

## Decolonization and Justice: An Introductory Overview



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*Decolonization and Justice: An Introductory Overview* by Muhammad Asadullah; Charmine Cortez; Geena Holding; Hamza Said; Jenna Smith; Kayla Schick; Kudzai Mudyara; Megan Korchak; Nicola Kimber; Noor Shawush; and Stephanie Dawndyck is licensed under a Creative Commons Attribution 4.0 International License, except where otherwise noted.

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# Introduction

MUHAMMAD ASADULLAH

'*Decolonization and Justice: An Introductory Overview*' emerged from the undergraduate students' final assignment in JS-419 on Advanced Seminar in Criminal Justice at the University of Regina's Department of Justice Studies, Canada. This book focused on decolonization of multiple justice-related areas, such as policing, the court system, prison, restorative justice, and the studies of law and criminology. This is quite likely one of the few student-led book projects in Canada covering the range of decolonization topics. Ten student authors explored the concept of decolonization in law, policing, prison, court, mental health, transitional justice and restorative justice. We are grateful to receive funding support from the University of Regina's OER Publishing Program Small Project Grant, which enabled us to hire a professional copy editor for the book.

The chapters in this book are organized under three major thematic areas. The first of these is *Decolonization and Post Colonial Criminologies* where the authors explore the theoretical aspects of the knowledge tradition and how indigenous legal traditions play an important role within this tradition.

Noor Shawush, in her chapter "Decolonizing the Land: Revitalizing Indigenous Legal Traditions", explores the influence of the natural world on the development of Indigenous legal traditions. Her investigations elucidate decolonization by looking at how it has impacted Indigenous laws. In so doing, she brings forth the crucial role language and ceremonies play in this regard. As opposed to the Western legal traditions, there was never any need for the Indigenous legal traditions to be written down. Settler colonialism eroded the practice of many legal traditions and placed Indigenous groups in new lands, forcing them to leave the environment on which their legal traditions, knowledge and language were sourced. This was done by displacing Indigenous peoples from their traditional lands and limiting their access to resources.

In her chapter entitled "Decolonization and Criminology: An Analysis of Knowledge Production", Charmine Cortez argues that the discipline of criminology in the settler-colonial State has been affected by the current systems of oppression that criminalize certain groups. She also reflects on the powerful ideological ramifications of the current criminological structure and the harm it causes to marginalized communities through the Western Justice System. Therefore, decolonization can occur in a variety of disciplines and settings, such as the Criminal Justice System, which consists of the police, courts, and corrections. She contends that these institutions harbour settler-colonial sentiment and ideologies through structures that generate cycles of harm by perpetuating inequalities amongst Indigenous people and other marginalized communities. Mainstream criminology maintains the relations of internalized colonialism and the political economy of criminalization by avoiding the socio-historical critique.

Geena Holding explores the impact of colonialism on court systems and their potential for decolonization in the chapter on "Justice For All: Decolonizing Courts Through Indigenous Justice". The lack of culturally appropriate sentencing processes and alternatives became clear with the implementation of several landmark developments. For example, in Canada, Gladue reports led to the creation of First Nations Courts (FNCs) and programs that are designed by Indigenous peoples to provide a culturally appropriate alternative form of dispute resolution. The Tsuu T'ina Peacemakers Court was established in 2000 and was the first of its kind in Canada. It integrated the Alberta Provincial Court with the Tsuu T'ina Nation community and justice traditions.

In the second section of the book entitled *Emerging Praxes around the Globe*, four authors present case studies of innovative and emerging practices of post-colonial criminologies both in post-conflict areas and advanced democracies like Canada.

Megan Korchak provides an overview of the colonial aspects of the correctional system, prisons and how they impact marginalized groups in her chapter "Decolonizing Prison: A Framework and Practices for Revisioning Incarceration". She demonstrates that the way that Indigenous people are processed and handled within the justice system amplifies existing personal trauma and issues of injustice and leads to longer and harsher sentences. Indigenous families living on reserves are often hundreds of kilometres away from the prison and therefore have limited access to loved ones.



This practice of incarceration splits up a disproportionate number of Indigenous families which creates trauma that can be deeply damaging to the entire family. She uses Asadullah's decolonization tree framework to suggest innovative practices. The framework emphasizes the action of consultation, interconnectedness, and traditional wisdom while attempting to do no further harm. She further speaks to the healing lodges in Canada as an alternative to a traditional prison. They create a path towards healing in a way that is culturally relevant and thus promotes empowerment and Indigenous sovereignty.

Kudzai Mudyara, in the chapter on "Policing and the Courts Through the Looking Glass: The Road to Transitional Justice and Decolonization in Zimbabwe", examines the influence of colonization on the Zimbabwean justice system using decolonization as a method for identifying and resolving the post-independence legacies. Before colonization, Zimbabwe had a structured policing system in place. Policing was informed by the African value system, which embodied the age-old precepts of *hunhu/ubuntu*. This system was destroyed and replaced by the British South Africa Company Police that came into existence during colonial rule. She uses micro and macro decolonization framework to suggest ways to reverse the damage inflicted by the colonial practices. Further, her chapter discusses several emerging praxes such as the Baraza Justice in the Democratic Republic of Congo as a method for fighting the corruption in the police, magistrates, impunity, favouritism, and a law system that does not accord equal rights to the poor. Many African countries that have reverted to their customary laws have taken their heritage and tradition into consideration. For instance, the Himba people of Namibia continue to practice ancient traditions. The Namibian Constitution endorses traditional governance and customary law as an element of its legal system within a framework of the rights of indigenous groups in Namibia.

Nicola Kimber addresses Canada's experience with Indigenous justice in her chapter entitled "Duty to Decolonize: Trauma in Canada" focusing on mental health issues facing Indigenous children, youth and adults. As many Indigenous peoples of Canada have experienced trauma whether personally or through familial history as a direct or indirect result of colonization, decolonization of Indigenous mental health is essential. Part of targeted trauma-informed practice includes acknowledging Indigenous perspectives. Among other case studies, she explores the Four Seasons Horse Teaching program. Established on Nekaneet First Nation territory, it is located at the federal Okimaw Ohci healing lodge in Saskatchewan. The program aims to rehabilitate offenders through physical, social, mental, emotional, and spiritual methods and practices; and is unique because it actively involves interacting with and caring for horses as part of the healing process.

Finally, in the *Way Forward* section, three chapters touch upon Indigenous self-governance, decolonizing policing and reconstructing Restorative Justice practices. The authors provide some useful and innovative recommendations.

In "Decolonizing Mental Health Services in Correctional Settings: Is Indigenous Self-Governance and Healing the Answer?" chapter Kayla Schick contends that psychology and correctional systems have been used as methods of assimilation throughout Canadian history. Canadian correctional institutions have an overpopulation of racial minorities and disproportionately high rates of mental illness. She speaks to multicultural family counselling in prisons, the Kunga Stopping Violence Program (KSVP), and Indigenous-operated healing lodges provide examples for decolonizing forensic mental health services at both the micro and macro levels. Such initiatives reflect a holistic approach that takes the family, history, and culture of each individual into account.

Stephanie Dyck discusses policing programs that offer a more comprehensive and culturally sensitive policing model that better reflect the communities in which they police in the chapter on "Decolonizing Policing: How Can It be Achieved?". Police are the frontline of the justice system. Community-based policing programs work to restore and build trust between the community and the police. First Nations Policing has been conceptualized in many different regions to better serve the cultural and historical contexts of their Indigenous communities. Australia, New Zealand, and the United States, similar to Canada, all have Indigenous populations that face similar challenges within their respective justice systems. However, funding is one of the greatest challenges for these programs and service delivery. Jurisdiction problems remain problematic for these models as well. While self-administered policing is thought to give autonomy and self-governance to indigenous communities, the models continue to be restricted through excessive government control.

Jenna Smith in her chapter entitled "Decolonization Restoration: Reconstructing Restorative Justice Practices"

explores decolonized restorative justice practices. The Production of 'Cellfish' and similar prison theatre programs include multiple practices that are considered restorative in nature. There have been many successes with community-based justice systems as well. A community-based justice program was implemented by Augustine Park in Red Deer, Canada which began in 2014 in response to an Indigenous community grieving children who died at residential schools. She concludes by noting that decolonization of restorative justice is possible for postcolonial societies but must be approached from a reasonable and structured decolonial framework.

# I. Decolonization and Law

NOOR SHAWUSH

## **Title: Decolonizing the Land: Revitalizing Indigenous Legal Traditions**

### **Abstract**

*Indigenous languages are heavily influenced by the surrounding environment giving rise to various linguistic identities throughout North America. Indigenous legal traditions are based on linguistic notions unique to each group. During the process of colonization, settler laws were enforced at the expense of Indigenous legal traditions through the seizure of land. By understanding the relationship between the natural environment and Indigenous legal traditions, we can begin to understand how to approach decolonizing law.*

*Keywords:* Environment, decolonization, legal traditions, Indigenous, law

### **Introduction**

Indigenous people have occupied Turtle Island, or modern-day North America since time immemorial (Monchalin, 2016). Recognized as the earliest legal practitioners in North America (Borrow, 2005), Indigenous groups across Canada have developed social, political, economic, and cultural systems to guide their behavior with one another (Parrott, 2020). Encompassing a large group of nations, Indigenous people have diverse yet related cultural traditions (Monchalin, 2016). Dozens of languages are spoken among Indigenous people, each reflecting a unique linguistic and cultural identity (Monchalin, 2016). As Borrows (2005) explains, “These nations’ linguistic, genealogical, political and legal descent can be traced back through millennia to different regions or territories in northern North America. This explains the wide variety of laws among indigenous groups” (p. 176). Manley-Casimir (2012) echoes similar sentiments, articulating that “Indigenous peoples have constructed their vision of law within their unique normative worlds” (p. 138). Evidence suggests that Indigenous laws are directly influenced by the natural world through land and language. This paper will examine the influence of the natural world on the development of Indigenous legal traditions and explore decolonization by illustrating the impact of colonization on Indigenous laws. This paper will argue that Canadian law can only be decolonized if Indigenous peoples regain control over their physical environment. State conflicts related to British Columbia’s Wet’suwet’en people and legal personality in New Zealand will be introduced to reinforce concepts articulated in decolonial literature. The recent granting of legal personality to the Magpie River in Quebec will also be discussed. In exploring these case studies, this paper seeks to reinforce the notion that Indigenous legal traditions rely on connections with the land as well as access and control over relevant natural resources.

### **Law in the Colonial Context**

European settlers imposed legal, political, and social structures based on the misconceived notion that Indigenous people “did not have law because they were ‘savage’ and ‘living without subjection”” (Borrows, 2005, p. 177). Some have argued that Indigenous peoples were ‘pre-legal’, suggesting that “societies only have laws if proclaimed by some recognized power that is capable of enforcing such proclamation” (Borrows, 2005, p. 176). This perspective aligns with those of Thomas Hobbes and John Locke, who argued that humans need to create a government and positive laws to maintain State power and a civil society (Monchalin, 2016). As Indigenous legal traditions did not resemble European laws, Indigenous people were said to have “no government at all, and live at this day in that brutish manner” (Hobbes, 1651). Absorbed in their perceived superiority, “the British looked to their own laws as the most rational, effective, and impeccable” and imposed them on Indigenous nations (Monchalin, 2016, p. 66). As Indigenous legal traditions demonstrate, law does not have to be centralized to exist. Robert Cover’s (1982) theory of law proposes such an approach, arguing that “We inhabit a *nomos* –a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful of valid and void... no set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning” (p. 4). Positivist legal traditions are not necessary to social order. In reality, by embodying a particular *nomos*, “communities create their own normative legal systems based on their cultural values” (Manley-Casimir, 2012, p. 142).

### **Indigenous Legal Traditions**

With respect to his analysis of civil law systems in Europe, Latin America and East Asia, Merryman (2000) describes the concept of 'legal tradition' as "A set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught." (p. 1). Indigenous legal customs were not written down, they exist in the "oral tradition, enunciated in songs, stories and ceremonies, often developed through consensus" (Law Commission of Canada, 2006, p.4). To ensure the preservation of such legal systems over time, symbolic memory strategies including wampum belts, culturally modified trees, land forms, crests and other objects in nature were used (Borrows, 2005). These traditions generally acknowledge a deep human connection to the land, spirit world, and waters (West Coast Environmental Law, n.d.). For example, the Mi'kmaq of the Far East maintained internal peace among the families within the society by dividing the territory into seven districts, each with a Chief and family rights to certain hunting grounds and fishing waters (Royal Commission on Aboriginal Peoples, 1996). The Haudenosaunee of the Eastern Great Lakes "maintained a sophisticated treaty tradition about how to live in peace that involved all relations: the plants, fish, animals, members of their nations and members of other nations" (Borrows, 2005, p. 178). Noticeably, these two examples demonstrate that in creating laws, Indigenous groups involved their specific environment and the natural world to reinforce relationships and societal roles.

Although European legal systems were imposed on Indigenous people, Indigenous rights and legal traditions have not completely disappeared (Law Commission of Canada, 2006). Many Aboriginal and treaty rights established prior to the arrival of Europeans have been recognized under Section 35 of the *Constitution Act, 1982* (Reynolds, 2018). These are rights that have survived extinguishment, surrender and infringement by the Crown (Reynolds, 2018). Section 35 of the *Constitution Act, 1982* "protects the existing culture, practices and traditions of Aboriginal people throughout the land" (Borrows, 2005, p.173). This section has been identified by the courts as having a "noble purpose," in ending Indigenous injustice brought about by colonization (Borrows, 1999). While such rights have been granted, they are considered to be exercised within a colonial State, as Aboriginal laws are undermined when they are in conflict with the State's legal orders (Law Commission of Canada, 2006). The Crown has the capacity to exercise fee simple title, which is absolute and uncontroverted ownership, thereby holding the power to extinguish Aboriginal rights (Borrows, 1999).

### **Impact of Colonization on Indigenous Legal Traditions**

The Canadian State used law to oppress, discriminate and "eliminate Indigenous people as peoples" (McGuire & Palys, 2020, p. 61). The role of law was to support colonization through the dispossession and disruption of Indigenous legal systems by imposing limitations on their power to govern themselves (Reynolds, 2018). Through the *Indian Act*, a violent process of assimilation was set in motion to limit the exercise of Indigenous law (Law Commission of Canada, 2006). According to Monchalin (2016), "assimilation and control were the main purposes and philosophical underpinnings of the Indian Act" (p. 109). The *Indian Act of 1876* imposed systems of governance that served colonialism by institutionalizing legal infrastructure that presumed Canadian sovereignty and ignored Indigenous sovereignty, thereby replacing traditional forms of governance (Monchalin, 2016; McGuire & Palys, 2020). The elements that formed Indigenous legal traditions such as stories, ceremonies, language and environment were criminalized as "superstitious nonsense" (Napoleon & Friedland, 2015, p.6).

Between 1884 and 1951, the *Indian Act* began to outlaw traditional sacred practices including the Potlach and the Sundance (Monchalin, 2016). These ceremonies consisted of formalized rituals through which individuals were able to directly participate in Indigenous legal traditions (Borrows, 2005). These practices were central to the identity of many Indigenous groups and validated the distinct heritage, value systems and social organization of each (Monchalin, 2016). Potlach and Sundance ceremonies are practiced in different geographical locations (Monchalin, 2016; Borrows, 2005), but each Indigenous group has its own distinct ceremonies "to renew, celebrate, transfer or abandon legal relationships" (Borrows, 2005, p. 191). By intentionally disrupting the practice of legal traditions and bonds with spiritual forces, the colonial State had attempted to fill the void with Christianity (Indigenous Corporate Training, 2016; Truth and Reconciliation Commission, 2015b). After criminalizing these important political and legal processes, Indigenous people continued to practice these processes "underground" (Napoleon & Friedman, 2014). At the time, participating in these practices was a crime liable to up to six months imprisonment (Indigenous Corporate Training, 2012). On more

than one occasion, Elders were arrested and imprisoned for having participated (Monchalin, 2016). This was particularly disruptive to communities, as Elders were relied upon to identify, transmit and communicate the law (Borrows, 2005).

As knowledge keepers, elders were responsible for orally passing down legal traditions and ensuring cultural continuity (Hele, 2021). According to Borrows (2005), oral history “is conveyed through layers of culture that entwine to sustain national memories over the lifetime of many generations” (p. 191). The process of transmitting legal traditions was bound by language however, with the operation of Residential Schools, the ability to pass down laws and other cultural knowledge systems was severely threatened. As the Truth and Reconciliation Commission (2015b) notes, Residential Schools represented a “systematic, government-sponsored attempt to destroy Aboriginal cultures and languages and to assimilate Aboriginal peoples so that they no longer existed as distinct peoples” (p. 6). By 1920, all Indigenous children between the ages seven and fifteen were required to attend school, whether that be Day School or Residential School (Monchalin, 2016). Parents who resisted the federal mandate were threatened with fines or imprisonment (Monchalin, 2016). At the schools, English and French were the only languages allowed to be spoken (Truth and Reconciliation Commission, 2015a). Students underwent severe punishments for speaking their native tongue, including public whippings, lashes, beatings or forced confinement (Monchalin, 2016; Truth and Reconciliation Commission, 2015a). A particularly horrific punishment practiced was the placement of needles through children’s tongues to be left in place for extended periods of time (Monchalin, 2016). Anker (2016) indicates that “residential schools had the effect of crippling Indigenous languages and, through them, the broader way of life of the first peoples of Canada” (p. 18). Like other legacies of the system, this had an intergenerational impact. Having been forbidden to speak their language, “former students found themselves unable or unwilling to teach their own children Aboriginal language and cultural ways” (Truth and Reconciliation, 2015a, p. 6).

As Wolfe (2006) states “Whatever settlers may say—and they generally have a lot to say—the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory” (p. 388). Similar sentiments echo in Palmater (2017), who identified theft of lands and natural resources as well as control of new trading routes as the “colonial pursuit of unearned power and wealth” (p. 74). During the process of colonialism, Indigenous people were “faced with a loss of territory and essential resources, catastrophic disease, forced dislocation, externally imposed disruption and compulsory replacement of governance structures and practices” (Napoleon & Friedman, 2015, p. 6). As Borrows (2005) illustrates, “relationships of family law, the law of obligations and property law hinged upon these connections to the land and resources” (p. 197). By displacing Indigenous peoples from their traditional lands and limiting their access to resources, settler colonialism eroded the practice of many legal traditions and placed Indigenous groups in new lands, forcing them to leave the environment on which their legal traditions, knowledge and language were sourced.

### **Decolonization**

Decolonizing the dominant Eurocentric legal system in Canada requires an active resurgence against the structures, ideologies and discourses that have been used to govern Indigenous peoples (Monchalin, 2016). As Napoleon and Friedman (2015) attest, however, “forced social disintegration, dislocation, and assimilation, a lack of state recognition, or even state and outsider reprobation, did not and could not completely repress Indigenous legal tradition” (p. 9). While Indigenous legal traditions have resisted colonial tactics of control, the ability to practice such traditions are still subject to colonial forces that maintain State-imposed systems of governance over Indigenous nations. Many definitions of decolonization applied to the field of law exist and each incorporate a unique element. Two central themes dominate decolonial discourse: (1) re-establishing a connection with the land and (2) confronting dominant systems of governance. In revitalizing legal traditions, Manley-Casimir (2012) emphasizes that the “revival of old legal traditions and the development of new legal traditions in the face of the colonial experience are equally valid forms of legal interpretation” (p. 145). The next section of this paper will identify two approaches to revitalizing Indigenous legal traditions in the post-colonial context and offer re-establishing Indigenous control of the land as an approach to decolonizing law.

Legal pluralism refers to the “co-existence of multiple legal systems within a given community or social political space” (Sage & Woodcock, 2012, p. 1). This requires a shift away from commonly held assumptions “that law must be

uniform, comprehensive, and monopolized by the state; that the rule of law consists of a single model or form to which all constituent legal systems must conform; and that political and economic development depend on conforming to this model” (Sage & Woodcock, 2012, p. 2). While Canada is a juridically pluralistic state, drawing on common law, civil law and Indigenous legal traditions to sustain order, Indigenous legal traditions are not given the recognition they merit (Borrows, 2005). Borrows (2005) proposes legal pluralism as an approach to decolonization, suggesting that applying legal traditions more explicitly in decision making “could create a stronger tradition of positivistic indigenous law to rest beside more customary legal traditions” (p. 198). Borrows (2005) also suggests developing Indigenous constitutions or applying other culturally appropriate legal traditions in the post-colonial context. During these processes, Indigenous groups may take the opportunity to “compare, contrast, accept and reject governmental and legal standards from many sources including their own” (Borrows, 2005, p. 200). Borrows’ proposal is complimentary to the Canadian legal system as it seeks to promote cultural diversity while recognizing that there may be other practices and approaches to law that would complement traditional legal practices.

Borrows approach to recognizing Indigenous legal traditions has amassed criticism. Moulton (2016) indicates that the Canadian legal system is unable to fully recognize Indigenous law through legal pluralism. Moulton (2016) argues that “Canada’s colonial past and its adherence to a hegemonic and monolithic conception of law are co-constitutive of a process whereby the recognition of Indigenous law will always demand conformity with dominant political and legal discourses” (p. 365). Exercising Indigenous legal traditions through legal pluralism, may be seen as conforming to colonial legal systems, and, as McGuire and Palys (2020) argue, “when we accept the colonial governments’ systems of law, justice and governance – foundational cultural institutions – we remain colonized” (p. 61). Rather than “conceiving of law as a static set of rules from which objective principles can be derived” (Manley-Casimir, 2012), decolonization starts by moving away from the idea that Indigenous legal traditions need to model the Canadian legal system (McGuire & Palys, 2020). By modeling the Canadian legal system, Indigenous people’s systems of governance and laws are viewed as inferior to those of the dominant State. The constitutional right to self-government pursuant to Section 35 of the *Constitution Act* follows that First Nations “have the authority to design a diversity of forms for their governing institutions so that these institutions will reflect their diverse traditions, needs and preferences” (Dacks, 2004, p. 671). The right to self-determination rests on the original status of Indigenous peoples as independent and sovereign nations within the territories they traditionally occupied (Dacks, 2004); therefore, the powers that be must relinquish control for Indigenous groups to freely express and practice legal traditions. As McGuire and Palys (2020) articulate, true decolonization starts by recognizing Indigenous people’s rights to local self-governance, not “imposed systems of ‘self-governance’” (p. 61).

Dominguez and Luoma (2020) define decolonization as a means of reversing “colonialism including its political, economic, social, cultural and environmental impacts” (p. 2). As it stands, environmental practices are colonial in nature as they reflect the notion that systems growth through the consumption of resources is without limits (Howitt, 2020). This narrative, however, is particularly threatening to Indigenous people and their rights and relationship to the land, since “Indigenous people’s stories, ceremonies, teachings, customs and norms often flow from very specific ecological relationships” (Borrows, 2005, p. 196), decolonization must address the value of land, animals, plants and the natural world in its entirety. As McGuire and Palys (2020) observe, “the power of the land, of our ancestors and our cultures is essential to rebuilding our communities’ resilience and capacity” (p. 77). In addition to revitalizing Indigenous legal traditions, decolonization entails addressing the larger injustices of colonization including the dispossession and the destruction of ecosystems and the “possessive acquisition that the state and state laws have with the land and its resources” (Anker, 2016). As Alfred (2017) explains, “the way to fight colonization is by re-culturing yourself and re-centering yourself in your homeland” (p. 12). As a result of colonialism, Indigenous peoples have lost control over their land and resources. Based on the connection between Indigenous legal traditions and the environment, this paper recognizes active resistance against extraction projects, pipelines, pollution, or any other environmentally harmful activities as a valid form of decolonization. Resistance in the post-colonial context requires Indigenous peoples to reassert their relationship with the land and in doing so, address, confront and challenge colonialism as well as people, institutions and governments.

