Decolonization and Restorative Justice: Addressing Canada's Indigenous Incarceration

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Abstract
Mass incarceration of Indigenous people has been well documented in Canadian prisons. It represents a national crisis resulting from the government's failure to eradicate the ongoing colonization problem and poses a threat to the sustainability of Indigenous people and their communities. The government's response includes the landmark Gladue decision, which essentially recognized mass incarceration as a crisis and required judges to consider the background of Indigenous offenders when sentencing, as well as the process of decolonizing the prison by introducing programs that teach Indigenous culture and history. However, both these responses have not effectively addressed the problem. In this paper, I argue that the Canadian government's response to the over-incarceration of Indigenous people represent a human rights issue that the Gladue Report has not alleviated because the report has not been implemented in a meaningful manner during bail hearing or sentencing. Therefore, the government should consider an alternative measure that returns to the traditional Indigenous law through the implementation of restorative justice, which has been proven to be effective.

The Crisis of Indigenous Overrepresentation

The overrepresentation of Indigenous people in Canadian prisons remains highly disproportional compared to other racial groups within Canada and has been characterized as a crisis. Indigenous peoples are notably over-represented in the criminal justice system, both as victims and as those incarcerated (Monchalin, 2016). In Canadian prisons, Indigenous people account for 28 percent of both provincial and federal admission of adults while making up only 4.3 percent of the Canadian population (Tetrault, 2022).

Indigenous over-incarceration is one of the most serious problems that Canada faces in its journey to achieve reconciliation. To understand the over-incarceration of Indigenous people in Canadian prisons, it is important to consider the Canadian history of colonization that has resulted in the suffering of Indigenous people and their fight for self-determination amid ongoing colonization. In this paper, I argue that, although Canada has implemented a number of legal procedures to address over-incarceration, these have failed, which constitute a human rights violation of Indigenous people. More problematically, while Canada continues to over-incarcerate Indigenous peoples, the primary way of dealing with this issue is to make prisons "more Indigenous." While this is a positive step in some ways, it also ignores the systemic problems of racism and colonialism in Canada today. Thus, I will examine the response of the Canadian government by asking the following questions: In what manner has the Canadian government response to the over-incarceration of Indigenous people has been ineffective? Therefore, what are the potential benefits of utilizing alternative measures such as Restorative Justice to address the issue of over-representation?

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Literature Review

Canadian Colonialism and Indigenous Peoples

One outcome of the colonization process was the imposition of ‘white’ law upon Indigenous peoples, beginning a pattern of conflict that continues to the present time (Griffith, 2011). This white law was supposed to treat everyone with fairness and justice, yet Indigenous people have historically been criminalized as a result of this system. The impact of colonization is felt in every aspect of Indigenous people and their communities such as in the health outcome, especially for those who are and have been incarcerated due to systematic abuse and racism. The settler policies that have led to the continuation of ongoing colonization, which have resulted in “creation of geographical, marginalized, and underfunded spaces (ghettos, inadequate housing, and schools) causing current health determinants that result in health inequities at various levels of social structures” (Bleau et al., 2022). The Canadian government has not remedied the past atrocities, nor has it created policies that responds to the current settler colonial policies that is leading to health inequalities for Indigenous people and their communities. Thus, the health outcome is a risk factor for the over-representation of Indigenous people within prison population.

Indigenous peoples shared a different perspective than the European colonizers regarding criminalization and offences. Rather than punishing individuals who violated social norms, the Indigenous justice system was rooted in restoring harmony and looked to spirituality as the bedrock of Indigenous concepts of justice and social harmony (Monchalin, 2016). European settlers made little effort to consider Indigenous laws and governance when dealing with crimes. Europeans overlooked the traditional method of Indigenous people in dealing with a crime because they had not written laws or manuals to prove the existence of Indigenous laws and methods of social control. According to Monchalin (2016):

> Indigenous communities in North America had various injunctions and rules that were passed down by word of mouth for centuries. In many Indigenous societies, these injunctions and rules were passed on through oral exchange and interpreted by elders for the peace of all (p. 54).

Despite these systems, the Europeans viewed their method as superior and democratic and implemented a system under which the Indigenous people continues to suffer. The European system was built on punishment, unlike the Indigenous system, which favoured harmony and community responses to crime. There is little consideration by the Canadian government in allowing Indigenous people the autonomy to deal with Indigenous offenders with a system that works well for their people. This is a violation of Indigenous people’s human rights as stated in the UN Declaration on the Rights of Indigenous Peoples Act, which advocates for the sovereignty of Indigenous people over their own affairs and need to respect Indigenous people’s rights in all aspects of society, including in the legal system (2021).

