of criteria including who has inflicted the crime and upon whom.” Definition from “Tazir.” In *The Oxford Dictionary of Islam*. Ed. John L. Esposito. *Oxford Islamic Studies Online*. 24-Sep-2017. <http://www.oxfordislamicstudies.com/article/opr/t125/e2363>

Max Planck Working Group on Child Law in Muslim Countries, which was established in the summer of 2014 and held its inaugural meeting at the workshop in Rabat. The overall aim of the Working Group is to explore how parenthood is being negotiated in Muslim countries and to examine the legal concepts that reflect changing perceptions of parenthood and that have emerged over the course of the last few decades.”⁴³²

The American Journal of Comparative Law published all the articles on this subject in a single edition.⁴³³ In it there were several articles on the *Shari’ah* and the best interests of the child principle. Because of its relevancy, this thesis will briefly review some of those articles. The first article was an introductory chapter that outlined the proceeding chapters and gave a brief idea of the concept of the best interests of the child in Islam.

It has been suggested that the Islamic concept of the best interests of the child principle is known as *maslahat at-tifl*.⁴³⁴ There are also specific terms used including "the benefit of the child" or *manfa'at al-walad*, "the welfare of the child" or *maslahat al-walad*, and “the good fortune of the child” or *hazz al-walad*.⁴³⁵

Some writers have divided the rights of the child into two types. According to Ahmed Fekry Ibrahim, the protection of the child in Islam may be divided into the basic rights of the child and the best interests of the child. According to the article, most jurists have no problems in deciding cases on basic interests of the child.⁴³⁶ These include issues such as the

⁴³² Yassari, Nadjma, Lena-Maria Möller, and Imen Gallala-Arndt. "Introduction–Negotiating Parenthood in Muslim Countries: Changing Concepts and Perceptions." *American Journal of Comparative Law* 63.4 (2015): 819-827. Print.

⁴³³ Fall edition, 2015 American Journal of Comparative Law.

⁴³⁴ Literally translated to interests of the infant. Ibrahim, Ahmed Fekry. "The Best Interests of the Child in Pre-modern Islamic Juristic Discourse and Practice." *American Journal of Comparative Law* 63.4 (2015): 859-891. Print.

⁴³⁵ Ibid.

⁴³⁶ Ibid, at pg. 860.

child's right to life, physical health and moral upbringing. It would also include providing the child with the proper education to become a good Muslim and would entail both Islamic religious education and the education that would prepare him for the needs of this world. It is only with knowledge that a Muslim child can learn of their rights and obligations as well as how to best fulfill their potential. This was the minimum threshold in child rights and accepted by all the jurists.

The author then describes how or when the best interests of the child is triggered by giving the analogy of the custody issue when a child is allowed to choose the parent they wish to follow which is not a basic but best interests right.⁴³⁷ Therefore, it can be said that the best interests of the child will usually need to be considered when there is a conflict between their rights and the rights of others, be it their parents in custody cases or Government agencies in case of immigration issues.

The next related article is "The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches"⁴³⁸ which aptly provided the opening paragraph. As the topic suggests, the scope is limited in that it specifically refers to custody matters. However, it does try to provide a practical aspect by comparing several Muslim states as examples although this thesis questions the choice of states especially Indonesia. Malaysia has close ties with Indonesia and it is the largest Muslim State, but it is not an Islamic State.⁴³⁹ In fact, it is a secular state and the reason for this can be seen by a simple study of Indonesia's history. Before making assumptions a historical, sociological and legal history should have been carried out.⁴⁴⁰

⁴³⁷ Op. Cit. n 434 above, at pg. 861.

⁴³⁸ Op. Cit. n 359 above.

⁴³⁹ China and India have the largest Muslim populations in the world but are neither Islamic nor Muslim States.

⁴⁴⁰ Like Malaysia, Indonesia is a multi-racial country but predominantly made up of Muslims. Unlike Malaysia Islam is not embedded in the Constitution, and in fact during the formation of the *panca sila* or national philosophy, there was no inclusion of Islam as the official religion. In fact the then ruler of Indonesia, Sukarno was a staunch communist and implemented a socialist agenda for Indonesia. Therefore, Indonesia is

Apart from that, the examples of other jurisdictions were also very useful but it does not negate the fact that the article again limits itself to family matters. A certain theme is seen to be building and it seems that the Symposium was limiting the discussion on best interests of the child principle in Islam to family law matters. The next two articles were even more entrenched in the family law sphere. The articles were firstly “An Enduring Relic: Family Law Reform and the Inflexibility of Wilāya”⁴⁴¹ and secondly “Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law.”⁴⁴² Both topics, the former on guardianship and the latter on adoption or *kafala*, are essentially family law matters. Although they may provide further illustration of the best interests of the child principle in Islam they are still limited. The articles do not deal with the larger picture as to how and if the best interests of the child can be used in non-family matters in Islam.

The discussion now moves on to how the best interests of the child principle are applied in situations where the child commits a crime. This thesis submits that the Islamic position on this issue is similar to the position under the CRC. This is mainly due to the fact that in order to be liable for a crime, three main requirements need to be fulfilled: the child must be sane (*aqil*), have reached the age of majority or maturity (*baligh*) and committed the act of his own free will (*mukhtar*). The second requirement of *baligh* shows that a child could not accept criminal liability in Islam. As seen in the above discussion on the concept of *baligh*, the threshold of who a child is appears quite low and well within the ambits of the CRC.

actually a secular state and should not have been used as an example. Nonetheless, there are other elements in the article which were useful regarding Indonesia, such as how it is trying to absorb the Islamic values into their laws.

⁴⁴¹ Möller, Lena-Maria. "An Enduring Relic: Family Law Reform and the Inflexibility of Wilāya." *American Journal of Comparative Law* 63.4 (2015): 893-925. Print

⁴⁴² Yassari, Nadjma. "Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law." *American Journal of Comparative Law* 63.4 (2015): 927-962. Print.

In fact, it is further submitted that the Islamic position works in such a way that not only does it ensure that the child is treated justly but it also provides rehabilitation efforts to ensure that the child will be able to repent and mend his ways. Aside from that, if a child has done something illegal then the parents are to bear the responsibility. The *Shari'ah* also provides that in cases where the rights of others are affected, for example in cases where there has been an infliction of bodily injury, the parents or guardians of the child must be responsible to make the payment of *diyah* or compensation for such injuries caused. These are the generally accepted principles in Islam; now the thesis will concentrate on specific issues pertaining to the application of the best interests of the child principle in Malaysia.

The *Shari'ah* in Malaysia and its implication for Child laws

In Malaysia, the *Shari'ah* has its own jurisdiction and its own courts to enforce it. The *Shari'ah* is limited to the private law whereas the statute and common law prevails in the public law sphere. Thus, in the vast majority of areas like criminal law and other administrative legal functions, the common law prevails. However, in the family law sphere matters such as marriage, divorce, inheritance and the like fall within the jurisdiction of the *Shari'ah* Courts for Muslims. On the other hand, in cases of marriage and divorce, non-Muslims are bound by the Law Reform (Marriage and Divorce) Act 1976, and these cases are heard in the High Court.

Despite this obvious demarcation, there are an increasing number of cross jurisdictional cases. This is despite the prohibition in Article 121(1A) of the Federal Constitution, which states as follows:

“Article 121 Judicial power of the Federation

- (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—
- (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
 - (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
 - (c) (Repealed)

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.”

Based on the initial draft and explanation during the tabling of this amendment, this was supposed to have clearly demarcated the realm of *Shari’ah* and Civil law. Lately however, some judges⁴⁴³ have begun to question the said demarcation. Despite the clarity of the said provision, the Civil Courts have begun to question some decisions of the *Shari’ah* Courts specifically on the issue of conversion and custody issues between the spouse that has converted to Islam and the spouse who has remained a non-Muslim. There have been cases whereby the *Shari’ah* Courts have decided in favour of one party and the aggrieved party files a suit in the civil courts who in turn decide for that aggrieved party.

This encroachment has a history dating some years back. There were two well-publicised cases involving an English woman and another case with an Australian national. In both cases the husbands were Malay Muslims and upon marriage both women had converted freely to Islam. However, after having children and not adapting to life in

⁴⁴³ It was noted that most of this cross-jurisdictional matters occur when the Judge presiding in the civil courts was a non-Muslim.

Malaysia, they both fled back to their respective homelands bringing their children.⁴⁴⁴

Both cases happened in the 90s and in both cases the men obtained a *Shari'ah* Court Order declaring that the custody of children should be with the father in cases where the mother has converted out of Islam, whilst both women got civil High Court Orders in their respective jurisdictions saying the custody of the children was theirs.

The Australian case took a turn for the worse because the Malaysian,⁴⁴⁵ with the assistance of an Australian colleague went to Australia in order to take his children back to Malaysia. He was successful but it did not do any favours for diplomatic relations between Malaysia and Australia. It should be noted that in both these cases there were valid court orders in the respective countries and jurisdictions. The Malaysian had obtained a *Shari'ah* Court order whilst his wife had obtained an Australian High Court Order. After the incident the wife filed a suit in the Malaysian civil court⁴⁴⁶ which rejected the case based on Article 121 (1A).⁴⁴⁷

The above incidents illustrate the issues relating to the implementation of the *Shari'ah* in child law matters. The first is the issue of religion and/or faith. It is submitted that this is one of the main points of divergence between the position in Islam and the CRC. The CRC is clear that since the paramount principle is the best interest of the child, the child should be allowed to choose his/her religion freely when they feel they have attained the right age to do so. Article 14 of the CRC states as follows:

⁴⁴⁴ The English woman had a baby girl and the Australian had actually two children, a boy and a girl, aged around 8 and 10.

⁴⁴⁵ He happened to be part of the Terengganu Royal family

⁴⁴⁶ At that time the judge was a Malay Muslim, although had the judge been a non-Muslim, the decision might not have changed if they follow the law.

⁴⁴⁷ Federal Constitution

“Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

Added to this, if we refer to the UN “Fact Sheet: A summary of the rights under the Convention on the Rights of the Child”⁴⁴⁸ it clearly expands this argument. It says as follows:

“Article 14 (Freedom of thought, conscience and religion): Children have the right to think and believe what they want and to practise their religion, as long as they are not stopping other people from enjoying their rights. Parents should help guide their children in these matters. The Convention respects the rights and duties of parents in providing religious and moral guidance to their children. Religious groups around the world have expressed support for the Convention, which indicates that it in no way prevents parents from bringing their children up within a religious tradition. At the same time, the Convention recognises that as children mature and are able to form their own views, some may question certain religious practices or cultural traditions. The Convention supports children’s right to examine their beliefs, but it also states

⁴⁴⁸ www.unicef.org/crc/files/Rights_overview.pdf

that their right to express their beliefs implies respect for the rights and freedoms of others.”

Despite what is stated as being a positive response from spiritual leaders from across the globe, there remains some degree of naivety in that statement. The fundamental rights propagated by the CRC is that despite the right of the parents to direct the education of the child, that child still has the right to choose whether to accept the religion that they were taught.

However, it is fundamental to Islam that the child has no right of choice because he has yet to reach the ability to accept legal capacity. Once the child is born to Muslim parents, he is pronounced a Muslim. If reference is made to the responsibility of the Muslim parent to his child, it is to ensure that the child receives proper Islamic education. Furthermore, once the child reaches the age of majority and is sane, then he may exercise the choice.⁴⁴⁹ Therefore, as long as the child has not attained the age of majority or *baligh*, he/she must abide in the religion of his/her parents or protectors.