### **Promising Decolonizing Practices**

This section will highlight decolonial practices in Canada and New Zealand. The first case study will introduce Wet'suwet'en First Nation in British Columbia and recent conflicts with the State. This case study seeks to highlight the impact of colonialism on Wet'suwet'en law and will outline a number of practices that align with decolonization values and principles. The second case study relates to New Zealand's recent developments in law by which legal personality has been granted to three environmental landmarks. Granting personhood to environmental landmarks reflects a systemic decolonial practice that reflects Māori values and legal traditions. Taken together, these decolonial practices recognize and seek to establish the fact that the environment (i.e., the natural surroundings/landscape) serves as a foundation for Indigenous legal traditions. Further, this section will reinforce Cover's theory of law by comparing Indigenous and settler colonial *nomos* and the interpretation of laws based on relationships with land.

### ***Wet'suwet'en First Nation, the Feast System of Governance, and State Conflict***

The Wet'suwet'en are an Athabaskan-speaking Indigenous group with territory in British Columbia. Their worldview incorporates holistic values, such as people are part of the living environment, respect for living things (particularly fish and animal species), and reciprocity with the natural world (Gottesfeld, 1994). Wet'suwet'en's legal traditions are fundamentally connected to the feast system, which is their central governance institution (Office of the Wet'suwet'en, 2013). The feast system of governance is deeply rooted in the spiritual qualities of the land, the animals inhabiting it and the title holder (Office of the Wet'suwet'en, n.d.). Through the feast system, resources from different territories are brought into the feast hall to be distributed by the host clan to validate ownership of the territories (Office of the Wet'suwet'en, 2013). Through the feast hall, people are given titles and authority over territories (Office of the Wet'suwet'en, n.d.). The authority granted through the feast hall is used to "settle disputes and breaches of Wet'suwet'en law within the forum of the feast as well as outside the feast hall" (Office of the Wet'suwet'en, n.d.). The feast hall also serves to validate Indigenous authority and provide a format for the exercise of that authority in accordance with Wet'suwet'en law (Office of the Wet'suwet'en, n.d.). Anker (2016) describes the feast hall as "kin-based gift economies in which giving creates patterns of mutual indebtedness that calibrate social hierarchy and power, but in which what is valued is generosity, altruism, and kindness" (p. 39). According to the Law Commission of Canada (2006) "the feast system remains central to Wet'suwet'en government, law, social structure and world view" (p. 23).

Similar to many other First Nations in British Columbia, Wet'suwet'en never formally ceded their land to Canada (Bliss & Temper, 2018). Despite this, the Supreme Court ruled in *Delgamuukw v. British Columbia* that "Aboriginal title is a burden on the Crown's underlying title", and that British Columbia became subject to Canada's legislative authority by entering confederation (Borrows, 1999, p. 4). The ruling in *Delgamuukw v. British Columbia* sustains legal framework that allows the Crown to extinguish Aboriginal title, despite claims of the existence of sovereignty prior to European occupation. The assertion of Crown sovereignty negatively influences Indigenous peoples by undermining "pre-existing Aboriginal land-use regimes through the sub structural placement of Crown title" (Borrows, 1999, p. 9). This remains a source of contention, as pipelines and other invasive projects are planned on Wet'suwet'en territory. Due to their reliance on the feast system, the Wet'suwet'en are particularly burdened by environmental disruptions as it also threatens their legal traditions.

Costal Gas Link, a corporation under TransCanada received court approval to construct an energy transport corridor through Wet'suwet'en territory (Bellrichard & Barrera, 2020). Five of the six band councils within the Wet'suwet'en Nation signed agreements in support of the project, however these councils have derived their authority from the *Indian Act*, which is not a traditional form of government (Bellrichard & Barrera, 2020). Wet'suwet'en's hereditary chiefs are the leaders of the nation's governance system and have inherited their role through their matrilineal line through the Potlatch system (Sterritt, 2019). They had said "no" to all oil and gas pipelines crossing the Wet'suwet'en lands and declared that no pipelines can be built without their consent (Sterritt, 2019). Despite government approval, Wet'suwet'en prevented workers from entering Wet'suwet'en territory and employed multiple other forms of resistance. For example, Wet'suwet'en hereditary chiefs issued eviction notices to Coastal GasLink citing Wet'suwet'en trespassing laws, trees were found blocking the service roads, and camps were established along the only service road that leads to the territory (Bellrichard & Barrera, 2020). In doing so, Wet'suwet'en expressed active resistance against colonial forces and continued to reassert their traditional laws, title, and rights over the territory.

In 2019, the Supreme Court ruled against Wet'suwet'en, permanently restricting Wet'suwet'en from blocking access to

pipeline work sites (Dhillon & Parrish, 2019). Tait and Spice (2018), explain that the injunction “shows blatant disregard for Anuk Nu’at’en (Wet’suwet’en law) which pre-dates Canadian and provincial law, for the feast system of governance that upholds Anuk Nu’at’en, and for Aboriginal Title” (p. 1). Claims that the project was not approached with free, prior and informed consent led Wet’suwet’en and its supporters to continue engaging in active resistance through barricades and protests (Bellrichard & Barrera, 2020). The situation quickly escalated, as the Royal Canadian Mounted Police were sent in to enforce the injunction order and were prepared to shoot Indigenous land defenders under Bill C-51 (Dhillon & Parrish, 2019). Under the Anti-Terrorism Act, Bill C-51 “sanctions the criminalization of Indigenous environmentalists by enhancing surveillance and legal powers against any potential interference with Canada’s ‘critical infrastructure’ or ‘territorial integrity’” (Dhillon & Parrish, 2019). This Bill in particular demonstrates that the law continues to support colonialism at the expense of Indigenous people.

A brief overview of Wet’suwet’en’s legal traditions and recent conflict with the colonial State serves to illustrate the effects of colonialism on self-determination and sovereignty. By engaging in this conflict, the State expressed blatant disregard for Wet’suwet’en legal traditions, laws, and community authority. This demonstrates that the colonial State continues making preferential interpretations of laws, and in so doing supporting colonialism. By engaging in active resistance against the colonialist state and reasserting control over their traditional lands, the Wet’suwet’en and its supporters have successfully embodied the principles of decolonization.

### **Legal Personality in New Zealand**

The Indigenous people of Aotearoa (modern day New Zealand) are collectively known as the Māori. Māori legal traditions are based on *tikanga*, which refers to a “system comprising practice, principles, process and procedures and traditional knowledge. It encompasses Māori law but also includes ritual, custom, and spiritual and socio-political dimensions that go well beyond the legal domain” (Jones, 2016, p. 23). Underlying these practices and principles are values that reflect respect for all living things and their interconnectedness (Jones, 2016). The philosophy behind Māori law is bound by cosmology and connections to the gods and spiritual worlds of the Māori knowledge systems (Jones, 2016). Māori legal traditions incorporate cosmologies that promote protective views of the environment and an obligation to nurture and protect the natural world without engaging any elements of ownership (Williams, 2019). Kaitiakitanga is a foundational concept within Māori legal traditions and refers to the ethic of stewardship and guardianship of the natural environment (Jones, 2016), as well as a spiritual element that represents an obligation for humans to nurture and provide care for the land that sustains life (Williams, 2019).

Like Canada, New Zealand is governed by settler-colonial law. As the population of British migrants increased in Aotearoa, plans for settlement on behalf of the British government were created (New Zealand History, n.d.). The British government sent individuals to establish law and order over the settler population and encouraged the Māori people to adopt the institutions of British governments (Jones, 2016). The Treaty of Waitangi was signed in 1840 between representatives of the British Crown and a group of Māori chiefs (New Zealand History, n.d.). The Treaty of Waitangi is known as New Zealand’s founding document and provided a framework for the relationship between the Māori and the settler government. This Treaty granted the Crown authority to establish a government in Aotearoa while protecting the property and authority of the Māori (Jones, 2016). According to Jones (2016), “self-determination and reconciliation underpin the treaty” (p. 7). The concept of rangatiratanga was expressed in the Treaty of Waitangi as the spiritual element within the Māori worldview, which broadly translates in English as the right to self-determination and sovereignty (Williams, 2019). Williams (2019) points out that although rangatiratanga is expressed in the Treaty of Waitangi, it has always been “a point of contention for Maori-Crown relations” (p. 165). While the English believed they were guaranteed ‘undisturbed possession’ of property, the Māori believed they were “giving up government over their lands but still retaining the right to manage their own affairs” (New Zealand History, n.d.). Due to differences in worldview, the Treaty of Waitangi is interpreted differently by the Māori and English which has led to disagreements with respect to governance.

Settlers established common law systems centered around ownership of land and the individual (Williams, 2019). Settler-colonialists imposed British-influenced legal systems and an anthropocentric approach to property (Williams, 2019). Anthropocentrism refers to the notion that humans are supreme over nature (Williams, 2019). Unlike the settlers,



the Māori “had no concept of absolute ownership of land, and the idea of exclusion and boundaries are very rare” (p. 159). Anthropocentrism is foreign to Māori legal traditions, as “indigenous gods and spirits represent and inhabit the natural world, from mountains, rivers, and other landscape features to the animal and plant world today” (Magallanes, 2015, p. 280). As such, “humans are not seen as having any rights or even ability to completely dominate nature and are instead seen as its guardians” (Magallanes, 2015, p. 281). Under the Treaty of Waitangi, the Māori text failed to refer to the Crown’s exclusive right to buy land from the Maori, whether the Māori were willing to sell or not (Magallanes, 2015). Williams (2019) indicates that “Māori ‘sellers’ believed that the settler-colonial ‘buyers’ were simply making a gift to them in order to live and share the land with them” (p. 159). Due to discrepancies in worldview, the settler government and Māori went to war over land use and sale violations (Magallanes, 2015). Upon winning the war, the settler government confiscated large amounts of Māori land and continued to impose authority over the Māori, breaching guarantees of possession of land, estates, forests and fisheries as well as restricting their autonomy and use of natural resources (Magallanes, 2015).

Māori cosmology has been integrated in New Zealand law as a part of the settlement of Māori grievances from the “colonization of New Zealand and the subsequent loss of Māori control over their lands, waters and their treasured natural resources” (Magallanes, 2020). Recently, New Zealand has developed a legal framework granting legal personality to land and natural objects. According to Magallanes (2020), “the legal recognition of Maori tribal cosmology – including the personality of nature as their ancestors – was thus one way of acknowledging and returning traditional control over these aspects to Maori” (para. 4). Personhood has been granted to a number of natural objects in New Zealand, including Te Urewera, Te Awa Tupua, Mount Taranaki, and The Whanganui River. This means that these natural objects are conceived as a person, with rights, powers, duties and liabilities of a legal person (Williams, 2019). In granting legal personality, the geographic objects are protected from injury and have legal standing in a court of law (Williams, 2019). The constitutional protection of environmental landmarks “represents a movement towards decolonization of land and marks an assertion of rights and decision-making” over ancestral Indigenous lands (Williams, 2019, p. 170). These objects no longer exist in the settler-colonial context, in that neither the Māori or New Zealand government owns nor claims property rights over them (Williams, 2019). Operationally, these geographic objects are managed by relatively similar governing bodies and boards comprised of human guardians (Māori and Crown) that seek to act on the behalf of the natural object all the while providing an avenue for Māori groups to practice rangatiratanga and kaitiakitanga (Williams, 2019). In governing these natural objects, an emphasis is placed on environmental protection and the prevention of injury in the form of pollution rather than property rights and ownership (Williams, 2019).

Williams (2019) argues that “Aotearoa New Zealand has illustrated and codified a national commitment to incorporating Māori cosmologies into its legal system where practical” (p. 167). Multiple scholars have indicated that legal personality has been offered as response to contests of authority over land (Sanders, 2018; Williams, 2019; Jones, 2016). Rather than transferring title back to the Māori group traditionally owning the land, legal personality has been offered as way for the government to give up title without returning it to the Māori (Sanders, 2018). While legal personality in and of itself is a Western legal concept, it does express fundamental ideas embedded in Māori legal traditions such as kaitiakitanga and non-ownership (Jones, 2016).

Granting legal personality is an approach to environmentalism that reinforces Indigenous legal traditions. Recognizing Māori cosmologies within the context of settler common law demonstrates a decolonial approach to ownership not possible under most settler governments. Granting legal personality to landmarks and sacred sites on Crown land guarantees environmental protections and provides Indigenous groups with the opportunity to govern geographical locations that were forcibly taken from them by colonial powers. This would also serve as a blanket to protect elements of the environment that are fundamental to exercising Indigenous legal traditions. As the environment continues to serve as a foundation for Indigenous legal traditions, granting legal personality would serve to protect them.

### ***Legal Personality in Canada***

Following New Zealand’s advancements in conservation and environmental law, many began to advocate for similar legal rights to be granted to natural objects and ecosystems. In granting such rights, these entities are given intrinsic value, which demonstrates a shift away from colonist ideologies based on ownership and exploitation. In February 2021, legal personhood was granted for the first time in Canada to the Magpie River, a wild river renowned for whitewater

activities. The Magpie River is located on Nitassinan, the traditional ancestral territory of two Innu communities in Quebec's Cote-Nord region, Ekuanitshit and Uashat mak Mani-utenam. Referred to as Muteshekau-Shipu in Innu, the river has been a source of traditional Innu activities and land-based practices (Canadian Parks and Wilderness Society, n.d.). The river has been threatened by proposed hydroelectric activities, causing distress to those who rely on the river for traditional activities (Canadian Parks and Wilderness Society, n.d.). The proposed activities would have negative impacts on the environment such as mercury and methane pollution and would disrupt aquatic ecosystems (Canadian Energy Research Institute, 2004).

Through the work of the the Muteshekau-shipu Alliance, which includes First Nations, municipalities, environmental groups and citizens, the Muteshekau-Shipu river was granted nine legal rights: the right to flow; the right to respect for its cycles; the right for its natural evolution to be protected and preserved; the right to maintain its natural biodiversity; the right to fulfil its essential functions within its ecosystem; the right to maintain its integrity; the right to be safe from pollution; the right to regenerate and be restored; the right to sue (Stuart-Ulin, 2021). Included in the resolution, is that the river is to be represented by the Innu and guardians appointed by the municipality (Lowrie, 2021). Chief Pietacho of the Innu Council of Ekuanitshit, expresses Indigenous values associated with recognizing such rights, "The Creator put us on this piece of territory called Nitassinan, which encompasses all these rivers, all these mountains, all these trees... The Innu people always believed that you had to protect the earth. It's water – it's life" (Kestler-D'Amours, 2021).

The nine rights granted to the river were put forward by the municipality of Minganie and the Innu Council of Ekuanitshit, both part of the The Muteshekau-shipu Alliance. While the resolution may have strength in a court of law, the province of Quebec has yet to grant the river official protected status. Many speculate that this is deliberate due to the river's potential for hydroelectric power (Lowrie, 2021), which raises questions as to whether these rights will be respected when they conflict with Hydro-Quebec, a provincial provincially owned corporation, or other government motives. While this new piece of legislation is a celebration for Indigenous people and environmental conservationists, it is too soon to tell whether these rights will be valued and respected when they infringe on provincial or even federal projects.

## **Conclusion**

Active resistance against the colonial state on behalf of the Wet'suwet'en and the recognition of Māori legal traditions in New Zealand law has reinforced the notion that Indigenous laws rely upon a connection to the land and natural resources. Legal personality has been formally recognized in Canada for the first time and while the resolution is not constitutionally recognized as is in New Zealand, it nonetheless formally acknowledges Indigenous values in a Western system of governance. As Monchalin (2016) explains, "people are the land, the language comes from the land, and thus teachings reflect place, connection and way of life with the land" (p. 24). The relationship that Indigenous people have with the land reflects a particular *nomos* that is in conflict with colonial law. As it stands, the law is interpreted as a function of the social norms and values of the mainstream settler ideology that created them. This paper has demonstrated that colonization severely restricted Indigenous people's ability to practice their long-established legal traditions. Language, ceremony, and Elders are at the foundation of Indigenous legal traditions and were systemically targeted by assimilative polices. Since Indigenous legal traditions are heavily entrenched in land-based linguistic identities, there is a clear connection between Indigenous legal traditions and the environment. Analyzing the exercise of Indigenous laws and the right to self-determination in the post-colonial context demonstrates that colonialism continues to restrict the exercise of Indigenous legal traditions. Decolonization has been offered as an approach to revitalizing Indigenous laws and confronting colonial systems of governance. This paper has explored legal pluralism and the disruption of current governance structures as two methods of decolonization and has offered regaining control of the land through legal personality as a method to decolonize law. It is important to recognize that Indigenous groups will have different approaches to decolonization depending on their unique circumstances and environments; however, no matter which approach is taken, revitalizing Indigenous legal traditions begins with regaining authority over the land.

## **Limitations**

The case made for the dependency on the environment for the revitalization of Indigenous legal traditions in Canada

must be interpreted with caution and a few limitations borne in mind. First, thorough investigations into this issue have been constrained by deadlines. These time constraints may potentially have negative impacts on the depth and analysis of the research. Secondly, the conclusions were derived based on an analysis of research and literature that has been conducted by other scholars in the field of decolonization, colonization, and environmentalism. Very few sources speak to the specific connection between Indigenous legal traditions and the natural environment and even fewer address this connection in a decolonial context. There is a literature gap as regards environmental approaches to decolonizing law in the Canadian context; this topic requires further study.

### Discussion Questions

1. Do you think environmentalism and conservation are essential to the practice of Indigenous legal traditions? If so, should environmental protections be included in Aboriginal law?
2. Consider legal personality. How would you apply it in Canada? Consider the perspective of various Indigenous groups and/or approaches taken by other countries (e.g., New Zealand, Ecuador, India, etc.).

### Recommended Activities

1. Watch the documentary “INVASION.”
1. Consider the impact of pipelines on Indigenous legal traditions.
2. [https://www.youtube.com/watch?v=D3R5Uy5O\\_Ds](https://www.youtube.com/watch?v=D3R5Uy5O_Ds)

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## 2. Decolonization and Criminology

CHARMINE CORTEZ

### **Title: Decolonization and Criminology: An Analysis of Knowledge Production**

#### **Abstract**

*Mainstream criminology plays a significant role in the development of our current policies and legislation. This chapter evaluates the influence of a settler-colonial ideology on the shaping of the current criminological structure accepted by academia and, through this latter, on what this means for the Justice System (JS). Using case studies from Southern, Indigenous, and Africana perspectives, this chapter reflects on the entrenchment of contemporary colonial and imperialist processes in the settler-colonial State and how this influences the production of criminological knowledge and, through it, policy and legislation. This is a cycle that continuously harms the Indigenous peoples and other marginalized communities. By addressing the injustices and gaps within this aspect of knowledge production, I argue the need for a 'Post-Colonial Criminology'. Such a discipline would better reflect and respond to society's views on the precepts of crime, justice, and punishment.*

#### **Introduction**

The theory offers the means and opportunity to analyze and critique our understanding of the world. Theories are shaped by our realities, belief systems, culture, and worldview. For researchers within the increasingly interdisciplinary field of criminology, the study of crime and criminal behaviour is to engage with a tremendous body of scientific research with the aim of providing a rational explanation to support their theories. If developed effectively, such theories generate potential strategies for designing programs and impacting policies within the Justice System (Williams & McShane, 2018). A good theory can induce positive real-life consequences that improve our social, political, and economic conditions. Our current policies and legislations are almost inevitably guided in part by criminological philosophies. The fact that criminology is partly grounded in the past is what makes a move towards a Post-Colonial Criminology so important. It would consider the influence of socio-historical contexts on current theories and research, on criminal justice culture and society and trace the implications for policy, knowledge, and understanding.

The social and economic injustices towards Indigenous peoples and their current relations to the Canadian Justice System bear witness to the ideological implication that our current Justice System is set up to fail society's Indigenous people in society and continuously imposes other factors of injustices on marginalized communities. These injustices do not occur in a vacuum; they are brought about by systematic and structuralized forces that maintain the powerful Eurocentric and social-Darwinist ideology of imperialism and capitalism over time (e.g., see Agozino, 2021; McGuire & Palys, 2020; Monchalin, 2015). This paper will argue that the discipline of criminology in the settler-colonial State, is both complicit in and negatively affected by the current systems of oppression that criminalize certain groups. One way of dismantling these systems is to change society's perceptions and views on crime and punishment. This involves finding alternatives to the way academics conduct research and creating a paradigm shift toward cultural and ideological enlightenment within the theoretical framework of mainstream criminology. This paper reflects on the powerful ideological ramifications of our current criminological structure and the harm it wreaks on marginalized communities through the Western Justice System. This paper also attempts to define what decolonization means to the discipline of criminology and what post-colonial criminology might look like. Case studies from diverse theoretical perspectives such as Southern, Indigenous, and African are used to help illustrate the need for a post-colonial model, which would better reflect society's views and help shape new perceptions of crime and punishment within a broader framework of social justice.

#### **Impact of Colonization**

The colonial ideology was imposed on settler-colonial countries through systems of governance that are still reflected in our current institutional policies and practices (McGuire & Palys, 2020; Monchalin, 2015). Many scholars and academics have argued that these systems of governance are grounded in capitalist, imperialist, and patriarchal law-making principles that continue to shape the development of hierarchical systems through violence, social and political

exclusion, oppression, economic exploitation, and control of culture (Kitossa, 2012; Agozino, 2004; Blagg & Anthony, 2019). McGuire and Palys (2020) argue that State-imposed hierarchy maintains the colonial tactics of domination by perpetuating the fragmentation of Indigenous systems, legal traditions, and culture through policies such as *The Indian Act* (1985). Divisiveness plays a fundamental role in colonial-system processes by introducing the notion of “inferiority” and “superiority”. This establishes and maintains settler-colonial domination over the Other (i.e., Indigenous peoples and marginalized communities) while offering a justification or rationale for the associated dispossession, social and cultural exclusion, and policies of disenfranchisement (Cunneen & Tauri, 2019; Blagg & Anthony, 2019).

The internal and external processes imposed through the colonial system have indeed fostered a myriad of social, economic, and political intergenerational harms to marginalized communities. Westernized systems of crime control and criminology have failed to take these harms into account, which means the issues have festered and multiplied, resulting in significant over-representation of Indigenous peoples in all areas of the Justice System. To put this in context, according to Statistics Canada (2011), Indigenous peoples (those that have partaken in the survey and self-identify as Aboriginal identity) comprise 4.3 percent of the Canadian population. Of these, First Nations are 60.8%, Metis is 32.3%, Inuit are 4.2% of the total identified population, with another 2.7% having different or multiple Aboriginal backgrounds. This statistic has its limitations due to the historic “ethnic mobility” factor of Aboriginal backgrounds brought about and influenced by various social factors as well as legislation. The *Indian Act* (Bill C-31), enacted in 1876, imposed a definition to regulate the conditions by which “Indian” status was accorded in certain Indigenous communities (Monchalin, 2015). Beyond, yet linked to criminology and criminal justice is the systematic exclusion and marginalization of Indigenous peoples in Canada. This is reflected in significantly higher rates of poverty (25.3%) (Citizens for Public Justice, 2015), unemployment, lack of access to education, substance use and abuse, and other factors that are direct consequences of genocidal harm and prolonged periods of systemic oppression (Monchalin, 2015).

These socio-economic factors are interrelated with the criminalization and victimization of Indigenous peoples by the westernized system of crime control and have led to over-representation in the courts and prisons. Poverty, lack of education, and unemployment are considered “disadvantages to access to a competent legal service” and make one “less likely be able to pay a fine and more likely to end up in jail” (Monchalin, 2015, p. 146). As of 2018/2019, Statistics Canada reported that Indigenous adults are 29% of federal admissions and 31% of provincial admissions, and both rates are higher in Saskatchewan (75%) and Manitoba (75%) where Indigenous peoples represent approximately 15% of the population. Despite representing 8.8% of the Canadian population, Indigenous youth represented 43% of admissions to correctional services; 47% of these were custody admissions and 40% community admissions.

