

Balancing the Best Interests of the Child and Cultural Rights in Canada: Reflection Essay

Julia Green

Before I came to law school, I had the great privilege of working in an immigrant support centre in Ottawa for almost two years. It was here, surrounded by so many incredible social workers, lawyers, and community leaders, that I became inspired to pursue a career in the legal field. Working with the newcomer population allowed me to see up close how the nexus between poverty, race, class and unfamiliarity with the local culture can bring about situations of injustice. I spent my days listening to stories about misunderstood tax procedures, bed bug nightmares, deportation orders and more. Every day brought forth stories of tragedy, stress, and fear, as well as those of resilience, joy, and adaptation.

One day, a member of the city's Somali community wandered into the reception area and began asking the intake worker what kind of steps he could take to protect himself for when the government inevitably came to take his children away. Confused, my colleague asked what he meant, and he explained that he had noticed child protection workers coming to take away many of the children within the Somali community, seemingly for no reason. He wanted to know if it was possible for him to get some kind of document explaining that his children should be given to another member of the community, a neighbour or an extended family member, instead of to some place where they would be living with strangers. My colleague, if I recall, could do nothing but attempt to explain that child protection services do not intervene without just cause, and send the fellow on his way.

This interaction always stuck with me. This man, as both a member of the Black community and an immigrant, probably had good reason to worry: after all, his children fall into two of the most over-represented groups in the child welfare system. But something about this interaction felt incongruent. Here was person who obviously believed he was raising his children in a perfectly acceptable manner, yet still understood that manner may not be found to be acceptable to the general Canadian population. From what I overheard, it sounded like this person genuinely wanted the best for his children and his family. So why did he have to still live in fear that he might lose them?

When it came time to pick a topic for the term paper that I needed for the Major Concentration in International Human Rights and Development, I knew I wanted to write something about children's rights in the world and in Canada. At first, I thought I would simply write a paper that was a comparison of the recent changes to Ontario and Quebec's child welfare systems, situating them within the international human rights framework. I envisioned this as a means to brush up on this particular area of law, since it hadn't been extensively covered in any of the classes I had taken so far. However, as I began working on the paper, I kept thinking about that former client. I was trying to understand how his experience fit into the larger topic of child welfare protections. Then, as I was reading through the comments from the various delegations

over the years at the UN Committee on the Rights of the Child, I saw a comment from the Indian delegation in 1995 that I quoted in my paper. In speaking about children's rights, the delegation mentioned the right to culture, stating specifically that, "The right to culture implies not just the freedom to preserve one's culture and retain it but, more importantly, the non-imposition of a culture considered to be better or superior."

Until the moment I read that line, I had never really considered that a right to culture even *existed*. Sure, I knew that most countries seem to have a general pride for their various cultures, and that protections for certain groups is almost as old as human rights law itself. At no point had I ever considered that people have *right to culture* however, as much as they have a right to education, freedom from slavery and torture, freedom of expression, etc. As soon as this was on my radar, I realized that my paper had to be about the tension between this right and that of the best interests of the child. By exploring these two rights in detail, I was finally able to put into words what was not sitting right with me about what the man who came to the immigrant support centre was saying. This paper gave me the opportunity to show that there was not only something morally off with the fact that so many children within this particular Ottawa community were being targeted by child protection services, but potentially something legally incorrect as well.

There was so much content to cover for this paper that it felt very easy to write, and I actually felt like I could have written even more. The main thing I struggled with though was checking my privilege, as a White, Canadian-born woman, when I was writing about the cultures of overrepresented groups. I tried to be very careful with my research and use sources that seemed reliable, both statistics and anecdotes. However, I invite anyone involved in this project to offer me criticism or advice on any part of my paper where I may have made an error or assumption about one of the groups I focus on in the final part of my paper.

Annotated Bibliography

Adjei, Paul Banahene & Eric Minka, "Black parents ask for a second look: Parenting under 'White' Child Protection rules in Canada" (2018) 94 Children and Youth Services Review 511–524.

