Does the UNCRC still fit for Indigenous peoples? Or are alternative frameworks required?

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Introduction

Ko Tawhitirahi te maunga, ko Te Awapoka te awa, ko Te Aupōuri te iwi, ko Luke Fitzmaurice-Brown toku ingoa. My name is Luke Fitzmaurice-Brown and I am from Aotearoa New Zealand. I trace my whakapapa, or ancestry, to Te Aupōuri, a Māori iwi (tribe) of the Far North of the country, as well as Scotland, England, Norway and Ireland. I am the descendant of both Indigenous and non-Indigenous peoples and I approach my research from that standpoint. Thank you to the conference organisers for having me, to Ruth and Naomi for organising this stream, and to all of you for listening.

My research considers Indigenous children's rights, with a particular focus on Article 12 and on child protection. The rights of children of all ethnicities are protected by the UNCRC, including special protections for Indigenous children. However, are these protections enough, or do they sometimes contribute to the marginalisation of Indigenous children, rather than correcting it?

This presentation seeks to answer that question, using the New Zealand child protection system as a case study. It is based on my PhD research, which initially focused on implementing children's participation rights within the child protection system. While that was the starting point, during the course of my research I came to believe that the international children's rights framework may sometimes be a barrier to progress for Māori children in this context, rather than an enabler.

In this paper I argue that because the overrepresentation of Māori in the child protection system is a product of colonisation, approaches which promote decolonisation are required. For us as Māori, that means upholding our right to collective self-determination and developing responses based on Māori knowledges. Individualist approaches to children's rights may inhibit that process, and the UNCRC is ill-equipped to addressing the broader problems which affect Māori children's rights.

Placing this discussion in context

Māori children are overrepresented in the New Zealand child protection system, as well as a range of negative statistics.[1] This issue has been highly publicised in recent years, with a series of protests leading to several reviews of the child protection system from a Māori perspective.[2] Those reviews found that recent law changes aimed at improving outcomes for Māori children were unlikely to be effective. Three reviews recommended changes based on a 'reform from within' philosophy, while three other reviews argued that only a more fundamental overhaul would be effective.[3]

These reviews took place alongside the implementation of another shift within child protection policy, towards more meaningfully listening to children's voices. A 2015 had found that children were often left feeling ignored or voiceless in child protection processes.[4] The attempt at rectifying that injustice included legislative reform,[5] changes to policy and practice guidance,[6] and the creation of a centralised team designed to improve the practice of listening to children across the system.[7]

When I began my PhD, I was a member of that centralised team. I had approached my PhD research initially from a children's rights perspective, focusing on the implementation of Article 12 in a child protection context. I still deeply believe in the importance of listening to children's views, and the damage that can be caused by ignoring them. But the increase in protest from Māori about the child protection system as a whole gave me pause. The subsequent reviews of the system have confirmed the damage it has caused to Māori, both historically and up to the present day.

The problem I sought to address was two-fold. Firstly, to that ensure children's views are listened to, and secondly, to address the wider the harm the system causes Māori. In our advocacy for Māori children, I think we need to choose tools and approaches which address both of those issues. The question for me was whether the UN Convention on the Rights of the Child fulfilled that criteria.

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[1] Department of the Prime Minister and Cabinet *Child and Youth Wellbeing Strategy* (2019). Department of the Prime Minister and Cabinet. Available at https://www.childyouthwellbeing.govt.nz/sites/default/files/2019-08/child-youth-wellbeing-strategy-2019.pdf

[2] Office of the Children's Commissioner *Te Kuku O Te Manawa* (2020); Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (2021); and Whānau Ora Commissioning Agency *Ko te wā whakawhiti: It's time for change - a Māori inquiry into Oranga Tamariki* (2020).

[3] L. Fitzmaurice-Brown *Revisiting the 2019 Oranga Tamariki inquiries: What did we learn, and what might that mean for the future of child protection in Aotearoa* (2023: submitted for publication).

[4] Expert Panel *Investing in New Zealand's Children and their Families* (2015). Ministry of Social Development.

