

THE PRINCIPLES OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD AND THEIR INFLUENCE ON ISRAELI LAW

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INTRODUCTION

Israel ratified the UN Convention on the Rights of the Child (henceforth CRC) in a swift and non-controversial process.² At

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the time the Convention was ratified, few seemed to believe it would have significant impact on Israeli law.

The aim of this article is to examine the CRC's mode and scope of actual influence on Israeli law. In exploring this question, I will suggest initial directions regarding the lessons that can be drawn from the Israeli experience for the ongoing debate on the Convention's ratification by the United States.

Reviewing the CRC's influence on Israeli law is particularly interesting given that, in 1988, the Ministry public committee was charged with reevaluating the entire body of Israeli child law in light of the CRC and with suggesting legislative reforms meant to adapt Israeli legislation to it.³ The extensive work of this committee is one of the most ambitious attempts of any legal system to promote the Convention's systematic implementation. The public committee's reports created a platform for absorbing into Israeli law not only the Convention as such, but also the extensive body of interpretive work on its provisions developed by the UN Committee on the Rights of the Child. Its work significantly enhanced the CRC's influence on Israeli legislation and case law.

In this article, I present the work of the public committee and then proceed to consider the influence of the CRC and of the UN Committee's work on Israel's legislation and case law.

I. THE PUBLIC COMMITTEE FOR THE IMPLEMENTATION OF THE CRC

In response to the initiative of an NGOs lobby, the Israeli Ministry of Justice established a public committee to consider ways of implementing Section 4 of the CRC, which determines

2. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

3. Tamar Peled Amir, *The Report of the Israeli Public Committee, General Part*, (2003) 31-39. (Isr.). The committee is known as the Public Committee for the Implementation of the CRC. Its official name was: "The Committee for the Review of Basic Principles in the Realm of the Child and the Law and their Implementation in Legislation."

that states parties must undertake measures for the implementation of the rights recognized in the CRC.⁴

The committee was chaired by Tel Aviv District Judge, Savyona Rotlevi.⁵ It included about eighty experts from various disciplines, operated for six years through six sub-committees, and submitted six detailed reports dealing with various spheres of children's life.⁶

The committee's terms of appointment were quite exceptional. Whereas public committees are usually requested to examine a concrete issue, the task of this committee was to review the entire body of Israeli legislation in light of the CRC's fundamental principles.⁷ The first complex question the committee had to address, therefore, was whether and how the CRC affects the perception of children and their legal status.⁸

In order to create a solid and homogeneous theoretical foundation for its work, the committee decided that, prior to any concern with concrete issues, it would devote time and resources to understand the conceptual change represented by the CRC.⁹

The key tool in the interpretation of the CRC, which state parties rely upon for its implementation, is the work of the UN Committee on the Rights of the Child. Its decisions, published as General Comments, interpret CRC provisions in different contexts.¹⁰ This Committee also conducts days of study leading

4. *Id.*

5. *Id.*

6. The Committee was appointed by the then Minister of Justice, Tsahi Hanegbi, on 27 June 1997. *Id.* at 15-31.

7. The Six reports related to the following topics: General Report, Children and their Families, Out of Home Placement, and Education. *Id.* at 87-101.

8. *Id.* at 101-103; see also Cris Revas, *Introduction into the U.N. Convention on the Rights of the Child*, in U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 9-12 (Jonathan Todres, et al., eds., 2006).

9. Amir, *supra* note 3 at 21. (Judge Saviona Rotlrv Introduction to the Committee's Report).

10. The interpretive work of the UN Committee is conducted in accordance with a set of procedural rules. See Comm. on the Rights of the

to recommendations on ways of implementing the CRC.¹¹ The CRC requires all state parties to submit periodic reports on their implementation of the Convention, and the Committee's reactions to these reports are a significant context of interpretation.¹²

The study of the CRC and its interpretation led the public committee to the understanding that the UN Committee views the CRC as based on a new, complex, and holistic conception of children's rights. On the one hand, the CRC unequivocally recognizes the child as a separate person and an independent rights bearer.¹³ On the other, the rights granted to children are significantly different from those granted to adults.¹⁴ According to the CRC, recognizing children's rights rests on the need to recognize rights specific to children and adapt the mode of granting other rights to the unique characteristics of childhood, including the child's evolving capacities.¹⁵

The conception of children's rights underlying the CRC according to this interpretation is one that views the needs and rights of children as a whole. The very recognition of children as rights bearers, then, is not thought of as in conflict or in tension with the principle of the child's best interests. Children's rights

Child, General Comment No 73, Provisional Rules of Procedure, UN Doc. CRC/C/4/Rev. 1 (2005), available at: www2.ohchr.org/english/bodies/crc/discussion2008.htm. See also *Committee on the Rights of the Child*, OFF. UN HIGH COMM'R HUM. RTS., <http://www2.ohchr.org/english/bodies/crc/discussion2008.htm> (last visited Oct. 12, 2013).

