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Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation

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ABSTRACT

Along with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) has received the most religion-based reservations by Muslim states on various articles and/or on the treaty as a whole. Conversely, the Convention is the only international treaty that contains an explicit reference to Islamic law. Based on relevant United Nations documentation, this article undertakes a comparative study in order to elaborate upon ways that religious legal traditions impact upon implementation of the Convention by Muslim states. The article also examines the relevance of the reservations to the implementations of the treaty by reserving states.

I. INTRODUCTION

Developing an approach to religious interpretation that can integrate legal traditions with modern universal values, as expressed in international human rights norms, is an important priority. Concerning the relationship between

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The author would like to dedicate this article to his first teacher of international law, the Iranian member of International Law Commission, Professor Djamshid Momtaz.

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personal aspects of Muslim legal tradition (MLT)[1] and human rights, there is a wealth of literature on women's rights but very little on the rights of children.[2] This article will undertake a comparative study, based on the relevant UN documentation,[3] on the ways that MLT impacts the implementation of the Convention on the Rights of the Child (the CRC or the Convention)[4] by Muslim states.[5]

The CRC, which came into force more than sixteen years ago, is the most universally accepted human rights treaty. It is "the first legally binding

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1. For the purpose of this study, when a reference to early (classical, historical, or traditional) Muslim public and family law is concerned the terms Shariah, Muslim law, Islamic law or Muslim legal traditions (MLT) all have similar meaning. Yet, the term MLT is preferred by the author, as "legal traditions" or "religious legal traditions" are more familiar terms for non-Muslim readers. Because other religions and civilizations have such traditions as well, for studying other legal traditions such as Catholic, Talmudic, civil law, common law and Hindu, see for example, H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law (2000). On comparing the extent to which personal (family) MLT and public MLT are applied by Muslims, the differences are described as:

   > In terms of subject matter the hold of *Shariah* was and is strongest in the area of personal status (marriage, divorce, maintenance, matters of minors such as custody and guardianship, and inheritance), and weakest or non-existent [in public aspects,] in areas such as penal law, taxation, and constitutional law.

   Joseph Schacht, An Introduction to Islamic Law 76 (1964).
2. For example, on the issue of Islam and women's rights, a long list of articles at the Emory School of Law website, *available at* http://www.law.emory.edu/IHR/tp14.html. Yet, the only article on Islam and children's rights is Safir Syed, *The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child: The plight of Non-Marital Children under Shari'a*, 6 Int'l J. Child. Rts. 359 (1998).
3. The reports of Muslim states to the Committee on the Rights of the Child (the Committee), documentation on consequent discussions of the reports in the Committee, and Concluding Observations of the Committee on states reports comprise the main sources of this article. Other relevant sources, especially with regards to other non-Muslim legal systems or practices of non-Muslim states, are mostly used in the footnotes.

   The Committee on the Rights of the Child is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its state parties. It also monitors implementation of two optional protocols to the Convention, on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. The Committee is comprised of ten members from different states and legal systems who are of "high moral standing" and experts in the field of human rights. *See* United Nations Committee on the Rights of the Child website, *available at* http://www.ohchr.org/english/bodies/crc/. States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially two years after acceding to the Convention and then every five years. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of "concluding observations." *See* United Nations Treaty Body Database, *available at* http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet.
4. Convention on the Rights of the Child, adopted 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989), *(entered into force*, 2 Sept. 1990) [hereinafter Children's Convention].
5. The term Muslim states refers to fifty-seven member states of the Organization of Islamic Conference (OIC), plus Bosnia and Herzegovina, which is an observing state of that organization. For the list of OIC members see The Organization of the Islamic Conference website, *available at* http://www.oic-oci.org.

international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights."[6] Notably, this convention is the only international treaty that includes an explicit reference to "Islamic law."[7]

Along with the Convention on the Elimination of Discrimination Against Women (CEDAW)[8] the CRC has received the most religion based reservations of Muslim states on different articles and on the treaty as a whole. This article will also examine the relevance of Muslim states' reservations to the practice of MLT.

Unlike theoretical visions of Islam and human rights that presume *Shariah*[9] to consist of divine and immutable rules, this study provides a vision of Muslim law that has been subject to different interpretations, practices and modifications by states. This study also distinguishes between effects of personal (family) MLT and public MLT on children's rights.[10] A secondary issue of this article is to what extent the commitment of Muslim states to the CRC has encouraged them to abandon or modify the problematic aspects of MLT (problematic MLT).

There are two possible areas of relations between MLT and the CRC. First, there are matters which are specific to children, such as the issues of adoption, child marriage, and children born out of wedlock. Second, there are issues which are common between children and adults, such as freedom of religion and discrimination on the grounds of sex. To limit the scope of the discussion, this article will mainly focus on those areas of relations that are specific to children.

This article is divided into seven parts. The first part is devoted to an introduction to Muslim religious principles regarding children, MLT, and reservations of Muslim states to the CRC. The concept of maturity in MLT with regard to Articles 1 and 37 of the Convention will be studied in the second part. Article 1 defines "child" and Article 37, among other things, prohibits capital punishment and life imprisonment for children under the age of eighteen. In the third part, different areas of distinction and discrimination will be examined with relationship to Article 2 of the Convention. Then, with regard to Article 14 of the Convention, the fourth part is devoted to the issues relevant to children's freedom of religion. The fifth part is on Articles 20 and 21 of the Convention and the issue of adoption. As Articles 2, 14,

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6. *See* UNICEF website *available at* http://www.unicef.org/crc/index.html.
7. On Islamic law see Schacht, *supra* note 1.
8. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980) (*entered into force* 3 Sept. 1981), 1249 U.N.T.S. 13, *reprinted in* 19 I.L.M. 33 (1980) [hereinafter Convention on Discrimination against Women].
9. On *Shariah* see Schacht, *supra* note 1.
10. *See id.*

20, and 21 have been the subject of major specific reservations of Muslim states, the issue of reservations to these articles will be discussed as well. The sixth part of this article is on approaches of the Committee on the Right of the Child (the Committee)[11] towards problematic MLT and reservations of Muslim states. Finally, the concluding section will be a summary of the discussions along with some realistic suggestions.

II. AN INTRODUCTION TO RELIGIOUS PRINCIPLES, MLT, AND RESERVATIONS OF MUSLIM STATES TO THE CRC

None of the four great Abrahamic prophets had a normal childhood situation. Abraham was adopted by his uncle. Moses, an abandoned child, was adopted by the wife of Freon. Jesus was raised by Mary in a very difficult situation, under the suspicion of conceiving a child outside of wedlock. Mohammad himself was an orphan and grew up under the guardianship of his grandfather and then his uncle.

Islam, in light of the principle of mercy,[12] and similar to all other great religions, is very much concerned about vulnerable people such as the poor, the old, the disabled, children, and especially children deprived of family.[13] Based on this principle and customs of the time, early Muslims established special arrangements and legal institutions for the care of children. Regarding rights of children and the duties of parents and guardians of children, these rules covered such matters as maintenance, kinship, breastfeeding, care, and custody.[14] As will be discussed later, the majority of these traditions are still considered as contributing to children's rights, and few of them are inconsistent with the modern standards of human rights.

Based on MLT, or the so called *Shariah* or Islamic law, some Muslim states have entered reservations to the convention. These reservations are either to

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11. Regarding the Committee see United Nations Committee on the Rights of the Child website, *available at* http://www.ohchr.org/english/bodies/crc/.
12. Iran reiterates this principle in its report to the Committee:

    > It is well known that the lofty Islamic *Shariah*, the unique Heavenly Book which has recommended pardon and forgiveness even in the heaviest and harshest of crimes, such as those calling for retribution, and the great and kind Prophet of the religion has recommended the giving of love to children and showing kindness to them. They cannot but look at children and their rights with kindness and generosity.

    Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Second periodic reports of states parties due in 2001 (Iran), ¶ 204, U.N. Doc. CRC/C/104/Add.3. (1 Dec. 2003)[hereinafter *Consideration of Reports*, 2001].
13. On Orphans see the *Qur'an 2:83, 177, 215, 220; 4:2, 3, 6, 8, 10, 36, 127; 6:152; 8:41; 17:34; 59:7; 76:8; 89:17–20; 90:14, 15; 93:6, 9, 10; 107:1–3.*
14. *See generally* J. Nasir, The Islamic Law of Personal Status 56, 189–90 (Mark S.W. Hoyle ed., 2d ed. 1990).

the whole Convention (General *Shariah* Based Reservation or GSR) or to its specific articles (Specific *Shariah* Based Reservation or SSR).[15] Qatar, Iran, Saudi Arabia, Brunei Darussalam, Syria, and Oman are states with GSR,[16] among which Brunei Darussalam, Syria, and Oman have also specified in their GSR some articles of the Convention, including Articles 14 and 21, as the focus of their general reservations. 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."

All fifty-seven Muslim states are signatories to the Convention, including the twenty-two states who entered reservations or declarations. Algeria, Djibouti, and Kuwait have declarations on the CRC. Bangladesh, Bosnia and Herzegovina, Brunei Darussalam, Egypt, Indonesia, Iran, Iraq, Jordan, Maldives, Mali, Morocco, Oman, Qatar, Saudi Arabia, Syria, Turkey, and the United Arab Emirates entered reservations to the convention. Finally, Malaysia and Tunisia have entered both declarations and reservations. Yet, as will be discussed further, not all of these reservations or declarations are necessarily ones based on *Shariah*.

III. THE CONCEPT OF MATURITY IN MLT AND ISSUES CONCERNING AGE: ARTICLES 1 AND 37 OF THE CRC

Apart from those articles of the CRC to which Muslim states have reservations, implementation of some other articles of the Convention may also be affected by MLT. Article 1 of the Convention, on the definition of "Child," and Article 37(a), in regards to capital punishment and life imprisonment of juveniles, are among these articles.

According to Article 1 of the CRC, "For the purposes of the present Convention, a child means every human being below the age of eighteen years

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15. For the reservations and declarations to the CRC see, *Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, Committee on the Rights of the Child,* U.N. Doc. CRC/C/2/Rev.5 (1996). It is not the purpose of this article to study the legality of these reservations. For an analysis of issues concerning legality of such reservations, the role of the Committee with respect to reservations, and the consequences of a determination that a reservation is illegal see William A. Schabas, *Reservations to the Convention on the Rights of the Child,* 18 Hum. Rts. Q. 472 (1996).

16. Mauritania and Afghanistan had a similar reservation upon signature but their reservations were not confirmed on ratification. Pakistan also had a similar GSR upon ratification but withdrew from it later. Among non-Muslim states part of the reservation of the Holy See is similar to the GSR of Muslim states. It reads as follows:

> The Holy See declares that the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law (Art. 1, Law of 7 June 1929, n. 11) and, in consideration of its limited extent, with its legislation in the matters of citizenship, access and residence.