- This article focuses on Canada's Black community in particular, especially how it may employ different parenting practices that tend to be unfairly targeted by Child Welfare Agencies. The study presents qualitative findings on Black parents' knowledge, perceptions, and experiences dealing with child protection rules and processes in Toronto.

Boatswain-Kyte, Alicia et al, "A longitudinal jurisdictional study of Black children reported to child protection services in Quebec, Canada" (2020) 116 Children and Youth Services Review 105219.

- A study which uses longitudinal empirical research to investigate the overrepresentation of Black children in the child protection system in Quebec.

Canadian Multiculturalism Act, RSC 1985, c 24 (4th Supp.).

- The Canadian Multiculturalism Act sets out important protections for individuals which ensure that everyone benefits from equal protection and benefit of the law without discrimination. One of this Act's primary aims is to preserve and enhance the multicultural heritage of Canada.

Chaze, Ferzana, "Child Welfare Intervention in Visible Minority Immigrant Families: The Role of Poverty and the Mothering Discourse" (2009) 11 Journal of the Motherhood Initiative for Research and Community Involvement 56.

- Chaze investigates the different cultural practices that fit into the "Mothering Discourse" of immigrant families living in Canada. Importantly, she discusses not only varying takes on parenting but also the perceptions and stereotypes that child welfare agencies might have of these groups, leading to higher scrutiny and surveillance.

Clarke, Jennifer, "Beyond Child Protection: Afro-Caribbean Service Users of Child Welfare" (2012) 23:3 Journal of Progressive Human Services 223–257.

- Clarke looks at the Afro-Caribbean community in Toronto, using interviews with mothers and youths to understand how they perceive and experience the child welfare system.

Contenta, Sandro & Jim Rankin, "Report shines light on poverty's role on kids in CAS system", *The Toronto Star* (15 August 2016), online:
<<https://www.thestar.com/news/insight/2016/08/15/report-shines-light-on-povertys-role-on-kids-in-cas-system.html>>.

- An important article from the Toronto Star which highlights the information prepared in a report by Deborah Goodman, Nico Trocmé, and Kofi Antwi-Boasiako at the University of Toronto. Their report looked specifically at the way poverty plays a role in the involvement of child welfare services in a family's affairs.

Donnelly, Jack, "Cultural Relativism and Universal Human Rights" (1984) 6:4 *Human Rights Quarterly* 400–419.

- Donnelly's 1984 piece provides perhaps the most comprehensive definition of cultural relativism available, which was important for providing important background context needed for the discussion included in this paper.

Harris-Short, S, "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" (2003) 25.

- Harris-Short's piece provided an important foundation for this paper, as it specifically looked at cultural relativism as it relates to the Convention on the Rights of the Child. It points out that "cultural differences" may still be used as an excuse for certain human rights abuses, but that the tension between cultural relativism and universalism is essentially the fundamental weakness of the international legal system.

Johnson, James, "Why Respect Culture?" (2000) 44:3 *American Journal of Political Science* 405–418.

- In this article, Johnson presents an argument that we do not truly have moral reasons to respect culture in any direct sense. While I generally disagree with his thesis, this article contains an interesting discussion of reasons why culture is typically valued within societies.

Jouannet, E, "Universalism and Imperialism: The True-False Paradox of International Law?" (2007) 18:3 *European Journal of International Law* 379–407.

- Similar to Harris-Short's piece above, Jouannet's piece looks at the criticism of universalism as a conduit for imperialism in the modern international human rights framework.

Maiter, Sarah, Carol A Stalker & Ramona Alaggia, “The Experiences of Minority Immigrant Families Receiving Child Welfare Services: Seeking to Understand how to Reduce Risk and Increase Protective Factors” (2009) 90:1 *Families in Society* 28–36.

- This article reports on a research study with minority immigrant families, which aimed to understand the stressors they perceived as contributing to child welfare interventions, and services they found helpful or unhelpful.