11. OFF. UN HIGH COMM'R HUM. RTS., *supra* note 10 (providing a summary of these days of discussion).

12. A key tool that aided the public committee in its work was a UNICEF handbook that cites the main decisions of the UN Committee on the interpretation of the CRC, and assists countries on how to implement it and report to the UN. See RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 2-7 (3d ed. 2007), available at http://poundpuplegacy.org/files/Handbook_UNCRC.pdf.

13. *Id.* See also EUGEN VERHELLEN, CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND, MOTIVATION, STRATEGIES, MAIN THEMES, (2000).

14. Amir, *supra* note 3 at 21-31, 101-103.

15. Gerison Lansdown, *The Evolving Capacities of the Child*, UNICEF INNOCENTI RESEARCH CENTRE, (2005) available at <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>.

are indeed meant to promote the best interests of the child and are bound by this principle. One of the children's unique rights is the right to be in contact with their parents.¹⁶ Note that not only is the recognition of children's rights not antithetical to the principle of parental autonomy, but the CRC lays particular stress on the parents' role in ensuring the children's rights and wellbeing.¹⁷

Following its understanding of the deep conceptual change conveyed by the Convention, the public committee faced the challenge of systematically implementing this approach in various realms of Israeli law. As its main tool, the committee chose the four rights that the UN Committee had defined as guiding principles for interpreting the CRC: the principle of -interests (Section 3), the principle of life, survival, and development (Section 6), and the principle of participation (Section 12).¹⁸ In defining these rights as principles, the UN

16. CRC, *supra* note 2, at arts. 7-9.

17. See Amir, *supra* note 3, at 21-27 (discussing of the perception of children's rights according to CRC that was developed within the public committee). Article 5 of CRC recognizes the role of parents, requiring that "[s]tates Parties shall respect the responsibilities, rights and duties of parents ... to provide ... appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." CRC, *supra* note 2, at art. 3(2). The Convention also states that children have the right to know and be cared for by their parents, and recognizes that the "rights and duties" of parents should be taken into account when States Parties seek to ensure a child's wellbeing. See CRC, *supra* 2, at art. 7(1). For discussion of Parental Autonomy according the Convention, see Barbara Bennett Woodhouse, *The Family Supporting Nature of the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF THE TREATY PROVISION AND IMPLICATIONS ON U.S. RATIFICATION, 45 (Jonathan Todres et al. eds., 2006); see also *Recommendations of the Committee on the Rights of the Child – Role of Family*, OFF. UN HIGH COMM'R HUM. RTS., available at: <http://www2.ohchr.org/english/bodies/crc/docs/discussion/family.pdf> (discussing the stance of the UN Committee on the importance of the family in promoting children's rights).

18. See, Comm. on the Rights of the Child, *General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention*, U.N. Doc. CRC/C/5, para. 13 (Oct. 15, 1991); see also Comm. on the Rights of the Child,

Committee states that the Convention's provisions must be implemented in their light.

The primacy of these four principles does not emerge unequivocally from the CRC's language, and granting them this status was itself an important interpretive move. As discussed below, these four principles jointly convey, according to the interpretation of the UN committee, the perception of children's rights presented above.¹⁹

The public committee worked in two stages. In the first stage of its work, it developed detailed legislative models based on the interpretation of the UN Committee and recommendations for implementing these models in all areas of children's lives.²⁰ In the second stage, it formulated recommendations for broad legislative reforms in certain areas, implementing not only the principles but also the CRC as a whole.²¹

II. THE CRC AND THE PUBLIC COMMITTEE: INFLUENCE ON ISRAELI LAW

The public committee's work enjoyed wide public resonance and its recommendations were largely accepted as the compelling interpretation of the CRC, both by Israeli legislators and by the courts. In the explanatory notes accompanying many of the bills meant to implement the CRC as well as in many judicial decisions, therefore, we find combined references to the CRC as well as to the reports of the public committee.

When we examine the influence of the CRC on Israeli law, either directly or through the public committee's recommendations, the most interesting finding is that Israeli law has largely implemented the first and perhaps most important stage of the committee's work: adopting the recognition of the

General Guidelines for Periodic Reports, U.N. Doc. CRC/C/58, para. 40 (Oct. 11, 1996).

19. Amir, *supra* note 3, at 101.

20. *Id.* at 13-19.

21. *Id.*

child as a separate person and a rights bearer, and endorsing the CRC's basic conceptions as conveyed in its four principles.

III. THE INFLUENCE OF THE CRC ON BASIC CONCEPTIONS OF ISRAELI LAW

A. Recognizing the Child as a Separate Person and a Rights Bearer

The child's recognition as a separate person and a rights bearer is a tenet of the CRC. This is the view conveyed by Jaap E. Doek, the former chairman of the UN Committee on the Rights of the Child: "The CRC's central goal is the explicit international recognition that children are not just individuals who become human beings but are human beings with their own rights."²² The most prominent Israeli law conveying this principle was enacted in 2002. It requires that the explanatory notes accompanying all bills detail their implications for the rights of children, for their life conditions, and for the services provided to them.²³ The explanation accompanying this bill stated that its purpose was to ensure that every bill would take into account its effect on children's rights, in the spirit of the CRC.²⁴

As for Israeli case law, a significant process indicating strengthening recognition of the child as a separate person and as a rights bearer is evident after the ratification of the CRC. Although recognition of children as separate from their parents had been featured in the case law preceding the Convention, after the ratification identity as a basic principle of children's

22. Jaap E. Doek, *The Eighteenth Birthday of the Convention of the Rights of the Child: Achievements and Challenges*, 41 U. MICH. J.L. REFORM 61, 62 (2007).