Schabas, *supra* note 15.

unless under the law applicable to the child, majority is attained earlier."[17] Legislation in some Muslim states on the age of adulthood is influenced by the concept of maturity in MLT. According to this concept, the criteria for adulthood is not merely a child's age, but a child's maturity (*Boulough*). The Sudan report[18] observed that maturity is marked in two ways:

> The first is the appearance of the usual outward "signs of maturity," such as puberty, the growth of pubic hair and, in the case of young girls, menstruation and the ability to conceive. The second is the attainment of full legal age, a subject on which jurists hold differing views and on which other positive laws are also at variance.[19]

According to MLT, upon reaching the stage of maturity a child is subject to all the rights, duties and responsibilities of an adult. These responsibilities and rights include criminal responsibility, the right to dispose of and possess his/her property as well as the right to make decisions regarding his/her marriage.[20] Among these issues, child marriage has been of special concern to the Committee.

Capital punishment of children under the age of eighteen is also in conflict with the provisions of Article 6(5) of the International Covenant on Civil and Political Rights (the ICCPR)[21] and Article 37(a) of the CRC that requires state parties to ensure that, "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."[22]

As far as the criteria for determining the age of maturity is concerned, in branches of Sunni and Shiite sects provide age limits for girls that are lower than for boys.[23] As a result, according to MLT, girls are eligible for marriage

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17. Children's Convention, *supra* note 4, art. 1.
18. On state reports see *Consideration of Reports*, 2001, *supra* note 12.
19. *Committee on the Rights of the Child: Consideration of Reports,* Periodic reports of states parties due in 1997 (Sudan), ¶ 30, U.N. Doc. CRC/C/65/Add.17 (6 Dec. 2001).
20. According to MLT "when a minor matures mentally and attains puberty he becomes an adult and all his dispositions become enforceable." M. J. Maghniyyah, The Five Schools of Islamic Law 584 (1995). *See also* Nasir, *supra* note 14.
21. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (*entered into force* 23 Mar. 1976). Article 6(5) of ICCPR reads as follows, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." Among fifty-seven Muslim member states of the CRC, forty-four are signatories to the ICCPR and therefore committed to the provisions of this treaty as well. Thirteen states that are not signatories to the ICCPR are including Bahrain, Brunei, Comoros, Guinea-Bissau, Kazakhstan, Indonesia, Malaysia, Maldives, Oman, Pakistan, Qatar, Saudi Arabia, and United Arab Emirates.
22. Children's Convention, *supra* note 4, art. 37(a).
23. This is mainly because the relevant MLT are influenced by traditions of the place of its emergence i.e., Saudi Arabia, where girls reach physical maturity earlier than boys.

earlier than boys. The different ages of marriage for boys and for girls will be discussed in the next part and is another concern of the Committee with regard to Article 2 (non-discrimination) of the Convention.

As mentioned earlier, according to MLT, having reached the age of maturity a child is entitled to make decisions about his/her marriage. However, before this age his/her father or guardian can marry him/her to somebody.[24] These rules, which are the reflection of tribal traditions at the time of the emergence of MLT, are incorporated in the legislation of some Muslim states. Yet, "where the marriage of a young girl [or boy] is arranged by her [or his] guardian, she [or he] can repudiate the marriage upon the attainment of puberty. This provision of Islamic law is called the option of puberty."[25]

Consistent with the provision of Article 1 of the Convention, many Muslim states have adopted the age of eighteen as the age of maturity.[26] However, the age of maturity for boys in MLT, i.e., fifteen years, has been considered by some Muslim states such as Syria, Sudan, Iran, and Pakistan as the age of criminal responsibility.[27] Interestingly, Saudi Arabia and Oman,

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24. Concerning marriage of child by his guardians under MLT see M. Mohaqeq Damad, The Fiqhi Study of Family Law, Marriage and Its Dissolve (Articles 1034–1157 of Iran Civil Code), 11th edition, in Persian, Markaz-e Nashr-e Olum-e Eslami, Theran, Iran 48–50 2005. In comparison with other legal traditions unlike Hindu law, in MLT practices of dowry and giving bride as a gift, that are current in India and other parts of Indian sub-continent, are not legitimized by scriptural sources. *See* Savitri Goonesekere, *The Best Interest of the Child: A South Asian Perspective, in* The Best Interests of the Child, Reconciling Culture and Human Rights 122, 135 (Philip Alston ed., 1994).
25. *Committee on the Rights of the Child: Consideration of Reports*, Second periodic reports of States parties due in 1997 (Pakistan), ¶ 108, U.N. Doc. CRC/C/65/Add.21 (11 Apr. 2003).
26. *See e.g, Committee on the Rights of the Child: Consideration of Reports,* Initial reports of states parties due in 1993 (Pakistan), ¶ 20, U.N. Doc. CRC/C/3/Add.13 (28 May 1993); *Committee on the Rights of the Child: Consideration of Reports*, 1997 (Indonesia), ¶ 50, U.N. Doc. CRC/C/65/Add.23 (7 July 2003); *Committee on the Rights of the Child: Consideration of Reports*, 1997 (Syrian Arab Republic), ¶ 13, U.N. Doc. CRC/C/SR.361 (21 Mar. 1997).
27. *See Consideration of Reports*, 1997 (Syrian Arab Republic), ¶ *supra* note 26; *Committee on the Rights of the Child: Consideration of Reports*, 2002 (Sudan), U.N. Doc. CRC/C/SR.817 (27 Sept. 2002); *Committee on the Rights of the Child: Consideration of Reports*, 2005 (Iran), ¶ 68, U.N. Doc. CRC/C/SR.1016 (28 Jan. 2005); *Committee on the Rights of the Child: Consideration of Reports*, 1994 (Pakistan), ¶ 5, U.N. Doc. CRC/C/SR.134 (11 Apr. 1994). In comparison with other legal systems for example, in English common law, the minimum age at which a person could be convicted of a crime was seven. The current minimum age is ten. The position in a range of other European jurisdictions is currently as follows: seven in Cyprus, Ireland, Liechtenstein, and Switzerland; eight in Scotland and North Ireland; nine in Malta; twelve in Greece, Israel, Netherlands, San Marino, Turkey; thirteen in France; fourteen in Austria, Bulgaria, Germany, Hungary, Italy, Latvia, Lithuania, Romania, Slovenia; fifteen in Czech Republic, Denmark Estonia, Finland, Iceland, Norway, Slovakia, Sweden; sixteen in Andorra, Poland, Portugal, and Spain; eighteen in Belgium and Luxembourg. Gillian Douglas, *The Child's Right to Make Mistakes: Criminal Responsibility and the Immature Minor, in* Children Rights and Traditional Values 265 (Gillian Douglas & Leslie Sebba eds., 1998).

both with GSR, find Article 1 of the Convention to conform to MLT. Saudi Arabia in its report states that "Article 1 of the Convention on the Rights of the Child is totally in harmony with Islamic law with regard to the definition of the child."[28] Oman also declares that "[t]he Decree [No. 32/97 on the Personal Law] is in accordance with the principles of Islamic *Sharia*." This law established 18 years as the majority age (legal adulthood).[29] Yet, in practice, especially regarding the age of marriage, Muslim states have different policies.

A. (Early) Child Marriage

There is no provision in the CRC relevant to child marriage,[30] but Article 16(2) of CEDAW implicitly bans the practice of child marriage. This article reads as follows, "the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."[31] This article does not specify a minimum age at which a child can be married, although a General Assembly Recommendation set fifteen as the minimum age of marriage.[32]

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28. *Committee on the Rights of the Child: Consideration of Reports,* Initial report of Saudi Arabia due in 1998 (Saudi Arabia), ¶ 30, U.N. Doc. CRC/C/61/Add.2 (29 Mar. 2000).
29. *Committee on the Rights of the Child: Consideration of Reports*, Initial reports of States parties due in 1999 (Oman), ¶ ¶ 12–14, U.N. Doc. CRC/C/78/Add.1 (18 July 2000).
30. On child marriage and relevance of provisions of the CRC to the issue see Ladan Askari, *The Convention on the Right of The Child: The Necessity of Adding A Provision To Ban Child Marriages*, 5 ILSA J. Int'l & Comp. L. 123, 124 (1998).
31. Convention on Discrimination against Women, *supra* note 8. Also preamble of Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages on prohibition of child marriage reaffirms that all states:

    > Should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.

    Id. Similar to CEDAW, Article 2 of this convention fails in identifying a minimum age for marriage. The article reads as follows:

    > States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

    Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *adopted* 7 Nov. 1962, G.A. Res. 1763 A, 17th Sess., 521 U.N.T.S. 231, *(entered into force* 9 Dec 1964).
32. Principle 11 of this Declaration reads as follows:

    > Member States shall take legislative action to specify a minimum age for marriage, which in any case shall not be less than fifteen years of age; no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

Among the state reports, the case of Sudan is a clear example of the legality of child marriage at a very young age: ten for both Muslim boys and girls. The age for non-Muslims is fifteen years for boys and thirteen for girls.[33] In Saudi Arabia there is no age limit for marriage,

> [In Saudi Arabia] the regulations do not define a specific age for marriage, as Islamic law regulates this matter in a manner that ensures happiness for both spouses and prevents the countless social dangers inherent in delaying the age of marriage. In this context, it stipulates that a person wishing to marry must have the capacity therefore. This flexibility in Islamic law helps to close loopholes and safeguard the interests of both parties.[34]

Also, in Pakistan guardians can marry their wards from the time of birth.[35] As mentioned earlier, if the marriage is not rejected by the children at the time of maturity, it will be considered legal.[36]

In Oman, a state with GSR, the minimum age of marriage for both boys and girls is eight. The report affirms that this age, "is in accordance with the principles of Islamic *Sharia*."[37] In Iran, another state with GSR, fifteen is the age of marriage for boys and thirteen for girls.[38] Yet, despite its reservation, Iran is reviewing its legislation to withdraw from MLT. A member of the Iranian delegation states that, "the relevant *Shariah* provisions were currently being reconsidered in the light of the need for children to have attained a certain level of maturity before entering into marriage. The Government was considering the preparation of legal provisions to formalize the reforms."[39]

B. Penalizing of Premarital Sexual Intercourse

One important matter which is linked to the issue of child marriage is the penalizing of premarital/extramarital sexual intercourse in the legislation of some Muslim states. Apparently in the legislation of Indonesia this issue is left as a private matter and the age for sexual consent is twelve.[40] In contrast, in Syria and Sudan sexual intercourse is permitted only within marriage.[41]

General Assembly Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 2018 (XX), 20 U.N. GAOR Supp. (No. 14) at 36, U.N. Doc. A/60141 (1 Nov. 1965).

33. *Consideration of Reports*, 1997 (Sudan), *supra* note 19, ¶ ¶ 37, 54.
34. *Consideration of Reports*, 1998 (Saudi Arabia) *supra* note 28, ¶ 33.
35. *Consideration of Reports,* 1998 (Saudi Arabia) *supra* note 28, ¶ 33.
36. *Consideration of Reports*, 1997 (Pakistan), *supra* note 25, ¶ 108.
37. *Consideration of Reports*, 1999 (Oman), *supra* note 29, ¶ ¶ 12–14.
38. *See Consideration of Reports,* 2005 (Iran), *supra* note 27, ¶ 73.
39. *Id.*
40. *See Consideration of Reports*, 1997 (Indonesia), *supra* note 26, ¶ 50.
41. *Consideration of Reports*, 1997 (Syrian Arab Republic), *supra* note 26, ¶ 38.

