First Peoples Child & Family Review
An Interdisciplinary Journal Honoring the Voices, Perspectives and Knowledges of First Peoples through Research, Critical Analyses, Stories, Standpoints and Media Reviews

Volume 7, Number 2, 2013, pp. 130-147

Native Family Law, Indian Child Welfare Act and Tribal Sovereignty

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Abstract

There has been historical abuse of Native American children in the U.S. which began in the late 19th century in what is known as the residential school movement. It led to their forced integration on pain of removing and eradicating traces of their Indian heritage. The lack of protection for Indigenous children in being transferred from the reservations to non-Indian foster parents caused the U.S. Congress to use their legislative power and enact the Indian Child Welfare Act of 1978 [ICWA]. This has intervened in a process that is aimed at keeping Native American children within the tribe of their parents over the last 35 years. The result of the ICWA is that it has led to the greater supervision by tribal courts over children but it has caused a conflict to arise with the state courts due to jurisdictional reasons that allows guardianship and supervision to non-Indian parents. The Arizona Court of Appeals has recently ruled in Navajo Nation v. Arizona Department of Economic Security (2012) CA-JV 11-0123 that an Indian child can stay with his non-Native foster parents despite the protests of the tribe that it was infringing the provisions of the statute. This article is intended for the practitioner and policy makers and brings to the fore the issues of the preservation of children on reservation lands, and the need for a greater care consideration in the determination if they should be transferred to foster parents outside the tribe's jurisdiction. It also conducts a comparison with Canada where First Nations children have also suffered abuse and where there is an ongoing debate about the course of action to prevent the appropriation of children from the reserves to live with the non-Native foster parents.

Keywords:

Introduction

The Native American tribes are sovereign nations but their relationship with the U.S. is born from the instrument of federal statutes and judicial precedence. The Indian reservations are designated territories of the individual tribes who have their own tribunals where the tribal councils acts in a judicial capacity. They may have their own courts which apply their own laws and by-laws. The courts have jurisdiction in the realm of family laws and the most contentious disputes have arisen in child custody cases.

The U.S. Congress has a plenary authority over the Indian nations. Article I, Section 8 of the Constitution states that "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian

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tribes".[1] The effect of this provision is that the Indian nations are recognised as competent in terms of promulgating their own codes and most of the 565 tribes in the US are governed by their own laws which provide them the jurisdictional powers except for the statutes that the U.S. Congress has enacted that permits federal courts' jurisdiction.[2]

The various Indian tribes have different degrees of sovereignty based on their historical relationship with the federal authorities. The U.S. government has not allocated a reservation to all the tribes but their sovereignty is implied even in the absence of reservation lands. The Department of the Interior exercises trustee jurisdiction over the Indian tribes and if the land is held is in trust then the state has no powers of taxation over the tribes territories.[3]

The powers of the Indigenous tribes to govern themselves has been restricted by a trilogy of Supreme Court judgments that have defined their status as a form of wardship. In Johnson v. M'Intosh[4] Chief Justice Marshall ruled that the colonial concept of "discovery" gave title to the U.S. government by whose subject, or by whose authority, it was made by all other European governments".[5]

This was followed by Cherokees v. Georgia[6] where Chief Justice Marshall held that the Cherokee Nation sovereignty had been "eviscerated and it existed only as a distinct society, but not as a political entity" and its relations to the U.S. was "as that of a ward to his guardian".[7] In the subsequent Worcester v. Georgia 31[8] the Chief Justice ruled that the state's jurisdiction did not extend to the Cherokee reservation because the Indian tribes were "domestic dependent nations".

The effect of these rulings is that the U.S. exercises a legislative power over the Indian nations. There is a duty of pre-emption that ties the Native people to the federal government in a bilateral relationship and the states are excluded from any exercise of jurisdiction unless such a power has been expressly reserved for them. It has been recognized in civil jurisdiction and extends to the domain of Family Law and child care cases.

The US government has enacted various statutes that have an express purpose of regulating the conduct of Native Americans. In Criminal Law there is the Major Crimes Act of 1885, that provides federal courts with the jurisdiction to try serious crimes when committed by Indians. The rule against double jeopardy does not apply to the serious crimes or felonies and the accused can be punished by their tribal courts and in the federal court.

The tribes are also bound by the I*ndian Civil Rights Act of 1968*, which incorporates the Bill of Rights of 1791 into the tribal constitutions. These protect the due process rights and oblige the

1 The Indian Appropriations Act of 1871 terminated the practice of the US entering into treaties with the tribes and it required the Federal Government to interact with the various tribes through enacting statutes. Section 1 states that"[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation. . .".

2 http://www.nationalreentryresourcecenter.org/faqs/tribal

3 http://www.ncai.org/about-tribes/Indians_101.pdf page 11

4 (8 Wheat) 543 (1823).

5 Page 574.

6 30 US 1 (1831).

7 Parah 10.

8 US 31 (6 Pet.) 515 (1832).

Indian tribes to exercise their power of self government to provide judicial redress to an accused person on reservation lands.[9]

However, the Indian courts are excluded from trying non-Indians who have committed crimes against Indians on reservation lands. This rule was confirmed in the case of Oliphant v Suquamish Indian Tribe[10] where the tribal authority had argued that it had inherent jurisdiction over the defendant who had committed a crime on their land and no treaty or act of Congress had removed its authority over the non-Indians. The Supreme Court held that the tribes' status was in accordance with the previous rulings of the Court that the plenary power over the Indians rested with the federal government.

