Decolonising child protection in Aotearoa: What can be learned from First Nations internationally?

by

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EXECUTIVE SUMMARY

This project explores issues of indigenous child protection in a global context. This report examines the work of indigenous people internationally, their mechanisms for decolonising and re-indigenising child protection overseas and asks how we can apply those learnings in Aotearoa New Zealand. The research method for this project was a comparative socio-legal analysis of child welfare instruments in Canada and the United States of America.

Indigenous child welfare in Canada is rooted in the historical context of Indian Residential Schools and the mass uplift of indigenous children in the 60s Scoop. This has led to a large overrepresentation of indigenous children in the Canadian state care system. The reports of the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission made recommendations to the state government to improve indigenous child welfare, including to devolve power to indigenous governments to set up independent indigenous child protection services. These recommendations led to the creation of Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families. This legislation affirms indigenous jurisdiction over child protection and family services and sets out national minimum standards for providing care to indigenous children. A Supreme Court Case upheld this legislation as constitutional. Recently, indigenous groups such as the Cowichan Tribes have used Bill C-92 to develop their own child protection laws and institutions.

Indigenous child welfare in the US is rooted in the historical context of Indian Boarding Schools and the mass uplift and displacement of indigenous children, including through the Indian Adoption Project. These disparities led to the creation of The Indian Child Welfare Act 1978 which set standards for indigenous child protection to prevent the breakup of indigenous families. This Act affirms Tribal authority over child services and prioritises indigenous children being placed in indigenous families. Recently the Act was threatened by a Supreme Court case where opposition argued that it was unconstitutional, and sought to dismantle the jurisdiction of indigenous tribes. The Supreme Court rejected those arguments and upheld the Act. The US still faces issues with implementing the Act, and does not have a national inquiry body. A state level commission made recommendations about upholding sovereignty as part of future best practice.

Sovereignty and self-determination are core issues in indigenous rights law across the globe. One of the key takeaways is the North American framework of separate sovereignty for indigenous tribes, that could be replicated with iwi in Aotearoa. In the child protection context, sovereignty can give better effect to the care of indigenous children. However, improving indigenous child welfare in state child welfare systems highlighted a tension of using state legislation to empower indigenous peoples who should already have that power, derived from their own self-determination and sovereignty. The consequences of decades of colonisation and repression are

manifesting, and indigenous people are demanding change. This has seen a push for the reinvigoration of indigenous cultures alongside a re-indigenisation of colonial systems.

In all the research, indigenous groups advocated for increased public awareness of indigenous child welfare history and increased cultural competency of child services workers. Public awareness is a key tool of decolonisation to lay foundations to change how people think. Cultural competency for social workers and decision-makers will help improve the care of indigenous children within the state care system. These recommendations focus on decolonising and indigenising state care systems, which may be in tension with indigenous sovereignty in child protection.

The different pieces of legislation demonstrated issues with sovereignty, public policy and indigenous-state relationships in each jurisdiction's approach to indigenous child protection. All the legislation set out placement preferences for indigenous children to remain with indigenous families - representing a key step in reconciling indigenous child welfare. The Canadian legislation provides for the creation of coordination agreements similar to Oranga Tamariki strategic partnerships. This again raises the question of sovereignty and how it should be balanced against the fact that indigenous services are being allowed to exist by virtue of state legal mechanisms. This highlights universal tensions between the goal to improve indigenous child welfare and working within restrictive state legal systems.

HE MIHI

I te tuatahi, e rere ana āku mihi maioha ki tōku whānau. This work has been made possible by the support of my family and friends, who have patiently kept me company while working on this project. I really appreciate your love and care.

Secondly, to my stellar supervisor Dr Luke Fitzmaurice-Brown for his support and guidance. Your passion for child protection is inspiring, and working on this project alongside you has taught me so much about not only child protection in legal systems, but indigenous cultures at large. I feel proud to say that you are my summer research supervisor, and I hope I have made a helpful contribution to your work. E mihi kau ana ki a koe, e te rangatira.

Finally, my thanks to the team at Ngā Pae o te Māramatanga for taking me onboard as a New Horizons summer research intern. I have learned so much throughout this programme and I feel proud to be researching alongside the other interns in this amazing summer cohort. Kei te mihi, kei te mihi, kei te mihi.

INTRODUCTION

Children are central to the indigenous world-view as carriers of cultural knowledge, values and languages - a manifestation of the past, present and future of indigenous peoples. However, colonial governments globally have sought to break this sacred connection. This has led to indigenous advocacy and legislation to reinstate the wellbeing of indigenous children.

The decolonisation and re-indigenisation of child protection in Aotearoa manifests through the struggle for rangatiratanga over our most precious taonga - our tamariki. These efforts focus on the cooperation of Māori and the State to create “by Māori, for Māori” services that protect both the physical and cultural wellbeing of indigenous children.

Recently, this position has been jeopardised by efforts to repeal section 7AA of the Oranga Tamariki Act, which enshrines the Crown’s commitments to improving outcomes for tamariki Māori.[1] After consultation, Parliament decided to retain iwi strategic partnerships.[2] But section 7AA’s other important functions of reducing disparity, having regard to cultural concepts like mana and whakapapa, and upholding Treaty promises are still being threatened by repeal. If this is what’s at stake in NZ,

[1] Oranga Tamariki | Ministry for Children “Section 7AA - What We Do” <https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/section-7aa/what-we-do-section-7aa/>.
[2] (29 Jan 2025) 781 NZPD (Oranga Tamariki (Repeal of Section 7AA) Amendment Bill — Second Reading, Karen Chhour).

what can we learn about child protection sovereignty from indigenous groups overseas?

This project explores issues of indigenous child protection in a global context. This report examines the work of indigenous people internationally, their mechanisms for decolonising and re-indigenising child protection overseas and asks how we can apply those learnings in Aotearoa New Zealand. This report examines histories, legislation, case law and child services providers to draw connections between global indigenous efforts.

METHODOLOGY

The research method for this project was a comparative socio-legal analysis of child welfare instruments in Canada and the United States of America. This method allowed me to analyse state and tribal child welfare legislation, policy and social service providers to compare with Aotearoa and each other to find themes and draw conclusions. To explore different output styles during the project, I presented my Canada research as a legal research memo and my US research as a research essay. This report is presented using New Zealand Law Style Guide referencing to allow for simpler citation of legal sources.

A note on terminology - this report uses the general term “indigenous” throughout. Academic sources and colonial governments have used a range of terminology with various histories that were not always appropriate.[3] I use the general term “indigenous” to avoid these offences, especially towards groups that I am not a part of. As an exception to this rule, this report uses the term “Indian” when discussing the US political/legal term “Indian” defined as people who are registered members or are eligible to be registered members of state-recognised Tribes.[4]

[3] American sources use the terms “Indian”, “American Indian”, “Native”, “Native American” and “Alaskan Native” depending on the time and context. Canadian sources use the terms “First Nations, Inuit and Métis”, “Aboriginal” and “Indigenous” depending on the time and context.

[4] For the purposes of this report, the ICWA definition of “Indian” is: 1) an enrolled member of a federally recognized Indian Tribe; 2) an Alaska Native member of an Alaska Native Claims Settlement Act (ANCSA) regional corporation; or 3) a biological child of a member of a federally recognized Indian Tribe or ANCSA regional corporation, and personally eligible for such enrollment/membership (Indian Child Welfare Act of 1978 25 USC § 1903).

FINDINGS

Canada

Introduction

The Canada section will discuss the historical context of indigenous child welfare in Canada, the report of the Royal Commission on Aboriginal Peoples, the Calls to Action of the Truth and Reconciliation Commission of Canada, Bill C-92: An Act respecting First Nations, Inuit and Métis children, the Supreme Court case on Bill C-92, examples of the implementation of Bill C-92, and examples of indigenous child welfare representative bodies.