Likewise, in Pakistan, by reviving a traditional punishment code called *Hudood*, laws penalize sexual relations out of marriage.[42]

This code, when extended to children under the age of eighteen, is in conflict with the provisions of both Articles 37(a) and 37(b). In conflict with Article 37(a), a child might be faced with "cruel, inhuman or degrading treatment or punishment" such as flogging for engaging in premarital sex. Article 37 (b) of the convention also states that "deprivation of liberty should only be used as a measure of last resort and for the shortest period of time."

The *Hudood* code severely affects female children in Pakistan.[43] Thomas Hammarberg, a member of the Committee, offers the following recommendation for a major overhaul of the legislation of Pakistan: "(1) [E]liminate the apparent inconsistencies in the ages of criminal responsibility; (2) [eliminate]the conflict between Hudood and other criminal legislation; (3)[eliminate] the imprisonment of rape victims as a result of that conflict, and the many other violations of internationally recognized children's rights."[44]

In contrast to Pakistan, Iran, with its similar punishment system based on *Hudood*, has not been criticized by the Committee for penalizing premarital sexual intercourse of children.[45] One of the reasons for the better situation in Iran, along with other social and economical factors, is the legality of temporary marriage (*Mut-eh*) in legislation. This religious legal tradition, provides the possibility of legal sexual relations before and outside (permanent) marriage. Though not applied widely, this law prevents unmarried children, especially pregnant girls, from being suspected of having committed a sexual offence and mitigates the severe consequences such as those existing in Pakistan. Moreover, unlike Sunnis, Shiites do not require the presence of

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42. *See Consideration of Reports,* 1997 (Pakistan), *supra* note 25, ¶ 6; *Consideration of Reports*, 1997 (Sudan), *supra* note 19, ¶ 38.
43. The statement by Mrs. Santos Pais a member of the Committee elaborates on the result of application of this code in Pakistan as follows:

> The statement in paragraph 20 of the report (CRC/C/3/Add.13) that premarital/extramarital sex was prohibited and therefore the question of sexual consent did not arise was particularly difficult to comprehend, since the difference between adultery and rape was determined by the question of consent [both are considered as offence.],. UNICEF, reporting on the situation of women and children in Pakistan, had found that girls of 12 and 13 years of age had been punished for adultery because rape could not be proved. Had the question of consent been used, deprivation of liberty might have been prevented in those cases. Depriving a child awaiting trial of his liberty was in any case contrary to the principle of presumption of innocence established in article 40 of the Convention.

Consideration of Reports, 1997 (Pakistan) *supra* note 25, ¶ 6.

44. *Id.* ¶ 9.
45. *See Committee on the Rights of the Child: Summary record of the 1016th meeting* (Islamic Republic of Iran), U.N. Doc. CRC/C/SR.1016 (28 Jan. 2005); *Committee on the Rights of the Child: Summary record of the 617th meeting* (Islamic Republic of Iran), U.N. Doc. CRC/C/SR.617 (14 July 2000); *Committee on the Rights of the Child: Concluding Observations* (Islamic Republic of Iran), U.N. Doc. CRC/C/15/Add.123 (28 June 2000); *Committee on the Rights of the Child: Summary record of the 618th meeting* (Islamic Republic of Iran), U.N. Doc. CRC/C/SR.618 (23 May 2000).

two witness for the validity of marriage contract. Therefore, even pregnant girls who are under the suspicion of illegal sexual relation, can claim that they are married, because they do not need to provide witnesses for their unofficial marriages.[46]

Despite the above mentioned advantages of *Mut-eh*, it has been an issue of concern with the chairperson of the Committee "that such arrangements might facilitate the exploitation of girls."[47] In response, the member of the Iranian delegation reiterates that, "temporary marriage agreements were concluded in full recognition of children's and women's rights, and women and girls were protected against all forms of exploitation. Temporary marriage contracts could be concluded only with the woman's consent."[48]

Despite the advantages of prohibition of child marriage, some disadvantages of this prohibition in traditional societies should be considered. First, even in those states where premarital sexual relations are not penalized, these kinds of relations are not tolerated by the communities because it is considered severely immoral. Considering this situation, the only legal and moral way for sexual intercourse after reaching the age of maturity (twelve to fifteen years of age) is marriage.

Second, in communities where marriage is restricted by many different thorny traditions, it is very important for parents, especially in poor families, not to miss any chance of suitors marrying their daughters even if this marriage should happen before the age eighteen. Without such marriages their daughters are unable to marry or to have legal sexual relations for the rest of their lives.

Regarding child marriage, in some Muslim countries one may suggest that legislation penalizing premarital sexual intercourse should be eliminated. Also, an earlier age of marriage than 18 can be applied, subject to the decision of the courts and with a focus on the best interests of the child.[49] In any case, the issue of "full consent for marriage" and "possibility of child-abuse"

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46. On differences of views between Shiite and Sunni schools of law on temporary marriage and the issue of witness see Nasir, *supra* note 14, ¶ 69–71.
47. *See Considerations of Reports*, 1997 (Iran), *supra* note 25, ¶ 70.
48. *Id.* ¶ 74.
49. On the principle of "Best interest of the child " Article 3(1) of the CRC reads as follows, "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."

    It should also be noted that along with Article 3(1), the principle is referred to in several other places within the convention itself as well as in a number of other important international human rights instruments. Within the Convention the phrase "the best interest of the child appears in relation the separation of the child from the family setting" (art.9); with reference to parental responsibility for the uprising and development of the child (art.18); in relation to the adoption and comparable practices (art. 20, 21); in the context of the child's involvement with the police and the justice system (arts. 37, 40). *See* Goonesekere, *supra* note 24, at 3.

should remain under special consideration by the courts, particularly in poor and underdeveloped areas.

With regard to Shiite societies, *Mut-eh* or temporary marriage has been criticized widely. This is particularly true among women's rights advocates, because this institution might give cause to child abuse and polygamy. Yet it seems that if applied properly this tradition, because it is based on the consent of both partners, can enhance the possibility of legal male-female relations before permanent marriage.

C. Capital Punishment of Juveniles

As mentioned earlier, the concept of maturity in MLT regarding the age of liability for punishments is in conflict with the provision of Article 37 of the Convention. Yet, not a single Muslim state has had a specific reservation to Article 37 of the Convention. Furthermore, the majority of Muslim states, even those with SGR, have explicitly reiterated in their reports their commitment to the provisions in Article 37. For example, the SGR State of Oman declares that, "no sentence of death or life imprisonment shall be pronounced on a person who has not reached 18 years."[50]

Unlike the majority of Muslim states, especially those with GSR, Sudan is a non-reserving state that in its reports explicitly refers to the possibility of child execution in its legislation. Sudan, in its initial report, considered an exception to the application of Article 37 of the Convention as "a juvenile delinquent may be sentenced to death only for an offence punishable by penalties and sanctions, in accordance with provisions of Islamic law."[51] In its second report, Sudan refers to murder as one example of an offence that is punishable by death even for children younger than eighteen.[52] Also, according to Article 33 paragraph 3 of the Sudan Penal code, life imprisonment might be handed down to persons under eighteen years of age for the crime of brigandry.[53] Furthermore, considering that the age of maturity for girls might be even earlier than fifteen years old it is unclear whether in Sudan the minimum age for the application of the death penalty and life imprisonment for girls could likewise be earlier than fifteen.

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50. *Consideration of Reports*, 1999 (Oman), *supra* note 29, ¶ 56; Also for Iran see *Committee on the Rights of the Child: Summary Record of the 618th Meeting, Consideration of Reports of States Parties*, Initial report (Iran), ¶ 37, U.N. Doc. CRC/C/SR.618 (23 May 2000).
51. *Consideration of Reports*, 1992 (Sudan), ¶ 166, U.N. Doc. CRC/C/3/Add.3 (16 Dec. 1992).
52. *Consideration of Reports*, 1997 (Sudan), *supra* note 19, ¶ 41.
53. *Id.* ¶ 42.

The same problem exists in other states, such as Iran and Pakistan, that penalize murder and sexual offences under the traditional *Hudood* code. In these states, though no specific instances are reported, in theory the application of *Hudood* might cause the execution of children even under the age of fifteen, a possibility referred to by Pakistan in its initial report.[54] But in 2000, in a withdrawal from part of *Hudood* tradition, Pakistan approved new legislation on the prohibition of capital punishment for juveniles under the age of eighteen.[55]

Another issue that has not been greatly considered by the Committee are those cases where executions of offenders under eighteen years of age are postponed until such time as they reach the age of eighteen. This was one issue of concern with Ms. Karp, a member of the Committee, when discussing the report of Saudi Arabia:

> With regard to the juvenile justice system, it was unclear whether the prohibition of the death penalty referred to children who were under 18 years of age, or to those who had committed the respective offence when they were under 18 years of age.[56]

The response by the member of the Saudi delegation to this concern is still unclear. He says,

> It was prohibited to use the death sentence for juveniles. If, however, the accused had reached the age of majority by the time of the trial, the judge was responsible for deciding to what extent criminal responsibility should be applied.[57]

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54. *Consideration of Reports*, 1993 (Pakistan), *supra* note 26, ¶ 158. The report reads as follows:

> According to section 45(1) of the Punjab Youthful Offenders Ordinance, 1983 (and in similar laws in other provinces) no offender below the age of 15 years shall be sentenced to death or transportation or any imprisonment. However, a young person even below the age of 15 years who has reached puberty can be given the punishment prescribed by the *hudood* laws.

55. *Committee on the Rights of the Child: Summary Record of the 901st Meeting, Consideration of Reports*, Second Periodic report, U.N. Comm. on the Rights of the Child, 34th Sess.(Pakistan), ¶ ¶ 70, 73, U.N. Doc. CRC/C/SR.901 (30 Sept. 2003); On relevant cases and legislation in Iran see article written in Persian by the Iranian winner of 2004 Nobel Peace Prize Shirin Ebadi, On the Occasion of Cancellation of Leyla Mafi 's Death Sentence 2: Isn't Now the Time for Reviewing the Related Legislation (30 June 2005), *available at* www.roozonline.com/02article/008238.shtml; Also, on other aspects of legislation of Iran regarding children Shirin Ebadi, The Rights of the Child: A Study on legal aspects of Children's rights in iran (trans. M. Zaimaran 1994).

56. *Committee on the Rights of the Child: Summary Record of the 688th Meeting, Consideration of Reports*, Initial Report 2001, (Saudi Arabia), ¶ 42, U.N. Doc. CRC/C/SR.688 (24 Jan. 2001).

57. *Id.* ¶ 83.