[5] Oranga Tamariki Act 1989, s 11

[6] See, for example: Oranga Tamariki *See and engage tamariki – guidance* (2017). Accessed 21 March 2023 from https://practice.orangatamariki.govt.nz/practice-approach/practice-standards/see-and-engage-tamariki/see-and-engage-tamariki-guidance/

[7] For further information on these changes, see: Oranga Tamariki Voices of Children and Young People Team *Te Mātātaki 2021* (2021). Oranga Tamariki – Ministry for Children.

The Convention and its shortcomings

The UNCRC is the most widely ratified human rights treaty in history, but there remains an ongoing debate around its tension between 'welfare rights' (perhaps best exemplified by Article 3), and their 'agency rights' (best exemplified by Article 12). This tension is deliberate, welfare rights and agency rights must be read together.[8] Indeed, this reflects a broader philosophy of the UNCRC that the rights it contains are not to be read in isolation but are indivisible and interdependent.

The Convention has been criticised from an Indigenous perspective for representing a particularly individualised view of children,[9] which may clash with the more collective view held by many Indigenous peoples. Although this has been defended by children's rights advocates,[10] the assumed universality of the Convention remains a point of criticism.[11] One of the tensions resulting from that individualised approach is a perceived overemphasis on the rights of children and underemphasis on the rights of parents, although this too has been defended by children's rights advocates.[12] The debate regarding the extent to which the UNCRC recognises parents' rights remains ongoing. My suggestion here is that this remains contested ground from an Indigenous perspective.

Of course, the Convention does mention the rights of Indigenous children, with Article 30 stating that Indigenous children have the right to enjoy their own culture, religion and language. The UN Committee has noted that the Convention "was the first core human rights treaty to include specific references to Indigenous children in a number of provisions."[13] The rights in Article 30 are to be exercised collectively with other members of the child's community.

However, the existence of Article 30 may not mean that Indigenous children's rights as Indigenous peoples are sufficiently prioritised. The Committee have stated that while the collective cultural rights of an Indigenous child form a part of determining their best interests, ultimately it is the best interests of the specific child that is the primary concern.[14] This is deliberate, the Convention is explicitly aimed at the rights of individual children, part of which involves ensuring they are not subsumed within a larger group. But this does illustrate that Article 30 is not a silver bullet. How Indigenous children's rights should be upheld when they are in tension remains up for debate.

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[8] A. Parkes *Children and international human rights law: The right of the child to be heard* (2013) Routledge.
[9] Smith, above n. 9
[10] M. Freeman *Children's Rights as Human Rights: Reading the UNCRC* (2009). In J. Qvortrup, W. A. Corsaro, & M. S. Honig (Eds.), The Palgrave Handbook of Childhood Studies (pp. 377–393). Palgrave Macmillan.
[11] P. King, D. Cormack & M. Kōpua *Oranga Mokopuna: A tangata whenua rights-based approach to health and wellbeing* (2018). MAI Journal – a New Zealand Journal of Indigenous Scholarship 7(2), 187-202.
[12] J. Tobin *Justifying children's rights* (2014). In M. Freeman (Ed.), *The future of children's rights.* Brill | Nijhoff.
[13] UN Committee on the Rights of the Child *General Comment 11* (2009), p. 2
[14] UN Committee on the Rights of the Child, above n. 16

Indigenous alternatives to the Convention

There are alternative theorisations of children's rights which may address some of these challenges, one of which from New Zealand is known as 'Oranga Mokopuna'. The Oranga Mokopuna model seeks to reconcile the rights of Māori children as children with their rights as Māori.[15] The latter includes not just Article 30, but also the UN Declaration on the Rights of Indigenous Peoples, domestic legal instruments, and broader Māori laws and values. Oranga Mokopuna is framed as an alternative model of children's rights which, as the authors put it, "disrupts Western notions of rights that are assumed to have universal application."[16]

The core argument the authors of Oranga Mokopuna make is that "only once tangata whenua rights for Māori are realised can international human rights instruments be usefully applied."[17] The model describes the inherent rights of Māori as Indigenous peoples, grounded not just in legal instruments but in Indigenous laws and values, as well as our relationships with the land, our ancestors and with each other. The recognition of those rights is said to be a crucial prerequisite for upholding the legal rights of Māori children. The authors argue that once those broader rights have been acknowledged, children's rights advocates can turn to domestic instruments such as He Whakaputanga o Nu Tirene and Te Tiriti o Waitangi, our country's founding documents, which provide the modern legal foundation for Māori rights. Only then, according to the Oranga Mokopuna model, can international instruments be given effect, namely the UNDRIP and the UNCRC.