The *Shari'ah* is closer to the CRC

All the above discussions lead this research to the notion that the *Shari'ah* is closer to the CRC than initially thought. The *Shari'ah* has always preached that the child should be brought up in a proper and legal family. These rights stem from the Holy *Qur'an* which states that-

⁴⁴⁹ It is true that conversion out of Islam is a crime under the *Shari'ah*. However, it is only punishable if the person who converts commits acts of terrorism that hurts the fabric of the Muslim society.

“O ye who believe! Ward off from yourselves and your families a Fire whereof the fuel is men and stones, over which are set angels strong, severe, who resist not Allah in that which He commandeth them, but do that which they are commanded.”⁴⁵⁰

The classical English has slightly masked the meaning but what the provision above asserts is that the paramount duty of the parents to bring up a child in an environment that would ensure that child will be a person as envisaged in Islam. As with all divine revelations there is no actual enforcement (unless prescribed by the State law) but the fact that the person believes in the Book would make him aware of the retribution that comes for contravening the rule.

This legal family unit is necessary to save the child from undue pressure of being brought up in questionable circumstances. A legal family here refers to officially wedded men and women making a familial unit with their off-spring. According to Islam every child has the right to be born into such a family unit.⁴⁵¹ The right of the child to be brought up in a family⁴⁵² and have an identity⁴⁵³ are all provided in the CRC. These rights are related to the child being brought up in a safe, healthy and conducive environment as well as being protected. All are provided for in the CRC. The relevant verse in the *Qur'an* has also been supported by articles and practices of the Companions of the Holy Prophet Muhammad (pbuh) such as follows:

⁴⁵⁰ The Holy *Qur'an* 66:6 translation by Muhammad Marmaduke Pickthall

⁴⁵¹ In the cases of illegitimate children, the responsibility falls on to the State, whilst with single mothers, widows and rape victims, the child will be the joint responsibility of the mother and the State. In Islam, the child is not at fault as the sin falls squarely on the person committing the act, either the father of the child or both the parents.

⁴⁵² Articles 5, 8, 9 and 16, CRC have all expressed the importance of the family unit within specific areas.

⁴⁵³ Articles 8 and 30, CRC are referred.

“The nature of the rights of children could be inferred from the following anecdote: “One day a man came to Umar ibn al-Khattab to complain of a disobedient son. So Umar had the boy brought to him and he blamed him for his disobedience. Then the boy addressed Umar by saying ‘O Commander of the faithful: Are there no rights for a boy against his father?’ Umar said "Yes". Then the boy said ‘What are these rights O Commander of the Faithful?’ Umar said, ‘To choose a good mother for him, to select a good name to him and to teach him the Quran’. Then the boy said: ‘O Commander of the faithful; my father has not accomplished any of these rights. As for my mother, she was a black slave for a Magian; as for my name, he has named me Jual (beetle); and he has not taught me even one letter from the Quran’. Then Umar turned round to the man and said ‘You came to me complaining disobedience on the part of your son, whereas you have not given him his rights. So you have made mistakes against him before he has made mistakes against you.’” To violate children’s rights is to contravene the Shariah and to disobey Allah.”⁴⁵⁴

The above quote illustrates the importance of child rights in Islam. The right of the child is on par with that of the father and an adult. Therefore, it should not be said that the child’s rights are not supported in Islam. There are other areas where the *Shari’ah* provisions or maxims are closely related to the CRC and form just a part of the similarity. However, the main factor is how the CRC is interpreted, especially the best interests of the child principle. If it was interpreted literally then the *Shari’ah* should not differ greatly from the CRC because the threshold of rights accorded to the child in the best interests principle is the same. The

⁴⁵⁴ Arfat, Shahbina. “Islamic Perspective of the Children’s Rights: An Overview” available at [http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.2\(1\)/AJSSH2013\(2.1-32\).pdf](http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.2(1)/AJSSH2013(2.1-32).pdf), 11 Oct 2017. Online.

above findings regarding *Shari'ah* law provide the basis for the hypothesis that the *Shari'ah* is closer to the CRC.

The principle in the CRC provision that clearly states that the child's best environment is within the family unit is seen in the preamble of the CRC which states as follows:

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

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,”⁴⁵⁵

The *Shari'ah* has always placed the best interests of the child within the family unit whenever relevant. Added to that Articles 5, 9, 10, 16, 18 and 19 of the CRC have all mentioned the importance of the family unit, guardians and parents in the life of the child. It would be difficult to reconcile this fact with the position of those who argue in favour of the welfare and paramountcy principle as highlighted in Chapter Three. The argument that the interests of the child alone should be the only consideration is definitely not in line with the CRC⁴⁵⁶. The English position is also precarious as it does not reconcile with the position of

⁴⁵⁵ Pre-ambular paragraphs 5 and 6, CRC.

⁴⁵⁶ This research has consistently maintained that the threshold of the best interests of the child principle should be as stipulated in the CRC and confirmed during the *travaux preparatoires*. This was discussed in Chapter Two and followed by the explanation of the welfare/paramountcy principle in England in Chapter Three. The case of *ZH v (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4 also supports the contention that the principle in England does not fully comply with the CRC.

the European Court of Human Rights or the European Convention on Human Rights.

Notwithstanding the children who have no parents or if the parents or guardians themselves are the perpetrators of the crime on the child, it is proposed here that the law in England does not reflect the actual law or position of the CRC because of the almost absolute protection of the child to the detriment of other interested parties. As explained above, this is not what the CRC had planned.

The discussion above establishes that the *Shari'ah* position is functionally closer to the best interests of the child principle and is more compatible with the CRC. However, as mentioned earlier, the *Shari'ah* does not seem to be referred to in the best interests of the child principle. This is despite the fact that it has been reflected in other articles such as Article 20, CRC that mentions a specific provision of the *Shari'ah*, the provision of *kafalah*. Clearly, the drafters of the CRC accommodated the *Shari'ah* principles in general and therefore the best interests of the child principle should have had the *Shari'ah* principles embedded into them or at the very least been reflected upon in the *travaux preparatoires*.

The *Shari'ah* has an inherent best interests of the child principle in that there are other instances that have proven that the *Shari'ah* has used the best interests of the child principle, albeit without declaring it so. The best example is that of marriage where the mother remarries or has children of a young age. There was almost unanimous agreement among Sunni jurists that remarriage of the mother to someone who was not a close relative of the child would result in her forfeiting her right to custody. Due to this consensus, it would seem as though all the jurists forming this consensus followed a best-interests, rather than a basic-interests, approach, since this rule was arguably not driven by a concern about serious physical or moral harm to children.

All of the above makes the article by Michael Freeman on Article 3⁴⁵⁷ even more partial.⁴⁵⁸ As explained in Chapter Two, the commentary was quite extensive and covers almost all aspects possible for the best interests of the child principle. However it did not look at alternative systems such as the *Shari'ah* law in applying the best interests of the child principle. This research has shown that there are benefits that could have been gleaned from the *Shari'ah* law.

Incorporating the *Shari'ah* into the Child Act 2001

The separation of laws in Malaysia is both an enabler and an obstructer. Nonetheless that is the system that Malaysia has and is using. Earlier it was adduced that Malaysia would be better off using the *Shari'ah* as a means to better comply with the CRC than using the common law. This argument stems from the socio-legal background of Malaysia, as discussed in this and the previous chapters, and taking into consideration for the separation between the private and public law application. Any amendment to the Child Act 2001 should encompass *Shari'ah* principles to make the law applicable in both the Civil and *Shari'ah* Courts. It would be unprecedented in Malaysia but one that is necessary for Malaysia to fully comply with the CRC.

This is based on the fact that the best interests of the child principle must be referred to in all aspects of the child, whether it be public and private laws or criminal and civil laws. It has always been emphasised that the outcome of this research should be as practical as possible to allow or assist the policy makers when amending the Child Act 2001. Any radical

⁴⁵⁷ Freeman, Michael. "Article 3. The Best Interests of the Child." In A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.). *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden and Boston. Martinus Nijhoff Publishers, (2007). Print.

⁴⁵⁸ See articles by Choudhry, Shazia and Helen Fenwick. "Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act." *Oxford Journal of Legal Studies* 25.3 (2005): 453-492 and Fenwick, Helen. "Clashing Rights, the Welfare of the Child and the Human Rights Act. *The Modern Law Review* 67.6, (2004): 889-927 and Reece, Helen. "The Paramountcy Principle: Consensus or Construct?" *Current Legal Problems* 49 (1996): 267. Print.

departure would require an overhaul of the system, and one which I have tried to steer away from. In keeping with that objective, the following proposals would be feasible so long as they do not involve any amendment to the Federal Constitution.

Firstly, the Child Act 2001, as mentioned earlier should be made applicable to both the civil and *Shari'ah* courts, but only on the provisions that are compulsory under the CRC. In this case, the best interests of the child principle should be a pioneering principle. As stated earlier, the principle is already applied in the *Shari'ah* albeit inherently, so it should not constitute too big a step. The criminal courts would be a bigger obstacle and one that requires substantial training on the part of the judges to allow for such a step. The civil family courts have already begun to apply the principle despite it not being in any written law. This can be seen in the recent case of *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik*⁴⁵⁹ whereby the Judge held as follows:

“Held, ordering the defendant to undergo DNA testing to determine the child's paternity:

- (1) In the exercise of judicial discretion and the inherent power of the Court and having regard to article 3 of the CRC, it was in the best interests of the child that the defendant be ordered to undergo DNA testing to determine the child's paternity.
- (2) Article 7 of the CRC, which 'inter alia' stated that as far as possible a child had the right to know and be cared for by his or her parents, was also applicable as it did not contradict but was very much in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia. Article 7 was consistent with the provisions of fundamental

⁴⁵⁹ [2013] 4 MLJ 272

liberties in the Federal Constitution. The minor had the right to know whether the defendant was his father.

- (3) The decision in *Peter James Binsted v Juvencia Autor Partosa's* case⁴⁶⁰ was distinguishable as the court there did not consider the issue of the best interests of the child. The issue there was whether the father of the child would be subjected to hurt if DNA testing was ordered.

(4) and (5) ...”

The above demonstrates the development, impact and obstacles of the best interests of the child principle in Malaysia in one simple case. It has referred to the best interests of the child principle in Article 3 of the CRC but also referred to the *Peter James Binstead* case which was decided in 2000 but did not refer to the best interest of the child principle. This omission was not due to the fact that the Child Act was enacted in 2001 but rather that the judge in the *Peter James Binstead* case did not see the applicability of the principle in Malaysian family law. However, the Court of Appeal had already referred to the best interests of the child principle from another jurisdiction, specifically Canada, in the case of *Neduncheliyan Balasubramaniam V Kohila A/P Shanmugam* [1997] 3 MLJ 768. In that case one of the parties was Canadian so the Court of Appeal referred to Canadian law on the child. Nonetheless, Malaysian Courts used the principle in 1997 but till 2013 it was not deemed accepted law.

Furthermore the *Lee Lai Ching* case illustrated that the Child Act 2001 was not referred to at all when the Courts were discussing issues related to the child. This is not a vindication for the Child Act 2001 that the policy makers had hoped for when the Act was

⁴⁶⁰ [2000] 2 MLJ 569

drafted, to fulfil Malaysia's obligation under the CRC. The civil courts have clearly started on the path of using the best interests of the child principle. Amending the Child Act 2001 would further enhance the position by stating - as with the English Children Act 1989 - an overarching principle at the beginning of the Act.