Justice Rehnquist delivering the judgement of the Court in this case held that the " The history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress."[11]

The main impact of civil laws governing the tribes is determined by the nature of relationship to the Native Americans. In private interactions there are complicated rules for the enrolled members of an Indian Reservation if they marry non-Indians. While there is no general rule, most tribes adhere to the practice that if an Indian seeks to divorce a non-Indian they would have the right to use the state courts as well as the tribal courts, but if a non-Indian seeks to divorce an Indian they would have recourse to only the reservation court.

The tribal court jurisdiction over divorce may involve those who are not domiciled or enrolled on the reservation. They will have to comply in attending the tribe's court on the basis of the domicile and status of the plaintiff. In the instance of a marriage various statutes come into effect such as the Uniform, Marriage and Divorce Act 1970 Part III which applies when there is a dissolution of property among the various claimants.

The main statute that governs the child care and welfare issues is the Indian Child Welfare Act 1978 that was promulgated in order to protect Native children from the guardianship of non-Native parents. It has jurisdiction over the adoption and child custody proceedings, foster care placement, and termination of parental rights. This does not include parental custody pursuant to divorce proceedings. The statute allows the tribal courts to exercise exclusive jurisdiction over adoption and custody of children who reside or are domiciled within the reservation of their tribe.

This article will consider the ICWA and its primary goals. It will then investigate the main object of maintaining the children within the care of the tribe and if that has been accomplished. This will be conducted by reviewing the case law in the U.S. and by examining the conflict between the state and the tribal courts and if it can be resolved by keeping the best interests of the child at the forefront. There will a comparison with the Canadian laws where the government has also been accused of discriminating against the Native families by appropriating children to provide care in non-Indian surroundings.

9 The *Indian Reorganization Act* in 1934 that had the effect of establishing the Tribal Courts. Section 476 allowed Indian nations to select from a catalogue of constitutional documents the enumerated powers for tribes and for tribal councils. While the Act did not specifically grant recognition to the Tribal Courts it is considered the authority of the tribe and not the US delegation paved the way for the Tribal Courts legitimacy.

10 435 U.S. 191 (1978).

11 Parah 198.

Objectives of the Child Welfare Act

In the late 1800s there was a forced policy of assimilation of the Indian children which was effected by removing the Native children from their natural homes and confining them in boarding schools. Their transfer from the reservations and their billeting in the these institutions was called the Boarding House movement. The largest institution in the U.S. which was responsible for placing and transforming the children's identity was the Thomas Carlyle Industrial School in Pennsylvania. This institution was founded by the U.S. Army officer R. H. Pratt in 1879 at a former military installation, and it became a model for other such schools.

Pratt narrated the philosophy of this school in a speech made in 1892: (H Pratt in The Advantages of Mingling Indians with Whites) pp 260-271

> "A great general has said that the only good Indian is a dead one. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him and save the man." [12]

The ideology of such an institution was to immerse the Indians in white culture but the impact was immense in that the concept was founded that the Native people were uncivilised and their children could be appropriated for the purpose of wholesale integration in a white environment. There has been a detrimental effect on the Indian families through this process of non-Indian supervision and control and the federal government's plan to address the "Indian problem" by forcefully assimilating indigenous people into the dominant white population.

In an early inquiry into the effect of federal policy on the Native Americans the Merriam Report (1928) presented a compelling critique of the federal Indian policy in education, economic development and social policy towards the Native Americans.[13] It became the focus of promoting change that led to the *Indian Reorganisation Act* 1934 that reformulated federal policy towards the indigenous people.

The report was very critical of confining the children of American Indians in boarding schools. The report "found that children at federal residential schools were malnourished, overworked, harshly punished and poorly educated".[14] The findings also showed that the mandatory integration had retarded the progress of the Indians and that the exertions the children were forced to perform in the residential school environment constituted a violation of child labour laws in most states.[15] The discipline of the boarding schools was restrictive rather than developmental and the routine institutionalism was almost the invariable outcome of the boarding school programme.

In an attempt to deal with this gross abuse that has a historical connection the Indian Child Welfare Act was enacted in 1978. The objective of this statute was to prevent the high removal rate of Indian children from their traditional homes and their adoption by non-Indian parents. The statute under section 1902 grants placement preference for adoption of American Indian children initially to family members, secondly to members of the same tribe, and thirdly to members of another Indian tribe.

12 Reprinted in Richard H. Pratt, "The Advantages of Mingling Indians with Whites," Americanizing the American Indians: Writings by the "Friends of the Indian" 1880-1900 (Cambridge, Mass.: Harvard University Press, 1973), pp 260-271.

13 The Problem of Indian Administration: Report of a Survey made at the request of Honorable Hubert Work, Secretary of the Interior, and submitted to him, February 21, 1928 study) John Hopkins University Press, Baltimore (1928).

14 Page 351.

15 Ibid 382.

Peter K Wahl in Little Power to help Brenda ? (2000) page 811 writes on the issue of appropriation of Indian children prior to the enactment of the Act as follows:

> In the late 1960s and 1970s between 25 and 35% of all Indian children nationwide were separated from their families and living in an adoptive family, foster care or in an educational institution. Approximately, 85% of these Indian children were placed with non-Indian families.[16]

The ICWA permits tribal courts the major role in child custody proceedings which involve Indian children, by allocating their tribunals sole jurisdiction on the reservation upon which the child resides on, or is domiciled , or when the child is a ward of the tribe. There is also a presumed jurisdiction over non-reservation Native Americans' foster care placement applications.

The Rosebud Sioux tribe, for example, has jurisdiction under Chapter Two of its legal code over the subject matter of Family Law including rights of children. Section 2-2-1 states that the Rosebud Juvenile Court shall have the authority to hear any Petition for adoption involving any Indian child whose domicile or actual residence is within the exterior boundaries of the Rosebud Sioux Tribe or within Indian Country within the original boundaries of the Rosebud Sioux Tribe Reservation, or where jurisdiction is conferred upon the Tribal Court by the Federal *Indian Child Welfare Act Public Law* 95-608.