Historical Context

Indigenous child welfare in Canada is rooted in the historical context of colonial government policies that aimed to civilise "savages" by removing indigenous children from their families.[5] These policies include Indian Residential Schools and the mass uplift of indigenous children into the state care system during the "60s scoop".[6]

Indian Residential Schools existed as a colonial force to "civilise" indigenous peoples by removing children from their homes, families and communities. The first residential school was opened in 1831 and a total of approximately 150,000 indigenous children were taken from their families and sent to residential schools.[7] These children were subject to a cultural genocide at the hands of the Canadian government and church groups.[8] The last federally-run residential school was closed in 1996.[9]

Large numbers of children were also uplifted into the state care system from the 1950s to the 1980s in the period known as the "60s scoop".[10] This came after a statutory amendment allowed provincial and territorial laws to apply to indigenous First Nations reserves. Children were taken and placed in Residential Schools or purposefully fostered and adopted out to non-Indigenous homes. In Saskatchewan the adoption of indigenous children was even *advertised* on TV, radio and in newspapers to "induce families to investigate transracial adoption".[11] Uplift was often the only child welfare

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[5] National Collaborating Centre for Indigenous Health *Indigenous Children and the Child Welfare System in Canada* (September 2017) at 2.
[6] At 1.
[7] At 2.
[8] Truth and Reconciliation Commission of Canada *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 1.
[9] *Indigenous Children and the Child Welfare System in Canada*, above n 5, at 2.
[10] At 2.
[11] Allyson Stevenson "Selling the Sixties Scoop: Saskatchewan's Adopt Indian and Métis Project" (19 October 2017) Active History <https://activehistory.ca/blog/2017/10/19/selling-the-sixties-scoop-saskatchewans-adopt-indian-and-metis-project/>.

"service" offered to indigenous families.[12] Indigenous children still have a higher chance of being separated from their families as their non-indigenous counterparts.[13]

These historical events, coupled with underfunding, have led to a large overrepresentation of indigenous children in the Canadian state care system. In the 2021 Census, indigenous children made up 53.8% of children in foster care, despite only making up 7.7% of children in Canada (under 14).[14] There are more indigenous children in the state care system now than there were in residential schools.

Royal Commission on Aboriginal Peoples

The Royal Commission on Aboriginal Peoples was appointed in 1991 to "restore justice to the relationship between Aboriginal and non-Aboriginal people in Canada and to propose practical solutions to stubborn problems".[15] This section will discuss the findings and recommendations of the Commission.

The Commission's 1996 report made recommendations to federal and provincial governments, including a recommendation to collaborate with indigenous people in cultural and health issues such as childcare.[16]

The Commission found that the right to self-government rests with Aboriginal Nations as a whole, not individual communities.[17] It found that health is a core area of self-government which therefore can be carried out independently from the Canadian government.[18] It found that self-government leads to culture growth and indigenous leadership development.

On funding, the Commission recommended that as self-government became a reality "federal, provincial and territorial governments [should] enter into long-term economic development agreements with Aboriginal governments or institutions, agreements which would, among other things, transfer all of their economic development programming responsibility and funding to Aboriginal institutions".[19]

Truth and Reconciliation Commission

The Truth and Reconciliation Commission of Canada ("TRC") was established in 2009 as part of the Indian Residential Schools Settlement Agreement to record the stories

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[12] *Indigenous Children and the Child Welfare System in Canada,* above n 5, at 3.
[13] National Collaborating Centre for Indigenous Health *Reconciliation in First Nations Child Welfare* (September 2017) at 2.
[14] Government of Canada "Reducing the number of Indigenous children in care" <https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851>.
[15] The Institute on Governance *Summary of the Final Report of The Royal Commission on Aboriginal Peoples: Implications for Canada's Health Care System (*October 1997) at 1.
[16] At 3.
[17] At 2.
[18] At 2.
[19] At 3.

of Survivors and educate Canadians about residential schools. This section will outline the findings of the TRC in relation to child welfare.

The TRC heard testimony from over 6,000 witnesses to "lay the foundation for reconciliation in the relationship between Indigenous and non-Indigenous people in Canada".[20] The TRC made 94 calls to action to redress the legacy of residential schools and advance reconciliation. These are the calls to action for child welfare:[21]

1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:
    i. Monitoring and assessing neglect investigations.
    ii. Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.
    iii. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.
    iv. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to family healing.
    v. Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.
2. We call upon the federal government, in collaboration with the provinces and territories, to prepare and publish annual reports on the number of Aboriginal children (First Nations, Inuit, and Métis) who are in care, compared with non-Aboriginal children, as well as the reasons for apprehension, the total spending on preventive and care services by child-welfare agencies, and the effectiveness of various interventions.
3. We call upon all levels of government to fully implement Jordan's Principle.
4. We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:

[20] *Reconciliation in First Nations Child Welfare* (September 2017), above n 13, at 2.
[21] Truth and Reconciliation Commission of Canada *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) at 1.

i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.

ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.

iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.

5. We call upon the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.

Call to Action #3 asks all governments to implement Jordan's Principle. Jordan's Principle is a legal requirement that provides access to support for indigenous children in need and ensures that the government of first contact pays for the support without delay.[22] The principle is named in memory of Jordan River Anderson, an indigenous child born with complex medical needs. Jordan spent more than two years unnecessarily in hospital while provincial and federal governments argued over who should pay for his at-home care. Jordan died in the hospital at the age of five years old, never having spent a day in a family home. The Canadian state care framework creates ambiguity about who has jurisdiction over services for indigenous people on reserves, leading to delayed access to care.[23] This is further complicated by funding issues, where provincial and federal governments often argue over who the funding should come from. Jordan's Principle is one way indigenous people seek to overcome this issue.

Call to Action #4 calls upon the federal government to enact indigenous child welfare legislation to establish national standards for uplift and custody cases of indigenous children. The TRC specified that the legislation affirm indigenous sovereignty of child welfare, prioritise culturally appropriate placements and remember the history of residential schools in their decision-making. This led to the passing of Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families.

Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families

Overview of Bill C-92

In 2019 Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families was passed, affirming indigenous jurisdiction over child protection and family services and setting out national minimum standards for providing care to indigenous children. The purposes of the Act are to: affirm the right of self-government in child

[22] First Nations Child & Family Caring Society *Jordan's Principle Information Sheet* (June 2024).
[23] Laura Murphy "Bill C-92: An Act respecting First Nations, Inuit and Metis children, youth and families" (video, 29 March 2022) YouTube <https://www.youtube.com/watch?v=s3UEp0XHm1o>.

and family services; set out principles for the provision of child services of indigenous children; and contribute to the implementation of UNDRIP.[24]

The Preamble of the Act acknowledges the history of indigenous child welfare in Canada including residential schools and the history of mistreatment of indigenous women and girls by the state care system. It affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government and jurisdiction in child and family services. It also affirms the importance of "reuniting Indigenous children with their families and communities".[25] The Preamble further outlines that the Act was created to uphold the TRC Calls to Action, UNDRIP, The UN Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination.

The Act is structured around three key principles: the paramountcy principle, cultural continuity and substantive equity. The paramountcy principle means that the Act must be administered according to the best interests of the child. Cultural continuity recognises that culture is "essential to the wellbeing of indigenous children, families and communities", including language, custom and other indigenous knowledge.[26] Substantive equity considers that "children, family members and indigenous governing bodies can exercise their rights without discrimination", to ensure there are no gaps in care between indigenous and non-indigenous children due to jurisdiction disputes.[27]

Section 10 of the Act describes the best interests of indigenous children as taking into account not only physical and emotional safety but also the importance of an ongoing relationship with indigenous community and culture.[28] It specifies that where possible a child's best interest should be considered consistently with the laws of their own indigenous group.[29] The factors to consider best interest include: cultural, linguistic and religious upbringing, preservation of cultural identity and plans for child care that include customs and traditions of their indigenous group.[30]

The Act sets standards for child services providers and placement priority rules for indigenous children. Services should take into account culture and family origins alongside physical wellbeing.[31] Before significant decisions are made, the child's parents, care provider and indigenous governing body must be notified.[32] Providers should consider the provision of preventive and/or prenatal care, considering socio-

[24] An Act respecting First Nations, Inuit and Métis children, youth and families SC 2019 c 24 ("Bill C-92"), s 8.
[25] Preamble.
[26] Section 9(2).
[27] Section 9(3).
[28] Section 10(2).
[29] Section 10(4).
[30] Section 10(3).
[31] Section 11.
[32] Section 12(1).