Secondly, the *Shari'ah* has the principle inherent in its application of child rights. Applying the *Shari'ah* in the Malaysian context will assist the authorities in fulfilling their CRC obligations two-fold. The first is that the actual best interests of the child principle will take into consideration other interests such as the family and the environment so long as the child's rights are not diminished. The discussions in Chapters Two and Three have highlighted that the CRC interpretation of the best interests of the child should be based on Article 3 itself and this means that the best interests of the child is a primary consideration. This definition would include the interests of others besides the child so long as the child's interests are still the priority.

The best interests of the child principle in the *Shari'ah* does just this. According to the *Shari'ah* the child's interests lie not only within the child but the child's environment. The child must be accorded the rights that have been sought under the CRC such as education, safety, family support, development and the necessary freedoms. Therefore providing the best interests - without diminishing the interests of the child - is already practised under the *Shari'ah*, giving it an advantage over the common law.

The second of the two-fold fulfilment of the obligations is based on the divinity of the *Shari'ah*. Since the *Shari'ah* is divine-based law (for the most part), it would be easier and more convincing for its followers to abide by the said duties as they are ordained. As pointed out earlier in the research Asians are generally conservative and a part of that conservatism is related to the fact that they believe strongly in the spiritual. This may seem folly to the western paradigm but it plays an important role in the Asian paradigm. The

Muslims in Malaysia are duty bound to abide by the law and know that should there be any infraction of the law, they will know that although they might escape punishment from the authorities but they will not be able to escape God's reckoning. Furthermore, disobedience relating to any law or rule may result in the Muslims committing sin, something which they fear the most. This will indirectly assist in the enhancement of child rights and ensure that the best interests of the child are protected.

The best example to illustrate this is the consumption of pork or other pork-based products. Although there is no specific rule or law in the Islamic law enactments of any state in Malaysia relating to this, Malaysian Muslims insist on only consuming *halal* based products. Pork is forbidden in Islam through the *Qur'an*. However, the anomaly is that there are several other items forbidden by the *Shari'ah* with the force of law in Malaysia such as drinking alcohol and gambling, yet some Muslims openly defy those laws. Nonetheless, it can be stated that if the matter is related to *Shari'ah law* and teaching, compliance will be high because the majority will conform to the teaching.

Thirdly, the dualist state conundrum needs to be considered. Malaysia has a dualist system of legal governance and it has no intention of modifying this position in the near future. The international law to which Malaysia has become a party requires a two-step approach. After becoming a party, the provisions are not immediately applicable in Malaysia although they are binding on Malaysia. Malaysia will have to pass an enabling act to allow for the international law to be applicable in Malaysia. In the case of the CRC, despite having an enabling law in the form of the Child Act 2001, the fulfilment of the obligations are not forthcoming. There is a certain hesitation or defensive attitude towards international law especially from those of the western paradigm.

The same could not be said for Islamic based laws which are accepted unilaterally.⁴⁶¹ Islamic law, even though it may seem to be alien to Malaysians would be accepted without question. This could be related to the above point on divinity, but the fact that it is deemed to be local law or the law of the land also plays an important role. Islamic laws that are introduced are deemed to be part of traditional Malaysian law so it should be accepted as such. Therefore the CRC provisions would be readily accepted once it has been stated that they are compliant with the *Shari'ah*.

The above three factors are not the only factors but they are the strongest to justify why the CRC principles would be accepted if they are introduced through the *Shari'ah*. This is probably peculiar to Malaysia but in essence the acceptance is more important than the peculiarities.

Conclusion

This chapter illustrates how the *Shari'ah* as applied in Malaysia, forms part of Malaysia's socio-legal complex. Furthermore the functionality of the *Shari'ah* has to be compatible with the customs in Malaysia and not merely taken without proper research and study. Historically, the law of the land has been through several changes, but the two most dominant in Malaysia have been the English common law and the *Shari'ah*. These two systems still share the legal landscape, so much so that it is still quite difficult to ascertain what the legal system in Malaysia really is. It has been illustrated that the law of the land is the *Shari'ah* and its principle should be applied in the occurrence of any lacuna in the law.

This chapter has also clearly illustrated that despite the obvious differences between the CRC and the *Shari'ah* principles on child rights, there are more similarities. These are

⁴⁶¹ It should be said that the acceptance seems unilateral but there some opposing groups. However, they are either minority groups or those that do not want to be seen as going against the mainstream thinking.

noticeable in the best interests of the child principle where despite not being expressly provided in any of the major sources of the *Shari'ah*, there is no denying the existence of an inherent principle leading towards the same. This would mean that the CRC principles and the *Shari'ah* are generally compatible. Although it cannot meet the standards expected in the western world, it has its own standards that are almost similar while not exactly the same. The *Shari'ah* certainly does not negate the co-existence of its principles with the international human rights regime or the common/civil law. Although some flexibility will be needed from both spheres, it is plausible. However, it must be highlighted that the variance allowed in mainstream Islam and *Shari'ah* law is limited.

Finally, the application of the *Shari'ah* in Malaysia has affected Malaysia's implementation of the CRC principles. It is Malaysia's duty to impress upon the CRC Committee that the CRC must also be able to accept that the implementation and interpretation of the CRC principles in Malaysia needs to accommodate *Shari'ah* principles especially in the case of the best interests of the child principle.

The compatibility of the *Shari'ah* law principles with the international human rights regime should therefore not be an issue, because in general they do not contradict each other. The only exception to the situation relates to cases involving the custody of the child in cases of the conversion of one of the parents out of Islam. The application of the *Shari'ah* in Malaysia has affected Malaysia's implementation of the CRC principles because of the apprehension of those who do not understand the applicability of the CRC. Otherwise, there are no conflicting provisions and the *Shari'ah* should not then affect Malaysia's application of the CRC.

Chapter Six

Conclusion

“We all breathe the same air. We all cherish our children’s future.”⁴⁶²

Introduction

The quotation above was taken from one of John F. Kennedy’s most famous speeches. It was given in a totally different context, on world peace, but the words ring true for the situation of children today especially in light of the best interests of the child principle. The underlying message is that everyone in this world is the same, no matter what colour, creed, race or religion they profess. The best interests of the child principle should be applicable to all children. However this research has shown that the application of the CRC differs between jurisdictions. This difference is based on the interpretation of the CRC by the States as well as the application of the CRC provisions based on domestic conditions.

Despite the seemingly obvious notion of child rights, there are still abuses of the rights of children no matter where it is in this world, including Malaysia. This thesis explores how Malaysia, given its unique socio-legal system, should seek to fulfil her obligations under the international human rights instrument, the CRC. One of these that needs to be reiterated is the CRC Committee’s recommendation regarding Malaysia’s dual legal system and its application⁴⁶³.

The CRC Committee under the subtopic “Principal subjects of concern and recommendations” have listed several recommendations, including: that an international

⁴⁶² Excerpt from John F. Kennedy’s famous speech on peace delivered on 10 June 1963 in the American University, Washington DC, USA available at <http://www.humanity.org/voices/commencements/john.f.kennedy-american-university-speech-1963>.

⁴⁶³ Concluding Observations: Malaysia Item No. 16, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. CRC/C/MYS/CO/1

study be conducted on the question of the dual legal system of the civil and *Shari'ah* systems; there should be a comprehensive review of the national legal framework to ensure compatibility with the CRC; and to expedite the process of necessary law reforms. While there is still much work to be done in Malaysia to fulfil these recommendations, in this thesis Malaysia's compliance with the CRC in the context of its dual legal systems has been examined. It is a step in the right direction towards fulfilling the said recommendations.

I would suggest that the intention of the CRC Committee's recommendations is that Malaysia ought to harmonise⁴⁶⁴ both the civil and *Shari'ah* laws to accept the CRC as it stands. However, as elaborated in this research, the interpretation of the best interests of the child principle that is being used by the CRC Committee may not reflect the true meaning of the CRC. I have argued that the CRC has not been fully implemented in England because the English paramountcy principle is not always compatible with the rights-based approach of the CRC. Though Malaysia shares the common law approach of English law, it differs in that it did not have a pre-existing welfare principle prior to signing the CRC and it also has the added complexity of a pluralistic legal system⁴⁶⁵ in which civil law shares jurisdiction with *Shari'ah* in some circumstances. I have further argued that, while civil law is not yet fully in compliance with the CRC, the existence of *Shari'ah* is not necessarily holding Malaysia back from compliance and, indeed, in some respects is closer to the CRC 'best interest' principles than the civil law. As shown, the *Shari'ah* had always posited the best interests of the child as inclusive of other interests or the rights of others and not the child's interests only.

The rights of the child under the *Shari'ah* are integral to the family, which as mentioned in Chapter Five, also form part of the CRC. The child has a right to a good family,

⁴⁶⁴ The concept of harmonisation in international law consists of domestic law being brought into line with International law, either a multilateral treaty or a convention.

⁴⁶⁵ As stated in Hussain, Jamila. "More Than One Law for All: Legal Pluralism in Southeast Asia". *Democracy and Security* 7.4 (2011): 374-389 at pgs. 378-379. Print.

to a name and nationality, a right to an education as well as rights to be brought up in a safe environment. As I have mentioned on Chapters Two and Five, all of these fall within the ambit of the CRC and the definition of the best interests of the child. Again, this is on the basis that the best interests of the child is based on “a primary consideration” and not “the paramount consideration”.⁴⁶⁶

This is not to suggest that *Shari'ah* law is perfectly compliant with the CRC. The development in *Shari'ah* law and the literature on the best interests of the child principle from the Islamic perspective has been quite slow, but it is nevertheless present, as demonstrated in Chapter Five⁴⁶⁷. Increasingly Muslim jurists are trying to participate in the child rights dialogue although in Malaysia there is no evidence of jurists, whether secular or Muslim, comparatively studying the best interests of the child principle. Most development in the best interests of the child principle in Malaysia is driven by the Courts through case law.

The current development of the CRC principles seems to have taken a unilateral approach. This approach can be seen in the application of the best interests of the child principle. However, the unilateral approach as espoused by the CRC Committee has allowed some flexibility by leaving the interpretation for the jurists' discretion in the member States. This interpretation has been left to the States whether by the judiciary or the academicians. In Malaysia, the jurists are leading the development of the best interests of the child principle but separately, namely the civil law and *Shari'ah* law acting separately. However, the better option would be to apply an interpretation of the best interests of the child that would be

⁴⁶⁶ This is the basis of this hypothesis, that the best interests of the child is based on “a primary consideration” and not based on “the paramount consideration” as agreed during the *travaux preparatoires* of the CRC, as highlighted in Chapter Two.

⁴⁶⁷ Further evidence can be seen in the First Max Planck Symposium on Child Law in Muslim Countries convened at the Centre Jacques Berque in Rabat, Morocco, April 1-5, 2015 as mentioned in Chapters One and Five.

acceptable to both sets of jurists. Based on this research, such a possibility is not fiction but more of an inevitability.

The development of *Shari'ah* laws as well as the civil laws has been carried out separately but in tandem. What is meant by in tandem here is that the laws drafted may refer to similar subject matter like marriage and adoption, enacted at about the same time but were done without consultation between the two institutions. This has created a comparative minefield as the cross referral has been minimal at best. The civil law and *Shari'ah* laws both developed based on how the *ratio* of the case law was decided by the judges or the interpretation of the enactments of the states. There were no comparisons between the legal systems because the subject(s) involved was not the child but rather the parents (in the case of divorce and custody⁴⁶⁸).