23. Law on Information about the Influence of the Legislation on Children's Rights, 2002, SH No. 1859 p. 48 (Isr.).

24. See Draft Proposed Law on Information about the Influence of the Legislation on Children's Rights Bill (No. 3125), 2002, HH 608 (Isr.), for the rationales of the bill on the obligation to provide information on the legislation's influence on the rights of the child.

rights and relying on the CRC.²⁵ Thus, for instance, former Chief Justice Meir Shamgar, in a decision dealing with the custody of children whose mother had joined the Jehovah's witnesses sect, ruled relying on the Convention: "The approach encapsulated in the concept of children's rights is this: the child is an autonomous creature, with rights and interests independent of those of his or her parents."²⁶

Concrete expressions of the growing recognition of the child as a separate individual appear in a series of Supreme Court rulings that rely on the CRC. Thus, for instance, decisions that annulled divorce agreements unless the child's interests were considered separately and no conflicts of interests prevailed between the child and the parents,²⁷ the case law that recognized the child's right to separate representation in divorce proceedings,²⁸ and the case law stating that, on child related issues, the child is not bound to parental decisions to grant jurisdiction to religious courts on all the divorce matters.²⁹

B. Adopting CRC Principles

A process pointing out the adoption of the four CRC principles and their interpretation in Israeli legislation and jurisprudence is clearly discernible. Their absorption as the guiding principles regarding children's rights is evident in the amendment of the Municipalities Ordinance, requiring the establishment of a committee for promoting children's rights in every local authority. The amendment states:

25. See generally Tamar Morag, *Children's Rights in Israeli Case Law: a Spiral Progression*, 28 ISRAEL STUD. REV., no. 1, Winter 2013, at 282 [hereinafter Morag Spiral], for review of the CRC's influence on Israeli Law.

26. CA 2266/93 Anonymous v. Anonymous, PD 46(1), 221, p. 248 [1995](Isr.).

27. HCJ 10109/02, Katz v. High Rabbinic Court in Jerusalem 57(2), PD 875 [2003](Isr.).

28. HCJ 2898/03 Anonymous v. High Rabbinic Court in Jerusalem 58(2), PD 550 [1998](Isr.).

29. HCJ 2898/03 Anonymous v. High Rabbinic Court in Jerusalem 58(2), PD 550, 564 [2004](Isr.).

149(7). (1) The council will elect a committee whose task is to initiate and plan activity promoting the status of children and youths, protect them and safeguard their rights, *including the implementation of the principles of the child's best interest, non-discrimination, the right to develop in suitable conditions, and the right of children and youths to be heard and to suitable participation in decisions that concern them.*³⁰

This legislation conveys recognition of the CRC principles as a key tool in the Convention's actual implementation.

C. The Participation Principle

The principle of participation is anchored in Article 12 of the Convention, which states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.³¹

The right to participation as formulated in Section 12 includes three main components: the right to express views, the right to do so freely, and the right to have those views given due weight. Accompanying this right is the right to receive information.³² The right to participation was defined by the UN Committee as a symbol of the change process in the perception of the rights of the child expressed in the Convention:

30. Seventy-Second Amendment of the Municipality Ordinance (New Version), 5724-1964, SH No. 1733 p. 149 (2000) (emphasis added).

31. CRC, *supra* note 2, art. 12.

32. *Id.* art. 32.

The new and deeper meaning of this right is that it should establish *a new social contract*. One by which children are fully recognized as rights-holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights holders.³³

The writing dealing with the participation principle enumerates several key reasons for making the right to participation the central symbol of the CRC and of its conception of rights.³⁴ First, the participation of children conveys the recognition of the child as an active and influential subject and clearly expresses the child's right to dignity.³⁵ Second, it enables a distinction between children while recognizing each child's specific abilities and needs.³⁶ Third, this right places children's concerns at the center of decisions that affect them.³⁷ Fourth, the right to participation is a major sign of the transition toward a conception of rights suited to children and their evolving capacities.³⁸ Approaches dealing with children's rights prior to the CRC had emphasized issues of children's autonomy, requiring complex discussions of children's competence for decision making and emphasizing the tension between the best interest of the child principle and the right of children to freedom and autonomy.³⁹ By contrast, the right to participation is a modular right that can be implemented gradually, according to the child's age and maturity, and its implementation is contingent on the best interest principle.

33. Comm. on the Rights of the Child, 43rd Sess., Sept. 11-29, 2006, available at http://www2.ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendations_after_DGD.doc.

