

## Children's Rights, Family Values, and Federal Constraints

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By comparison with the South African model that fully complies with international standards for the promotion and protection of the rights of the child, this article seeks to review the state of child law in the United States. The United States has been criticized for being one of only two countries in the world that have not ratified the International Convention on the Rights of the Child. There is strong opposition against ratification of the convention from within the ranks of evangelical Christians, based essentially on a perception that the convention undermines family values. However, this article argues that the main obstacle confronting the United States in this regard derives from the constitutional dispensation of federalism.

### Introduction

There are many dimensions to the protection of the rights of the child. In South Africa, for example, international directives relating to children's rights have been incorporated into the constitution and are therefore protected on an equal basis throughout the country. In the United States, on the other hand, child law by and large falls within the jurisdiction of states and are therefore subject to federal constraints.

In this article, we shall first explore the South African model that fully complies with international standards and thereafter take the state of child law in the United States under review. The United States has been criticized for being one of only two countries in the world that have not ratified the International Convention on the Rights of the Child (CRC). There is strong opposition against ratification of the convention from within the ranks of evangelical Christians, based essentially

on a perception that the convention undermines family values. However, this article argues that the main obstacle confronting the United States in this regard derives from the constitutional dispensation of federalism.

## **The South African Model and International Standards Pertaining to the Rights of the Child**

When the question was debated in South Africa whether or not children's rights listed in the Chapter on Fundamental Rights in the 1994 Interim Constitution were to be retained in the final constitution, Mr. Tony Leon of the Democratic Party and chairperson of the Constitutional Assembly Theme Committee on Fundamental Rights stated, "Children's rights are like chicken soup, they do no harm."<sup>1</sup> The Constitutional Assembly did not treat the rights of the child as chicken soup but, on the contrary, extended the protections afforded to those rights to uphold international standards applying to the best interests of the child almost to a fault.

South Africa ratified the CRC on June 30, 1995, without reservation<sup>2</sup> and, furthermore, takes its international obligations quite seriously. Customary international law,<sup>3</sup> as well as self-executing international agreements,<sup>4</sup> is part of the law of the land unless they are inconsistent with the constitution of the country or an act of Parliament. The South African Constitution furthermore instructs courts of law to prefer an interpretation of legislation that is consistent with international law.<sup>5</sup> When interpreting the constitutional Bill of Rights, courts of law *are permitted* to consider comparable foreign law,<sup>6</sup> but *are compelled* to take international law into account.<sup>7</sup> They are evidently precluded from following international-law directives that are at odds with constitutionally protected rights.<sup>8</sup> South African child law is, therefore, a good starting point for coming to grips with the CRC,<sup>9</sup> and for evaluating the implications of its unconditional ratification.

The South African Constitution proclaims that a child's best interests are of paramount importance in all matters concerning the child (§28(2)). It affords to every child the right to a name and a nationality from birth (§28(1)(a)). Every child has a constitutional right to family care, parental care, or appropriate alternative care when removed from the family environment (§28(1)(b)); to basic nutrition, to shelter, to basic health care services and social services (§28(1)(c)); and to be protected from maltreatment, neglect, abuse, and degradation (§28(1)(d)). As a matter of constitutional obligation, every child must be protected from exploitative labor practices (§28(1)(e)) and may not be required or permitted to perform work or to provide services that are considered inappropriate for a child

of that age (§28(1)(f)(i)) or would place at risk the child's well-being; education; physical or mental health; or spiritual, moral, or social development (§28(1)(f)(ii)). The constitution guarantees to everyone the right to basic education and the right to further education (§29(1)). It is perhaps important to note that while the social rights of persons enunciated in Sections 26 and 27 of the constitution are subject to progressive implementation depending on the available resources at the disposal of the state, a child's comparable rights to basic nutrition, shelter, and health care services have been proclaimed in the constitution as immediately enforceable rights.<sup>10</sup>

The child, like everyone else, is also entitled to basic rights applying to the administration of justice, such as the rule against arbitrary arrests; the proscription of detention without trial; protection against violence; freedom from torture and from cruel, inhuman, and degrading treatment or punishment (§12(1)); and guarantees the long list of basic norms of criminal procedure pertaining to persons arrested (§28(g), read with §35(1)), in detention (§28(g), read with §35(2)), and accused of a criminal offence (§28(g), read with §35(3)). Current South African law makes ample provision for alternative measures designed to avoid the detention of juveniles in a prison and to orchestrate the rehabilitation and reintegration into society of young offenders. In a recent judgment, the Constitutional Court noted that "the Convention on the Rights of the Child has become the international standard against which to measure legislation and policies, and has established a new structure, modeled on children's rights, within which to position traditional theories of juvenile justice."<sup>11</sup>

The CRC places numerous obligations on states parties to ensure its effective implementation at the municipal levels: recognize the inherent right to life of every child and ensure "to a maximum extent possible" the survival and development of the child (art. 6); implement the right from birth of a child to a name and a nationality (art. 7); combat the illicit transfer and nonreturn of children from abroad (art. 11); respect the right of the child to freedom of thought, conscience, and religion (art. 14); ensure the access of children to information (art. 17); protect the child against all forms of physical violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (art. 19), from economic exploitation (art. 32), and from all forms of sexual abuse (art. 34); secure access of all children to health care services (art. 24) and a standard of living adequate for the child's physical, mental, spiritual, moral, and social development (art. 27); provide compulsory primary education free of charge to all children and make secondary education available on the basis of capacity by every appropriate means (art. 28); and much, much more. The convention proclaims, most

importantly, that in all of this “the best interests of the child shall be a primary consideration” (art. 3).

Several provisions in the CRC have been elaborated in other international human rights instruments, including the *Hague Convention on the Civil Aspects of Child Abduction* of 1980,<sup>12</sup> the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*,<sup>13</sup> the 1999 *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*,<sup>14</sup> an *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* adopted in 2000,<sup>15</sup> the further *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* of the same year,<sup>16</sup> and the 2001 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, which supplemented the *United Nations Convention against Transnational Organized Crime* of November 25, 2000.<sup>17</sup>

International standards of juvenile justice have been proclaimed in international treaties such as the 1995 United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (“The Beijing Rules”)<sup>18</sup> and the 1999 United Nations *Rules for the Protection of Juveniles Deprived of Their Liberty*,<sup>19</sup> which proclaim the well-being of a juvenile to be the guiding factor in determining sentences of child offenders, confine restrictions on personal liberty of a child offender to serious acts involving violence against another person or persistent criminal behavior, and altogether prohibit the death penalty and corporal punishment for crimes committed by juveniles.