Very little if any thought was put into the best interests of the child at the outset. The civil law has developed as seen in the case law examined in Chapter Four. After the first cases of the introduction the best interests of the child principle such as *Jeyasakthy Kumaranayagam v Kandiah Chandrakumaran*⁴⁶⁹, the principle did not fully develop even with Malaysia entering the CRC in 1996. However, the principle was slowly being developed by the judiciary. This was shown in the cases of *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik*⁴⁷⁰ which acknowledged the best interest of the child principle as well as in the *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*⁴⁷¹. The latter case acknowledged the existence of the CRC, the guiding principles and further stated that Malaysia is bound to the principles because no

⁴⁶⁸ Both legal systems, be it civil or *Shari'ah* have developed their own positions on divorce and child custody. Despite the fact that there was no cross referencing, the factors taken into consideration for both these legal systems also include the best interests of the child principle. The difference would be based on the interpretation of the best interests of the child principle and what other factors are deemed in the best interests of the child based on the relevant legal system.

⁴⁶⁹ [1996] 5 MLJ 612

⁴⁷⁰ [2013] 4 MLJ 272

⁴⁷¹ [2013] 5 MLJ 552.

reservations were made. Nonetheless, the development was achieved by case law and there is no standardisation through any of the written laws. Therefore the application, though a welcome development but was not uniform.

Furthermore, as mentioned in Chapter Five, the *Shari'ah* is developed by relevant State assemblies that may or may not have the same goals as the Federal Government, creating a dichotomy of purpose in the law. The Federal Government has control of the Child Act 2001 but the States have control of the *Shari'ah* state enactments that overlap on child issues such as the age of majority.

This research contributes to the available literature regarding best interests of the child and the *Shari'ah*. The amount of literature in the *Shari'ah* regarding the best interests of the child principle is limited.⁴⁷² Moreover, much of the literature concentrates on the rights of children in Islam and is written in Arabic. Therefore, one of the primary contributions of this thesis is in demonstrating that the *Shari'ah* laws do not necessarily contravene the CRC. This means that the Islamic States and Muslim Nations would be unencumbered when applying the best interests of the child principle. This is despite the fact that several Muslim and Islamic States have always placed general reservations on the human rights instruments.⁴⁷³ The only pre-requisite for the Muslim and Islamic States to accept the best interests of the child principle is that the CRC provision on the principle has to be interpreted accordingly, that is, that the test is based on primary consideration and not the paramountcy principle. This is based on the actual wording of Article 3, CRC where the best interests of the child is a primary consideration.

⁴⁷² As mentioned in previous chapters, the Max Planck Seminar was also a step towards encouraging more literature towards clarifying what the best interests of the child principle in Islam is to the English speaking world.

⁴⁷³ Discussed in detail in Chapter Five.

If the principle is based on primary consideration, the CRC becomes a more inclusive instrument taking in aspects of all jurisdictions and not merely those of the West. The *Shari'ah* appears old and archaic to the Western paradigm but it has been consistent and the provisions are clear, without ambiguity, in the eyes of a Muslim. We can take the example of the definition of a child. In Islam the child comes of age when the child is deemed ready as decided by destiny or fate,⁴⁷⁴ whilst in the West, the child's age of maturity is determined by law. These are some of the challenges in projecting the best interests of the child principle in a more favourable light, acceptable to all.

This insight into how the best interests of the child principle is perceived is not a new development of the *Shari'ah* but rather a new perspective on traditional thought. The applicability of the *Shari'ah* throughout the ages has never been as much scrutinised as it is today. Nonetheless, the *Shari'ah* approach should be able to shine a light towards appreciating the fact that the CRC is actually repeating something that has already been entrenched in the *Shari'ah* with regards to the development of the child. This entrenchment refers to the preferred situation of allowing the child to develop to their full potential. The simplified version is the development within the family unit. A more complete view would include the overall application and implementation of the development of the child as described in detail in Chapter Five and briefly below.

Compatibility of the *Shari'ah* and the CRC

Initially, this research was very sceptical about the *Shari'ah's* compatibility with the CRC and any other human rights treaties. Perception plays an important role here since it has

⁴⁷⁴ In Islam, the coming of age of the child or *baligh*, is determined by God. The child will be an adult after the biological signs and attributes are reached. Subjective it may be, but that has been the Islamic method of determining the adult and it has survived through the ages. It is doubtful that something as basic as the child's age of majority will be changed in Islam, notwithstanding the conflict with Article 1, of the CRC.

generally been perceived that Islam restricts progress and suppresses women and children⁴⁷⁵. The pressure on Muslims in the western world has never been so heavy and the actions of fanatics who claim to represent Islam are not helping the situation. The situation is even more engrained in the Malaysian mind-set. Historically Malaysians have been told by the English colonials who ruled Malaysia, that those with English and national school education were preferred over those with a traditional Islamic education.⁴⁷⁶

Besides that, the *Shari'ah* has been referred to by those drafting the CRC or at the very least they were made aware of its principles as mentioned earlier. An example of the impact of this is that the concept of *kafalah* in Islam which is an alternative to adoption is mentioned in Article 20 of the CRC. Islam forbids adoption⁴⁷⁷ on the grounds of protecting the child's identity and heritage, which is also provided for in the CRC in Article 8. It is accepted that the interpretation of Article 8 may differ from what is described above but it falls within the ambit of what has been prescribed by the CRC. Therefore the CRC did, to a certain extent, utilise *Shari'ah* principles in interpreting the best interests of the child principle, yet the CRC Committee has still taken a western centric interpretation. For example the approach taken by the CRC Committee regarding the best interests of the child principle in the CRC Committee's Concluding Remarks: Malaysia - stated in paragraph 36 as follows:

“... The Committee also notes that the Law Reform (Marriage and Divorce)

Act 1976 (Act 164), as well as the Islamic Family Statutes, are based on a primary

⁴⁷⁵ The perception is that Islam suppresses women's rights and that of the child.

⁴⁷⁶ Ingham, Barbara, and Colin Simmons. “*Development studies and colonial policy*”. Routledge, (2005): pgs 195-212 article by Martin Rudner entitled Colonial Education Policy and Manpower Underdevelopment in British Malaya is one example of articles that illustrate the colonial policy to undermine the traditional education system in favour of the English system. In page 198 the article states, “Government ambivalence towards the provision of English education was especially pronounced with respect to the Malay community. Yet English had become a virtual prerequisite for entry even into minor government service posts, thereby excluding the great majority of Malays.”

⁴⁷⁷ Discussed in Chapter Two.

presumption that a mother is the best person to take care of a child, leaving the consideration of the best interests of the child as a secondary concern.”⁴⁷⁸

The above illustrates how the CRC is using the Western Centric approach where the best interests of the child should be the paramount consideration. However, as discussed in the previous chapters, the best interests of the child principle in the CRC is wider and more flexible than as espoused. The CRC Committee was also prejudiced in their above conclusion because the actual determination by both the civil and *Shari'ah* Courts are more in-depth and consider several factors. This is clearly unfortunate and should be highlighted to the CRC Committee.

The next part of the compatibility discussion relates to the compatibility of *Shari'ah* with the international human rights instruments as well as the common law and civil law. After separating the Church and the State's governance, the western psyche has been to try and further distance the church from all governance issues. As this divide widens, the differences with the *Shari'ah* also grow and are viewed as more significant, relatively acting in tandem. The same situation is experienced in Islam but the difference is that Islam is re-emerging into Muslim lives including governance. Almost all Muslim States are experiencing a renaissance where people are seeking a return to Islamic governance.⁴⁷⁹

If the issue was solely based on the provisions of the CRC, all the evidence in this research shows the *Shari'ah* and the CRC concept of the best interests of the child principle are compatible and in fact, the same can be said for most of the provisions of the CRC. In

⁴⁷⁸ Concluding Observations: Malaysia Item No. 36, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. CRC/C/MYS/CO/1

⁴⁷⁹ This is based on the recent developments around the Muslim world such as the Declaration of *Shari'ah* law in Brunei, Pakistan and Sudan. The electoral wins by the Turkey's Justice and Development Party (AKP), Egypt's Freedom and Justice Party or President Morsi's party and Algeria's Islamic Salvation Front (FIS). The latter two parties were violently forced out of power by illegal *coup d'etat*. All three parties are leaning towards a more Islamic rule. Growing support for the Islamist parties in Indonesia and Malaysia to an extent that the ruling parties of the respective countries have resorted to adopting Islamic policies.

fact it is arguable that the provisions of most of the international human rights instruments are compatible with the *Shari'ah*. That is the general rule but as with any general rules there are always exceptions to that rule. For example, within the CRC there is one specific provision, namely Article 14 that allows the child the right of freedom of choice of religion. In Islam the child will take the religion of the parents or at the very least the father. That is the only exception in the CRC that the *Shari'ah* will not be able to comply with, subject to the fact that the best interests of the child principle is interpreted as agreed in the *travaux preparatoires*. Another difference pointed out earlier is the point of variance that occurs due to the different thresholds imposed on the best interests of the child, namely “a primary” or “the paramount” consideration⁴⁸⁰.

Therefore, on the basis of this research, it is submitted that the *Shari'ah* is compatible with most of the provisions of the international human rights instruments and for the purpose of this research, specifically the CRC. As for compatibility with the common law and civil law principles on the best interests of the child principle, the situation remains the same. As long as the interpretation of the best interests of the child principle is based on the provisions of the CRC, then there would be no incompatibility issues.

The Research Inference

The approach taken in defining and implementing the best interests of the child principle by both England and Malaysia differ despite both sharing a common law heritage. Malaysia has approached the best interests of the child principle and its implementation in accordance with the CRC from a purely international human rights law perspective whereas the English approach was based on a family law perspective. This difference in approaches

⁴⁸⁰ Discussed in-depth in Chapter Three and concluded slightly later in this chapter.

is surprising because as pointed out in Chapter Four, the drafters of the Child Act 2001 conducted a study tour of England. The purpose of the trip was to study the Children Act 1989 and try to incorporate the child friendly principles into the Child Act 2001, which included the best interests of the child principle in England.

However, the drafters would probably not have been able to appreciate the variation of the best interests of the child principle in England because they would firstly need to understand the difference between the paramountcy principle in England and the best interests of the child principle in the CRC. Secondly, the drafters would need to understand the perspective taken by England, that is, a family law perspective based on the historical development of the principle in England since the mid-nineteenth century. It would explain the approach taken, which is more based on international human rights. Finally, the drafters also lacked the experience in dealing with the best interests of the child principle. England had been using the welfare principle even before the CRC and the Children Act 1989⁴⁸¹ whereas Malaysia was only beginning its learning curve in applying the principle.

Furthermore, Malaysia only began interpreting the best interests of the child after becoming a party to the CRC, notwithstanding the application of the *Shari'ah* with its own understanding of the principle. England on the other hand, has been applying the principle based on its development of child rights through the common law as part of family law practice. It was inevitable that the practice in England would be difficult to change. The comparison of both jurisdictions indicates that despite the principle being exactly the same in wording, the application is different. Malaysia's application is also limited in that it is only recently developing into accepted law whereas England has the benefit of a more mature approach to the application of the Convention. The development in England has gone towards

⁴⁸¹ As illustrated in Chapter Three, the beginning of the principle in the case of *R. v De Manneville* (1804) 5 East 221

something more than the principle, with the law developing and evolving further than envisaged by the best interests of the child principle.