34. See generally GERISON LANSDOWN, PROMOTING CHILDREN'S PARTICIPATION IN DEMOCRATIC DECISION-MAKING (2001) (discussing the importance of children's right to participation).

35. *Id.* at 1-4.

36. *Id.*

37. *Id.* at 2.

38. LANSDOWN, *supra* note 34.

39. See *id.*

In examining the Convention's influence on Israeli law, this principle is clearly the one that has been most widely and significantly implemented in Israeli legislation and case law.

Several legal provisions dealing with the participation of children in legal proceedings had been anchored in Israeli legislation prior to the ratification of the CRC. These provisions had dealt with arrangements on hearing children in judicial decisions dealing with the protection of children at risk,⁴⁰ the requirement that minors over nine years old consent to their adoption,⁴¹ and the participation of children in proceedings dealing with the implementation of the Hague Convention on child abduction.⁴² Yet, beyond the fact that all these provisions had dealt with a limited number of issues, they had not defined children's participation as a right, rarely setting up arrangements to ensure that participation would be meaningful by considering such matters as modes of participation, providing information, or giving due weight to the child's view.

A series of amendments designed to implement the right of children to participate in various realms of life has been enacted in Israeli legislation following Israel's ratification of the convention. All of them define participation as the minor's right, refer explicitly to the principle of participation anchored in Section 12 of the CRC, and formulate the amendment by relying on this Section's wording. Unlike the legislation that had preceded the CRC, this legislation deals with broad arrangements regulating various matters bearing on modes of minors' participation. Thus, a comprehensive amendment of the Youth Law (Judgment, Punishment, and Treatment) 1971 dealing with *delinquent youth* devotes a long chapter to the right of minors in criminal trials to information and participation in all decisions bearing on their punishment and treatment and to the

40. Youth Law (Care and Supervision), 5720-1960, 8 SH No. 311 p. 52 (Isr.).

41. Adoption Law, 5741-2010, 7 SH No. 2268, p. 110 (Isr.).

42. Hague Convention (Return of Abducted Children), 5751-1991, 13 SH No. 1355, p. 148 (Isr.).

explanation of all decisions affecting them.⁴³ An amendment to the Law on Working Youths 1953 adopted in 2008, authorizing the Minister of Labor and Welfare to grant permits allowing children to be employed in public or artistic performances or in advertising, states the right of children to participate in the decision to grant this permit.⁴⁴ Another amendment concerns legislation dealing with children as witnesses. The Law on the Rules of Evidence (protection of children) 1955, allows minors who are victims of incest or of sex offenses not to testify and enables a children's investigator to appear in court instead.⁴⁵ Special procedures were also determined for children who do testify in such cases.⁴⁶ According to an amendment to the law, no decision will be made about the child's testimony on such offenses and the mode of his or her testimony before he or she is given an opportunity to express his or her view on these matters.⁴⁷

The most comprehensive legislative reform on child participation that has been adopted in Israeli law following the ratification of the convention relates to children's participation in divorce proceedings. Following the recommendations of the public committee, special units staffed by social workers were established in family courts to enable the participation of children in these proceedings.⁴⁸ According to legislation formulated by the committee, children aged six and over involved in cases of divorce disputes are invited to attend a meeting with a social worker.⁴⁹ At this meeting, they are given

43. Youth Law (Trial, Punishment and Modes of Treatment), 5731-1971, SH No. 2171, p. 688 (Isr.).

44. Law on Working Youths, 5731-1973, SH No. 1673, p. 256 (Isr.).

45. Amendment to the Law on the Rules of Evidence (Protection of Children), 1955, SH No. 184 p. 96 (Isr.).

46. *Id.*

47. Tenth Amendment of The Law of Evidence Revision (Protection of Children), 5764-2004, SH No. 1957 p. 534 (Isr.). The bill and the explanatory note were published in the following source: Tenth Amendment of The Law of Evidence Revision (Protection of Children) (No. 46), HH 129 (Isr.).

48. Participation of Children in the Civil Procedure Regulations, 1984, KT 5744, 2220 (Isr.).

49. *Id.*

the opportunity to express their feelings, attitudes, and desires.⁵⁰ The children can choose whether to have the social worker convey their wishes to the judge or meet personally with the judge dealing with the case.⁵¹ Every child who wishes to meet with the judge has a right to do so.⁵² Whatever the child says remains confidential, whether told to the judge or to the social worker.⁵³ The committee's recommendations were examined in a pilot project that operated in two family courts and accompanied by an evaluative study. Given the pilot's success, the Israeli Minister of Justice has recently signed new regulations ensuring the gradual introduction of participation units in all family courts in the country.⁵⁴

As for the stance of Israeli case law on the right to participation, this seems to be the issue recording the most significant change in Israeli case law following Israel's ratification of the CRC. *Ad hoc* references to the importance of relating to the children's wishes can be found in the case law preceding the Convention, but without recognizing the child's participation as an independent right.⁵⁵ After the ratification, a series of Supreme Court rulings show increasing recognition of the children's right to be heard on issues affecting them, as an independent right that follows from the Convention. For example, Justice Arbel notes: "Hearing the child's wishes, a right that is also anchored in Section 12 of the UN Convention on the Rights of the Child, conveys the view of the child as an autonomous person, as a rights bearer."⁵⁶

In recent years, hundreds of decisions in lower judicial instances have increasingly included statements in a similar

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Participation of Children in the Civil Procedure Regulations, *supra* note 48.

