

THE IMPLEMENTATION OF THE RIGHTS OF THE CHILD IN THE UNITED STATES

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Abstrak

Di awal abad ke 20, Pengadilan Amerika Serikat mulia meberikan beberapa bentuk perlindungan hukum kepada anak-anak. Sejak tahun 1960-an, anak mulai memperoleh hak untuk berpartisipasi. Trend terhadap pengakuan hak anak di tahun 1990-an sebaliknya meningkatkan jumlah kejahatan anak. Dengan peningkatan jumlah kejahatan anak di tahun 1990-an, orang tua merasa perlu untuk lebih mengawasi cara membesarkan anak agar menjadi warga masyarakat yang bermoral dan patuh terhadap hukum. Trend dalam pengasuhan anak bertumbuh dari gerakan nilai-nilai keluarga di tahun 1980-an. Amerika Serikat yang belum meratifikasi Konvensi Hak Anak cukup membingungkan, khususnya dikarenakan peranan penting delegasinya pada Perserikatan Bangsa-Bangsa (PBB) dalam menyusun Konvensi Anak di tahun 1980-an. Namun demikian, AS telah menandatangani Konvensi Anak di tahun 1995 dan meratifikasi Protokol Tambahan tentang Keterlibatan Anaka Dalam Konflik Bersenjata. Sejak penandatanganan Konvensi Hak Anak di tahun 1995, beberapa negara bagian mengakui perlunya perubahan terhadap perlindungan hak orang dalam membesarkan anak mereka. Pada tahun 1996, Colorado merupakan negara bagian pertama yang merubah Undang-Undang Dasar Negara Bagiannya. Pemilih menolak perubahan tersebut, politisi konservatif melanjutkan perlawanan terhadap Konvensi Hak Anak. Peter Hoekstra memperkenalkan perubahan hak orang tua untuk Konstitusi AS pada musim panas tahun 2008. Pada tahun 2009, Hoekstra kembali mengusulkan perubahan konstitusi yang mendukung hak orang tua kepada Penyokong Senat dengan Jim DeMint. Konvensi Anak merupakan perjanjian internasional terkait hak asasi manusia yang digolongkan sebagai “not self-executing”, oleh karena itu meskipun Konvensi Anak diratifikasi, tiap negara bagian dapat mengusulkan perubahan terhadap konstitusi mereka yang memberikan hak orang tua yang diinginkan.

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Kata Kunci : Amerika Serikat, Perlindungan Anak, Konvensi Hak Anak

Abstract

Early 20th century- U.S. courts began to give children some form of legal protection, most notably in custody hearings. From the 1960s, children began to earn participatory rights of their own. The trend for recognizing children's rights reversed in the 1990s amid an increase in juvenile crime. With a rise in juvenile crime in the 1990s, parents felt the need to be more in control of a child's upbringing in order to raise more morally-sound and law-abiding citizens. This trend in parenting grew from the family values movement of the 1980s. The U.S. has yet to ratify the Convention on the Rights of the Child (CRC) is quite perplexing, particularly in light of the crucial role its UN delegates played in structuring the CRC in the 1980s. The U.S. has, however, signed the CRC in 1995 and ratified the Optional Protocols on the involvement of children in armed conflict and the Optional Protocol on the sale of children. Since the sign of the CRC in 1995, several states recognized the need for such an amendment protecting the rights of parents to raise their child as they see fit. In 1996, Colorado was the first state to propose an amendment to its state constitution. While voters rejected the amendment, socially conservative politicians continued their fight against the CRC. Peter Hoekstra introduced a parental rights amendment for the U.S. Constitution in the summer of 2008. In 2009 Hoekstra again proposed a constitutional amendment supporting the rights of parents with Senate co-sponsor Jim DeMint. The CRC is a human rights treaty, which is classified as “not self-executing, therefore even if the CRC is ratified, individual states can propose amendments to their state constitution that will grant their desired parental right.

Keywords : The United States of America, Ratification, The Convention on The Rights of The Child

A. Background

After a 10-year deliberation, the Convention on the Rights of the Child (CRC), became the first international legal instrument to acknowledge the child as an individual, extend human rights to children by establishing standards in health care, education, and legal, civil and social services; “[t]he

treaty has inspired changes in laws to better protect children, altered the way international organizations see their work for children, and supported an agenda to better protect children in situations of armed conflict.”¹ To date, the CRC is the most ratified convention; as of November 2005, 192 states and non-state organizations, with the notable exceptions of the United States and Somalia, have ratified the CRC.