Muir, Nicole & Yvonne Bohr, “Contemporary Practice of Traditional Aboriginal Child Rearing: A Review” (2014) 9:1 *First Peoples Child & Family Review* 66–79.

- This review paper explores Aboriginal child rearing to determine if traditional practices are still in use, how these may differ from mainstream child rearing and may have been modified by mainstream influences and colonialism.

Philip Alston, “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” in Alston Philip, ed, *The Best Interests of the Child: Reconciling Culture and Human Rights* (New York: Oxford University Press, 1994) 1.

- Alston's chapter was another important foundational piece for this paper: its analysis uses the Convention, and especially Article 3(1), which incorporates the principle that, in all actions concerning children, 'the best interests of the child shall be a primary consideration,' to examine the broader relationship between culture and human rights.

Pineschi, Laura, “Cultural Diversity as a Human Right? General Comment No. 21 of the Committee on Economic, Social and Cultural Rights” in Silvia Borelli & Federico Lenzerini, eds, *Cultural Heritage, Cultural Rights, Cultural Diversity* (Brill-Nijhoff, 2012) 27.

- Pineschi's piece gives more insight into what is really meant by "cultural rights" by examining the way that the protection of "cultural diversity" ought to be guaranteed in order to protect cultural heritage.

Sen, Amartya, “How Does Culture Matter?” in *Culture and Public Action: A Cross-Disciplinary Dialogue on Development Policy* (Washington, UNITED STATES: World Bank Publications, 2004) 38.

- Sen gives readers a reason for why culture matters not only for sociology, anthropology, and history, but should also be important to economists. His essay looks particularly at how culture may influence development, and potentially help to modify or alter the development policies that seem appropriate in our world.

Ahmed Obaid, Thoraya, “Promoting Human Rights Across Cultures”, (4 October 2010), online: *United Nations Population Fund* <<https://www.unfpa.org/press/promoting-human-rights-across-cultures>>.

- I found this press release particularly interesting because Ahmed Obaid, then Executive Director of the UNFPA, made specific comments about the importance of acknowledging cultural practice when approaching human rights issues affecting women and girls. Ahmed Obaid was the first Saudi Arabian to head a United Nations agency.

Department of Justice, “Criminal Law and Managing Children’s Behaviour”, (11 March 2011), online: *Government of Canada* <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mcb-cce/index.html>>.

- This government document provides an overview of the law in Canada when it comes to child abuse, in particular physical punishment. It sets out the general rules, as established by laws and precedent.

Lasalle, Martin, “Black children are overrepresented in Quebec’s welfare system”, (16 March 2021), online: *UdeM Nouvelles* <<https://nouvelles.umontreal.ca/en/article/2021/03/16/black-children-are-overrepresented-in-quebec-s-child-welfare-system/>>.

- An article published by UdeM which breaks down the information from Botswain-Kyte's study, mentioned above.

Lavergne, C et al, *Are Visible-Minority Children Overrepresented in Montreal’s Child Protection Services System? Results of a study comparing reporting of visible-minority and non-visible minority children*, Study Overview, by C Lavergne et al, Study Overview 5 (Centre jeunesse de Montréal-Institut universitaire, 2011).

- Another study investigating the over-representation of visible minority children in the child welfare system, this time in Montreal particularly. Like many of the other studies, it found that Black children are almost twice as likely as other children to be reported.

Marchildon, Jackie, “The Truth About the Secretive Practice of ‘FGM’ In Canada”, (6 February 2018), online: *Global Citizen* <<https://www.globalcitizen.org/en/content/fgm-in-canada-2/>>.

- I used this article simple to support my claim that FGM does indeed continue to exist in Canada, though it is certainly not widespread and is strictly prohibited by law.

Musalo, Karen, “When Rights and Cultures Collide”, (12 November 2015), online: *Markkula Center for Applied Ethics at Santa Clara University* <<https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/when-rights-and-cultures-collide/>>.