55. *See, e.g.*, CA 740/87 Jane Doe v. Richard Roe 43(1) PD 661, 667 (Isr.).

56. File No. 5579/07 Family Appeal Request, Anonymous v. Anonymous (Aug. 7, 2007), Nevo Legal Database (by subscription) (Isr.).

spirit.⁵⁷ A significant rise has also been recorded in the scope of children's hearings by the courts, particularly in proceedings conducted in family courts.⁵⁸ And yet, despite the considerable influence of the CRC on the case law and on judicial practice, the participation principle cannot be said to have been fully endorsed in the case law. The post-CRC case law emphasizes the actual right to be heard,⁵⁹ but offers no clear stance on the weight to be assigned to the minor's wishes, nor do courts show a uniform pattern in their willingness to hear children.

D. The Best Interest of the Child Principle

The best interest of the child principle is anchored in Section 3 of the Convention. Section 3(1) states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁶⁰

Two main questions emerged concerning the interpretation of this principle. One is what are its contents and its relationships with the complex of rights mentioned in the CRC, and with the other three principles in particular. The second question is the weight to be assigned to this principle.

Regarding the relationship between this principle and other rights, the UN Committee has recurrently stressed that the CRC must be read as a whole.⁶¹ In the context of the best interest of the child, therefore, we must consider the full range of children's rights. According to this interpretation, the child's best interest is not in tension or in contrast with specific children's rights, including children's liberties and their right to participation. All

57. Morag Spiral, *supra* note 25, at 291-292.

58. Rhona Schuz, *The Right of the Child to Participate: Theory v. Practice in the Family Courts*, 2 FAM. L. 207 (2008) (Isr.).

59. Morag Spiral, *supra* note 25, at 290-291.

60. CRC, *supra* note 2, art. 3(1).

61. Amir, *supra* note 3, at 39-43.

are bound to the principle of the child's best interest and all must be taken into account when examining this principle.

This was the approach adopted and developed by the Israeli public committee.⁶² According to its recommendations, the contents of the best interest of the child principle must be defined as "the range of the rights, the needs, and the interests of the child."⁶³ The committee thereby sought to adopt the holistic interpretation endorsed by the UN Committee stating that, when considering the best interest of children, all their rights and interests must be taken into account.⁶⁴

As for the weight of this principle, the view of the UN Committee stating that this is a primary consideration means that, when making decisions and formulating policy, the child's best interest must be actively considered prior to considering the rights of others, even though other considerations also enter into play.⁶⁵ According to the interpretation of the UN Committee, this principle compels constant review of the legal arrangements in its light.⁶⁶

The best interest of the child principle had been recognized as a significant principle in Israeli child law before the CRC's ratification, but had been perceived as vague and subjective.⁶⁷ In the wake of the ratification, two directions of change are discernible in the legislation. One concerns the contents of this

62. *Id.* at 137.

63. *Id.*

64. See Robert Licht-Petran, *Deciding on the Case of a Girl: Toward Reconciliation between her Best Interest and her Rights*, in CHILDREN'S RIGHTS AND ISRAELI LAW 429-61 (Tamar Morag, ed., 2010) (Isr.).

65. HODGKIN & NEWELL, *supra* note 12, at 38.

66. In its General Comment No. 5, the Committee emphasized the importance of ensuring that domestic law reflects Article 3. The Committee states that the best interest principle "requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests of the child systematically." Convention on the Rights of the Child Gen. Comment No. 5, 34th Sess., Sept. 19-Oct. 3, 2003, para. 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003). For further discussion, see HODGKIN & NEWELL, *supra* note 12, at 37.

67. Licht-Petran, *supra* note 64, at 436.

principle and the other the need for reevaluating concrete arrangements in its light.⁶⁸

Changes in the contents of the principle appear in the amendment to the Adoption Law. The best interests of the child principle, which had not been defined in the past in this legislation, were now defined according to the wording recommended by the public committee as “the range of the rights, the needs, and the interests of the child,” endorsing the interpretations of this principle by the UN Committee and the Israeli public committee.⁶⁹

As for Israeli case law, the best interest of the child had been recognized as the guiding principle in decisions concerning children from the early years of Israel. The legal scholarship, however, was critical of the implementation of this principle prior to the CRC ratification.⁷⁰ The claim was that its application was vague, subjective, and paternalistic, and that the principle was largely presented in Israeli case law as inherently in tension with children’s rights.⁷¹

In the case law following the ratification, one key change is evident insofar as the conceptualization of this principle is concerned. The new formulation of the child’s best interest as the range of the rights, the needs, and the interests of the child formulated by the public committee is well reflected in the case law. Dozens of judicial rulings refer to the new formulation when defining the best interest of the child principle and to the change in the perception of this principle conveyed by the Convention, by referring to the CRC and to the reports of the public committee.