This, to me, is an improvement on previous rights-based frameworks which ignore wider Indigenous considerations. Oranga Mokopuna has the potential to shift the way advocates think about what it means to uphold the rights of Māori children, and in that respect it has significant value. However, if the ultimate goal is to respect the rights of Māori as Indigenous peoples, I am not sure whether it is it necessary to reference the international children's rights framework at all. If there were no opportunity cost to doing so, I think I could be persuaded. However, bearing in mind the wider goals of decolonisation, I am not convinced that this is the case. I think advocates for Māori children need to ask whether we should discard non-Indigenous approaches to children's rights entirely.

[15] King et al., above n. 14
[16] King et al., p. 186
[17] King et al., p. 188

Imagining decolonisation

So far I have alluded to the concept of decolonisation, but it is important to define this further. In New Zealand, the term decolonisation is increasingly used to describe the restoration of tikanga Māori, a term which refers to Māori values, laws and knowledges. This is not to downplay the material aspects of decolonisation, which are still important, but most New Zealanders, including most Māori New Zealanders, acknowledge that decolonisation for us will not involve the outright removal of colonial settlers and their descendants.[18]

Instead, decolonisation involves the restoration of Indigenous ways of being, knowing and living to the place they occupied prior to colonisation. Colonisation has involved the diminishment and removal of those Indigenous ways of being, knowing and living. Decolonisation must involve their restoration. It is an epistemological exercise as much as it is a material one.

If we agree that decolonisation is important, then this has implications for both how we view law generally, and how we view children's rights frameworks specifically. The latter is important because the process of colonisation in Aotearoa New Zealand diminished and degraded Māori customs relating to children and families, through a long-term social policy focus on assimilating Māori child-rearing practices into European family structures.[19]

The important point for our purposes is that decolonisation as it relates to children and families in Aotearoa New Zealand involves a restoration of pre-colonial practices. For Māori, this is not only a moral imperative, it is also constitutionally guaranteed. It was recently determined that Te Tiriti o Waitangi, our country's founding document, includes a guarantee to Māori of Māori control over our child-rearing practices and social policies relating to family.[20] The adoption of legal frameworks which contribute to that goal of Indigenous restoration is therefore important.

This is not just a matter of child protection or children generally. Indigenous legal scholars have argued that Indigenous peoples have had their own systems of law for thousands of years, and that the revival of those systems is a crucial aspect of Indigenous self-determination.[21] Napoleon argues that Indigenous legal orders can provide a solution to the problems faced by Indigenous peoples, arguing that this "is not about trying to go back in time, but about drawing on the strengths and

[18] For a discussion of this issue and of decolonisation in Aotearoa New Zealand more broadly, see R. Kiddle, B. Elkington, M. Jackson, O. Ripeka Mercier, M. Ross, J. Smeaton & A. Thomas. *Imagining Decolonisation* (2020). Bridget Williams Books.
[19] J. Ruru *Kua tutu te puehu, kia mau - Maori aspirations and family law policy* (2020). In M. Henaghan & B. Atkin (Eds.), Family law policy in New Zealand (5th ed., pp. 57–97). LexisNexis.
[20] Waitangi Tribunal, 2021, above n. 4
[21] A. Lajole *Introduction: Which Way Out of Colonialism?* (2007) In Law Commission of Canada (Ed.), Indigenous Legal Traditions. (pp. 3-11). UBC Press.

principles of the past to deal with modern-day problems and situations."[22] Some take this one step further to argue that the concept of 'rights' are inappropriate for Indigenous peoples.[23] Regardless of whether we agree with the latter point, at a minimum the restoration of Indigenous legal orders can be a crucial aspect of decolonisation. The use of Indigenous legal orders to solve issues affecting Indigenous peoples can both help to solve the particular problem at hand, while also contributing to broader advancements for Indigenous peoples over time.