Rule 3-1-4 of the Rosebud tribe's legal code provides jurisdiction to the juvenile court for hearing any civil disputes or for criminal trial. It states "that except as otherwise provided, the Juvenile Court shall have original jurisdiction over any Indian child domiciled or residing upon or found upon the Reservation, or who has been transferred to the Juvenile Court under the Indian Child Welfare Act, and over all persons having care, custody, or control of such children which includes circumstances in (1) concerning any child who has violated any Tribal, local, or municipal ordinance, within the jurisdiction of the Rosebud Sioux Tribe".

The Indian Tribes Department of Social Services deals with minors in custody after they have committed a criminal offence. They exercise the jurisdiction over a child on probation or under the protective supervision, or of a child who may be transferred by the tribal court to a Federal Court if this court consents in any pending action.

However, the main purpose of ICWA is the accommodation of children who no longer have a parental home. The statute has facilitated the issue of adoption and child custody proceedings that includes foster care placement, termination of parental rights and pre-adoptive and adoptive placement. The tribal court has jurisdiction providing the Native American parent does not object and these courts are willing to accept the referral.

This process does not include parental custody pursuant to divorce. In general the tribal courts have the powers to determine custody under section 1911 in accordance with the best interests of the child. The court determines that provision based upon a series of factors which includes the aspirations of the child's parent as to custody; the wishes of the child as to the custodian; the interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest; the child's adjustment to home, school and community; the mental and physical health of all individuals involved.

16 Peter K. Wall, Little Power to help Brenda? A Defence of the Indian Welfare Act and its continued Implementation in Minnesota. Mitchell Law Review. 216 Pp 811- 818 (2000).

The statute has vested powers on the tribe to ascertain the domicile of the child by determining the status of the parents. In the seminal case of Mississipi Band of Choctow Indians v Holyfield[17] the facts concerned parents who were both enrolled members of the Mississippi Band of Choctow Indians and residents of the Choctaw reservation. They had twins who were born out of wedlock in a hospital 200 miles from the reservation. When the parents separated the issue arose of the adoption.

The State argued that the children were born away from the reservation and were not domiciled in its parameters. Both parents executed consent to adoption forms in the chancery court in favor of Mrs. Holyfield who was non-Indian. The tribe tried to invalidate the decree on the ground that the ICWA vested the jurisdiction for adoption in the Tribal Court since the parents were domiciled on the reservation. It was refused and at the State court this decision was affirmed.

The Choctaw Nation then took the case to the US Supreme Court and argued that the term "domicile" for the purpose of the statute should be interpreted in the same manner as that of the parents. The Court granted certiorari but was split 6-3 based on the presumption that both the parents and the appellant had an equal interest in the welfare of the children. The judgment was to the effect that the ICWA would apply and the proper adjudicating body would be the Tribal Court.

The issue was the voluntary relinquishment by the Native parents of their Indian children and not a voluntary intrusion by the State. It was the involuntary separation of children from their families that was the focus of the ICWA. There has been a recent case filed in the Supreme Court involving a dispute between a Cherokee father and adoptive parents of the child. If the court grants certiorari then it may revisit some parts of the questions raised in Mississipi Band of Choctow Indians v Holyfield.

In Adoptive Couple v Cherokee Nation[18] the US Supreme Court has to determine the constitutionality of ICWA by a non-Indian couple. The questions presented to the judges are the following:

> Whether a non custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law ?
>
> Whether ICWA defines parent in the Act to include an unwed biological father who has not complied with State law to attain legal status as parent ?

In the U.S. the statute governing the custody and adoption of children is the Uniform Child Custody Jurisdiction And Enforcement Act 1997. This instrument has the purpose of processing "interstate recognition and enforcement of child custody orders". The custody proceedings pertaining to an Indian child have been excluded by the section (A) Rule 3127.03 that states in " child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. 1901 et seq., it is not subject to sections 3127.01 - 3127.53 of the Revised Code to the extent that the proceeding are governed by the Indian Child Welfare Act. (B) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying sections 3127.01 to 3127.53 of the Revised Code".

However, there is a clause that the treatment of the children has to be of sufficient standard as to merit the criteria of the UCCJEA. Under section (C) A child custody determination made by

17 490 US 30 (1989).

18 Docket No 27148) (2012).

a tribe under factual circumstances has to be "in substantial conformity with the jurisdictional standards of the Revised Code to be recognized and enforced by its sections".[19]

Blood Quantum Requirements

In order for a Native person to be considered a member of a tribe for the purposes of determining which court should have jurisdiction certain requirements need to be satisfied. The blood quantum determines whether a person is indigenous, although there are those tribes that do not impose blood quantum requirements in resolving tribal citizenship and whether one is "Indian". The U.S. tribes are not homogenous and many of them since the forced integration of their children have become heterogeneous.