Thus, the Tel Aviv Family Court states:

68. *Id.*

69. Section 1(2) of the Eighth Amendment of the Adoption Law, 5771-2010, SH No. 2268 p. 110 (Isr.).

70. Licht-Petran, *supra* note, 64 at 436-39.

71. For a similar critique of the subjective and paternalistic characteristics of the best interest of the child in American and English law, see GERALDINE VAN BUREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 45 (1995); Robert Mnookin, *Children’s Rights: Beyond Kiddie Libbers and Child Savers*, 7 J. CLINICAL CHILD PSYCHOL. 163 (1978).

The new conceptualization of the best interest of the child principle, however, was clearly endorsed in the rhetoric but less so in judicial rulings. Some of them not only refer to this new conceptualization but also implement this terminological change, as evident in the courts' attempt to examine and balance the full range of relevant rights.⁷² But in others, despite references to the new conceptualization, the discussion is still mainly paternalistic and fails to relate in any meaningful way to the relevant rights, particularly to those touching on participation and on children's liberties.

The reevaluation of legislative arrangements, given the commitment to submit legislation to constant review in light of the best interest of the child principle, has so far been conducted in two contexts.⁷³ An amendment to the Youth Law (Judgment, Punishment, and Treatment) dealing with delinquent youths was meant to reduce the scope of minors' arrests.⁷⁴ According to the explanatory note that accompanied the bill, this amendment was designed to apply the CRC principle of the best interest of the child to this specific context.⁷⁵ A similar reexamination of legal arrangements bearing on children in light of this principle was conducted regarding the Law on Working Youths. The amendment that, as noted, deals with granting permits to children employed in artistic performances or in advertising, determined that permits would not be granted if the work could be harmful to the child's best interest. As stated in the

72. For a comprehensive review of children's rights as fundamental to the examination of the child's best interests, see File No. 1152/04 Family Appeal Request (TA), *Anonymous v. Anonymous* (Sept. 27, 2004), Nevo Legal Database (by subscription) (Isr.). For a review of the Israeli case law relating to the principle of the best interests of the child after the ratification of the Convention, see Tamar Morag, *The Influence of the Committee for the Review of Basic Principles in the Realm of the Child on the Depth Perceptions of Israeli Case Law*, 3 FAM. L. 67 (2009).

73. Youth Law (Trial, Punishment and Modes of Treatment), 5731-1971, SH No. 2171 (Isr.).

74. *Id.*

75. Proposal for the Amendment of the Law on Working Youth (No. 2612), 1997, HH 315, 321 (Isr.).

explanatory note accompanying the bill, the aim of the amendment was to implement the best interest of the child principle according to the CRC.

E. The Life, Survival, and Development Principle

The life, survival, and development principle is anchored in Section 6 of the CRC, which states:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”

This principle brings together three key rights: the right to life, to survival, and to development. Of the three, the right to development has been acknowledged as a cornerstone of children’s rights recognition as formulated in the Convention.⁷⁶ Interpretations delve into the significant potential influence of this right, given that it imposes on the parents and on the state an obligation to ensure the children’s development. Recognition of the development principle conveys the change in the view of children’s rights represented by the CRC, at two levels. First, this right is unique to children, given that a key distinction between children and adults is that children go through a rapid and vulnerable process of development.⁷⁷ Second, the interpretation process clarified that parents play a crucial role in the implementation of this right. According to the UN Committee, the primary responsibility for ensuring the children’s development lies with the parents and the state must assist them in the fulfillment of this obligation.⁷⁸ Parents, therefore, are

76. See generally MANFRED NOWAK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 6: THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT (2005).

77. HODGKIN & NEWELL, *supra* note 12, at 244.

78. For a discussion of parents’ obligations to children according to the CRC, see *id.* at 232.

crucial to the protection of children's rights, and the recognition of children's rights is not in tension with the recognition of the parents' status.

Specific aspects of child development bearing on areas such as education, health, and protection had already been anchored in Israeli legislation prior to the CRC's ratification. The *principle* of development as such, however, does not feature in Israeli legislation even after the ratification.

By contrast, we do find initial signs of recognition of this principle in the case law. Whereas the case law that had preceded the Convention contains hardly any references to children's development as compelling a different attitude toward them, the post-CRC case law speaks of specific obligations that follow from their developmental process.

The Supreme Court defined the right to development as the right underlying the authority and obligation of the state to protect children at risk:

The purpose of the law is to involve the authorities in the concern for minors in distress, to offer a helping hand to ensure their survival, to assist in their rehabilitation, and to enable them to grow in an environment where they can follow a natural course of development physically, mentally, intellectually, and socially, and realize their potential (Section 6 of the Convention on the Rights of the Child).⁷⁹

An expression of the special commitment derived from the principle of development may be found in the ruling of the Tel Aviv District Court. In an appeal to a custody decision on illegal residents, the court stated: "Children go through a rapid and significant process of development. In the course of it, violating one or more of their rights could be harmful to their development, at times irreversibly and at times in a way involving violations of other rights."⁸⁰

79. CC 6041/02 Anonymous v. Anonymous 58(6) PD 246, 270 (Isr.).

80. File No. 282/06 Administrative Appeal (TA), Ajman v. State of Israel (Oct. 30, 2006), Nevo Legal Database (by subscription).