economic conditions.[33] Service providers must make "reasonable efforts to explore options for indigenous children to remain with their family" before resorting to uplift.[34] The Act prioritises placements in this order: the child's parent; another adult member of their family; an adult in the same indigenous group or community; an adult in a different indigenous group or community; or any other adult.[35] This includes preferring placements near other children they are related to, taking into account customary adoptions and promoting family ties if placed outside their families.[36]

Finally, the Act reaffirms the right of self-government of indigenous groups (as per s 35 of the Constitution Act 1982) in the jurisdiction of child and family services.[37] Indigenous academic Van Napoleon described these indigenous made laws as "indigenous legal orders".[38] Indigenous governments seeking to use this legislative authority can notify the Minister and provincial governments to create coordination agreements that can include funding, support and any other measure.[39] Making reasonable effort to enter a coordination agreement over a year long period will give the same force of law as entering into an agreement. The Minister must make available information on pending and complete coordination agreements.[40] Indigenous legal orders, like federal and provincial laws, must also be made accessible to the public.[41]

Importantly, these indigenous legal orders have the same force of law as federal laws.[42] Indigenous legal orders are not affected by federal laws. Where there is a conflict between federal law and an indigenous legal order, the indigenous legal order will prevail.[43] Similarly, where there is a conflict between provincial law and an indigenous legal order, the indigenous legal order will prevail.[44] Where indigenous legal orders of different indigenous groups conflict, the prevailing law will be the law of the indigenous group the child has stronger ties to.[45] This power to override federal and provincial laws led to a lawsuit questioning the constitutionality of these sections of Bill C-92.

Supreme Court Case

Following the enactment of the Act in 2022, the Attorney General of Quebec took a claim to the Quebec Court of Appeal ("QCCA") to question its constitutional validity.

[33] Sections 14 and 15.
[34] Section 15.1.
[35] Section 16(1).
[36] Sections 16(2) -16(3), and 17.
[37] Section 18(1).
[38] Val Napoleon "Thinking about indigenous legal orders" in René Provost and Colleen Sheppard (eds) *Dialogues on Human Rights and Legal Pluralism* (Springer, Dordrecht, 2012) at 229-245.
[39] Bill C-92, above n 24, at s 20.
[40] Section 25.
[41] Section 26.
[42] Section 21(1).
[43] Section 22(1).
[44] Section 22(3).
[45] Section 24(1).

The QCCA found that the Act is constitutionally valid except for ss 21 and 22(3) which give indigenous legal orders priority over provincial laws. The QCCA found that these provisions were outside of Parliament's jurisdiction as they altered Canada's constitution. This decision was appealed to the Supreme Court of Canada ("SCC").

The SCC unanimously affirmed that the Act as a whole is constitutionally valid, overturning the QCCA's 2022 decision.[46] The Court found that the "incidental effects" of the Act's national standards on the exercise of power of provinces does not make the Act unconstitutional. Setting national standards is within federal jurisdiction and therefore is binding on provincial governments.

Section 21 of the Act, which details that indigenous legal orders will have the same force of law as federal laws, is a valid way for Parliament to incorporate indigenous legal orders by reference. The Court found this to be an exercise of a standard legislative drafting technique under Parliaments jurisdiction over Indians and lands reserved for Indians (s 91(24) of the Constitution Act 1867).[47] This was not found to alter the architecture of the Constitution. Similarly, the Court found it is therefore open to Parliament to affirm that indigenous legal orders will prevail if there is conflict under s 22(3). This is a restatement of the doctrine of federal paramountcy, not a fundamental change to the architecture of the Constitution.

A key difference in the SCC decision is the basis of the legal arguments. In the QCCA decision, much of the discussion is rooted in section 35 of the Constitution Act 1982 which recognises and affirms the existing "aboriginal and treaty rights" of indigenous peoples ("s 35 aboriginal right"). The SCC focuses on section 91(24) of the Constitution Act 1867 which gives Parliament legislative power over "Indians and lands reserved for Indians". The SCC focuses on the question brought up from the QCCA of constitutionality in a narrow legal sense, not completely unpacking the tensions between s 35 aboriginal rights and the larger architecture of the Constitution.

Critiques of the Supreme Court Case

The SCC's focus on s 91(24) has garnered criticism from some indigenous groups as not going far enough to affirm the place of indigenous self-government in the legislative powers of the Canadian constitution.

The First Nations Child & Family Caring Society thought that because the SCC decision did not engage on this issue, the legislation is more open to repeal.[48] The SCC found that the Crown must honour the right to self-government in child and family services as long as it agreed with laws in force, meaning that their validity relies on

[46] Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families* 2024 SCC 5 at Headnote.
[47] At [122].
[48] First Nations Child & Family Caring Society *Supreme Court of Canada Decision on An Act Respecting First Nations, Métis and Inuit Children Youth and Families* (March 2024) at 2-3.

other Acts of Parliament that could be repealed. They believe this issue may "receive further analysis in upcoming cases before the SCC".[49]

Kristyn McDougall, Métis/Michif law student from Saskatchewan, wrote an essay discussing the SCC ruling saying it was "not the aboriginal rights victory we had hoped for".[50] McDougall found the decision "anti-climactic" as it did not discuss many implications this would have on indigenous rights law. McDougall argued that ultimately this means that indigenous self-government have not yet been judicially recognised and that indigenous people "are still relying on Canada's 'courtesy' to have our own sovereign laws afforded the power to override conflicting provincial and federal settler-colonial laws".

Implementing Bill C-92

Bill 38 Indigenous Self-Government in Child and Family Services Amendment Act

In 2022 British Columbia passed Bill 38 or the Indigenous Self-Government in Child and Family Services Amendment Act which recognises "the inherent right of Indigenous communities to legally create and control their own child and family services".[51] This allows Indigenous Governing Bodies ("IGBs") to exercise jurisdiction over child and family services.[52] The Bill makes amendments such as strengthening collaborative and consent-based decision-making with Indigenous communities for adoption placements and enabling information sharing between IGBs and the provincial government. It also creates an Indigenous child welfare director position within the Ministry of Children and Family Development.[53] The amendments were designed to fit in alongside Bill C-92 federal regulations.

Indigenous groups in B.C. welcomed the Bill, Cowichan Tribes council member Stephanie Atleo saying that "these changes represent a significant step toward reconciliation by recognizing for the last 150 years, the laws and policies regarding Indigenous children and child welfare have had a severe impact on Indigenous families".[54] The Bill received support from indigenous groups because it was developed in consultation with indigenous communities.[55] The Bill is an important start

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[49] At 3.
[50] Kristyn McDougall "The Supreme Court of Canada's Ruling on the Constitutionality of Bill C-92: Not the Aboriginal Rights Victory We Had Hoped For" (10 December 2024) The Canadian Bar Association Saskatchewan Branch <https://www.cbasask.org/Publications-Resources/BarNotes-(1)/Articles/The-Supreme-Court-of-Canada%E2%80%99s-ruling-on-the-consti#_edn9>.
[51] "New legislation gives B.C. Indigenous communities control of their own child welfare system" *CBC News* (online ed, 25 November 2022).
[52] Frances Rosner "Paradigm Shift in the CFCSA — Indigenous Children Cannot Afford to Wait" *Indigenous Matters, BarTalk* (online ed, April 2023).
[53] "B.C. passes historic legislation to uphold Indigenous jurisdiction over child welfare" *BC Gov News* (online ed, 25 November 2022).
[54] "B.C. proposes legislative changes to give Indigenous communities power over their own child welfare system" *CBC News* (online ed, 26 October 2022).
[55] Frances Rosner, above n 52.

to reconciliation in B.C., a province where indigenous children/youth made up 12.6% of the general population but 67.9% of children/youth in state care.[56]

Despite this good work, Métis lawyer Frances Rosner cautions that the amendments still present barriers.[57] Rosner highlights this stipulation - only indigenous communities with formally recognised IGB structures can take advantage. Rosner found that out of over 200 First Nations and Indigenous communities in B.C., only 11 have recognised IGBs. She says that the future of Bill 38 agreements will "depend greatly on the establishment of IGB's, the capacity of IGB's to develop their own child and family services laws, and then the ability to successfully enter agreements". This is an obstacle in Bill C-92 - that indigenous legal orders trump federal laws *if* they can be properly articulated. This had led to the development of bodies like the Indigenous Law Research Unit ("ILRU") to help indigenous communities record their laws.[58]

Cowichan Tribes

A case study of the Cowichan Tribes explores the use of Bill 38 and indigenous legal orders by IGBs in British Columbia to set up indigenous child and family services.