## **Protection of the Rights of the Child and Family Values**

International law places a high premium on family values and parental interests. The *Covenant on Civil and Political Rights* recognizes the family as “the natural and fundamental group unit” of society and proclaims that it must, as such, be protected by society and the state.<sup>20</sup> The *Covenant on Economic, Social and Cultural Rights*, in a similar vein, promises “the widest possible protection and assistance ... to the family, which is the natural and fundamental group unit of society, particularly ... while it is responsible for the care and education of dependent children.”<sup>21</sup> The CRC mandates respect for the rights and duties of parents or 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.”<sup>22</sup> Within the confines of the criminal justice system, the *United Nations Guidelines*

*for the Prevention of Juvenile Delinquency* (The Riyadh Guidelines) proclaims that “every society should place a high priority on the needs and well-being of the family and of all its members”<sup>23</sup> and calls on governments to “establish policies that are conducive to the bringing up of children in stable and settled family environments.”<sup>24</sup>

The *Universal Declaration of Human Rights* deals with the rights of a child in the context of education only. It affords to parents a prior right to choose the kind of education to be given to their children.<sup>25</sup> It is reasonable to assume that the parents’ choice to send their children to a religious school is included in this prior right, as would be the parents’ preference as to the kind of religious education their offspring is to receive. In its education clauses, the *Covenant on Economic, Social and Cultural Rights* upholds the liberty of parents or guardians to choose the schools for their children other than those within the public education system and expressly includes within that liberty a competence of the parents to ensure the religious and moral education of their children in conformity with their own convictions.<sup>26</sup> It sanctions the establishment of independent schools, subject only to the condition that such schools comply with general educational policies stipulated in the covenant and that they uphold minimum standards laid down by the state.<sup>27</sup> The *Covenant on Civil and Political Rights* calls on states parties “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.”<sup>28</sup>

Concerns have been expressed in certain religious circles because the CRC only makes allowance for “direction” by parents or legal guardians to the child in the exercise of his or her right based on his or her evolving capacities,<sup>29</sup> or—as stated elsewhere in the convention—for “the responsibilities, rights, and duties of parents . . . to provide direction and guidance” to a child in the exercise of his or her rights in a manner consistent with his or her evolving capacities.<sup>30</sup> This wording has been interpreted by some analysts as reducing the role of parents to merely that of giving advice to the exclusion of issuing instructions.<sup>31</sup> It is submitted that one should not make too much of sweeping formulations in international instruments, since the words and phrases chosen by the drafters are often not decided upon with any sense of precision and are sometimes weakened in the process of compromises that always attend their drafting. International law, most importantly, in principle upholds the sanctity of a family environment and is supportive of parental authority. Potential fears that restricting parental authority to giving advice, directions, or guidance would undermine the responsibility of parents to compel their children to do certain things can be laid to rest by adding

an understanding to the instrument of ratification to clarify the meaning to be attached by the particular state party to such evasive formulations.<sup>32</sup>

It is also important to note that the CRC in its preamble proclaims the conviction “that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”<sup>33</sup> and recognizes “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”<sup>34</sup> It is an elementary norm of statutory interpretation that all ambiguous provisions in the CRC must be interpreted in view of the principles enunciated in the preamble.

International law thus proceeds on the presupposition that a child’s interests are best served within a family environment and under parental care and control. Admittedly, domestic practices within the family circle are to a large extent based on traditions determined by ethnic or religious affiliation. That, too, must be respected by the repositories of political power. A salient principle of contemporary international law thus proclaims the right to self-determination of peoples, and peoples—the beneficiaries of this right—have been identified as national or ethnic, religious or linguistic communities within a political society.<sup>35</sup> Article 30 of the CRC affords to children the right to self-determination as defined in contemporary international law. It provides:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.<sup>36</sup>

France and Turkey entered reservations to this provision, seemingly prompted by a certain animosity of the governments of those states toward sectional group formations within their respective countries.<sup>37</sup> Oman entered a reservation to record its position denying a child the right to profess his own religion or belief.<sup>38</sup>

Two matters seem to provoke criticism in certain religious circles—instances where biblical family values are said to be undermined. The first concerns internationally proclaimed religious rights of the child and the second corporal punishment within the family environment.

## Religious Rights of the Child

Several provisions of the CRC deal with the religious rights and freedom of opinion of a child. It requires states parties to ensure the right of a child who is capable of forming his or her own opinion to express those views freely in all matters affecting the child and demands that due weight be given to the views of the child in accordance with his or her age and maturity.<sup>39</sup> Every child is furthermore entitled to enjoy freedom of thought, conscience, and religion.<sup>40</sup> The child is to be protected against all forms of discrimination or punishment on the basis of, among other things, his or her expressed opinions or the beliefs of his or her parents, legal guardian, or family members.<sup>41</sup> States parties to the convention are instructed to secure and to respect the rights and freedoms of the child without discrimination of any kind based on, among other things, the religion or political or other opinion of the child or that of his or her parents or legal guardian.<sup>42</sup>

Article 14 of the CRC provides:

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 belief 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.<sup>43</sup>

Several Muslim states entered reservations to this provision. Leaving aside those states that repudiated (unspecified) provisions in the CRC that are in conflict with (unspecified) pre- and proscriptions of Islamic law (Afghanistan, Brunei Darussalam, Djibouti, Iran, Kuwait, Mauritania, Qatar, and Saudi Arabia) or of the state constitution with an Islamic bias (Indonesia, Malaysia, and Tunisia), and those that entered (unspecified) reservations to Article 14 insofar as its provisions are in conflict with the dictates of *Shari'a* (Maldives, Morocco, and the United Arab Emirates), other Muslim states that gave some indication of their religiously based concerns in some instances protested the right of a child to choose a religion or belief (Jordan and Oman). Algeria recorded that Islam is its state religion and that a child's education must accord with the father's religion. Jordan and Syria do not recognize the system of adoption provided for in the CRC.<sup>44</sup>