The Bureau of Indian Affairs which is part of the Department of the Interior has used a "blood quantum" definition generally of one-fourth degree of American Indian "blood" and/or tribal membership to recognize a person as an American Indian. The individuals who are enrolled in federally recognized tribes receive a Certificate or Degree of Indian Blood (CDIB) by the Bureau of Indian Affairs, specifying a certain percentage of Indian blood.[20]

However, each tribe has a particular set of requirements, which include a blood quantum, for membership in the tribe and these vary widely and some tribes require at least a one-half Indian or tribal blood quantum; still others require a one-fourth blood quantum. In California and Oklahoma the tribes require a one-eighth, one-sixteenth, or one-thirty-second blood quantum; and some tribes have no minimum blood quantum requirement at all but require an explicitly documented tribal lineage. R Cook in Heart of Colonialism bleeds blood quantum.[21]

In recent times there has been an increased urbanization and interaction with nontribal members, thus facilitating marriage between various ethnic groups. As a consequence of increasing contact over 60% of all American Indians are married to non-Indians, which has certain implications pertaining to group membership (as established by blood quantum), heritage, and identity. Borderwich (1996) in Revolution in Indian country estimates that the US Congress has estimated that by the year 2080 there will be less than 8 % of American Indians who will have one-half or more Indian "blood" quantum.[22]

The child born of a mixed parentage with less then the required blood levels of the tribe has been determined to be a non-Indian in US v Cruz.[23] In this instance the 9th Circuit Court in Montana analysed whether a defendant in a criminal case could be prosecuted by a Federal Court under the laws of the U.S. The federal government contented that Cruz was Indian and committed an assault on tribal land, and could not be charged in a Federal Court under the Major Crimes Act 1886.

He was convicted in the District Court but appealed that he was not an Indian and, therefore, not subject to federal jurisdiction but state jurisdiction. He based his argument on the fact that his father was Hispanic and his mother was 29/64 Blackfeet Indian and 32/64 Blood Indian. The

19 Effective Date: 04-11-2005.

20 http://www.bia.gov/WhatWeDo/ServiceOverview/TribalGov/index.htm

21 Heart of Colonialism bleeds blood quantum. Roy Cook americanindiansource.com/bloodquantum.html Accessed 16/3/13.

22 F. M. Bordewich,"Revolution in Indian country," American Heritage, vol. 47, no. 4, pp. 34–46, 1996.

23 9th Cir. (Feb 10th 2009).

Blackfeet are a federally recognised tribe based in northern Montana: the Blood Indians are a Canadian tribe. Cruz's genealogy showed that he is 29/128 Blackfeet Indian and 32/128 Blood Indian.

The Court affirmed that the evidence in this case does not demonstrate that Cruz is an Indian and remanded the matter back to the lower court with directions that it should acquit him of all federal charges. This analysis of blood quantum fixes the definition of qualification to being Indian very narrowly.

However, the courts have adopted a test of determining the Indian status of an individual. In US v Juvenile Male[24] an Indian minor who was charged in a Montana District court for committing crimes under the Major Crimes Act on an Indian reservation challenged the fact that he was an Indian. The juvenile who was one fourth Indian blood claimed that he does not identify as Indian, and that he was not socially recognized as Indian by other tribal members despite the fact that he was an enrolled member and received tribal benefits.

The Federal Court which took over jurisdiction in this case decided that the issue whether someone was an Indian had to be based on a case-by-case analysis. The bench held that there was a "specific "framework for determining an individual's Indian status and that US v Bruce[25] provided that authority. According to that case a defendant is an Indian if the government proves beyond a reasonable doubt that he has (1) a sufficient degree of Indian blood (2) tribal or federal government recognition that he is an Indian; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life.[26]

Based on these considerations the juvenile may be deemed as an Indian even if he did not have the social connection with the tribe of which he was a member and lived on the reservation. The Court held in Bruce that "the Tribal enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."[27] This means that the juvenile defendant need not satisfy the test of social connection before it is determined that he is an Indian.

PN Limerack (1987) on page 338 writes in *The Legacy of Conquest: The Unbroken Past of the American West*, that to "Set the blood quantum at one-quarter, hold to it as a rigid definition of Indians, let intermarriage proceed as it had for centuries, and eventually Indians will be defined out of existence. When that happens, the federal government will be freed of its persistent "Indian problem".[28]

There is also the distinction between those tribes whose members are quantified by relevance to the data of reservation, versus non-reservation-based membership criteria and degree of blood required. The data suggests that tribes located on reservations have maintained a higher blood quantum requirement as a consequence of geographic isolation. Their location has tended to isolate the tribe from non-Indians and intermarriage with them. Therefore, these tribes with

24 564 U.S. ___ (2011).

25 394 F.3d 1215 (9th Cir.2005).

26 Parah 1223–24.

27 Parah 1224.

28 P. N. Limerick, The Legacy of Conquest: The Unbroken Past of the American West, W.W. Norton & Company, New York, NY, 1987. page 338

a more inclusive membership have set a lower (or nonexistent) blood quantum requirement since their populations generally have reduced interaction and intermarriage with non-Indian populations.[29]

Custody process of Indian children

There is a general rule that the tribal courts have a remit over all areas where they exercise jurisdiction. This requirement was established in Williams v Lee[30] which ensures that state law may not interfere with tribal self government in principle. The exercise of state jurisdiction in a matter where one of the parties resided on reservation land would undermine the authority of the tribal courts' over the tribes affairs, and hence would infringe on the right of the Indians to govern themselves. This rule extends to the non-Indian defendant in a divorce, custody and child care proceeding and the tribal court is the forum for a dissolution application.

In terms of precedence of how the courts will decide the child custody issue after termination of marriage according to the Williams v Lee principle there was a Supreme Court decision in the case of the Three Affiliated Tribes v. Wold Engineering.[31] The ruling was that the first-in-time temporary orders for custody issued by the Tribal Court fixing the domicile on the reservation would be upheld against the State's jurisdiction. The decision favoured tribal self government over state interference for the well being of the child.

The question becomes relevant of how it is applicable to child custody and support claims incidental to a divorce action between a non-Indian and an Indian. In Byzewski v Byzewski[32] an Indian mother Marilyn who was a resident and a domicile of the Standing Rock Sioux Indian Reservation gave birth to a child outside the reservation. The issue arose whether the child's domicile was the Sioux reservation.