- Musalo's piece also touches on the debate between international human rights and the right to culture, focusing on the practice of FGM specifically.

Noël, Jean-François, *The Convention on the Rights of the Child*, by Jean-François Noël (Department of Justice Canada, 2002).

- A government document which furnishes important historical context on the CRC in the international context. It also explains how the CRC functions within Canadian law.

Omorogbe, Philip, “Reflecting on human rights, cultural relativism and neo-colonialism | International Human Rights Program”, (22 July 2015), online: *University of Toronto Faculty of Law International Human Rights Program* <<https://ihrp.law.utoronto.ca/news/reflecting-human-rights-cultural-relativism-and-neo-colonialism>>.

- This blog post written by a University of Toronto student reflects on his experience in London, England, working with the NGO PEN International. As Nigerian-Canadian, the author found himself doing some deep thinking about neo-colonialism and the prevalence of cultural relativism in international human rights work.

Pourghassemi, Sabrina & Subhangi Anandarajah, “Indigenous children overrepresented in Canada’s child welfare system, research says”, (27 October 2020), online: *Ryersonian.ca* <<https://ryersonian.ca/indigenous-children-overrepresented-in-canadas-child-welfare-system-research-says/>>.

- This is the article which provided the outstanding fact that today, more Indigenous youth are within Canada's child welfare system than when residential schools were at the height of their use. The piece is a comprehensive look at the numbers, and some of the reasons behind them.

Public Health Agency of Canada, *Provincial and territorial child protection legislation and policy - 2018*, regulations, by Public Health Agency of Canada, regulations (2019).

- A comprehensive document from the Public Health Agency of Canada which describes every provincial and territorial statute that protects children.

Robinson, Mary, “Universality and priorities”, online: *United Nations Development Programme Human Development Reports* <<http://www.hdr.undp.org/en/content/universality-and-priorities>>.

- A blog piece written by Mary Robinson, former United Nations High Commissioner for Human Rights, on the universality debate. According to her, "every moment spent debating the universality of human rights is one more opportunity lost to achieve effective implementation of all human rights."

Ward, Michelle, Corry Azzopardi & Gillian Morantz, "Assessing Child Maltreatment in a Multicultural Setting", (April 2018), online: *Caring for Kids New to Canada* <<https://kidsnewtoCanada.ca/screening/maltreatment>>.

- This web page discusses how parents from all cultural backgrounds want the best for their children, but notes that customs and beliefs about parenting and child behaviour differ among families, populations and cultures. It proclaims that naturally, Canadian norms and laws may come into conflict with cultural norms, beliefs, and parenting practices in some newcomer families.

"Attendance Rights", online: *Justice for Children and Youth* <<https://jfcy.org/en/rights/right-to-attend-school/>>.

- This is an online resource for parents to help them understand the laws in Canada related to their obligations towards their children. It covers everything from school attendance to immunization requirements.

"Best Interests of the Child", online: *Canadian Bar Association* <<https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Best-Interests-of-the-Child>>.

- The Canadian Bar Association attempts to define the principle of the best interests of the child as a three-fold concept: a substantive right, an interpretive principle, and a rule of procedure.

"Canada & The UN: Conventions And Treaties", (17 May 2016), online: *The Canadian Civil Liberties Association (CCLA)* <<https://ccla.org/get-informed/talk-rights/canada-the-un-conventions-and-treaties/>>.

- I used this document as a means to confirm the dates Canada signed on to several of the treaties mentioned in this paper. It provides the name of the convention/covenant/treaty, as well as when it was signed and the year it was ratified. There is also a short description of what each document entails for Canada.

“Canada’s Declarations / Reservations about the UN Convention on the Rights of the Child”, online: *Canadian Children’s Rights Council* <https://canadiancrc.com/UN_CRC/UN_Canada_Declarations_Reservations_Convention_Rights_Child.aspx>.