The fact that the U.S. has yet to ratify the CRC is quite perplexing, particularly in light of the crucial role its UN delegates played in structuring the CRC in the 1980s (the United States has, however, signed the CRC in 1995 and ratified the Optional Protocols on the involvement of children in armed conflict and the Optional Protocol on the sale of children). While historically the United States has been reluctant to sign treaties that it feels will impair the sovereignty of the federal government, ratification of the CRC stalled in the 1990s with the rise of the parental rights movement.

This movement, in turn, has been taken up by socially conservative Christians and those who support the restoration of "family values" to American citizens, starting with the child. In the United States, the emphasis is not on the rights of the child, but rather those of the parent, and concerns that the government is overstepping its boundaries by entering the most sacred realm- the home. This paper will explore the historical background of child and parental rights in the United States and will demonstrate that it is the very nature of the U.S. Constitution and structure of the federal government that is preventing the CRC from being ratified.

B. Discussion

Mary Ann Mason, an expert on public policy issues concerning children's rights and the history of the American family and of childhood, offers a non-traditional approach to the CRC argument by tracing the historical role of children in United States history, where, since the colonial period (late 17th century), the child was seen as the property of his or her father or the beneficiary of charity: “The history of our treatment of children...reveals a relatively young country in which... A large percentage of children were slaves and indentured servants, controlled by their masters, and all children

¹ Seymour, Dan. "20 Years of the CRC." UNICEF. 30 Jun. 2009.

<<http://www.unicef.org/rightsite/237.htm>>.

were firmly under the control of their fathers...The concept of 'children's rights' was certainly unknown."² Historically, children's rights, in the broadest sense, focused on protection from abuse and it was only until the early 20th century that U.S. courts began to give children some form of legal protection, most notably in the case of custody hearings where the child's "best interest," a key concept in the CRC, was introduced.

However, it was not until the Civil Rights Movement of the 1960s that children gained any participatory rights of their own, and the trend for recognizing children's rights reversed in the 1990s amid an increase in juvenile crime, creating the sense of urgency that parents needed to be more in control of a child's upbringing in order to raise more morally-sound and law abiding citizens. This trend in parenting developed from the family values movement of the 1980s, adopted by Republicans to attract social conservatives, and is the backbone of the inflammatory state of U.S. politics today.

The phrase "family values" is used by social conservatives to invoke the image of a nuclear family deeply rooted in Christian values. Common themes in family value campaigns include opposition to abortion, sex education, homosexuality, and same-sex marriage. "An alleged decline in values...has been blamed for a myriad of social problems, including unemployment, poor health, school drop-out rates and an increase in juvenile crime...Many people have concluded that the logical solution to the problem is the reunification of the traditional family structure...recent years have seen an increase in governmental programs and policy proposals at both the local and national levels aimed at bolstering the traditional family structure, or otherwise encouraging what are presumed to be 'family values.'"³ During the Clinton Administration of the 1990s, "unwarranted and unacceptable intrusion by public school systems and other government bureaucracies into family life and childrearing"⁴ resulted in the resurgence of the family values campaign in 2000 with the election of George W. Bush and composed a key component of the 2004 Republican Party Platform and Bush's re-election.

² Mason, Mary Ann. "The U.S. And the International Children's Rights Crusade: Leader or Laggard?" *Journal of Social History*. Summer (2005). p. 953.

³ Perry, Twila L. "Family Values, Race, Feminism and Public Policy." Santa Clara University. <<http://www.scu.edu/ethics/publications/other/lawreview/familyvalues.html>>.

⁴ Donovan, Patricia. "The Colorado Parental Rights Amendment: How and Why It Failed." *Family Planning Perspectives*. July/August 1997.

What social conservative family value proponents fear is that under the CRC, “[a] child is recognized as having, at times, interests separate from his or her parents, and in all cases, the ‘best interests of the child’ are the primary consideration,”⁵ requiring that the federal government, and not parents themselves, is responsible for establishing certain mandates that all household must comply with, regardless of their personal beliefs.

Michael Farris, founder of parentalrights.org is a lawyer, political activist, and key figure behind the pro-family movement. His website, parentalrights.org, promotes “protecting children by empowering parents” and is a highly informative collection of opinion pieces, legal analysis of the CRC, and international news articles concerning the improper execution of the CRC abroad as it infringes on parents' rights. A brief look at a summary of the CRC as analyzed by his organization warns similarly minded social conservatives that their efforts to raise and instill in their children Christian family values will be eroded by the state if the CRC is ratified. “Nannies in Blue Berets: A Legal Analysis” written by Farris offers the following ten points for consideration concerning the CRC:

- “Parents would no longer be able to administer reasonable spankings to their children.
- A murderer aged 17 years and 11 months and 29 days at the time of his crime could no longer be sentenced to life in prison.
- Children would have the ability to choose their own religion while parents would only have the authority to give their children advice about religion.⁶
- The best interest of the child principle would give the government the ability to override every decision made by every parent if a government worker disagreed with the parent’s decision.
- A child’s right to be heard would allow him (or her) to seek governmental review of every parental decision with which the child disagreed.⁷
- According to existing interpretation, it would be illegal for a nation to spend more on national defense than it does on children’s welfare.

