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INTERNATIONAL STANDARDS FOR THE PROMOTION AND PROTECTION OF CHILDREN’S RIGHTS: AMERICAN AND SOUTH AFRICAN DIMENSIONS

Johan D. Van der Vyver

In September 2002, a twelve-year old South African girl1 prevailed on two strangers to kill her grandmother, a business woman of Pietermaritzburg (59 years of age), with whom the girl was staying at the time.2 The two strangers, Sipho Hadebe and Vusumuzi Tshabalala, were convicted and sentenced to 25 years imprisonment for the murder of the grandmother.3 Thereafter the girl was brought to trial.4 She, too, was convicted.5 In sentencing her, the trial judge, Swain, J., considered the options: imprisonment, correctional supervision and home-based supervision.6 He decided on the latter course.7 The trial court postponed sentencing of the accused for 36 months under stringent conditions.8

The Supreme Court of Appeal subsequently decided that by not sentencing her, the trial court was too lenient.9 It consequently imposed a sentence of seven years imprisonment, suspended for five years plus correctional supervision in terms of Section 276(1)(h) of the Criminal Procedure Act 51 of 1977 for a period of 36 months and under much the same conditions as those upon which the suspension of sentencing were made conditional by the trial court.10 For the period of 36 months, the girl was placed under house arrest in the care and custody of her mother.11 She was to continue her secondary school education (at the time of her appearance in

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1 In South African law, the identity of a juvenile offender may not be made public, and since the name of the deceased might indicate who the child perpetrator was, it too should not be published.
3 Id. at 5.
4 Id.
5 Id. at 49.
6 Id. at 304.
7 Id. at 305.
8 Id. at 304-07.
10 Id. at 528.
11 Id.
court, she was 14 years old and in the ninth grade); she was permitted to participate in school activities; she had to attend a program of the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) focused on life skills and therapeutic courses and undergo regular therapy; she was to receive medical and dental treatment as required; and upon attaining the age of 15, she was to render 120 hours per year of community service.\(^\text{12}\) A correctional officer was instructed to visit her at least four times per week at irregular intervals to ensure compliance with the terms of the girl’s confinement and to submit quarterly reports to the Court.\(^\text{13}\)

The Court chose this course of action based on the best-interests-of-the-child criterion, in terms of which emphasis in the sentencing of juvenile offenders must always be on rehabilitation (rather than deterrence or prevention) and their reintegration into society.\(^\text{14}\) The Court also considered international instruments dealing with juvenile justice issues, including the United Nations Convention on the Rights of the Child.\(^\text{15}\) The South African Constitution underscores this approach by providing that every child has the right “not to be detained except as a matter of last resort, in which case . . . the child may be detained for the shortest appropriate period of time,”\(^\text{16}\) and by instructing courts of law to consider international law when interpreting the constitutional Bill of Rights.\(^\text{17}\)

It might be noted that the Supreme Court of Appeal could find no particular extenuating circumstances besides the age factor in this case.\(^\text{18}\) The girl persistently denied the allegations against her and showed no remorse.\(^\text{19}\) She drugged her grandmother before the event by putting sleeping tablets in her tea.\(^\text{20}\) She witnessed the strangling of the deceased\(^\text{21}\) and insisted that the perpetrators also cut the victim’s throat to make sure she was dead.\(^\text{22}\) She invited her 6 year old brother to enter the room where the crime was committed and while the corpse of the dead woman was still there.\(^\text{23}\) She permitted the perpetrators to ransack the deceased’s home and to take

\(^{12}\) Id. at 528-29.

\(^{13}\) Id. at 528.

\(^{14}\) Id. at 524.

\(^{15}\) Kwa Zulu Natal v. P., supra note 9, at 523.

\(^{16}\) S. Afr. Const. 1996 § 28(1)(g).

\(^{17}\) Id. § 39(1)(b).

\(^{18}\) Kwa Zulu Natal v. P., supra note 9, at 525.

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id. at 519.

\(^{23}\) Id. at 525.
valuables from the house as a reward for their deed, and also promised sexual favors to one of the killers. She tried to fake an alibi. There was no clear motive for the murder, except, possibly, that she had been reprimanded by the deceased for regularly running up an enormous telephone bill to call her 20 year old boyfriend. At more or less the same time a similar crime was committed in the United States (hereinafter the “U.S.”).

In November 2001, a 12 year old American boy, Christopher Pittman, shot and killed his grandparents, Joe Pittman (66 years of age) and Joy Pittman (62 years of age). On March 22, 2005, when he was 15 years of age, Christopher was convicted by a jury in Charlestown, South Carolina of the dual murders and sentenced to serve two terms of 30 years in prison on the two charges. Christopher was tried as though he were an adult, and 30 years imprisonment is the minimum sentence prescribed by the law of South Carolina for murder. The Court ordered that the two sentences were to run concurrently. Christopher had to serve the first two years of his sentence in a prison for juveniles, and when he turns 17 he will be transferred to an adult penitentiary.

Closer scrutiny of the facts in the case will reveal that the accused at the time of the crime on a regular basis used an anti-depression drug, called Zoloft, which, if taken by youngsters could, according to expert evidence, create an inclination to commit suicide and a tendency toward violent acts. The jury rejected a plea of “involuntary intoxication” based on this evidence, holding that in view of his conduct at the time of the offence and thereafter the accused was capable of distinguishing between the right and wrong of his conduct. This outcome does not reflect reduced culpability for youthful offenders.

24 Kwa Zulu Natal v. P., supra note 9, at 519.
25 Id.
26 Id.
28 Id. at 153.
29 Id. at 161.
30 Id. at 153.
31 Id.
33 State v. Pittman, 647 S.E.2d at 152.
34 Id. at 170-71.
35 Id.
36 Id. at 154.
Evidence was also produced to show that Christopher had a boisterous life history. He grew up in central Florida in the care of his father after the mother left them (the mother being the daughter of the murdered couple). At one stage he ran away from home, and after an attempted suicide he ended up in a psychiatric hospital. He subsequently moved in with his maternal grandparents (the deceased) in South Carolina. The day before the killings, he was involved in a brawl on the school bus with a fellow learner, provoking a strong reprimand from the grandparents. Except for the last-mentioned bit of evidence, which was considered as a possible motive for the murders, the rest of the background history did not seem to feature in the verdict of, or sentence imposed by, the Court.