According to Cunneen & Tauri (2019b), Indigenous people are more vulnerable and susceptible to victimization within the Justice System due to the ongoing colonialism, oppression, and associated legacies of traumatic experiences; thus, they are twice as likely to report as victims of violent crimes than non-Aboriginal people, and “six times more likely to be a victim of homicide, and at a higher risk of being victimized multiple times” (Monchalin, 2015; p. 145). As an extension of the historical imposition of colonial-patriarchal views amongst Indigenous communities, Indigenous women have become the most vulnerable population, with more repeated victims of violent assault than any non-Indigenous women in Canada, and these cycles of victimization frequently began in childhood (Monchalin, 2015, p. 145). The result is ongoing intergenerational violence, which places Indigenous women at risk of early involvement in the sex trade for sexual exploitation (Monchalin, 2015). According to the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) Final Report (2019), “in some communities, sexually exploited Indigenous children and youth make up more than 90% of the visible sex trade, even where Indigenous people make up less than 10% of the population” (p. 55). It is important to consider that such acts against Indigenous children and youth and the ensuing higher levels of criminalization and victimization are a direct result of the ongoing colonialist, discriminatory perceptions maintained through social and political institutions and rooted in westernized theorizing, which has labelled Indigenous peoples as the “problem” (Cunneen & Tauri, 2019b) most recently and as savages or dogs during Canada’s historical colonial period. Many Indigenous and non-Indigenous scholars argue that westernized Justice Systems impose neo-colonial domination by victimizing and criminalizing certain groups, enforcing practices of subjugation through violence, coercive assimilation and, more specifically, control of the “Other”. (Blagg & Anthony, 2019).

### **Definition of Decolonization**

Due to the deeply contextual nature of what decolonization is and why there exists a myriad of definitions for the term among both Indigenous and non-Indigenous scholars around the world. Regardless of the various interpretations, these authors often advocate for decolonization as a response to colonial structures and ideologies seen to perpetually impose systemic and institutionalized inequalities (Blagg & Anthony, 2019; Monchalin, 2015; Agozino, 2019; Asadullah, 2021). Decolonization is a goal and process of liberation from the harms wrought by the colonial system (Monchalin, 2015). It involves undoing colonial ideologies contained in “intellectual, psychological, and physical forms and it won’t happen by magic, happenstance, or friendly agreement” (Asadullah, 2021, p. 3). This process must occur at both the micro and macro levels. Microforms of decolonization pertain to the “mind, body, restoration of language, culture and ceremonies, and praxis” whereas the macro form addresses the need for systemic and institutional change (Asadullah, 2021, p. 4). Decolonization scholars have ways of weaving these forms into their respective definitions. For example, Monchalin (2015) and Cunneen & Tauri (2019a) refer to decolonization as a process of unravelling and reversing colonialism in both its micro and macro forms. As for Agozino (2019) and Kitossa (2012), a focus on the macro-form of decolonization predominates, specifically within the production and institutionalization of criminological knowledge.

Decolonization can occur in a variety of disciplines and settings, such as the Criminal Justice System, which consists of the police, courts, and corrections. These institutions harbour settler-colonial sentiment and ideologies through structures that generate cycles of harm by perpetuating inequalities amongst Indigenous people and other marginalized communities (Cunneen & Tauri, 2019a; Smith, 1999). It is thus imperative to identify and analyze what aspects of policies and practices set the stage for these societal harms. Criminology makes use of social science research methods to conceptualize and define crime and provide an effective crime control model for society. Agozino (2004) argues that “Criminology is a social science that served colonialism more directly than many other social sciences” (p. 343). Criminological theories, epistemology, and policies were developed through a Eurocentric lens that contemporary criminology continues to use while ignoring and continuously failing to reflect on the implications of criminology as a ‘control-freak’ discipline (Kitossa, 2012; Agozino, 2004).

Decolonizing criminology starts with acknowledging the discipline of criminology as a colonial tool both historically and today. Learning from history allows us to construct new foundations that thwart the legacy of colonialism. In Canada, this will also require the positioning of Indigenous peoples at the forefront of criminology; no longer as subjects of westernized research but as leaders, researchers, and scholars involved in knowledge and methodological production (Cunneen & Tauri, 2019a; Smith, 1999). Decolonization requires moving away from the westernized approach of research methodologies, such as the rule of objectivity; domination over knowledge construction and dissemination; and impassive reasoning. As an alternative, incorporating a localized, holistic, empathetic and non-hierarchical approach guided by the Indigenous social and cultural context has been proposed (Asadullah, 2021). A decolonization framework requires building relationships, engaging in meaningful consultations with local community leaders and experts, facilitating an anti-oppressive and trauma-informed approach, and an elicited model that resonates within the cultural context (Asadullah, 2021).

Such structural and institutional changes provide a space in which the microform of decolonization begins. As post-colonial criminology re-defines ‘crime’ and the responses to it, more focus is put on acknowledging deeper societal harms that lead to ‘crime’ or criminal decision making and on implementing Indigenous contextual methods of healing. There is no hierarchical structure around the process of decolonization once macro and microforms begin to guide and inform each other and even occur simultaneously. Overall, the decolonization of criminology calls for the incorporation of Indigenous knowledge and approaches to social science research methods that reflect the experiences of Indigenous peoples with the Justice System and benefit them (Cunneen & Tauri, 2019a).

### **Analyzing the Discipline of Criminology**

The discipline of Western criminology developed around the early eighteenth to the late nineteenth century in Europe through the formulation of basic ideas about the criminal justice system and the processing of ‘crime’ and criminal behaviour (Williams & McShane, 2018). Mainstream criminological theories, such as Classical and Positivist, explain crime phenomena in different ways. The Classical school of thought focused on lawmaking and criminal processes and was premised on beliefs about criminal behaviour as an act of individual free will and rational decision making, whereas the Positivist school studied ‘criminal’ behaviour through social, biological, and psychological conditions believed to



produce criminogenic effects in the individual. Both schools of thought were inspired by the Enlightenment period, during which scientific methodologies were utilized and legitimized through observation and objective reasoning to make sense of human realities and criminological knowledge (Williams & McShane, 2018; Smith, 1999). Thus, many post-colonial authors argue that the policies and practices within the Justice system, especially those influenced by such theories and methodologies, serve to further the development of the structure of race-class-gender dominance in Western societies (Smith, 1999; Agozino, 2019). Furthermore, the institutionalization of these theories, 'proven' using the traditional scientific method, served to justify the harmful implications for marginalized societies.

Decolonization scholars such as Agozino (2004), Smith (1999), and Kitossa (2012) argue that criminology is a fundamental feature of imperialism and colonial reason. First, the Enlightenment context was grounded in imperial policies and practices asserting moral claims related to the concept of "civilized" man that necessarily dehumanized those classified as "uncivilized" societies, and this led to racial categorization in criminology (Smith, 1999). Perceptions of who among the uncivilized is deemed a 'criminal' are not the same as with 'normal' (civilized) populations, and this anomaly implies the need for a stronger retributive or punitive response from state institutions. Secondly, the classifications and power relations between the West and the "Other" were also enforced through systems of governance to justify imperialism and colonialism (Blagg & Anthony, 2019). This all became synonymous with Westernized rational thinking and resulted in the rejection from criminology of the collective cultural knowledge and socio-economic and justice traditions of the "Other". Cunneen and Tauri (2019b) argue that policy formation processes refer to administrative criminologies generated by authoritarian criminologists for empirical validation that in turn reinforces the theoretical and conceptual binary oppositions between the West and the "Other" (i.e., Offender/Victim, Crime/Criminal, and Moral/Immoral) and ingrains them in crime control policies (p. 25).

Reflecting on the social ills of the "Other" (marginalized communities) and how this interconnects with the over-representation of Indigenous peoples across the Justice System, it becomes evident that Western criminology administers a dominant, colonial concept of the criminal process that undermines Indigenous perspectives on crime (Cunneen & Tauri, 2019b). In this way, criminology is a "control-freak" discipline, one that legitimizes mechanisms of socio-economic oppression through systems of control and social exclusion (Agozino, 2004). Furthermore, criminological ways of knowing directly collide with imperialism when higher rates of Indigenous victimization and criminalization in the Justice System are viewed simply as an 'outcome' to unfortunate circumstances of history (Kitossa, 2012). Under Eurocentric criminological research, social ills and Indigenous communities become an "Aboriginal" problem. This perpetuates a further internalization of colonialism that allows non-Indigenous researchers to dominate the construction and dissemination of crime-control knowledge and reinforce inferior beliefs about Indigenous people by reducing them to statistical data belonging to the Justice system (Cunneen & Tauri, 2019a; Smith, 1999).

Lastly, mainstream criminology maintains the relations of internalized colonialism and the political economy of criminalization by "avoiding the socio-historical critique and implications of its practice, epistemology, and theory" (Kitossa, 2012). The ongoing narrative positing crime as either an individual problem or constructed by specific socio-economic dysfunction (such as poverty or unequal opportunity) – or both – is contradictory to the theory of criminalization and a direct repercussion of imperialism/colonialism, racism, and other institutional/systemic modes of oppression (Agozino, 2019; Kitossa, 2012). Analyzing the current representation of Black, Indigenous, and people of colour criminologists within the academic discipline is one way to reflect on this issue. The predominance of white, authoritarian criminologists in the field and their inclination toward Western theorizing has limited alternative and oppositional theorizing on crime and criminal behaviour (Kitossa, 2012). Criminologists who identify as Black, Indigenous and people of colour are underrepresented in the field and continue to struggle in connecting a counter-colonial and counter-imperial discourse to the institutionalized Eurocentric normative criminology. As mentioned earlier, State-vested interests (economic and other) in the authoritarian/retributive approach to crime-control also means there will always be limitations to funding alternate research and developing decolonial alternatives, making these inadequate for full implementation within the Justice System. The key to a post-colonial criminological discipline is increased representation of Black, Indigenous, and criminologists of colour. Many postcolonial scholars and academics around the world have made efforts towards challenging the colonial bent of criminology, which is the subject of the next section.

## **Case Studies**

One of the ways in which scholar(s) of criminology can determine and establish the principles and values of post-colonial criminology and its inner workings is by embracing an 'alternative' criminological model that challenges the foundations of colonialist and imperialist reason. The use of case studies from Southern, Indigenous, and Afrocentric Criminology provides the opportunity to seek knowledge from academic scholars and practitioners that offers insight into 'colonized' experiences, how the discipline of criminology works against the racialized "Other", and lastly, to fathom alternative ways of research and methodologies that benefit the overall well-being of marginalized communities.

### ***Southern Criminology***

Southern Criminology situates the discipline of criminology in the context of Global North and Global South. The consequences and effects of colonialism link the power relations of the Global North to the colonized spaces of the Global South, both past and present (Blagg & Anthony, 2019; Carrington et. al., 2016). In terms of criminological thought, the Global North is guided by capitalist and imperialist ideologies that guarantee the exploitation, subjugation, and state violence, at the expense of the Global South. According to Carrington et. al. (2016), imposing Western imperial power in the "Southern" societies resulted in white-settler dominant communities that infringed upon local, ethnic, and tribal boundaries, and more importantly, exploited labour and depleted other southern resources. This all had a direct influence on societies now considered to be settler-colonial States; for example, legacies of colonialism in Canada and other post-colonial States such as Australia and New Zealand where cultural and political identity is often based on a European-settler worldview (Carrington et. al., 2016). Furthermore, the authoritative impact of Western imperial ideology ascribes social ills as consequences of the processes of industrialization, leading to the criminological theorizing of crime as an urban phenomenon rather than a direct consequence of imperialism/colonialism.

The criminological thought in Southern criminology identifies and acknowledges the global North's linear and binary ways of thinking (i.e., developed/developing, first/second/third world). Post-colonial disciplines must confront such ideological limitations and consider the colonial experience when attempting to theorize contemporary social conflict (Blagg & Anthony, 2019; Carrington et. al., 2016). The criminological field would benefit from more inclusiveness as regards patterns of crime, justice, and security outside of the global North perspective. The global South plays a role in incorporating new and diverse perspectives into criminological research agendas with the aim to radicalize colonized societies, and in a way, democratizing the discipline of criminology through engagement with non-European perspectives. With this, post-colonial criminology utilizes the global South's epistemologies, methodologies, and ontologies. This locates the westernized knowledge system in a historical context of imperialism, thus levelling the power imbalance in the knowledge production of the global North (Carrington et. al., 2016).

One of the ways Southern criminology confronts this power imbalance is through a paradigm shift in criminological thought toward a focus on concepts of power and class between the global North and South. Moosavi (2019) provides a non-Western-centric lens by highlighting the arguments of Syed Hussein Alatas, a Southern criminologist who aimed to decolonize the social sciences. Moosavi (2019) encourages Western criminologists to go beyond their current scope and engage with the works of Alatas and other Southern criminologists to understand criminological topics through a Southern lens. Analyzing the influence of Western crime control models in Southern societies, Alatas contends that non-Western intellectuals are without a voice and therefore in a state of 'intellectual bondage,' acquiescing to methods of knowledge production that maintain and perpetuate Western systems of control and exploitation (Moosavi, 2019). Furthermore, Alatas proposes a criminological focus on the 'crimes of the powerful,' which occur constantly but are often under-researched and ignored by criminologists. The 'crimes of the powerful' relate to the idea of the power imbalance between the Global North/South, challenging the ideas and practices of the North and holding the elite class accountable for the plight of underprivileged groups or classes (Moosavi, 2019). Overall, there is a need for criminological knowledge production to look towards Southern Criminology to fill the gaps in our current theories and methodologies so that we clearly see their engagement with and the connections between colonial power, class inequality, and crime.

### ***Indigenous Criminology***

Indigenous criminology focuses on the idea of decolonization as the restoration and revitalization of Indigenous knowledge and legal traditions (Cunneen & Tauri, 2019b). This is a response to the socio-economic injustices that colonialism has caused, acknowledging the use of colonial tools including cultural and land dispossession through a

disavowal of Indigenous knowledge and ideologies. Thus, resulted in the displacement of Indigenous Justice Systems in favour of Euro-centric systems of governance, law, and order. In addition, the current criminological discipline tends to ignore and invalidate Indigenous epistemologies given its current preference for Western theorizing and scientific research methods developed during the Enlightenment period that do not resonate with Indigenous methodology (Smith, 1999). Mainstream criminology's response to the over-representation of Indigenous people lies in its pronouncements on the "indigenization" of the Justice System (Mcguire & Palys, 2020). "Indigenization" occurs when settler-colonial states "fit" Indigenous traditions and customs into colonial perspectives strictly to benefit the interests of the state and continue to maintain control over Indigenous systems of governance (Mcguire & Palys, 2020; Monchalin, 2015). These traditions and customs are likely to be taken without any social and historical context, skewing their intention and purposes in a way that makes it unlikely for the communities to develop genuine practices. Thus, there is wariness and caution over contemporary theories and methodologies claiming to integrate Indigenous traditions and customs into the non-Indigenous structures. These methods are more than likely to misappropriate certain community traditions and impose further colonial harm on marginalized communities.

Cunneen & Tauri (2019a) argue that the post-colonial discipline intends to move away from the mainstream discipline, replacing it with Indigenous epistemologies and methodologies that celebrate and benefit localized communities. That said, it is important to recall how the term "Indigenous" encompasses a wide range of First Nations peoples, Metis, and Inuit cultures and traditions based on their understanding of community and the main principles sustaining it. Indigenous ways of knowing were largely transmitted orally to new generations, through storytelling, rituals, art, dance, and ceremonies and valued knowledge that is local, holistic, and verbalized—passed down from dreams, the ancestors, stories, and experiences (Cunneen & Tauri, 2019a; Monchalin, 2015). Indigenous principles involve "harmony, balance, and circular thinking" that emphasize the interconnection of human beings with all other living things (Monchalin, 2015). This principle is also reflected in traditional Indigenous justice systems and responses to criminality, which involve the entire community in the judicial process and aim for "healing" concerning all modes of crime (Monchalin, 2015). Smith (1999) says these sorts of Indigenous knowledge and principles can only be implemented within the post-colonial discipline if Indigenous academics and scholars with the knowledge of both contemporary and historical traditions are highly involved including in senior roles. Indigenous knowledge and ideologies must also be protected by intellectual property rights during the research process, and the outcomes shared amongst the local community (Cunneen & Tauri, 2019a; Asadullah, 2021) and driven by Indigenous protocols that contain explicitly outlined goals and fathom the impact of the proposed research to ensure that it is beneficial and not harmful towards individuals and/or the community (Smith, 1999). Smith (1999) also created a list of strategies that non-Indigenous researchers must follow to become more culturally sensitive as regards Māori communities. These strategies include: 'avoidance', whereby the researcher avoids dealing with the issues and instead partakes in personal development; Māori 'language' and 'cultural knowledge' acquisition; 'consultation' with Maori communities seeking support and consent; and "making space to recognize and attempt to bring more Māori researchers and 'voices' into an organization (pp. 176-177). A more localized, holistic, and non-hierarchical approach towards postcolonial criminology informed by Indigenous cultural contexts allows the discipline to broach empirical research on questions and issues that are relevant to Indigenous people and their communities (Cunneen & Tauri, 2019b; Asadullah, 2021).

### ***Afrocentric Criminology***

When looking outwards for non-Western, post-colonial criminology, it is important to consider the voices of those directly affected by modes of capitalism and imperialism. This is why Agozino (2021) argues that decolonizing criminology requires recognition of the social and historical struggles of the colonized African populations, as these experiences are interconnected with the injustices occurring in the rest of the world. Furthermore, Agozino (2012) suggests that the criminological field ought to carry out research and knowledge production based on data reception rather than data collection. This means researching the current experiences of 'colonized' peoples in the Criminal Justice System obtained from the colonized voices themselves and incorporating it into our perceptions of 'crime' and justice, rather than tabulating data collected through a researcher's lens (Agozino, 2021). A focus on the Afrocentric context of crime and liberation helps criminologists reflect on the theory of the political economy of criminalization and acknowledge the current Afrocentric struggles towards decolonization (Agozino, 2021).

Criminologists often have willful ignorance towards the consequences of capitalism, colonialism, and imperialism on a nation's ability to ensure that the Rule of Law operates on legacies that regulate and maintain inequitable social conditions. Here again, we see why Agozino (2021) argues that the discipline of criminology is considered a “control-freak” discipline and that both political economists and criminological (anomie) theorists have often misinterpreted the hypothesis surrounding class inequalities and societal reactions to crime. While poverty and unequal opportunity cause deviance, many rich and powerful individuals also commit crimes and are more likely to get away with them. Western contemporary criminology such as feminist and critical criminology are also complicit in the silence about institutionalized crimes against African populations (i.e., slavery, apartheid, and other socio-economic exploitation) (Agozino, 2019). To fill this knowledge gap, one must consider the contributions of liberation criminology. The contributions of such African scholars as W.E.B Dubois, Frantz Fanon, Kwame Nkrumah, Amilcar Cabral, Angela Davis and Biko Agozino fortify the development of criminological theories and often take a Marxist approach to the current political climate and struggle for emancipation (Agozino, 2021).

Liberation criminology considers the historical contexts of deviance and social control in order to decolonize and abolish oppressive power relations. It does not claim to be an alternative discipline to mainstream criminology; rather, the discipline shifts the focus towards reparations for victims of imperialism and figures out what is to be done about the repressive and controlling institutions that continue to impose socioeconomic injustices (Agozino, 2021). The decolonization of criminology will not happen overnight or through a specific set of methods applicable to all societies affected by Eurocentric oppression. There will “constantly be a struggle between the colonizers and the colonized by all means necessary” (Agozino, 2019 p. 19). Lastly, the decolonization of criminology is both a violent and non-violent struggle in that one could weaponize the concept of theory by changing a society's perception of crime and criminal behaviour. Mainstream authoritative criminologists and theorists who benefit from the legacies of colonialism, however, may be opposed. Representation of Indigenous and other marginalized scholars within the interdisciplinary field of criminology can provide new ways of thinking about combating the socio-economic injustices that help perpetuate crime and ‘criminal’ behaviour.

### **Limitations**

As this paper discusses the discipline of criminology and its theories, methodologies, and policy, there are limitations as to the scope of the analysis. This includes the lack of substantive data to conclusively support the validity of these theories. In addition, decolonization is a rather new concept within the discipline of criminology, and there is an associated lack of available research arguing strongly in its favour. However, efforts to source and involve Indigenous scholars and non-Indigenous academics, whose works reflect on their personal and professional experiences, offer a more inclusive and anti-oppressive approach that will benefit future decolonization academics in the field and lead the way to a Post-Colonial Criminology.

### **Conclusion**

To properly analyze and assess a criminological theory, the following questions must be asked: Who conducts the research? What is the main purpose and intention of the research? What methods will be utilized? Whose interests does it serve and who stands to benefit? Who has designed its questions and framed its scope? Who will write it up? How will its results be disseminated? (Cunneen & Tauri, 2019a). Colonialism and imperialism have left lasting social, economic, and political scars on our society, specifically as regards Indigenous people and marginalized ethnic communities. Westernized systems of crime control help perpetuate the outmoded ideologies that maintain the injustices upon which the systems of colonialism and imperialism were predicated.

There is danger in criminological perceptions positing socio-economic marginalization as the result of ‘reactions’ to unfortunate historical circumstances as it construes a narrative about marginalized communities being responsible for their victimhood and inherently tied to the justice system. A way to combat this perception is through the holistic and localized approach implicit in the concept of decolonization. By encompassing the need to challenge ourselves as settler-colonial beings and address the need for systemic and institutional change, especially in the discipline of Criminology but also Education, decolonization occurs when we critique and analyze Western criminology and enrich it with the perspectives and reflections of Indigenous people and other marginalized communities.

Post-Colonial Criminology could be expressed as a function of a wide range of theories encompassing Southern,

Indigenous, and Afrocentric ideologies. These challenge social power imbalances, holding the colonizer and/or imperialist power accountable for crimes against humanity, and placing the voices of those who were colonized at the forefront of the liberation or decolonial movement. Coming to terms with social and historical contexts is imperative if researchers and academics are to fathom the ideological implications of contemporary theories on future policies and practices. Both imperialism and colonialism have considerable influence on academic disciplines conducting scientific research. Whether or not this has brought positive changes in the field, it was at the expense of (disavowing) Indigenous knowledge and traditional ways of thinking about social relations. Therefore, decolonizing criminology attempts to identify and resist these colonial structures by revitalizing Indigenous systems having localized, holistic, and non-hierarchical approaches through the involvement of Indigenous people in senior roles of knowledge production and its implementation. I have hopes that the post-colonial discipline of criminology will have a necessary impact beyond the Justice System by broadening the way we theorize about social factors related to crime and criminal justice. Post-Colonial Criminology has a capacity for acknowledging systemic injustices and allowing Indigenous peoples and traditional practices to guide us in healing from the conflicts imposed by colonial, imperial, and capitalist worldviews and methods. This in turn will lead to a more sustainable and peaceful way of living with ourselves and with others.

### **Discussion Questions**

- 1) What are the pros and cons of implementing either Southern, Indigenous, and/or Africana ideologies into mainstream criminology?
- 2) Why is it important to consider the historical and societal context of criminological theories and how they affect our current perceptions of crime and criminal behaviour?
- 3) What impact on real-life scenarios do policies/practices aiming to decolonize criminological theory have?

### **Recommended Activities**

- 1) Watch the 1964 National Film Board of Canada Short Documentary by Jack Ofield, *Because They Are Different* (available online at [https://www.nfb.ca/film/because\\_they\\_are\\_different/](https://www.nfb.ca/film/because_they_are_different/)). How are the attitudes of settler communities towards Indigenous peoples in the 60s reflected in the perspectives we have today? Explain why there is a significant focus on the socio-economic conditions of people on reserves and how representations of this might be used to falsely justify the need for assimilative integration of Indigenous peoples?
- 2) Explore and reach out to Indigenous community-based organizations in your area. Do comparative research on local Indigenous practices and governance to figure out the similarities and differences between their responses to crime and those that flow from mainstream criminological theoretical theory.

