

Has The Application of The Convention on The Rights of The Child Positively Affected The Enjoyment of Human Rights For Indigenous Children in South America?

Introduction

Human rights belong to all the peoples. They are embedded with the dignity of every person. For this reason, it is essential to ensure that anyone is able to enjoy them. The international community has been trying to emanate legislations that could safeguard human rights. The Conventions of the United Nations deal with the matter. One of the most ratified Conventions is the Convention on the Rights of The Child, which seeks to protect children worldwide and ensure the enjoyment of their rights. Knowing the effects of the implementation of this Convention helps understand which factors produce an actual improvement in the enjoyment of human rights. This paper will focus on the rights enjoyed by indigenous children in South America to understand the effects of the Convention on the region. It will try to answer the following question: has the application of the Convention on the Rights of the Child positively affected the enjoyment of human rights for indigenous children in South America?

The paper will rely on the theories of previous scholars to answer this question. It will analyze the understanding of human rights and their origins by focusing on the different sources of these rights in different contexts and historical periods. Then, it will focus on the reasons behind the Convention on the Rights of the Child considering the assumptions upon which it was based. In doing so, it will concentrate on the universal against cultural arguments linked to it. In next step, the paper will specifically analyze the reasons why, according to some scholars, indigenous children in South America do not fully enjoy the rights stated in the Convention. One of the main arguments is linked to the right to self-determination, which is perceived as a tool for

the enjoyment of indigenous children's rights. The other argument relates to poverty and discrimination, which are perceived as obstacles to the rights of indigenous children.

Through the analysis of these theories and of specific case studies, like Brazil and Colombia, the paper will seek to understand if the Convention on The Rights of The Child helps with the implementation of the enjoyment of human rights for indigenous children. The research will be based on the theories already formulated, and it will adapt them to the specific cases to reach an answer to the main question.

Literature Review

Human rights are the center of many debates in the political environment. The assumptions of their universality were questioned since their formulation. Critiques refer to the impossibility of elaborating universal human rights adaptable to all peoples and cultures regardless of their traditions. These critiques emerge when culturally different countries try to finalize one singular legislation. In drafting the Convention on the Right of the Child, member states attempted to find common universal principles adaptable to children in every part of the world. However, some members and scholars interpreted the Convention as dominated by western principles. This factor can partially explain why the human rights of children are still violated, especially in the case of children living in different contexts, such as indigenous children. More specifically, scholars like Terri Libesman (2007) perceived the right to internal self-determination as essential for indigenous to enjoy human rights. Self-determination can guarantee an understanding of the different cultures that, on the practical level, leads indigenous children to access the welfare system. Other scholars, like Angelika Beck (2012), see discrimination and poverty as the causes of the negation of indigenous children's rights: their conditions prevent them from accessing the primary sectors for an adequate standard of living.

Human rights are the source of many discussions that develop in the international context. Internationally, they were officially defined at the end of WWII in the Universal Declaration of Human Rights (Clapham, 2015). The aim of the Declaration, as stated in the preamble, is to guarantee “freedom, justice, and peace” for the safeguarding of the dignity of human beings (United Nations, 2015). The United Nations General Assembly asserts the Declaration “as a common standard of achievement for all peoples and nations,” highlighting the universality of these principles (United Nations, 2015). However, neither the sources nor the universality of human rights is defined.

In his book “Human Rights: A very short introduction,” Andrew Clapham (2015) suggests that the origin of human rights is hard to define. Their history dates to the philosophy of religions worldwide: human rights are based on concepts that relate to religions all over the world (Clapham, 2015). Western religions’ impact on human rights is evident, but the influence of philosophies like Confucianism and Buddhism is also present (Clapham, 2015). Over the years, it has been researched the origins of human rights in legal documents like the Magna Carta, the English Bill of Rights, and the American Declaration of Independence (Clapham, 2015). Similarly, other researches refer to philosopher like John Locke, Karl Marx, and Immanuel Kant. Most of the time, in this legal and philosophical framework, a natural law that could be universal for all human beings as embedded in humanity itself has been researched.

In this regard, these theories connect with a natural idea of the origins of human rights. In “What are human rights? Four schools of thought,” Marie-Bénédicte Dambour (2010) explains that the natural school of thought supports that human rights belong to all people because they belong to all human beings. In this sense, human rights are part of humanity itself, and, for this reason, they are universal and exist regardless of their adoption by society (Dambour, 2010). The

author classifies three more schools of thought. The “deliberative school of thought” aims at universalism but associates human rights with society’s choice to adopt them (Dambour, 2010). The “protest school” of thought states that human rights result from a demand for the oppression of the disadvantaged living in a society (Dambour, 2010). The “discourse school” of thought claims that human rights are just a construct derived from the discourses on the topic (Dambour, 2010). Their existence stems from the rhetoric developed around them (Dambour, 2010).