IV. POSSIBLE AREAS OF DISTINCTION AND DISCRIMINATION: ARTICLE 2 OF THE CRC

Article 2 of the Convention, on prohibition of discrimination, reads as follows:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.[58]

In the preparatory discussions of the Convention the only matter of concern for some Muslim states with regard to this article was the issue of children born out of wedlock.[59] Yet, under MLT there are two other areas of distinction on the grounds of sex affecting implementation of Article 2. First, linked to issues concerning age, discussed in the previous section of this article, is the different ages of maturity and marriage between boys and girls. Second is the differences in rights (duties) of custody and guardianship of children between men and women.

Malaysia has included Article 2 in the list of articles in its reservation.[60] Tunisia is another reserving state that has entered a specific reservation to this article only. Tunisia's reservation reads as follows, "The Government of the Republic of Tunisia enters a reservation with regard to the provisions of Article 2 of the Convention, which may not impede implementation of the

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58. Children's Convention, *supra* note 4, art. 2 § 1. The wording of Article 2(1) of the CRC is taken from Articles 2 and 24 of the ICCPR. Article 2(1) of the ICCPR reads as follows:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, *supra* note 21, art. 2 § 1. Article 24 (1) of the ICCPR reads as follows:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. *Id.* art. 24 § 1.

59. For more information on the preparatory discussions see Sharon Detrick, The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires," 148–50 (Sharon Detrick ed.,1992).
60. *Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, supra* note 15, Malaysia ¶ 1.

provisions of its national legislation concerning personal status, particularly in relation to marriage and inheritance rights."[61] Malaysia has not submitted any report to the Committee. Therefore, the report of Tunisia as a state with SSR along with the reports of some other Muslim states in particular those with GSR will be examined in this part.

A. Children Born out of Wedlock

In theory according to MLT where a child is born outside of lawful wedlock, the child is illegitimate and "[n]o paternity can be established."[62] Consequently, the non-marital child has no claim of maintenance, custody, guardianship, or inheritance rights whatsoever as regards his father.[63]

In practice, as will be discussed further, only the right of the child to inherit from his/her unmarried father is applied in the legislation of some Muslim states. General Comment No. 17 of the Human Rights Committee on Article 24 of the ICCPR addresses this issue of discrimination in inheritance:

> Reports by States parties should indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between legitimate children and children born out of wedlock.[64]

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61. *Id.* Tunisia ¶ 1; Those state parties who objected in preparatory discussion to the inclusion of provisions for non-marital children in the article, such as Algeria, Morocco, and Iraq didn't enter reservations with respect to Article 2.
62. Nasir, *supra* note 14, at 157.
63. A. Fyzee, Outlines of Mohammedan Law 215 (1964); I. Ghanem, *Islamic Medical Jurisprudence*, 21 Med., Sci. & L. 280 (1981); Schacht, *supra* note 7, at 168; Syed, *supra* note 2, at 376–77. In a comparison with western legal systems Meeusen argues that it must be pointed out that by historical comparison with Western society, even as recent as the first half of this century, Islam was revolutionary as a force in reforming and elevating the status of the non-marital child. Constrained by the Christian doctrine of the sanctity of marriage, the non-marital child in common law jurisprudence, in contrast, was deemed *filius nullius* – a child of no one. *See* J. Meeusen, *Judicial Disapproval of Discrimination Against Illegitimate Children: A Comparative Study of Development in Europe and the United States,* 43 Am. J. Comp. L. 119–20 (1995); *see also* Goonesekere, *supra* note 24. As another comparison with other legal systems, according to Jewish Legal Traditions a child born as a result of sexual relations between parents who are in the category of *isurey orayot* (forbidden relations)—such as relations between mother and son, brother and sister, other first-degree relatives, and a married woman with a man who is not her husband—is considered a *mamzer*. The personal status of a *mamzer* is highly problematic, since he cannot marry most Jews. *See* Yehiel S. Kaplan, *The Interpretation of the Concept The Best Interest of the Child in Israel, in* Children'S Rights and Traditional Values, *supra* note 27, at 57.
64. *Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women: Compilation of General Comments and General Rec-*

Most Muslim states (for example Egypt, Indonesia, Syria, Iran, and Tunisia) have satisfactory provisions in recognition of children born out of wedlock. Also, some of these states have passed legislation on the recognition of the father of these children, such as a search for paternity through genetic imprinting tests, taking the father's name for the child and sharing the responsibility of the child.[65]

Unlike the majority of Muslim states, in Oman a child born out of wedlock is classified as such in the birth register.[66] Furthermore, an unmarried mother in this country might become subject to persecution by the court. As discussed earlier, in those Muslim states that penalize extramarital sexual intercourse under traditional *Hudood* code, an unmarried mother is under suspicion of having committed a sexual offence.[67]

Of those state parties which have enacted legislation to deal with children born out of wedlock, almost all have provided for supporting measures for these children. Therefore, fosterage and other supporting measures with regards to children born out of wedlock have not been considered an issue of concern by the Committee and most of these arrangements apparently are satisfactory.[68]

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ommendations Adopted by Human Rights Treaty Bodies, Note by the Secretariat, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (29 July 1994).

65. *See Committee on the Rights of the Child: Consideration of Reports*, 1993 (Egypt), ¶ 7, U.N. Doc. CRC/C/SR.68 (20 Dec. 1993); *Consideration of Reports*, 1997 (Indonesia) *supra* note 26, ¶ 147; *Committee on the Rights of the Child: Consideration of Reports*, 2000 (Syrian Arab Republic), ¶ 59, U.N. Doc. CRC/C/93/Add.2. (18 Oct. 2002); *Consideration of Reports*, 2005 (Iran), *supra* note 27, ¶ 20; *Committee on the Rights of the Child: Consideration of Reports*, 1999 (Tunisia), ¶ 36, U.N. Doc. CRC/C/83/Add.1 (30 Oct. 2001). For example Tunisia as a state with a specific reservation to Article 2 states:

> Proceeding from the same desire to remove obstacles concerning this category of child and any discrimination, Act No. 98–75 of 28 October 1998 relating to granting a patronymic family name to children of unknown parentage or abandoned children, grants children born outside marriage the right to a complete identity; to seek their paternity and the right to maintenance. Indeed this law goes further. It facilitates the search for paternity through genetic imprinting tests and confers on the child whose paternity is thus established the right to maintenance.

66. *See Committee on the Rights of the Child: Summary Record of the 728th Meeting, Consideration of Reports of States Parties*, Initial Report (Oman), ¶ 48, U.N. Doc. CRC/C/SR.728 (5 Oct. 2001).
67. This situation is explained by a member of Omani delegation:

> In Oman, the Constitution was based on Islamic law, which did not tolerate adultery or fornication. Requiring the father of an illegitimate child to provide financial support, would thus run counter to the law. There were criminal provisions against both men and women who committed adultery or fornication. A woman who delivered an illegitimate child thus risked prosecution if she tried to prove paternity, because she would in effect be admitting that she had committed a crime.

Id. ¶ 44.

68. *See Consideration of Reports,* 1999 (Tunisia), *supra* note 65, ¶ 166; *Consideration of Reports,* 2001 (Saudi Arabia), *supra* note 56, ¶ 63; *Committee on the Rights of the Child: Consideration of Reports,* Initial reports of States parties due in 1993, Addendum (Kuwait), ¶ 255, U.N. Doc. CRC/C/8/Add.35 (9 Dec. 1996).

Normally Muslim states in their reports make no reference to the right of inheritance of the child from his/her unmarried father. Nigeria is among the few states that had a reference to this discriminatory aspect of MLT in its initial report.[69] However, in its second periodic report it does not refer to these rules but merely mentions some subtle social discrimination.[70]

Also, a member of the Morocco delegation refers to the question of inheritance of children born out of wedlock in MLT. He further suggests a remedy for the issue of inheritance on a voluntary basis. For example, according to MLT a father was not precluded from leaving a legacy to a natural child.[71]

For Tunisia, as a state with SSR to Article 2, it seems that there is a trend of withdrawing from problematic MLT. In the Concluding Observation of the second report of Tunisia, the Committee notes its satisfaction with "the adoption of a series of new laws regarding children born out of wedlock and with regard to the joint responsibility of the spouses."[72] "The Committee welcomes the information on the measures taken to address discrimination against children born out of wedlock, in line with the Committee's previ-

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69. The report reads as follows:

> The Constitution of the Federal Republic of Nigeria (S.39 (2)) of 1979 stipulates that no child shall be discriminated against due to the circumstances of his birth. Traditional and religious values, however, infringe on the full implementation of this part of the Constitution. For example, in the Muslim tradition, a child born out of wedlock has no right to inheritance. . . . There exist, however, very good foster laws in those States having such traditions.

Committee on the Rights of the Child: Consideration of Reports, Initial reports of states parties due in 1993 (Nigeria), ¶ 38, U.N. Doc. CRC/C/8/Add.26 (21 Aug. 1995).

70. *See Committee on the Rights of the Child: Consideration of Reports*, Second periodic reports of states parties due in 1998 (Nigeria),¶ 96, U.N. Doc. CRC/C/70/Add.24 (17 Sept. 2004).

71. *Committee on the Rights of the Child: Summary Record of the 319th meeting* (Morocco), ¶ 22, 13th Sess., U.N. Doc. CRC/C/SR.319 (30 Sept. 1996). The report reads as follows:

> The Islamic principle that a natural child or a child born out of wedlock could not inherit was precise and absolute; no possibility of derogation existed. Remedies would have to be sought by other means. A father was, for example, not precluded from leaving a legacy to a natural child. Although Islamic principles could not be modified, efforts were being made to introduce changes in a number of areas by making certain options available on a voluntary basis. That was the way in which conformity to the Convention could be achieved and equal opportunities in the social sphere ensured. A number of such measures had already been taken to soften the impact of classical Islamic law; others would follow.

Id. Though it is not the purpose of this article to have a theoretical study in seeking these remedies a quoting from what Meeusen states might be helpful. He says:

> There are no positive provisions in the *Shari'a* that relegate the non-marital child to an inferior status, rather, the legal position of the non-marital child is arrived at by default. The *Shari'a* provisions merely state the facts. . . . Therefore, the rights of the non-marital [child] in relation to the father are not denied because they simply do not exist in Islam.

Meeusen, *supra* note 63, at 377.

72. *Committee on the Rights of the Child: Consideration of Reports*, 2001 (Tunisia), ¶ 5, U.N. Doc. CRC/C/15/Add.163 (6 Nov. 2001).

ous recommendations."[73] Yet, the Committee remains concerned about "the implementation of the legislation in practice."[74] Furthermore, in referring to the instances of discrimination under Article 2, the Committee no longer refers to children born out of wedlock. Rather, it refers to many other discriminatory aspects such as "discrimination based on the political and human rights activities, expressed opinions or beliefs of children or their parents, legal guardians or family members; disability; national, ethnic, or social origin."[75]

Generally, discrimination against children born out of wedlock is one of the main concerns of the Committee on the Rights of the Child with regard to a number of Muslim states such as Djibouti, Oman, and Tunisia.[76] In a few cases the Committee has referred to the right to inherit as one instance of discrimination. For example, in Concluding Observations of Qatar and Brunei a reference was made to inheritance: "In particular, the Committee is concerned about discrimination against females and children born out of wedlock under existing personal status law (e.g. in inheritance, custody and guardianship)."[77] This discrimination in the field of inheritance from the father is the only aspect that can directly be linked to MLT. Yet, in the majority of cases instances of discriminations are not specified by the Committee.