However, all the above is based on the benchmark set by the CRC, so both jurisdictions have actually accepted the same law and provision but with different application. The CRC Committee must return to the principles of the CRC, which was agreed by the State Parties during the *travaux préparatoires*.⁴⁸² The CRC Committee also has an important role to play by setting the standards that parties are obliged to follow. However, this determination by the CRC Committee must be in accordance with the provisions of the CRC. It would be unconscionable for the CRC Committee to determine that the principle that States must attain is above what has been set in the CRC.

Furthermore, the CRC Committee must be more inclusive by studying the acceptance of the principle as practised in other jurisdictions and legal systems. The *Shari'ah* law may be difficult to understand and explain but it is important especially since several States apply that law. The best interests of the child principle will only become an accepted norm once the ambiguity that surrounds it has been cleared. It may not be agreeable to most of the scholars and child rights activists but it would be better for child rights in general for the principle to be clear and standardised.⁴⁸³ However, if the CRC Committee decides that the principle should be at a higher threshold, then it should be expressly stated so that the States are able to reply and raise objections should the States feel uncomfortable with the new standard.

⁴⁸² As illustrated in Chapter Two.

⁴⁸³ Some of these authors include Michael Freeman who stated that the best interests of the child principle was purposely indeterminate to allow flexibility. This was provided in the following article: Freeman, Michael. "Article 3. The Best Interests of the Child." In A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.). *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden and Boston. Martinus Nijhoff Publishers, (2007): 1. Print.

A final dynamic that should be reiterated here is Malaysia's socio-legal complexities which include her history. In this research it has been emphasised time and again that the history of Malaysia must be considered. This dynamic has even been emphasised by Andaya in their latest edition of "A History of Malaysia."⁴⁸⁴ Even the preface provides interesting insight into Malaysia, illustrating the authors' personal experience of the country. In the bigger scheme of things this illustrates that flexibility is required in applying international human rights principles. It is not argued that the CRC Committee provides time for States to develop and progress their application of the principles. However, the application must still be based on the exact principle with the appropriate threshold. Malaysia, specifically is in dire need of the principle and the following will highlight the reasons.

The Necessity of the best interests of the child principle in Malaysia

Malaysia was recently rocked by some very high profile cases that illustrated the shortcomings of Malaysia's inadequate policies and laws incorporating the best interests of the child principle.⁴⁸⁵ These cases are the Richard Huckle and the Qu'ranic memorisation school cases. In the former, Richard Huckle was convicted in England after he pleaded guilty to seventy one sexual offences against children in Malaysia (except the first case which was in Cambodia).⁴⁸⁶ He managed to get a job as a volunteer teacher with the British Council and

⁴⁸⁴ Andaya, Barbara Watson, and Leonard Y. Andaya. *A history of Malaysia*. Palgrave Macmillan, 2016. Pg. 2.

⁴⁸⁵ The best interests of the child principle has been explained in Chapter Two and includes a wide range of rights and expectation for the child. These rights have been disseminated in the English context through the Children Act 1989's umbrella provision, which Malaysia does not have. The principle requires that in any matter involving children that the best interests of the child principle shall be applicable.

⁴⁸⁶ Highlights of the judgment and the case obtained from the Star newspaper at the following website: <https://www.thestar.com.my/news/nation/2016/06/06/paedophile-richard-huckle-who-abused-malaysian-children-jailed-for-life/>. Online, 6 November 2017.

worked with impoverished children. According to the excerpts from the case the abuse spanned nine years from March 2006 to December 2014.

The second case refers to a fire in a privately-run religious school on 14 September 2017 which killed 21 children and two teachers.⁴⁸⁷ Upon investigation it was found that the fire was caused by juvenile delinquents who were high on drugs and were not happy with children in the religious school monopolising the enclosed courts nearby. However this case was not the first case involving privately-run religious schools. On 26 April 2017, a student at another privately-run religious school died, initially thought due to injuries sustained from being disciplined in the school. Later after a second post-mortem it was revealed that the student died of leptospirosis or rat-urine poisoning.

Initially the first post mortem's finding was that the cause of death was due to the level of injuries sustained from the abuse. The hospital amputated both legs to stop the spread of infection. The family of the deceased had trouble accepting the results of the second post mortem but the finding was confirmed and the police treated the case as death by rat poisoning. The abuser was charged for causing hurt under the penal code.⁴⁸⁸ There are other cases but the above suffice to elucidate the point.

If the best interests of the child principle is applied unilaterally throughout all policies and laws of Malaysia, as in England,⁴⁸⁹ then the cases would not have occurred or at the very least been minimised. The principle would have been in all the administrators' minds when they vetted teachers for the post of volunteer English teachers. The applicant would need references and training to ensure that the standards are met both academically and

⁴⁸⁷ Newspaper on the case is available from the Star newspaper at the following link: <https://www.thestar.com.my/news/nation/2017/09/17/seven-held-over-arson-attack-police-youths-started-fire-after-being-insulted-by-tahfiz-students/>. Online, 7 November 2017.

⁴⁸⁸ The excerpts can be found on this website from the Malaysian Sun newspaper as follows: <http://www.thesundaily.my/news/2017/07/11/autopsy-shows-abused-tahfiz-student-died-rat-urine-disease-updated>. Online, 8 November 2017.

⁴⁸⁹ Through section 1 of the Children Act 1989

professionally. The teacher would be under systemic review throughout his tenure and the likelihood of his actions being caught or brought to the attention of the authorities would have been greatly increased.

In the second case, the authorities who approved the building of the religious school would have insisted that the school be equipped with basic fire-fighting equipment. The main problem is that these privately-run religious schools were never initially designed to be schools. More often than not these schools use old buildings that are unused or simply abandoned. They lack the basic requirements of new buildings let alone a school. The authorities have been rather lax in their enforcement of building laws and in the supervision of how children or students are treated because it was felt that these schools provide a service to the community. If the authorities understood the principle of the best interests of the child then these children would not have been allowed to be in such schools lacking proper facilities. Also these students would not have been allowed to attend these schools without the proper monitoring and supervision of the teachers or guardians. All of this is at the micro level.

At the macro level, the government or society as a whole should not allow death traps such as the quoted school to even exist. However, the lack of awareness within the government and society is partially due to the lack of authority of the best interests of the child principle in Malaysia. There are hundreds of privately-run religious schools that suffer from the same problem and are just waiting for another accident to happen. Notwithstanding the fact the highlighted case was based on an intervening factor or mischief, the possibility of future incidents happening remains.

In the third case, where the child fell sick, the school should have brought the child to seek medical attention. The school failed to do so and when the child went home there was another lapse of two weeks before proper medical attention was sought for the child. In the

two week period the child's parents brought the child to a *bomoh* or witch doctor⁴⁹⁰. The dereliction of duty from firstly the school and secondly from the parents could be deemed as a criminal offence. However, such is the situation in Malaysia that there was no action taken against the parents because it was felt that they had tried to help the child.

The Royal Malaysian Police or PDRM⁴⁹¹ also needs to relook at its strategy in dealing with child issues. As mentioned in Chapter Four, the PDRM is focused on serious crimes and due to financial and other commitments appear unable to provide coverage to all aspects of policing. Nevertheless this does not explain the fact that a paedophile was rampant for nine years in the country and went undetected.⁴⁹² No inquiry has been conducted officially by PDRM so there are no internal investigations to be made public for their shortcomings. This is despite calls from the opposition to conduct such an investigation into the PDRM.⁴⁹³

The parents must now take corrective or rehabilitative measures for their children suspected to have been abused by the paedophile. However, most parents are rather reluctant to come forward on two accounts. Firstly there is the fear that their child will be branded for life as an abused victim and secondly, they are unwilling to accept that their child has been

⁴⁹⁰ Despite Malaysia having one of the better medical services in the world, there are still large pockets of society that believe in the mystical world and approach. In Malaysia there are the *bomoh* or witch doctors and the traditional healers. The latter are still in the process of being monitored and regulated through the Ministry of Health's Traditional Healthcare Bill. The former is unregulated and deals with spiritual healing. Unfortunately, there is no way to ascertain whether those who practise it are sincere or fraudulent. In the case of the amputated child, the *bomoh* was referred to because the child was said to be spiritually disturbed in school after being caned. This affects all races be it the mainstream Malay, Chinese, Indians and even more so in the indigenous population both in East and West Malaysia.

⁴⁹¹ The Malay abbreviation for the Royal Malaysian Police Force.

⁴⁹² Nonetheless the problems of detecting paedophilia cases is not limited to developing countries but all countries that implement the CRC. The issues involve the wider justice system, the vulnerability of the victims and other factors which all make it difficult to detect and prosecute this crime, as the scandals emerging in the West over historic paedophilia cases testify. England has experienced this difficulty, such as in child grooming cases and the other abuse cases. The Crown Prosecution Service (UK) even highlighted in their guidelines on the difficulty of handling these cases on their website at <https://www.cps.gov.uk/legal-guidance/guidelines-prosecuting-cases-child-sexual-abuse>. 31 Dec 2017. Online.

⁴⁹³ This can be seen from this online news from Australia. <http://www.abc.net.au/news/2016-06-08/malaysia-pressured-to-explain-handling-of-richard-huckle-case/7488584>. Online. 9 November 2017.

abused.⁴⁹⁴ A large contributing factor could be traced to the background information provided in Chapters One and Four. Due to Malaysia's conservative mentality and Asian paradigmatic thinking, these families are still bound by the shackles and taboos of the society.

The worst case to befall Malaysia in recent times was probably what happened in 2015 to the most under represented group, the indigenous people in Peninsular Malaysia. The country was shocked and later the world.⁴⁹⁵ The facts of the case remains obscure but what is understood is that seven indigenous or *orang asli*⁴⁹⁶ children ran away from their school for fear of punishment for going against their teachers' instruction. Their school is located in a rural and dense jungle area in the east coast state of Kelantan.⁴⁹⁷ The incident occurred around 23 August 2015 and after six weeks hiding in the jungle only two were found alive, and their condition was heart-wrenching.⁴⁹⁸ What was worse was that the school authorities did not inform the parents of the children's disappearance. Further the authorities only launched a search and rescue mission after they had been missing for four days.⁴⁹⁹ I will not continue with this incident but instead look at the related issues that illustrate the lack of understanding and application of the best interests of the child.

⁴⁹⁴ As highlighted in this news article by Reuters at : <https://www.reuters.com/article/us-malaysia-sexcrimes-huckle/malaysian-communities-in-denial-after-major-paedophile-case-police-idUSKBN14Z00M>. 31 Dec 2017. Online.

⁴⁹⁵ The story as seen from an international perspective. <http://www.bbc.com/news/magazine-35161791>. 4 Jan 2018. Online. And <http://www.aljazeera.com/indepth/features/2015/10/malaysia-outrage-5-indigenous-children-die-151015094936769.html>. 4 Jan 2018. Online.

⁴⁹⁶ The Malay term for indigenous people which is literally translated to mean "original people".

⁴⁹⁷ There have been some history between the local Malay population and the local *orang asli* population involving the *orang asli* land. The issue has been ongoing for at least four decades but this research will not delve into that discussion. Suffice to say that there was animosity between the two groups.

⁴⁹⁸ The stories in local newspaper after their miraculous survival:

<https://www.thestar.com.my/news/nation/2015/10/10/kids-survive-46-days-in-the-jungle-two-orang-asli-children-found-emaciated-but-alive-in-unforgiving/>, and <https://www.nst.com.my/news/2016/08/167666/orang-asli-kids-who-went-missing-kelantan-jungle-shy-away-school>, both Online.