Several elements of the American criminal justice system are at odds with international standards. There is the American practice of trying a juvenile offender as an adult. The emphasis in the penal policy of some states is on the nature of the crime and not so much on the culpability of the accused. In addition there is the institution of minimum sentences for juvenile offenders. Juveniles are also treated as adults at a younger age for purposes of detention.

All the states constituting the U.S. make provision for the prosecution of juveniles as though they were adults. Different rules apply in different states as to the offenses for which this can be done, the procedure to be followed in such cases, and the age upon which a juvenile may be prosecuted as an adult. In some states, a juvenile court decides whether a juvenile offender is to be tried as an adult, while this occurs automatically in

37 Id. at 152.
38 Id.
39 State v. Pittman, 647 S.E.2d at 152.
40 Id.
41 Id.
43 Id. at 6.
44 Id. at 8.
46 Griffin, supra note 42, at 1.
47 Id.
other states in cases of certain serious offences. The most common age restriction for trying a juvenile as an adult is 14 years, but in states such as Kansas and Vermont the minimum age is as low as 10 years. At the end of 2007, altogether 23 states, including South Carolina, had no minimum age upon which a juvenile could be transferred for trial from the juvenile court to a regular criminal court. In some states the decision to try a juvenile offender as an adult is almost exclusively based on the nature of the crime and in disregard of the reduced culpability of the accused.

Although accountability is supposed to count for something when it comes to sentencing of juveniles prosecuted as an adult, in actual practice this in many cases seems to be fiction rather than truth. The sentence imposed in the case of Christopher Pittman should not be considered as something out of the ordinary. In dismissing an appeal against that sentence, the Court of General Sessions of South Carolina cited instances where a 13 year old defendant received a sentence of 100 years imprisonment, where a 15 year old defendant was sentenced to life imprisonment without parole, where a defendant between the ages of 14 and 15 received a prison sentence of 91½ years, where a 13 year old received a mandatory life sentence and where a 16 year old defendant received a life sentence without parole plus 60 years. The ages cited here apply in all instances to the convicted persons at the time the crime was committed.

I. SOUTH AFRICAN ADHERENCE TO INTERNATIONAL-LAW STANDARDS

The 1989 Convention on the Rights of the Child (hereinafter “CRC”) places numerous obligations on States Parties to ensure its effective implementation at the municipal levels: recognize the inherent right to

48 Id.
49 National Center for Juvenile Justice, supra note 45.
50 Id.
51 Id.
52 GRIFFIN, supra note 42, at 6.
54 Id. at 2 (citing Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999)).
55 Id. (citing Harris v. Wright, 93 F.3d 581 (9th Cir. 1996)). See also State v. Pilcher, 27085 (La. App. 2 Cir. 5/10/95); 655 So.2d 636.
56 Id. (citing State v. Ira, 2002-NCMA-037, 132 N.M. 8, 43 P.3d 359).
57 Id. (citing State v. Green, 502 S.E.2d 819 (N.C. 1998)).
58 Id. (citing State v. Taylor, 1996 W.L. 580997 (Tenn. Crim. App. 1996)).
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 non-return 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).

The South African Constitution upholds these principles almost to a fault. It 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, shelter, 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 Articles 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. In a recent judgment, the Constitutional Court noted that "the CRC 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.”

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 of 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 re-integration in society of young offenders. This is evidenced by the punishment decided upon in the case of the girl of Pietermaritzburg who, at the age of 12, arranged the murder of her grandmother.

The judgment in that case also bears evidence of the constitutional commitment of the “new South Africa” to abide by international standards of human rights protection. Customary international law is (§232), and self-executing international agreements are (§231(4)), part of the law of the land unless such law is or agreements are inconsistent with the Constitution or an Act of Parliament. The 1996 Constitution furthermore instructs courts of law to prefer an interpretation of legislation that is consistent with international law (§233). When interpreting the constitutional Bill of Rights, courts of law are permitted to consider comparable foreign law (§39(1)(c)), but are compelled to take international law into account (§39(1)(b)). They are evidently precluded from following international law directives that are at odds with constitutionally protected rights.

Reducing the age of majority to 18 years as of 1 July 2007 was an important step toward bringing South African law in line with international standards.

The CRC altogether prohibits capital punishment and life imprisonment for juvenile offenders, and furthermore provides that “detention or

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62 S v. M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) at 245 (S.Afr.).
63 See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 565 (S. Afr.) (stating that “[i]t would be a strange reading of the Constitution that utilised the principles of international human rights law to take away a guaranteed right”).
65 CRC, supra note 59, art. 37(a).
imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”\textsuperscript{66} The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter “The Beijing Rules”) likewise provide that:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
(b) Restrictions on personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
(d) The well-being of the juvenile shall be the guiding factor in consideration of her or his case.\textsuperscript{67}

The Beijing Rules further prohibit capital punishment and corporal punishment for crimes committed by juveniles.\textsuperscript{68} Much the same principles are proclaimed in the 1999 United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.\textsuperscript{69}

These international-law directives featured prominently in the sentencing of the twelve-year old Pietermaritzburg girl. Judge Belinda van Heerden on one occasion summarized as follows the general approach to the sentencing of juvenile offenders based on South African constitutional provisions and international-law principles:

The judicial approach towards the sentencing of juvenile offenders must therefore be reappraised and developed in order to promote an individualised response which is not

\textsuperscript{66} Id. art. 37(b).
\textsuperscript{68} Id. art. 17.2-17.3.
only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the nature and interest of the juvenile offender. If at all possible, the sentencing judicial officer had to structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community.\footnote{S. v. Kwalase 2000 (2) SACR 135 (C) at 139 (S. Afr.).}

Taking the international standards into account (and actually citing them),\footnote{S. v. Nkosi 2002 (1) SACR 135 (W) at 145 (S. Afr.) (citing the CRC and the Beijing Rules).} South African courts have laid down the following more concrete criteria as part of the juvenile criminal justice system of the country:

(i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.