It seems that more problematic than MLT on the right of inheritance are other discriminatory aspects and factors against children born out of wedlock. These include violations of rights due to social and economic shortcomings in providing efficient support for children. In traditional societies bearing a child out of marriage is considered a great sin against the moral values of the community and results in the isolation of the mother and her child. This fact increases the responsibility of the state in these societies for providing affirmative measures supporting this vulnerable and handicapped unmarried mother and her child. In those states where such a mother is subject to the threat of being penalized or the child is subject to discriminatory treatment, both child and mother are discriminated against twice over. They are subject to punishment, legal disability in matters of personal status and, in addition, social stigmatization.

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73. *Id.* ¶ 22.
74. *Id.*
75. *Id.* ¶ 23.
76. *See Committee on the Rights of the Child: Consideration of Reports*, Concluding Observations, 2000 (Djibouti), ¶ 9, U.N. Doc. CRC/C/15/Add.131 (28 June 2000); *see also, Committee on the Rights of the Child: Consideration of Reports*, Concluding Observations, 2000 (Oman),¶ 24, U.N. Doc. CRC/C/15/Add.161 (6 Nov. 2001); *Committee on the Rights of the Child: Consideration of Reports*, Concluding Observations, 1995 (Tunisia), ¶ 7, U.N. Doc. CRC/C/15/Add.39 (21 June 1995).
77. *See Committee on the Rights of the Child: Consideration of Reports*, Concluding observations of the Committee on the Rights of the Child, 2001 (Qatar), ¶ 30, U.N. Doc. CRC/C/15/Add.163 (6 Nov. 2001); *Committee on the Rights of the Child: Consideration of Reports*, Concluding Observations, 2003 (Brunei Darussalam), ¶ 24, U.N Doc. CRC/C/SR.907(3 Oct. 2003).

B. Different Ages of Marriage for Boys and Girls

As discussed in the previous part, influenced by the traditional concept of maturity and by other factors, the majority of Muslim states consider the legitimate age of marriage to be younger for girls than for boys. Along with other discriminatory aspects, the Committee has voiced its concern about the lower marriageable age for girls than for boys in many Muslim states. For example, in Indonesia and Pakistan the age of marriage for girls is sixteen. In Syria it is the age of seventeen. In these three countries the marriageable age of boys is eighteen or older.[78] Apparently the legislation on the age of marriage in none of these three states is consistent with MLT; Iran, a state with GSR, attempts to conform with MLT. In Iran, the marriageable age for girls is thirteen and fifteen for boys.[79] On the other hand, Oman, another state with GSR, has the minimum age of eighteen for marriage for boys and girls.[80] Interestingly, Oman finds that this provision "is in accordance with the principles of Islamic *Sharia*."[81]

Although applying a consistent age of marriage for boys and girls seems like the best policy to further equality, this could exacerbate discrimination against girls because of the illegality/immorality of premarital sex. As girls normally mature physically earlier than boys and thus are ready for sexual relations earlier, imposing a similar age barrier for boys and girls to enter into marriage as the only legal/moral possibility for sexual intercourse, is discrimination against girls' right to moral/legal sexual relations. They should have access to this right earlier than boys to further true equality. This policy is consistent with Article 3 of the Convention, which prioritizes the interests of the child.[82]

C. Difference between the Mother and the Father in Their Rights (Duties) of Custody and Guardianship of Children

The issue of guardianship and custody of children under MLT is controlled through two legal institutions: *Hizanat* (Custody) and *Wilayat* (Guardianship). While custody of the child is the duty (right) of both parents,[83] guardianship,

78. *Consideration of Reports*, 1997 (Indonesia), *supra* note 26, ¶ 50; *Committee on the Rights of the Child: Consideration of Reports*, Initial reports of States parties due in 1995 (Syrian Arab Republic), ¶ 37, U.N. Doc. CRC/C/28/Add.2 (14 Feb. 1996).
79. *Consideration of Reports*, 2005 (Iran), *supra* note 27.
80. *Consideration of Reports*, 1999 (Oman), *supra* note 29, ¶ ¶ 12–14.
81. *Id.*
82. On the principle of "best interest of the child" see Goonesekere, *supra* note 24, at 3.
83. In a comparison with other older legal systems, for example Old English Common Law did not create a forcible legal duty of maintenance for parents. *See* Gooneskere, *supra* note 24, at 121.

where the issue of payment of the maintenance for the child is concerned, is only the duty (right) of the father or in his absence the male relatives of the child. The right to guardianship gives the father, but not the mother, an open hand to interfere in various aspects of his children's lives, especially those of his daughters, even after their age of maturity.[84] For example, according to the majority of Muslim jurists a father must give permission for the marriage of his daughter for her first marriage, and to his son if he is under the age of maturity. For some other activities such as traveling, a daughter should have the permission of her father.[85]

Another distinction is that MLT recognizes specific rules in regard to the custodial rights of either the father or the mother. In the case of divorce, deciding custody issues in MLT was primarily based on the child's age,[86] rather than "the child's best interests," a principle proclaimed in Article 3 of the convention.[87] For example according to the previous provision of Civil Code of Iran:

> [I]n the event of separation of parents, if the child is male, he will remain under the custody of the mother for two years and afterwards the custody of the child will pass to the father. In the case of a female child, she will remain under the protection and custody of the mother until she is seven years old. . . . Guardianship rests with the father and paternal grandfather; the mother has less responsibility in this regard.[88]

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84. In a comparison with other older legal systems, for example the English law of 1980s concedes the superiors parental right of the father which will prevail unless he is "unfit" to be guardian. According to this system, the father's legal right of custody over a marital child was so absolute that he could claim the physical custody of a child who was being nursed at the mother's breast. Also Roman–Dutch law, which combined Roman Law with Germanic custom, recognized the husband's marital power over his wife and his natural guardianship over minor children. His protective authority over the wife and marital children was deeply entrenched in the system. *See* Goonesekere, *supra* note 24, at 125, 127.

    Such distinction between the role of father and mother is not necessarily the result of religious traditions but mainly the consequent of social underdevelopment. For example, irrespective of the different religions and other considerations, and similar to other underdeveloped societies, the father's right to control religion appears to be given special significance in Indian Subcontinent, so as to determine the issue of guardianship and custody. *See id.* at 129.

85. For more information on Hizanat and Wilayat see *Consideration of Reports*, 2001 (Oman), *supra* note 66, ¶ 43; *Consideration of Reports,* 1998 (Saudi Arabia), *supra* note 28, ¶ 143; *Committee on the Rights of the Child: Consideration of Reports,* Initial reports of States parties due in 1996 (Iran), ¶ 71, U.N. Doc. CRC/C/41/Add.5 (23 July 1998).

86. Similarly in most Jewish legal traditions it is believed that until the child is six years old he needs his mother, especially emotionally. Therefore, when the mother is fit to meet her child's needs the right of custody of a child up to the age of six will be granted to her. Above the age of six a son should be in the custody of his father, who is obliged to teach him the religious principles of Jewish law and a profession. *See* Kaplan, *supra* note 63, at 50–51.

87. On the principle of "best interest of the child" see Goonesekere, *supra* note 24, at 3.

88. *Consideration of Reports*, 1996 (Iran), *supra* note 85, ¶ 71.

According to the consequent discussions after the second report of Iran, legislation with regard to custody of children has been changed but still remained partly on the basis of age. "[I]n most cases, mothers were granted custody of children up to the age of seven, and fathers were granted custody of children over that age. If custody of a child was awarded to the father, the mother could appeal the decision in court."[89] Pakistan has a similar provision to the one stated in the initial report of Iran. But in the case of divorce the related age for a boy is seven years; for a girl the time of puberty is the deciding factor and not the age.[90]

Indonesia has another understanding of "Islamic law" with regard to custody of children. Indonesia does not differentiate between boys and girls, but refers to another concept of MLT, i.e., the age *mumayiz*. "According to Islamic law, which applies to Muslims in Indonesia, in the event of a divorce, the child, if he or she is under the age of 12 (not yet *mumayiz*) will be brought up by the mother (*hadhanah*), while the father remains responsible for providing for day-to-day expenses and the cost of the child's education. But if the child is twelve or over (*mumayiz*), the child is free to choose whether he or she wishes to be brought up by the mother or the father."[91]

Oman, despite its GSR, makes no reference to MLT. It considers the best interest of the child warrants giving custody to the mother for children of all ages.[92]

In the Concluding Observations concerning the reports of some Muslim states, the Committee has announced its concern with regard to matters relating to custody upon separation in family law. These laws, under which custody is determined by the child's age rather than the child's best interests, have been considered by the Committee as discrimination against mothers. [93]

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89. *See Considerations of Reports*, 2005 (Iran), s*upra* note 27, ¶ 46.
90. *Consideration of Reports*, 1997 (Pakistan), *supra* note 25, ¶ 89; The report reads as follows:

> The courts have always given importance to the best interests and welfare of the child while deciding questions of custody in divorce and separation cases. Under the provisions of Islamic law, as applied in Pakistan, the general rule is that custody of a boy who has not attained the age of 7 and that of a girl who has not attained puberty is to remain with the mother. The male child up to this age, and the female child during most of her young age, is considered to be better off in the custody of the mother.

Id.

91. *Consideration of Reports*, 1997 (Indonesia), *supra* note 26, ¶ 146.
92. *Considerations of Reports,* 2000 (Oman), *supra* note 76, ¶ 41.
93. For example, see *Committee on the Rights of the Child: Consideration of Reports*, Concluding Observations, 2003 (Pakistan), ¶ 44, U.N. Doc. CRC/C/15/Add.217 (27 Oct. 2003); *Committee on the Rights of the Child: Consideration of Reports*, Concluding Observations, 2001 (Egypt), ¶ 33, U.N. Doc. CRC/C/15/Add.145 (21 Feb. 2001); *Committee on the Rights of the Child: Consideration of Reports*, Concluding Observations, 2001 (Saudi Arabia), ¶ 25, U.N. Doc. CRC/C/15/Add.148 (22 Feb. 2001).

V. FREEDOM OF RELIGION: ARTICLE 14 OF THE CRC

Freedom of religion is a broad issue that can be widely discussed under the scope of Article 18 of the ICCPR.[94] This article addresses only those aspects of freedom of religion that under Article 14 of the CRC are of particular relevance to children.

As discussed earlier, according to the concept of maturity in MLT, a boy at fifteen years and a girl at nine to thirteen years of age are considered adults. From this age on, boys and girls have the same duties, responsibilities and rights as an adult of older age, including the right (duty) to choose their religion.