In the ruling of the Jerusalem District Court on a case dealing with the corporal punishment of children, the Court relied on the CRC and on the reports of the public committee and stated:

The right to development: childhood is a stage of constant growth, experimentation, learning, change, and exposure. It is an extremely dramatic and intensive process, vital and central to the child's development... The gradual development process that minors undergo, involving the development of many personality aspects, compels fulfillment of the physical, mental, social, and cultural needs that they are entitled to.⁸¹

Despite the significance that should be ascribed to the penetration of a rhetoric that acknowledges child development as a central characteristic of childhood requiring special protection, full endorsement of the approach that recognizes unique state obligations deriving from it is yet to be endorsed. A limited number of rulings reflect the influence of this recognition not only in the courts' rhetoric but also in their actual decisions. One prominent example is the ruling of the Tel Aviv District court in the appeal of a decision placing in a detention center a seventeen-year old girl residing in Israel illegally.⁸² In its decision to overturn the ruling on her placement in a detention center, the court relied on the CRC, emphasizing the detention's potential effect on her development.⁸³ This ruling, however, is an exceptional instance of actual implementation of the development principle. A broad examination of the case law reveals that, despite initial rhetorical recognition of children's development as requiring a unique attitude toward children, Israeli case law has yet to show clear recognition of the state obligations deriving from the right to development.

81. File No. 113/03 Criminal Trial (Jerusalem), State of Israel v. Vullach (July 29, 2004), Nevo Legal Database (by subscription).

82. File No. 000282/06 Administrative Appeal (TA), Ajman v. State of Israel (Jan. 30, 2006), Nevo Legal Database (by subscription).

83. *Id.*

F. The Equality Principle

The equality principle is anchored in Section 2 of the CRC, which states:

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

CRC does not confine itself to applying the equality principle to children but seeks to protect them from specific forms of discrimination. Section 2(2) of the Convention prohibits discrimination of children on the basis of the status, activities, expressed opinions, or beliefs of their parents or guardians. The main innovation of this Section involves recognition of the children's right to be accepted in society as separate persons, and precludes imposing on them in any way or form the implications of any actions by their parents or guardians.

Israeli law includes no general provision anchoring the principle of equality, *inter alia* due to Israel lacking a constitution.⁸⁴ The Israeli Supreme Court, however, recognized equality as an overarching principle to be used in the interpretation of a broad range of legislation and defined it as a principle that follows from "the very soul of our entire

84. See Amos A. Shapira, *Why Israel Has No Constitution, But Should, And Likely Will, Have One*, 37 ST. LOUIS *Luis U. L.J.* 283 (1992- *Journal* (1993).

constitutional regime.”⁸⁵ The equality principle is also anchored in a series of legal provisions, such as the legislation on equal employment opportunity or on equal rights for women. The only realm where the right to equality in a children-related context is anchored in legislation is education.⁸⁶

No CRC based amendments were located aiming to anchor the equality principle in contexts touching on children. One exception is the Municipalities Ordinance noted above, which defines this as one of the principles that will guide the work of the local committees on the rights of the child.⁸⁷

The focus of the case law touching on the discrimination of children deals with education and special education. To justify the very existence of the equality principle, the Supreme Court relies on its own precedents and on other international conventions rather than on the equality principle in Section 2 of the CRC. The case law, however, recurrently refers to Section 28 of the CRC, which anchors the right to education and the right to equality in education.⁸⁸ The main explanation for the absence of references to Section 2 seems to be that the right to equality, unlike the right to equality in education, is not perceived as unique to children.

IV. FURTHER INFLUENCES OF THE CRC ON ISRAELI LAW

Israeli law, then, adopted from the work of the public committee, mainly the first part dealing with the perception of the child and the endorsement of CRC principles. In all that

85. HCJ 98/68 Bergman v. Minister of Finance 23(1) PD 698, 693 [1969] (Isr.).

86. Pupils' Rights Law, 5761-2000, SH No. 1761 p. 42 (Isr.); Section 2 of the Special Education Law, 5748-1988, SH No. 1256 p. 114 (Isr.); National Education Law, 5713-1953, SH No. 131 p. 137 (Isr.).

87. Seventy-Second Amendment of the Municipality Ordinance (New Version), 5724-1964, SH No. 1733 p. 149 (2000).

88. HCJ 2599/00 Yated: Children with Down Syndrome v. Ministry of Education 50(3) PD 834 [(2003)] (Isr.); *see also* HCJ 7245/10 Adalah: The Legal Center for Arab Minority Rights in Israel v. Ministry of Social Affairs and Social Services [2013] (Isr.).

concerns the CRC's implementation beyond these principles, either by applying some of the Convention's specific provisions or by implementing the public committee's recommendation regarding extensive legislative reforms, the process has been far slower. And yet, it is constantly ongoing.