Other reservations to Article 14 reflect concerns for parental rights. The Holy See entered a reservation to Article 14 (which is, in essence, really an understanding) to record that it interprets this provision (and certain others) “in a way which safeguards the primary and inalienable rights of parents.”<sup>45</sup> A declaration appended to the instrument of ratification of Kiribati is to the same effect, but adds that the rights proclaimed in this provision (and certain others) “shall be exercised ... in accordance with the Kiribati customs and traditions regarding the place of the child within and outside the family.”<sup>46</sup> A Polish declaration is, in essence, the same, referring to “Polish traditions and customs.”<sup>47</sup> Singapore added a declaration to its instrument of ratification to Article 14 (and certain other provisions) noting its understanding that those rights will be exercised

with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and the best interests of the child and in accordance with the customs, values and religions of Singapore’s multi-racial and multi-religious society regarding the place of the child within and outside the family.<sup>48</sup>

The Syrian Arab Republic, in response to objections raised by Germany to its initial reservations, also emphasized the right of parents or legal guardians in regard to the religious education of children in their care.<sup>49</sup> The Netherlands and Syria emphasized that a child wishing to adopt a religion or belief of his or her own choice should be capable of making such a choice, taking into consideration his or her age or maturity.<sup>50</sup>

It will appear from statutory provisions and judgments of the Constitutional Court that South African law also places a high premium on the family environment. A lengthy section in the Children’s Act of 2005 enumerates circumstances that must be taken into account in establishing the best interests of the child, and those circumstances include “the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment.”<sup>51</sup> The Constitutional Court on one occasion observed that “the parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children.”<sup>52</sup>

The South African Constitution indeed does not address the religious rights of a child as such but does afford to everyone “the right to freedom of conscience, religion, thought, belief and opinion,”<sup>53</sup> and also permits religious observances at state and state-aided schools.<sup>54</sup> The latter provision is subject to specified conditions, including one that renders attendance of such observances free and



voluntary.<sup>55</sup> The right not to attend religious observances in state or state-aided schools is one that can be waived by a child.<sup>56</sup>

It is perhaps also of interest to an American audience to note in passing that the Constitutional Court has on several occasions emphasized the vital importance of religion to the state as a component of South Africa's constitutional democracy. In one such case, Justice Albie Sachs, delivering the unanimous decision of the Court, had this to say:

Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people's temper and culture, and for many believers a significant part of their way of life. Religious organizations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.<sup>57</sup>

Looking next at religious rights of the child from the perspective of parental authority, it becomes clear that the exercise of parental rights is subject to limitations dictated, in general, by the best interests of the child. Parents cannot dictate to their children the religion they should adhere to upon reaching a stage in their development when they can and should decide for themselves. A case in point is one where the Transvaal Provincial Division of the High Court was petitioned to endorse a settlement agreement in a divorce action that contained the following provision: "Both parties undertake to educate the minor child [then three years old] in the Apostolic Church and undertake that he will fully participate in all religious activities of the Apostolic Church."<sup>58</sup> The court refused to make this provision an order of court, basing its decision on the best interests of the child. Acting Judge Fabricious had this to say:

[I]t is often said that it is "useful" (if not essential) to ensure that a child belongs to a church, or adheres to a religion and partakes in its activities, so that it can, at a more mature age, at that stage exercise its free choice. There is a fallacy in this argument. It fails to appreciate fully the nature of the human

being within the framework of the imposition of religious dogma upon it... If a child is forced, be it by order of the parents, or by an order of Court, to partake fully in stipulated religious activities, it does not have the right to his full development, a right which is implicit in the Constitution.<sup>59</sup>

The state has a duty to step in to prevent, counteract, and punish conduct of parents that is harmful to children in their care. Withholding medication or therapeutic treatment from a child upon instructions of the parents can therefore also not be tolerated—even in cases where the parents’ decision is based on religious conviction. In the United States, the right of parents to withhold life-sustaining medication or therapeutic treatment from a child in their care has had a checkered history.<sup>60</sup> There are, on the one hand, state laws in place that exempt parents who prefer spiritual treatment or faith healing from statutory requirements to furnish health care to a child in care,<sup>61</sup> but this concession to freedom of religion will not absolve a parent from criminal liability for involuntary manslaughter if the child should die in consequence of being denied conventional medical treatment.<sup>62</sup> Parents will therefore be prosecuted for providing spiritual treatment for their children in lieu of traditional medical care but only if such treatment turned out to be ineffective and resulted in the death of the child.<sup>63</sup> In South Africa, on the other hand, the High Court as upper guardian of all children can intervene by sanctioning feasible medical procedure while the life of the child can still be saved. It can consequently overrule the decision of parents who, for religious reasons, would not give their consent for a child to receive a blood transfusion (or other therapeutic treatment) considered by a pediatrician to be necessary for the survival of the child.<sup>64</sup> In South Africa, the constitutionally protected right to life of a child will in all circumstances trump the claim to the exercise of religious liberty of the parent.

South African courts will always endeavor to accommodate as far as possible the religious convictions of parents. The demands of Jehovah’s Witnesses who object to blood transfusions may be accommodated by the court’s ordering alternative therapeutic procedures not involving blood transfusion and might also accommodate the wishes of a child who has reached a certain level of maturity and who, for religious reasons, prefer not to undergo certain medical procedures.<sup>65</sup>

## **Corporal Punishment**

Article 19 of the CRC places an obligation on states parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”<sup>66</sup>

This provision raises the problem of corporal chastisement of the child by parents, guardians, or other persons entrusted with the care of a child.

The propriety of corporal punishment of a child may arise at three quite distinct levels: (1) corporal punishment as a means of retribution in the criminal justice system of a country; (2) corporal punishment as a disciplinary measure in schools; and (3) chastisement of a child as a means of promoting his or her submission and obedience to parental authority within the family environment.

It has come to be widely accepted that flogging as a sentence imposed by criminal courts constitutes a cruel and inhuman punishment,<sup>67</sup> and therefore violates a basic principle of international human rights. International tribunals have been less accommodating to support efforts to outlaw corporal punishment in schools.<sup>68</sup> Here, again, we may pause to consider interesting jurisprudence on the subject in the South African Constitutional Court.