The Cowichan Tribes are the historic descendants of Cowichan Nation communities who occupied winter villages at the Cowichan and Koksilah Rivers and the Cowichan Bay.[59] Vancouver Island has been their home since time immemorial as part of the larger group of Coast Salish people that speak the *Hul'q'umi'num* language. Today with a membership of over 5,500 they are the largest single First Nation in British Columbia.

The Cowichan Tribe has a long history of self-governance in child and family services, beginning with the tribe's first social worker in 1976.[60] Their timeline includes assuming delegated authority over child and family wellness in 1996 and beginning to develop Cowichan child and family legislation in 2010. In 2021 the ILRU published educational material on Coast Salish laws relating to children and caregivers.[61]

On the 24th of November 2023 the Cowichan Tribes passed the *Snuw'uy'ulhtst tu Quw'utsun Mustimuhw u' tu Shhw'a'luqw'a' i' Smun'eem* –"The Laws of the Cowichan People for Families and Children".[62] The law, referred to as "Our Law", is rooted in *Snuw'uy'ulh* (traditional teachings) and is primarily focused on prevention and support

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[56] "Cowichan Tribes now fully responsible for child welfare services" *CBC News* (online ed, 24 June 2024).
[57] Frances Rosner, above n 52.
[58] Indigenous Law Research Unit "About Us" <https://ilru.ca/about-us/>.
[59] Cowichan Tribes "About Cowichan Tribes" <https://cowichantribes.com/about-cowichan-tribes/history/>.
[60] Cowichan Tribes Child and Family Wellness Legislation Project "History" <https://ourchildlaw.cowichantribes.com/history/>.
[61] Jessica Asch, Tara Williamson, and Leslie-Ann Paige *Toolkit: Coast Salish Laws Relating to Child and Caregiver Nurturance & Safety* (Indigenous Law Research Unit, 2021).
[62] Cowichan Tribes Child and Family Wellness Legislation Project "Home" <https://ourchildlaw.cowichantribes.com/>.

for Cowichan families.[63] The law guarantees sovereignty so that the tribe no longer has to follow federal and provincial laws. It sets up a child and family services agency to provide cultural and holistic support.[64] The law has a core set of guiding principles such as *Shtun'ni'iw's* - importance of knowing where you come from.[65] It also details minimum standards, instructions to facilitate collaborative decision-making and the implementation of support and early intervention services.

In 2024 the Cowichan Tribes signed a coordination agreement with the federal and provincial government to start phasing in this law. The agreement includes funding arrangements of $207.5 million from the federal government and $22 million from the provincial government over four years to help set up the tribe's child and family services.[66]

Collective Representative Bodies

First Nations Child & Family Caring Society

The First Nations Child and Family Caring Society of Canada ("the Caring Society") is a national body that was founded in 1998 and "works to ensure the safety and well-being of First Nations youth and their families through education initiatives, public policy campaigns and providing quality resources to support communities".[67]

The society spearheads national initiatives such as the National Day of Truth and Reconciliation or Orange Shirt Day. They focus on education and story-telling, with films and books for children through to newsletters and annual reports for adults.

Our Children Our Way Society

The Our Children Our Way Society represents 25 Indigenous child and family service agencies in British Columbia.[68] They are an advocacy group fighting for changes in policy, practice, legislation and funding. They have agreements with both federal and provincial governments in a formal Partnership Forum.

The society provides resources to agencies as well as a forum to discuss issues of child and family services in the province. They host conferences that platform indigenous speakers on policy development, prevention services and jurisdictional pathways with a focus on partnership as an avenue for providing better services.

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[63] Cowichan Tribes *A guide to exploring our proposed child and family services law* (September 2023) at 1.
[64] Snuw'uy'ulhtst tu Quw'utsun Mustimuhw u' tu Shhw'a'luqwa'a' i' Smun'eem (Laws of the Cowichan People for Families and Children) at 40.
[65] At 8.
[66] "Cowichan Tribes now fully responsible for child welfare services", above n 56.
[67] First Nations Child & Family Caring Society "About Us" <https://fncaringsociety.com/about>.
[68] Indigenous Child & Family Services Directors Our Children Our Way Society "Our Children Our Way" <https://ourchildrenourway.ca/>.

United States of America

Introduction

The US section will discuss the historical context of indigenous child welfare in the US, the Indian Child Welfare Act, the recent US Supreme Court decision of *Haaland v Brackeen*, and examples of indigenous child welfare service providers and representative bodies. The US research focuses on policies affecting the indigenous peoples of the continental US and Alaska - excluding Hawai'i.

Historical Context

Indigenous child welfare in the US is rooted in the historical context of assimilation and eradication policies aimed at dealing with the "Indian problem".[69] The US colonial government routinely legislated to dismantle indigenous tribes and integrate them into white American society through the systemic uplifting of indigenous children. The key culprit policies were the institution of Indian boarding schools and the Indian Adoption Project.

The 1800s Indian boarding school policy removed indigenous children from their homes, families and communities for a genocidal re-education. The purpose of boarding schools was to "Kill the Indian, Save the Man", leading to the multigenerational loss of children, sacred cultural knowledge, values and languages at the hands of the US government and church groups.[70] The first boarding school was opened in 1879 and within the first twenty years of boarding school operations, an estimated 20,000 children had been stolen from their families.[71] By 1925, 60,000 indigenous children were in boarding schools, which made up nearly 83% of indigenous school-age children.[72] There is still no official data on the total number of children lost to Indian boarding schools.

As Indian boarding schools phased out of use, the Indian Adoption Project (1958) took its place as the next phase of assimilation.[73] This project saw indigenous children taken from their families and rehomed to white foster and adoptive parents. In boarding schools indigenous children lost their communities, but they had each other. In foster

[69] National Native American Boarding School Healing Coalition *Healing Voices Volume 1: A Primer on American Indian and Alaska Native Boarding Schools in the U.S.* (June 2020) at 6
[70] At 3.
[71] At 2-3.
[72] At 1-2.
[73] At 6.

and adoptive homes indigenous children were truly isolated, especially when suffering in abusive households. The racist biases of euro-centric social culture bled into child welfare practices that resulted in more indigenous children being taken. State care workers thought that indigenous families were "backward, uncivilised and unfit to raise children", even going as far as removing any children on reservations, which were deemed "unsuitable environments" for child-rearing.[74] By the 1960s one in four indigenous children were living apart from their families.[75] By the 1970s, 85% of foster placements were in non-indigenous settings and 90% of adoptions were with non-indigenous families.[76]

For much of American history, the child welfare system was wielded to alienate indigenous children, Tribal sovereignty and traditional culture like child-rearing practices. In the 1970s a new range of legislation was created to begin remedying these historical wrongs. The Bureau of Indian Education was established, and Tribal governments were granted more control over their own affairs.[77] This push for education and protection of indigenous children and families resulted in the Indian Child Welfare Act in 1978.[78]

ICWA: Indian Child Welfare Act

The Indian Child Welfare Act 1978 ("ICWA") was created to set standards for indigenous child protection and to "prevent the breakup of Indian families".[79] ICWA recognises that indigenous children are vital to the continued existence of indigenous Tribes and acknowledges the US government's responsibility to protect and preserve those children. The Act also recognises the history of uplifts of indigenous children, subsequent broken families, and the government's failure to remedy prevailing cultural and social norms.[80]

ICWA affirms Tribal authority over child services placements and requires state courts to notify Tribes when proceedings involve their children.[81] Tribes are given certain powers to intervene in court processes and/or transfer cases to the jurisdiction of Tribal authorities. ICWA requires that "active efforts" need to be made toward "remedial services and rehabilitative programs designed to prevent the breakup of the Indian

[74] Marcia Zug "ICWA Downunder: Exploring the Costs and Benefits of Enacting an Australian Version of the United States' Indian Child Welfare Act" (2020) 33 Can J Fam L 161 at 3.
[75] National Native American Boarding School Healing Coalition, above n 69, at 6.
[76] Meschelle Linjean and Hilary N Weaver "The Indian Child Welfare Act (ICWA): Where we've been, where we're headed, and where we need to go" (2022) 17(5) Journal of Public Child Welfare 1034 at 1038.
[77] Indian Self Determination and Education Assistance Act of 1975 25 USC ch 46.
[78] Indian Child Welfare Act of 1978 25 USC.
[79] Indian Child Welfare Act of 1978 25 USC § 1901.
[80] Indian Child Welfare Act of 1978 25 USC § 1901.
[81] Meschelle Linjean and Hilary N Weaver, above n 76, at 1036.

family".[82] The Act sets out preferences for indigenous children to be placed with indigenous families, with priority given to extended family, other families in the Tribe and then to Indian families of other Tribes.[83] ICWA has been key to devolving decision-making power to Tribal authorities and keeping indigenous children in their own families and communities.

