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The Treatment of Aboriginal Children in Canada: A Violation of Human Rights Demanding Remedy

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Abstract

This article examines two problems faced by the Canadian population: the current conditions of Aboriginal children and the lack of concrete course of action established to improve the dire conditions and lack of access to basic resources. This article proposes that a human rights framework can be utilized to address the disparities between Aboriginal and non-Aboriginal children in Canada. An integrated human rights framework acknowledges the complexity of the relationship between universal, natural and legal rights and provides a system of accountability to track the quality and success of the improvements made by the government of Canada. Due to the complex and systematic nature of the problem, a human rights framework provides a way to supplement the treaties and agreements that the government of Canada has often used as reasons for not taking responsibility. This paper concludes that an integrated human rights framework is an effective way to address the significant gaps between Aboriginal and non-Aboriginal children in terms of access and funding for social, health and educational services.

Keywords: Human Rights, Framework, Aboriginal Children

Introduction

For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments, ignore Aboriginal rights, terminate the Treaties, and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious and racial entities in Canada. The establishment and operation of residential schools were a central element of the policy, which can best be described as "cultural genocide" (Truth and Reconciliation Commission, 2015, pg v).

The release of the report from the Truth and Reconciliation Commission (TRC) in December 2015 was a call to action for all Canadian people to begin a comprehensive healing process with Aboriginal

peoples and to immediately redress the impact of colonialism, specifically residential schools. The TRC represented an important historical moment for Canada's relationship with Aboriginal people. There have been other reports written about the importance of a fundamentally different approach to the treatment of Aboriginal people including the Royal Commission on Aboriginal Peoples in 1991 and in 1995, an acknowledgement by the Conservative Federal Government of the Aboriginal right to self-government (Parliament of Canada, 1999). The release of the TRC is seen as a seminal moment in Canadian history. The Calls to Action from the TRC which took over 6 years and spoke to over 6,700 residential school survivors, are opportunities for redress and reconciliation (TRC, 2015).

This article addresses whether a human rights framework constructed from existing knowledge about human rights theories, can be used to remedy inequities in social, health and education services in Aboriginal communities. It argues that Canada, through its treatment of Aboriginal children, is in violation of two UN conventions: the UN convention on the Rights of the Child and the UN convention on the Rights of Indigenous People. This article will: (1) review theories of human rights; (2) review Canada's current human rights commitments nationally and internationally; (3) provide a brief history of the treatment of Aboriginal children in Canada post colonization; (4) provide an overview of the social, economic, and educational conditions currently faced by Aboriginal children in Canada; and (5) propose an integrated framework which links a human rights framework to the concrete outcomes for children called for by the TRC to address the economic, social and health disparities experienced by Aboriginal children. This is accomplished by exploring a landmark human rights ruling for the First Nations Child and Family Caring Society (FNCFCS) and the Assembly of First Nations (AFN) that found that the Federal Government does not provide fair funding for child welfare services on reserve. As a nation that embraces freedom and tolerance for all, it is important that we lead by example and that all Canadians be treated equally under the law.

The references for this article were limited to published literature; unpublished literature was not accessed. In addition, primary data was not accessed, which means the article used data collected using other hypotheses. The literature in this article is primarily Western; Aboriginal sources were used when possible.

Definition of Aboriginal People

Aboriginal people in Canada include distinct populations: First Nations (includes Status and non-Status) Métis and Inuit. According to the National Household Survey in 2011, there were 1,400,685 Aboriginal people living in Canada (4.3% of the population) (Statistics Canada, 2013). There are over 600 First Nations communities. First Nations people were the Aboriginal peoples who were forced to live on reserve during the process of colonization when Europeans began to settle in North America. Aboriginal people are not homogeneous in their culture or history and should be recognized as a rich and diverse culture. For the purposes of this article, the broader term Aboriginal is generally used when arguing for the need for a human rights framework for Indigenous peoples.

Human Rights Theories

There are various definitions of human rights, but in general a right is a natural or legal entitlement to have or obtain something or to be able to behave in a certain way (Wenar, 2005). A theory

is a set of rules or hypotheses that work together to predict an expected outcome. A human rights theory provides a way to understand how people around the world have access to basic rights and freedoms that can transcend laws and culture. There are several dominant theories of human rights, each offering a unique and important perspective: universality of human rights, legal and natural rights, and negative and positive rights. Each should be considered in the development of a human rights framework for the treatment of Aboriginal children in Canada.