This was an appeal from a district court divorce judgement that led Indian husband Raphael August Byzewski, residing in Grand Forks County, to acquire custody of the couple's three children and an order that she pay child support. Marilynn asserted that the district court lacked subject matter jurisdiction to adjudicate Raphael's custody and support claims.

The North Dakota circuit court affirmed that each of these matters is governed by different jurisdictional principles in the state court. The issue was in meeting the subject matter and personal jurisdictional requirements to sever the marriage does not necessarily grant the court authority to adjudicate related incidents of the marriage. As the court cannot adjudicate a divorce contract unless it has jurisdiction over the defendant, it must have personal jurisdiction over a non-resident spouse in order to decide such matters of spousal obligations.

The ruling was that the marriage contract entered into within the state but outside reservation boundaries might arguably grant a court personal jurisdiction over an Indian domiciled on a reservation. However, they are not necessarily sufficient to grant the court subject matter jurisdiction under the principle set out in Williams v. Lee and the exercise of jurisdiction by the state would be deemed to interfere with the sovereignty of the Tribe.

29 R. Thornton, Tribal membership requirements and the demography of "old" and "new" Native Americans, Population Research and Policy Review, vol. 16, no. 1-2, pp. 33–42, 1997.

30 358 US 217 (1959)

31 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986)

32 429 NW 2d 394 (ND 1988)

The Supreme Court's denial of state court jurisdiction provides non-Indian spouses of Indian persons to be subject to the tribal court jurisdiction without the benefit of Indian citizenship. This would not be a valid reason for finding there was no infringement upon tribal self-governance. The district court lacked subject matter jurisdiction over Raphael's child custody and support claims and accordingly, the divorce judgment was reversed and there was an award to Raphael of custody of the children and orders for Marilynn to pay support, was otherwise affirmed.

This infers that the district court can only adjudicate an interstate child custody dispute in an initial divorce proceeding under the provisions of the Uniform Child Custody Jurisdiction Act, Chapter 14-14. However, this Act is inapplicable to jurisdictional disputes between a state court and a tribal court. It is a matter of constitutional principle that a court in a divorce action has personal jurisdiction over a non-resident spouse and an order to make a valid child custody award is not settled. A court gains personal jurisdiction over a defendant in accordance with the due process clause under the 5th Amendment. If the defendant has reasonable notice that an action has been commenced and there is a sufficient connection with the tribe "to make it fair to require defence of the action in the forum."

Inability of the ICWA to achieve its goals

The states are currently electing to bypass ICWA. This is because they have an interest in Indian children also and if the tribes are not providing the level of child protective services that is deemed appropriate, this provides reasonable grounds for a state to intervene on behalf of a needy child. They may, further argue, that the tribes lack the resources in many instances to provide the administrative oversight necessary to ensure child welfare and to handle all of the child care cases that arise within the tribe's jurisdiction. Accordingly, a reallocation of resources from the state to the tribe could improve tribal services and strengthen tribal jurisdiction.

The state courts in the US have recently applied a very stringent test under the child welfare provisions in allocating Indian children to non-Indian parents. In Navajo Nation v. Arizona Department of Economic Security[33] a petition was filed against the biological mother, alleging that the child was living in a drug house infested with cockroaches and had not been bathed or taken to a doctor since birth.

The court was unable to locate the mother to determine whether the ICWA applied and Z was placed with the brother and sister-in-law of the alleged father. A paternity test later proved the man was not the biological father and that Z was living with non-relatives. There was no other father who was identified.

The Arizona Court of Appeals affirmed the findings of the juvenile court in a ruling of a Navajo child, that the child was "rescued" from his parents' home at the age of 1 month, and would remain with non-Indian parents. It upheld a juvenile court decision that had grounds to deviate from the principles of the statute. The grounds were defined as the bond formed between the 2-year-old child, identified as "Z" and his guardians which was determined as an overriding factor.

Judge Kessler's judgement states:

> "While the interest of the [Navajo] Nation and the Congressionally-presumed interest of Z in maintaining his heritage weighed against a finding of good cause to deviate from the ICWA's

33 CA-JV 11-0123 (2012)

> preferences, on this record we cannot say the court erred in weighing all these interests," the appeals court wrote in a unanimous ruling.[34]

The Arizona DES recorded that the Navaho tribe had initially failed to offer alternative homes consistent with the ICWA and, Z had bonded with the family and would suffer severe distress if he was removed from that adoption. The Navaho Nation's argument that the court had not sought alternative homes with family or tribal members was overruled despite the 11 months the child had spent with his adoptive family. The Arizona Department of Economic Security had established that the family provided good care to the child and the biological Indian mother produced the names of six relatives who could care for the child.

The Court took into consideration the fact that the Act does not provide the 'good cause' guidelines for the non-Indian party to show that the child should be placed in their foster care other than with the Indian guardians. It followed the Department of the Interior's Bureau of Indian Affairs 1979 guidelines for state courts as examples of good grounds to deviate which are as follows: (1) a request to deviate that comes from the biological parents or the child (provided he or she is of "sufficient" age), (2) extraordinary physical or emotional needs of the child (as established by qualified expert testimony), and (3) the determination after a diligent search for a family that meets the placement preferences that a "suitable" family is not available.[35]

The critics of this decision have described this ruling as against the intention of the statute. The issue seems to be that the bonding has to occur and if it had taken place then there will be no transfer because this will harm the child when removed from a non-Indian home. This would allow the caretakers the same role as the parents and the ruling appears to deny that the child re-bond with their Indian guardians.