UN Declaration of the Rights of Indigenous People

The UN Declaration on the Rights of Indigenous People (The UN Declaration) is a critical

document that needs to be examined when discussing Indigenous over-incarceration as a human rights issue. The Declaration outlined several rights and standards concerning Indigenous people that should be recognized and applied to countries' existing human rights frameworks. The most profound section of the UN Declaration, as outlined by Tokum (2018), is Article 4, concerned with Indigenous people's rights and the basis for building other provisions:

> Article 4 Indigenous peoples, in exercising their right to self-determination, have 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 functions. (p. 140)

This Article provides a general statement about the rights of Indigenous people, as the mandate is not about creating new rights but clarifying and redressing past atrocities and recognizing the rights of Indigenous people. The history of colonization has shown that Canada has not respected the rights of Indigenous people and the over-incarceration of Indigenous peoples is a stinging rebuke against Canada’s ongoing lack of meaningful reconciliation policies. The over-representation of Indigenous people in the criminal justice system is a reflection of Canada's refusal to recognize Indigenous people's self-determination, thus taking away their ability to tackle the issue at hand (Montford and Moore, 2018). Indigenous people's ability to handle their affairs since the first contact with colonizers was taken away from them, and Canada has yet to restore these rights despite adopting the UN Declaration (Chartrand, 2019). This UN Declaration is meant to be seen as a soft law, which means it is not legally binding but a reference for nations to follow concerning Indigenous people (Tokum, 2018).

As a developed nation, Canada was one of the last few countries to recognize the UN Declaration, which initially opposed the UN Declaration altogether during its adoption in 2007 (Toki, 2018). This demonstrates how Canada's unwillingness to accept the UN Declaration and what is required of the government to demonstrate and uphold Indigenous peoples' rights as outlined in the mandate. Thus, failure to do so, as outlined in the mandate, demonstrates Canada's lack of concern for decolonizing and upholding human rights despite claiming to be a champion of human rights on the world's platform. Canada's continuous over-incarceration of Indigenous people and lack of effort to find a solution to the crisis is a human rights issue. This crisis is beyond an Indigenous issue but a Canada-wide issue, which is not receiving the care or attention it deserves as a human rights issue. This Declaration aims not only to recognize the rights of Indigenous people, but also to repair the consequence of the historical denial of the rights of Indigenous people, such as their self-determination, and affirm their basic human rights (Tokum, 2018, p. 145).

However, Canada as a colonizer is more concerned with controlling Indigenous people, instead of helping them or allowing them to use their methods to deal with crime. According to Cunneen (2014), Canadian courts continue to represent a form of illegitimate colonial control over Indigenous Canadians, arguing that the courts have “ignored the existence of Aboriginal communities as politics, thus having a legitimate role in the management of their rights” (p. 370). Prison is one of the many ways in which Canada handles Indigenous peoples.

Gladue: Bail and Sentencing

The Gladue case set a precedent for how all Indigenous offenders are sentenced, including bail hearings emphasizing their background to be considered and prison as a last resort. As a mechanism to ameliorate the overrepresentation of Indigenous people when they come in contact with the justice system, the Gladue framework mandates that courts consider the following:

> (1) the "systemic or background factors" that have contributed to bringing the Aboriginal offender before the courts; and
> (2) the "types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection." (Hewitt, 2015, p. 331)

Considering the background factors of the Indigenous offenders and how this has led an individual to be brought to court, including colonization and generational trauma, is intended to lessen individual blameworthiness and mitigate the length of sentences. The principle is applicable in court for both bail hearings and sentencing (Hewitt, 2015). This is important because Indigenous offenders face challenges in getting bail. According to Hewitt (2015), in comparison with non-Aboriginal accused, Aboriginal persons were more likely to be denied bail, were more likely to be held in pre-trial detention, and more likely to be charged with multiple offences (p. 197). It is evident that Indigenous offenders are disproportionally affected by a denial of bail during their hearing, something that implies that stereotypical and structurally racist assumption about Indigenous offenders means that they are disproportionately perceived as guilty before a court hearing. This plays into the assumption that all Indigenous people are criminals, therefore more likely to commit crime and more likely to be guilty than non-Aboriginal counterparts (Rogin, 2014, 55). The Gladue Report is designed to impede these assumptions as it was intended to highlight the systematic disadvantages that Indigenous people experience, thereby ensuring them a better opportunity to receive bail. However, the application of Gladue during a bail hearing is focused on inappropriate consideration that exacerbates rather than alleviates the systematic issues faced by Indigenous people during bail phase. For instance, in the case of R.v. Misquadis-King, the Supreme Court instructed the judges to look at dealing with the root cause of the offenders, which is problematic because it is a bail hearing and not a sentencing domain (Rogin, 2014). This is inappropriate because the alcohol problem of the offenders is not being considered in how it may have led the offenders to end up at the court. Rogin (2014) suggests that the loss of connection to the longer stay of offender in detention does not consider their circumstance, but rather assumes the guilt of Indigenous offenders. Therefore, the first step for Indigenous offenders is to be rehabilitated based on the assumption that Indigenous criminality could be fixed through treatment and rehabilitation (Rogin, 2014). The systematic bias at a bail hearing makes the application of Gladue far less insignificant in addressing Indigenous over-incarceration than it should be.