⁵ Mason, p. 955.

⁶ Article 14: “States Parties shall respect the right of the child to freedom of thought, conscience and religion.” “Convention on the Rights of the Child.” Officer of the United Nations High Commissioner for Human Rights, 20 Nov. 1989. <<http://www2.ohchr.org/english/law/crc.htm>>.

⁷ Article 12: “[T]he child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.”

- Children would acquire a legally enforceable right to leisure.
- Christian schools that refuse to teach “alternative worldviews” and teach that Christianity is the only true religion fly in the face of article 29⁸ of the treaty.
- Allowing parents to opt their children out of sex education has been held to be out of compliance with the CRC.
- Children would have the right to reproductive health services, including abortions, without parental knowledge.”⁹

In light of policies implemented under the Clinton Administration (the United States signed the CRC in 1995, among others) several states recognized the need for such an amendment protecting the rights of parents to raise their child as they see fit.

In 1996, Colorado was the first state to propose an amendment to its state constitution by declaring that parents had a fundamental right to “to direct and control the upbringing, education, values and discipline of their children.”¹⁰ However, residents voted against the amendment, partly because of an effective campaign which “succeeded in convincing voters that the amendment's seemingly innocuous language would, in practice, have serious unintended consequences, such as nullifying laws allowing minors to obtain confidential reproductive health care and other sensitive health services, disrupting school sex education and AIDS prevention activities, and impeding the removal of children from abusive homes.”¹¹ Pro-CRC support groups have maintained a similar stance, noting that the situation of children in the United States will benefit greatly from the ideals outlined in the CRC. Nevertheless, socially conservative politicians continued their fight against the CRC.

Although previous efforts to amend the U.S. Constitution to grant parents specific rights in regards to childrearing have failed, Peter Hoekstra, a Republican House Representative from Michigan, re-introduced a parental rights amendment in the summer of 2008. H.J.R. 97 was “a constitutional

⁸ “States Parties agree that the education of the child shall be directed to... The preparation of the child for... understanding, peace, tolerance, equality of... religious groups and persons of indigenous origin.”

⁹ <http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC=%7B2B53865E-A8C1-4FE6-AF67-08789FBE3C0A%7D>.

¹⁰ Donovan, Patricia.

¹¹ Donovan, Patricia.

amendment stating that the liberty of parents to direct the upbringing and education of their children is a fundamental right that cannot be infringed upon by federal, state, or international treaty law without demonstrating government interest 'of the highest order.'"¹² Without any co-sponsors, the proposed amendment floundered. The following year, however, Hoekstra again proposed a constitutional amendment supporting the rights of parents, and this time, he had found a similarly-minded co-sponsor to uptake his cause- the newly elected Republican Junior Senator from South Carolina, Jim DeMint.

As lead sponsor in the Senate, DeMint is undoubtedly the most ideal candidate as his political and moral beliefs closely mirror those of the parental rights movement. On his homepage, DeMint in his mission statement presents parents as protectors of the "most vulnerable, the unborn,"¹³ who will grow up into adults one day. Empowered parents create "strong families [which] are the true strength of America. That's why we must protect marriage between a man and a woman because we know children that are raised by a mother and father have the best chance to succeed. And that's why we need to fight for commonsense judges to protect our rights, our laws, and religious liberties."¹⁴

In the eyes of like-minded socially conservative, family values supporters, U.S. ratification of the CRC will open a Pandora's box of chaos- "U.S. ratification of the CRC would increase these tensions by giving children the right potentially to access and pursue activities traditionally viewed as sensitive contentious subjects...A young female's right to an abortion without parental consent, a child's right to chose their own religion"¹⁵ will undermine the already crumpled fabric of American society because under the CRC, the child, a legal minor, would be able to determine his or her own destiny through his or her own choices without the guidance of parents.

Due to the intricacies of U.S. law, a system of checks and balances for one branch to limit another, and the process for which an amendment can be ratified, the proposed amendment is known as S.J. Res.16 in the Senate and

¹² Zahn, Drew. "Who Will Raise Kids: Mom, Dad or State?" *World Net Daily*, 29 Mar. 2009. <<http://www.wnd.com/index.php?fa=PAGE.printable&pageId=93333>>.