This ruling is in the aftermath of the South Carolina Supreme Court's decision in Adoptive Couple v. Baby Girl.[36] In this case the prospective non-adoptive parents filed a petition seeking to adopt the child, and the father who was unwed was an enrolled member of the Cherokee Indian tribe opposed to the adoption. The tribe intervened on his behalf and at the Family Court, in Charleston County, the judge denied the petition and required prospective adoptive parents to transfer the child back to the Indian father.

However, the non-Indian prospective adoptive parents appealed and in the state Supreme Court CJ Toal, ruled as follows:

> (1) unwed, adjudicated father of child was a "parent" under the Indian Child Welfare Act (ICWA); (2) father did not voluntarily consent to the relinquishment of his parental rights under the ICWA; (3) emotional bonding that occurred between prospective adoptive parents and child during contested adoption proceedings did not establish that father's prospective custody of child was likely to result in serious emotional or physical damage to child; and (4) child's best interests would be served by transferring custody from prospective adoptive parents to adjudicated father.

The Court held that the adoptive family and the child had bonded, but that the Act had set a clear objective about granting a placement preference to the biological family. The tribe won because it argued that the health and welfare of the child would be better looked after if the child

34 http://turtletalk.files.wordpress.com/2012/08/navajo-v-adec.pdf

35 www.aacasa.org/library/resources/.../TheChildWelfareSystem.pdf Accessed on 16/3/13

36 (2012) WL 30442287 No. 27148 (2012).

stayed with the Indian children. This has led to the argument that only a new statute can alter this outcome and the ICWA has limitations as it was only meant to preserve the relationship with the tribe of the child. This case is under appeal to the US Supreme Court (See above).

There is a basis for amending ICWA and the changes that are needed must take into account the abuse of Indian children and continuing exploitation. This is because it is obvious that the legal regime does not have the machinery to accommodate the children with their own families or the tribe when they are in foster care. The whole objective of the Act was to maintain the children within the social and cultural environment of the tribe.

The promulgation of the Indian Child Welfare Act was intended to retain children within the Indian tribal environment but it has not been successful in preventing these children from going into non-Native foster care. There is also the fact of substance abuse and higher crime rates among native children then in other communities. Lorie M. Graham (1998; p. 23) stated in "The Past Never Vanishes" that the federal policy reflected in the provisions of the Act that have not eliminated the problems historically associated with federal policy of non-Indian adoption.

Their findings were as follows:

> While the law is not flawless, it provides vital protection to Native American children, their families, and tribes. Yet recent studies suggest that one-fifth of all Native American children "are still being placed outside of their natural tribal and family environments." Courts, social welfare agencies, and attorneys who fail to follow the letter and spirit of the law have all contributed to this ongoing crisis. The "Existing Indian Family" doctrine, a state judicially created exception to the ICWA that has received some recent congressional support, is one such example.

While the doctrine varies slightly from state to state, the end results are the same: to cutoff a number of Native American children from their extended families and cultural heritages by thwarting the express language and goals of the ICWA and ignoring Indigenous views of what constitutes an "Indian family." It is in this way that the doctrine is reminiscent of past U.S. policies. Indeed, these recent challenges to the ICWA cannot be properly evaluated without placing them in the larger historical context of U.S. Indian policy toward American Indian children. The legacies of these policies remain with us today as Native American nations struggle to reconnect with their lost loved ones and maintain a sense of community for their children and their children's children. To ignore the past, as the author believes the Existing Indian Family doctrine does, is to risk reversing all that has been achieved by Native American nations in the past twenty years with respect to familial self-determination.[37]

An empirical investigation by Hillary L Barrows in A Literature Review of Child Welfare in American Indian families (2012 Pge 6 various shortcomings of the ICWA and the manner in which the Act is implemented. This points to a number of the procedural flaws in the care programmes that are currently being implemented. In the investigation of the South Dakota reservation the findings reveal as follows:

> The Indian children make up only 15% of the child population yet comprise more than half the children in foster care. The state is removing 700 Native children every year, sometimes in questionable circumstances [and] is also failing to place Native children with relatives or tribes.

37 Graham, Lorie M. 1998 The Past Never Vanishes: A Contextual Critique of the Existing Indian Family. Doctrine. American Indian Law Review, 23: 1.

There were 90% of American Indian children in foster care or in residential homes treatment are placed in non-Indian families. Poverty, crime and alcoholism are very real problems in these communities. There is priority on the reservations despite the federal government sending thousands of dollars for every child it takes.

Barrows informs that there was uncertainty and "Nobody knows when the placement will take place" and while ICWA protects Indian families "many of them are battling to protect their children". The research concludes with the recommendation that there should be "a holistic approach to Indian child welfare that would develop progammes to hold those on reservations find jobs and come to terms with their addictions making family reunification an option down the road. Establishing programmes to help adults with drug and alcohol abuse could also help children and teens with the same problems as they may be more likely to follow in the steps of their family members".[38]

There is further original research that corroborates these findings which determines the failings of eradicating the social deprivation on the reservations that lead to broken families needing the intervention of ICWA. There is high rate of crime, alcohol and drug abuse on the reservation from which the authors provide a causal link between the lack of supervision for children who are delinquents on the reservations and the shattered homes. Sullivan and Walters (2012) ask the question if "the ICWA helps place children with their tribes and kin, but who helps the parents who battle addiction or are in jail?" Sullivan and Walter in *Incentives and Cultural Bias Fuel the Foster System* (2012).[39]

Welfare policy for child removal in Canada

There are contemporary abuses of Indigenous children in Canada which parallels that of the US. This is premised on a high incidence of their removal from the care of their natural parents and transfer into guardianship by non-Native agencies. There is also a disproportionate amount of children from First Nation backgrounds who are being targeted for adoption by non-Indian parents.