### **Recommended Readings**

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# 3. Decolonization and Court

GEENA HOLDING

## **Title: Justice For All: Decolonizing Courts Through Indigenous Justice**

### **Abstract**

*This chapter will examine the impact of colonialism on court systems and explore their potential for decolonization. Decolonization is defined as an ongoing process that requires a multidimensional approach towards developing non-hierarchical systems. Using case studies from Canada, the U.S. and Australia, the reintroduction of Indigenous courts is examined as one way to begin the decolonization process. The goal of this chapter is to provide an analysis of how effective these courts have been and where further action is needed.*

### **Introduction**

Colonization has shaped court systems around the world erase and exclude Indigenous values and justice practices. Eurocentric institutions predicated on colonial policies have reinforced systemic racism and inequalities, creating a system that impedes Indigenous access to justice. Token gestures, such as sweat lodges within prisons and cultural diversion programs for minor offences, only serve as distractions to focus attention away from a criminal justice system that forcibly imposes Eurocentric beliefs onto diverse First Nations and Indigenous communities (McGuire and Palys, 2020). Because historically embedded colonial ideologies run so deep, decolonization is the only solution to the inequalities and social problems that stem from colonization. This implies taking the power back through active resistance against ongoing colonization by embracing the resurgence of Indigenous cultures, laws, and governing systems (Palmater, 2018). The process of decolonizing colonial court systems has already begun, with the establishment of Indigenous legislative frameworks and courts.

Examining the introduction of Indigenous courts introduced in the U.S., Canada, and Australia reveals both structural differences and recurring themes. The Navajo Nation Peacemaking Courts of the U.S., the First Nations/Indigenous Courts of Canada, and the Aboriginal Courts of Australia all serve as examples of implementing Indigenous justice practices into the mainstream court system, and there has been a positive response to their implementation so far. There continue to be limitations, however, including lack of funding and recognition, narrow participation criterion, and the restrictions for these courts within colonial legal frameworks. Applying the assessment tools included in Asadullah's (2021) decolonization tree framework indicates that, although a movement towards decolonization has begun, there is an ongoing need for fundamental systemic changes and formal recognition of Indigenous sovereignty. This paper aims to provide a comparative analysis and further recommendations for decolonizing these court systems.

### **Impact of Colonization**

Colonization describes the permanent settler occupation of lands based on the continuing displacement of Indigenous peoples and the creation of systems and infrastructures that make the land productive from a Eurocentric capitalist perspective (Bonds and Inwood, 2016). The appropriation of these lands has denied Indigenous peoples' access to resources and prosperity, while the creation of systems and infrastructures designed to enrich settlers and their mother nation by limiting Indigenous rights and other governance changes, expropriating their land, using them and others as colonial labour in the export of natural resources, has played a significant role in the marginalization of Indigenous populations. To this day, legal institutions rooted within colonial systems results in the overincarceration of Indigenous peoples and disproportionate rates of apprehension among Indigenous children (Blagg, 2017; Boothroyd, 2019; Cunneen, 2018; EagleWoman, 2019).

Zion (2006) notes that postcolonial state institutions are hierarchical and impersonal, based on social stratification, rooted in colonization, that excludes and marginalizes Indigenous membership. Eurocentric governance structures are based on an ideology that differs significantly from Indigenous worldviews, while the justice system deflects attention away from societal injustice and towards the criminalization of the poor (Monchalin, 2015). Legal hierarchies are dominated by associations that require graduation from approved law schools, which has led to a bench and bar being dominated by the Anglo middle-class (Zion, 2006). The growth of Indigenous and restorative justice movements has

been a response to the increasing recognition that these systems serve to reinforce structural inequalities and the marginalization of minority groups (Monchalin, 2015; Zion, 2006). The impacts of colonization are embedded within a state's social structure, from racialized policing to substantial employment, income and housing disparities (Bonds & Inwood, 2016; EagleWoman, 2019; Monchalin, 2015).

As a part of the criminal justice system, courts were also established based on colonial policies and practices. EagleWoman (2019) identifies the lack of culturally appropriate judicial forums, the failure to recognize Indigenous methods of justice, and systemic racism as key contributors to the overincarceration of Indigenous peoples. For example, judges are known to hand down the harshest sentences to Indigenous offenders when exercising their discretion (EagleWoman, 2019), and prisons around the world show an overrepresentation of Indigenous peoples (Archibald-Binge et al., 2020; Bureau of Justice Statistics, 1999; EagleWoman, 2019). The colonial impact on courts was wrought through the development of legislation and sentencing procedures that do not reflect the values and practices of Indigenous populations. Decolonization of the courts is necessary to repair the dysfunctional relationship between the justice system and Indigenous peoples.

### **Defining Decolonization**

Decolonization involves recognizing and understanding the colonialism embedded in a State's policies and infrastructures, challenging colonial-induced manifestations, and reclaiming Indigenous identity and lands (McGuire & Palys, 2020). It is a process that requires an overhaul of the state's legal and political systems, and for settlers to recognize the benefits they continue to reap from the historical displacement and marginalization of Indigenous peoples. Indigenous groups have made it clear that what is most important is the recognition of their rights – to be able to legislate and govern under their own principles – is key (EagleWoman, 2019; McGuire & Palys, 2020; Palmater, 2018). Decolonization can be visualized as a tree, with growth obtained from listening to and consultation with marginalized groups all the way to building relationships into a non-hierarchical model:

Source: (Asadullah, 2021, p. 19)

A non-hierarchical model would be one that respects Indigenous law and justice practices as independent from the State legal system. Building relationships would mean addressing the inequalities between Indigenous and non-Indigenous people, taking concrete steps to remedy them, and rebuilding legal and political systems in a way that will benefit everyone.

The courts play an important role in the criminal justice system. They apply the law to the cases brought before them in order to determine an appropriate sentence or resolution. This effectively makes them an extension of the dominant legislative body, which becomes problematic when state laws have been created according to a Eurocentric perspective. Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) outlines the right of Indigenous peoples to promote, develop and maintain institutional structures based on their customs, spirituality, traditions and practices, including juridical systems. This points to the need for a self-administered court system that would allow Indigenous communities to enforce their own interpretation of the law (EagleWoman, 2019).

Decolonizing the courts would require a “radical break that is profoundly unsettling to the settler colonial state” (Boothroyd, 2019, p. 906). In other words, the Indigenous harm reduction and diversion programs favoured by courts are not to be confused with true decolonization, as they serve to reinforce the power of colonial state structures through mollification (Boothroyd, 2019; EagleWoman 2019). An essential step in decolonization is the creation and recognition of independent Indigenous courts that are able to set their own criterion for participation and sentencing procedures (Boothroyd, 2019; Cunneen, 2018; EagleWoman, 2019), which would require a complete reconceptualizing of the court system. This may sound unreasonable to those accustomed to living under one central justice system, but it is important to remember that Indigenous communities across the world had been successfully practicing their own justice methods and systems before the Eurocentric practices were inflicted upon them. Decolonization must involve a recognition and revival of these systems because Indigenous peoples have clearly been failed by colonial institutions.

In summary, decolonizing requires: 1) implementing UNDRIP recommendations; 2) nurturing Indigenous courts as legally independent systems; 3) recognizing Indigenous sovereignty and land rights as well as the impacts of colonialism in relation to them; and 4) providing the necessary supports and resources for the creation and maintenance of these



systems. The result would be a court system that functions significantly differently, with Indigenous legal authority granted equal status to State authority.

### **Promising Decolonizing Practices**

This chapter outlines a number of examples of court decolonizing practices in three countries: the United States (U.S.), Canada and Australia.

#### **Navajo Nation Courts in the U.S.**

1.7% of the U.S. population is made up of Indigenous peoples belonging to 561 federally recognized tribes, and they are incarcerated at a rate 38% higher than the national average (Jones et al., 2014; Bureau of Justice Statistics, 1999). The 1934 *Indian Reorganization Act* formally authorized tribal institutions of self-governance, allowing the majority of Tribal Nations in the U.S. to adopt tribal constitutions and court systems (EagleWoman, 2019). This has led to the creation of over 330 formal tribal courts within the U.S. that have jurisdiction over tribal members within their territory and on certain activities of others (EagleWoman, 2019). Outside these boundaries, however, jurisdiction is limited by federal legislation and U.S. Supreme Court decisions, and there continue to be jurisdictional disputes over prosecution (EagleWoman, 2019; Jones et al., 2014). The U.S. Indigenous law movement has yet to become nationally organized, and the 1993 *Indian Tribal Justice Act*, which recognizes traditional Indigenous law, was only passed at the suggestion of the Navajo Nation's courts (Zion, 2006). The Navajo Nation have remained at the forefront of the U.S. Indigenous justice movement since the creation of the Navajo Court of Indian Offenses in 1892.

In 1982, the Navajo Nation established the Peacemaking Court, and eventually removed the word "court" in recognition of the return to the community-based roots of peacemaking (Judicial Branch of the Navajo Nation, U.S., 2021). The courts were designed to value the differences between Anglo law as a common law system built on authority, rank, and obedience, while Navajo common law is built on relationships, traditions, emotions, and personal engagement (Yazzie, 2005). Yazzie (2005) explains that the traditional Navajo response to crime is to talk the problem out respectfully, and that appointed Peacemakers take an advisory role while the involved parties themselves must make the decisions regarding dispute resolution and sentencing. Peacemakers are Elders, or Navajo wise persons, and are responsible for guiding participants through the steps of prayer, expressing feelings, the lecture, discussions, reconciliation, and consensus, while community and family members offer support throughout the process (Judicial Branch of the Navajo Nation, 2021; Yazzie, 2005). This differs significantly from Eurocentric courts, which often use formal representatives for the involved parties and assign the decision-making process to a judge or jury.

Peacemaking has important differences to mainstream restorative justice programs such as victim-offender mediation. Whereas mediation is seen as a one-time service based on individuality and material achievement, Peacemaking is viewed as a way of life explicitly grounded in community culture, values, and spirituality (Nielsen, 1999; Yazzie, 2005). According to Zion (2006), although the Navajo Nation courts are following a parallel path to restorative justice movements, these courts are in the unique position of trying to revive Navajo culture while facing attacks on their jurisdiction and competence. Although Peacemaking strategies have allowed the practice of Navajo common law and the return of conflict resolution to these communities, an important step in recognizing Indigenous sovereignty, they continue to be threatened by a perceived lack of legitimacy (Nielsen, 1999; Zion, 2006). There are concerns that mainstream U.S. society could push for the modification and standardization of Peacemaking procedures in accordance with the existing status quo, which would undo the progress made in respecting the independent practice of Indigenous justice (Nielsen, 1999).

Another issue that threatens Peacemaking is a lack of resources and formal recognition of Indigenous legal authority. Funding is scarce for technical support, training, and educational materials. As well, few Peacemakers are able to rely on Peacemaking as a source of income, and a lack of community resources makes it difficult to address relevant social problems faced by many Indigenous community members (Nielsen, 1999). Traditional justice systems are an essential part of sovereignty and perhaps this is why there has been a reluctance to develop legislation that explicitly confirms Indigenous authority in these areas. EagleWoman (2019) describes U.S. federal Indian law as a pendulum that swings from the support of tribal sovereignty to the destruction of tribal sovereignty. On the one hand, Navajo Nation courts have been granted the authority to require judges to be fluent in the Navajo language and lawyers to pass the Navajo Nation bar exam in order to be admitted for court appearances (EagleWoman, 2019). On the other, the

U.S. Supreme Court has issued several decisions curtailing tribal court jurisdiction where non-Indigenous people are involved, asserting their authority as ultimate (EagleWoman, 2019).

Navajo Peacemaking in the United States offers an idea of what returning to the roots of Indigenous justice might look like. But it is important to remain vigilant in the face of government rhetoric that aims to distract while continuing to inflict colonial harm (McGuire & Palys, 2020). There continues to be significant overlap between tribal and federal jurisdiction, and tribal courts must share concurrent jurisdiction with federal authorities over serious or felony offenses, regardless of the tribal status of those involved (EagleWoman, 2019). The decisions and restrictions imposed by state courts, as well as the lack of funding allocated to tribal courts, indicate that the Eurocentric legal system remains dominant in the U.S. As Yazzie (2005) so succinctly states, “governments are afraid of what is underneath the water” (p. 132).

In summary, Navajo Peacemaking in the United States has proven that traditional Indigenous methods can be used within a modern court system, and that they work (Yazzie, 2005). The establishment of Navajo Nation courts is the first step in unravelling centuries of colonization and repairing some of the damage that has been inflicted under settler rule. If the ultimate goal is true Indigenous sovereignty, then these courts are a necessary and valuable part of this journey. However, there remains a need for recognition of Indigenous authority, jurisdictional clarity and appropriate funding and resources for these courts to operate to their fullest extent.

### **First Nations Courts in Canada**

Indigenous Peoples make up around 4.9% of the total Canadian population, in over 630 First Nation communities representing more than 50 different Nations and Indigenous languages (Government of Canada, 2016). Approximately 26% of federal correctional admissions and 28% of provincial and territorial custody admissions consist of Indigenous peoples (EagleWoman, 2019). The diversity among the cultural backgrounds, beliefs and practices of different First Nations is of great significance when it comes to establishing a justice system that effectively represents and respects all Canadians. However, Canada has typically quashed Indigenous rights to sovereignty, positioned Indigenous belief systems as inferior, and failed to make more than token gestures towards Indigenous justice (McGuire & Palys, 2020). Recent years have shown a growing demand for the respect of Indigenous rights and justice practices, but progress has been limited.

Canada has demonstrated a more centralized approach to Indigenous justice than the U.S. and began to adopt legislative changes in recognition of the overrepresentation of Indigenous peoples within the criminal justice system at the end of the 20th century. In 1999, the Supreme Court of Canada (SCC) was tasked with assessing the case of *R. v. Gladue*, and ruled for the addition of Section 718.2(e) of the Canadian Criminal Code:

“all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” (CCC, [1999], 2021)

This section indicates that Indigenous offenders must be sentenced in a way that emphasizes restorative justice and the unique background factors faced by Indigenous people (Ralston, 2020). It marked a shift in the criminal justice system towards recognizing Indigenous circumstances and accommodating Indigenous practices. Gladue factors must be considered for all self-identified Indigenous persons, and Gladue pre-sentencing reports were developed as a way to identify the circumstances and their influence on involvement with the criminal justice system for each individual offender, usually after a number of extensive meetings (Department of Justice, 2018).

The lack of culturally appropriate sentencing processes and alternatives soon became clear with the implementation of Gladue reports. This led to the creation of First Nations Courts (FNCs) and programs that are designed by Indigenous peoples to provide a culturally appropriate alternative form of dispute resolution. Gladue courts have been set up across Canada to follow the colonial criminal justice model while incorporating Indigenous values and principles into the court processes. According to the Department of Justice (2018), these specialized courts are part of and have the same powers as provincial courts but can allow for the diversion of Indigenous offenders who plead guilty into community-based alternative sentencing processes. McGuire and Palys (2020) describe such systems as “parallel systems” serving as a “pan-indigenization and sanitization of Indigenous justice – essentially rearranging things to best suit colonial interests” (p. 66). Indeed, Gladue courts have been criticized for providing standardized plans of care and simply

referring offenders to Indigenous programming that does not always reflect the diversity of First Nation communities (Department of Justice, 2018). The fact that non-compliance with a plan of care can result in incarceration shows the limitations of FNCs operating within a dominant Eurocentric justice system. It is worth noting that an Indigenous person has yet to be appointed to the Supreme Court of Canada, which remains the most powerful sentencing body in the country (Monchalin, 2015; White, 2021).

Other First Nations Courts include Elders and spirituality to develop Indigenous healing plans that address complex social justice issues stemming from the intergenerational effects of colonization (Johnson, 2014). The Tsuu T'ina Peacemakers Court established in 2000, the first of its kind in Canada, and integrated the Alberta Provincial Court with the Tsuu T'ina Nation community and justice traditions (Johnson, 2014). The court used a judge who was a member of the First Nations Bar, court clerks were hired directly from the community, and two Elders served as Peacemakers and community witnesses to the proceedings (Johnson, 2014). The leadership and direction of Indigenous peoples within the court was a major improvement on the limitations of previous diversionary programs, but it is still a far cry from true sovereignty. "Indigenization" of the court system, or the hiring and promotion of Indigenous justice professionals, allows it to appear more culturally sensitive while failing to challenge the status quo or implement real system-wide change (McGuire & Palys, 2020, pp. 62-63). Although the Tsuu T'ina Peacemakers Court allows for valuable Peacemaking practices, it is still tied to the Alberta Provincial Court and falls within the mainframe of the State criminal justice system. Another recurring issue with FNCs and programs is a lack of funding and resources, which are not allocated at a comparable rate to the rest of the criminal justice system (Boothroyd, 2019; EagleWoman, 2019).

A more recent example of FNCs, the Calgary Indigenous Court (CIC), was established in 2019 to apply Indigenous restorative justice principles, such as Peacemaking, to bail and sentencing hearings for Indigenous offenders (Provincial Court of Alberta, n.d.). The assigning of Indigenous prosecutors and legal counsel allows for a more open and trusting relationship with the accused people (Narine, 2020), while the use of healing plans, traditional rituals and cultural supports is more in line with Indigenous values (Elizabeth Fry Society, 2019; Grant, 2019). What makes this court particularly unique is the Soksipaitapiisin Case Management Table (CMT), which was developed through consultations with Elders and Knowledge Keepers to provide supports for Indigenous offenders with mental health, substance abuse, or other complex issues (Dalshoug, 2021). The CMT allows offenders to meet with an Elder and Knowledge Keepers who provide cultural guidance, individualized support and teachings, and access to resources such as counselling and addiction treatment services (Dalshoug, 2021). In its first case, the Calgary Indigenous Court granted bail to an offender who may not have been released without the supports put in place, which included arranging for a sober group home and a plan with a treatment centre for addictions (Grant, 2019).

The Calgary Indigenous Court has built on some of the key concepts of previous courts to provide a multidimensional approach. This has very promising implications for addressing intergenerational trauma as a result of colonization because the court is guided by Indigenous philosophy and provided with the necessary resources for treating some of the root causes behind involvement with the justice system. The use of the CMT allows for Healing Plans tailored to each individual offender and their needs, while the use of traditional rituals such as blanket ceremonies are key for reconnecting offenders to their cultural identities (Dalshoug, 2021; Provincial Court of Alberta, n.d.). However, these court systems still must operate within the dominant mainstream Canadian legal system, which limits their ability to further develop Indigenous justice principles or even follow them to their fullest extent.

In summary, FNCs have gradually improved and become a bigger part of the mainstream court system in Canada. These courts have become more meaningful than peripheral diversionary programs, although there are ongoing issues with insecure funding and State sovereignty. The Calgary Indigenous Court is perhaps the closest Canada has come to decolonizing its court system: there is a recognition of Indigenous authority, and traditional justice practices are followed alongside needed supports and the guidance of Elders. If Indigenous peoples were granted full power over sentencing procedures and deciding who is eligible for participation, and receive adequate resources to operate these courts independently from provincial and federal court systems, a decolonized court system could be attainable.

### ***Aboriginal Courts in Australia***

Approximately 2.5% of the Australian population identify as Indigenous, including Aboriginal and Torres Strait Islander communities that live across urban and remote areas, while Indigenous people constitute around 28% of the Australian

prison population (Archibald-Binge et al., 2020; Blagg, 2017). Australia takes a more centralized approach to Indigenous justice policies than the U.S. with state-level jurisdiction (Harris, 2004; Jones et al., 2014). This approach has been characterized by the implementation of restorative justice programs that claim to be grounded in Indigenous practice and a diversionary solution to the overincarceration of Indigenous peoples. The reality is these programs, however, is they only accept a limited degree of cultural difference while remaining within the confines of Eurocentric conceptions of justice, and effectively commodify Indigenous worldviews (Blagg, 2017; Tauri, 2017).

In Australia, the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADC) provided recommendations including hiring more Indigenous court staff and interpreters and providing cross-cultural training for court personnel (Harris, 2004). This ultimately led to the creation of Aboriginal Courts, beginning with the Nunga Courts established in South Australia in 1999. The Nunga Courts were inspired by the Senior Magistrate's experiences attending circuit sittings in the Pitjantjara Lands, and they allowed for increased involvement of community members, family, and Elders in court proceedings and sentencing (Courts Administration Authority of South Australia, 2012). The Magistrate Courts of Queensland followed suit with the creation of Murri Courts, while New South Wales established a Sentencing Circle program based on the Canadian model in 2001. These courts lacked defined jurisdiction and procedures and had to operate within the Magistrates' Court system, which is overseen by a Magistrate with the assistance of Indigenous persons (Harris, 2004). The Sentencing Circle program is also problematic in the sense that it is based on the practices of Canadian Indigenous peoples rather than those who reside in Australia (Tauri, 2017).

Koori Courts were introduced in Victoria as a more comprehensive court system: The Koori Division of the Magistrate's Court was established, and new legislation defined the jurisdiction and procedure of these courts (Harris, 2004). Under Koori Courts, participants including the offender, magistrates, family, and Elders sit around a table to take part in an informal and culturally appropriate sentencing conversation (Magistrates' Court of Victoria, 2020). Empowering Indigenous communities to participate in decision making and have an influence over the structure of court proceedings is an important part of decolonization. They are, however, still part of a hybridized system that can only operate to the extent permitted by non-Indigenous courts (Harris, 2004). Mainstream courts continue to show an inadequate response to Indigenous beliefs and values and there is an ongoing lack of non-custodial sentencing alternatives, services, and programs (Cunneen, 2018). The implementation of Aboriginal Courts has not slowed the rate of Indigenous imprisonment and have remained peripheral in the criminal justice system, which arguably is preventing the introduction of significant change (Cunneen, 2018; Harris, 2004).

Nevertheless, Aboriginal Courts have had a positive impact by providing Indigenous offenders with more culturally appropriate legal services and proceedings. Koori Court programs have been shown to reduce reoffending rates, as well as the average number of days spent in youth detention, and participating Elders have reported success in reaching those with little family and community support (Archibald-Binge et al., 2020; Wahlquist, 2018). The Koori Court model has been less intimidating and more approachable for Indigenous offenders, making it easier for them to speak about issues that led to their offending, while a recent Supreme Court decision has confirmed that Aboriginal cultural rights must be considered in certain court processes (Allam, 2018; Wahlquist, 2018). The positive implications of these courts emphasize the need for consistent funding and an increase in the availability of sentencing alternatives.

In summary, the development of Aboriginal Courts in Australia has reflected a growing recognition of Indigenous rights and the issue of overincarceration. Koori Courts have been among the most promising of these ventures and have made some significant improvements to the Magistrates' Court system. Aboriginal Courts are still under the authority of a colonial court system, however, and funding remains inadequate or unstable or insecure in some areas. For Australia to successfully address the overrepresentation of Indigenous peoples within its criminal justice system, further expansion of these programs and a larger investment of resources may be required.

### **Discussion and Comparative Analysis from a Decolonizing Lens**

This section will offer a comparative analysis of the U.S. Navajo Nation Courts, Canadian First Nations Courts, and Australian Aboriginal Courts from Asadullah's decolonizing tree perspective (2021), which has assessment tools for each step of decolonization.