In one area, a broad reform aimed at implementing the CRC has already been adopted—the punishment and treatment of delinquent youth. Following the public committee's recommendations, two extensive amendments have been enacted in the Youth Law (Judgment, Punishment, and Treatment),⁸⁹ dealing with delinquent youth. The first was enacted in 2008,⁹⁰ and, according to the explanatory note accompanying the law, its aim was to adapt the legislation to the CRC and its principles. This amendment sets guidelines for enacting the law, including the exercise of the powers accorded by it, while preserving the child's dignity as a person. Several provisions were also enacted meant to ensure due process, including informing the minors' parents, providing the minor with legal representation, and informing minors of their rights. The second amendment to this law, which was also enacted following the public committee's recommendations, regulates the right of the minor brought to trial to alternative criminal proceedings.⁹¹ Alternative proceedings were defined in this legislation as “proceedings ... that are not conducted before a court and aim, among others, to lead to activity conveying that the minor has accepted responsibility for the criminal act, including by providing redress to the victim, the community, or the society.”⁹² The starting point for amending the law was Section 40(3) of the CRC, which states:

89. Youth Law (Trial, Punishment and Modes of Treatment), 5731-1971, SH No. 2171, p. 688 (Isr.).

90. *Id.*

91. Youth Law (Judgment, Punishment, and Treatment), 5772-2011, SH No. 2325 p. 58 (Isr.).

92. *Id.* at sec. Sec. 12A.

States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law... (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Several proposals for legislative reforms formulated by the public committee are today at various stages of implementation. Thus, for instance, governmental committees were appointed for implementing the public committee's recommendations regarding the following topics: separate legal representation for children at risk, the rights of children in out of home placements, the definition of parental responsibility, and the appointment of a Commissioner for Children's Rights.⁹³

As for Israeli case law, since the Convention's ratification, references to it appear in over seventy rulings of the Supreme Court and in hundreds of rulings of lower instances.⁹⁴ Although most of the case law deals with the Convention's principles, courts have also referred to concrete rights, mostly the right to education, the right to protection from violence, the right to a family, and the rights of minors in criminal proceedings.⁹⁵

V. POTENTIAL LESSONS FROM THE ISRAELI EXPERIENCE FOR THE AMERICAN DEBATE ON THE RATIFICATION OF THE CONVENTION

The review of the CRC's influence on Israeli law revealed an interesting picture suggesting that, probably due in part to the

93. Morag, *supra* note 72, at 68.

94. Search was conducted in the Nevo Legal Database on August 12, 2013. For Supreme Court rulings, see *e.g.* CA 3112/94 Abu Hassan v. State of Israel PD 53(1) 422 [1999] (Isr.), CA 2266/93 John Doe v. Jane Doe PD 49(1) 221, 248 [1995] (Isr.), CA 4596/98 Jane Doe v. State of Israel PD 54(1) 145 [2000] (Isr.). Civil Further Appeal 7015/94 The State of Israel v. Jane Doe PD 50(1) 48 [1995] (Isr.).

95. For review of Israeli Case Law see Morag, *supra* note 72.

public committee's work, Israeli law has largely endorsed a new conception of children's rights. The concrete expressions of this approach seem to be the four principles of the CRC and their interpretation. The CRC has thus served as a platform for leveraging a deep conceptual change in Israeli law, touching on the actual recognition of children as rights bearers and on the unique characteristics of children's rights.

Continued adaptation of Israeli law to the CRC is a slow but ongoing process. Despite the difficulties hindering progress in the full implementation of the CRC and of the public committee's recommendations, successful absorption of the CRC's principles has created a good normative foundation that, in the future, will ease the Convention's integration into Israeli law.

What, then, can be learned from the Israeli experience that could contribute to the current debate on the United States joining the Convention?

First, supporters of children's rights can learn from the Israeli experience that adopting the Convention can definitely be an effective tool in the promotion of these rights.

Furthermore, the debate surrounding the possibility of the United States joining the CRC seems to have focused mainly on the influence of some of its concrete provisions. Insufficient emphasis has been placed on the deep and broad conceptual change represented by the CRC insofar as the characteristics of children's rights are concerned, and on the potential implications of this change for the status and wellbeing of American children.

As this article has shown, the conceptual change in the perception of children's rights conveyed by the CRC, prominently manifest in the interpretation of its four principles, reflects a transition to an approach founded on recognizing the difference between children's and adults' rights. This is a holistic approach that seeks to overcome the pitfalls that had hindered the discourse on children's rights prior to the Convention, including the view that recognizing children's rights clashes with the principle of the child's best interests or with the principle of parental autonomy. These pitfalls had often precluded recognition of children as rights bearers.

A review of the potential advantages accruing from the United States joining the Convention should therefore be conducted out of acquaintance with the CRC's conception of children's rights and with the ability to absorb it into the law via the Convention's principles. Integrating the fundamental conceptions of the Convention into American law can therefore provide a significant basis for American law recognizing children as rights bearers and, as a direct result of it, for promoting the wellbeing of American children.