According to Islamic principle of freedom of belief, every human being is free to choose his/her religion or belief.[95] In fact, the Koran rejects non-believers justifying their following of the religion because of their parents.[96] In the same sense, according to Shiite jurists every Muslim from the age of maturity (a boy at fifteen years and a girl at nine to thirteen years of age) should stand for his/her own beliefs.[97] But in contrast to this progressive rule, according to other MLT, a Muslim child or adult is not allowed to choose a religion other than his father's, i.e., Islam.[98]

Despite the restrictions against conversion in MLT, in practice there has never been a single case where a child changed his/her religion or where a child was punished for such a conversion. In this sense, the effect of MLT

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94. Article 18(1) of the ICCPR reads as follows:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

ICCPR, *supra* note 21, art. 18 § 1. Article 18(2) of ICCPR reads as follows: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

95. Id, art. 2 § 1. According to the Qur'an every human being is free to choose his/her religion or belief on his/her own will: "Duress is not permissible in religion, as the path has become clear from falsehood." Qur'an 2:256.

96. *See* Qur'an, 2:170; 5:104, 7:28; 10:78; 21:53, 54; 26:74–76; 31:21; 43:22, 23.

97. It is the view of all the grand Shiite jurists (Mujtahids), as proclaimed in the first article of their main jurisprudential treatise called *al-risalatul- amaliyyah* or *Resalah Tawdhih-al-Masael,* that "*Taghlid* (following others) in principles of religion is not permissible, and a Muslim should be certain about principles of the religion [by his/her own findings]." See for example the view of Ayatollah Fazel Lankarani in English, *available at* http://www.lankarani.org.

98. To briefly elaborate on the reasoning for this contradiction, it seems that despite the early Koranic principle of freedom to choose religion, in practice early Muslim jurisprudence had to consider aspects to protect this newly emerged Muslim community. While early Muslims were in a state of war with surrounding unbeliever enemies, conversion of any member of their community to the religion of enemies could be suspected as his/her joining the enemy camp. Even today the concern of protection of community is more serious in multi religious communities, where each community intends to protect its identity and existence from the treats of other communities.

on freedom of religion of children has never been a serious one. Yet, during the preparatory discussion of the Convention, the matter was an issue of concern for some Muslim states.[99] This concern was introduced by the permanent representative of Bangladesh in an article submitted to the conference according to which: "Article *7(bis)* [Article 14] . . . appears to run counter to the traditions of the major religious systems of the world and in particular to Islam. . . . It appears to infringe upon the sanctioned practice of a child being reached in the religion of his parents."[100]

Eventually, no explicit reference to the right of children to choose religion was added to the final version of the article. Furthermore, a paragraph respecting the rights and duties of parents in providing direction for their children's religion was included in the article. The final version of Article 14 reads as follows:

> 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.[101]

Despite the modified version of Article 14 as explained above, ten Muslim states—Bangladesh, Maldives, Morocco, United Arab Emirates, Brunei, Syria, Malaysia, Oman, Jordan, and Iraq—entered SSR to this article. Algeria also entered a declaration on the article.[102] The other three states with GSR,

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99. For more information see Detrick, *supra* note 59, at 238; David Johnson, *Cultural and Regional Pluralism in Drafting of the UN Convention on the Rights of the Child, in* The Ideologies of Children's Rights 95, 99–103 (Michael Freeman & Philip Veerman, eds., 1992).

100. Paper Submitted by the permanent representative of Bangladesh, U.N. Doc. E/CN.4/1986/39, Annex IV, at 2, *quoted in* Detrick, *supra* note 59, at 244.

101. Children's Convention, *supra* note 4, art. 14. However, similar to Article 18(3) of the ICCPR, according to Article 14(3) of the CRC, not freedom to have or choose a religion, but freedom to manifest a religion can be subject to limitations by states. Article 18(3) of the ICCPR reads as follows:

> 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. 4. The states parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

ICCPR, *supra* note 21, art. 18 § 3.

102. Similarly some non-Muslim states such as Poland and the Holy Sea have entered declarations to the effect that a child's right to freedom of religion, as defined in Article 14, shall be exercised with respect for parental authority.

Qatar, Iran, and Saudi Arabia can be considered as reserving states to this article as well.[103] Among the fifty-seven Muslim states that are parties to the CRC, forty-four of them are signatories to the ICCPR and none of them have entered reservations to its Article 18 on freedom of religion.[104]

Unlike other reserving states that have no reference in their reservations to the conflicting area of MLT and the provisions of the article, Jordan and Iraq insist in their reservation that the freedom of religion in Article 14 conflicts with MLT. The reservation of Iraq to this article reads as follows:

> The Government of Iraq has seen fit to accept [the Convention] . . . subject to a reservation in respect to article 14, paragraph 1, concerning the child's freedom of religion, as allowing a child to change his or her religion runs counter to the provisions of the Islamic *Shariah*.

Jordan, in its reservation, announces that Article 14 which "grant[s] the child the right to freedom of choice of religion" along with Articles 20 and 21 "are at variance with the precepts of the tolerant Islamic *Shariah*" and excluded itself from commitment to these three articles.

Part of a report by a nongovernmental organization that is attached to the second report of Jordan, finds "freedom to choose a religion" not only in conflict with Islam, but also with Christianity.[105] However, the same report correctly refers further to a real reason for ignoring this right, i.e. the family system of the country. The report states that, "[m]oreover, the individual's family links and the religious and ideological upbringing that individuals receive within their families in Jordan do not permit the renunciation of religion."[106]

Syria, when explaining its reservation, has a reference to the same family law concerns and does not refer to MLT.[107] The report reads as follows:

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103. *Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, supra* note 15.

104. *See* text accompanying note 21 for the name of Muslim states that are not signatories of the ICCPR. Among reserving states to Article 14 of the CRC seven states: Maldives, United Arab Emirates, Brunei, Malaysia, Oman, Qatar, and Saudi Arabia are not member of the ICCPR. The six other reserving states i.e., Bangladesh, Morocco, Syria, Jordan, Iraq, and Iran, despite their reservations to the CRC, are members of ICCPR and therefore committed to Article 18.

105. The report reads as follows:

> The freedom of individuals to choose or abandon their religion is incompatible with the provisions of the divinely revealed laws. In Jordan there are two divinely revealed religions, Islam and Christianity, neither of which permit an individual to abandon his religion or choose another religion.

Committee on the Rights of the Child: Consideration of Reports, Periodic Reports of States Parties due in 1998 (Jordan) at 55, ¶ 9(33), U.N. Doc. CRC/C/70/Add.4 (17 Sept. 1999).

106. *Id.*

107. On the issue of conflicts of religious family laws in Muslim countries see Kamran Hashemi, *The Right of Minorities to Identity and the Challenge of Non-discrimination: A Study on the Effects of Traditional Muslims'* Dhimmah *on Current States Practices*, 13 Int'l J.on Minorities & Group Rts. 22, 1–25 (2006).

> The prevailing principle in Syria is that children are brought up in the religion of their fathers. This principle is dictated by the nature of the Syrian family, which is based on the patriarchal system, i.e. the father is the head of the family and the harmony and spiritual cohesion of the family make it necessary to avoid any discord in religious belief between the head of the family and his children as long as the latter are below the age of maturity. . . . Hence, the principle of religious freedom should not be adopted in the absolute sense since it would lead to disintegration of the family and, consequently, of society of which the family forms the basic unit.[108]

As was expected from the beginning, in practice MLT has not been in any conflict with the provisions of Article 14. That is the reason why none of the reserving Muslim states have a reference in their reports to the practical aspects of their reservations. By the same token, the Committee has never raised any concern on the issue of changing or choosing religion by children with regard to the reports of Muslim states.

VI. KAFALAH OF MLT AND ADOPTION: ARTICLES 20 AND 21 OF THE CRC

According to MLT "if a child is adopted, the links between the child and his biological parents must not be broken."[109] For example, an adopted child does not inherit from his/her adopting parents. In the preparatory discussions of the Convention on adoption a paper was submitted by Bangladesh showing its concern and those of some other Muslim states on the acceptance of adoption.

> Article 11 [article 20] is liable to give difficulties in Muslim countries since the understanding of Bangladesh is that adoption is not a recognized institution under Muslim law. In cases of such adoption the question of inheritance rights will rise to complex problems in Islamic jurisdictions. A form of words may be found to protect Islamic conceptions on the subject.[110]

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108. *Committee on the Rights of the Child: Consideration of Reports,* Initial Reports of States parties due in 1995 (Syrian Arab Republic), ¶ 82, U.N. Doc. CRC/C/28/Add.2 (14 Feb. 1996).
109. *Consideration of Reports*, 1997 (Indonesia), *supra* note 26, ¶ 207; In comparison to other traditional legal systems, for example according to Hindu religious traditions "men who have attained the age of discretion (15 years) may adopt boys only. A Hindu woman may adopt a boy only with the consent of her husband. There is no provision for the adoption of girls." *Committee on the Rights of the Child: Consideration of Reports,* Second periodic reports of States parties due in 1997 (Bangladesh), ¶ 137, U.N. Doc. CRC/C/65/Add.22 (14 Mar. 2003).
110. Paper Submitted by the permanent representative of Bangladesh, *supra* note 100, *quoted in* Detrick, *supra* note 59, at 312.

In response to this concern of Muslim states, two provisions were considered in the draft Convention. First, in Article 20, a reference to "Kafalah of Islamic law" was included as follows:

> A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.