(ii) Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.

(iii) Where imprisonment is considered appropriate it should be for the shortest possible period of time, having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender.

(iv) If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his/her family or community.

(v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.\footnote{Id. at 137.}

Provision is made in South African law for minimum sentences in cases of certain serious offences.\footnote{See Criminal Law Amendment Act 105 of 1997 s. 51(1)-(2).} However, the concerned legislation authorized a court of law to impose a lesser sentence in the case of adult offenders (persons over the age of 18 years at the time the crime was committed) if it was satisfied that "substantial and compelling circumstances exist which justify
the imposition of a lesser sentence.’ Minimum sentences do not apply at all to child offenders under the age of 16 years. As far as child offenders between the ages of 16 and 18 are concerned, the Act provided:

If any court referred to in subsection (1) or (2) [that is, a court under an obligation to impose a minimum sentence] decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

The point of departure prescribed by this provision was clearly that a child offender of between the ages of 16 and 18 at the time the crime was committed should not receive the prescribed minimum sentence. Should the court decide to impose the minimum sentence, it must enter its reasons for imposing the minimum sentence on the record of the proceedings. The Act did not require “substantial and compelling reasons” for not imposing the minimum sentence.

The rather strange wording of the above provision nevertheless gave rise to conflicting interpretations. In the one set of cases, it was decided that the court was generally obliged not to impose a minimum sentence in the case of child offenders between the ages of 16 and 18 years, while other judgments proceeded on the assumption that the applicable legislation generally allowed that the minimum sentences be imposed in such cases.

Applying the sentencing guidelines laid down in the South African Constitution and in international instruments, the Supreme Court of Appeal in a subsequent judgment held that in the case of juvenile offenders of between the ages of 16 and 18, the sentencing Court “is generally free to apply the usual sentencing criteria,” though it should keep in mind that the offences singled out for minimum sentences do deserve severe punish-

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74 Id. s. 51(3)(a).
75 Id. s. 51(6).
76 Id. s. 51(3)(b).
78 See, e.g. Direkteur van Openbare Vervolgings, Transvaal v. Makwetsja 2004 (2) SACR 1 (T) (S. Afr.).
ments. The Court in that case substituted a prison sentence of eight years for a life sentence imposed by the court a quo in a case involving the murder of a defenseless elderly person by his 17 year old neighbor. The judgment seemingly laid to rest controversies that had emerged from the conflicting judgments of different branches of the High Court regarding the interpretation of the statutory provision regulating the imposition of minimum sentences in the case of juvenile offenders of between 16 and 18 years at the time the crime was committed.

But then the legislature intervened. It enacted the Criminal Law Amendment Act of 2007, which prescribed minimum sentences for certain serious crimes in all cases where the perpetrator was over the age of 16 years when the crime was committed, but added that "if the accused person was 16 years or older, but under the age of 18 years, at the time of the commission" of the offence, a maximum of one half of the minimum sentence may be suspended.

This provision was applied in the case of Ntaka v. The State. In that case, a 17 year old boy was convicted of rape. The victim was also 17 years of age and attended the same high school as the perpetrator. The perpetrator and victim lived in the same neighborhood and were friends. The Regional Court, East London, applying the Criminal Procedure Act of 2007, imposed the prescribed minimum sentence for rape of ten years im-

79 Brandt v. S. [2005] 2 All SA 1 (SCA) ¶ 12 (S. Afr.) (stating that a sentencing Court can impose a lesser sentence than the prescribed minimum sentence in the case of a convicted person who was between the ages of 16 and 18 when the crime was committed, if the sentencing Court is satisfied that the prescribed sentence would be unjust and disproportional to the crime, the criminal and the needs of society). See also S. v. Gagw & Another 2006 (1) SACR 547 at 551-52 (S. Afr.); S. v. Malgas 2001 (1) SACR 469 (SCA) ¶ 34 (S. Afr.).


81 Criminal Law Amendment Act 105 of 1997 s. 51(5)(b).


83 Ntaka v The State, supra note 82, ¶ 3.

84 Id.

85 Id.
prisonment, and suspended four years of the sentence. The Supreme Court of Appeal reduced the sentence to five years imprisonment, noting that correctional supervision requested by the Appellant would not be appropriate in the prevailing circumstances. Justice Edwin Cameron (Cachalia, J. concurring) noted that during the period the crime was committed (May of 2004) 50,000 rapes were reported in South Africa, of which 7,000 occurred in the Eastern Cape (the region where the crime took place). He went on to say: “Every rape sentence sends a public message. This option [correctional supervision] would be so soft that its message would be misunderstood. It would enable the courts’ seriousness in seeking to punish and deter rapes to be called into question.”

The constitutionality of this newly enacted provision was recently challenged in the Transvaal Provincial Division of the High Court of South Africa by the Centre for Child Law of the University of Pretoria. Acting Judge Sulet Potterill afforded standing to the Centre to bring the action, even though its application was not based on the actual prosecution of a child offender. Instead, the application was brought in the name of the Centre and in the interests of 16 and 17 year old children potentially at risk of being sentenced to serve a minimum sentence, as well as in the public interest. The Centre for Child Law is a law clinic registered with the Law Society of the Northern Provinces of South Africa, and its main objective is “to establish and promote child law and uphold the rights of children in South Africa and in particular to use the law and litigation as an instrument to advance such interests.” In view of the constitutional provisions proclaiming that every child has the right “not to be detained except as a measure of last resort, in which case . . . the child may be detained for the shortest appropriate period of time,” and that “[a] child’s best interests are of paramount importance in every matter concerning the child,” Acting

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86 Id. ¶ 1.
87 Id. ¶¶ 41-42.
88 Id. ¶ 41.
89 Id. ¶ 40.
91 Id. ¶ 10.
92 Id.
93 Id. ¶ 5.
94 S. Afr. Const. 1996 s. 28(1)(g).
95 Id. s. 28(2).
Judge Potterill decided that the statutory provision prescribing minimum sentences for a child offender who was between the ages of 16 and 18 years when the offence was committed was unconstitutional. In South African constitutional law, all findings of unconstitutionality by a court other than the Constitutional Court is automatically taken on review by the Constitutional Court. The final decision of the Constitutional Court is currently still pending.