¹³ DeMint, Jim. "Family Values." <<http://demint.senate.gov/public/index.cfm?p=FamilyValues>>.

¹⁴ DeMint, Jim.

¹⁵ Mason, p. 961.

H.J. Res. 42 in the House of Representatives. The text, however, is unchanged, and if ratified, will explicitly state as the 28th Amendment in the U.S. Constitution, that parents have a “fundamental right” to raise and educate their children with minimal interference by the government. The amendment is specifically written so that neither treaty nor “any source of international law” (i.e. The CRC) may supersede U.S. law in regards to parental and/or child rights:

Section 1. The liberty of parents to direct the upbringing and education of their children is a *fundamental right* (emphasis by the author).

Section 2. Neither the United States nor any State shall infringe upon this right without demonstrating that its governmental interest as applied to the child involved is of the highest order and not otherwise served.

Section 3. *No treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article* (emphasis by the author).¹⁶

The process of ratification is rather lengthy- any proposed amendment needs to pass in both the U.S. House of Representatives and Senate by two-thirds majorities each, and then win ratification by three-fourths of the states. Currently, there are 7 co-sponsors in the Senate and 142 co-sponsors in the House. The proposed amendment is likely to be an issue that constituents would like their incoming House Representatives and Senators to pursue as they start their terms in January 2011. However, even if the constitutional amendment were ratified, individual states could still legally choose to ratify the CRC through creating new laws or even amending their own state constitutions to grant children specific rights. Conversely, should the CRC be ratified by the Obama Administration, or by any future administration, individual states may follow in Colorado's steps and propose amendments to their state constitution that will grant their desired parental rights which may not be in accordance with the guidelines set by the CRC.

Pro-CRC groups, such as the Child Rights Information Network (CRIN), are acutely aware of this aspect of law in the United States, known as “nullification- the argument that says states can sometimes trump or disregard

¹⁶ Library of Congress, 14 May 2009.

federal law,"¹⁷ and is a rather contentious issue in the history of the United States and one that is currently on-going in the form of "a tsunami of interest in states' rights and resistance to an overbearing federal government."¹⁸ When the United States ratifies a treaty, it is designated as either "self-executing" or "not self-executing": "Treaties that are deemed 'self-executing' are given direct force in United States law and may be enforced by the courts from the date of ratification. Treaties that are deemed 'not self-executing' are not directly enforceable by the courts and do not create binding obligations on the government."¹⁹ The CRC is deemed a human rights treaty, which are generally categorized as "non self-executing," meaning that even if the CRC were to be ratified, it would ultimately be up to each state to develop and execute its own laws.²⁰

Nullification stems from the 10th Amendment in the U.S. Constitution which states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"²¹ and was written to establish the division of power between the federal government and state governments. Nullification goes hand-in-hand with states' rights, "the theory of state sovereignty- that in the United States the ultimate source of political authority lay in the separate states."²²

Already the United States in its history has been affected drastically by such politically divisive arguments, most noticeably before the outbreak of the American Civil War. Several states, again led by leaders from South Carolina, upset with the prospects that the anti-slavery presidential candidate Abraham Lincoln was to win the election and would undoubtedly outlaw slavery, felt that the practice of slavery was far too important to their

¹⁷ Johnson, Kirk. "States' Rights is Rallying Cry for Lawmakers." *New York Times*, 16 Mar. 2010.

¹⁸ Johnson, Kirk.

¹⁹ Geary, Patrick. "United States: Is Obama's Win also a Victory for Children's Rights?"

²⁰ "In the 1950s, the Supreme Court of California...found that the human rights provisions of the United Nations Charter are not self-executing: They cannot be relied upon as generating the law of decision of a case without domestic legislative implementation." Schneebaum, Steven M. "Human Rights in the United States Courts: The Role of Lawyers." *Washington and Lee Law Review*, Summer 1998.

<http://findarticles.com/p/articles/mi_qa3655/is_199807/ai_n8788427/?tag=content;col1>.

²¹ "Bill of Rights Transcript." The U.S. National Archives and Records Administration.

<http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html>.

²² "States Rights, One of the Causes of the Civil War." 16 Feb. 2002.