The problem was recognised in the mid 1960s after the Hawthorn Report that was directed to child welfare services, which stated that the "the situation varies from unsatisfactory to appalling".[40] The findings confirmed that no Aboriginal people or organizations were consulted about the changes made to the Indian Act in 1951 to implement changes to the manner in which children's welfare was governed on First Nations Reserves. There was no commitment to preserve Aboriginal culture in these reforms.

In 1966 the federal government and the government of Manitoba entered into a contract to offer for the existing Children's Aid Societies of Central, Eastern and Western Manitoba to deliver child welfare services. The northern bands of First Nations continued to receive some services from the Department of Indian Affairs, but provincial child welfare authorities only intervened in emergency or very critical situations.

38 Hillary Burrows Social Work Project. University of Denver Fall Quarter 2012 SW 4018 (Page 6), https://portfolio.du.edu/portfolio/getportfoliofile?uid=223294.

39 Sullivan and Walter in Incentives and Cultural Bias Fuel the Foster System (2011) Parah 16-18 in Burrows study taken from http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system

40 H.B. Hawthorn ed A Survey of the Contemporary Indians in Canada. A Report on Economic, Political, Educational Needs and Policies, Vol 1 & 2 Ottawa: Canada Department of Indian Affairs and Northern Development, 1966, page 327.

The Canadian Council on Social Development recorded as follows: "In most provinces, these child welfare services were never provided in any kind of meaningful or culturally appropriate way. Instead of the counselling of families, or consultation with the community about alternatives to apprehending the child, the apprehension of Aboriginal children became the standard operating procedure with child welfare authorities in most provinces."[41]

Patrick Johnston, in *Native Children and the Child Welfare System* (1983) undertook a survey of the prevailing Aboriginal child welfare strategy and compiled a statistical report of the child welfare system in Canada.[42] The Indian children were shown to be over-subscribed in the child welfare system comprising 40–50% in the province of Alberta, 60–70% of those in care in Saskatchewan, and some 50–60% in care in Manitoba. They were deemed to be 4.5 times more likely than non-Aboriginal children to be in the care of child welfare authorities.

The First Nations' representative Anthony Wood of God's River Indian Reserve was quoted in this investigation as follows:

> There was no publicity for years and years about the brutalization of our families and children by the larger Canadian society. Kidnapping was called placement in foster homes. Exporting Aboriginal children to the U.S. was called preparing Indian children for the future. Parents who were heartbroken by the destruction of their families were written off as incompetent people.[43]

The child welfare system replaced the residential schooling on the First Nations Reserves for the Native children and served to remove the indigenous children from their parents, but the programme of appropriating children was termed 'in the best interests of the child.' Johnston (1983) concludes with the premises that the Sixties Scoop was not a coincidence but was 'an outcome of fewer Indian children being sent to residential school and of the child welfare system emerging as the new method of colonization.

In retrospect, the wholesale apprehension of Native children during the Sixties Scoop appears to have been a terrible mistake. While some individual children may have benefitted, many did not. Nor did their families. And Native culture suffered one more of many severe blows. Unfortunately, the damage is still being done. While attitudes may have changed to some extent since the Sixties, Native children continue to be represented in the child welfare system at a much greater rate than non-native children.[44]

The study confirms that the outcome of the child welfare system was that it removed the Aboriginal children from their families, communities and cultures on the premises that the ideal homes for them were those that were those reflected the "white, middle-class homes in white, middle-class neighbourhoods." As a consequence of this strategy there were between the decade's span of 1971 and 1981 over "3,400 Aboriginal children were shipped away to adoptive parents in other societies, and sometimes in other countries."[45]

41 The Justice system and the Aboriginal people. The Aboriginal Justice and Implementation System. Chapter 14. Child Welfare. sttp://www.ajic.mb.ca/volumel/chapter14.html.

42 P Johnston in Native Children and the Child Welfare System. Lorimer, Toronto (1983) Page 24.

43 Ibid Page 26.

44 Ibid page 62.

45 Ibid page 63.

Problems on First Nations Reserves in Canada

In Manitoba there was an enactment of the Child and Family Services Act (1979) that was aimed at preserving the First Nations child under the control of the Aboriginal homes. This is a reconciling statute that recognizes that the cultural sensitivity of aboriginal families and growing the children within their environment. However, this has not stemmed the tide of transfers from the Reserves to the non-Native parents for adoption. This is because of the prevailing poverty, alcoholic abuse and violence that has been considered to be a detrimental to the child's growth in these homes.

In *For Generations to Come: The Time Is Now: A Strategy for Aboriginal Family Healing* (1993) the co-authors Sylvia Maracle and Barbara Craig state as follows:

> The Aboriginal people have defined family violence as a consequence to colonization, forced assimilation, and cultural genocide; the learned negative, cumulative, multi-generational actions, values, beliefs, attitudes and behavioral patterns practiced by one or more people that weaken or destroy the harmony and well-being of an Aboriginal individual, family, extended family, community or nationhood."[46]

These problems were highlighted in a documentary report that premised their removal on the grounds of social welfare. Cindy Blackstock of the First Nations Child and Family Caring Society of Canada was quoted in this report: "We actually have three times the number of First Nations children in child welfare care today than we did at the height of the residential schools."[47] The report's findings showed that 76,000 children in welfare care, of whom over 22,000 were actively waiting for adoption. There were many whose parents were victims of poverty.