While on paper ICWA grants a raft of protections for indigenous children, it is unreliably enforced.[84] As federal legislation, much of the potential of ICWA is unmet if individual states are not willing to adopt supporting legislation. ICWA has no official oversight agency to enforce compliance, nor does it have a national data collection or reporting mechanism.[85] This has led to issues in practice such as deficient Tribal notification, insufficient resources for foster licensing and insufficient training for child welfare staff like social workers and attorneys. So despite ICWAs protections, indigenous children are still four times more likely than white children to be removed from their families, and they continue to be adopted out of community and culture.[86]

On a wider scale, ICWA stands for the protection of indigenous identity, Tribal sovereignty, and the promotion of traditional notions of welfare and child-rearing. Anti-ICWA cases argue not about the best interests of children, but the definition of Indian in the first place - undermining indigenous sovereignty, self-determination, and the black-letter law. ICWA eligibility is based on Tribes own citizenship criteria.[87] These cases used racist and biased arguments such as the nature of blood quantum, cultural stereotypes such as not living on a reservation, and lack of indigenous language, cultural practice and Tribal engagement as reasons for children to fall outside of ICWA boundaries.[88] Many of these things are a direct result of colonisation. The most recent lawsuit that has questioned the validity of ICWA in the courts is the case of *Haaland v Brackeen*.

The Brackeen Litigation

Background Context

[82] At 1037.
[83] The priority order for foster and pre-adoptive placements is: (1) an extended family member; (2) a foster home approved by the Tribe; (3) an Indian foster home approved by a non-indigenous licensing authority; or (4) a children's institution approved by the Tribe that can meet the child's needs. The priority order for adoption is: (1) extended family members; (2) another member of the child's Tribe; and (3) another Indian family (Indian Child Welfare Act of 1978 25 USC § 1915).
[84] Meschelle Linjean and Hilary N Weaver, above n 76, at 1035.
[85] At 1040.
[86] At 1040-1041.
[87] ICWA applies to: unmarried persons under age 18 who are 1) an enrolled member of a federally recognized Indian Tribe; 2) an Alaska Native member of an Alaska Native Claims Settlement Act (ANCSA) regional corporation; or 3) a biological child of a member of a federally recognized Indian Tribe or ANCSA regional corporation, and personally eligible for such enrollment/membership (Indian Child Welfare Act of 1978 25 USC § 1903).
[88]Meschelle Linjean and Hilary N Weaver, above n 76, at 1042.

In 2017, white American foster parents Chad and Jennifer Brackeen filed a lawsuit against ICWA regulations that they claim interfered with their adoption of an Indian child. The Brackeens objected to the ICWA placement preferences that prioritise placing Indian children with Indian families over non-Indian families. The child in question, A.L.M., of Navajo and Cherokee descent, was the Brackeen's foster child for most of his life. While qualifying as A.L.M. 's foster parents, the Brackeens position as adoptive parents became unsteady when the Tribe identified a Navajo adoptive family. According to the ICWA regulations, the Navajo family was the preferred placement. The Brackeens argued that it was in the best interests of A.L.M. to remain with them instead of the other family because they were the "only family" he had ever known.[89] They argued 'reverse discrimination' - that they were being unfairly denied custody of A.L.M because they were not Indian i.e. based on their race.

This string of litigation began in 2017 and finished in 2023. Over this period, other non-Indian foster couples seeking custody of Indian children joined the suit. They are referred to as the petitioners/plaintiffs, alongside state representatives. Additionally, A.L.M.'s biological parents had another baby, who was also put up for fostering/adoption. The legal standing of all the foster parents was an issue in these cases. Except for one family, all the other non-Indian foster parents - including the Brackeens - actually got custody of the Indian children over Indian relatives who wanted to raise them.[90] The case still made it to the Supreme Court.

Legal and Policy Arguments

The overall policy behind the lawsuit is that ICWA is unconstitutional because it treats people differently before the law based on their race, particularly, discriminating against non-Indian families. This was argued on the legal grounds of lack of congressional authority, violation of anti-commandeering, violation of non-delegation and violation of the Equal Protection Clause.[91] These arguments question the power of Congress to legislate for Indian policies at state level, and the power of that legislation to give Indian people and Tribes rights and powers that are different to American citizens'.

The key contention here is Tribal sovereignty and the term 'Indian' as a political classification. The term 'Indian' generally describes the race of peoples indigenous to the Americas but it is *also* a US political class whose definition stems from Tribal sovereignty. Indians, in the political sense, are citizens of their own Tribes. Indian Tribes have a unique government-to-government and nation-to-nation relationship

[89] *Brackeen (Texas) v Zinke* 338 F Supp 3d 514 (ND Tex 2018) at 1.
[90] Rebecca Nagle "Update: Supreme Court Decision" (podcast, 23 June 2023) This Land <https://crooked.com/podcast-series/this-land/>.
[91] Jamie Miller "Haaland v Brackeen: Supreme Court saves ICWA, but indigenous child welfare still at risk" (2023) 30 Va J Soc Pol'y & L 17 at 20.

with the US as enshrined in the US Constitution and settled in hundreds of treaties.[92] Essentially, federally recognised tribes operate as separate nations within the physical boundaries of - but legally separate from - the US, in a similar way that countries that share a land border are still separate nations. At base, countries don't make laws for each other's citizens. But by virtue of this unique trust relationship, negotiated over hundreds of years and recorded in treaties, the US government has some powers to legislate for Indian Tribes. This power stems from treaties that commonly included the exchange of land to the US government in return for certain rights, the provision of healthcare and social services "in perpetuity".[93] These agreements have evolved to give Tribes the modern status of "domestic dependent nations". This legal status, coupled with Tribes' inherent sovereignty, is what allows the US government to legislate for Indians as a separate group from American citizens under US laws.

The petitioners' arguments on the passing and implementation of ICWA are than it was an overreach of congressional authority and a violation of anti-commandeering. The argument on congressional authority is that the passing of ICWA was an inappropriately wide use of Indian law-making power that should only apply to regulating land and other physical properties pursuant to individual treaties.[94] This argument undermines the present-day US-Tribal relationship by restricting congressional powers and ignores the history of indigenous child welfare in the US at the hands of the US government. The argument on anti-commandeering and non-delegation is that the provisions stipulating the actions of state workers such as to notify Tribes of proceedings amount to unduly forcing states to adopt federal laws.[95] SImilarly, this misrepresents the power of Congress to legislate on Indian affairs. Child welfare services are a state based operation so in order to effect change, policies must be implemented at the state level.

The petitioners' argument on the different rights of Indian people is that their different treatment under ICWA violates Equal Protection Clause rights to not discriminate on the basis of race. This clause is part of the justification for ending segregation in the US, guaranteeing protection from racial discrimination.[96] This is where the definition of Indian comes into play. The Equal Protection Clause applies to categories such as race, but Indian is a political classification. This argument undermines Tribal self-determination, the US-Tribal relationship and ignores historical context that calls for targeted rectification like affirmative action initiatives.

Supreme Court Case

[92] National Indian Child Welfare Association "Summary of the Brackeen (Texas) v. Zinke Decision" (15 October 2018) at 1.
[93] PBS Origins "Native American Reservations, Explained" (video, 4 April 2024) YouTube <https://www.youtube.com/watch?v=yljnxwi79hc&t=8s>.
[94] Jamie Miller, above n 91, at 20.
[95] At 22.
[96] Constitution Annotated: Analysis and Interpretation of the U.S. Constitution "Amendment 5.7.3 Equal Protection" <https://constitution.congress.gov/browse/essay/amdt5-7-3/ALDE_00013730/>.