South African law is also particularly sensitive to the needs of a child victim or witness in criminal proceedings. Legislation dealing with such matters was recently declared unconstitutional by the Transvaal Provincial Division of the High Court (Judge Eberhardt Bertelsmann presiding). Judge Bertelsmann noted in that case that the child is “an alien in the courtroom,” and went on to say:

It is a historical fact that our entire legal system was designed by adults for adults, including courts and court procedure . . . . Court proceedings are, in colonial tradition, accompanied by pomp and circumstance, unusual clothing, robes and formalistic language that would come across as stilted, artificial, magniloquent and bombastic in any other setting . . . . Children are by their very nature ill-equipped to deal with a confrontational and adversarial setting in which adults dictate the subject-matter, the nature and the style of the conversation.

The problem confronting the Court was in essence that a Section in the Criminal Procedure Act providing for the appointment of intermediaries for witnesses under the age of 18 years granted discretion to the trial court to appoint or not to appoint an intermediary when a child witness was to be called to testify in a criminal trial. The threshold provision of the Section required that the child victim should be exposed to “undue” stress and suffering before the services of an intermediary “may” be considered. The Act
further contemplated that the Court might refuse to appoint an intermediary even in the case of a very young child victim about to be called as a complainant witness.\textsuperscript{102} In pronouncing these provisions unconstitutional, Judge Bertelsmann said:

\begin{quote}
It is . . . difficult to fathom why the legislature should have seen fit to demand that the child victim should be exposed to ‘undue’ stress and suffering before the services of an intermediary may be considered. This threshold provision places a limitation upon the best interests of the child that is neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. The child is entitled as of right to a procedure that eliminates as much as possible of the anguish that accompanies the necessity of having to relive the horror of abuse, violation, rape, assault or deprivation that the child experienced when he or she became a victim or a witness. To demand a extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable.\textsuperscript{103}
\end{quote}

The court reformulated the Section — as courts of law may do in South Africa when declaring a statutory provision unconstitutional — to make the appointment of a competent intermediary mandatory in all cases where “any witness under the biological . . . age of eighteen years is to testify, . . . unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of the proceedings,” and authorizing the court to appoint a competent intermediary for “a witness under the mental age of eighteen years.”\textsuperscript{104} The provision affording to a court the power to refuse to appoint an intermediary for a child victim about to be called as a complainant witness was simply declared unconstitutional (without any substitute formulation).\textsuperscript{105}

Other provisions of the Criminal Procedure Act declared unconstitutional include: ones distinguishing between cases involving a child accused, and a child victim or witness, in regard to the discretion of the court

\textsuperscript{102} Id. s. 170A(7) (providing that the Court must provide reasons for refusing to order the appointment of an intermediary in respect of a child complainant below the age of 14 years).

\textsuperscript{103} S. v. Mokoena 2008 (5) S.A. at 599.

\textsuperscript{104} Id. at 613.

\textsuperscript{105} Id. at 599.
to order that proceedings be held behind closed doors;\textsuperscript{106} one that makes provision for witnesses or an accused to give evidence by means of closed circuit television or similar electronic media;\textsuperscript{107} and one relating to the taking of the oath or an affirmation to tell the truth and which in effect prevented children who cannot convey an appreciation of the abstract concepts of truth and falsehood to the court from testifying.\textsuperscript{108} Judge Bertelsmann stated in the latter context that the provision in question "does not take into account that a witness who, for whatever reason, may not be able to understand or to verbalise an understanding of the abstract intellectual concepts of truth or falsehood, may nonetheless be perfectly able to convey the experience that has led to the witness becoming involved in the criminal trial."\textsuperscript{109}

The judgment of Bertelsmann, J. was not confirmed by the Constitutional Court.\textsuperscript{110} The Constitutional Court decided in essence that the provisions of the law relating to child witnesses were not an issue that emanated from the facts in the case before the Court.\textsuperscript{111} The Court nevertheless decided to consider the constitutionality of the provisions concerned, because merely deciding that the High Court overstepped its authority by considering their constitutionality could send the wrong message.\textsuperscript{112} It decided on the merits that the statutory provisions condemned by