There was another Canadian study conducted in March 1999 entitled *Our Way Home*, whose author Janet Budgell notes that in the Kenora region in 1981, "a staggering 85 per cent of the children in care were First Nations children, although First Nations people made up only 25 per cent of the population. The number of First Nations children adopted by non-First Nations parents increased fivefold from the early 1960s to the late 1970s. Non-First Nations families accounted for 78 per cent of the adoptions of First Nations children."[48]

Kenn Richard, who commissioned this report and who is the director of the Native Child and Family Services of Toronto, reflected on it as another phase of the integration process that started with the residential schooling in the 19th century. He said as follows:

> British colonialism has a certain process and formula, and it's been applied around the world with different populations, often Indigenous populations, in different countries that they choose to colonize. And that is to make people into good little Englishmen. Because the best ally you have is someone just like you. One of the ones you hear most about is obviously the residential schools, and residential schools have gotten considerable media attention over the past decade or so. And so it should, because it had a dramatic impact that we're still feeling today. But child welfare to a large extent picked up where residential schools left off.

46 S Maracle and B Craig as cited in Family Violence in Aboriginal Communities, An Aboriginal perspective, The National Clearing House on Family Violence, Cat H 72-21/150-1997E, http://www.phac.aspc.gc/ca/acfrcnivf/familyviolence/html/fvaorbor_ehtml. Accessed 17/3/13.

47 Cindy Blackstock of the First Nations Child and Family Caring Society of Canada The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice lose, Children and Youth Services Review. Vol 33 Issue 1, Pages 187-194.

48 Janet Budgell in A Report to the Aboriginal Healing and Wellness Strategy on the Repatriation of Aboriginal People Removed by the Child Welfare System. Published by Native Child and Family Services of Toronto, 1999.

> We'll assimilate Aboriginal kids openly through the residential schools. And after we close the residential schools we'll quietly pick it up with child welfare.' It was never written down. But it was an organic process, part of the colonial process in general.[49]

In the period of the residential schools there were no records kept of the adoption records but that has now been made a compulsory requirement. The present figures reveal an optimum level of Aboriginal children being transferred on account of welfare needs and placed with non-Native parents. This is because it has been defined that they are unsuitable to be in the guardianship of First Nations Reserves because of their domestic circumstances which are not dissimilar to the Native Americans in the US. These circumstances are comprised of the violence, alcoholic and drug abuse that has caused the dysfunctional process to arise in the homes of these children.

Conclusion

The children of the Native American tribes in the US were victims of historical abuses that emanated from the residential school movement which forcibly transferred them to non-Indian homes and foster care. The *Indian Child Welfare Act* (1978) was deemed to be a preventative measure to stop their relocation in non-Indian surroundings and cultural framework. Its intention was to maintain them on the reservations and to keep them under the guardianship of the tribe to which their parents belonged.

However, the issue of non-Indian foster care and parentage has not dissipated and there are still a disproportionate number of these children being removed into non-Indian parental supervision. The problem can be sourced to the discretion available to the courts to exercise their power in keeping the children in non-Indian care and the inherent social ills that pervade on Indian reservations because of substance abuse and other social problems.

The Native American tribes generally exercise an original, exclusive jurisdiction over domestic matters including custody of children. There has been a conflict between the tribal courts and the state courts who should exercise the jurisdiction over the children in the event of marital breakdown or lack of parent or suitable guardian from the tribe. There is in principle a separation between the state jurisdiction and the tribal powers established by the judgment in Williams v Lee which led to the decision that the tribes are independent entities and the state cannot interfere in their jurisdiction. The tribes have the autonomy and the power to enforce the provisions of the ICWA in order to supervise the child within the reservation's boundary.

However, the state has a right based on its superior capacity in cases where the funds are at issue and it has the better standards of care and interest in the child. While the legal codes of individual tribes provide a role to the Indian Child Welfare Act of 1978 to prevent the displacement of the child the relocation cannot be stopped if there are non-Indian parents who can supervise the children as their guardians. This power can be enforced by the state courts because they have more economic resources in comparison to the tribes and they have to consider the welfare of the child as a supreme test in any case before them.

The judgement of the Navajo Nation v. Arizona DES was based on the principle that the non-Native parents could exercise their guardianship even if it is contrary to the intention of the Act. It provides a broad discretion to the courts in the interpretation of the ICWA and that can mean

49 K. Richard in First Peoples Child and Family Review, Vol No 1, September 2004, pages 101-109.

that the tribe will lose the right to maintain the child within an Indian environment if it cannot satisfy the test of keeping to a standard of care or guardianship.

At present the Supreme Court in the U.S. is considering if in principle a non-custodial parent can invoke ICWA to block an adoption voluntarily if it is commenced by a non-Indian parent under state law. This seems on the surface to increase the prospects of Indian children being taken into non-Indian care. There is a need to prevent that from happening by analysing the current process of adjudicating on the current remedies for the children who lack parental supervision. It has to be understood that the Native Americans suffer from the high incidence of poverty on the reservation. This leads to the substance abuse and crime by juveniles.

These problems mirror the problems that are being faced in First Nations Reserves in Canada. This is because the residential school movement that was replicated in Canada has left the same symptoms of despair in the Native families. This has led to dysfunctionality but rather than attacking the source of the illness and prevent the damage from Colonial polices the authorities are implementing a policy of removal from the homes on account of social welfare.

In order to address the cause and effect of the problems that lead to the removal of the Native children there needs to be a holistic approach will prevent the dissipation of the family structure. There has to be a comprehensive program formulated that will remove this degradation and there must be an implementation of a curriculum that will also guarantee that the children will not be transferred into foster care until available options on the reservation have been exhausted.

There is need for further legislation in the U.S. for the grant of jurisdictional rights to the Indian tribes. At present there is uncertainty and the tribal courts lack sufficient powers to appoint guardians who could supervise children if the parents are not deemed to be capable of looking after their children. It allows the state courts the right by default that had been taken from them by the ICWA, but it has not borne fruition due to the lack of a proper infrastructure on the reservations.

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