The South African Schools Act of 1996 prohibits corporal punishment “at a school to a learner.”<sup>69</sup> The constitutionality of this provision was contested on religious freedom grounds by an association, originally established in the United States “to promote evangelical Christian education” and that controlled 196 independent Christian schools in South Africa with an enrollment of 14,500 pupils.<sup>70</sup> The applicant claimed that corporal punishment is an integral part of an active Christian ethos and should be permitted in their schools. In support of this position, the applicant cited several Bible texts pertinent to the need for “corporal correction”—the term preferred by the applicant for corporal punishment:

Train up a child in the way he should go: and when he is old, he will not depart from it. (Prov. 22:6 KJV)

Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him. (Prov. 22:15 KJV)

Chasten thy son while there is hope, and let not thy soul spare for his crying. (Prov. 19:18 KJV)

Do not withhold discipline from a child; if you punish him with the rod, he will not die. Punish him with the rod and save his soul from death. (Prov. 23:13,14 NIV 1984)

The applicant based the divinely imposed responsibility of parents for the training and upbringing of their children on Deuteronomy 6:4–9:

שְׁמַע יִשְׂרָאֵל יְהוָה יְהוָה אֱלֹהֵינוּ יְהוָה אֶחָד

*Sh'ma Yis'ra'eil Adonai Eloheinu Adonai echad.*

Hear, Israel, the Lord is our God, the Lord is One.

וְאָהַבְתָּ אֶת יְהוָה אֱלֹהֶיךָ בְּכָל־לִבְבְּךָ וּבְכָל־נַפְשְׁךָ וּבְכָל־מְאֹדְךָ

*V'ahav'ta eit Adonai Elohekha b'khol l'yav'kha uv'khol naf'sh'kha uv'khol m'odekha.*

And you shall love the Lord your God with all your heart and with all your soul and with all your might.

וְהָיוּ הַדְּבָרִים הָאֵלֶּה אֲשֶׁר אָנֹכִי מְצַוְּךָ הַיּוֹם עַל־לִבְבְּךָ

*V'hayu had'varim ha'eileh asher anokhi m'tzav'kha hayom al l'yavekha.*

And these words that I command you today shall be in your heart.

וְשִׁנַּנְתָּם לְבָנֶיךָ וְדִבַּרְתָּ בָם

*V'shinan tam l'vanekha v'dibar ta bam*

And you shall teach them diligently to your children, and you shall speak of them

בְּשִׁבְתְּךָ בְּבֵיתְךָ וּבְלֶכְתְּךָ וּבְשֹׁכְבְּךָ וּבְקוּמְךָ

*b'shiv't'kha b'veitekha uv'lekh't'kha vaderekh uv'shakh'b'kha uv'kumekha*

when you sit at home, and when you walk along the way, and when you lie down and when you rise up.<sup>71</sup>

The constitutionality of the provision in the Schools Act was upheld in the High Court,<sup>72</sup> and by the Constitutional Court.<sup>73</sup> The court in both instances accepted the religious sincerity of the applicant and assumed that the need for corporal correction constituted part of the religious belief it professed. However, the biblical texts cited in support of its submissions confined the duty to chastise a child to the parents and did not provide support for the parent to delegate that responsibility to third parties *in loco parentis*, including school authorities. Flogging of children has been designated in South Africa,<sup>74</sup> and in neighboring countries,<sup>75</sup> as a cruel and inhuman (or degrading) punishment, and, in terms of the constitution, the right to self-determination of religious communities (and others) may not be exercised “in a manner inconsistent with any provision of the Bill of Rights.”<sup>76</sup> Speaking for a unanimous Constitutional Court, Justice Albie Sachs observed:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are

binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, whenever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful to the law.<sup>77</sup>

The right of parents to chastise their children was not in issue in the case. It might be noted in passing that there is a reasonable foundation for confining the right to apply "corporal correction" to a parent, since one could expect the parent to apply moderate chastisement with compassion, and compassion might be wanting in a third person who lacks the ties of kinship upon which that compassion is founded.

When it comes to chastisement of a child by a parent or guardian, religious communities will necessarily be at odds with the Committee on the Rights of the Child (the body that oversees implementation of the CRC), which extended the proscription of subjecting a child to any "form of physical or mental violence, injury or abuse,"<sup>78</sup> to also include chastisement within the family environment. In a general comment of March 2, 2007, the Committee on the Rights of the Child noted that corporal punishment of children "in their homes, schools and other institutions" has become more noticeable in recent years.<sup>79</sup> They proclaimed that such punishments conflict with "the equal and inalienable rights of children in respect of their human dignity and physical integrity"<sup>80</sup> and called for the elimination of such violent and humiliating punishments as "an immediate and unqualified obligation of States Parties."<sup>81</sup> Those who believe that chastisement of a naughty child is a biblical duty of parents and guardians will most certainly not find peace with this committee's assessment.

Even then, chastisement must be applied with moderation. In 1998, the European Court of Human Rights was called upon, in the case of *A v. United Kingdom*, to consider possible violations of Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* that outlaws "torture or ... inhuman or degrading treatment."<sup>82</sup> A stepfather had caned his stepchild on several occasions and was brought to trial in the United Kingdom but successfully raised the defense of "reasonable chastisement." The European Court decided unanimously that the United Kingdom did not provide the child with adequate protection from inhuman or degrading treatment and awarded the applicant £10,000 in damages and a further £20,000 in costs and expenses.<sup>83</sup>

In *A v. United Kingdom*, the Court invoked the doctrine of "positive obligation," based on Article 1 of the European Convention, which provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention."<sup>84</sup> According to this doctrine, the

duty of High Contracting Parties to “secure to everyone” the concerned rights and freedoms includes a positive obligation to secure the protection of those rights and freedoms from violations by nonstate perpetrators. Violations censured by the court are, therefore, not confined to those attributable directly to state action.

This case stands in stark contrast to the decision of the US Supreme Court in *DeShaney v. Winnebago County Department of Social Service*.<sup>85</sup> Since the age of two years, Joshua DeShaney was repeatedly flogged by his father, in consequence of which he suffered serious injuries. Hospital personnel reported the beatings on several occasions to social services authorities, but they declined to remove Joshua from the care of his father. At the age of four years, Joshua suffered permanent brain damage and was institutionalized in consequence of further beatings inflicted by his father. The father was subsequently convicted of the assaults. Joshua and his mother thereupon brought a civil rights action against the local authorities, based on their failure to act and thereby depriving Joshua of his liberty interests in bodily integrity in violation of the Due Process Clause of the Fourteenth Amendment. The US Supreme Court rejected their claim, holding that the Fourteenth Amendment places a limitation on the state’s power to deprive an individual of life, liberty, or property and cannot be invoked to ensure that those interests do not come to harm through other means.<sup>86</sup>

Additionally, many years ago, a federal court also seemed to uphold the principle of positive obligation by stating that “denying includes action as well as inaction ... the omission to protect, as well as the omission to pass laws for protection.”<sup>87</sup> However, this dictum remained a cry in the wilderness and does not reflect the current state of American law.