⁴⁹⁹ Some reports from independent local agencies which are more critical than the docile government backed papers: <https://www.malaysiakini.com/news/315577>, and <http://says.com/my/news/no-comment-says-education-ministry-s-representative-over-the-orang-asli-children-tragedy>. Both online.

Firstly the principle should be applied to all, notwithstanding their race, creed and religion. The *orang asli* are simple folk and it is the government's duty to care and protect them. The Government provided the *orang asli* with hostel facilities to assist in providing the children with education, even the rural folk, but unfortunately away from their family. It was seen as a more practicable and cost-saving approach, which is absolutely acceptable. However, by doing so, the Government has also created a duty of care to protect the children especially when they are at the hostels. The environment should have been more conducive to the well-being of the children and not one based on fear. It was definitely not in the children's best interests.

Secondly, the lack of action by the authorities to take the matter seriously and to warrant a search and rescue operation immediately shows signs of apathy towards the *orang asli* community and children as well. The moment any child is missing in Malaysia, the Royal Malaysian Police and the Ministry of Women, Family and Community Development have an alert system that informs all agencies and the public to be on the lookout for the missing child. However, in this case it was not activated until it was too late.⁵⁰⁰ The apathy within the educational system does not stop at school level but goes further. In fact the Ministry of Education concluded an investigation into the case but no charges or disciplinary action was taken against any teacher. Besides the apathy, the lack of action also illustrates the non-application of the best interests of the child principle because the teachers were not given better training to accommodate the *orang asli*. As mentioned earlier, the *orang asli* are simple folk and as such the teachers should have been trained to treat each child carefully. Clearly this was not done, and five children died from the mistake.

⁵⁰⁰ In this case the public would not have been able to help but the early warning would have required the authorities to begin the search and rescue mission much sooner. Compared to how missing children are treated in the UK, like in the Mikael Kular case in Scotland and the April Jones case in Wales - both good examples of when the best interests of the child is not taken lightly.

Based on the cases above and several cases that have been referred to in the preceding chapters regarding child issues such as the underage marriage and neglect, it is clear that besides the law, other aspects need to be looked at in Malaysia, namely social and educational aspects relating to child development. Nevertheless, in this research the focus is on the development of the legal aspect. This then leads to the impact on Malaysia.

The Impact on Malaysia

I will now consider the impact that the CRC has had on Malaysia and propose two ways in which the best interests principle could be better implemented. The past has been covered in the preceding chapters, so here the focus is on the current situation and the future. Currently, Malaysia is still in the trial and error stage of implementing this principle. It is limited in its scope as it only covers children in need of care and protection as well as in situations where a child has been involved in criminal matters. As pointed out in Chapters Four and Five as well earlier in this chapter, it is only now that the principle is spreading into the family law realm specifically in custodial matters.

The initial impact was positive with the enactment of the Child Act 2001, but it has not developed further than that. It is true that the Child Act 2001 should have been a catalyst for a new dawn in child rights in Malaysia. It has however, failed to materialise because, as noted above, the scope of the Act is limited. This, as argued earlier in this thesis, contravenes Article 3 of the CRC.

Another positive outcome is that the Ministry of Women, Family and Community Development, through the JKM have conducted training and outreach programmes. A notable programme is the training or sensitisation of Judges which has been done progressively. It has created awareness amongst the Judiciary of Malaysia and these judges

are made aware of Malaysia's obligations and commitments to all the international law instruments but with emphasis on the international human rights instruments⁵⁰¹.

This can be seen in the recent case of *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik* [2013] 4 MLJ 272 whereby the Judge held as follows:

“Held, ordering the defendant to undergo DNA testing to determine the child's paternity:

- (1) In the exercise of judicial discretion and the inherent power of the Court and having regard to article 3 of the CRC, it was in the best interests of the child that the defendant be ordered to undergo DNA testing to determine the child's paternity.
- (2) Article 7 of the CRC, which 'inter alia' stated that as far as possible a child had the right to know and be cared for by his or her parents, was also applicable as it did not contradict but was very much in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia. Article 7 was consistent with the provisions of fundamental liberties in the Federal Constitution. The minor had the right to know whether the defendant was his father.
- (3) The decision in *Peter James Binsted v Juvencia Autor Partosa's* case⁵⁰² was distinguishable as the court there did not consider the issue of the best interests of the child. The issue there was whether the father of the child would be subjected to hurt if DNA testing was ordered.

⁵⁰¹ This will be part of fulfilling the recommendation from the CRC Committee, specifically item 37 as highlighted in Chapter Four.

⁵⁰² [2000] 2 MLJ 569

(4) and (5) ...”

The above demonstrates the development, impact and obstacles to the best interests of the child principle in Malaysia in one simple case.

It has referred to the best interests of the child principle in Article 3 of the CRC but also referred to the *Peter James Binstead* case which was decided in 2000 but did not refer to the best interest of the child principle. This omission was not due to the fact that the Child Act was enacted in 2001 but rather that the judge in the *Peter James Binstead* case did not see the applicability of the principle in Malaysian family law. However, the Court of Appeal had already referred to the best interests of the child principle from another jurisdiction, specifically Canada, in the case of *Neduncheliyan Balasubramaniam V Kohila A/P Shanmugam* [1997] 3 MLJ 768. In that case one of the parties was Canadian so the Court of Appeal referred to Canadian law on the child. Nonetheless, Malaysian Courts had used the principle in 1997⁵⁰³ but until 2013 it was not deemed accepted law: in the *Neduncheliyan* case, the Court of Appeal referred to the case of *Re L (Minors) (Wardship: Jurisdiction)*⁵⁰⁴ which had used the best interests of the child principle.

However, the Court of Appeal did not reiterate the principle nor did they specifically refer to it. Although the principle could have been said to have been brought in by the Court of Appeal, the *Peter James Binstead* case was not wrong to have claimed that there was no applicability of the principle in Malaysia through the *Neduncheliyan* case. The debate was only settled in 2013 when the Court of Appeal again, in the *Lee Lai Ching* case, referred to the best interests of the child principle⁵⁰⁵. However the *Lee Lai Ching* case illustrated that the Child Act 2001 was not referred to at all when the Courts were discussing issues related to

⁵⁰³ *Neduncheliyan Balasubramaniam V Kohila A/P Shanmugam* [1997] 3 MLJ 768

⁵⁰⁴ [1974] 1 WLR 250

⁵⁰⁵ A more in-depth discussion has been provided in Chapter Four.

the child. This is not a vindication for the Child Act 2001 that the policy makers had so hoped it would bring.

Where does Malaysia go from here? It does not bode well if the current trajectory is maintained. As stated in Chapters Four and Five, there have to be drastic policy and legal changes before a truly consistent and comprehensive adoption of the best interests of the child principle in Malaysia. This then leads to the question of the impact on the future of child rights which does seem rather bleak. However, this thesis will now propose a way forward for Malaysia, child rights and in a way the CRC itself. This would also entail possible recommendations based on the analyses of this thesis.

The Way Forward and Recommendations

The way forward can be looked at through a tri-dimensional perspective, namely the CRC, some comments for England and finally for Malaysia. The CRC and the Malaysian perspective will include the *Shari'ah* views. With that in mind, let us briefly look at the possible recommendations and way forward for England.

The welfare or paramountcy principle in England has to incorporate the actual definition of the best interests of the child principle. Drawing on the work of Choudhry and Fenwick, this research has argued that the welfare principle does not follow or conform to the CRC and the ECHR as well as England's own Human Rights Act.⁵⁰⁶ This thesis cannot agree with the numerous articles and case law that claim the welfare principle in England fulfils England's requirements under the CRC and ECHR.⁵⁰⁷ The welfare principle is based

⁵⁰⁶ Choudhry, Shazia. and Helen Fenwick. "Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act." *Oxford Journal of Legal Studies* 25.3 (2005): 453-492. Print. And Reece, Helen. "The Paramountcy Principle: Consensus or Construct?" *Current Legal Problems* (1996): 267. Print.

⁵⁰⁷ Bainham, A., Day Sclater, S., and Richards, M. (eds), "*What is a Parent? A Socio-Legal Analysis*" Hart Publishing, 1999.

on a higher threshold, that is, “the paramount consideration” than what was initially envisaged by the drafters of the CRC. This higher threshold places the child who is the subject of the test at the top or in paramount position in all considerations in the best interests principle. The interests of others are deemed secondary to that of the child. Some authors argue that the CRC principle would be a dilution of the paramouncy principle and thus a regressive step for England, based on their view that the paramouncy principle is an advancement or development from the CRC principle.⁵⁰⁸ However, I prefer the views of Eekelaar, who has suggested that it was time for England to look beyond the welfare principle.⁵⁰⁹

The evolution of a principle takes time and is developed through trial and error. Similarly in this case, the best method of development for the best interests of the child principle is through progress and with the debate surrounding the principle; hence looking beyond the best interests of the child is inevitable. What that actually is remains to be seen but in the interim, this thesis proposes that England should reconsider falling within the ambit of the CRC, ECHR and England’s own Human Rights Act 1998. That would mean that instead of the welfare or paramouncy principle, the best interests of the child principle would be based on a primary consideration. This would lead to something similar to a proportionality test, or the balance of interests, or the child’s interests to be considered as well as those with interests linked to the child such as the parents,⁵¹⁰ siblings, guardians and to a lesser extent the other relatives.

⁵⁰⁸ Lowe, Nigel and Gillian Douglas. *Bromley’s Family Law*. 11th ed. Oxford: Oxford University Press. 2015. Print. And Fortin, Jane. *Children’s Rights and the Developing Law*. Third Edition, Cambridge University Press (2009). Print.

⁵⁰⁹ Eekelaar, John. “Beyond the Welfare Principle” *Child & Family Quarterly* 14.3 (2002). Print.

⁵¹⁰ If the child has parents and the parents are not the subject matter that is being deliberated upon then the best interests of the child principle has to be invoked.

This is the proposed way forward for England but this is not the emphasis of this research. However the welfare principle has proven to be resilient and has managed to maintain its position as the absolute test for children in England. Despite this it does not sway this thesis from the fact that the welfare principle is not in line with the CRC despite what the case law says⁵¹¹ and although there seems to be a softening of the stance of the Courts in England as suggested in Chapter Three and the latest case law,⁵¹² it will be some time before the position in England manifestly changes to follow the CRC position.

Looking at the position in the CRC, it is clearly an international human rights instrument that governs or at the very least provides a benchmark for all to follow. Based on all the information that the researcher collated, this thesis recommends that the way forward for the CRC is to acknowledge that the best interests of the child is based on a primary consideration and that would include the interests of others. This would mean a return to the actual standards set in the CRC as concluded during the *travaux préparatoires*. This is a standard that could be achieved by most Member States with some ease. Article 3 of the CRC provides some discretion for the member States on the threshold of the best interests of the child principle if it is interpreted according to the original interpretation.