In June 2023 the Supreme Court released its judgement rejecting the petitioner's challenges, upholding ICWA in its entirety and reaffirming the status of Tribes.[97] The Court declined the petitioner's arguments on congressional authority and anti-commandeering, and found a lack of standing for the Equal Protection and non-delegation arguments.[98]

On congressional authority, the Court found that the Constitution combined with the trust relationship between the US and Tribes allows for a breadth of law-making power including the creation of ICWA.[99] Similarly the Court did not find an anti-commandeering issue, saying that the ICWA provisions are not a full control on state authorities.

The Court rejected the arguments on Equal Protection and non-delegation due to lack of standing. The Court found that the petitioners could not prove that the ICWA placement preferences 'injured' them in a way that would be solved by ICWA being struck down.[100] In part this is because, despite ICWA, most of the petitioners were awarded custody anyway. The Court also found lack of standing due to legal process, because the suit was against federal parties instead of the state courts who make placements.[101] This finding meant that the Court did not further investigate the Equal Protection arguments and therefore did not rule on whether the placement preferences were discriminatory. Kavanaugh J in his separate judgment found that the Equal Protection issue was "serious" but that it would not be discussed in this case.[102]

The Court acknowledged the history of indigenous child welfare in the US and highlighted the centrality of children to Tribes. Gorsuch J's concurring judgment stepped through the history of Indian reservations, Indian boarding schools and the widespread uplift of indigenous children into the state care system.[103] Gorsuch J upheld the constitutionality of ICWA saying "In adopting [ICWA], Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history".[104]

In summary, the case was a success in protecting the constitutionality of ICWA. The Court recognised ICWAs importance in protecting the future of indigenous peoples by keeping families together. It also upheld Tribal sovereignty by acknowledging the

[97] *Haaland v Brackeen* 599 US 255 (2023) Opinion of the Court at 2.
[98] Syllabus at 3-7.
[99] Jamie Miller, above n 91, at 21.
[100] Syllabus, above n 97, at 6-7.
[101] At 7.
[102] Kavanaugh J concurring at 2.
[103] Gorsuch J concurring at 2-12.
[104] At 38.

unique trust relationship between the US and Tribes that secured the future perpetual provision of health and welfare services for indigenous people.

Critiques of Brackeen

When asked if the rejection of the anti-commandeering arguments closed the door on future challenges, Executive Director of the ICWA Law Centre Shannon Smith replied that the opinion was strong and she was hopeful this would be the end. She said that Gorsuch J's commentary on the history of indigenous child welfare was impactful, presenting "an opportunity to uphold the promises, recognize the connections and recognize the importance of the future of tribes".[105] However, she concluded that Tribal sovereignty will always be challenged, especially when it protects highly profitable property like land, oil and other resources.

JD Candidate Jamie Miller wrote an article on the case, arguing that despite the success, indigenous child welfare is still at risk.[106] She argues that Kavanaugh J's comment on the seriousness of the Equal Protection issue invites a future challenge on different facts.[107] She found that ICWAs Tribal powers make it the perfect target for dismantling sovereignty through an Equal Protection argument.[108] In the interim, she recommends that judges take steps to become more culturally competent in indigenous child welfare cases such as preferring kinship placements and incorporating cultural and Tribal wellbeing into the 'best interest' assessment.

Implementing ICWA

Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission

The Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission ("MWTRC")[109] was created to investigate the ineffective implementation of ICWA in Maine.[110] The MWTRC was endorsed in February 2013 by the governor of Maine and Tribal chiefs to "investigate whether or not the removal of Wabanaki children from their communities has continued to be disproportionate to non-Native children" and make recommendations for systemic and cultural reconciliation.[111]

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[105] Nancy Marie Spears "'A Place of Calm:' Indian Child Welfare Expert Unpacks the Historic Brackeen v. Haaland Decision" *The Imprint* (online ed, 21 June 2023).
[106] Jamie Miller, above n 91, at 17.
[107] At 27.
[108] At 31.
[109] The acronym "MWTRC" has been adopted for this report. The Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission in its report uses the shortening "TRC", however for clarity this report instead adopts "MWTRC" to distinguish from the Truth and Reconciliation Commission of Canada that is also referred to as the "TRC".
[110] Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission *Beyond the Mandate: Continuing the Conversation* (14 June 2015) at 12.
[111] At 6.

The MWTRC heard stories from people who were in care, foster and adoptive families, Tribal leaders, services providers and more. They found that in Maine, Wabanaki children entered foster care an average 5.1 more times that non-indigenous children over a 13 year period. There were sixteen total findings about the state of Maine's indigenous child welfare since the implementation of ICWA.[112]

The report made fourteen recommendations, the first being to respect Tribal sovereignty. It recommended honouring Wabanaki through supporting cultural revival, developing legal training to recognise cultural bias and increasing support for foster and adoptive families.[113] The MWTRC also made recommendations to the Wabanaki Tribe such as resolving blood quantum eligibility requirements, working more collaboratively with non-indigenous communities and creating more truth-telling opportunities.

Collective Representative Bodies

National Indian Child Welfare Association

The National Indian Child Welfare Association ("NICWA") is a national nonprofit dedicated to the wellbeing of indigenous families.[114] It was developed in 1983 to train indigenous child welfare workers in indigenous run service providers both on and off reservation. Now it provides training and resources focused on "tribal capacity to prevent child abuse and neglect" including working on ICWA cases. Their vision is that every indigenous child has "access to community-based, culturally appropriate services that help them grow up safe, healthy, and spiritually strong".

Their work is a mix of hands-on child services training, community outreach and public policy advocacy. They also have a research division that collects data on behalf of Tribes. Their philosophy includes the promotion of "spiritual strength" and cultural identity for indigenous children alongside safe and healthy physical home environments. Their membership is made up of Tribal governments, indigenous social service providers and other frontline child services staff.

[112] At 64-65.
[113] At 66-67.
[114] National Indian Child Welfare Association "About" <https://www.nicwa.org/about/>.

DISCUSSION

Introduction

This section draws together the international research with New Zealand context to explore common themes and ask questions about the future of indigenous child protection. This section uses policy, commissions of inquiry, case law and legislation to discuss tensions between sovereignty and incrementalism in child welfare, public awareness, cultural competency, decolonisation and re-indigenisation.

Sovereignty

Introduction

The power and importance of sovereignty and self-determination was a core theme across the findings. For state-indigenous relationships in North America, indigenous sovereignty is a given. It is the core basis of relationships between state governments and tribal governments. However, up until 2014 in New Zealand, it was assumed that Māori had ceded their sovereignty to the British Crown under the Treaty of Waitangi.[115] This section will discuss the Canadian and US constructions of indigenous sovereignty generally, how they impact child welfare and what we in Aotearoa New Zealand can learn from them.

Tribal Sovereignty

A key takeaway from the North American articulation of sovereignty is the unique independent status of tribes and their government-to-government relationship with the State. This section will discuss the social and political forms of sovereignty.

The North American approach to sovereignty stems from hundreds of treaties between individual nations and the US government, which indigenous people hold as proof that the state government recognised their tribes as sovereign political groups. This sovereignty, though not widely understood, has allowed tribes to flourish as independent nations with features like separate citizenship and legal systems. They may have their own Attorney General like New Zealand does, or tribal identification cards just like we have New Zealand passports.

In contrast, Indigenous sovereignty to the point of separate citizenship seems like a far off dream in NZ. Looking back at the Māori text of Te Tiriti, Māori rangatira were of the understanding that their tino rangatiratanga was being protected, and that the British Crown would have Kawanatanga over their own (Pākehā) people. This is not

[115] Waitangi Tribunal *He Whakaputanga me te Tiriti: the Declaration and the Treaty* (Wai 1040, 2014) at xxii.

dissimilar from the basis of state-tribal relationships in North America. Then why is it so different now? The assumption of cession of sovereignty, based on the English text, guided colonial thought and government systems. Te Tiriti was not honoured, and NZ legal instruments were not built to accommodate our rangatiratanga. This is how our sovereignty was systematically suppressed - we have not been given the same assumption of independence or room to grow.