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\textsuperscript{106} \textit{Id.} at 604, 613-14. The Court substituted "the court must" for "the court may" and deleted a phrase making a ruling by the Court subject to a request of the parent of guardian.
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\textsuperscript{107} \textit{Id.} at 605. The Act authorized the court to refuse the giving of evidence by children other than through electronic means if such means were readily available. The Act compelled the court to give reasons to refuse electronic evidence if the child "complainant" was below the age of 14. The Court now ordered that reference to a person below the age of 14 be deleted, as well as the reference to "complainant," thereby compelling the court to give reasons in all instances for refusing an application to permit a vulnerable child to testify through close circuit television or other similar means.
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\textsuperscript{108} \textit{Id.} at 606.
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\textsuperscript{109} S. v. Mokoena 2008 (5) S.A. at 607.
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\textsuperscript{110} See Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development & Others, Case No. CCT 36/08 [2009] ZACC 8 (April 1, 2009) [hereinafter "Director of Public Prosecutions"].
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\textsuperscript{111} \textit{Id.} ¶ 40 (holding that "the constitutional issue sought to be raised must arise on the facts of the case before the court"); \textit{id.} ¶¶ 48-49 (holding that it was inappropriate for the High Court to raise constitutional issues not dictated by the facts in the case); \textit{id.} ¶¶ 55-57 (noting that certain provisions declared unconstitutional by the High Court were still in bill form before Parliament and dealing with them prematurely implicated the separation of powers).
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\textsuperscript{112} \textit{Id.} ¶¶ 64-65.
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the High Court were not unconstitutional. The essence of the Constitutional Court's reasoning was that affording to a judicial officer the discretion to appoint an intermediary for a child witness, and distinguishing between a child complainant and a child witness, did not violate the best interest of the child criterion stipulated by international law and embodied in the South African Constitution.113 “In a matter involving a child,” the Court decided, “the conferral of judicial discretion enables the courts, on a case-by-case basis, to determine whether the services of an intermediary are required.”114 The Court, having noted that “[t]he child complainant and the child accused are not similarly situated,”115 rejected the supposition that differentiating between a child accused and child complainants or child witnesses was irrational.116 The Constitutional Court was concerned, however, about evidence presented that indicated a lack of facilities in some jurisdictions to properly train or have available intermediaries for child witnesses, particularly in cases involving children who were complainants of sexual offences.117 The Court consequently instructed the Director-General of the Department of Justice and Constitutional Development to furnish the Court with certain information, for example how many intermediaries each Regional Court requires to meet its needs, what steps are being taken to ensure that each Regional Court has the number of intermediaries necessary to meet its needs, the availability of separate rooms from which a child witness may testify, the available closed circuit facilities and one-way mirrors, and the steps being taken to provide such facilities where they do not exist.118 The information must be provided before July 1, 2009.119

II. AMERICAN PERCEPTIONS AND IMPLEMENTATION OF INTERNATIONAL LAW

The American criminal justice system deviates in many respects from principles that have come to be accepted as sentencing directives in enlightened systems of law. In the U.S., exclusive emphasis is placed, for

113 Id. ¶ 129.
114 Director of Public Prosecutions, ¶ 124.
115 Id. ¶ 142.
116 Id. ¶ 151.
117 Id. ¶¶ 200-05.
118 Id. ¶¶ 206, 208(c), 209 (e).
119 Id. ¶ 209(e).
sentencing purposes, on the gravity of the crime.\footnote{See, e.g., Weems v. U.S., 217 U.S. 349, 367 (1910) (holding that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offence").} In \textit{Solem v. Helms}, it was decided that proportionality of a punishment to the offence is determined with three criteria in mind: "(i) the gravity of the offence and the harshness of the penalty; (ii) the sentences imposed on other criminals [for offences of the same gravity] in the same jurisdiction; and (iii) the sentences imposed for the same crime in other jurisdictions."\footnote{463 U.S. 277, 292 (1983).} The essence of the penal policy in \textit{Solem} was subsequently overruled in \textit{Harmelin v. Michigan}, where Justice Scalia decided that "the Eighth Amendment contains no proportionality guarantee";\footnote{501 U.S. 957, 965 (1991).} that taking into account mitigating factors for sentencing purposes "has no support in the text and history of the Eighth Amendment";\footnote{\textit{Id.} at 994.} and "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."\footnote{\textit{Id.} at 994-95.} Individualization of sentencing to fit the crime, the criminal, and the interests of society—which have become the international standard of penology—is thus not part of the American sentencing philosophy. In addition, as noted in the introductory paragraphs of this essay, prosecuting and punishing juveniles as adults are commonplace in the U.S.

Some state courts seem more inclined than others to consider the culpability of juvenile offenders when it comes to sentencing. In \textit{Workman v. Commonwealth}, the Kentucky Supreme Court held that life imprisonment without the option of parole of two 14 year old children convicted of rape "shocks the general conscience of society today and is intolerable to fundamental fairness."\footnote{429 S.W.2d 374, 378 (Ky. Ct. App. 1968).} In \textit{Naovarath v. State}, the Nevada Supreme Court similarly condemned a life sentence imposed on a 13 year old child convicted of murder, holding that "[c]hildren are and should be judged by different standards from those imposed upon mature adults."\footnote{779 P.2d 944, 946-47 (Nev. 1989).} In \textit{State v. Massey}, the Washington State Court of Appeal, by contrast, confirmed the life sentence of a 13-year-old convicted of first degree murder, holding that in determining "whether in view of contemporary standards of elementary decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness," the
convicted person’s age is not an element to be considered; the inquiry must
instead be confined to “a balance between the crime and the sentence im-
posed.” The Court confirmed that “there is no cause to create a distinc-
tion between a juvenile and an adult who are sentenced to life without
parole for first degree aggravated murder.”

The U.S. has been condemned on many occasions for not complying
with its international commitments, ranging from acts of aggression to
its failure, almost as a matter of course, to comply with its obligations under
the Vienna Convention on Consular Relations to inform an alien arrested or
detained in the U.S. on criminal charges of his or her right to contact the
consulate of the country of his or her nationality. Its juvenile criminal
justice system has also been at issue many times before international tribu-

On December 16, 1977, Roach was sentenced to death by a crimi-
nal court of South Carolina for the rape and murder of a 14 year old girl and
the murder of her 17 year old boyfriend. At more or less the same time,
Pinkerton was sentenced to death in Texas on charges of murder and at-
t tempted rape. Roach and Pinkerton were both 17 years old at the time
the crimes were committed. Complaints were lodged on their behalf
before the Inter-American Commission of Human Rights, based on the sub-
mission that the execution of persons who were juveniles at the time the
offence was committed violated the American Declaration of the Rights
and Duties of Man of 1948.