This thesis further submits that the *Shari'ah* is compatible with the CRC's provisions on the best interests of the child in Article 3. Therefore, the CRC Committee should include the views from the *Shari'ah* experts to interpret the CRC. If this was done before it is not apparent now since most of the Muslim and Islamic States maintain several reservations. I understand that this is not how the international legal regime functions but in order to gain the full participation and comprehensive application of the CRC principles, this could be considered. There are more than fifty countries that either practise or apply the *Shari'ah*

⁵¹¹ J v C [1970] AC 668, 711

⁵¹² *ZH v (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4

either directly through their legal systems or indirectly as a mere faith or belief system of the majority of the people in the relevant country. Any form of acknowledgement of the *Shari'ah* principles would propel the CRC positively in the estimation of Muslims as a whole.⁵¹³

Even Article 1, which defines a child as being below 18 years of age, allows a State to allow an earlier age of majority. In Islam this is attained when the child has attained *baligh* or maturity. It is true that some have claimed that this low age of majority encourages child marriages and forced marriages but as stated in Chapter Five, it has been well regulated within the *Shari'ah* especially in Malaysia. Therefore, the thesis submits that the CRC and the *Shari'ah* are compatible and that it should be accepted as part of the principles within the CRC.

Finally, what is the way forward for Malaysia, which is the crux of this thesis? The socio-legal complexities in Malaysia have always played a significant role and this is inevitable and appropriate when discussing the way forward. Malaysia's multi-racial society will have to be catered for when describing these recommendations.⁵¹⁴ The socio-legal complexities in the Malaysian context require a more measured approach and not one purely based on applying transplanted legal principles. The thesis may seem slanted towards a civil versus *Shari'ah* law approach to the research, which is only partially true. A large majority of Malaysians are Muslims, hence the focus. There are other communities in Malaysia that are equally covered through the various Acts in place.⁵¹⁵

⁵¹³ It is accepted that some provisions would be deemed non-compliant, none more apparent than Article 14 of the CRC on freedom of religion as mentioned earlier. In Islam, the child must follow the religion of the parents, or at the very least the father. Besides that, other provisions in the CRC are compatible.

⁵¹⁴ This includes the issues raised in the subtitle "Background" in Chapter One including the differences between East and Peninsular Malaysia, racial disharmony and all the issues that should be considered in analysing Malaysia as a subject.

⁵¹⁵ An example of the law that is specific to non-Muslim and related to this topic is the Law Reform (Marriages and Divorce) Act 1976 [Act 164], which regulates the age of marriage. Incidentally, the ages are similar to the *Shari'ah* law, *i.e.* 18 years old for men and 16 years old for girls subject to the conditions that the Act has set.

As stated above, the role and strength of the best interests of the child principle has to be increased. The limited scope of the principle is due to the Child Act 2001 not mentioning or covering other areas of application of the principle, which as stated earlier in this thesis, contravenes Article 3 of the CRC.

The first recommendation is the amendment of the Child Act 2001 to enhance the scope of the best interests of the child principle to all aspects of Malaysian life. Once that has been done the amendment must be made known to all Malaysians so that the Courts in Malaysia will always consider the best interests of the child whenever there is an issue that requires the application of the law to a child and not only when the Courts refer to foreign jurisdictions. It will also inform those people in authority that whenever they deal with children, the best interests of the child must be cared for or, put simply, the primary consideration.⁵¹⁶

The next aspect is the application of the principle in the Malaysian *Shari'ah* laws, which as alluded to in the previous chapter are unique. The thesis has made it clear that the *Shari'ah* principles are compatible with the CRC and in particular the best interests of the child principle. The way forward would entail a more streamlined and uniform *Shari'ah* code. Once the *Shari'ah* has been made uniform it would make application and execution smoother. Although criminal laws are mainly under the civil law, the *Shari'ah* has a significant role to play especially in custodial matters, inheritance and marriage issues.

This thesis does not propose a harmonisation of the laws but a more uniform approach towards the best interests of the child principle. Therefore an amendment to the Child Act 2001 in making the best interests of the child principle cover all aspects of the child would

⁵¹⁶ Again, this is based on the actual wordings of the Article 3 of the CRC whereby the principle is based on a primary consideration. Therefore, based on the primacy standard, it would be easier to conform to the standard whilst upholding and preserving the culture and customs of the Asian people who, as alluded to in Chapters One and Four, are conservative in nature. This will assist in making the principle even more acceptable to all the within the Malaysian society.

encompass the *Shari'ah* and its Courts⁵¹⁷. This will not come easily because the amount of training required would have to be comprehensive in order to re-educate not only the enforcement agencies but society in general to instil the awareness and significance of the best interests of the child principle in everyday life.

Malaysia has significant obstacles to overcome before it could actually proceed with the recommendations. Nonetheless, these measures are necessary to ensure Malaysia fulfils her obligations under the CRC whilst maintaining adherence with the *Shari'ah* and its local customs. It can only be done if Malaysia seriously takes note of the proposals and recommendations made.

⁵¹⁷ As referred in the "Background" in Chapter One where the Malaysian Child Act 2001 needed to be more CRC friendly.

Bibliography

- Ajjola, Adeleke Dirisu. *The concept of Family in Islam*. Adam Publishers, 2008. Print.
- Allen, Richard. *Malaysia; Prospect and Retrospect: The Impact and After-Math of Colonial Rule*. London, New York: Oxford University Press, 1968. Print.
- Alston, Philip. "The Best Interests Principle: Towards a reconciliation of culture and human rights." *International Journal of Law and the Family* 8.1 (1994): 1-25. Print.
- Amuda, Yusuff Jelili. "Harmonization of Civil and Islamic Law on Child Labour." *OIDA International Journal of Sustainable Development* 1.6 (2010): 89-102. Print.
- Andaya, Barbara Watson and Leonard Y. Andaya. *A History of Malaysia*. London: Macmillan Press Ltd, 1982. Print.
- . *A History of Malaysia*. Second edition, University of Hawaii Press, 2001.
- . *A History of Malaysia*. Third edition, Palgrave Macmillan, 2017.
- Antonio, Cassese. *International Criminal Law*. Oxford University Press, (2008). Print
- Aries, Philippe. *Centuries of Childhood*. Penguin, 1960. Print.
- Arthur, Raymond. "Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland." *International Journal of Children's Rights*, vol. 18, no. 2 (2010): 217-231. Print.
- Aun, Wu Min. *The Malaysian Legal System*. Kuala Lumpur, Pearson Malaysia, (2006). Print.
- Baderin, Mashood A. *International Human Rights and Islamic Law*. Oxford University Press, (2003). Print.
- Banakar, Reza, and Max Travers, eds. *Theory and method in socio-legal research*. Bloomsbury Publishing, 2005. Print.
- Bari, Abdul Aziz. *Malaysian constitution: A critical introduction*. Other Press, 2003.

- . *The Monarchy and the Constitution in Malaysia*. Institute for Democracy and Economic Affairs, 2013.
- Buang, Salleh. *Malaysian Legal History: Cases and Materials*. Kuala Lumpur, Dewan Bahasa dan Pustaka, 1993. Print.
- Brown, C.C. *Sejarah Melayu or Malay Annals: an annotated translation by C.C. Brown*. Oxford University Press, 1970. Print.
- Bussani, Mauro, and Ugo Mattei, eds. *The Cambridge companion to comparative law*. Cambridge University Press, 2012. Print.
- Choudhry, Shazia and Helen Fenwick. "Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act." *Oxford Journal of Legal Studies* 25.3 (2005): 453-492. Print.
- Choudhry, Shazia and Jonathan Herring. *European Human Rights and Family Law*. Oxford and Portland, Oregon: Hart Publishing, 2010. Print.
- Coons, John E.; Mnookin, Robert H. & Sugarman, Stephen D., "Deciding What's Best for Children" *Notre Dame J.L. Ethics & Pub. Policy* 7(1993): 465. Print.
- Curran, Vivian Grosswald. "Comparative Law and the Legal Origins Thesis: '[N]on scholae sed vitae discimus'." *American Journal of Comparative Law* 57 (2009): 863-876. Print.
- DeMause, Lloyd. "The evolution of childhood." *the Journal of Psychohistory* 1.4 (1974): 503. Print.
- Diduck, Alison and Felicity Kaganas. *Family Law, Gender and the State: Text, Case and Materials*. 3rd Edition Oxford and Portland, Oregon: Hart Publishing. 2012. Print.
- Dilthey, Wilhelm. trans. Rudolf A. Makkreel "Chapter 2" *Hermeneutics and the Study of History*. Princeton New Jersey: Princeton University Press. 229-234. Print.

- Drew, Sandhya. "Human Trafficking: A Modern Form of Slavery?." *European Human Rights Law Review* (2002): 481-492. Print.
- Dumanig, Francisco Perlas, Maya Khemlani David, and Lorraine Symaco. "Competing Roles of the National Language and English in Malaysia and the Philippines: Planning, Policy and Use (doi: 10.14425/00.45. 77)." *Journal of International and Comparative Education* 1.2 (2012).
- Eekelaar, John. "The Emergence of Children's Rights." *Oxford Journal of Legal Studies* 6.2 (1986): 161-182. Print.
- . "The importance of thinking that children have rights." *International Journal of Law, Policy and the Family* 6.1 (1992): 221-235. Print.
- . "*Family Law and Personal Life*" Oxford: Oxford University Press, 2007. Print.
- . "Beyond the Welfare Principle" *Child and Family Law Quarterly*, 14.3 (2002): 237-249. Print.
- Fenwick, Helen. "Clashing Rights, the Welfare of the Child and the Human Rights Act". *The Modern Law Review*, 67.6 (2004): pp. 889-927. Print.
- Fineman, Martha Albertson. *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*. New York and London: Routledge, 1995. Print.
- . "What Place for Family Practice?" *The George Washington Law Review*, 67 (1999): 1207-1224. Print.
- Fineman, Martha Albertson, and Anna Grear (eds). *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. Ashgate Publications Ltd., 2013. Print.
- Fortin, Jane. *Children's Rights and the Developing Law*. 3rd ed. Cambridge: Cambridge University Press, 2009. Print.
- Freeman, Michael D.A. *The Rights and Wrongs of Children*. London: Pinter Pub Ltd, 1983. Print.

- . "Taking Children's Rights More Seriously" *International Journal of Law and the Family*, 6 (1992) 52-71. Print.
- . "Article 3. The Best Interests of the Child." In A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.). *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden and Boston. Martinus Nijhoff Publishers, (2007). Print.
- Freeman, Michael, and Phillip Veerman, eds. *The Ideologies of Children's Rights*. Netherlands: Vol. 23, Martinus Nijhoff Publishers, 1992. Print.
- Gallala-Arndt, Imen. "The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches." *American Journal of Comparative Law* 63.4 (2015): 829-858. Print.
- Gallagher, Anne T. *The International Law of Human Trafficking*. New York, Cambridge University Press (2010). Print.
- Gibaldi, Joseph, and Modern Language Association of America. *MLA style manual and guide to scholarly publishing*. (1998). Print.
- Glenn, H. Patrick. *Legal traditions of the world: Sustainable diversity in law*. Oxford University Press, 2010. Print.
- Gomien, Donna, "Whose Right (And Whose Duty) is it? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child" *NYL Sch. Journal of Human Rights* 7 (1989): 161. Print.
- Hamzah, Wan Arfah. *A First Look at the Malaysian Legal System*. Oxford Fajar, (2009). Print.
- Hashemi, Kamran. "Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation". *Human Rights Quarterly* 29 (2007):194-227. Print.