These court systems show different responses in each of the respective countries. The U.S. system remains relatively decentralized, allowing Tribal Nations to form their own constitutions and court systems (EagleWoman, 2019; Zion,

2006). This can be positive in terms of recognizing the diversity among Indigenous communities and the importance of respecting the sovereignty of each Nation. But it can also be problematic when there is a lack of clarity regarding jurisdiction, legislative authority, and funding allocations. In contrast, Canada's justice system has remained highly centralized, with FNCs formed within provincial/territorial and federal court systems (EagleWoman, 2019; Johnson, 2014). This has allowed for these courts to access certain supports, such as treatment programs utilized by the Calgary Indigenous Court (Dalshoug, 2021; Provincial Court of Alberta, n.d.), and to act as diversionary programs for Indigenous offenders caught up in the mainstream court system. However, they are constricted within Eurocentric systems that do not necessarily reflect Indigenous values, and neither funding nor supports are guaranteed as long as they remain a minority system. Australian courts also follow a more centralized approach, and Aboriginal Courts are beginning to show an acceptance of Indigenous justice practices (Cunneen, 2018; Harris, 2004). These programs are limited, however, and Australia has yet to establish a comprehensive Indigenous court system that meets the needs of Indigenous offenders.

Asadullah (2021) fathoms decolonization as a tree structure, and this is one way of determining the progress that efforts towards decolonization have made. The "roots" of decolonization are listening and consultation with Indigenous groups using a trauma-informed approach (Asadullah, 2021). The reason for the development of many Indigenous courts was research indicating the overrepresentation of the Indigenous Peoples in mainstream criminal justice systems. This appears to have led to consultations with Indigenous groups and community leaders in many cases: the Navajo Nation has had an influential role regarding legislation in the U.S. (Zion, 2006), Indigenous peoples designed the FNCs adopted by the Canadian court system (Johnson, 2014), and the very first Australian Aboriginal courts were informed by the Magistrate's consultations with Indigenous communities (Harris, 2004; Magistrates' Court of Victoria, 2020). There also appears to be a growing recognition of the harm caused by colonial policies embedded in the mainstream criminal justice systems, and these now need to take this into account (Ralston, 2020; EagleWoman, 2019; Cunneen, 2018). The roots of decolonization are beginning to grow as there is more awareness around the impacts of colonization and the problems faced by Indigenous groups. But, as many Indigenous groups are calling for sovereignty (EagleWoman, 2019; McGuire & Palys, 2020; Palmater, 2018; Tauri, 2017), such consultations must continue until a justice system in line with this vision is developed.

The next part of Asadullah's decolonization tree is the trunk, consisting of relationship building that allows for the development of a non-hierarchical model (2021). This is where significant limitations begin to appear: although governments often portray the development of Indigenous courts as a partnership, the state almost always takes a dominant authoritative role. A true partnership requires equality and respect for each other's values, and this has yet to be fully demonstrated. The case study examples have shown recurring problems around a lack of funding, resources, and legislation to assert and make irrevocable the autonomy of Indigenous courts from the State justice system (Boothroyd, 2019; Cunneen, 2018; EagleWoman, 2019; Harris, 2004; Yazzie, 2005). Without the trunk, the branches and fruit of the tree – which constitute learning and sharing – are restricted (Asadullah, 2021). It is difficult to learn from Indigenous court systems and share their knowledge and practices unless they are granted the appropriate space and conditions in which to operate.

Table 1.1 summarizes the comparative analysis of the Navajo Nation Courts, FNCs, and Aboriginal Courts (Courts Administration Authority of South Australia, 2012; Department of Justice, 2020; EagleWoman, 2019; Farrenkopf & Bryan, 2013; Harris, 2004; Judicial Branch of the Navajo Nation, 2021; Provincial Court of Alberta, n.d.; Zion, 2006):

**Table 1.1 Comparative Analysis of Different Indigenous Courts in Australia, Canada and the U.S.**

<b>Court System</b>	<b>Landmark Legislation</b>	<b>Systemic Structure</b>	<b>Funding Sources</b>	<b>Consultation Groups</b>
Navajo Nation Courts	<i>Indian Reorganization Act</i> (1934); <i>Indian Tribal Justice Act</i> (1993)	Decentralized: independent from federal agencies; territorial jurisdiction	Federal: Bureau of Justice Assistance; Office of Justice Programs; U.S. Department of Justice	Navajo Nation
First Nation Courts	<i>Criminal Code</i> Section 718.2(e) (1996); <i>R. v. Gladue</i> (1999)	Centralized: branch of provincial/territorial systems; Crown-delegated jurisdiction	Federal: Indigenous Justice Program; provincial/territorial: government	First Nations; Elders; community leaders
Aboriginal Courts	<i>Aboriginal Communities Act</i> (1979); <i>Royal Commission into Aboriginal Deaths in Custody</i> (1991)	Centralized: branch of Magistrates' Court systems; Crown-delegated jurisdiction	Federal: Department of Justice	Indigenous communities; Aboriginal Legal Rights Movement

Source: The Author.

Ultimately, the decentralized approach utilized by the U.S. has allowed for greater diversity among tribal courts that are able to operate independently (EagleWoman, 2019). Considering the major role of sovereignty in decolonization, Canadian and Australian court systems may benefit from following a similar model. Issues with funding, jurisdiction, and recognition remain in each of these examples, and emphasize the need for further consultation with Indigenous groups as well as the development of a non-hierarchical court system. The roots of decolonization have been established, but there is much to be addressed if they are to continue growing and flourish.

### **Conclusion**

The courts are an essential part of the colonial criminal justice system. Colonization influenced the wellbeing of Indigenous groups across the world by creating and maintaining State institutions built on their exclusion and marginalization. Court systems maintain the status-quo power of these mainstream institutions and continue to overincarcerate Indigenous peoples at alarming rates. Decolonizing the courts means redistributing legislative and judicial power to Indigenous peoples so they may function as equals in their society. It is more than creating diversionary programs or hiring more Indigenous bodies to increase representation (McGuire & Palys, 2020). Using the U.S., Canada and Australia as case studies reveals that many of the courts being developed show promising signs of addressing the harmful effects of colonial policies but have yet to reach decolonization.

The Navajo Nation courts have shown how Indigenous justice can work within the U.S. criminal justice system through a decentralized approach that allows for the development and maintenance of independent tribal courts. FNCs in Canada also show progress in implementing Indigenous beliefs, values, and practices as part of a centralized system, usually operating as a branch of provincial or territorial court systems. Finally, Aboriginal Courts in Australia reflect a movement towards recognizing Indigenous justice systems under the Magistrates' Court system. These courts have shown positive results despite jurisdictional and funding limitations (Archibald-Binge, et al.; Grant, 2019; Narine, 2020; Wahlquist, 2018). Nevertheless, true decolonization will require the implementation of these programs alongside a radical reformulation of how the dominant criminal justice system works and how funding is distributed. As McGuire and Palys (2020) have stated, "Our colonizer's justice is inadequate and we must challenge our internalized colonial thoughts by rejecting its imposition" (p. 77). For courts to meaningfully represent Indigenous values, they must be freed from the bounds of a colonial justice system that was built to repress them.

### **Discussion Questions**

1. After reviewing the case studies in this chapter, do you believe Indigenous courts would operate more effectively as part of a centralized or decentralized court system?
2. There is ongoing criticism of current decolonization efforts for failing to address root causes and serving as a distraction from real change. Are Indigenous courts another example of tokenism, or do they provide an effective alternative to colonial courts? What more can be done to establish these courts as a channel for decolonization?
3. Funding and resource distribution continue to be significant barriers to the creation and operation of Indigenous

courts. What can governments and legal bodies do to address this problem? From where should funding for these courts come?

### Recommended Activities

1. Stay updated on the implementation of Indigenous courts and legislation through the United Nations Decolonization website at <https://www.un.org/dppa/decolonization/en> and the Department of Economic and Social Affairs at <https://www.un.org/development/desa/indigenoupeoples/>.
2. Contact your local government representative to express an interest in the development of decolonization initiatives in your area and add your support to Indigenous-led petitions at Change.org and Amnesty International.

### Recommended Readings

Woo, G. L. X. (2011). *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada*. University of British Columbia Press.

McCaslin, W. D. (2005). *Justice as Healing: Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre*. Native Law Centre.

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# 4. Decolonization and Prison

MEGAN KORCHAK

## **Title: Decolonizing Prison: A Framework and Practices for Revisioning Incarceration**

### **Abstract**

*Colonization has had and continues to have significant lasting and damaging impacts on Indigenous peoples. More specifically, colonization within the justice system, including its correctional facilities, is pervasive and harmful as the two are closely intertwined. Extensive harms lie at the intersection of colonization and justice, including over-incarceration of Indigenous peoples. There is a fair amount of research on colonization and the prison system, but a lack of research on decolonization and the prison system. The importance of decolonization within the penal system is here explored against a background of what decolonizing prisons actually means and including examples of decolonized practices from around the world. Results show that attempts to decolonize prisons are beneficial, necessary and possible using a number of culturally informed methods.*

### **Introduction**

Colonization deeply changed the way the world works. Through colonization, an outsider group takes over the land and assumes power over groups indigenous to the area (Monchalin, 2016). In the Canadian context European settlers took over Indigenous land now known as Canada, dispossessed Indigenous peoples, and forced them to become dependant on the imposed Western systems (Monchalin, 2016). In Canada as elsewhere in the 'New World', the colonizers stole land from Indigenous peoples, and imposed laws and policies to make it legal, such as through *The Indian Act*, and displaced children into residential schools, thereby damaging the family unit (Monchalin, 2016). This is only a short list of colonial practices and its impacts in Canada, and they certainly are not just a thing of the past. Colonization and its impacts plague every institution in society in various ways to date (Monchalin, 2016). One such institution is the justice system, which is a contemporary colonial structure targeting the ancestors of the once-colonized (McGuire & Palys, 2020). Indigenous peoples face undue harm due to the nature of the justice system as a tool aimed at safeguarding the colonial structure and Westernizing the Indigenous (Monchalin, 2016). It is crucial for colonized groups to regain power and deconstruct colonial systems that continue to oppress them (McGuire & Palys, 2020).

Decolonization is the mechanism that will allow for restoration and conciliation of colonized groups who have had their power stolen (McGuire & Palys, 2020). Every system in society must be decolonized for this to occur, but particularly the Canadian Justice System (McGuire & Palys, 2020). This chapter will provide an overview of the colonial aspects of the correctional system, prisons and how they impact marginalized groups. This will include a brief introduction to what is currently being done to decolonize prisons. This paper will focus primarily on Indigenous peoples in Canada and offer an overview of decolonization and three promising decolonizing practices: healing lodges, prison theatre, and prison design.

### **Impact of Colonization**

The deep and complex relationship between colonialism and the penal system can be traced back to the creation of penitentiary system and explored as an ongoing colonial legacy (Chartrand, 2019). Improper treatment of Indigenous peoples in the prison system is more covert than in previous decades as there are now more rules, regulations and oversight (Chartrand, 2019). Despite the rules and regulations that attempt to ensure proper and fair treatment in the penal system, however, Indigenous peoples have been targeted since the first implementation of prisons (Chartrand, 2019). The legal system is an "instrumental mechanism" for colonization (M. McGuire, personal communication, January 18, 2021). The causal nature of this mechanism affords colonial groups and the prison system domination over the colonized, which creates a power imbalance fueled by racial difference and socio-economic inequity. The institutionalized racism of colonialism is very prominent in the justice system (Agozino, 2003), and it has created a problem of Indigenous over-incarceration (Chartrand, 2019; Martel et al., 2011).

The way that Indigenous people are processed and handled within the justice system amplifies existing personal

trauma and issues of injustice and also leads to longer and harsher sentences (Martel et al., 2011). Indigenous peoples face an ironic duality of their race contributing to the length and severity of their sentences in opposing ways (Martel et al., 2011). By identifying as Indigenous, they are categorized as high risk and high need too often, which qualifies them for both less and more programs (Martel et al., 2011). They are identified as having the highest need for certain programs because of their Indigenous ancestry, yet have less access to programming for the same reason. Indigenous ancestry makes a disproportionate number of offenders be categorized as high-risk on assessment scales, meaning they are too high-risk to participate in programs classified as lower- or medium-risk (Martel et al., 2011). Therefore, their over classification as high-risk due to systemic racism is a direct barrier to accessing several programs (Martel et al., 2011). This highlights how some of the policies within the penal system exacerbate colonialism. Indigenous people also face a loss of opportunity in the penal system because of their cultural background (Martel et al., 2011). For instance, Indigenous peoples are classified in higher risk categories and mainly sent to medium or maximum-security institutions, which offer less opportunity and freedom; while a disproportionately low number of Indigenous inmates are sent to minimum security institutions or are deferred to programs equating to that security level (Martel et al., 2011). This is a direct result of systemic racism in the justice system and continued colonization (Martel et al., 2011).

Further to this, imprisonment continues to damage important connections. There is a complete disruption in families when a loved one is locked away and isolated. Indigenous families living on reserves are often hundreds of kilometers away from the prison and therefore have limited access to loved ones (Withers & Folsom, 2007). This was also true of most residential schools. The targeting of adult Indigenous people for incarceration splits up a disproportionate number of Indigenous families which creates trauma that can be deeply damaging to the entire family (Griffiths & Murdoch, 2018). Having a parent sent away to prison creates single-parent families, which is difficult on the parent(s) and the children (Withers & Folsom, 2007). As well, it can create an intergenerational cycle of crime within the family, as children of an incarcerated parent are two to four times more likely to come into contact with the justice system (Withers & Folsom, 2007). Single Indigenous parents can be at an elevated risk of being arbitrarily deemed unfit and having their children unrightfully placed in care, making them over-represented in child protection. Foster care and other alternative-to-family 'solutions' are a colonial continuation of residential schools by separating Indigenous families and removing children from their culture (Monchalin, 2016). Incarceration continues the colonial legacy of breaking up families and causing intergenerational trauma. Prison is very damaging in several avenues of life and Indigeneity adds additional harms on top of the typical experiences in the justice system.

Aside from these damaged connections, criminal records impact one's ability to gain employment. Many workplaces require a criminal record check to be conducted as a condition of employment. In this way, prison serves as a direct obstacle to reintegration back into the community (Heydon & Naylor, 2018). It limits the opportunities an offender will have once they are released from incarceration and return to the community and this limitation of reintegrative opportunities can be damaging (Heydon & Naylor, 2018). Employment is an essential part of living a productive life and limiting an offender's employment opportunities also limits their capacity to avoid a criminogenic lifestyle (Heydon & Naylor, 2018).

The focus on punishment is a colonial ideal as opposed to Indigenous ideals of healing (Elliott, 2011). Prison is counter-productive and there is a cycle of recidivism when trauma goes unaddressed, and healing is pushed aside (Elliott, 2011). This is especially true among individuals afflicted by a legacy of unhealed colonial trauma (Elliott, 2011). Generational lack of healing, loss of culture, and trauma mean that root problems go unresolved and a web of crime and entanglement in the justice system can spin out of control (Monchalin, 2016). Many Indigenous peoples get stuck in a cycle of punishment and incarceration (i.e., the revolving door)—a result of colonial policies and practices keeping Indigenous people bound to/by the legal system (Elliott, 2011). Western ideals of justice prevent Indigenous peoples from healing in a culturally meaningful way, allowing the cycle of crime to continue (Monchalin, 2016).

### **Decolonization Overview**

There are several ways to conceptualize and define decolonization. Lisa Monchalin defines it as “[T]he unlearning and undoing of colonialism. It is a process and a goal. It is a reimagining of relationships with the land and peoples” (2016, p. 293). We must actively undo colonialism by deconstructing the persistent colonial ideologies residing in systems. Decolonization is an interesting approach as it goes against typical ways of knowing, whereby you simply learn new

information, such as in a history class. Decolonization is a deep and complex act of unlearning the colonial ideas you were taught (Monchalain, 2016). This takes learning to a whole other level as it requires more than just a passive deposit of knowledge. Rather, decolonization involves an active, intentional, and effortful process aimed at undoing colonialism (Monchalain, 2016).

Decolonization can take place at the psychological, intellectual and/or physical levels and in macro or micro forms (Asadullah, 2021). Micro forms of decolonization are on a smaller and more personal scale and can include decolonizing the mind in part through reconnecting to language (Asadullah, 2021). Decolonizing the mind is an important step to healing (Ngũgĩ, 1986 cited in Asadullah, 2021). One must open one's mind up to decolonization and work on reconstructing thought processes that break free from a colonized mindset (Monchalain, 2016). Decolonization should permeate everyday life by reaffirming ways of cultural existence and practices (Yellow Bird, cited in Monchalain, 2016)

Macro decolonization is the big picture (Asadullah, 2021). It is the dismantling of the colonizing tendencies of societal systems, institutions and policies (Monchalain, 2016). Decolonization on a macro level is much more complex as colonialism is reinforced through several different layers of each system (Monchalain, 2016). One of the massive organizational colonial structures is the criminal justice system, which has several layers. Decolonizing the justice system would mean decolonizing police, courts, sentencing, and prisons. That also includes all of the layers or subsystems such as practices and policies in each setting. It is an effortful process to undo colonial harms at such a grand scale. However, the process has to start somewhere, and small steps can lead to major essential changes.

A context-specific definition of a *decolonized prison* is difficult to formulate. There are already several different definitions and understandings of the term "*decolonization*", including those introduced in this paper. There are also different understandings of "*prison*" and what it stands for. Some argue that prisons are for punishment while some argue that they are for healing and change (Elliott, 2011). The Oxford Languages online dictionary defines prison as "a building in which people are legally held as a punishment for a crime they have committed or while awaiting trial" (Oxford Languages Online Dictionary, n.d.). This definition takes on a Western view as it mentions punishment and no other concepts (Elliott, 2011). Prisons in Canada have a mandate to offer programming that "addresses individual criminal behaviour" and includes correctional, educational, employment and social programs (Correctional Service Canada, 2019, p. 1). This programming is supposed to assist in rehabilitating offenders away from criminogenic behaviours. However, prisons have been on a path away from rehabilitation, and have become overburdened, tougher and harsher, especially for Indigenous people (Ling, 2019). The prison system and the overarching justice system is stacked against Indigenous peoples; it is thus inequitable. This imposed rule of prison is clearly not working for Indigenous peoples.

There is no context-specific definition for the *decolonization of prisons*, so the meanings must be combined subjectively to create one. The decolonization of prisons can be defined as the undoing of colonial harms within the justice system, specifically prisons. It would mean creating a decolonized space to heal and repair harms done after a crime has been committed in society in a way that aligns with Indigenous values and ideals.

### **Decolonizing Prisons**

The decolonization of prisons is an imperative step to reducing systemic racism in the justice system in order to produce fairer outcomes (Monchalain, 2016). Prisons that continue to reinforce colonialism inevitably create social harms and reduce any attempt at reconciliation (Monchalain, 2016). In order to align with the Truth and Reconciliation Commission's Calls to Action under the justice section, decolonization is necessary (Monchalain, 2016).

Decolonization of prisons means more than simply Indigenous spaces by adding more Indigenous workers within the prison system (McGuire & Palys, 2020). It also means more than simply accommodating Indigenous peoples by implementing cultural components to the system (McGuire & Palys, 2020). Decolonization means that Indigenous peoples have control and sovereignty over their own systems (McGuire & Palys, 2020). Full autonomy is important for regaining control and power, rather than the current Western system exerting power over Indigenous systems in the form of funding and imposed policies (McGuire & Palys, 2020).

The decolonizing framework for restorative justice proposed by Muhammad Asadullah can be adapted to conceptualize the decolonization of prisons (2021). This would demonstrate underlying concepts important for a

framework on how to go about the decolonization of prisons in a culturally informed manner grounded in respect (Asadullah, 2021). The proposed framework is a tree with four distinct components: roots, trunk, branches and fruit (Asadullah, 2021). Each of these will be outlined below in regard to decolonizing prisons.

The tree roots emphasize the action of consultation and active listening while attempting to do no further harm (Asadullah, 2021). It is also important to be trauma informed and engaged in non-oppressive techniques (Asadullah, 2021). This means that Indigenous peoples need to be actively consulted while attempting to implement decolonization in prisons. Any action without consultation violates basic respect and goes against the do no harm principle (Asadullah, 2021). There needs to be meaningful consultation across the entire process between the justice system and Indigenous peoples and their voices should be amplified rather than suppressed. Indigenous systems of justice existed long before the Western criminal justice system (Elliott, 2011). Therefore, they have valuable insight on how to apply justice to their own people and should be listened to (Monchalin, 2016). This would especially mean ensuring those with lived experience are heard, this means current and former prisoners. Indigenous voices within the prison system should be listened to, amplified and consulted about meaningful ways to achieve decolonization.

The trunk highlights local indigenous peoples and the action of relationship building and interconnectedness (Asadullah, 2021). People are interdependent and relationships are the key to this relational approach to justice (Llewellyn, 2011). There is an equality of relationships in this approach underscored by respect, dignity and concern (Llewellyn, 2011). Thus, meaningful relationships need to be achieved with those who are consulted in the indigenous community (Asadullah, 2021). It cannot be a superficial collection of one-sided information, or it would violate the importance and equality of relationships (Llewellyn, 2011). There should be a meaningful relationship between local Indigenous peoples and justice system officials. As well, there is an imbalance in the relationship between inmates and justice system personnel where inmates are seen as inferior to corrections workers (Griffiths & Murdoch, 2018). Decolonizing prisons would attempt to balance these relationships in the carceral facility and view everyone more as equals in order to achieve equality of relationships (Llewellyn, 2011).

The tree branches reach out to local and traditional wisdom for learning (Asadullah, 2021). Local Indigenous groups have capacity, wisdom and are experts in their own practices (Asadullah, 2021). There is much to be learned from locals and they should be co-creators of emerging knowledge (Asadullah, 2021). When researching how to decolonize the justice system and make it fair for Indigenous peoples, drawing upon local knowledge is crucial. Without this, any ideas would be uninformed and the opportunity to learn from the experts themselves, the Indigenous peoples, would be lost.

The tree's fruit is the final element of the Decolonizing Tree and embodies sharing as the outcome if the earlier steps are successfully ed (Asadullah, 2021). Following the tree's processes should create a locally informed and guided plan for decolonizing prisons that is relevant to the specific culture in a given setting (Asadullah, 2021). Following all of these steps should lead to a decolonized framework that can be applied in the prison setting (Asadullah, 2021). Indigenous peoples should be engaged in and benefit from this process and they should be able to guide and inform their own processes as they evolve (Asadullah, 2021). This could look like a decolonized program or decolonized spaces in the prison setting, and even decolonized alternatives to prison.

### **Promising Decolonizing Practices**

There will be a lot of necessary steps in the decolonization of prisons moving forward. Prisons need an overhaul in order to be transformed from colonial institutions to institutions of healing (Chartrand, 2019). Trauma needs to be addressed through relevant cultural programming and colonized groups need to be reconnected to their culture (Nielsen, 2016). Prison systems need to promote sovereignty of colonized groups and let them handle offenders in a culturally appropriate way (McGuire & Palys, 2020). Full consultation with Indigenous peoples is necessary when discussing changes to prison systems to ensure that decolonization is progressing in a meaningful way (Cunneen, 1997; Monchalin, 2016).

There are marginalized groups around the world who suffer from racialized over incarceration as a result of colonialism. This wide scope means there are also several decolonial practices in place and rooted in specific cultural contexts that aim to reduce the impacts of colonialism within prisons. These practices are not approaches that can be copied and reproduced for use in other cultures while expecting the same results (Asadullah, 2021), and doing so would

result in further colonial harm by imposing culturally insensitive practices upon the group (Chartrand, 2019). Looking to other cultures' practices relating to prisons helps us appreciate the value of decolonial practices. Different colonized groups may have different beliefs and histories, however, decolonial practices grounded in their own cultural contexts can show benefits for all (Monchalin, 2016). This section outlines three promising practices rooted in a decolonizing prison framework.

### **Healing Lodges in Canada**

Healing lodges are an excellent attempt to decolonize prisons. They are culturally appropriate centres that promote healing and cultural connection and are shown to be beneficial for offenders who participate. (Nielsen, 2016). Healing lodges follow Indigenous customary laws which include values such as, "individual autonomy, non-coercion, collectivism, interconnectedness and healing" (Nielsen, 2016, p. 324). Healing lodges are an alternative to a traditional prison. They create a path towards healing in a way that is culturally relevant and thus promotes empowerment and Indigenous sovereignty (Nielsen, 2016). Despite the attempt to decolonize prisons through the use of healing lodges, Correctional Service of Canada (CSC) institutions are still overrun with colonial practices that negate the success of healing lodges (Nielsen, 2016; Boyce, 2017). To make them more transformative, holistic and decolonized, healing lodges must be run by Indigenous groups (Nielsen, 2016).