The issue with Gladue also carries over into sentencing. In the context of sentencing, often the Gladue Report is not even an option for the Indigenous offenders because they are not given a chance to present it. In instances in which it is presented, judges frequently give it less weight than is intended (Hewitt, 2015). Consequently, Gladue is often not applied in meaningful

matters in which it would make a difference for the Indigenous people. There is a structural bias that presents during the sentencing of Indigenous offenders, which impacts the applicability of Gladue because it is considered legally irrelevant (Rogin, 2014). The day-to-day problems of how Gladue is implemented in court are further exacerbated by inequality built into the structure of Canada's criminal justice system. Mandatory minimum sentences provide a clear example of this. Mandatory minimum sentences precede the application of the Gladue Report in sentencing. Judges cannot override the mandatory minimum sentence and are therefore not allowed to consider an Indigenous offender's background as required by the Gladue Report (Manikis, 2016, p. 3). Despite the precedent the Gladue court case set for how the court sentences Indigenous people, the legislation ultimately fails the people because other provisions take precedence, or it is not considered at all for the Indigenous offenders.

Indigenizing Prison

Efforts to reduce the presence of Indigenous people in prison have not succeeded, as the above discussion of Gladue demonstrates. Perhaps this is why, in recent years, correctional administrators have led efforts to decolonize prisons and introduce Indigenizing programs that celebrate Indigenous culture, teach their history and engage in spiritual healing. The movement to Indigenize prison came from the inmate-led Native Brotherhood that started in 1958 (Tetrault, 2022). The Indigenized programs aim to help Indigenous offenders who are often deprived of their culture due to ongoing colonization. Through these programs, people recognize and address the impact of colonialism on themselves and celebrate Indigenous identity. Due to the movement and effort by Indigenous people to pressure the government, the Correctional Service of Canada (CSC), in 1980s officially introduced a formalized Indigenous program focused on spiritual practices (Weinrath, 2016). The program has become quite popular among inmates and is quite common. They have introduced Elders into their institutions, established special Aboriginal "pathways" units emphasizing Indigenous culture, and hired Aboriginal liaison program officers to help inmates develop plans to reintegrate into the community (Weinrath, 2016). While the efficacy and management of such programs are still not clear, the Canadian government has invested significant resources into Indigenous-led initiatives.

Tetrault (2016) argues that decolonization involves Indigenous-led collaborations with non-Indigenous people to advance material change by restoring Indigenous culture, language, and history and addressing power imbalances. Actions such as Indigenous programming represent a way for the Canadian government to try and “fix” Indigenous over-incarceration without dealing with the problems of colonialism. This is precisely what the Canadian government is doing by introducing an Indigenous pathway program and allowing for spiritual practices in prison. There are certainly positive effects. For instance, these programs appear to be a positive thing for Indigenous inmates as it mitigates the negative effects of prison. Tetrault (2022) described how Indigenized programming can advance the dignity, cultural pride, and religious rights of incarcerated people. Participants want cultural programming to be expanded and made more widely accessible. Tetrault further states in his article that programs are well received by the intimates and appear to enjoy the program as it gives them the opportunity to learn about their culture. However, Indigenous inmates have difficulty accessing the program because of the restriction set by the prison, especially in maximum security prisons. Also, many

of these programs fail to recognize the cultural distinction of individuals because the program set by the government mixes Indigenous culture and chooses which aspect of the culture is presented in prison. Although these programs may help offenders connect with their Indigenous heritage, these programs can do nothing to reduce the mass incarceration of Indigenous people, as outlined in the Declaration by the UN, which urges governments in their Call for Justice to address the injustice that Indigenous people have experienced, but not limited to discrimination, racism, prejudice and eliminate all forms of violence. The action of the Canadian government's effort to Indigenize prisons falls short of addressing the issue of mass incarceration, which is a grave injustice that jeopardizes the health and well-being of the Indigenous community and violates the human rights of Indigenous peoples. Indigenization of prisons appears to be a positive move by the government; however, the response is inadequate in making a significant difference to the over-incarceration of Indigenous people. Therefore, the Indigenizing of prisons represents nothing more than a cultural band-aid over the gaping wounds of colonialism.