Tikanga Māori and child protection

I believe that there are alternatives to the UNCRC which could prove more effective at advancing the interests of Māori children in child protection contexts. In my PhD research I discussed three Māori concepts which could contribute to this objective – mana, rangatiratanga and wānanga. Mana is often translated as inherent dignity, but importantly the concept has both an individual and a collective aspect.[24] Rangatiratanga, conversely, refers to Māori authority and self-determination, which while primarily collective also has an individual component.[25] Taken together, I believe these two principles could form an overarching framework for child protection which ensures both the collective and individual aspects of Māori children's wellbeing are addressed.

Wānanga, meanwhile, involves bringing people together based on Māori customary practices, to collectively deliberate and ensure all perspectives are heard.[26] I believe this could be a culturally-appropriate vehicle through which the principles of mana and rangatiratanga could be given effect, and children's voices be listened to in a way which contributes to wider processes of decolonisation. Bringing together Māori children, families, Indigenous leaders and professional experts would enable child protection decisions to be made within an Indigenous epistemological framework.

There is more to each of these principles than we have time to discuss here, but I mention each of them briefly to illustrate that approaches grounded in Indigenous knowledges are not just theoretical. These are tangible concepts which have endured throughout the colonisation process and are now in the process of being revitalised. We now have an opportunity to embrace these concepts in a way which could provide huge benefit to Indigenous children and families.

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[22] V. Napoleon *Thinking about Indigenous legal orders* (2013). In R. Provost & C. Sheppard (Eds.), *Dialogues on Human Rights and Legal Pluralism* (pp. 229-245 at 244) Springer.
[23] J. Corntassel *Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination* (2012). Decolonization: Indigeneity, Education & Society, 1(1), 86–101.
[24] H. Mead *Tikanga Māori: Living by Māori Values* (2016) Huia Publishers.
[25] Mead, above n. 27
[26] N. Mahuika & R. Mahuika *Wānanga as a research methodology* (2020). AlterNative (16)4, 369-377

A more pragmatic compromise?

In practice, there may be compromises to be made in deciding when approaches to our advocacy for children should be grounded in the UNCRC and when we should discard the Convention entirely. In my PhD research I proposed 'a bias towards Indigeneity' as such an approach. This would encourage the adoption of Indigenous advocacy frameworks to the greatest extent possible, but acknowledge that in some instances international rights-based frameworks may be a more pragmatic alternative. In between the two ends of that spectrum are frameworks which adopt rights-based approaches but incorporate Indigenous interests – Oranga Mokopuna and UNDRIP, to name two examples. Where rights-based approaches are likely to prove particularly persuasive, these approaches can be a necessary corrective to alternatives which ignore or fail to prioritise indigenous interests.

What I'm confident of, however, is this. In child protection, in Aotearoa New Zealand and when it comes to Māori children, alternatives to the UNCRC exist which could almost always prove more effective in advancing their interests. For us as Māori, that alternative is tikanga Māori; the laws, values, and principles which Māori people have relied on for a thousand years.

What I'm pretty sure of, furthermore, is this. Approaches based on tikanga can apply not just within child protection, but to all things concerning Māori children. Tikanga experts would find it hard to name a circumstance in which tikanga would fail to advance Māori children's interests. What's more, tikanga-based approaches can have benefits well beyond the issue to be determined, as adopting such approaches contributes to decolonisation. The need, therefore, to use non-Māori approaches such as the UNCRC to advocate for Māori children is limited, and will become more so over time.

What I would ask, perhaps more tentatively, is this. In international contexts, have we considered the limits of the Convention? Have we examined whether non-Western knowledges, including Indigenous legal orders, could do a better job at advancing the interests of some children? Have we asked whether there are costs to advocacy based on the Convention, or whether that may be impeding decolonisation? If we recognise that decolonisation is epistemological as much as it is material, have we done enough to name the harms of reinforcing advocacy frameworks which are primarily colonial in their origin? Can we name those epistemic consequences?

These are questions which each of you is better placed to answer than me and the answers will vary in different contexts. All that I'm sure of relates to my own context. But I think these are questions we should be asking ourselves. Perhaps if nothing else they may help us to hone our skills as advocates, even if we decide that discarding the UNCRC would be throwing out the baby with the bathwater. But surely asking the question is the least we owe the children we advocate for.