There are ten Indigenous healing lodges in Canada, all are correctional institutions designed to be culturally relevant for Indigenous offenders (Nielsen, 2016). Four of the healing lodges are run by CSC and six are run under Indigenous groups (Correctional Service Canada, 2021). There are not enough healing lodges to serve the overrepresented Indigenous population incarcerated, so most Indigenous offenders do not get an opportunity to go to these facilities (Nielsen, 2016). A very small number of people are able to attend these lodges due to severely limited capacities. In the 2017/2018 fiscal year, a total of 147 people attended healing lodges, 18 of the participants were non-Indigenous while the remaining 129 were Indigenous (Connolly, 2019). The need for more healing lodges is clear, considering Indigenous over-incarceration rates that year showed that a quarter of inmates in the Canadian justice system were Indigenous, despite making up only 4% of the general Canadian population (Department of Justice Canada, 2018). These numbers are only continuing to rise, confirming the extensiveness of Indigenous over-incarceration and how crucial access to culturally relevant programming is. Healing lodges are also minimum-security facilities, so only offenders categorized at that level qualify for a healing lodge, meaning many are turned away due to their disproportionately high classification (Nielsen, 2016). Those who are medium risk are considered on a case-by-case basis, but from the low-capacity rates very few get in at that security level (Nielsen, 2016).

There is an important bond and connection between staff and residents at healing lodges as well as a connection to the outside community (Trevethan, Crutcher, Moore, & Mileto, 2007). This bond is less hierarchical compared to the scales for offenders and corrections officers in a traditional prison setting (Griffiths & Murdoch, 2018). An analysis of the *Pê Sâkâstêw* healing lodge determined that clients were generally satisfied with the overall connection to culture within the centre and their overall experience at the healing lodge (Trevethan et al., 2007). The many opportunities at this centre include cultural arts, music, dance, ceremonies, and guidance from elders (Trevethan et al., 2007). Programs at this lodge revolve around substance abuse, emotion management, cognitive skills, family improvement and the *In Search of your Inner Warrior* program for an in-touch way of living (Trevethan et al., 2007). All programs are tailored to the Indigenous population and the particular problems they face as a result of intergenerational trauma and colonialism (Trevethan et al., 2007). Lower recidivism rates were also linked to attending and participating in the programming the *Pê Sâkâstêw* healing lodge (Trevethan et al., 2007).

The CSC's mandate has several constraints regarding the application and utilization of such lodges as a culturally relevant program for healing (Boyce, 2017). Many of the CSC's policies limit the scope of programming and restrict what is done in the lodges (Nielsen, 2016; Boyce, 2017). Margaret Boyce analyzed Okimaw Ohci Healing Lodge in Saskatchewan and found several issues linked to continued colonial control in the facility and weak accommodation counteracted through counterproductive policies (2017). Accommodation by the CSC is seen in its recognition of the importance of healing lodges to Indigenous peoples and creating a space for the practice (Nielsen, 2016). However, the implementation is still overseen through a Western, colonial lens and is only done on a small scale (Boyce, 2017). Healing lodges are part of decolonizing the prison system but are themselves still somewhat colonized through the policies and practices that

CSC puts forward to be followed (Boyce, 2017). Indigenous sovereignty calls for independent operation of these facilities without colonial oversight and counterproductive rules to follow (Boyce, 2017). The implementation of healing lodges sets a path for decolonization, but further work needs to be done. In time with changes, they may become increasingly decolonial institutions.

### **Prison Theatre in New Zealand**

Prison theatre is another example of decolonizing prisons (Hazou, 2020). Prison theatre was used as programming in a prison in Auckland, New Zealand (Hazou, 2020). New Zealand has a colonial legacy where Indigenous groups such as the Maori were (and continue to be) colonized (Tauri, 2019). Maori offending has been linked to the lasting impacts of colonialism: loss of identity and displacement (Quince, 2007; McIntosh & Workman, 2017). These themes also resonate with Indigenous peoples in Canada (McGuire & Palys, 2020). The Maori peoples are disproportionately overrepresented in the justice system as a result of colonialism (McIntosh & Workman, 2017). Decolonization is an important part of healing and escaping the cycle of imprisonment (Monchalin, 2016).

In Auckland Prison, inmates took part in a play called *Puppet Antigone* (Hazou, 2020). Preparations for the play included weeks of rehearsal as well as workshops focused on mask work and storytelling (Hazou, 2020). The play conveyed themes of morals, right and wrong, and humility (Hazou, 2020). It was an old Greek play transformed as the theatre group was encouraged to draw cultural connections to it and input their own culturally relevant meanings. (Hazou, 2020). The group of prisoners was guided by a *kaumatua*, an elder Maori who led the group through cultural protocols in the play (Hazou, 2020). Facilitators of the theatre program ensured acknowledgement of Maori practices with efforts to not reinforce colonial practices (Hazou, 2020). This program was conducted with the *Treaty of Waitangi* in mind, in the sense that facilitators engaged in partnership and sought to advance Maori knowledge (Hazou, 2020). This decolonial approach to prison theatre allowed the group to explore and share parts of their culture stifled by colonialism (Hazou, 2020). There was an overall sense of pride and cultural connectedness amongst inmates who participated in the theatre program (Hazou, 2020).

The play employed the use of puppets, which served as a useful medium for free expression distanced from the individual (Hazou, 2020). Using the puppets, they were able to work on empathy and emotions and portray themselves in a different way (Hazou, 2020). There was a focus on repairing evil with ties to Maori culture and the impacts of colonialism (Hazou, 2020). Theatre in prison challenges colonialism and can help prisoners express themselves (Hazou, 2020).

Prison theatre is very transformative as it takes place in an environment where people are confined and controlled (O'Connor & Mullen, 2011). In a typical prison setting, inmates are encouraged to comply and conform to those in power (O'Connor & Mullen, 2011). Inmates also experience a sense of lost autonomy, liberty and control over their own bodies (O'Connor & Mullen, 2011). Theatre counters this by providing an outlet for self expression and roleplaying (O'Connor & Mullen, 2011). According to Hughes, the arts can be therapeutic, foster change in an individual and are linked to positive outcomes in the justice system (2005). Prison theatre is enlightening for those involved in the prison environment and can humanize relationships between staff and inmates for more understanding and cohesion (O'Connor & Mullen, 2011). With prison theatre, there is a focus on empowerment and transformation of the self in connection to others (Hartnett, 2011).

Furthermore, relating to the topic of the arts, culturally relevant music and songs have been used to keep individuals out of prison and stop the cycle of recidivism and (Bamarki, 2016). Decolonization includes cultural revitalization and institutional reform in corrections to allow traditional practices to take place (Bamarki, 2016). It also includes empowering Indigenous peoples to reclaim their culture and identity. Songs are an important part of Indigenous culture and are viewed as “gifts from spirits” (Bamarki, 2016, p. 8). Songs are a medium of decolonization in practice. This program is intended to prevent returning to prison but given its cultural relevance it would be a useful program to apply within the prison setting.

Indigenous inmates benefit from the use of theatre and the arts in prison as long as they are used in are culturally relevant ways. An example of this is performing plays written by Indigenous people, for Indigenous people. Playing these cultural roles can restore a sense of cultural identity and sense of self.

### **Prison-based program in the State of Hawaii's Department of Public Safety, USA**

Prisons are often thought of as a place of punishment (Elliott, 2011). The general image of a generic prison contains bland colours and concrete walls permeating a sense of dullness. The atmosphere and aesthetics of the prison environment have an overall impact on inmates' attitudes and experiences (Griffiths & Murdoch, 2018). Prisons have been improving in recent years by adding more life to spaces through design (Wener, 2012). In progressive prisons, inmate cells have reflected more of a dorm room style (Griffiths & Murdoch, 2018). In Hawai'i, cultural teachings were incorporated within a culturally competent space, which resulted in more cultural engagement and set the tone for decolonizing prisons (Schar, Biewenga & Lombawa, 2020).

To reduce the over-incarceration of Native Hawaiians, a corrections model relevant to their culture was proposed (Schar et al., 2020). It was meant to connect the individual to family/spirit/land while promoting harmony/healing and ending intergenerational imprisonment (Schar et al., 2020). It was intended to be a culturally relevant and holistic approach to corrections. It was designed by local university students and faculty in consultation with stakeholders, members of the culture, and groups involved with decolonization worldwide (Schar et al., 2020). They made sure to intertwine relationships with prison design and upheld consultation with Native Hawaiians throughout the process (Schar et al., 2020). Creating the plan for what a decolonized prison for Native Hawaiians could look like was characterized by efforts of co-creation and partnership, rather than being imposed on Native Hawaiians (Schar et al., 2020).

There were several goals of the framework for the integration of culturally appropriate design including, "Align the agency,' Partner with the community,' 'Create equitable exchange and representation, 'Share cross-cultural knowledge,' 'Promote holistic health,' and 'Design for relationships'" (Schar et al., 2020 p. 267). The framework also articulated the importance of cultural competency training for enhanced cultural awareness and understanding as well as the need for spaces devoted to cultural practices (Schar et al., 2020). The final tool was a document touching on relationships important to Native Hawaiian culture (Handy & Pukui, 1958, cited in Schar et al., 2020) and showing how designs can strengthen relationships (Alexander, 1998 cited in Schar et al., 2020). The use of biophilic design shows the connection between people and the land and how important this is in physical and visual spaces (Wilson, 2006; Browning, Ryan & Clancy, 2014). Bringing culture into the landscape of prisons is an important aspect of healing (Cook, Withy & Tarallo-Jensen, cited in, Schar et al., 2020). Loss of culture has created trauma and those wounded in this way need cultural healing (Cook et al. cited in, Schar, at al., 2020). There is a link between place and sense of self within Hawaiian culture, which highlights the importance of establishing a culturally appropriate prison environment in order to restore and heal this sense of self (Office of Hawaiian Affairs, 2012; Schar et al., 2020).

Some programming ideas emerging from this study include "[a] culinary institute, flower and tree farm, aquaculture center, aquaponics farm, coffee farm, masonry institute, recycling center, therapy community, arts and crafts academy, reforestation and woodworking camp..." (Schar et al., 2020, p. 266). These programs were identified as beneficial because they link to aspects of Native Hawaiian culture (Schar et al., 2020). As well, through an aspect called "talk story," which is an informal sharing of stories, researchers inquired about how to implement Native Hawaiian models of reconciliation and a place of refuge (Schar et al., 2020).

Overall, this promising practice implemented a framework for how to involve Native Hawaiian culture in prison design and practice of a decolonial nature. Aspects of this, such as creating a culturally relevant physical space can be applied to any cultural group in a culturally relevant way and would be beneficial in other prisons. Indigenous peoples would benefit from a space consistent with Indigenous values rather than a primarily Western colonial prison space. Many prisons have special spaces for Indigenous ceremonies or sweat lodges while the overall prison remains Westernized (Griffiths & Murdoch, 2018). It is not enough to simply accommodate Indigenous peoples by adding a few Indigenous spaces (McGuire & Palys, 2020). Prisons need to be environments that are fully culturally appropriate, connected and relevant in order to promote healing (Chartrand, 2019).

### **Limitations**

There are several limitations to consider when it comes to decolonizing prisons. There is very limited literature on the topic of decolonization. As well, one must take into consideration that this paper only highlights published academic articles. There is more literature out there that is either not published or not academically published. Consultation with local indigenous peoples would have added to the decolonizing goal of this paper by adding the voices of marginalized

people through consultation. However, due to the limited scope of this paper, direct consultation was not conducted. Another topic not explored due to limitation was the abolishment of prisons themselves. This movement has gained some ground, since prisons did not exist pre-colonization amongst Indigenous peoples (Monchalin, 2016). Further research is needed on the topic of the decolonization of prisons to better inform the practices of the legal system in a way that aligns with colonized groups. Further research is also needed to fill the immense gaps in literature.

### **Conclusion**

This paper delved into the topic of decolonization of prisons, including the impact of colonization, an overview of decolonization, and three promising decolonizing practices: healing lodges, prison theatre and prison design. Colonization has vastly impacted Indigenous peoples and continues to damage their well-being. The Canadian justice system and prisons perpetuate colonization because our penal system was initially created as a colonial tool. Indigenous parents who refused to send their children to residential schools were arrested and sent to prison; both practices formed part of Canada's assimilation policies institutionalized through the Indian Act. Indigenous peoples suffer disproportionately in the prison system due to colonization. Colonization in prisons has several impacts on Indigenous inmates, such as damaging classification, limited opportunities, damaged relationships including with family often made worse by the distance of prisons from reserves, and lowered employment opportunities. Decolonization has several different definitions including the unlearning of colonial ways and the undoing of colonization. It is present in micro form on an individual level or in a macro form on a structural level. The two are deeply intertwined as micro decolonization at the individual level is arguably part of the systemic nature of colonialism – people's ideas can inform laws and policies which in turn shape the larger systems in place. Societal mindsets must also be decolonized. The decolonization of prisons can be evaluated according to a framework that aims to engage consultation, listening, Indigenous peoples, relationships and the wisdom of locals to develop ways to decolonize prisons. This tree framework consists of four steps (Asadullah, 2021). If all of these steps are taken, an informed and culturally appropriate outcome to be implemented by Indigenous peoples to decolonize prisons should result. Missing any of the steps can contribute further harms through a failure to not engage in meaningful consultation. Indigenization and accommodation should not be relied too heavily upon. They are merely steps towards the ultimate goal of Indigenous autonomy and self determination. Several promising decolonizing practices for prisons are emerging. Healing lodges represent a culturally relevant alternative to traditional prisons. However, the lodge framework needs improvement to get rid of the many embedded colonial aspects. Prison theatre is a good way to build relationships and connect to culture. Spatial design is also crucial for a culturally relevant environment where Indigenous people can engage with their own culture. The many decolonization efforts around the world will help shape the future transformational efforts of decolonization.

Decolonization is an important aspect of reclaiming lost power and restoring power differentials within society. Indigenous peoples need a justice system that works for them rather than against them. Prisons have made attempts at decolonization but much more needs doing. New policies and practices must have decolonization in mind in the aim of stopping contemporary colonial practices and restoring the power to Indigenous peoples.

### **Discussion Questions**

- 1) What can you do on an individual level to help promote decolonization? What can society and its institutions do to help foster decolonization?
- 2) What are your thoughts on the promising decolonization practices explored in this paper? What are some other promising decolonization practices you have seen or heard of?

### **Recommended Activities**

- 1) Watch APTN *Investigates: Indigenous people in Canada behind bars* at [www.aptnnews.ca](http://www.aptnnews.ca) (Crozier, 2017). What were the key points about Indigenous-over-incarceration? What did they say needs to be done to combat this in terms of decolonization efforts? What barriers stand in the way of decolonizing prisons and the justice system?
- 2) Do some research about penal institutions in your area. What are they doing in terms of decolonization practices?



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# 5. Decolonization and Transitional Justice

KUDZAI MUDYARA

## **Title: Policing and the Courts Through the Looking Glass: The Road to Transitional Justice and Decolonization in Zimbabwe**

### **Abstract**

*The effects and impacts of colonialism continue to render themselves unforgettable in many nations around the world. Zimbabwe gained its independence in 1980 and declared itself free from the grip of the British. It seemed the road to recovery was on the horizon; however, the leadership, or lack thereof, was overtaken by corruption and looting of funds intended to improve the lives of citizens. The central explanation for this is found in previously untold stories of the stripping away of the traditions, language, and culture of the Zimbabweans by British settlers during colonial rule. In fact, the road to decolonization travelled by Zimbabwe citizens has been strewn with misery and oppression kept in place by the colonial mentality that continues to characterize the country's governance. This paper gives an analytical overview of the Zimbabwean sectors affected by associated corruption and injustices, such as policing and the court system.*

### **Introduction**

A nation built on the backs of thousands upon thousands of Indigenous freedom fighters, guerillas, and war veterans came together as brothers and sisters to fight for the liberation of Zimbabwe. The forefathers had chanted songs to raise the spirits as they took up arms to fight for a greater Zimbabwe. Two local spirit mediums, Sekuru Kaguvi and Mbuya Nehanda, performed rituals on the freedom fighters to boost their morale and strength, since they were fighting with mere bows and arrows. In 1898, these mediums were executed by hanging by the British South Africa Company (BSAC). The United Nations Educational Scientific and Cultural Organization has recognized Sekuru Kaguvi and Mbuya Nehanda in its Memory of the World Register as key spirit mediums who inspired the Zimbabwean revolution against colonial rule (The Sunday Mail, 2021). They are now commemorated in the names of streets and hospitals in many parts of Zimbabwe.

Over 41 years after the country gained independence, an eerie and mysterious strangeness now fills the streets. Poverty lurks at the doorsteps of thousands and hunger roams like a disease across highly populated areas, quietly defeating the street kids as they hunt the rubbish bins for food. Death raids the hospital beds of pregnant women with stillborn births. Unemployed youth linger in the streets, idle with nothing to do apart from stealing, committing crime. The situation in Zimbabwe demands an emergency response. In this paper, I aim to uncover the traumas issuing forth from colonialism and the related political unrest that impact the lives of many Zimbabweans even as they hope for decolonization and transitional justice. This paper will unveil the impacts of colonization on the Zimbabwean justice system while recognizing decolonization as a method for identifying and resolving the post-independence legacies of the former colonial rule within a framework of policing and the courts. Case studies from various other African countries will be referenced in the hope that the Zimbabwean justice system might borrow and implement related measures.

### **Impacts of Colonization**

Colonial rule impacted the country of Zimbabwe in several ways and these impacts are visible amongst the masses. Not only has colonization shaped the governance structure but the mind and body of its victims as well. The plethora of impacts from colonization ranges from culture, tradition, and justice system to food and lifestyle. For example, in pre-colonial Zimbabwe a mystical musical instrument called the *mbira* was played, mainly by the Shona tribe that dominates the population in Zimbabwe. This instrument and music encompassed all aspects of Shona culture, both sacred and secular. It was played for thousands and thousands of years but forbidden through colonization when replaced with other forms of music such as the Christian hymn. The role of missionaries was to destroy and dominate the traditions and cultures of the Tonga people—in the name of 'civilization.' Christianity was used as an ideological weapon to scare people into not resisting white domination. This all may have happened eons ago, but the effects are still prevalent in Zimbabwe. The *mbira* has rarely been played post-independence, and most of the country's churches continue to cast the music as demonic. Similarly, the Zimbabwean people have long begun denigrating themselves and everything associated with their traditions, culture, and religion.

### **Policing**

Before colonization, Zimbabwe had a structured policing system in place: the people were the police and the police the people. When the British occupied Mashonaland, Zimbabwe in 1890 they did so with the assistance of the British South Africa Company (BSAC). The pre-colonial era in Zimbabwe had been peaceful and there were no official institutions assigned for policing. The colonial institutionalization of justice established prisons, police stations, and uniformed police officers, and these still embody active elements of colonialism in Zimbabwe. In the olden days, policing was informed by the African value system, which embodied the age-old precepts of *hunhu/ubuntu*. Policing efforts in the pre-colonial era sought to transform these beliefs, because they informed social behavior and norms. Policing was learned at a young age within the community through socialization and passed down by word of mouth. Dr. Chihuri explained that the infusion of good behavioral tenets into the young would nurture and sustain a self-policing and self-respecting community united against crime. This was achieved in part through teachings of idioms and proverbs to young and old alike, conveying positive values in a way that would be remembered. Mention of such proverbs was used to prevent people from committing crimes and to make them merciful. For instance, an old proverb designed to remind society about things to avoid includes a reference to tempering justice with mercy: *Mambo haatongi nedemo and Tsvimbo haivaki musha*. This approach was systematic and valuable in also reminding and compelling a Shona King to exercise righteousness among his subjects (Mwale, 2017).

This system was destroyed and replaced by the British South Africa Company Police (BSACP) that came into existence during colonial rule. The BSACP achieved cohesion for their own imperialistic agenda through dishonesty, cunning, and deceptive ideas. The BSACP was used as a vehicle to scatter people when the British mining magnate Cecil Rhodes arrived in Zimbabwe. It also recruited Africans and used them as colonial tools in enforcing unfair laws against their own people. The Africans were given inferior training and were not allowed to eat at the same table as their European counterparts (Mwale, 2017). Therefore, the structure and much of the functioning of post-independence policing in Zimbabwe is a looking-glass reflection of the structures and functioning implemented during the colonial era.

### **Court system**

There is no doubt that the biggest cause of the issues faced within the country is the Zimbabwe Constitution 2013 (s.189[1]), which outlines the court system, its members, and the supreme court judges appointed at the recommendation of the Judicial Service Commission (Constitute Project, 2013). The Judicial Commission is described as an “independent body”. This system has not worked, however, as evidenced by the amount of corruption in the justice system. If Zimbabwe were able to embrace more of its customary traditions, it could mean less traffic through the formal courts. British colonial court systems were hierarchical, with the colonial high courts on top and the native customary courts at the bottom. Colonial court systems were divided along race lines, with cases involving Europeans being heard in the common law courts while those involving Africans—if of no interest to colonial authorities—were heard before the African authorities in the customary courts. Once Zimbabwe recognizes that their traditional system was competent and in use under the Crown, it could trigger a transition toward adoption by the formal courts of the customary law and abandonment of the inherited British colonial court systems (Feingold, 2018).

### **Corruption and Injustices**

The pre-independence capitalist system was established by the first Rhodesian-born ruler Ian Smith (Former Prime Minister of Rhodesia/Zimbabwe 1963-1979 and serving in Parliament until 1987). Smith was an ardent supporter of white rule and declared the independence of Rhodesia from the British Commonwealth. A black nationalist fighting against white-minority control over government, Robert Mugabe, became the first Prime Minister (1980-1987) of Zimbabwe and then President (1987-2017). Mugabe adopted Smith's principles towards implementing universal healthcare and increased access to education. However, the lack of experience in running the system that former primer Minister Ian Smith had built was beyond what Mugabe had expected. Rather, he saw this as an opportunity to redistribute designated funds and wealth meant for the citizens. Before he realized it, the practice of corruption became prevalent throughout the sectors. Mugabe tried to fix Zimbabwe's problems, but it was impossible while the white minority were accruing

most of the profits from the land. Everything fell apart and Zimbabwe was shunned by the world community when Mugabe created laws to expropriate farms from the white people at the turn of the century.

In 2017, Mugabe was forced to resign under military pressure but can not necessarily be said to have been removed from power by coup. His successor Emmerson Mnangagwa—the current President of Zimbabwe—has perpetuated Mugabe’s legacy of looting public funds designated for redistributing the wealth and sustaining the citizens. Though undeniable that Mugabe’s post-independence Zimbabwean government harvested what Ian Smith had sown, it did not occur to them to prevent depletion of the land. Many downfalls and areas of concern now pose a challenge in the country, such as education. Education was introduced to the Indigenous people of Zimbabwe as part of the colonial system by white missionaries and made more accessible by Mugabe initially. Post-colonization Zimbabwe has still not yet been able to bring its educational standards up to par. Many Africans see education as the only way of breaking the brutal stride of poverty, but access is far from universal. In Ghana and Zimbabwe, for example, those in the urban areas have a better chance of a quality education than those in rural areas. Due to the systemic racism implanted during colonial times most of the better schools were not accessible by blacks going into independence. They could not obtain the prerequisites for admission and could not afford the fees. The erosion of basic educational principles and implementation of tuition/user fees for ‘public’ school programs in most African countries have made access to quality education a challenge for many low-income families, particularly those inhabiting rural areas (Konadu-Agyemang & Shabaya, 2005). In fact, due to the rise in corruption and ensuing excessive levels of inflation in the country, most parents are unable to pay the increased tuition fees needed to keep their children in school.