Alternative Measure: Restorative Justice

Indigenous restorative justice has been viewed as the most effective measure in the fight against over-incarceration of Indigenous people as it acts as a diversion from incarceration by redirecting the offenders. At the center of Indigenous Restorative Justice is healing and returning to an Indigenous tradition that has long been dismissed. There are various definitions of Restorative Justice; at its foundation, it is about supporting the creation of "social arrangements that foster human dignity, mutual respect and equal well-being" (Hewitt, 2016, p. 316). A Restorative model allows people to look at the legal system in a new light and helps to transform how justice is done. According to Braithwaite:

> [R]estorative justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct of the workplace, our practice of politics. Its vision is of a holistic change in the way we do justice in the world (Hewitt, 2016, p. 316).

Decolonization represents a central tenant of restorative justice, which looks to revive Indigenous laws and methods that were historically ignored. Due to major players, such as the government and direct stakeholders and victims and inmates, Restorative Justice is being implemented within prison walls because of the initiatives of community agencies and individuals (Ness, 2007). As a part of the diversion program measure to the legal system, restorative justice helps to achieve healing on the part of the offenders and the victims; it is about giving power back to the Indigenous people to allow them to have self-determination and handle how their people commit a crime according to their own methods. For instance, the National Parole Board of Canada has begun operating a special hearing for Indigenous offenders. The elders assist with the process by informing the board members about Indigenous culture, experience, traditions and their relevance to the board members (Ness, 2013). This initiative taken by the government to implement restorative justice is due to the work of the communities. It is through restorative justice that government can take the Calls to Action and Justice as outlined by UN Declaration to be realized and demonstrated by actually doing the

work. This is a significant breakthrough for Indigenous people as a whole because by implementing the UN Declaration the government is responding to the needs of the Indigenous communities, which have been largely ignored for decades. This is because of the works of communities, agencies and individuals who have taken the step to use restorative justice through community-assisted hearing that takes place in Aboriginal communities and includes all parties, including the victim and community members (Ness, 2013). These community-based, restorative justice initiatives are designed and delivered by Indigenous bands and communities. These are a positive development and have significant potential to address the needs of crimes, victims, criminal offenders, and communities (Griffith, 2011). These community initiatives are focused on primarily producing healing for the individuals and communities, including the harm of ongoing colonization. The community's programs and services are based on the restorative justice model of law and justice, which functions to empower communities to assume ownership of troubles (Griffith, 2011).

Literature studies on restorative justice suggest that it is an effective diversion program with a low recidivism rate. Restorative justice is an approach that has been well utilized within the Indigenous communities and has been proven effective by the people it is supposed to serve. For instance, in recent years, there has been a creation of Indigenous courts, such as a Gladue court, and Peacekeeping, Healing, Tribal and more (Johnson,2014). These courts are seen as culturally appropriate as a dispute resolution system that is inclusive, respectful and designed by and for Indigenous people (Johnson, 2014, p. 2). These courts came to be through the effort of Indigenous people as well as under the leadership of non-Indigenous people who had a partnership with Indigenous people and their communities. The main goal of the court is that it is created based on and rooted in Indigenous traditions, values, customs and culture for dispute resolution. These courts are part of Indigenous therapeutic jurisprudence, which utilizes problem-solving and restorative justice approaches for Indigenous people (Johnson, 2014). These Indigenous courts are spread out across Canada with varying degrees of focus. For instance, the Tsuu T'ina Peacemakers court in Alberta is focused on matters that involve those who are in criminal and youth justice processes as well as legal processes, which has been designed to enable those on the reserve or those waived into the reserve to participate in all aspects of courts (Johnston, 2014, p. 6). The New West Minister First Nation court in B.C is considered a healing court and the first of its kind in B.C, which was created as a result of a pilot project and within existing resources on unceded traditional territories of Squamish, Tseleil Waututh and Musqueam of First Nations peoples (Johnson, 2014, p. 7). As a healing court, the New West Minister First Nation court is concerned with guilty pleas and a restorative justice sentencing (Johnson, 2014, p. 8).