- The Canadian Children's Rights Council website simply states Canada's reservations to the CRC, without any explanation or commentary on the reasoning for these reservations.

Convention on the Rights of the Child, 20 November 1989, UNTS 1577 at 3 (entered into force 2 September 1990) [CRC].

- The fundamental document from which the principle rights of children flow.

“Definitions of the right to participate in cultural life”, (8 December 2018), online: *Claiming Human Rights Guide to International Procedures Available in Cases of Human Rights Violations in Africa* <http://www.claiminghumanrights.org/cultural_life_definition.html>.

- This web page is less about interpretation, and more about the pure law. It quotes all the articles of different international conventions which mention cultural rights, including the ICCPR, the ICESCR, the CRC, the Convention on the Protection of Migrant Workers, CEDAW, the CRPD and the African Charter on Human and Peoples' Rights.

“Emerging from the ashes of war: 1946–1979”, online: *UNICEF* <<https://www.unicef.org/stories/learning-experience-19461979>>.

- A chronological description of the development of international children's rights, starting shortly after WWII.

“Frequently Asked Questions (FAQs)”, online: *Canadian Child Welfare Research Portal* <<https://cwrp.ca/frequently-asked-questions-faqs>>.

- A webpage meant to provide information to parents and guardians on how the child welfare system works, as well as who is considered a child, what is child abuse and neglect, and statistics about how many children are currently in the system.

“Guide to the Canadian Charter of Rights and Freedoms”, (23 October 2017), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html>>.

- A detailed description of Canada's Charter of Rights and Freedoms, including its history, structure, and different sections. I used this document to explain how the *Charter* protects cultural rights.

“History of child rights”, online: *UNICEF* <<https://www.unicef.org/child-rights-convention/history-child-rights>>.

- Another chronological representation of the evolution of children's rights worldwide. I used it to double-check/add to the chronology I used from the piece above entitled "Emerging from the Ashes of the War," also from UNICEF.

“Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare”, online: *Canadian Child Welfare Research Portal* <<https://cwrp.ca/publications/interrupted-childhoods-over-representation-indigenous-and-black-children-ontario-child>>.

- A report from the Ontario Human Rights Commission (OHRC) which examines the over-representation of First Nations and Black children in Ontario's children's welfare system. Despite finding that Ontario's child welfare agencies often do not record race data, the OHRC was able to ascertain that First Nations and Black children are indeed over-represented in many of Ontario's agency jurisdictions.

OHCHR, Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, 29 May 2013.

- This UN document, described at length in this paper, was meant to provide states with a better idea of precisely what is implied by the principle of the "best interests of the child."

“Ratifications of C138 - Minimum Age Convention, 1973 (No. 138)”, online: *International Labour Organization* <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283>.

- A webpage used to ascertain when Canada ratified the Minimum Age Convention of 1973. I was surprised to discover it was not until June 2016.

“Rights of children”, (23 October 2017), online: *Government of Canada* <<https://www.canada.ca/en/canadian-heritage/services/rights-children.html>>.

- This government document outlines the international protections which apply to children in Canada. It of course mentions the CRC, but also several other optional protocols and six other principle human rights treaties that Canada has ratified. The document goes on to identify the guiding principles of the CRC, such as definition of the child, non-discrimination, best interests of the child, right to life, survival and development, and respect for the views of the child. It also includes a brief history of children's rights in Canada.

“Status of Ratification Interactive Dashboard”, online: *United Nations Office of the High Commissioner* <<https://indicators.ohchr.org/>>.

- An interactive dashboard of a map which shows the ratification of various International Human Rights Treaties.

“Western Human Rights in a Diverse World: Cultural Suppression or Relativism?”, (25 April 2014), online: *E-International Relations* <<https://www.e-ir.info/2014/04/25/western-human-rights-in-a-diverse-world-cultural-suppression-or-relativism/>>.

- An essay on the international relations blog E-International Relations which questions whether the concept of universal human rights is actual a means of "cultural suppression."