The Commission concluded at the time that there was a rule of
international law with the force of jus cogens applying to Member States of
the Organization of American States which prohibits the execution of chil-
dren. However, the Commission was convinced by the U.S. “that there
does not now exist a norm of customary international law establishing 18 to

128 Id.
129 Johan D. van der Vyver, American Foreign Policy: Prejudices and Responsibil-
ities of the Sole Surviving Superpower in the World, 2005 J. SOU. AFR. L 435, 435-
130 Roach & Pinkerton v. U.S., Case 9647, Inter-Am. C.H.R., Report No. 3/87,
OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1986-87) [hereinafter “Roach & Pinkerton”].
131 Id. ¶ 3.
132 Id. ¶ 4.
133 Id. ¶¶ 23, 30.
134 Id. ¶ 6.
135 Id. ¶ 56.
be the minimum age for imposition of the death penalty,” though the Commission was of the opinion that a rule to that effect was emerging.\(^\text{136}\)

However, the Commission went on to hold that the arrangements in the U.S. as to juvenile executions violated the norm of equal justice laid down in Article II of the Declaration.\(^\text{137}\) The different arrangements that applied in the states of the U.S. in regard to the death penalty were the basis of this finding.\(^\text{138}\) Those arrangements made imposition of the death penalty for the same crime dependent on the place where the crime was committed, with perhaps only the side of a river where the act took place as the fortuitous divide between a penalty of life or death. The Commission summarized its views as follows:

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 Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.\(^\text{139}\)

Roach and Pinkerton were executed while their case was pending before the Inter-American Commission of Human Rights.\(^\text{140}\) That, in the opinion of the Commission, constituted a violation of the right of the applicants to life and to equal protection of the laws.\(^\text{141}\)

Since the holding in *Roach and Pinkerton* was handed down in 1987, two things relevant to that holding changed. First, the Inter-Ameri-
can Commission of Human Rights subsequently decided that a rule of customary international law had in the mean time been established pin-pointing the age upon which a person may be exposed to the death penalty at 18 years; and second, in the case of *Roper v. Simmons*, the U.S. Supreme Court not so long ago decided with a slight majority of 5 to 4 that sentencing a person to death for a crime committed while the perpetrator was under the age of 18 constituted a cruel and unusual punishment and was therefore unconstitutional.

The U.S. is one of only two countries in the world that have not ratified the CRC, the other one being Somalia. Since the early 1990’s Somalia has been in a state of anarchy and simply does not have a government to ratify the CRC. The U.S. is therefore in this regard in a sense the odd man out.

Human rights protagonists from time to time attempt to persuade U.S. officials to support ratification of the CRC. The judgment in *Roper v. Simmons* has afforded new impetus to those attempts. President Elect Barack Obama (as he then was) has stated that the failure of the U.S. to ratify the CRC is “embarrassing” and promised to review the matter.

The *Roper* decision indeed represents a giant step forward in bringing the American criminal justice system up to international standards but does not resolve the equal protection/non-discrimination dilemma that still remains an obstacle to ratification by the U.S. of the CRC. The great diversity at the states level of rules regulating the prosecution of juveniles for serious crimes as though they were adults may be cited in this regard.

The problem confronting the U.S. derives from the fact that its federal Bill of Rights has been confined to the protection of civil and political rights only, to the exclusion of the most fundamental natural rights of the individual, such as the right to life and to human dignity. In the U.S. the right of parents to withhold life-sustaining medication or therapeutic treat-

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144 Id. at 576.
ment from a child in their care has had a checkered history.\textsuperscript{147} 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 their care,\textsuperscript{148} 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.\textsuperscript{149} 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 death of the child.\textsuperscript{150} In South Africa, on the other hand, the High Court as upper guardian of all children can intervene by sanctioning a feasible medical procedure while the life of the child can still be saved.\textsuperscript{151} In South Africa, the constitutionally protected right to life of the child will in all circumstances trump the claim to the exercise of religious liberty of the parent.

The American federal system and, more precisely, the sovereign powers of the states, are commonly held out as an excuse for inequalities in the protection of the law afforded in regard to some of the most fundamental human rights. However, in international law the U.S. constitutes a single political entity and it is consequently required to uphold the customary-law norm of equal protection in regard to all fundamental rights and freedoms within its entire territorial domain. The U.S. Supreme Court indeed possesses wide powers to read those fundamental rights and freedoms into the general language of the Bill of Rights — as most recently evidenced by the judgment in \textit{Roper}. However, the absence of equal protection of the laws in the American juvenile criminal justice system, which clearly constitutes an insurmountable obstacle preventing ratification by the U.S. of the CRC, cannot be resolved by either the federal legislature or the U.S. Supreme Court.

Federal legislation that seeks to regulate matters which, under the American Constitution have been reserved for the states, including the juvenile criminal justice system, will without question be unconstitutional.\textsuperscript{152} Punishments prescribed by the states can only be declared unconstitutional


\textsuperscript{149} \textit{Id.} at 878.


\textsuperscript{151} See Hay v. B & Others 2003 (3) S.A. 492 (W) at 495 (S. Afr.).

\textsuperscript{152} See U.S. CONST. amend. X.
if they are found to be cruel and unusual within the meaning of the Eighth Amendment. The death penalty is always a cruel punishment; the question is whether that punishment for juveniles is unusual.

_Roper_ has again confirmed that "unusual punishments" do not denote those that are unusual in the world, or the Western world, but are confined to punishments found to be unusual within the U.S. The majority opinion in _Roper_ was therefore based on the premise that a sufficient number of states had abolished the death penalty in instances of juvenile offenders so as to render juvenile executions "unusual" and therefore unconstitutional. The minority judged that the states within the U.S. that still sanctioned juvenile executions were enough in number to retain the death penalty for juvenile offenders in the concerned states. The problem that will confront the U.S. Supreme Court if it were to take the prosecution of juveniles as adults under advisement is the simple fact that every single state within the U.S. currently still upholds that practice. If that practice is not "unusual" within the U.S., it does not violate the Eighth Amendment and can therefore not be declared unconstitutional.