## **Federalism as a Stumbling Block for Upholding the Rights of the Child**

Human rights protagonists from time to time attempt to persuade US officials to support ratification of the CRC.<sup>88</sup> President-elect Barack Obama (as he then was) stated that failure of the United States to ratify the CRC is “embarrassing” and promised to review the matter.<sup>89</sup> When the Obama administration on April 24, 2009, informed the president of the General Assembly of the United Nations of the United States’ candidacy for a seat on the Human Rights Council, it added an Annex to its letter outlining *The Human Rights Commitments and Pledges of the United States* in which it recorded a promise by the executive branch to work with the legislative branch “to consider the possible ratification of human rights treaties, including but not limited to the Convention on the Elimination

of Discrimination against Women.”<sup>90</sup> However, one never talks about these matters without saying that the United States is one of only two countries in the world that have not ratified the CRC, the other one being Somalia. However, it should be noted that the United States played a pivotal role in the drafting of the CRC,<sup>91</sup> and on February 23, 1995, did sign the CRC. In 2003, the United States ratified two protocols to the CRC dealing with the involvement of children in armed conflict, as well as with the sale of children, child prostitution, and child pornography (respectively).<sup>92</sup> Signing the convention is indicative of an intention to ratify the same.

So, why did the United States not ratify the CRC?

A fundamental problem confronting the United States is the fact that its federal Bill of Rights does not deal comprehensively with the protection of human rights and fundamental freedoms. It protects civil and political rights only, to the exclusion of the most basic natural rights of the individual, such as the right to life and human dignity. It also, understandably, did not include in the specially protected rights and freedoms those that only came to be identified after 1789 and that are today commonly designated as economic rights, social and cultural rights, and solidarity rights (respectively).<sup>93</sup> The protection of those basic human rights and fundamental freedoms not included in the federal Bill of Rights has come to be the responsibility of states. They include almost the entire spectrum of children's rights, ranging from the child's disposition within the family and his or her entitlement to basic education and health care on the one hand, and his or her prosecution and punishment within the juvenile criminal justice system on the other.

Due to the federal distribution of political power, the United States has on many occasions been condemned by international tribunals for not upholding equal protection of the laws in respect of rights and freedoms that have come to be accepted by the international community of states as basic to the very existence, dignity, and worth of the human person. In one such instance, the Inter-American Commission of Human Rights dealing with the death penalty imposed on two juveniles decided that the American juvenile justice system violated the norm of equal justice laid down in Article II of the *American Declaration on the Rights and Duties of Man*.<sup>94</sup> The Commission had this to say:

For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of State officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the

determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right—the right to life—results in a pattern of legislative arbitrariness throughout the United States which results in arbitrary deprivation of life and inequality before the law, contrary to Article I and II of the American Declaration of the Rights and Duties of Man.<sup>95</sup>

Since the holding in this case was handed down in 1987, the US Supreme Court, in *Roper v. Simmons*, decided that the sentencing of a person to death while the perpetrator was under the age of eighteen years constituted a cruel and unusual punishment as contemplated in the Eighth Amendment to the American Constitution and was therefore unconstitutional in the United States.<sup>96</sup> This most commendable decision did not, however, resolve the problem addressed by the Inter-American Commission, since the United States still does not uphold the principle of equality before the law and equal protection of the laws within its juvenile criminal justice system. This is particularly evidenced by the practice of prosecuting juveniles as though they were adults and upholding different rules of law in different states as to the age upon which, and the circumstances under which, this can be done.<sup>97</sup> It must be emphasized that in the international arena the United States constitutes *a single* sovereignty and by not upholding equal protection of the laws in regard to all the basic rights and fundamental freedoms of the individual—including those of the child—throughout the country, federalism as applied in the United States has come to be identified as a major stumbling block.

As a matter of constitutional law, nothing would prevent the president (with the consent of a two-thirds majority of the Senate) from ratifying the CRC. In virtue of Article VI, Clause [2] of the US Constitution (the Supremacy Clause), treaties entered into by the United States are self-executing and, therefore, without further ado become part of American municipal law.<sup>98</sup> The rule rendering treaties self-executing is admittedly subject to many exceptions,<sup>99</sup> but no one of those exceptions apply to provisions in a treaty that affords basic rights or fundamental freedoms to an individual. In American law, self-executing treaty provisions are subordinate to the Constitution,<sup>100</sup> equal in status with federal law,<sup>101</sup> and superior to state law.<sup>102</sup> Provisions in the CRC that might be self-executing in the United States—and those, if any, would include ones that afford rights only to the child—will then invalidate state laws and practices that are at odds with those self-executing provisions. However, the CRC does not grant children the rights proclaimed therein but invites a commitment of states parties “to ensure such protection and care as is necessary for his or her well-being,”<sup>103</sup> or to “ensure



that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities."<sup>104</sup> This language, requiring future state action to give effect to the provisions in an international agreement, constitutes a well-established exception to the rule of proclaiming treaties entered into by the United States to be self-executing.<sup>105</sup>

Christopher Klicka of the National Center for Home Education and a stern critic of the CRC had it all wrong when he cited the Supremacy Clause in support of the proposition that, upon ratification of the Convention, "otherwise valid state laws pertaining to education and parents' rights throughout the states which conflict with the provisions of the Treaty will be nullified by our own US Constitution."<sup>106</sup>

It has in any event become standard practice in the United States, without any exceptions thus far, to include reservations in ratification instruments of international human rights treaties (1) proclaiming that the treaty will not be self-executing in the United States (the nonself-executing reservation) and (2) excluding the binding force of any provision in the treaty that deals with a subject matter not listed in Article I, Section 8 of the Constitution as ones falling within the exclusive powers of Congress (the federalism reservation).<sup>107</sup>

## Concluding Observations

Protection of the rights of the child in the United States in many respects does not reflect well on this country. Yet international efforts to proclaim humane standards in education and healthcare of children and to promote the well-being of the child in a family environment and within society in general have been strongly condemned by a variety of interest groups with a particular religious agenda, such as the Heritage Foundation, Concerned Women of America, the Family Research Council, the Home School Legal Defense Association, and the Eagle Forum. Their concerns have been adequately addressed, and discredited, by several highly respected analysts, such as Jeremy Gunn and David Smolin.<sup>108</sup> I shall not dwell on this debate—my brief is focused on federalism as an obstacle to ratification of the CRC.