The universality of human rights purports that universal human rights are part of being a person – they are absolute. Universal human rights can be defined as liberties, freedoms and entitlements that every person would agree are fundamental to the human condition (Fagan, 2015). If there was a public discussion about what these rights were, where all the participants were from different cultures and countries with different assumptions and world views, and were given equal access to unbiased information and allowed to debate, anything agreed upon in that discussion would be considered a universal human right.

The universality of human rights has been the cornerstone for the creation and foundation of several nations. The United States Declaration of Independence in 1776 declared that everyone was “endowed by their Creator with certain inalienable rights” (para. 2). Several years later in 1789, the rallying cry for the French revolution was the principle that “men are born and remain free and equal in rights” (Jellinek, 2016). These political, social and economic revolutions against being ruled by monarchies approximately 250 years ago were based on the belief that by being human, people were afforded the right to self-determine and these beliefs are still fundamental in our thinking about human rights in 2016.

Legal Rights are those rights that are given to individuals by a legal system in a country; these are rights that can be changed and modified by the government (Fagan, 2015). Natural rights are not dependent on the legal system or the government of the country; and they cannot be repealed or changed by the government (Hart, 1955). Legal rights include citizenship, which leads to the right to vote or obtain services from the government are examples of legal rights. A natural right is a right that applies to everyone, no matter their citizenship status and is fundamental to human nature (Hart, 1955). The right to life and the right to food and drink can both be considered natural rights.

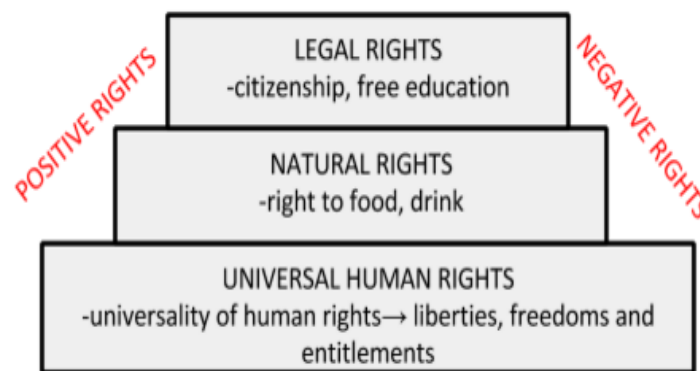
Negative rights imply inaction; whereas positive rights imply action. A negative right means that an individual cannot be subjected to the actions of another individual or the government. A positive right means that an individual is entitled to the actions of another individual or the government (Levin Institute, 2016). An example of a negative right would be the right to not be subjected to abuse, and an example of a positive right would be the right to receive aid from the government in a time of need.

Proposed Human Rights Framework

If Canada consistently applied an integrated human rights framework towards every decision involving Aboriginal people, and in particular Aboriginal children, it would help Canada to remain accountable in ensuring that significant progress is made towards the TRC’s Calls to Action. Figure A describes a human rights framework. The foundation in the figure acknowledges the universality of human rights; it forms the basis for any other type of right that is bestowed upon an individual. Its key

considerations include liberty and freedom. The next systems of rights are natural rights which include basic rights to food, water and housing. At the top of Figure A are legal rights which reflect the commitment to universal and natural rights for all citizens. Positive rights and negative rights can be interpreted as part of all the components of the figure. Each system of rights can act to ensure a right through proactive measures (positive rights) and defend against the infringement of rights (negative rights). This framework of rights incorporates positive and negative rights at all levels.

Figure A: Integrated Human Rights Framework



United Nations Conventions

The Convention on the Rights of the Child which was ratified by 193 countries (including Canada) in 1989 built upon the United Nations *Universal Declaration of Human Rights* which was ratified in 1948 (United Nations, 1948). This is an example of a convention that is legally binding which stipulates that all countries are required to present themselves before the United Nations General Assembly and detail the status of children in their countries. The United Nations General Assembly is the policymaking part of the UN and the Convention on the Rights of the Child is one of The United Nations' six legally binding agreements.

The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly in 2007 with only four countries voting against its ratification; one of them being Canada (United Nations, 2007). Canada had concerns about treaties, resources and self-government but in 2016, the Liberal government removed its objections to the Declaration. Unlike the Convention on the Rights of the Child, this declaration is not legally binding but can be used as a useful tool for eliminating human rights violations, and providing a basis for the treatment of Indigenous peoples.