One must consequently conclude that the U.S. cannot ratify the CRC. The U.S. as a matter of course always add a so-called "federalism clause" to its instruments of ratification of human rights treaties, thereby excluding the validity for the U.S. of any provision in the treaty dealing with matters which under the American Constitution falls within the exclusive jurisdiction of the states. In the present context, a federalism clause would not be advisable, or indeed feasible. The provision in the CRC demanding of States Parties to secure the rights enumerated in it "to each child within their jurisdiction without discrimination of any kind" is so fundamental to the entire Convention that a reservation seeking to exclude this demand would most certainly be "incompatible with the object and purpose" of the CRC and thus fall foul of Article 19(1) of the _Vienna Convention on the Law of Treaties_.

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153 _See_ U.S. _CONST._ amend. VIII.
154 543 U.S. at 564-65.
155 _Id._ at 595-96 (O'Connor, J., dissenting); _id._ at 607-13 (Scalia, J., dissenting).
157 CRC, _supra_ note 59, art. 2(1).
III. The South African Dilemma: Imposing Human Rights Principles from the Top Down

As far as international standards for the promotion and protection of children's rights are concerned, South Africa can walk tall. It ratified the CRC on 16 July 1995, and did so without any reservations.\textsuperscript{159} It might be noted as a point of interest that certain other countries that uphold plural legal arrangements for different population groups have been more circumspect in this regard. Canada, for example, entered a reservation to a provision of the CRC dealing with adoption (art. 21) to fully accommodate “customary forms of care among aboriginal peoples of Canada,” and in a statement of understanding interpreted its obligation to take legislative, administrative and other measures to implement the rights enunciated in the CRC (art. 4) to be conditioned by the right to self-determination of ethnic, religious or linguistic minorities “or persons of indigenous origin” as regulated in Article 30 of the CRC.\textsuperscript{160} Pluralistic arrangements to accommodate indigenous laws and practices of Aborigines probably also prompted a reservation by New Zealand “to continue to distinguish as it considers appropriate in its laws and practice between persons according to the nature of their authority to be in New Zealand.”\textsuperscript{161}

The South African Constitution does protect the right to self-determination of ethnic, religious and linguistic communities,\textsuperscript{162} and through its unqualified ratification of the CRC, its Government has contracted an international obligation to also uphold the right to self-determination of children. Article 30 of the Convention proclaims and defines this right in compelling terms:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such 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.\textsuperscript{163}

\textsuperscript{162} S. AFR. CONST. 1996 §31, 235.
\textsuperscript{163} CRC, supra note 59, art. 30.
The Children's Act 38 of 2005 sought to uphold this right vesting in a child by proclaiming that "[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration." Even before this provision entered into force on July 1, 2007, the right of parents to dictate to their children the religion they should adhere to upon reaching a stage in their development when they can decide for themselves has been placed under constraint. A case in point is one where the Transvaal Provincial Division of the High Court refused to make a provision in a divorce settlement agreement an order of Court in terms of which both parties undertook to educate their minor child (then three years of age) in the Apostolic Church and to see to it that the child fully participate in all religious activities of that Church. Acting Judge Fabricious stated in that case that forcing a child by an order of the parents or by an order of Court to partake fully in stipulated religious activities would not uphold the right of the child "to his full development," which the Judge held was "a right . . . implicit in the Constitution."

The right to self-determination of children must not be taken out of context. It is important to emphasize that South African law places a high premium on the family environment. The Constitutional Court on one occasion observed: "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."

The new Children's Act also emphasizes "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." And this, again, is in conformity with international-law standards. The *International 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. The *International Covenant on Economic, Social and Cultural Rights* in similar

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164 Children’s Act 38 of 2005, s. 10.
165 Kotze v. Kotze 2003 (3) S.A. 628 (T) (S. Afr.).
166 Id. at 631.
167 Christian Education, South Africa v. Minister of Education 2000 (4) S.A. 757 (CC) at 768 (S. Afr.).
168 Children’s Act 38 of 2005 s. 7(1)(k).
vein promises "the widest possible protection and assistance . . . to the fam-
ily, which is the natural and fundamental group unit in society, particularly . . . while it is responsible for the care and education of dependent chil-
dren." The United Nations Guidelines for the Prevention of Juvenile De-
linquency (The Riyadh Guidelines of 1990) proclaim that "[e]very society 
should place a high priority on the needs and well-being of the family and 
all its members," and call on governments to "establish policies that are 
conducive to the bringing up of children in stable and settled family envi-
nvironments." The Declaration on the Elimination of All Forms of Discrim-
ination Based on Religion or Belief, in dealing with religious rights of a 
child, provides that the parents or guardians of a child have the right to 
organize the family life in accordance with their religion or belief. It 
goes on to provide that the child may have access to education in matters of 
religion or belief in accordance with the wishes of the parents or guardians 
and may not be compelled to receive teaching in religion or belief which 
goes against the wishes of the parents or guardians. If a child is no 
longer in the care of his or her parents or legal guardians, their expressed 
wishes in matters of religion or belief are to be taken into account. The 
practices of religion or belief in which the child is brought up must, under 
no circumstances, be detrimental to his or her physical or mental health or 
to his or her full development.

The Children's Act mostly deals negatively with the right to self-
determination of the child. It seeks to prohibit, or at least to place con-
straints upon, cultural practices that violate basic human rights and funda-
mental freedoms of the child. It provides in general that "[e]very child has 
the right not to be subjected to social, cultural and religious practices which 
are detrimental to his or her well-being," and then goes on to address 
particular unbecoming practices, such as female genital mutilation, male

170 International Covenant on Economic, Social and Cultural Rights, art. 10(1), 
16, 1966).
171 United Nations Guidelines for the Prevention of Juvenile Delinquency, art. 11, 
172 Id. art. 13.
173 Declaration on the Elimination of All Forms of Intolerance and of Discrimina-
Based on Religion or Belief, art. 5(1), G.A. Res. 36/55, U.N. GAOR, 36th 
174 Id. art. 5(2).
175 Id. art. 5(4).
176 Id. art. 5(5).
177 Children's Act 38 of 2005 s. 12(1).
circumcision, and the proof of virginity. Genital mutilation is altogether prohibited.\textsuperscript{178}