Because states parties to the CRC merely commit themselves to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in this convention,"<sup>109</sup> and economic, social, and cultural rights provided for in the CRC are furthermore subject to progressive implementation "to the maximum extent of ... [the state party's] available resources,"<sup>110</sup> the substantive provisions of the CRC will not upon ratification become self-executing in the United States. Implementation of those provisions

will require future action in the form of legislative, administrative, and other measures. Such measures will essentially have to be proclaimed and implemented within the confines of municipal constitutional constraints, and here, federalism will preclude the United States from imposing on states a legal obligation to bring their regional child law regime into conformity with the CRC principles. That is perhaps unfortunate, but that is how the federal system of the United States mandates it to be.

If the state of American constitutional law had been different—that is, if any provisions of the CRC were self-executing in the United States—the President and the Senate would have been constrained to include a federalism reservation in their instrument of ratification. As noted earlier, it has become standard practice for the President and the Senate to add such a reservation to all instruments of ratification of international human rights treaties.<sup>111</sup> I might add in passing that a federalism reservation in an American instrument of ratification of the CRC would be “incompatible with the object and purpose of the treaty” and consequently violate Article 19 (c) of the *Vienna Convention on the Law of Treaties*.<sup>112</sup> Calling on states parties to “ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind”<sup>113</sup> and proclaiming that “[i]n all actions concerning children ... the best interests of the child shall be a primary consideration”<sup>114</sup> are so fundamental to the entire convention that a reservation that authorizes states within the United States to have it their own way when it comes to children’s rights and juvenile justice ought not to be accepted by any of the other states parties to the convention.

That is not how it needs to be, since compliance with the CRC entails no more than future action. That future action will be constrained by the constitutional supremacy of state powers in regard to child law.

This, then, again raises the question: Should the United States ratify the CRC, knowing for a fact that converting principles proclaimed in the CRC into practice will inevitably require voluntary cooperation of the states? The federal authorities have occasionally applied economic incentives to influence states to comply with standards of propriety in areas such as education, health care services, and the like in the past.

Ratification of the convention could, therefore, bear fruit in the long run. The CRC was not designed *to force* states parties to uphold the principles proclaimed in the convention. Its only enforcement mechanism is a reporting procedure. States parties are required to submit reports to the Committee on the Rights of the Child, outlining the measures they have adopted to give effect to the rights recognized in the convention “and on the progress made in the enjoyment of those rights.”<sup>115</sup> Such reports must be submitted within two years after the entry

into force of the convention for the state party concerned and thereafter at intervals of five years.<sup>116</sup> State party reports serve two extremely useful purposes: (1) they compel states parties to take a close look at their own legal institutions pertinent to the rights of the child and in view of all convention provisions that are binding on them, and (2) they provide an agenda for a friendly, diplomatic dialogue between a state party representative and the Committee on the Rights of the Child on matters emanating from the state party report. In this way, the rights of the child would remain in contention and be the subject of ongoing reflection, deliberation, and—it is to be hoped—eventual reform.

Although the federal government will not use its treaty powers to undermine the federal powers of states to deal with family matters, public education, juvenile justice, and other matters pertinent to the well-being of children, sensitivity in Washington, DC, to the many shortcomings of child law in the United States, provoked in part by its periodic discourses on these issues in the international arena, could serve as a driving force for the federal authorities to apply economic incentives to inspire legal reform within the sovereign domain of the states. It would be a sad day for America if religious communities will not contribute toward—or worse still, will persist in seeking to obstruct—such efforts toward a better tomorrow.

## Notes

1. Report of the Theme Committee Deliberations, special supplement on *Constitutional Talk*, in *THE ARGUS*, at 9 (Nov. 29, 1995).
2. Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations: Convention on the Rights of the Child (Ratification by South Africa), 16 June 1995, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (hereinafter Ratifications and Reservations).
3. Constitution of the Republic of South Africa, Act 108 of 1996, §232 (hereinafter SA Const.).
4. SA Const., §231(4).
5. SA Const., §233.
6. SA Const., §39(1)(c).
7. SA Const., §39(1)(b).
8. Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs, 2006 (1) SA 524, par. 104 (CC) (Sou. Afr).

9. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].
10. *Centre for Child Law v. MEC for Education, Gauteng, & Others*, 2008 (1) SA 203 (T) at 227 (S.Afr.).
11. *S v. M* (Centre for Child Law as Amicus Curiae), 2008 (3) SA 232 (CC) at 245 (S.Afr.).
12. Hague Convention on the Civil Aspects of Child Abduction, 1343 U.N.T.S. 89 (1980).
13. Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 32. I.L.M. 1134 (1993).
14. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 2133 U.N.T.S. 161 (1999).
15. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 263 of May 25, 2000, U.N. GAOR, 54<sup>th</sup> Sess., Annex I, U.N. Doc. A/RES/54/263 (2000).
16. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 263 of May 25, 2000, U.N. GAOR, 54<sup>th</sup> Sess., Annex II, U.N. Doc. A/RES/54/263 (2000).
17. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25 of Nov. 15, 2000, U.N. GAOR, 55<sup>th</sup> Sess., Suppl. (No. 49), at 60, U.N. Doc. A/45/49 (2000).
18. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33 Annex, U.N. GAOR, 45th Sess., Supp. No. 53, U.N. Doc. A/40/53/Annex (Nov. 29, 1985).
19. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, Annex, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49/Annex (Dec. 14, 1990).
20. International Covenant on Civil and Political Rights, art. 23(1) (1966), 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967) [hereinafter ICCPR].
21. International Covenant on Economic, Social and Cultural Rights, art.10(1), 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967) [hereinafter ICESCR].
22. CRC, *supra* note 9, art. 14(2).
23. United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), art. 11, G.A. Res. 45/112 of Dec. 14, 1990, U.N. GAOR Supp. (No. 49) at 200 (Annex), U.N. Doc. A/45/49.
24. *Id.*, art. 13.