One of the most radical takeaways from this research is that separate sovereignty of indigenous tribes is not far-fetched or racist or unconstitutional. It can be very normal if we let it be. Iwi and hapū sovereignty doesn't have to be a huge and complicated burden, or an unachievable pipe dream. It has been done overseas for hundreds of years. If we look to other indigenous groups for inspiration, we can strip back the colonial lies we have been told about why sovereignty would be so impossible. This understanding of sovereignty is core to the North American view of indigenous child welfare.

Sovereignty in Child Welfare

Tribal sovereignty in North America is the starting point of indigenous jurisdiction over child welfare protections, despite legislation being handed down from state governments. This section will discuss the forms of and tensions between indigenous sovereignty of child welfare and colonial child welfare systems.

Both ICWA and Bill C-92 begin by acknowledging the history of indigenous child welfare and indigenous sovereignty in the jurisdiction of the care and protection of their own children. Sovereignty is the starting point of both pieces of indigenous child welfare legislation, which sets the foundation for the Acts to operate within the bounds of that government-to- government relationship. Bill C-92 allows groups to make indigenous legal orders that have the power to override provincial and federal laws.[116] It also allows for coordination agreements to set up independent indigenous child welfare services.[117] ICWA devolves some decision-making power to tribes and gives preference to family and tribal placements.[118] These powers come alongside the general statements of sovereignty and jurisdiction - but still prescribe the ways indigenous people can be involved.

The Oranga Tamariki Act ("OTA") discusses cultural values like mana, but says nothing about rangatiratanga and sovereignty.[119] The Act acknowledges the need to improve the wellbeing of whanau, hapū and iwi through the care of children, but does not acknowledge their power or place to do so in the same way. The most power

[116] Bill C-92, above n 24, at s 21.
[117] Section 20.
[118] Indian Child Welfare Act of 1978, above n 78.
[119] Oranga Tamariki Act 1989, s 4(1)(a)(i).

devolution comes from strategic partnerships with iwi, similar to the Canadian coordination agreements. Strategic partnerships allow iwi to set up their own child welfare services to care for their children. These are typically based on existing relationships and were a recent addition to the Oranga Tamariki system. Although these partnerships have been very beneficial, negotiating a few strategic partnerships is not equivalent to sovereignty.

This highlights an interesting tension between using state legislation to empower indigenous peoples who should already have that power, derived from their own self-determination and sovereignty. ICWA and Bill C-92 "affirm" the right of indigenous governments to have jurisdiction over child welfare, but this jurisdiction should have existed before the passing of those Bills. This begs the question of whether even their version of sovereignty is independent enough from state power. On one level, treaties are the basis for state legislation to provide for indigenous groups in certain circumstances. So you could argue that the state legislative affirmation derives authority from tribes' agreement. On the other hand, this could be interpreted as empowering indigenous people only through the authority of the state government. This is the opinion of Métis/Michif law student Kristyn McDougall, who is concerned that this means indigenous groups are "still relying on Canada's 'courtesy' to have our own sovereign laws afforded the power to override conflicting provincial and federal settler-colonial laws".[120]

Conclusion

It is clear that sovereignty is a core issue in indigenous rights law across the globe. The consequences of decades of colonisation and repression are manifesting, and indigenous people are demanding change. For child welfare, more state governments are recognising that negative outcomes for indigenous children are the direct result of government policy that suppressed culture and outlawed indigenous child rearing practice. This has seen a push for the reinvigoration of indigenous cultures alongside a re-indigenisation of colonial systems.

Public Awareness and Cultural Competency

Introduction

A key theme from across these findings was the importance of stories, histories and truth as a foundation for the future wellbeing of indigenous people. Truth-telling can be used as a tool to reconcile relationships and give important context to child welfare policy and practices. This section will discuss public education and cultural

[120] Kristyn McDougall, above n 50.

competence in child protection as mechanisms for decolonisation and re-indigenisation.

Public Awareness

This research has highlighted the importance of public awareness of the history and current realities of indigenous child welfare in order to move forward. This section will discuss the role of truth-telling in decolonisation, commissions of inquiry as storytelling mechanisms, and calls for better public education.

One part of decolonisation is the breaking down of colonial myths and education about indigenous truths. Colonisation, as much as a physical process, was a cultural and spiritual process of dismantling indigenous cultures. It was a clash of worldviews where colonisers thought that there must be a winner and a loser, instead of many peoples living together in harmony. Colonisation would not have worked if new settlers did not believe in manifest destiny, or if workers in residential schools did not believe that ending the "Indian problem" through the removal and cultural abuse of children was merciful. Recording and sharing histories has been used as a tool to decolonise the minds of the public. This aims to make space for re-indigenisation.

Across the jurisdictions, commissions of inquiry were used to investigate the past, assess present measures and recommend future change. In Canada the TRC sat at a national level to record testimony from Indian Residential School survivors and their communities.[121] In NZ there have been national inquiries such as the Waitangi Tribunal's *He Pā Harakeke* report and the work of the Royal Commission on Abuse in State Care.[122] The US has not had a national level inquiry, but has commissions at the state level such as the MWTRC.

These groups alongside indigenous people have made calls to action to educate the public about the history of injustice in indigenous child welfare. In Canada, the central purpose of the TRC was to educate Canadians about the history of Indian Residential Schools. It made calls to action about this history being implemented at every level of the education system, from kindergarten to tertiary institutions.[123] In the US the MWTRC similarly recommended that indigenous history and culture be taught in schools.[124] In NZ the Abuse in State Care Commission recommended that the government take "active steps to raise awareness of abuse in care", including its effects on people.[125]

[121] *Reconciliation in First Nations Child Welfare*, above n 13, at 2.
[122] Waitangi Tribunal *He Pā Harakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021).
[123] *Truth and Reconciliation Commission of Canada: Calls to Action*, above n 21, at 7.
[124] Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, above n 110, at 67.
[125] Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *He Purapura Ora, He Māra Tipu: From Redress to Puretumu Torowhānui* (Volume 1, December 2021) at 330.

This signifies the importance of public awareness in decolonisation and laying the foundation of reconciliation to change how our societies think. The TRC found that "Reconciliation is not an Aboriginal problem; it is a Canadian one".[126] Alongside poor practice and outright racist policy, much harm has been done through the perpetuation of myths by the public, and fundamental misunderstanding of indigenous culture and the realities of colonisation. Knowledge is power, and increasing public awareness is one step that societies across the globe can take to help promote indigenous child welfare.

Cultural Competency

Increased awareness and education about indigenous culture is even more crucial in child protection practice and service delivery. This section will discuss cultural competency in state government systems and the tension between decolonising/re-indigenising state systems and indigenous sovereignty.

The commissions in both the US and Canada recommended some form of cultural competency training for child protection service providers. The TRC called for social workers and decision-makers to be better educated on the history and impacts of residential schools to contribute to the goal of reducing the number of indigenous children in state care.[127] The MWTRC recommended training for legal and judicial actors "beyond the basics of checklists and toolkits" to increase cultural awareness and recognise biases at all levels "in ways that frame ICWA within historical context".[128] These recommendations emphasise the importance of histories within the context of child protection work - a key connection that can be leveraged for more appropriate programme delivery.

However, recommendations for increased cultural competency raises a question of balance between reforming state government systems instead of just devolving power to indigenous groups. If the ultimate goal is sovereignty for indigenous groups to exercise control of child protective services, does working to make state systems more accommodating to indigenous people go against that? Arguably, the colonial roots of state government systems cannot be undone through cultural competency training alone without major overhaul and constitutional transformation. However, without this incrementalism, we may leave indigenous people who are already in the system vulnerable to continued abuse while we wait for the day of reckoning. When considering safety for indigenous children, families and communities, sovereignty is the end goal. But, until that can be realised, we should not discount the importance of

[126] *Honouring the Truth, Reconciling for the Future,* above n 8, at
[127] *Truth and Reconciliation Commission of Canada: Calls to Action*, above n 21, at 1.
[128] Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, above n 110, at 66.

decreasing harm within the state systems that are currently responsible for indigenous child welfare.