With institutionalized corruption being Zimbabwe’s main challenge in terms of blocked development, anti-corruption commissions, measures, policies, and a Special Anti-Corruption Unit were implemented by Mnangagwa leading up to the establishment of specialized (anti-corruption) courts in all ten provinces as of December 2020. Time will tell the outcome of these actions.

### **Defining Decolonization**

Decolonization is an undoing of colonial processes designed to demonize Indigenous traditions, cultures, ‘race’ by implanting colonial ideas of race purity and institutionalizing imperialist value/belief systems through the police and the courts in order to destabilize the masses, partly by turning them against themselves and their culture and keeping them poor through the accompanying socio-economic exclusion.

To understand the complex colonial systems currently in place in Zimbabwe, we must first unmask decolonization. For this, I lean towards the understanding that decolonization can be broken down into two integral and inter-related parts—micro decolonization and macro decolonization—as defined in Asadullah’s framework (2021). In the case of Zimbabwe, we can refer to colonization of the mind and body that made the colonized peoples’ traditional lifestyle seem inferior to that of the colonizer (Asadullah, 2021). Therefore, both Asadullah’s micro and macro decolonization come into play. On the one hand, micro decolonization encompasses the restoration of language and culture, mind, and body. On the other, macro decolonization addresses the inter-related institutional and structural changes such as self-governance, wealth redistribution, and policy reform related to traditional methods of policing and use of the courts. Decolonization not only denotes the removal of colonial power for economic and political independence, but the term also implies a complete dismantlement of practices and processes founded on the old colonial rule.

Decolonization is a shedding of inter-generational traumas and a coming to terms with the pains and struggles caused by the colonizers (Palmater, 2017). Palmater describes it as moving away from Eurocentric views and standards. However, she shuns the idea of political urgency for Indigenous people to “just get over it”, which is not good advice for anyone having mental health issues. Palmater calls for a more structured reconciliation process that would allow Indigenous people to forgive themselves for being colonized (victimized) and lay the blame at the feet of their colonizers. While the idea of taking up arms in a rebellion as Zimbabwe did drive the white settlers off the land, it alone was not the best way to encourage inclusion and decolonization. Rather, an approach including the development and implementation of an integrated micro and macro plan aimed at turning things around might have worked better. The Zimbabwean government was able to successfully drive out the white settlers through the land reform program of 2000, along with which they also inherited farms that were performing well.

This was because the settlers had secured the best and most fertile land that during colonialism (Thomas, 2003).

Interestingly, Kenya was in a similar situation after gaining independence, they too inherited the wealth left by the British. Both Kenya and Zimbabwe chose a basic transitional strategy that has five major components: to maintain aggregate production; to redistribute existing surplus; to introduce structural reforms in some sectors; to break down all vestiges of discrimination; and to consolidate state power through Africanization (Gordon, 1981). Amongst these commonalities were strategies for liberal foreign investment and a desire to increase budgets for the African public goods – including social services such as education and health. Though these strategies were similar for both countries, their outcomes were immensely different. What we learn from these outcomes mainly concerns land reform, land distribution, and differences in the inherited economies. Much of this is what slowed Zimbabwe's progress on the roadway to decolonization (Gordon, 1981).

### **Discussion**

Colonialism has played a crucial role in the country of Zimbabwe. The country was robbed of its natural resources and the people stripped of livelihood, culture, traditions, and language. The impacts of colonization are seen in all sectors of the governance of Zimbabwe. In order to peel back the layers of influence from colonial rule the country will need to start the process of decolonization with the justice system, government procedures and policing.

Present-day Zimbabwe continues to struggle with illegitimate processes imposed on civilians through the exercise of power that does not take the rights of the people into account. For example, consider restoring customary African policing in Zimbabwe. As explained above, during precolonial times the policing system in Zimbabwe relied heavily on oral storytelling. The imparting of social teachings was expected to be practiced through open relations in order to confront societal mischief responsibly and constructively. However, as the BSACP company made its way, the traditional Indigenous policing structures were dismantled (Mwale, 2017) and replaced by westernized systems.

It is a regular practice in most policing philosophies for people to be arrested and questioned using the least amount of force and in compliance with other legal rules including those regarding evidence for use in the courts. Such rules and practices were deliberately not respected under the BSAC rule when Zimbabwe was still a British colony of Southern Rhodesia. Although after gaining its independence and creating the Zimbabwe Republic Police (ZRP) force to correct the wrongs created under colonial rule, the African people's traditional fair and effective way of policing was lost. Dr. Chihuri, Police Commissioner—General of the Zimbabwe Republic Police force from 1994 to 2017—was a veteran who had received military training at Mgagao in Tanzania (News Pindula, n.d.). His aim was to tactfully transform the old BSCAP tradition of policing characterized by threats and coercion to a people-centered approach upholding the right to life and equal opportunity regardless of creed, race, tribe, or religion. Despite Dr. Chihuri's efforts to transform the police force and its effects on society, crime has generally risen. The police force has been used as a political tool to impose rules and regulations by use of excessive brutality and human rights violations. Ironically, these are the same practices used by the BSACP during the colonial era.

Zimbabwe makes its way into international news for the human rights violations and whenever the masses come out either to protest the existing government or at election time. The 2019 protests held by the opposition party, Movement for Democratic Change (MDC), sparked great international concern, as protestors were brutally battered and dispersed using teargas while peacefully protesting in the streets of Harare (Dzirutwe, 2019). The US Assistant Secretary for African Affairs Tibor Nagy called on Zimbabwe's security forces to exercise restraint and respect human rights. The British Embassy in Harare also expressed concern at the images of the crowd dispersion tactics employed in Harare (Dzirutwe, 2019). It is safe to say that the policing system and structure left behind by the British seems to be failing Zimbabwe today. The country has made no successful efforts to change its policing system, as this would require a complete reformation and revitalization of its current policing structures.

The current injustices in Zimbabwe evidence a lack of proper governance, given the failure to decolonize the courts and policing system following independence. The appropriate move would be for the country to turn to customary and traditional methods used in the colonial era's two-tiered court system (i.e., customary courts for Africans and common courts for Europeans or others). The current shortcomings in the system add up to a state of emergency and are caused by the way the systems are set up.

If we look back through history to when settlers first started making their way, we see they established themselves and came up with innovative ideas to turn the country into a money-making endeavor for the mother country and

to ‘civilize’ the Africans. To achieve this, the British strove to supply the nations of Northern and Southern Rhodesia (Zambia and Zimbabwe) with electricity using the massive waterbed that lay in the Zambezi valley in the area where the Tonga people lived. The idea was to build a dam that would provide hydroelectric power to the settlement. The river had always separated the peoples on either side, but they had always remained connected and enjoyed good relations. In 1955, however, the Tonga people were forcibly displaced from their lush river valley onto new lands that were inarable and heavily infested with the Tsetse fly. The chiefs and elders in the areas had been approached, but soon discovered the “resettlement” would happen without their agreement.

Today, the Tango are reliant on international food aid for survival. Their way of life before being forcibly removed was based on a traditional lifestyle as herdsmen and in livelihoods such as flood-recession farming—whereby communities living on the flood plains had planted crops on the fertile soil—and fishing (Siwilia, 2015). Of course, they also lost their traditional rights to hunt under colonial rule. In October 2021, the government provided the multiple displaced communities food aids like grain, powdered milk, and salt. It was also responsible for building hospitals, sinking boreholes, and constructing roads (Siwilia, 2015). The government made efforts to respond to the health crisis due to the disease brought in by the flies, but the lack of meaningful assistance accorded the Tonga people caused much undo suffering from numerous ailments over time (Siwilia, 2015). International experts say that even since Zimbabwe gained its independence restitution efforts have failed to improve the living conditions of the majority of the 250,000 Tonga.

After independence, the country should have rectified the Tongo’s situation, however, the post-independence government of Zimbabwe chose to ignore the injustices and associated trauma. The new government continued what the British had been doing for centuries, which means failing to provide adequate resources and also falling short on their promises to the people. The displacement of the Tongo people artificially increased populations in the country’s high-density areas and there is a consequential rise in poverty and disease. The displaced people also had their language taken away. What we learn from this experience is that when it comes to colonial-related trauma, both micro and macro decolonization are needed.

According to the new Constitution of Zimbabwe (Constitute Project, 2013), every person has rights of access either to the courts or to some other tribunal or forum established under the law for the resolution of a given dispute (Section 69(1)(3)). Rights of access to the courts are essential for democracy, given the need to uphold the Rule of Law. Constitutional rights of access to the court, however, will not alone be enough to regulate access. An uneducated population cannot be expected to navigate the court system, making justice inaccessible. The country must first, therefore, institutionalize a universal education system and ensure it as a right that extends to everyone including those in rural areas. As well, according to a case study by Monica Matavire (2012), the customary law system in Zimbabwe infringes on women’s rights. Matavire’s research illustrates that woman in the Shona tribes of Muzarabani remain inferior to men despite international declarations of inalienable human rights for all people. Under Zimbabwean customary law, a woman has an inferior role to her son. (Matavire, 2012). Therefore, both the lack of access to formal courts and the gender unfairness of the customary systems must all be addressed, and this will hinge in part on public education. Zimbabwe is already faced with the challenge of gender bias, a woman is not deemed the “head of a household”, this title is only given to men. This limitation puts women in an inferior position from the start when it comes to divorce, because under customary law when a woman is widowed or gets divorced her husband’s property is no longer accessible to her (Jacobs, 1991).

## **Decolonizing Practices**

### ***Baraza Justice in Democratic Republic of Congo***

The issues in the Democratic Republic of the Congo plague a case study entitled Baraza Justice (Peace Direct, 2014). The FOCHI (Foundation Chirezi), a small Congolese NGO founded in 2002, has worked closely with Peace Direct on the Baraza court project since 2010. The case study points to ongoing violence and conflict as the critical issue currently facing the country. The struggles of establishing the rule of law in a nation built on violence can be difficult because violence has become a way of life and therefore often the only mode of resistance. This skews the international response and causes interference by international donors who mean well and want to help rebuild the Congo. Their ideas for change, however, will be based on wrong assumptions until they become fully aware of the underlying problems. The

Baraza peace courts refer to a gathering where people in the community come together to discuss an issue, a problem, or celebrate a success. The primary focus of the Baraza system is to ensure accessible, fair, and non-punitive justice to those living in rural villages. FOCHI has promoted the creation of the Baraza system in the aim of establishing community-led justice courts that provide successful resolution to conflicts through participatory processes of dialogue and reconciliation. Baraza is a conflict resolution mechanism that aims to bring about reconciliation and is also a revival of a conflict resolution system that had functioned in the region before colonization (Peace Direct, 2014). All Baraza matters are carried out in the local languages to offset language barriers but also to ensure maximum social and cultural impact.

Floribert Kazingufu describes the Baraza system as a method for fighting the corruption in the police, magistrates, impunity, favoritism, and a law system that does not accord equal rights to the poor. In the Baraza peace court, everybody is equal, and the community eye is there to ensure equality and fairness of judgments. The Baraza system does not claim to address all types of cases or to be able to replace the national justice institutions. The Baraza peace courts address conflicts related to land rights, accusations of sorcery, robbery, rape, injury of person/property, domestic violence, public insult, intimidation/aggression, adultery, breach of trust, and/or the spreading of rumours (Peace Direct, 2014). The impacts of this system prove its success with fairer justice and more appropriate conflict resolution. The given communities identified successful justice as one of the most significant changes to result from the project. It increased collaboration and mobilization not only within the communities themselves but also between the community's local-leaders' authorities and ex-soldiers. The Baraza system has also fostered gains in female empowerment; more women report feeling secure to go directly to the peace courts to ask for assistance in matters of domestic violence (Peace Direct, 2014).

#### *Customary Laws in other African nations*

Zimbabwe could learn from the experiences of the many African countries that have reverted to their customary laws and taken their heritage and tradition into consideration. For instance, the Himba people of Namibia, found mainly in the capital of the country's Kunene region. The Himba reject modern progress and Western culture and continue to practice ancient traditions (Association Kovahimba). The Namibian Constitution endorses traditional governance and customary law as an element of its legal system within a framework of the rights of indigenous groups in Namibia (UNHCR, 2012). Namibia has a significant number of traditional communities operating under an organized system of traditional justice. Other African countries may shun this method as outdated and too informal to fit into a modernized system. Although such institutions predate colonialism, they may have been significantly different from what they are today. This can be blamed on the relation of colonial legal traditions and the formal justice system. Traditional justice systems generally apply customary procedural and substantive law and operate in an environment where traditional authorities are recognized formally or informally as having a leadership role in a given community and a relationship with a given territory. In Ethiopia, a number of unrecognized traditional communities are governed by their customary law. These groups have the right to use their traditional justice systems and even conduct criminal matters. In Uganda, a separate justice system caters to each ethnic group and Namibia has 49 unrecognized traditional authorities under their own system of governance (UNHCR, 2016).

Finally, we could also learn from the people of Tanganyika. They understood that the colonial court systems were the backbone of British colonial rule, and they rectified this post-independence. As discussed earlier, British colonial court systems were based on a hierarchy with the colonial high courts at the top and the native customary courts at the bottom (Feingold, 2018). When Cameron became the Governor of Tanganyika in 1925, he found a loose and somewhat unstructured system of indirect rule. He restructured the Native Authorities and standardized their role in communities throughout the territory. He did this to reinforce tribal units for efficient governance and to extend the power granted to the Native Authorities. Although Tanganyika has tried to come up with a single template for customary law, this is challenging with over 120 different tribes (Cotran, 1962).

#### ***Policing in Rwanda***

Civil war in countries such as Liberia, Rwanda, and Sierra Leone disrupted the post-independence transformation of policing. Colonization had stripped all three States of the resources required for them to protect citizens and offer fair investigations into matters of crime (Baker, 2007). Immediately after its Civil Wars, Rwanda had to make an incredible



transition to a new, democratic regime and decide what kind of policing would work best. All three countries are different and how they addressed community-based policing takes different forms and patterns based on the outcome of the respective country's civil war. In Sierra Leone, the existing regime was able to defeat the rebels. In Liberia, the existing regime reached a peace agreement with the rebels, but in Rwanda the rebels triumphed (Baker, 2007). What worked for Rwanda and Sierra Leone could still be applied in Zimbabwe given an appropriate allocation of resources. What we learn is that rebuilding a thriving regime and instituting successful policing would require a strong external partner to guide, foster and assist the host nation throughout the process (Kozma, 2014).

The Rwandan Community Policing Department (RCPD) aims for transparency and to promote partnership. They thus initiated things by engaging in interactions with the public via the police website, electronic and print publications, and toll-free emergency lines through partnerships with telephone service providers. The RCPD has also involved the youth and there are 1500 Youth Volunteers in Community Policing (YVCP), Anticrime Ambassadors, 150,000 Community Policing Committees (CPCs), 1640 Anti-crime clubs in schools transport associations, artists, faith-based organizations as well as government and private institutions committed to assisting the Rwanda National Police (RNP) (Rwanda National Police, 2016).

In the same way, the RNP also enjoys great involvement with the community activities such as supporting afforestation and also assist in helping vulnerable families pay health insurance, in the distribution of solar systems to the needy and in the electrification and construction of football fields among others (Rwanda National Police, 2016). Their results were perfect; they were ranked 1st for Africa and 21st globally as a country whose citizens trust and rely on their police services to impose law and order (World Economic Forum Global Competitiveness Report, 2014-2015). Rwanda's National Police is so advanced it has introduced E-policing and established a call centre along with a cyber-crime investigation centre (Rwanda National Police, 2016). The experiences of the Rwandese communities represent an opportunity to improve the Zimbabwean policing system and encourage public involvement with police to prevent crime.

### **Limitations**

One of the recurring limitations in bringing the country to implement more customary laws and practice more traditional and cultural practices is lack of funding. Traditional courts may not always be equipped for hearings while the formal court systems also lack funding, and the number of courts is inadequate to serve the population particularly in rural areas.

Most of the traditional laws established can at times be unacceptable from a human rights/social equity perspective. Extreme poverty and hardship also have a toxic impact on conflict-resolution customs that may not be fully understood in the West. The African concept of 'ubuntu,' which is translated as restoring a lost balance, is widely associated with the work of the Truth and Reconciliation Commission. The exploitation of women's rights in the traditional and formal courts of Zimbabwe continues to pose a challenge. Traditional chieftainship and chiefs need to undergo judicial educational programs to be informed on matters involving human rights particularly those of women.

The will for change in Zimbabwe is not evident as the current government struggles to uphold the Rule of Law. Although the constitution was rewritten in 2013, some laws still contravene human rights laws. For instance, a report that recently flooded the news and shocked the nation is the government of Zimbabwe's approval to evict 12, 000 Shangani people from Chiredzi in the Masvingo province. Zimbabwean President Comrade Emmerson Mnangagwa reportedly authorized the eviction. This planned eviction is meant to pave way for the production of lucerne grass for cattle by Dendairy, one of the largest dairy producers in the country. Dendairy is owned by two European residents of Zimbabwe, Neville Coetzee and Herman Ventar, who have allegedly given shares in this company to Emmerson Mnangagwa (Zimbabwe News Live, 2021). On the 26th of February 2021, the Minister of Local Government, Rural and Urban Development issued a statutory instrument ordering any person living on this land to permanently vacate with his or her personal property. The statutory instrument did not specify where the affected victims would be relocated (Diaspoint, 2021).

What is important to understand is that the Chilonga community is dominated by the Shangaan people who have lived in the area since the 1830's. Their traditional leadership structures and internal land heritage systems are rooted in local customs, oral history and the peculiar local language spoken by the Chilonga people, who bear witness to the olden times and respected cultural dynamic of the community (Diaspoint, 2021). Their eviction matter was taken to court

which ruled in favour of the Chilonga people's plea, and the government amended statutory instrument (SI) 63A in 2021. Law expert and leader of the opposition—the National Constitutional Assembly (NCA)—professor Lovemore Madhuku, described the evictions as unconstitutional and evidence of a “colonial mentality” (Diaspoint, 2021).

### **Conclusion**

Interestingly, after the execution of the two spirit mediums Nehanda and Kaguvi by the British South Africa Company (BSAC) in 1898 at the height of the colonization of Zimbabwe, their remains were allegedly transported to Britain and exhibited as war medals (The Sunday Mail, 2020). As noted in my introduction, Zimbabwe would benefit from scrutinizing how other countries have reverted to their traditional praxis, and this could be a game changer. Although the limitations noted above pose a challenge to moving forward, Zimbabwe can still attempt to adopt many of the principles and practices proven effective in Rwanda, Congo and Namibia. Zimbabwe should be able to excel under such changes, as tribal disputes are not as intense because there are fewer tribes than in other African countries. Again, as stated earlier regarding the impacts of colonization, the post-independence Zimbabwean government harvested the breadbasket that Ian Smith (the first white prime minister born in Rhodesia) had attempted to sow. Unfortunately, its development was curtailed due to mismanagement under the Mugabe reign.

Though colonization is to blame for the vast problems of today, such as the impacts of intergenerational poverty and trauma among the black masses, the country also suffers from problems created after independence. But these are also typical ramifications of colonialism. During his reign President Mugabe was able to accumulate fat Swiss bank accounts along with other fortunes through embezzlement and looting (The South African, 2017). In short, the inheritance by the colonized of the colonial mentality, which justifies the fact that a few get the most, has deprived the country of much-needed capital resources (Konadu-Agyemang & Shabaya, 2005). Looking back, we can critically analyze how colonization has even played a major role in post-Independence development. It is also inevitable that the trauma meted out during colonial times was made worse by the intentional failure to create an infrastructure for the delivery of education and health to the black masses. These impacts in themselves would be difficult to eradicate; however, the country's continued stagnation and suffering also reflects a lack of post-independence leadership. What we must be seeing here, is the renewal pattern of the colonial system, whereby the once-oppressed comes to play the role of the oppressor once in power (Memmi, 1957):

The representatives of the authorities, cadres, policemen, etc., recruited from among the colonized form a category of the colonized that attempts to escape from its political and social condition. But in so doing, by choosing to place themselves in the colonizer's service to protect his interests exclusively, they end up by adopting his ideology, even with regard to their own values and their own lives. (Memmi, 1969)

The “small colonizer” is part of the legacy of the colonial system (Memmi, 1969). The colonial system leaves a legacy of greed and a hunger for relative degrees of privilege and power. In this very important way, therefore, even the post-independence mis-leadership and corruption can be traced directly back to colonization. This illustrates the need for decolonization not only of a country's system but of the peoples' minds.

It has been reported that at least 5% of Zimbabwe's annual economic output (about 300 million) is lost to graft, while government corruption is estimated to cost US 482 million per year. The misappropriation of public funds in Zimbabwe clearly perpetuates the levels of poverty in rural and underdeveloped areas established during colonialism (Konadu-Agyemang & Shabaya, 2005) and this marginalizes the people who reside in those areas. While on a vacation abroad Ian Smith made derogatory statements about the Black Zimbabweans, he made statements about most of the blacks being illiterate and not understanding the political system that “we've foisted on them” (Mills, 1985). Smith led the independence but failed to prioritize education and other essential services once in control of the State system, but then the Africans adopted the same colonial attitude of using all the country's resources to support a small upper crust while the masses lived in ruin.

In terms of the courts, there was no Rule of Law for the colonized under colonization. The white colonizers received preferential treatment and rights under the constitution. This is another thing that makes it so difficult to stem post-independence corruption; colonial systems simply were not created to be accountable and responsible to the masses. As well, aside from the tremendous effort and resources it would take to re-invent the police and court systems created under colonialism, the post-independence governments in Zimbabwe have made no effort to break with the

past, partly because of the benefits that accrue to those at the top. Customary justice is important, as we have learned from the Baraza system in Congo and could be a contributing factor to ensuring the Rule of Law now embodied in the Zimbabwean constitution. Although Zimbabwe already has traditional courts in place, the need for them to be updated and informed on matters of human rights, such as customary practices that discriminate against women, can also pose a challenge. What Zimbabwe needs is an aggregate undoing and reconstruction of the underlying infrastructures of the colonial system that the colonial rulers imposed; in other words, to decolonize. As part of this process, Zimbabwe can repair and adjust those aspects of its customary and traditional laws that are illegal because they contravene human rights.

### **Discussion Questions**

1. How best can Zimbabwe begin to reclaim its court system and policing to better serve the people?
2. Based on what you have read about Zimbabwe, is there room for improvement? Do you think asking for assistance from European countries can assist in turning the impoverished state of the country around?
3. Can we copy / paste the court and policing systems developed in Rwanda and Congo for use in Zimbabwe?

### **Recommended Activities**

1. Get into groups of four with classmates to whom you have never spoken or who have a different ethnicity from you and discuss what areas of personal decolonization you could each work on.
2. Define how you see the acts of colonization impacting a nation or group of people who were once under colonial rule? How best can you come up with solutions to improve the lives of the people impacted?
3. Find out if there are groups of people in your local area impacted by colonization. If so, observe and study how their way of life has changed since the introduction of new regimes of policing and court systems.