Male circumcision, based on African (not Jewish) customs, of a child under the age of 16 is unlawful\textsuperscript{179} and requires the consent of boys of 16 years or older.\textsuperscript{180} Every male child may in fact refuse to undergo circumcision, depending on the age, maturity and stage of development of the child.\textsuperscript{181}

Virginity testing of a girl under the age of 16 years is likewise prohibited.\textsuperscript{182} Upon reaching the age of 16, virginity testing may only be performed with the girl’s consent.\textsuperscript{183} The results of virginity testing may not be disclosed without the child’s permission,\textsuperscript{184} and the body of the child who has undergone virginity testing may not be marked.\textsuperscript{185}

The provisions pertinent to social, cultural and religious practices affecting the well-being of a child have not yet entered into force. For that there are probably two quite different but related reasons.

The first possible reason derives from recent judgments of the Constitutional Court that rendered the constitutionality of legislation dealing with matters of general public interest dependent on adequate consultation with the people affected by, or with a special interest in, such legislation.\textsuperscript{186} This is important. In virtue of those decisions South Africa is not only a representative democracy but has also been converted into a consultative democracy. To the best of my knowledge, this state of affairs has made the constitutional system of South Africa unique in the entire world.

The consultative component of the South African constitutional system does not mean that the legislature is bound to give effect to public preferences. Nor would refusal of the legislature to uphold popular perceptions pertinent to constitutionally protected values violate the democracy prong of the constitutional system. Democracy has to do with the designation of persons in authority and is not implicated by \textit{bona fide} efforts of the repositories of political power to uphold a constitutionally protected value

\textsuperscript{178} Id. s. 12(3).
\textsuperscript{179} Id. s. 12(8).
\textsuperscript{180} Id. s. 12(9).
\textsuperscript{181} Id. s. 12(10).
\textsuperscript{182} Id. s. 12(4).
\textsuperscript{183} Children’s Act 38 of 2005 s. 12(5).
\textsuperscript{184} Id. s. 12(6).
\textsuperscript{185} Id. s. 12(7).
The people must be consulted, their views must be considered, but in the end the constitutional Bill of Rights remains the supreme law of the land. As stated by President Arthur Chaskalson in the death penalty case: “The question before us . . . is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the constitution allows the sentence.”

In this regard South African constitutional law also differs from its American counterpart. The American Constitution was proclaimed in the name of “We, the people . . .”, and the U.S. Supreme Court has taken this to authorize the interpretation and re-interpretations of the constitutional Bill of Rights to coincide with the will of the people. Upholding a juvenile criminal justice system which by contemporary standards is, to say the least, absolutely barbaric, may be justified in the U.S. because that is what the people want. The U.S. is probably unique in the world in that penal policy is there an election campaign issue and is therefore decisively influenced by largely uninformed, highly prejudiced and morally debased public pressures. Election campaigns of the 1990’s were particularly prone to “hard on crime” sentiments, including the deterrence fiction of harsh punishments in the case of juvenile offenders. And, as everyone probably knows, when people are crying out for justice, they are not really calling for justice; they are demanding revenge!

The second probable reason why provisions in the Children’s Act dealing with social, cultural and religious practices have been kept on ice is exactly because of certain discrepancies between the lofty constitutional principles embodied in the Bill of Rights and actual perceptions and practices of sections of the South African community. Those discrepancies are evident at three levels: (a) a certain persistent skepticism of sections of the supporters of the racist oligarchy of yesteryear whose privileged status in apartheid South Africa was at odds with, and challenged by, the human rights ideology; (b) the remnants of past discrimination in the facilities, services and support available to past victims of racial discrimination, for ex-

187 State v. Makwanyane, 1995 (3) S.A. 391 (CC) ¶ 305, 322 (S. Afr.)
188 State v. Makwanyane, supra note 187, ¶ 87.
189 U.S. CONST. Preamble.
190 See, e.g., Francis A. Allen, Due Process and State Criminal Procedures: Another Look, 48 NW. UNIV. L. REV. 16, 31 (1953) (noting that “[t]he tendency of the Court in the long run to conform to the major movements of public opinion has frequently been noted”).
ample in the area of public education; and (c) cultural practices of certain indigenous communities that are incompatible with the human rights ideology of our time. I shall confine my concluding comments to the latter contingency of the South African status quo.

The systems of human rights protection in the world today can, from a certain perspective, be divided into two main categories: Those that have grown from the bottom up, and those that have imposed human rights values on the political community from the top down.

In countries belonging to the former category, the values embodied in a Bill of Rights were based upon, and kept track with, an existing and evolving public ethos. Drafters and law-creating agencies simply endorsed moral perceptions entertained by a cross-section of the peoples comprising the nation. The American system of human rights protection may be cited as an example of this category.

South Africa, on the other hand, belongs to that category of political communities where Bill of Rights decrees have been imposed from the top down. That is to say, the rights and freedoms protected by the Constitution have been dictated by internationally recognized norms of right and wrong, which are in many instances not in conformity with the moral perceptions and customary practices of large sections of the South African population. Some of the laws that have been drafted to implement the principles of human rights from time to time provoke strong voices of protest from groups within the country whose age-old customs may fall prey to the concerned legal reform measures. The lives they live and the customs they observe are in many instances far removed from the nice-sounding ideologies written into the Constitution and specificities reflected in judgments of the courts. In one of the early judgments of the Constitutional Court, Justice Mokgoro referred to the "delicate and complex" task of accommodating African customary law to the values embodied in the Bill of Rights, and noted that "[t]his harmonization will demand a great deal of judicious care and sensitivity."

Effective implementation of the human-rights-based laws and judgments within the entire country will in the final analysis be conditioned by the cultivation of a human-rights ethos as a stronghold of all peoples and in all tribal communities of the South African "rainbow nation". In this respect South Africa still has many more miles to run.

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193 Id.