Canadian Context -- Canadian Charter of Rights and Freedoms

In 1982, the Canadian Charter of Rights and Freedoms was signed into law by Queen Elizabeth II as part of the repatriation of the constitution and represents an example of both natural (guaranteed rights which cannot be altered by law) and legalistic rights (rights given legally, however they can be subject to changes). By guaranteeing certain rights and freedoms (except when there are reasonable exceptions), the Charter recognizes basic rights and freedoms of all Canadians which echo those defined

in the US Constitution and the French revolution. Most importantly, the Charter recognizes the right of all Canadians to equal treatment (Section 15) and the rights of Aboriginal peoples (Constitution Act, 1982).

History of Canada's Treatment of Aboriginal Children

In 1763 there was a British proclamation that claimed the right to “purchase” land through treaty (Borrows, 1997). Just prior to Canadian confederation, the 1960s Indians Land Act was the beginning of a system that the Government of Canada would develop to force Aboriginal people to live on reserves. These reserves were often pieces of land that were remote without access to resources. In 1885, the Indian Act was amended to make any Aboriginal ceremony or dances illegal. It was amended again in 1914 to force an Aboriginal person to seek permission before wearing “Aboriginal” clothing (Indian Act, 1997). Aboriginal people struggled to obtain an education on reserve. If a person managed to leave the reserve for an educational opportunity, they lost their Indian status on the reserve and were unable to return to their home.

Residential schools became the enforceable policy of the Federal Government. Schools were largely not an institution of learning but rather an environment that was abusive, isolating and oppressive. Residential school was used as a tool of assimilation so that Aboriginal children would adopt the dominant culture. Duncan Campbell Scott, who was head of the Department for Indian Affairs from 1913 to 1932 stated:

I want to get rid of the Indian problem. Our objective is to continue until there is not a single Indian left in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department, that is the whole object of this bill (In MacDonald & Hudson, 2012, pg. 428).

In the 1960s, thousands of Aboriginal children were apprehended and placed for adoption in non-Aboriginal homes through the child welfare system. This policy, in combination with the practice of residential schools, resulted in a lost generation of people who were not raised by their parents. The current treatment of Aboriginal children cannot be understood or addressed without acknowledging their history of oppression. It also provides a strong argument for the need for a human rights framework and the need to redress the fundamental mistreatment of Aboriginal people through a framework that acknowledges the right to equality and dignity to guide all governments in Canada towards reconciliation with all Aboriginal people.

The TRC was a Commission formed in 2008 as the result of the Indian Residential Schools Settlement Agreement which was the largest class action settlement in the history of Canada. Its members spent six years listening to Aboriginal people describe the forcible removal of their children from their home and their experience of placement in residential schools (TRC, 2015). One of the clearest instructions from the TRC was the need to immediately remedy the current treatment of Aboriginal children by all governments in Canada. Between 1840 and 1996, when the last residential school closed, approximately 150,000 Aboriginal children were removed from their homes under duress and placed in a school whose sole purpose was to remove children from their “savage” parents so that every Indian child, in the words of Canada's first Prime Minister “would acquire the habit and modes of thought of white men” (TRC, 2015, p.2). Today, there are more Aboriginal children in the care of the Canadian child welfare system than at the height of the Residential School period (Blackstock, 2016).

The results of colonialism are the current social, economic, educational and health conditions that Aboriginal children and their families face. One in four First Nations children live below the poverty line; approximately one in eight Aboriginal children are disabled, double the rate of non-Aboriginal children in Canada; an Aboriginal youth is five to eight times more likely to commit suicide than other youth and nearly half of all children in foster care are Aboriginal; the rate of high school graduation is half that of other Canadian children (Rothman, 2007). The Auditor General of Canada (2004) estimated that it would require an additional 28 years to close the educational gap between Aboriginal and non-Aboriginal learners.

The Need for a Human Rights Framework

The treatment, history and current living conditions of Aboriginal children in Canada are in direct contradiction to a universal, moral or legal understanding of human rights. The well documented and longstanding poor outcomes for Aboriginal children and their families means that Canada stands in violation of its own Charter of Rights and Freedoms as well as the UN Convention on the Rights of the Child and in principle, the UN Declaration of the Rights of Indigenous Peoples. Aboriginal people are not given the same access and funding for education, housing, health and social services (King, 2012). Access to equal funding for First Nations children on reserve and children off reserve is a basic human right that the past governments of Canada have fundamentally failed to respect and reconcile.