25. Universal Declaration of Human Rights, art. 26(3), G.A. Res. 217A (III) of 10 Dec. 1948.
26. ICESCR, *supra* note 21, art. 13(3).
27. *Id.*, art. 13(4).
28. ICCPR, *supra* note 20, art. 18(4).
29. *Supra*, the text accompanying note 22.
30. CRC, *supra* note 9, art. 5.
31. See, for example, David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 81, 90–91 (2006).
32. *Id.*, at 93–94.
33. CRC, *supra* note 9, Preamble, Fifth Paragraph.
34. *Id.*, Preamble, Sixth Paragraph.
35. See ICCPR, *supra* note 20, art. 27. As to the right to self-determination in general, see JOHAN D. VAN DER VYVER, LEUVEN LECTURES OF RELIGIOUS INSTITUTIONS, RELIGIOUS COMMUNITIES AND RIGHTS, 67–81 (2004); Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 395–416 (1991); Johan D. van der Vyver, *Self-Determination of the Peoples of Quebec*, 10 J. TRANSNAT'L L. & POL'Y 1, 13–26 (2000); Johan D. van der Vyver, *Self-Determination and the Right to Secession of Religious Minorities under International Law*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 251, 258–71 (Peter G. Dachin & Elizabeth A. Cole, eds., 2002); Johan D. van der Vyver, *Cultural Identity as a Constitutional Rights in South Africa*, 14 STELLENBOSCH L. REV. 51, 52–62 (2003); Johan D. van der Vyver, *The Right to Self-Determination and Its Enforcement*, 10 ILSA J. INT'L & COMP. L. 421, 421–30 (2004).
36. CRC, *supra* note 9, art. 30.
37. The French reservation refers to Article 2 of the Constitution of the French Republic of October 4, 1958, which among other things proclaims French to be the official language of the Republic. Ratifications and Reservations, *supra* note 2, (Reservations of France). Turkey signified that it would interpret the right to self-determination according to “the letter and spirit” of its Constitution, which in turn emphasizes national solidarity and loyalty to “the nationalism of Atatürk” (art. 2) and proclaims the Turkish State “with its territory and nation” to be an “indivisible entity” (art. 3). *Id.* (Reservations of Turkey).
38. Ratifications and Reservations, *supra* note 2, (Reservations of Oman).
39. CRC, *supra* note 9, art. 12(1).

40. *Id.*, art. 14(1).
41. *Id.*, art. 2(2).
42. *Id.*, art. 2(1).
43. CRC, *supra* note 9, art. 14.
44. Ratifications and Reservations, *supra* note 2, (Reservations of Jordan); *Id.* (Reservations of the Syrian Arab Republic). Egypt initially also entered a reservation to the adoption provisions in the CRC but on July 31, 2003, withdrew all its reservations. *See id.*, note 8.
45. *Id.* (Reservations of the Holy See).
46. *Id.* (Declaration of Kiribati).
47. *Id.* (Declaration of Poland).
48. *Id.* (Declaration of Singapore).
49. *Id.* (Declaration of the Syrian Arab Republic).
50. *Id.* (Declaration of the Netherlands; Declaration of the Syrian Arab Republic).
51. Children’s Act 38 of 2005, §106(1)(k); and *see also id.*, art. 106(1)(f) (emphasizing the need for the child “to remain in the care of his or her parent, family and extended family,” and “to maintain a connection with his or her family, extended family, culture or tradition.”)
52. *Christian Education South Africa v. Minister of Education*, 2000 (4) SA 757, par. 15 (CC) (Sou. Afr).
53. SA Const., *supra* note 3, §15(1).
54. *Id.*, §15(2).
55. *Id.*, §15(2)(c).
56. *Wittman v. Deutscher Schulverein*, 1998 (4) SA 423 (T). The Court held in that case that a school-going child who voluntarily enrolled as a student at the German School in Pretoria while being free to receive her education elsewhere, submitted herself to the rules and regulations of the school, which included mandatory attendance of religious classes in a nondenominational setting.
57. *Home Affairs v. Fourie; Lesbian and Gay v. Minister of Home Affairs*, *supra* note 8, at par. 93 (CC) (Sou. Afr.); and *see also* *Christian Education South Africa*, *supra* note 52, at par. 36 (CC) (Sou. Afr.) (noting that “religion provides support and nurture and a framework for individual and social stability and growth,” and “affects the believer’s view of society and founds the distinction between right and wrong”); *Prince v. President*, 2002 (2) SA 794, par. 149 (CC) (Sou. Afr.) (Sachs, dissenting,

noting that “where there are [religious] practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile”).

58. *Kotze v. Kotze*, 2003 (3) SA 628, 629 (T) (Sou. Afr.).
59. *Id.*, at 631.
60. See Edward Egan Smith, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491 (1991).
61. *Walker v. Superior Court*, 763 P. 2d 852, 858 (1988) (referencing §270 of the Californian Penal Code).
62. *Id.*, at 878.
63. See John Dwight Ingram, *State Interference with Religiously Motivated Decisions on Medical Treatment*, 93 DICK. L. REV. 41, 59 (1988).
64. *Hay v. B*, 2003 (3) SA 492 (W)(Sou. Afr.)
65. See J. Malherbe & A. Govindjee, *A Question of Blood: Constitutional Perspectives on Decision-Making about Medical Treatment of Children of Jehovah's Witnesses*, 73 J. CONTEMP. ROMAN-DUTCH L. 61 (2010) (Sou. Afr.).
66. CRC, *supra* note 9, art. 19.
67. See, for example, in the European Court of Human Rights, *Tyrer v. United Kingdom*, 26 EUR. CT. HUM. RTS. (Series A, No. 26) (1978).
68. See, for example, in the European Court of Human Rights, *Campbell & Cosans v. United Kingdom*, 60 EUR. CT. HUM. RTS.(Series A) (1982) (declining to find a violation of the European Convention because the school officials only threatened the two complainants with corporeal punishment and never actually spanked them); *Costella-Roberts v. United Kingdom*, 247-C EUR. CT. HUM. RTS (1998) (declining to find a violation of the European Convention because no evidence was produced of the punishment's effects on the complainant); and see also in the United States, *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that corporeal punishment in public schools does not violate the Eight Amendment).
69. South African Schools Act 84 of 1996, §10 (Sou. Afr.).
70. *Christian Education v. Minister of Education*, *supra* note 52; and see Johan D. van der Vyver, *Freedom of Religion or Belief and Other Human Rights*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 85, 85–86 (Tore Lindholm, W. Cole Durham Jr. & Bahia G. Tahzib-Lie, eds., 2004).
71. *The Hebrew Bible: Andersen-Forbes Analyzed Text*, Deut. 6:4–8 (Logos Bible Software, 2008).