<<http://www.civilwarhome.com/statesrights.htm>>.

economy and was inherently protected by the Constitution. Nevertheless, this right was gradually being infringed upon by the newly created- and rapidly expanding- United States government. Finally, in 1860, starting with the state of South Carolina, citing “frequent violations of the Constitution of the United States by the Federal Government”²³ states seceded from the United States and formed the short-lived Confederate States of America. While the states' rights movement prior to the American Civil War was certainly a worse-case scenario, the current inflammatory political climate in the United States leaves much room for history to repeat itself.

C. Conclusions and Implications

President Obama's public admission that it is “embarrassing” that the United States has yet to ratify the Convention on the Rights of the Child has added flame to an already raging fire created by bipartisan politics and special interest groups in the United States. Given the current political climate of the United States and continuous efforts by the opposition to undermine and undo any policy that President Obama proposes, it is highly unlikely that, despite the president's pledge to review the CRC, ratification can be expected during Obama's tenure as president. In fact, current conservative tendencies will likely allow for the increased dialogue on the perceived “dangers” of the CRC as seen from the family values perspective- a foreign document that will enable the erosion of the parent-child bond which will result in the decay of American society.

Present efforts to ratification of the CRC can be directly linked to the efforts of three men- Michael Farris, founder of the group parentalrights.org, US Senator Jim DeMint, and US House of Representative Peter Hoekstra. Current backlash against the CRC may be seen as a result of United States citizens desperate to grab the reins and hold on to protect that which is most important to them- their children. In this instance, the child is seen as a political frontier, the last bastion which has yet to be fully dominated by a federal government that many fear is expanding greatly “to encroach upon the ability of parents to choose the best for their children.”²⁴

Regardless of ethnic background, sexual orientation, religious, or

²³ “States Rights, One of the Causes of the Civil War.”

²⁴ Zahn, Drew.

political affiliation, all parents want their children to grow up to become healthy individuals. To what degree these goals can be reached without infringing on the rights of others or to what degree the government may intervene varies across a spectrum. Therefore, the most likely scenario that the United States will not ratify the CRC at this particular point in time simply because the United States Constitution in its current form is a relatively flexible document open to interpretation and already implicitly provides both parental and child rights. What can be expected, above all, is that the issue of ratifying the CRC in the United States is a highly polarizing topic that will not be resolved quietly.

REFERENCES

- "Bill of Rights Transcript." The U.S. National Archives and Records Administration. <http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html>.
- "Convention on the Rights of the Child." Officer of the United Nations High Commissioner for Human Rights, 20 Nov. 1989. <<http://www2.ohchr.org/english/law/crc.htm>>.
- Seymour, Dan. "20 Years of the CRC." UNICEF. 30 Jun. 2009. <<http://www.unicef.org/rightsite/237.htm>>.
- DeMint, Jim. "Family Values." <<http://demint.senate.gov/public/index.cfm?p=FamilyValues>>.
- Donovan, Patricia. "The Colorado Parental Rights Amendment: How and Why It Failed." Family Planning Perspectives. July/August 1997. <<http://www.guttmacher.org/pubs/journals/2918797.html>>.
- Farris, Michael P. "Nannies in Blue Berets: A Legal Analysis." parentalrights.org, 15 Dec, 2008. <http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC=%7B2B53865E-A8C1-4FE6-AF67-08789FBE3C0A%7D>.
- Geary, Patrick. "United States: Is Obama's Win also a Victory for Children's Rights?" Child Rights Information Network, 11 Jul. 2008. <<http://web61388.aiso.net/resources/infoDetail.asp?ID=18874>>.
- Johnson, Kirk. "States' Rights is Rallying Cry for Lawmakers." New York Times, 16 Mar. 2010.
- Mason, Mary Ann. "The U.S. And the International Children's Rights Crusade: Leader or Laggard?" Journal of Social History. Summer (2005): 955-963.
- Perry, Twila L. "Family Values, Race, Feminism and Public Policy." Santa Clara University. <http://www.scu.edu/ethics/publications/other/lawreview/family_values.html>.
- "S.J.RES.16." Library of Congress, 14 May 2009. <<http://thomas.loc.gov/cgi-bin/query/z?c111:S.J.RES.16:>>.
- Schneebaum, Steven M. "Human Rights in the United States Courts: The Role of Lawyers." Washington and Lee Law Review, Summer 1998. <http://findarticles.com/p/articles/mi_qa3655/is_199807/ai_n8788427/?tag=content;coll1>.

"States Rights, One of the Causes of the Civil War." 16 Feb. 2002.
<<http://www.civilwarhome.com/statesrights.htm>>.

Zahn, Drew. "Who Will Raise Kids: Mom, Dad or State?" World Net Daily, 29
Mar. 2009. <<http://www.wnd.com/index.php?fa=PAGE.printable&pageId=933333>>.