A human rights framework has been used successfully in a landmark case about the treatment of 163,000 Aboriginal children living on Reserve across Canada. In 2007, the First Nations Child and Family Caring Society (FNFCS) and the Assembly of First Nations (AFN) filed a human rights case against the Department of Indigenous and Northern Affairs Canada, arguing that the funding provided to First Nations children on reserve was inequitable and therefore a violation of the Canadian Human Rights Act. A Human Rights Tribunal listens to complaints about violations of human rights and can order remedies accordingly if the Tribunal finds that there has been an infringement of human rights.

In response to this complaint, the Federal Government argued that child welfare services for First Nations people living on reserve cannot be compared to other services as they do not provide services but are only a funder, and therefore the service cannot be considered under a human rights framework. The Tribunal also heard evidence about Jordan's Principle, which ensures that "First Nations children do not experience denials, delays, or disruptions of services ordinarily available to other children due to jurisdictional disputes" (Jordan's Principle Working Group, 2015, p.4). After nearly a decade, on January 26, 2016, the Canadian Human Rights Tribunal ruled that the Federal government had indeed violated the human rights of 163,000 Aboriginal children and ordered INAC to take action for immediate relief of the inequality. On April 26th, 2016 the Tribunal released another decision on the case finding that there were several instances where Jordan's Principle had not been honoured since the original ruling and ordered the government to show how immediate relief for on reserve child welfare services was being undertaken (First Nations Child & Family Caring Society, et al, 2016).

Although the remedies ordered have yet to be implemented, the ruling's success in acknowledging the unequal treatment of Aboriginal children provides evidence that a human rights framework would be beneficial to inform the continual redress other issues of inequity such as education. This ruling is also an important step forward in reconciliation; the Federal Government was found guilty of discrimination.

If an integrated human rights framework (see Figure A) was used for the implementation of the recommendation of the TRC and the judgment of the Human Rights Tribunal, significant, immediate gains for Aboriginal children could be made across the nation. The TRC developed, through thousands of interviews, documents showing the systematic oppression of universal, natural and legal rights of Aboriginal people in Canada. The remediation of hundreds of years of colonialism undoubtedly begins with the truth but must follow with equitable treatment.

The remedies for health, education and social service disparities for Aboriginal children should be judged by the system of human rights. Specifically, many Aboriginal children live on reserves without sufficient water, housing, educational facilities and social services (National Council of Welfare & Mann, 2007). Aboriginal youth who want to attend secondary education often have to leave their home to pursue these goals. We must hold the Federal and Provincial governments accountable so that all children who live in Canada have the universal right to freedom and liberty as do other non-Aboriginal children in Canada. The right to food, housing and clean drinking water is a natural right that has been denied to many Aboriginal children. The education system which is a legal right for every child in Canada is not equally accessible to Aboriginal children and in most systems does not provide educational material that is culturally-relevant and incorporates indigenous knowledge systems which is of critical importance. That type of curriculum would be consistent with the Convention on the Rights of the Child, Article 29.1.c:

States Parties agree that the education of the child shall be directed to: The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own (UN, 1989).

Aboriginal children should be entitled to a government that acts to ensure their freedom, the right to basic needs and a society that allows for their full participation in all of the nation's resources and benefits. Aboriginal children also have the right *not* to be subjected to conditions that are intolerable.

Conclusion

This article recommends that an integrated human rights framework be adopted in order to address the inequities that Aboriginal children experience in Canada today. The history of colonialism and Canada's treatment of Aboriginal people has left Aboriginal children without equal access to basic human rights. This has resulted in significant gaps in access to resources, health, education and social service funding. Two recent initiatives, the TRC and the Canadian Human Rights Tribunal, have resulted in both a moral and legal need for action to address human rights inequities that are currently experienced by Aboriginal children. Each action taken by all governments in Canada as we remedy these inequities should ensure order that it articulates how it addresses and relates to human rights.

While this article proposes a solution to the inequities faced by Aboriginal children, it is untested. The framework must be sanctioned by Aboriginal people. The remedy for Aboriginal children lies in the Federal Government's willingness to understand these issues as a fundamental human right and the current situation as a national emergency. All Canadians must hold the Government accountable to equitable treatment of all people. There are many people who argue that children are a country's most important resource and they must be treated as such.

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