As evident from the different schools of thought, the universality of human rights is often questioned. Looking for equal and applicable principles for everyone around the world appears to be a struggle. This is also true for the guarantee of children’s human rights, which are violated worldwide. For example, according to Amnesty International (n.d.), the right to primary education is denied to about 61 million children. Moreover, it estimates that “one in six children was living in extreme poverty” in 2019 and that the number increased with the Covid pandemic (Amnesty International, n.d.). These numbers show a critical reality since their risk of being exploited drastically increased (Amnesty International, n.d.). A similar worrisome situation: 290 million children were not registered at their birth, so they do not exist in the legal system (Amnesty International, n.d.). Consequently, the reclamation of their rights is even harder to achieve (Amnesty International, n.d.).

To find a solution to protect the rights of children, the international community came to their defense by stipulating a series of obligations that states need to respect. It tried to find universal principles to apply in every state for the security of the children. The Convention on the Rights of the Child is a milestone in this sense. The purpose of the Convention is to guarantee that children’s human rights are respected worldwide (Liebel, 2020). As stated in the preamble, the Convention aims to safeguard every child’s human rights and dignity since they

need special care (UNHCR, n.d.). For the precarious circumstances many children face, the states agreed on developing universal principles for their global protection (UNHCR, n.d.). Consequently, the international community safeguards universal human rights that must be respected in every state, regardless of cultural background.

Signed in 1989, the Convention “is the first binding instrument in international law to deal comprehensively with the rights of the children” (Miller, 2004). As supported by Manfred Liebel (2020) in his book “Decolonizing childhood from exclusion to dignity,” the Convention represents the first tool to legally contrast injustices that children live. Moreover, thanks to the Convention, the ones previously ignored in the legal context could now receive the necessary attentions (Liebel, 2020). The Convention on the Right of the Child was “unanimously ratified by the United Nations General Assembly [...] and ratified by almost all states” (Liebel, 2020). The unanimous results from the importance that the document, since its preamble, gives to the consideration of cultures and traditions belonging to different states. (Liebel, 2020). Indeed, it tried to include universal ideals that could be accepted and adopted in every context to protect all children (Harris-Short, 2001).

Some precautions were taken to ensure the universality of the Convention. For example, during the drafting, all states and other international subjects, like NGOs, were involved (Harris-Short, 2001). The involvement of different stakeholders that could actively participate and affect the drafting signified, for some, a legitimization and universality of the Convention (Harris-Short, 2001). Similarly, as Libel (2020) expresses in his book, some scholars support that the adaptability to cultures of the Convention is because the document is a compliant instrument for cultures that are continuously developing and changing over time. The Convention reflects this dynamicity of cultures.

However, the same Convention and its universality have been criticized since its stipulation. Despite the claim of universality, some states complained that their values and traditions were not considered during the formulation of human rights (Harris-Short, 2001). Even if all states could participate in the drafting, the values resulting from it were predominantly belonging to western states since the others could not truly negotiate (Harris-Short, 2001). This is because western states were more influential in the drafting, so much to be considered as imposing their beliefs over the other ones, such as Asian, Latin American, and Middle Eastern (Harris-Short, 2001). The dynamics during the drafting resulted in a document that does not fully represent the cultural diversities of the international community; instead, it privileges and perpetuates the western perspective. ()

As Manfred Liebel supports (2020), the Convention embodies, for some states, the principles of Western culture. The document mirrors a solution that Western states preferred to adopt for a problem belonging to the international environment (Harris-Short, 2001). Therefore, non-Western states criticize “Western dominance or even arrogance” since the Convention does not consider the different cultures and traditions (Liebel, 2020). Even the definitions of child and childhood refer to the dominant culture. A child is defined as a person who has not turned eighteen yet (Liebel, 2020). If a definition is needed in the legal framework, in many cultures, childhood does not end at a specific age (Liebel, 2020). Childhood ends with the acquisition of knowledge and competencies that a person collects (Liebel, 2020). However, in Western understanding, a child is perceived as a vulnerable subject with less influence in the society compared to an adult (Liebel, 2020). This concept is reflected in the Convention even though many countries recognize a child as a more active and influential character (Liebel, 2020).