Second, those states that do not recognize adoption were excluded from the scope of Article 21. This article starts with, "States Parties that recognize and/or permit the system of adoption shall ensure that."[111]

Yet, even these provisions did not prevent some Muslim states entering reservations to relevant articles of the CRC on adoption. Seven states, Bangladesh, Maldives, United Arab Emirates, Kuwait, Oman, Syria, and Indonesia made a reservation to Article 21 and three others, Brunei Darussalam, Jordan, and Egypt on both Articles 20 and 21.[112] As Qatar, Iran, and Saudi Arabia are states with GSR they also can be considered as reserving states to Articles 20 and 21.[113]

Qatar, Syria, Egypt, and Jordan refer to MLT in order to justify their reservation.[114] Jordan is the only Muslim state that refers to the Koran and the teachings of the prophet in its report to prove the prohibition of adoption in MLT.[115]

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111. Children's Convention, *supra* note 4, art. 20.
112. *Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, supra* note 15.
113. For an example among those specific reservations to Articles 20 and 21, the reservation of Egypt reads as follows:

> Since the Islamic *Shariah* is one of the fundamental sources of legislation in Egyptian positive law and because the *Shariah*, in enjoining the provision of every means of protection and care for children by numerous ways and means, does not include among those ways and means the system of adoption existing in certain other bodies of positive law.
>
> The Government of the Arab Republic of Egypt expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention, and in particular with respect to the provisions governing adoption in Articles 20 and 21 of the Convention. *Id.*

114. *Consideration of Reports*, 1997 (Qatar), ¶ 76, U.N. Doc. CRC/C/51/Add.5 (11 Jan. 2001); *Consideration of Reports*, 1995 (Syrian Arab Republic), *supra* note 108, ¶ 124; *Committee on the Rights of the Child: Summary Record of the 67th Meeting, Consideration of Reports*, Initial Report, U.N. Comm. on the Rights of the Child, 3d Sess. (Egypt), ¶ 16, U.N. Doc. CRC/C/SR.67 (17 Aug. 1993); *Committee on the Rights of the Child: Consideration of Reports*, Periodic reports of States parties due in 1998 (Jordan), ¶ 63, U.N. Doc. CRC/C/70/Add.4 (13 Sept. 1999).
115. The report reads as follows,

> [A]doption is not legally permissible in Islam, being clearly prohibited in the fourth and fifth verses of the chapter of the Holy Koran entitled "The Confederate Tribes" which read as follows: . . . " and He does not regard your adopted sons as your own sons. These are mere words which

Muslim states have introduced different alternatives for adoption in their reports. For example, adoption is accepted in Iran under the title of guardianship, under which children may be put under the tutorship and supervision of a competent family by a judicial decree.[116] Similarly, Bangladesh and Pakistan introduce guardianship as an alternative for adoption in their reports, noting that, "Guardianship ensures that the child knows his/her paternity."[117] Despite this earlier statement, Pakistan finds little difference between adoption and what exists in Muslim traditions regarding the issue of inheritance: "The court-appointed guardian is similar in some cases to adoption and the recommendation in this article of the Convention is not totally alien to the law in Pakistan."[118] Syria introduces a new concept of filiation that is similar to the concept of adoption. The report of Syria reads as follows,

> The concept of filiation is similar to the system of adoption, the difference between them lying in the fact that, under the adoption system, one or both of the parents must be known whereas, under the filiation system, the filiated child must be of unknown parentage or the offspring of an unlawful marriage.[119]

To minimize the differences between adoption and *Kafalah*, some states have suggested solutions that a child under *Kafalah* can inherit from his/her adopted parents. Sudan considers a possibility of the abandoned child inheriting from its guardians through testamentary succession.[120] Also, a member of the Jordanian delegation says, "Such a[n adopted] child had no legal right to inherit from that family but, in practice, part of the inheritance was reserved for him or her."[121]

> you utter with your mouths, but God declares the truth and guides to the right path. Name your adopted sons after their fathers; that is more just in the sight of God." [sic] With these words, God abolished the system of adoption and prohibited the use of such false patronymics, it being more just and proper for people to be known by their true lineages. This was confirmed by the words of the Prophet (upon whom be peace): "Paradise shall be closed to anyone who claims to be the son of a person other than his true father" and "Anyone who knowingly claims to be the son of a person other than his true father commits an act of unbelief." [sic]

Consideration of Reports, 1998 (Jordan), *supra* note 114, ¶ 63.

116. *See Consideration of Reports*, 1996 (Iran), *supra* note 85, ¶ 90–91.
117. *Consideration of Reports*, 1997 (Pakistan), *supra* note 25, ¶ ¶ 203, 204; *Committee on the Rights of the Child: Consideration of Reports*, Initial Reports of States Parties Due in 1992, (Bangladesh), U.N. Doc. CRC/C/3/Add.38, ¶ 101 (7 Dec. 1995).
118. *Consideration of Reports*, 1997 (Pakistan), *supra* note 25, ¶ 205.
119. *Consideration of Reports*, 1995 (Syrian Arab Republic), *supra* note 108, ¶ 124.
120. The report reads as follows:

> Islam prohibits adoption and, in accordance with the provisions of the Islamic *Shariah*, foster children cannot inherit. They may, however, be saved from destitution on the death of their foster carer by means of such bequests, a subject which is covered under articles 315 and 316 of the Personal Status for Muslims Act. This type of bequest is defined in article 315 as "a bequest enabling a person who is not entitled to inherit to acquire a specific share of the estate of the testator," which is unquestionably in the interests of the foster child.

Consideration of Reports, 1997 (Sudan) *supra* note 19, ¶ 71.

121. *Committee on the Rights of the Child: Consideration of Reports of States Parties,* Summary record of the 621st meeting: (Jordan), ¶ 29, U.N. Doc. CRC/C/SR.621 (11 July 2000).

On the other hand, in Indonesia there has been a trend of withdrawal from religious traditions of adoption,

> According to Islam, if a child is adopted, the links between the child and his biological parents must not be broken. However, it is not uncommon that when a child is adopted, his adoptive parents keep the identity of the parents a secret from the child in order to make him believe that his adoptive parents are his biological parents.[122]

Another issue concerning adoption in Muslim states is that non-recognition of adoption is different from its illegality. "Adoption is practiced by some Islamic communities in South Asia, and has been described as a practice which is not prohibited, but an act that is *mubah* 'towards which religion is indifferent.'"[123] Mrs. Santos Pais, a member of the Committee states with regard to Pakistan, "[i]t had been indicated that, in Pakistan, adoption was not expressly recognized but that it was not illegal. That meant that it was authorized and, consequently, that all the guarantees provided for in article 21 of the Convention should apply."[124]

Apparently the Committee is satisfied with the different alternative systems of adoption in practice in Muslim states, which are mostly based on MLT. Yet, shortcomings in legislation and the non-existence of an efficient adoption law in states such as Bangladesh and Maldives have been the subject of concern.[125] On the other hand, the Committee has always found reservations to Articles 20 and 21 unnecessary. For example with regard to Egypt the Committee observed that,

> The State party's reservation to articles 20 and 21 of the Convention is unnecessary. It points out that article 20 (3) of the Convention expressly recognizes *kafalah* of Islamic law as a form of alternative care. Article 21 expressly refers to those States that "recognize and/or permit" the system of adoption, which does not apply to the State party because it does not recognize the system of adoption.[126]

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122. *Consideration of Reports*, 1997 (Indonesia), *supra* note 26, ¶ 207.
123. Goonesekere, *supra* note 24, at 121.
124. *Committee on the Rights of the Child: Summary Record of the 133d Meeting* (Pakistan), ¶ 31, U.N. Doc. CRC/C/SR.133 (21 Nov. 1995).
125. *See Committee on the Rights of the Child: Summary Record of the 380th Meeting* (Bangladesh), ¶ 21, U.N. Doc. CRC/C/SR.380 (29 May 1997); *Committee on the Rights of the Child: Consideration of Reports of States Parties* (Bangladesh), ¶ 47, U.N. Doc. CRC/C/15/Add.221 (27 Oct. 2003); *Committee on the Rights of the Child: Consideration of Reports of States Parties* (Maldives), ¶ 59, U.N. Doc. CRC/C/8/Add.33 (5 Aug. 1996); Interestingly both states despite their reservations have been urged by the Committee to become a party to "the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoptions." *See Committee on the Rights of the Child: Consideration of Reports of State Parties* (Bangladesh), ¶ 36, U.N. Doc. 30 CRC/C/SR.382 (30 May 1997); *Committee on the Rights of the Child: Consideration of Reports of State Parties* (Bangladesh), ¶ 40, U.N. Doc. CRC/C/15/Add.74 (18 June 1997); *Committee on the Rights of the Child: Consideration of Reports of State Parties* (Maldives), ¶ 31, U.N. Doc. CRC/C/SR.468 (4 June 1998).
126. *Considerations of Reports,* 2001 (Egypt), *supra* note 93, ¶ 33.

Yet, some member states still insist on their reservations, though their justifications do not seem logical.[127] Some others are reviewing their reservations. For example, according to the Committee, Oman is re-examining its reservation to Article 21 and some other articles.[128] Also in consequent discussions of the initial report of Bangladesh, a member of the Bangladesh delegation shared with the Committee his view on the necessity of its state withdrawing the reservation to Article 21.[129] Indonesia in its report declares its willingness to review its declaration.[130]

VII. THE COMMITTEE, RESERVATIONS, AND MLT

It is the policy of all UN treaty bodies to ask reserving member states to withdraw from their reservations.[131] In following this policy, the Committee has continually encouraged Muslim states to review and withdraw all their reservations.

According to Article 51 of the CRC, "a reservation incompatible with the object and purpose of the present Convention shall not be permitted."[132] Two kinds of reservations of Muslim states have been found by the Committee as possibly having an effect on the object and purpose of the Convention. First, as was mentioned earlier, on the reservation of Tunisia to Article 2 of the Convention, the Committee stated that, "the reservation relating to the application of article 2 raises concern as to its compatibility with the object

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127. For example the member of Egyptian delegation stated:

> The reservation filed by Egypt related exclusively to the use of the word "adoption." Adoption was not permitted under Islamic law, for reasons relating inter alia to inheritance practices. However, the Government of Egypt had no objection to the content of articles 21 and 22 of the Convention.

Committee on the Rights of the Child: Summary Record of the 680th Meeting, Consideration of Reports of States Parties, Second periodic report (Egypt), ¶ 60, U.N. Doc. CRC/C/SR.680 (22 Jan. 2001).

128. *Consideration of Reports*, 2000 (Oman), *supra* note 76, ¶ 8–9.

129. *Committee on the Rights of the Child: Summary Record of the 380th Meeting, Consideration of Reports*, Initial Report (Bangladesh), ¶ 47, U.N. Doc. CRC/C/SR.380 (29 May 1997).

130. *Consideration of Reports*, 1997 (Indonesia), *supra* note 26, ¶ 16.

131. In this regard the Vienna Declaration and Program of Action states:

> The World Conference on Human Rights encourages states to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.

The Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. On Hum. Rts., 48th Sess., 22d plen. mtg., pt. I, ¶ 5, U.N. Doc. A/CONF.157/24 (12 July 1993), *reprinted in* 32 I.L.M. 1661 (1993).