Conclusion

It is evident that widespread awareness of indigenous history and culture is tied to outcomes for indigenous children in state care systems. Reclaiming histories and sharing truths is something that contributes to the fight for sovereignty of indigenous cultures globally, breaking down colonial myths along the way. Increasing public awareness and practical cultural competency can contribute to increasing safety for indigenous people in wider society and state care systems. But there may still be more to consider when striking the balance between indigenising state systems and striving for sovereignty of child welfare jurisdiction.

Legislation

Introduction

Both historical injustice and modern indigenous sovereignty have come together in the design of indigenous child welfare legislation. This section will compare and discuss indigenous child welfare legislation and discuss flexibility in discretion, state-indigenous partnership services, re-indigenisation and sovereignty.

Separate Legislation vs Incorporated Principles

A stark difference between child protection systems in North America and NZ is that overseas, the care of indigenous children is governed by separate legislation. This section will compare the North American approach of separate child welfare legislation and the NZ Oranga Tamariki regime which covers all children to discuss the advantages and disadvantages, re-indigenisation and sovereignty.

The North American legislation was specifically established in response to their individual histories of failings in indigenous child welfare, using legislation as a tool to target the needs of indigenous children. The NZ regime, instead of having a separate piece of Māori only legislation, incorporates tikanga and other principles into the mainstream process to cater to all children, including tamariki Māori. The OTA, alongside s 7AA (which is under threat of repeal) sets out principles of mana tamaiti, whakapapa and the importance of tamariki Māori remaining with whānau, hapū and iwi.[129] Instead of outright instruction in the legislation to treat tamariki Māori differently, the OTA operates by applying principles on a case-by-case basis, where courts and

[129] Oranga Tamariki Act 1989, ss 4(1)(a)(i) and 13(2)(h)-(i).

service providers implementing the provisions will generally enforce the principles as if they were specific instructions.

So, despite the difference in legislation on paper, on a practical level all jurisdictions have child welfare systems that provide national standards for the care of indigenous children. For example, the US and Canadian legislation has particular rules about placement preferences for indigenous children. ICWA has a specific priority order for adoption placements, starting with family members.[130] Bill C-92 prioritises placements with family, then an adult from the same indigenous group and so on.[131]. Similarly, the OTA sets out that placement decisions should "be guided by" preference for placement with a member of the wider family, whānau, hapū and iwi.[132] Because of such strong case law, these are often enforced. Given these similarities in practice, it seems that the principles approach still works to achieve some of the same standards as the North American legislation, despite not being an independent piece of law.

An advantage of the NZ principles approach is the flexibility of discretion available to decision-makers. Because of the Family Court's growing recognition of the importance of culture to tamariki Māori, more often than not the principles are interpreted to favour the care of tamariki Māori with whānau Māori. Conversely, the North American legislation leaves less room for other interpretations, which could be seen as a stronger protection of the right to have indigenous children raised in indigenous homes. However, this may leave the North American legislation more vulnerable to challenge and repeal, if striking down the legislation is the only way to get around the placement preferences. This was seen in the US research, where critics found that despite the *Brackeen* success, ICWA could still be subject to repeal.

This different legislative structure also demonstrates the tension between re-indigenisation and sovereignty. The NZ approach is to apply tikanga Māori to the mainstream system, initially for the benefit of tamariki Māori. But, if it was widely applied, it could impact care decisions for children of any culture. In contrast, Bill C-92 does not attempt to incorporate any indigenous principles and instead directs groups to make their own laws for their own people in a separate legislative system. This may be a side effect of the physical size of Canada and the US, and also the differences between their indigenous groups that there may not be easily defined common principles such as whanaungatanga in te ao Māori. But it also follows earlier lines of questions, about the best way to protect not only indigenous children but indigenous culture, and if indigenous values should be kept separate from mainstream regimes.

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[130] The priority order for foster and pre-adoptive placements is: (1) an extended family member; (2) a foster home approved by the Tribe; (3) an Indian foster home approved by a non-indigenous licensing authority; or (4) a children's institution approved by the Tribe that can meet the child's needs. The priority order for adoption is: (1) extended family members; (2) another member of the child's Tribe; and (3) another Indian family (Indian Child Welfare Act of 1978 25 USC § 1915).

[131] Bill C-92, above n 24, ss 16-17.

[132] Oranga Tamariki Act 1989, s 13(2)(i)(iii).

Empowering Indigenous Jurisdiction

All the child welfare legislation empowers indigenous jurisdiction over child protection to some degree - but is this enough to devolve power? This section will discuss how different legislation allows for the creation of indigenous service providers and the tension between those services and tribal sovereignty.

The Canadian and NZ legislation both provide for the creation of indigenous child services in agreements with the state government. Bill C-92 gives indigenous groups jurisdiction in child welfare to create indigenous legal orders and enter into coordination agreements. This allows indigenous groups to set up their own child protection laws and services, like the Cowichan Tribes example discussed in the Canada research. Similarly, Section 7AA allows for the creation of strategic partnerships between iwi and the Crown to set up iwi-specific child services. These both operate to give indigenous groups sovereignty and jurisdiction over the welfare of their own children but are instruments of the state legal system.

This once again raises the question of sovereignty and how it should be balanced against the fact that indigenous services are being allowed to exist by virtue of state legal mechanisms. The Section 7AA repeal put OTA strategic partnerships at risk of being lost. Thankfully, due to strong feedback at the select committee stage, they were retained at the second reading.[133] But it called into question the strength of existing partnerships to stand on their own, and if their good works would ever be repeated in other iwi. Not only does this mean indigenous child welfare services rely on state legislation, but it also relies on state governments to come to agreement with indigenous groups. Bill C-92 makes a strong attempt at ensuring self-determination within the state legal system, by allowing the creation of coordination agreements after one year of *trying,* even if an agreement cannot be reached.[134] Indigenous-state relationships are being put to the test, and indigenous people are exercising their power to say no, even in the face of the huge power and negotiation imbalance. Recently, in Canada, indigenous leaders rejected a $47.8 billion settlement from the government to reform the First Nations Child and Family Services Program.[135] It will be interesting to see what this means for other indigenous groups negotiating with state governments in the child protection sector.

[133] Oranga Tamariki (Repeal of Section 7AA) Amendment Bill — Second Reading, above n 2.
[134] Bill C-92, above n 24, at s 25.
[135] Government of Canada “Final settlement agreement on Compensation and Agreement-in-Principle for long-term reform of First Nations Child and Family Services and Jordan's Principle” (22 November 2024) <https://www.sac-isc.gc.ca/eng/1646942622080/1646942693297> .

Conclusion

It seems that every country faces the similar issues with sovereignty, public challenge and indigenous-state relationships when creating legislation for indigenous children in a state system - especially when what is best for them is indigenous care. Now that some state governments are willing to be in partnership towards promoting indigenous child welfare, key structural restrictions of colonial systems are rearing their ugly heads.

CONCLUDING COMMENTS

The foundational theme of this research has been the key power of sovereignty and self-determination of indigenous peoples globally in the context of child protection. Put simply, indigenous communities care for indigenous children the best, and now indigenous groups around the globe are figuring out how to make that sovereignty possible.

So the question becomes how to achieve that sovereignty and reconcile colonial histories of violence against indigenous people and culture. Truth and storytelling will have a key part to play in re-writing myths and undoing biases that have created invisible barriers in child welfare services and the wider society. Tailored legislation has been drafted to work towards changing disparities in care for indigenous children.

But this decolonisation and re-indigenisation of state care systems comes at the cost of time and resources that could instead be put to use in the indigenous sovereignty space. This research has raised questions about striking the balance between these important considerations, and what they mean for the future of indigenous child protection.

Importantly, this research shows that iwi Māori struggling for sovereignty in child protection are not the only ones. This report collates some examples of indigenous child welfare service providers and representative groups that embody their own versions of rangatiratanga. They are only a small example of how much we can learn from indigenous peoples globally.

This research, as a socio-legal analysis, investigated child protection frameworks from the top down, which leaves more questions about the trickle-down policies and practices of on-the-ground service providers. Future research may consider the daily implementation of indigenous child welfare legislation and how it has been impacted by anti-indigenous policy and lawsuits.

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