In short, the main concern is that principles in the Convention are not universal. Consequently, they cannot be adapted to all cultures since they do not understand realities divergent from the West, as in the case of indigenous children. However, it is also true that the principles remain general, so they can conform to various cultures' understandings and interpretations (Harris-Short, 2001). Similarly, the Convention aims to guarantee specific human rights also to those children that were not considered by states up to that moment. For example, children are protected from discrimination (art 2) and violence, abuse, and exploitation (art 19) (UNHCR, n.d.). To achieve a better standard of living, they are granted the right to be registered at birth (art 7), the right to health (art 3), and to education (art 28) (UNHCR, n.d.).

Moreover, the Convention deals with the rights of children belonging to minorities, like indigenous children. Article 30 safeguards the traditions and cultures of different ethnicities, religions, minorities, and indigenous (UNHCR, n.d.). According to Michael Miller (2004), the Convention on the Right of the Child is "one of the first international human rights treaties to address explicitly the situation of indigenous children". Article 30 is not the only one to demonstrate that the Convention acknowledges that some children need additional protection. Article 2 prohibits discrimination against children belonging to cultural minorities (Miller, 2004). Articles 17 and 19 protect their traditional and cultural background (Miller, 2004). The first focuses on linguistic diversity while the second one on multicultural education in the states (Miller, 2004). These articles show that even if human rights apply to everyone, some children need special care to have their rights guaranteed. The Convention aims to do it.

There are different theories that try to explain why indigenous children struggle to see their rights recognized. Even if their concepts may be linked to each other, they focus on diverse aspects. For one school of thought, the right to self-determination is the leading cause while, for

the other one, poverty, equity, and discrimination are the elements that do not allow a real enjoyment of human rights.

The right to self-determination is strictly linked to indigenous people and colonization. As explained by Libesman (2007) in his article “Can International Law Imagine the World of Indigenous Children?”, the right to self-determination is discussed in several international contexts. The UN Declaration on the Rights of Indigenous People deals with the matter: Article 3 guarantees the right to self-determination to indigenous peoples, who can “freely determine their political status and freely pursue their economic, social and cultural development” (United Nations, 2018). Likewise, Article 4 links self-determination to “the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous function.” (United Nations, 2018) In other words, the right to self-determination allows indigenous peoples to express their culture and achieve an adequate standard of living. It respects a population that differs from the dominant one.

Indigenous peoples seek self-determination because they perceive themselves as distinct from the dominant society (Eversole et al., 2013). The indigenous peoples’ identification preexists the one of citizens of the state they live in because, firstly, they are part of their indigenous community (Eversole et al., 2013). However, the modern nation-state concept elevates the importance of citizens: citizens are part of the state itself, and it is within its borders that they enjoy their rights (Eversole et al., 2013).

Since their community exists regardless of the nation-state, the state’s sovereignty itself is questioned (Eversole et al., 2013). It does not mean that all indigenous peoples are willing to secede from the nation-state; most of the time, they aim to obtain the recognition of their identity within its context (Eversole et al., 2013). Internal self-determination would mean they have

decisional power over their political, legal, and social lives (Eversole et al., 2013). It may also mean the institution of independent regions inside the state (Eversole et al., 2013). In this way, their differences can be recognized, and there can be an actual understanding of their necessities to find a valuable solution for enjoying their rights (Eversole et al., 2013). Therefore, the right to self-determination guarantees the enjoyment of human rights for indigenous people.

According to Terri Libesman (2007), the right to self-determination is a prerequisite for the enjoyment of human rights for indigenous children. The author supports that self-determination can allow indigenous children to understand and develop their culture (Libesman, 2007). By acknowledging their culture, they can value and enjoy what is important to them as members of a community with specific traditions, such as the right to land and family, understood through their perspective and not through the perspective of the dominant culture (Libesman, 2007). Moreover, Libesman (2007) stresses the importance of indigenous children's identity in recognizing their rights, and, through self-determination, they can realize their identity. Indeed, identity forms and develops by relating with other people belonging to the same culture, with whom to share tradition and knowledge (Libesman, 2007). Self-determination allows this process, which is the right to identify in the own culture (Libesman, 2007).

In Libesman's (2007) viewpoint, the Convention on the Right of the Child considers the right to self-determination. Article 30 defines, for a child of a minority or indigenous group, "the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language" (UNHCR, n.d.). Libesman (2007) sees this article as a reflection of the right to self-determination already expressed in other international documents, like in the Declaration of the Rights of Indigenous Peoples, but, in this case, the right is specific to children. Even if it expresses the right of the

single child, the article also protects the collective right to enjoy the culture in the indigenous community (Libesman, 2007).

Similarly, article 7 concerns the right to be “registered immediately after birth” and article 8 “the right of the child to preserve his or her identity” (UNHCR, n.d.). The right to identity is strictly linked to the right to self-determination when it considers indigenous peoples since they saw their identity denied: self-determination can allow them to enjoy this right (Libesman, 2007). Even if this theory supports that self-determination can allow indigenous children to enjoy their rights, some countries, like Brazil, expressly denied it (Beck, 2012). Therefore, enjoying their right becomes more difficult for indigenous children.