132. *Id.* ¶ 46 "urges States to withdraw reservations to the Convention on the Rights of the Child contrary to the object and purpose of the Convention or otherwise contrary to international treaty law."

and purpose of the Convention."[133] The Committee has made a similar statement with regard to Tunisia's second report.[134]

Second, regarding GSRs, the committee has voiced its concern that the broad nature of these reservations may affect the implementation of the rights guaranteed in these articles and may raise questions about the compatibility of the reservations with the object and purpose of the Convention.[135]

When addressing the problematic MLT the Committee has taken a multifaceted approach towards the relevant reports. First, it emphasized the areas of consensus among Muslims, such as Islamic principles of tolerance and equality. Second, it stated its preference for a wider interpretation of religious texts. For example, with regard to Egypt and Qatar the Committee has stated, "Noting the universal values of equality and tolerance inherent in Islam, the Committee observes that narrow interpretations of Islamic texts by authorities, particularly in areas relating to family law, are impeding the enjoyment of some human rights protected under the Convention."[136]

The Committee also welcomes those interpretations of the *Shariah* that are consistent with the human rights standards. For example with regard to Egypt, Mr. Hammarberg, a member of the Committee, "noted with satisfaction that there were different interpretations of some aspects of the application of *Shariah* (Islamic law) and that Egypt had adopted an attitude consistent with the spirit of human rights in that regard."[137]

Third, the Committee has recommended relevant states consider either the practice of other Muslim states that have been successful in reconciling fundamental rights with Islamic texts or their own previous successful experiences. Yet, the name of these states is not noted in the relevant documents. For example, by the same wording with regards to Egypt and Saudi Arabia "the Committee encourages the State party to consider the practice of other States that have been successful in reconciling fundamental rights with Islamic texts."[138] By the same token, Mrs. Karp, a member of the Committee, recalled that previous successes of Morocco in modifying problematic MLT,

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133. *Consideration of Reports*, 1995 (Tunisia), *supra* note 76, ¶ 6.
134. *Id.* ¶ 10.
135. *See Committee on the Rights of the Child: Consideration of Reports*, Initial periodic report of states parties due in 1993 (Jordan), ¶ 1, U.N. Doc. CRC/C/8/Add.4 (26 Nov. 1993); *Consideration of Reports,* 2003 (Brunei Darussalam), *supra* note 77, ¶ ¶ 73–76; *Consideration of Reports,* 2001 (Saudi Arabia), *supra* note 93, ¶ ¶ 7–8; *Consideration of Reports*, 2000 (Djibouti), *supra* note 76, ¶ ¶ 9–10.
136. *Consideration of Reports,* 2001 (Egypt), *supra* note 93, ¶ 6; *see also*, *Consideration of Reports,* 2001 (Qatar), *supra* note 77, ¶ 9. Also there is similar wording in the report regarding Saudi Arabia; *see Consideration of Reports,* 2001 (Saudi Arabia), *supra* note 93, ¶ 6.
137. *Consideration of Reports,* 2001 (Egypt), *supra* note 93, ¶ 56.
138. *Id.* at ¶ 30; *Consideration of the Reports,* 2001 (Saudi Arabia), *supra* note 93, ¶ 24.

reaffirms a similar treatment for the conflict of MLT with the right of child born out of wedlock.[139]

Fourth, to encourage states to exchange information on reconciliation of problematic MLT and human rights, the Committee has recommended Muslim states hold meetings.[140]

Fifth, in reconciling problematic MLT with human rights, especially regarding gender issues, the Committee has recommended states mobilize religious leaders to be gender sensitive. For example, under the scope of Article 2 the Committee has recommended Oman and Qatar, "train members of the legal profession, especially the judiciary, to be gender-sensitive. Religious leaders should be mobilized to support such efforts."[141]

Considering that in most Muslim states religious leaders are government employees, the government has greater responsibility regarding them and their religious schools and institutions. In this sense, the Committee has also suggested the training of religious leaders. For example, the Committee has asked the government of Tunisia to "develop skills-training programmes in community settings for teachers, social workers, local officials and religious leaders to enable them to assist children to express their informed views and opinions and to have them taken into consideration."[142]

Sixth, for those articles to which there are no reservations, the Committee encourages Muslim states to avoid justifying their shortcomings by resorting to *Shariah*. For example, Mr. Kolosov, a member of the Committee, says, regarding Egypt, that, "he was aware that the *Shariah* was the fundamental source of legislation for the Arab states. However, Egypt had made no specific references to differences between the sexes in its reservation to the Convention, which it must now strictly uphold." [143]

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139. It reads as follows,

> [T]he law relating to children born out of wedlock appeared to be in conflict with many principles of the Convention. The Islamic principle involved was apparently clear and not open to a different interpretation, but, provided that no categorical prohibition was involved, some legislative means could perhaps be found to allow it to be waived and so permit the gap between the Code on Personal Status and the Convention to be closed. Moroccan lawmakers had, for example, managed to find a way to avoid confrontation with the religious principle that permitted a man summarily to divorce his wife.

Summary Record of the 319th Meeting, 1996 (Morocco), *supra* note 71, ¶ 15.

140. *Committee on the Rights of the Child: Summary Record of the 618th Meeting, Consideration of Reports of States Parties,* Initial report (Iran), ¶ 25 , U.N. Doc. CRC/C/SR.618 (23 May 2000). In response to the Committee a member of the Iranian delegation has made a reference to these meetings, "Iranian representatives held meetings with those of other Muslim countries periodically to discuss such matters. In 1998 a conference of Islamic scholars and the United Nations High Commissioner for Human Rights had been held at the United Nations Office at Geneva to discuss Islamic commentary on the Universal Declaration of Human Rights." *Id.* ¶ 26.

141. *Consideration of Reports*, 2001 (Qatar), *supra* note 77, ¶ 31; *Consideration of Reports*, 1999 (Oman), *supra* note 29, ¶ 25; Also there is similar advice for Egypt, *Consideration of Reports*, 2001 (Saudi Arabia), *supra* note 93, ¶ 24.

142. *Consideration of the Reports,* 2001 (Tunisia), *supra* note 68, ¶ 26.

143. *Committee on the Rights of the Child: Summary Record of the 66th Meeting* (Egypt), ¶ 40, U.N. Doc. CRC/C/SR.66 (28 Jan. 1993).

VIII. CONCLUSIONS

Van Bueren states that "the very concept that children posses rights has a far older tradition in Islamic law than in international law, where the notion did not emerge until the twentieth century."[144] It has even been suggested that child-rearing practices in medieval Islamic societies revealed a greater concern for the child's needs than in recent European societies.[145] Benefitting from their religious principles and the cultural heritage of their nations in respecting and loving children, Muslims states generally joined the CRC.

It seems that even according to today's standards, most of MLT are either consistent with or contribute to children's rights. Despite this fact, Muslim states entered six general reservations to the whole Convention based on their religious traditions: Two reservations to Article 2 on nondiscrimination, two reservations to Article 14 on freedom of religion, and two reservations to Article 20 or/and Article 21 on adoption.

The further implementation of the Convention by Muslim states, however, showed that in practice the provisions on which reservations are made are not necessarily the indicators of the areas of inconsistency between MLT and children's rights. While the main reservations of Muslim states are on Articles 14, 20, and 21 of the Convention, implementation of these articles by Muslim states has not been a subject of special concern for the Committee. For example, nowhere has the Committee given any concern to the issue of changing religion under Article 14. Other areas of MLT such, as the issues relating to age and matters relevant to the principle of non-discrimination, have been the subject of greater concern for the Committee, even though there are few reservations on relevant articles by Muslim states.

It should be noted that entering a religious based reservation, doesn't mean that that state is applying relevant traditions more strictly than other non-reserving states. As was discussed in detail, two non-reserving states, Pakistan and Sudan, have been the subjects of criticism by the Committee for the application of problematic MLT, more than many of the reserving states.

Considering what was explained on the subject of reservations of Muslim states, one might ask about the real reasoning behind these reservations. Bielefeldt has a good reply to this question:

> One should take into account that many Muslims still might feel insecure about the relationship between traditional religious norms on the one hand and modern legal standards on the other. That is why many Muslims assert the validity of the

144. Geraldine Van Bueren, The Best Interests of the Child: International Co-Operation on Child Abduction, Program on the International Rights of the Child 51 (1993).

145. *See* Anver Giladi, *Concepts of Childhood and Attitudes Towards Children in Medieval Islam*, 32 J. Econ. & Soc. Hist. Orient 121 (1989).

> traditional Islamic *Shariah* in principle and, at the same time, seem prepared to accommodate pragmatically some political and legal reforms. For instance, even those who defend the legitimacy of hadd-punishment in theory, frequently prefer to avoid the actual implementation of these punishments, invoking practical obstacles to their reintroduction.[146]

Remaining separate from the core negotiations in the early participating stages for the preparation of main international treaties, Muslim states used their reservations as a preventive measure against unexpected consequences of their ratification of the treaty. The statement by a member of the Syrian delegation is an elaboration about this precaution, "the authorities of this country had entered reservations to Article 20 of the Convention (concerning adoption) as a precaution in order to avoid any misunderstanding."[147]

On the issue of withdrawing from reservations, apart from those states with SSR that were mentioned before, Pakistan is the only Muslim state with GSR that withdrew its reservation. Interestingly enough, Pakistan finds nothing in the Convention in direct conflict with "any of the major percepts of Islam." As it states in its report, "Practically no provision of the Convention comes into direct conflict with any of the major precepts of Islam, barring the matter of adoption for which an appropriate provision has already been made in the Convention."[148] However, while some reserving states remained optimistic with regard to the issue of withdrawal, some others, like Jordan, argue that they should maintain their reservations.[149]

Some Muslim States are making progress withdrawing from problematic MLT. This fact appears when comparing the initial report of these states with their second report. For example, in MLT the dividing line for maturity was fifteen for boys and nine to thirteen for girls. Any step forward in applying Article 1 of the Convention can be considered a withdrawal in the application of problematic MLT. Another indicator is the elimination of juvenile executions in several Muslim states following ratification of the Convention. However, it is difficult to have a detailed assessment of this trend, as yet.

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146. Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 Hum. Rts. Q. 4 (1995).
147. *Consideration of Reports*, 1997 (Syrian Arab Republic), *supra* note 26, ¶ 10.
148. *See Consideration of Reports*, 1994 (Pakistan), *supra* note 27, ¶ 31. Some other GSRs are under reviewing by state parties. Oman has been re-examining its reservations to Articles 7, 9, 21 and 30 of the Convention. Yet, its reservation on Article 14 is not included in this re-examination. Similarly Committee has welcomed information that Qatar is re-examining its reservation to the Convention with a view to amending or withdrawing it. *See Consideration of Reports of State Parties* (Oman), ¶ 8, U.N. Doc. CRC/C/15/Add.161 (6 Nov. 2001); *See Consideration of Reports*, 2001 (Qatar), *supra* note 77, ¶ 10; *Consideration of Reports*, 1999 (Oman), *supra* note 29, ¶ 25. Also, there is similar advice for Egypt. *Committee on the Rights of the Child: Concluding Observations* (Egypt), ¶ 30, U.N. Doc. CRC/C/15/Add.145 (21 Feb. 2001).
149. *See Consideration of Reports*, 1999 (Jordan), *supra* note 105, ¶ 173.

Another important issue is that a distinction should be made between effects of personal (family) MLT and Public MLT on children's rights. Regarding the scope of this study many personal aspects of MLT even today can be considered as contributing to the rights of the child. Yet, as was elaborated in this article considering modern standards, some rules are in conflict with human rights criterions, such as the right of children born out of wedlock to inherit from their father.

With regard to the relation of public aspects of MLT to the provisions of the CRC, two issues, i.e. freedom of children to choose their religion and the punishment of children were studied in this paper. The main concern of Muslim states with regard to the issue of freedom of children to choose or change their religion is a family law matter. According to MLT, changing religion entails changing applicable religious family law, especially on inheritance and marriage, for the converted person. On the other hand, the public aspects of these traditional rules of freedom of religion, for example punishment of children for apostasy, have never been an issue of concern by human rights advocates. Yet, the major problematic aspect of public MLT with regard to children is contemporary application of the traditional Hudood punishment code, part of which is in sharp contrast with Article 37 of the Convention.