These are examples of the Indigenous courts that utilize restorative justice approach in their dispute resolution and problem-solving when concerning Indigenous people that is focused on healing plans for individuals, families, communities and nations (Johnson, 2014). These courts can help to address the complex social justice issues arising from Indigenous lives, including ongoing colonialization, intergenerational trauma, systematic racism, addiction, mental health issues and poverty (Johnson, 2014). Thus, the government needs to examine and analyze how this approach could be used to combat the mass incarceration of Indigenous people. As a solution, restorative justice has a lot to offers, yet the government is slow to making the appropriate and timely needed response that is required by the Indigenous community. For

instance, almost consistently, recidivism rates in restorative justice models are lower than in the criminal justice system (Griffith, 2011, p. 318). Despite how effective restorative justice may be, it is still lacking funding. The lack of timely response and funding for restorative justice is an example of the continued failure of the government to respect and appreciate the ways and manner in which Indigenous people handle their affairs. This illustrates the neo-colonialism that the government continues to perpetuate and the lack of respect that the government has for Indigenous people's human rights. This is a clear and direct violation of the amendment that the UN Declaration has outlined and has expected the government to implement when it comes to Indigenous people's human rights.

Discussion

Over-incarceration of Indigenous people is the continuation of historical colonial violence against Indigenous people and their communities. The problem of representation of Indigenous people in the criminal justice cannot be over-stated as an issue as it continues to plague Canada as a nation, which has not done enough to deal directly with the problem. This is a clear human right issue; Indigenous people are being denied their human rights as a result of over-incarceration, something that also challenges the ability of Indigenous people to exercise their self-governance over matters that affects their communities. The Canadian government has made efforts to address its relationship with Indigenous citizens, notably through the Truth and Reconciliation Commission. When it comes to prisons, the Canadian government also has made efforts to address the overrepresentation of Indigenous people. The most notable of these is the Gladue Report, which requires judges to take into account the background of an Indigenous offenders when considering sentencing and that prison should be the last resort. Gladue Report is named after the 1999 R. v. Gladue Supreme Court decision, which recognized the unique disadvantages Indigenous peoples experience (Manikis, 2016). The Gladue Report recognized that the disadvantages Indigenous people experience is part of the underlying problem of mass incarceration of Indigenous peoples. Yet, despite the Gladue's importance, judges often ignore the Gladue Report or do not implement it in a manner that makes it meaningful during bail hearings or with the sentencing process (Rogin, 2017).

Often the biases that judges have against Indigenous people impact the implementation of Gladue Report for Indigenous offenders. The discrimination and structural racism embedded into the criminal justice system is demonstrated through the judges who make these decisions on whether or not the Gladue is even considered at all. As part of decolonizing the current justice system, there is an initiative by the government and activists to introduce Indigenous teaching about the cultural practice and history to deal with the problem of mass incarceration (Tetrault, 2016). Research suggests incarcerated Indigenous individuals have positively received the practice of Indigenizing, but these efforts have done very little to decrease the over-incarceration of Indigenous people. Thus, as a part of decolonizing, it is important that the government utilize Indigenous restorative justice, which has shown to be effective in responding to mass incarceration. Restorative justice restores the ability of Indigenous people to deal with crime through their method of control, which is culturally relevant and impactful.

Conclusion

It cannot be overestimated that with the increase in the rise of Indigenous people in jail, this problem needs to be addressed. The problem is how the Canadian government views and handles Indigenous people. Indigenous people still feel the effects of colonization, marginalization, discrimination, and systematic racism. The over-representation of Indigenous people risk being a human right issue because it's depriving Indigenous people over the right to subsistence and sovereignty over affairs that affects their people and their communities.

The Canadian government is recognizing the effect of colonization and attempting to decolonize the criminal justice system. For instance, with the Gladue Report, the legislation imported judges to consider the distinct background and disadvantaged that Indigenous offender experiences and that prison should be a last resort. As part of decolonization, the government is introducing an Indigenous program's for Indigenous offenders to teach them about their culture and history. The response of the government showcases that the government is committed to helping reduce the overrepresentation of Indigenous people in prison. However, these responses have been ineffective. Thus, the government must consider alternative measures, such as restorative justice, which have been shown to be effective in eradicating the problem. The restorative model allows Indigenous people to deal with their people and the crime committed, thus allowing them to turn to their traditional ways and begin the process of healing. The government should do more to invest in similar diversion programs that can continue to address mass incarceration. The effect of mass incarceration is felt by the whole society, in particular by Indigenous communities. Therefore, the government needs to make it its mission to end this crisis. There must be more effort by the government to find a solution to the mass incarceration of Indigenous people because the approach that has been taken is not addressing the issue.

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