Another theory that tries to explain why indigenous children cannot enjoy their rights relies on poverty, equity, and discrimination. According to Paula Braveman and Sofia Gruskin (2003), there is a strong correlation between poverty and human rights; the enjoyment of human rights is restricted by discrimination and poverty for specific groups of people (Braveman et al., 2003). The authors focus on the right to health, but they extend their theory to other human rights, such as education and non-discrimination (Braveman et al., 2003). Their core argument relies on the fact that equity allows certain discriminated and poor minority groups to benefit from human rights (Braveman et al., 2003). “Poverty is not, in itself, a violation of human rights”; however, the state needs to address the problem so that poor people can equally enjoy their rights (Braveman et al., 2003).

For example, if the state does not address the problem of discrimination, it cannot find the reasons and modalities in which poverty develops in that environment (Braveman et al., 2003). A lack in this sense leads to a perpetuation of denial of human rights (Braveman et al., 2003). At the same time, “efforts to reduce poverty are essential aspects of fulfilling

commitments to equity and human rights” (Braveman et al., 2003). In short, poor people are discriminated against and marginalized. This does not allow them to enjoy their rights because they lack the resources that other people belonging to the population have. The state should grant equity to permit poor people effective access to benefit from their rights.

Indigenous peoples face the problem of equity too. According to Libesman (2007), equity consists of overcoming diversity to understand the different necessities that indigenous peoples have in order to achieve an adequate standard of living. With reference to the previous theory, equity is important, especially in the context of poor and discriminated minorities. Libesman (2007) explains that, in Latin America, poverty can develop into racism based on the “inferiority of indigenous peoples,” and it can be supported by the impossibility of access to the political and social spheres. Poverty looks strictly linked to indigenous peoples not because poverty belongs to them but because they are often discriminated against (Libesman, 2007). In many contexts, indigenous peoples cannot equally benefit from the education and health systems as the rest of the population living in the same country (Libesman, 2007).

Similarly, Angelica Beck (2012) affirms that “discrimination and social inequality” obstruct indigenous peoples’ rights. The author supports that marginalization and discrimination are a constant in many indigenous groups (Beck, 2012). One of the fundamental rights is the right to food, which is denied to many indigenous peoples in Latin America (Beck, 2012). “The causes of hunger are rather inequality and discrimination with regards to access to food and means for its procurement” (Beck, 2012). In this regard, the Convention on the Rights of the Child is a valuable tool to guarantee human rights.

The theory of poverty and discrimination gives the state the role of guarantor of equity for the fair enjoyment of human rights. The government is responsible for checking the

conditions affecting the equal enjoyment of human rights (Braveman et al., 2003). Beck (2012) argues that articles 24 and 27 of the Convention provide for the right to food for indigenous children because they focus on achieving an “adequate standard of living,” which includes the right to food and combat malnutrition. Similarly, in article 2, the Convention targets “discrimination of any kind,” regardless of the ethnic group, so it can be extended to indigenous children (UNHCR, n.d.). Article 24 guarantees “the highest attainable standard of health” while article 28 protects education “on the basis of equal opportunities” (UNHCR, n.d.). The preamble proclaims these rights equally achievable for all children (UNHCR, n.d.).

Since the Convention seeks to guarantee those processes that can enable the enjoyment of human rights, it can be perceived as an effective means to this goal. However, there is to keep in mind that the state needs to implement those services that can enable people to effectively enjoy their rights. The government has to prioritize the implementation of equity and to take all the precautions that can help discriminated peoples, like it can be an actual collection of data (Braveman et al., 2003).

Looking at these theories, the enjoyment of human rights for indigenous children seems linked to the possibility of expressing and living their culture. The Convention is perceived as a potential tool for the effective enjoyment of human rights. This paper will try to prove the actual effects of the Convention on the indigenous groups in Latin America, with a specific focus on Brazil and Colombia. The expectation is to prove that the Convention on the Rights of the Child will improve the conditions of indigenous children, but it cannot be the only instrument used to achieve an effective result. The right to self-determination is important, but other ways to achieve the goal need to be included. As seen, states are not ready to give this right to indigenous peoples, which is a problem that needs to be acknowledged: another solution can be found. The

defeat of poverty and discrimination is a massive task, and the right to equity can partially address it. If it is true that the state has to implement instruments to achieve equity, it has also to work on public opinion to eradicate discrimination. In this way, not only would the institutions not discriminate, but also they could be made by the same indigenous.

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