- Herring, Jonathan. *Family Law*. 5th ed. Longman Law Series, 2011. Print.
- . *Caring and the Law*. Oxford and Portland, Oregon: Hart Publishing, 2013. Print.
- Hoggett, Brenda, Richard White, Paul Carr and Nigel Lowe. *Clarke Hall & Morrison on Children: Law Relating to Children and Young Person Special Bulletin A Guide to the Children Act 1989*. London: Butterworths, 1990. Print.
- Hussain, Jamila. "More than One Law for All: Legal Pluralism in Southeast Asia." *Democracy and Security*, 7.4 (2011): 374-389. Print.
- Ibrahim, Ahmad. *Family law in Malaysia*. Malayan Law Journal, 1997. Print.
- Ibrahim, Ahmad, and Ahilemah Joned. *The Malaysian legal system*. Dewan Bahasa dan Pustaka, 1987. Print.
- Ibrahim, Ahmad and Faiza Tamby Chik, Ramlah Muhamad, Asiad Daud and Ismail Haji Hasan. *Perkembangan Undang-undang Perlembagaan Persekutuan*. Kuala Lumpur, Dewan Bahasa dan Pustaka (1999). Print.
- Ibrahim, Ahmed Fekry. "The Best Interests of the Child in Pre-modern Islamic Juristic Discourse and Practice." *American Journal of Comparative Law* 63.4 (2015): 859-891. Print.
- Ishaque, Shabnam and Muhammad Mustafa Khan. "The Best Interests of the Child: A Prevailing Consideration within Islamic Principles and a Governing Principle on Child Custody Cases in Pakistan." *International Journal of Law, Policy and The Family*, 29 (2015): 78. Print.
- Jackson, Emily. "Conception and the Irrelevance of the Welfare Principle." *The Modern Law Review* 65:2 (2002):176 – 203. Print.
- Kamali, Mohamad Hashim. *The Principles of Islamic Law*. Kuala Lumpur, Ilmiah Publishers: (2000). Print.

- . *Islamic Law in Malaysia: Issues and Developments*. Kuala Lumpur, Ilmiah Publishers, (2000). Print.
- Kelly, Joan B. "The Best Interests of the Child." *Family and Conciliation Courts Review*. 35:4 (1997): 378. Print.
- Kennedy, J. *A History of Malaya A.D. 1400-1959*. Macmillan & Co Ltd, 1962. Print.
- Kleinhans, Martha-Marie, and Roderick A. Macdonald. "What is a *Critical Legal Pluralism?*" *Canada Journal of Law and Society* 12.2 (1997): 25-46. *HeinOnline*. Web. 6 Nov. 2012.
- Legrand, Pierre. "How to Compare Now." *Legal Studies* 16 (1996): 232-242. *HeinOnline*. Web. 16 Dec. 2013.
- . "Comparative Legal Studies and the Matter of Authenticity." *Journal of Comparative Law* 2 (2006): 365. Print.
- . "The Impossibility of 'Legal Transplants'." *Maastricht Journal of European and Comparative Law* 4 (1997): 111. Print.
- Lowe, Nigel and Gillian Douglas. *Bromley's Family Law*. 11th ed. Oxford: Oxford University Press. 2015. Print.
- Lynch, Kathleen, and John Baker. *Affective equality: Love, care and injustice*. Basingstoke: Palgrave Macmillan, 2009. Print.
- MacDonald, Alistair. *The Rights of the Child: Law and Practice*. Bristol: Jordan Publishing Limited, 2011. Print.
- Markesinis, Basil. "Comparative law—a subject in search of an audience." *The Modern Law Review* 53.1 (1990): 1-21. Print.
- Merry, Sally Engle. "Legal Pluralism" *Law & Society Review* 22.5 (1988): 869-896. *HeinOnline*. Web. 13 Nov. 2012. Print.

- Möller, Lena-Maria. "An Enduring Relic: Family Law Reform and the Inflexibility of Wilāya." *American Journal of Comparative Law* 63.4 (2015): 893-925. Print.
- Mohd., Ismail, Hakimah Haji Yaacob and Khairatul Akmar Ab Latif. *Introduction to Malaysian Legal History*. Ilmiah Publishers (2004). Print.
- Monateri, Pier Giuseppe. *Methods of Comparative Law*. Cheltenham: Edward Elgar Publishing, 2012. Print.
- Mootz III, Francis J. *Law, Hermeneutics and Rhetoric – Collected Essays in Law*. Ashgate Publishing Limited, 2010. Print.
- . "The New Legal Hermeneutics". *Vanderbilt Law Review* 47 (1994): 115-143. *LexisNexis*. Web. 1 Jun. 2015.
- Mootz III, F. J. and Goodrich, P. *Nietzsche and Law*. Ashgate Publishing Ltd, 2008. Print.
- Newbold, T.J. *Political and Statistical Account of the British Settlements in the Straits of Malacca Vol. One*. Oxford University Press, 1971. Print.
- Nowak, Manfred. *Introduction to the International Human Rights Regime*. Martinus Nijhoff Publishers, (2003). Print.
- Örücü, Esin, and David Nelken, eds. *Comparative law: A handbook*. Bloomsbury Publishing, 2007. Print.
- Peters, Anne, and Heiner Schwenke. "Comparative law beyond post-modernism." *International and Comparative Law Quarterly* 49.04 (2000): 800-834. Print.
- Piper, Christine. "Assumptions about children's best interests" *Journal of Social Welfare and Family Law* 22(3) 2000: 261-276. Print.
- Rasool, Shahid. "What is Hermeneutics." *International Journal of Humanities and Religion* 2.5 (2013). Print.
- Reece, Helen. "The Paramountcy Principle: Consensus or Construct?" *Current Legal Problems*. 49 (1996): 267. Print.

Reimann, Mathias, and Reinhard Zimmermann. *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2008. Print.

Richardson, James T. "The Social Construction of Legal Pluralism." *Democracy and Security*, 7.4 (2011): 390-405. Print

Ryan, N.J. *The Making of Modern Malaysia: a History from earliest times to 1965*. 3rd ed. Oxford University Press, (1967). Print.

Saeed, Abdullah eds. *Islam and Human Rights Volume II: Contentious Rights and Case Studies*. Cheltenham, (2012). Print.

Said, Edward W. *Orientalism*. London: Penguin Books, (2003). Print.

Samuel, Geoffrey. "Comparative Law and Jurisprudence." *International Comparative Law Quarterly* 47(4) (1998): 817-836. Westlaw. Web. 10 Jan. 2014.

---. "Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences." ed. Mark Van Hoecke. *Epistemology and Methodology of Comparative Law*. Oxford: Hart Publishing, 2004, 34. Print.

---. *An Introduction to Comparative Law Theory and Method*. Oxford and Portland, Oregon: Hart Publishing. 2014. Print.

---. "Taking Methods Seriously (Part One)." *Journal of Comparative Law* 2 (2007): 94. Print.

---. "Taking Methods Seriously (Part Two)." *Journal Comparative Law* 2 (2007): 210-237. Print.

---. "Is Law Really a Social Science? A View from Comparative Law." *Cambridge Law Journal* [2008]: 288. Print.

---. "Comparative Law and its Methodology" in Watkins, D. and M Burton eds. *Research Methods in Law*. Routledge (2013): 100. Print.

- Sandberg, Russell. *Law and Religion*. Cambridge, Cambridge University Press, (2011): 160-166. Print.
- Sempek, Adam Nathan and Robert Henley Woody. "Family Permanence Versus the Best Interests of the Child." *The American Journal of Family Therapy*, 38 (2010): 433. Print.
- Simon, Caroline. "The 'best interests of the child' in a multicultural context: a case study". *The Journal of Legal Pluralism and Unofficial Law* 47:2 (2015): 175. Print.
- Siems, Mathias M. "The end of comparative law." *Journal of Comparative Law* 2 (2007): 133-150. Print.
- . *Comparative Law*. Cambridge University Press (2014). Print.
- Sopiee, M.N. *From Malayan Union to Singapore Separation: political unification in the Malaysia region, 1945-65*. Kuala Lumpur: Penerbit Universiti Malaya Sdn Bhd, 1974. Print.
- Spivak, Gayatri Chakravorty. "*Can the subaltern speak?*" Macmillan Education, (1988). Print.
- Stenson, Michael. *Class, Race and Colonialism in West Malaysia: The Indian Case*. University of Queensland Press, 1980. Print.
- Suffian, Mohamed. *An introduction to the Constitution of Malaysia*. Government Printer, 1976. Print.
- Swettenham, Frank. *Footprints in Malaya*. Hutchinson & Co. (Publishers) Ltd, 1941. Print.
- Syed, Safir. "The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child: The plight of Non-Marital Children under Shari'a." *The International Journal of Children s Rights* 6.4 (1998): 359-393. Print.
- Tamanaha, Brian Z. "The Folly of the 'Social Scientific' Concept of Legal Pluralism". *Journal of Law and Society* 20.2 (1993): 192-216. *HeinOnline*. Web. 6 Nov. 2012.

- Teubner, Gunther. "Legal irritants: good faith in British law or how unifying law ends up in new divergencies." *The Modern Law Review* 61.1 (1998): 11-32. Print.
- Thukiman, Kassim. *Malaysia Perspektif Sejarah dan Politik*. Penerbitan Universiti Teknologi Malaysia. (2002) at p. 29.
- Tisdall, E. Kay M., J. Brown, and M. Docherty. "Children's Best Interests versus Public Safety: How Are They Balanced." *International Journal Child Rights*. 6 (1998): 395. Print.
- Tomasevski, Katarina. *Women and Human Rights*. Zed Books Ltd. London & New Jersey (1993). Print.
- Tomuschat, Christian. *Human Rights between Idealism and Realism*. Oxford University Press, (2003). Print.
- UNHCR Guidelines on the Determining the Best Interests of the Child. 2008, Print.
- Wallbank, Julie and Jonathan Herring (eds). *Vulnerabilities, Care and Family Law*. Routledge, 2013. Print.
- Walsh, Bernadette, "The United Nations Convention on the Rights of the Child: A British View". *International Journal of Law and the Family*, 5 (1991): 170 – 194. Print.
- Watson, Alan. "The Importance of "Nutshells"." *The American Journal of Comparative Law* 42.1 (1994): 1-23. Print.
- Weeramantry, C.G. *Islamic Jurisprudence: An International Perspective*. Kuala Lumpur, The Other Press, (2001). Print.
- Winstedt, Richard. *The Malays: A Cultural History*. 6th ed. Routledge & Kegan Paul Ltd, 1961. Print.
- . *A History of Malaya*. Luzac, 1935. Print.
- Woodman, G. "Legal Pluralism and Justice". *Journal of African Law* 40 (1996): 152 at pg. 157. Print.

Van Hoecke, Mark, ed. *Epistemology and methodology of comparative law*.

Bloomsbury Publishing, 2004. Print.

Yassari, Nadjma. "Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law." *American Journal of Comparative Law* 63.4 (2015): 927-962. Print.

Yassari, Nadjma, Lena-Maria Möller, and Imen Gallala-Arndt. "Introduction—Negotiating Parenthood in Muslim Countries: Changing Concepts and Perceptions." *American Journal of Comparative Law (AJCL)* 63.4 (2015): 819-827. Print.

Zawawi, Majdah. *Assisted Reproductive Technologies in Malaysia: Balancing Rights and Responsibilities*. Kuala Lumpur, Unpublished PhD Thesis: International Islamic University, Malaysia, (2007) p. 303. Print.

Van Hoecke, Mark. "Is there now a comparative legal scholarship?." *The Journal of Comparative Law* 2017/1(2017).

Zweigert, Konrad and Hein Kötz. *An Introduction to Comparative Law*. Vol. 3. Oxford: Clarendon Press, 1998. Translation by Tony Weir.