72. *Christian Education South Africa v. Minister of Education*, 1999 (4) SA 1092 (SE) (Sou. Afr.).
73. *Christian Education South Africa*, *supra* note 52.
74. *State v. Williams*, 1995 (3) SA 632; 1995 (CC).
75. *See* Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State, 1991 (3) SA 76 (NmSC) in regard to Namibia; S. v. F., 1989 (1) SA 460 (Z), and S. v. *Juvenile*, 1990 (4) SA 151 (ZSC) in regard to Zimbabwe. Note, though, that following the latter decision, the legislature of Zimbabwe amended the constitution to provide that it will not be in the competence of courts of law to decide that corporeal punishment is a cruel and inhuman punishment (Constitution of Zimbabwe, §15(1), inserted by Constitution of Zimbabwe Amendment (No. 11) Act, 1990, §5(3)).
76. SA Const., *supra* note 3, §31(2).
77. *Christian Education South Africa*, *supra* note 52, at par. 35.
78. CRC, *supra* note 9, art. 19.
79. General Comment No. 8 (2006) on The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts. 19, 28, par. 2, 37, inter alia), U.N. Doc. CRC/C/GC/8, par. 20 (March 2, 2007).
80. *Id.*, at par. 21.
81. *Id.*, at par. 22.
82. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, E.T.S. 5 (1950), 213 U.N.T.S. 221 [hereinafter European Convention].
83. *A v. United Kingdom*, 90 EUR. CT. HUM. RTS. 2692 (1998).
84. European Convention, *supra* note 81, art. 1.
85. *DeShaney v. Winnebago County Department of Social Service*, 489 U.S. 189 (1989).
86. *Id.*, at 195.
87. *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala., 1871).
88. *See* Don S. Browning, *The United Nations Convention on the Rights of the Child: Should It Be Ratified, and Why?* 20 EMORY INT'L L. REV. 157 (2006); Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles*, 20 EMORY INT'L L. REV. 43 (2006).
89. Senator Barack H. Obama, *Address at the Walden University Presidential Youth Debate* (October 28, 2008), <http://www.youthdebate2008.org/debate-transcript>.



90. U.S. Human Rights Commitments and Pledges, par. 1 in the section on Commitments to Advancing Human Rights and Fundamental Freedoms (April 24, 2009), <http://www.state.gov/documents/organization/122476.pdf>.
91. See Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185 (2006).
92. *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, *supra* note 15; *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, *supra* note 16.
93. As to the distinct categories of human rights, their development, and basic characteristics, see JOHAN D. VAN DER VYVER, LEUVEN LECTURES ON RELIGIOUS INSTITUTIONS, RELIGIOUS COMMUNITIES AND RIGHTS, 91–99 (2004).
94. *Roach & Pinkerton v. United States of America*, Res. No. 3/87, Case No. 9647 (United States), OEA/Ser.I/V/II-71, doc. 9 rev. 1 (1986–87) (Sept. 22, 1987).
95. *Id.*, at par. 63.
96. *Roper v. Simmons*, 543 U.S. 551 (2003).
97. See Johan D. van der Vyver, *International Standards for the Promotion and Protection of Children's Rights: American and South African Dimensions*, 15 BUFFALO HUM. RTS. L. REV., 81 (2009).
98. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).
99. Restatement (Third) of the Foreign Relations Law of the United States, § 111(4); and see *People of Saipen v. United States Dept. of Interior*, 502 F.2d 90, 97 (9<sup>th</sup> Cir., 1974).
100. Restatement (Third) of the Foreign Relations Law of the United States, §§115(3), 302(2), 721; and see *Reid v. Covert*, 354 U.S. 1, 16–17 (1957).
101. Restatement (Third) of the Foreign Relations Law of the United States, §115(2); and see *Whitney v. Robertson*, 124 U.S. 190 (1988); *Fong Yue Tung v. United States*, 169 U.S. 698, 720 (1893); *Cook v. United States*, 288 U.S. 102, 118–19 (1933); *United States v. Dion*, 476 U.S. 743, 738 (1986); *United Shoe v. Duplessis Shoe*, 155 F. 842, 845–46 (1st Cir., 1907); *General Electric v. Robertson*, 21 F.2d 214, 215–16 (D. Md., 1927)
102. Restatement (Third) of the Foreign Relations Law of the United States, §111(1); and see *Nielson v. Johnson*, 279 U.S. 47, 52 (1929); *United States v. Pink*, 315 U.S. 203, 230–31 (1942); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA J. INT'L L. 627, 688 (1986).

103. CRC, *supra* note 9, art. 3(2).
104. *Id.*, art. 3(3).
105. *See*, for example, *Sei Fujii v. State*, 242 P. 2d 617, 621–22 (1952) (holding that the language of Articles 55 and 56 of the U.N. Charter under which Member States “pledge themselves to take joint and separate action” contemplates future action and is therefore not self-executing in the United States); *Medéllen v. Texas*, 128 S. Ct. 1346, 1358 (March 25, 2008) (holding that “undertake to comply” with judgments of the International Court of Justice, stipulated in art. 94 of the U.N. Charter, entails a commitment for future action to comply and therefore does not afford to judgments of the ICJ “immediate legal effect in domestic courts”).
106. Christopher J. Klicka, *The Convention on the Rights of the Child: The Most Dangerous Attack on Parents’ Rights in the History of the United States* (1999), available at [http://familyrights.us/UNCRC/klicka\\_special\\_report\\_1999.html](http://familyrights.us/UNCRC/klicka_special_report_1999.html).
107. L. Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L., 341, 341 (1995).
108. T. Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 111, 119–27; Smolin, *supra* note 31, at 90–107.
109. CRC, *supra* note 9, art. 4.
110. *Id.*
111. *See supra*, the text accompanying note 106.
112. Vienna Convention on the Law of Treaties, art. 19(c), U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (prohibiting reservations that are “incompatible with the object and purpose of the treaty”).
113. CRC, *supra* note 9, art. 2(1).
114. *Id.*, art. 3(2).
115. *Id.*, art. 41.
116. *Id.*