### **Recommended Readings**

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# 6. Decolonization and Restorative Justice

HAMZA SAID

## **Title: Restorative Justice: Decolonizing the White-Washed Monster Within**

### **Abstract**

*Indigenous peoples and minorities in settler colonial states constitute the majority of incarcerated people in Canada. In recent years, there has been a deep awakening as to why this over-representation of Indigenous peoples and minorities takes place in settler colonial criminal justice systems. Contemporary colonialism has been a recurring topic of interest in the quest to understand the incarceration rate of minorities and Indigenous peoples in colonial states. Monchalín (2016) defines contemporary colonialism as “a method of postmodern colonization in which domination is still based on settler rules and priorities but settlers calculate and perform more indirect or crafty ways of achieving their goals” (p. 74). Such indirect or devious methods have flooded restorative justice, polluting it. Restorative justice no longer aids in reducing the over-representation of minorities and Indigenous peoples in the criminal justice system of settler-colonial states, since the start of the copy and paste method of restorative justice. In fact, restorative justice may now contribute more harm because of its lack of cultural competence and top-down approach. This paper begins with an overview of decolonization then goes on to illustrate the impacts of colonization, and end the section in a discussion on three decolonial case studies of restorative justice practices: Maori Justice Practices in New Zealand, Pashtun Jirga in Pakistan, and Conflict Resolution and Visions of Haida in Canada. The paper concludes with a brief section on limitations of decolonization.*

**Keywords:** Impacts of Colonization, Decolonization, Restorative Justice, Decolonizing Restorative Justice.

### **Introduction**

Indigenous peoples and minorities do not have faith in the legitimacy of the systems, organizations, and actors in charge of and facilitating dispute resolution in colonial settler nations. This is why restorative justice was created. However, restorative justice has morphed into a process and practice that deviates from its origins and purpose, which was to give voice to the voiceless. Decolonization of restorative justice is important because it fixes the colonial power imbalances and acknowledges the monstrous biases and racism deeply embedded within restorative justice.

At the height of its murderous imperial scheming, the Europeans brutalized millions of Indigenous people (Burkhart, 2020, p. 62). The European colonization was characterized by such monstrous acts as cultural genocide and the simultaneous spread of white supremacist ideologies. According to Gahman (2016), European settlers and the system that arose from the colonization was a dehumanizing “monster”: “colonialism’s aggressive policy of land seizure and ethnic cleansing amplified, whilst also becoming highly gendered. This can be seen in images of Indigenous women who were represented as exotic Indian princesses or eroticized primitives living in the rural wild” (p. 328). The monster in restorative justice is why “settler colonial violence and territorial dispossession mark present worlds as an earlier, invasive species” (Carter & Carter, 2019, p. 5). In Canada, contemporary restorative justice emerged as a conflation of practices related to traditional Indigenous, and also Mennonite, conflict resolution practices but was transformed to fit our colonial-based criminal justice system. In other words, restorative justice has been consumed by the criminal justice system and spit out as a settler colonial tool that perpetuates further genocide and repression of Indigenous peoples and cultures.

Restorative justice was created to provide alternative measures to aid the failing age-old punitive approach. Restorative justice is a response to crime that takes the needs of victims, offenders and their communities into account. This approach eliminates most of the drawbacks of the punitive approach and is increasingly considered feasible for a diversity of types of crimes of various degrees of seriousness. While traditional approaches such as restorative justice aim specifically to create a system that works for Indigenous peoples, the programs are always delivered within the ideological confines of European institutions (Monchalín, 2016, p. 272). In other words, restorative justice has been colonized.

### **The Impact of Colonization**

Colonization could be seen as a disease that now manifests more subtly as bias and cultural supremacy in Canada. The consequences of colonialism and the realities of genocide are clearly reflected in the atrocities carried out in residential schools and considered root causes of the social injustices that Indigenous peoples continue to face, and which constitute cultural genocide. Colonialism has embedded issues such as poverty and intolerance in the Canadian landscape. Unlike other Canadians, Aboriginal peoples, and other minority groups here, are prone to live in poverty. This poverty references not only unemployment or low income, but a general lack of accessible socio-economic opportunities. As Knutilla (2017) has pointed out, the theory of rational choice suggests that individuals are independent and capable of making appropriate decisions regarding their own self-interest. This rationale assumes everyone should be able to make good choices but completely ignores the impact of unjust socio-economic forces and exclusion on certain groups' abilities to do so. At an ideological level, by blaming the victim, this rationale wrongly absolves the State from addressing issues of social inequalities and economic burdens that afflict Aboriginals (p. 33). Aboriginal youth are greatly impacted by conditions of poverty, and it makes them more likely to follow ways of crime. The oppression that leads to social inequality contributes to the growth of Aboriginal and Black youth incarceration under colonial systems.

As Palmater (2017) illustrates, the Community Well-Being Index (CWB) published by Indigenous and Northern Affairs Canada (INAC) reveals a considerable disparity – over a third – between First Nations and Canadians, with little to no improvement since the turn of the century. The INAC discovered that these scores for First Nations and Inuit communities dropped even further between 2001 and 2006 (INAC as cited in Palmater, 2017). The United Nations, by way of comparison, maintains data on states of well-being known as the Human Development Index (HDI), with Canada ranking fourth best in the world in 2010. If the statistics took the circumstances of First Nations and Inuit communities into account, however, Canada would rank 78th, behind nations like Cuba and Paraguay (p. 65). This shows that the suffering of Indigenous Peoples of Canada is hidden in statistics and is ongoing. Canada is a wealthy country having 7% of the world's renewable freshwater, yet its Indigenous communities have no clean drinking water and thus contract diseases eradicated from the general population.

Moreover, the colonization of Indigenous peoples is marked by discriminatory systems upheld by the Indian Act (1876) and by the Residential Schools, the last of which only closed its doors in 1996. These schools were created to eliminate Indigenous cultures. According to Aguiar and Halseth (2015), “By removing child-rearing from the community and placing it into the hands of the church and government, the residential schools contributed to the fracturing of family relationships and community cohesion” (p. 18). Colonialism has forced Indigenous peoples out of their way of life, deeming it as ‘inferior’ to the European settler ways. They did not only eradicate their way of living, but the Canadian government continues to create further harm by practicing tubal ligation surgeries on Indigenous women.

At the same time, the Indian Act (1876) established the goals of the European settlers to assimilate Indigenous peoples (Monchalin, 2016, p. 110). As McGuire (2019) has shown, the Haida people of the Pacific Northwest Coast had their own intricate governmental structures, including hereditary chiefs and matriarchs, as well as the potlatch, the predominant economic structure, prior to the imposition of Canadian legal and governmental systems (RCAP, 1996a, 1996b, 1996c). Acts of cultural genocide, such as the prohibitions under the Potlatch Law provisions of the Indian Act (1884), shattered traditional customs and ceremonies and transformed legal and social institutions (TRC, 2015, p. 2). That said, this disparagement of Indigenous cultures led to the oft-discussed intergenerational trauma and inequality.

The detrimental effects of colonialism did not vanish with the abolishment of residential schools and other overtly racist practices; rather, the disproportionate power the Canadian government yields over Indigenous peoples is still reflected in contemporary times. As described by Monchalin (2016), contemporary colonialism has manifested because “the legacies of earlier forms of colonialism become entrenched and embedded within society's dominant discourses and institutions” (p. 74). The colonialism that exists within Canadian institutions has led to numerous injustices among Indigenous peoples and other minority groups, such as higher rates of incarceration, suicide, poverty, illness, and infant mortality (Palmater, 2017, p. 75). The issues that persist with the current state of colonialism are aggravated by a lack of recognition and accountability from the government. While Indigenous peoples and other marginalized groups face systemic discrimination and social injustice, the government continues to engage in what Palmater (2017) has described as “deny, deflect, and defer” (p. 76). The government either denies that the issues are severe enough to be addressed or deflects the issues back onto those who experience them by blaming them for their plight.

The health of the land has also been dramatically impacted by colonialism. As illustrated in “The Uranium Leaking from Port Radium and Rayrock Mines is Killing us” written by Richard Van Camp of the Dogrib Tłı̨chǫ writer of the Dene nation from Fort Smith, Northwest Territories, reiterates what Uranium has done to the Indigenous communities surrounding the mining area of Port Radium in the Northwest Territories. Van Camp speaks of razor-sharp grass, plants bearing no fruit, people starving due to the land’s inability to make food under all the pollution and radiation. Van Camp uses imagery to convey that animals and fish they once hunted are now dead or toxic: “It is a dead caribou running on dead legs. I meet its eyes but there are only antlers... The fish are rolling sideways” (2018, p. 619). In other words, colonialism is not a thing of the past; it persists and continues to be destructive to Indigenous peoples and other groups marginalized under the colonial ethos.

### **Defining Decolonization**

To date, decolonization attempts, such as restorative justice, have acted as a veil, allowing the mainstream populations of colonial-settler countries to avoid facing the challenges that Indigenous sovereignty and socio-economic inclusion of minority groups would pose to classic conceptions of Canadian values and history, at least temporarily. As Shepard (2006) has shown, the Algerian journalist Henri Fonfrède coined “decolonization” in his 1836 text, *Decolonization of Algiers*, and social scientists have been using the term since the 1920s. For example, in the 1950s, it was used to criticize the French colonial regime, which initially colonized most of the world (as cited in Asadullah, 2021, p. 3). Moreover, decolonization takes two forms: macro and micro. Macro forms of decolonization aim to decolonize social institutions (political, educational, and family) while micro forms target people’s minds and behavior (Asadullah, 2021). Monture Angus (1999) defines decolonization as “a state of being free from responding to colonial forces, through the reclamation of Indigenous ways of being” (as cited in McGuire & Palys, 2020, p. 73). According to Palmater (2017), decolonization is a process involving resistance, resilience, and reclamation (as cited in McGuire & Palys, 2020, p. 72).

Also, Blagg (2017) indicates that the dual notion of reclamation and resistance derives from the erosion of the neoliberal pillars of the northern welfare state and its hegemonic consensus, culminating in accelerated casualization of the labor market, and the large inequalities between rich and poor. This creates the kinds of absolute destitution, unemployment, and chaos of existence once typical of early industrialism in mid-20th century Europe. Unsurprisingly, this erosion has caused the northern welfare state to see an increase in beggars and vagrants, homeless and unemployed, and the sick and mentally ill (p. 63). Therefore, macro decolonization is clearly needed and is the only solution left to save our social institutions and societies from collapse.

Furthermore, decolonization can help give self-determination back to Indigenous people and allow them to reconnect with their culture and ways of life. When Indigenous peoples were colonized, their culture and traditions were deemed as inferior by the colonizers. Western ideologies and sought to be imposed on Indigenous. The case with restorative justice and the criminal justice system is not any different – restorative justice is not representative of Indigenous traditions or peoples and therefore needs to be decolonized.

Both decolonization and resurgence facilitate a renewal of our roles and responsibilities as Indigenous peoples to the sustainable praxis of Indigenous livelihoods, food security, community governance, and relationships to the natural world and ceremonial life that enables the transmission of these cultural practices to future generations (Corntassel 2012, p. 97).

That said, Indigenous peoples need to be more involved in decisions that affect them. By restorative justice being decolonized, Indigenous peoples will have the opportunity to not only be involved on the ground-level of decision making but also at the top.

Corntassel (2012) highlights an important aspect of micro decolonization: “The decolonization process operates at multiple levels and necessitates moving from an awareness of being in struggle, to actively engaging in everyday practices of resurgence” (p. 89). This points out the importance of active participation in making changes. According to Monchalin (2016), the process of decolonization needs to take place among all citizens, not just among Indigenous peoples. While it is generally noted that Indigenous peoples need to be ‘decolonized’, non-Indigenous peoples need to ‘decolonize’ themselves by stopping to view their practices as superior to Indigenous’ practices and costumes (Monchalin, 2016, p. 297).



Decolonization can take place in various forms, even through art. One exhibition, entitled the *Indian Art Revisited*, displays art pieces that “challenge colonialism and its impacts and realities” (Monchalin, 2016, p. 301). Music has also been serving as a way of raising awareness about colonialism. Music artists, such as A Tribe Called Red, have been creating platforms for conversations about decolonization (Monchalin, 2016, p. 300). After all, decolonization is about challenging colonial systems and the way they affect Indigenous peoples and other marginalized groups. Despite colonialism’s suppression of Indigenous people, traditional knowledge has been passed on through generations by elders’ teachings. The elders will form an integral part of the decolonization process in putting forward the solutions to the harm done by colonialism (Monchalin, 2016, p. 303). Furthermore, decolonization is about raising awareness, resisting, and acting towards righting the injustices that colonialism ingrains.

### **Decolonizing Restorative Justice**

Asadullah (2021), notes that four must be admitted before restorative justice can be decolonized: “1) the colonial context of the criminal justice system, 2) the institutional power imbalance between justice stakeholders and Indigenous or other marginalized communities, 3) that government-led RJ may contribute more harm, and 4) the need for a trauma-informed approach”. In addition, also according to Asadullah (2021), the framework of decolonizing restorative justice is best expressed by a Decolonizing Tree consisting of four parts: 1) roots, 2) trunk, 3) branches, 4) fruit (p. 18).

First, the root stands for a trauma-informed method and an anti-oppressive structure. Secondly, the trunk represents local communities. Thirdly, the branches stand for cultural competency and local teachings. Fourthly, the fruits stand for cognitively, politically, historically, and religiously appropriate (Asadullah, 2021, p. 19). For restorative justice to be decolonized, these steps must first be taken. It is not okay for restorative justice to encompass State views and a top-down approach. Communities must be brought together in the creation of a restorative justice practice that is culturally competent and shaped to the needs of their societies rather than by state-forced practices that are not culturally competent.

Decolonization aims to deconstruct the colonial ideology and value systems ingrained in social institutions and societies but also to thwart the colonial mentality that rears its ugly head within restorative justice. According to McGuire & Palys (2020), “Imposed systems of ‘self-governance’ that leave every change still requiring ministerial permission and fiscal control in the hands of the state further impede the potential for fundamental change” (p. 61). In other words, restorative justice is practiced under colonial systems, and therefore cannot be implemented to its full capacity. Moreover, Blagg (2017) claims that restorative justice cannot be implemented into the criminal justice system because the criminal justice system is still a colonial-based institute (p. 63).

Ever since Indigenous peoples were colonized, their cultures, beliefs, and way of life were perceived as inferior by the settlers. As a result of colonialism, the Western criminal justice system became widespread and the main scheme of punishment in different parts of the world, including Canada (McGuire & Palys, 2020, p. 67). As an alternative to the punitive approach, the Western criminal justice system incorporated restorative justice, classifying it as “an ‘Indigenous’ way of responding to justice issues” (McGuire & Palys, 2020, p. 67). However, restorative justice as presented by the Western criminal justice system, “ignores the diversity amongst Indigenous legal traditions and laws” (Friedland as cited in McGuire & Palys, 2020, p. 68). In addition, restorative justice has itself been colonized, operating within colonial institutions where hierarchy and lack of self-determination persist (McGuire & Palys, 2020).

A monster has come to reside in restorative justice, which means it has been infiltrated by colonial processes and is not sufficiently representative of Indigenous beliefs and values (Blagg, 2017). In fact, LaRocque describes restorative justice as a “reinvented Indigenous” tradition established from a colonial perspective (as cited in Monchalin, 2016, p. 284). Yet as Blagg (2017) suggests, “critical restorative justice, relevant to the needs of Indigenous and other colonised subjects, should be informed by the interconnected processes of what Walter Dignolo (2007; 2011) calls decoloniality and inter-culturality” (p. 62). Due to the indigenization of restorative justice, the State often assumes certain approaches that worked for one group will work for the other groups because they are ‘similar’. This homogenizing effect defeats the need of cultural relevance and appropriateness.

For example, the family group conference of the Maori in New Zealand was forced on the First Nations of Canada (Lee as cited in Tauri, 2005, p. 19). As Tauri (2005) pointed out, the State generalizes Indigenous cultures: “Family group

conferencing is based on Maori culture, and the Maori are an indigenous people; Australian Aboriginal and Canadian First Nations are indigenous, therefore the forum must be appropriate for all Indigenous” (p. 20). Such an assumption leads to generalization of groups and creates further stereotypes. According to Tauri (2005), “It does so by enabling colonising societies to homogenise a range of disparate cultures by emphasising or overemphasizing similarities in cultural practice” (p. 19). Homogenization of cultures is harmful; it prevents the colonized from being self-determined and participating in processes that are culturally appropriate for them.

Consultation is another significant aspect of the decolonization of the colonial monster that resides within Canadian restorative justice. Apart from government agencies and policy workers, there must be consultation with the community. According to Tauri (2019), this can include “independent researchers, inmates, ex-inmates, inmates and ex-inmates’ families, victims and service providers” (p. 115). Consulting with elders is also pivotal in the process of decolonization, as elders “remain a great resource to their communities and are seen as a source of traditional cultural knowledge, wisdom, resilience, connectedness, and leadership” (Busija et al., 2020, p. 523). Formal participation by Elders in design and implementation of government programmes would ensure strategies that are culturally relevant and beneficial to Indigenous peoples (Busija et al., 2020, p. 523). That said, the consultation with Elders and other community members can enhance direct participation in important decision making.

Restorative justice is treated as a franchise being sold on people, rather than a practice that considers the needs of Indigenous peoples (p. 72). The notion that restorative justice is being marketed is clarified by Alfred (2009), who noted that “the culture of being colonized takes away a peoples’ ability to resist the racist aggression and political, economic and cultural pressures of the colonial state and settler society” (as cited in McGuire & Palys, p. 61). Therefore, the process of decolonizing restorative justice must start by challenging the colonial system. As stated by Blagg (2017), restorative justice is a modernist, Euro-American philosophy aimed at changing what is now largely a Western approach to justice reform (p. 63).

Povenelli (2002) highlights that the acknowledgement of cultural difference in restorative justice strategies is okay with the white justice system, as long as it does not ‘impose’ a progressive alterity that undermines white supremacy, particularly where land disputes are concerned (as cited in Blagg, 2017, p. 61). The only way to get the monster out and decolonize restorative justice is to acknowledge its roots and original purpose and methodology and eliminate the colonial biases related to Indigenous peoples and other marginalized groups. That said, a decolonized restorative justice would be based on inclusivity, rather than being a monstrous shadow lurking within the powerful institutions of colonialism.

### **Promising Decolonizing Practices**

#### ***Maori Justice Practice in New Zealand***

Prior to colonization, Maori justice processes in New Zealand were focused on collectivism not individualism. If a person committed an offence, they would need to compensate the victim and their families too (Tauri & Morris, 1997). “For example, the agreed outcome might have been the transfer of the offender’s goods to the victim or work by the offender for the victim” (Tauri & Morris, 1997, p. 150). Additionally, “The marae was the preferred setting, kaumatua were the primary decision makers (though working through tribal or Maori committees), and the restoration of communal harmony was the primary although not the only aim” (Tauri & Morris, 1997, p. 153).

The impact of colonization in New Zealand can be seen in the disproportionate incarceration rates of Maori. According to Tauri (2005), “Maori males comprised 10.9 percent of prisoners in 1930, increasing to 23.3 percent in 1958. Maori female prisoners increased from 4.7 percent to 47 percent of female prisoners over the same period (p. 3). Furthermore, Tauri (2019) notes the failures of crime control policies, with the example of Integrated Offender Management. One of the issues with IMO was its ‘orientalization’ of crime control policy (p. 108). Orientalization is a process that generalizes outcomes and fails to consider that different cases might require different approaches. Instead, the one-size-fits-all approach of the IMO assumed that what worked for Black Canadians, would also work for the Māori (p. 108).

In addition, the effectiveness of crime control policies is exaggerated and, rather than focusing on the actual solution, the justice system is focused on control rather than rehabilitation (p. 112). The criminal justice system clearly does not engage communities and continues to “rely ... on non-indigenous theorising and research on criminality to develop

policies and programmes targeted at Maori/Indigenous offending” (Tauri, 2005, p. 9). Despite the ineffectiveness of crime control policies, they remain in existence. The notion of being ‘tough on crime’ gives the illusion of safety, but according to Tauri (2019), reduction in crime begins with addressing communities’ needs.

The benefits of decolonizing restorative justice are extolled by Tauri (2019), who claims that New Zealand’s criminal justice system has been unable to address the overrepresentation of Māori people in prisons. Analyzing existing policies and “develop[ing] a policy process based on the needs of [the] community, and one less concerned with the ballot box needs of politicians” (p. 113), would arguably help decrease incarceration rates. Tauri (2019) also highlights the need to focus on treatment and social support rather than relying on punitive measures.

Family group conferences are an example of how Maori practices can be integrated into mainstream processes. In 1989, family conferences were introduced in New Zealand, with families participating in a process of restoration and decision making (Tauri & Morris, 1997). The families reportedly found more opportunity for participation and effective communication with the conferences than in the courts (Tauri & Morris, 1997). Some claim that family conferencing “empowers Maori to deal with their youth offenders in culturally appropriate ways” (Maxwell & Morris as cited in Tauri & Morris, 1997, p. 14). Although the State still forms part of these conferences and the decision-making process, family conferences exemplify how Maori needs can be satisfied within New Zealand’s justice system (Tauri & Morris, 1997, p. 159).

### ***Pashtun ‘Jirga’ and Conflict Resolution***

Indigenous and local conflict resolution approaches were in practice long before colonialist approaches were introduced (Yousaf & FurrukhZad, 2020, p. 1203). The Pashtun *Jirga* has been historically embedded in the Pashtun culture in Pakistan and Afghanistan (Yousaf & FurrukhZad, 2020, p. 1201). The *Jirga* consists of tribal elders who “sit in a circle to decide matters ranging from inter- and intra-tribal disputes to matters of regional and national importance” (Gohar as cited in Yousaf & FurrukhZad, 2020, p. 1201). However, as stated by Yousaf and FurrukhZad (2020), “the major approach towards peace and conflict resolution employed by state elites remained the use of brute force to subjugate and control peripheral communities, while indigenous systems were either neglected or marginalised because of their perceived ‘backwardness’ and ‘incompatibility’ with the modern world” (p. 1202).

In other words, colonialist systems exert power over others; they cast non-Western practices as inferior or underdeveloped. In a sense, this may also be owing to the settlers’ lack of awareness of different cultures, as they seem to insist that there is only one right way of resolving conflict (Yousaf & FurrukhZad, 2020, p. 1203). This lack of knowledge and understanding has also contributed to regional conflicts in Federally Administered Tribal Areas (FATA); Western approaches to conflict are not culturally appropriate as they are not specific and comprehensive in local contexts. The *Jirgas* (tribal councils) in the Pashtun culture evidence the importance of decolonizing restorative justice.

The role of *Jirga* in the Pashtun culture has been effective in countering military violence. During a conflict in Kurram, which “peaked with local and Afghan Sunni militants entering the region to join hands with local Sunni elders against the Shia population”, *Jirga* measures were practiced (Yousaf & FurrukhZad, 2020, p. 1209). *Jirga* cultural practices led to the Murree Accord, and despite violations from part of “the local Sunni Taliban militants” (Yousaf & FurrukhZad, 2020, p. 1210), conflicts in the region have decreased. As noted by Yousaf and FurrukhZad (2020), “when major efforts failed to establish peace in Kurram, a grand tribal *Jirga* was convened, involving all stakeholders, to reach a negotiated settlement on the issue” (p. 1210). Even though *Jirga* does not yield a final solution, the Kurram case demonstrates that *Jirga* can assist in mitigating conflict and violence by applying authentic cultural-based conflict resolution processes (Yousaf & FurrukhZad, 2020, p. 1211).

To achieve long-term peace, therefore, traditional structures and systems must be incorporated into dispute resolution and peace-building processes along with active participation at the local, culturally specific level (Yousaf & FurrukhZad, 2020, p. 1212). The Pashtun *Jirga* has great potential to address conflicts that Western approaches are not successfully able to counter. It is a colonial myth that European approaches are the only ways to address conflict and violence; as the case of the Pashtun *Jirga* demonstrates, cultural-informed practices have long offered optimal solutions for regional and national conflicts.

### ***Haida Justice Practice in Canada***

Another important case study that underlines a decolonized restorative justice practice looks at the vision of the Haida

justice system (HJS). The Haida justice system (HJS) is an extension of the Haida people located in the archipelago of Haida Gwaii, which are islands 100 kilometres west of the northern coast of British Columbia. Furthermore, the HJS is a justice system that stems from Haida law, language, and Haida way of living. As stated by McGuire (2019), the Haida rule and justice has acted as a buffer against colonialism's destructive effects (2019, p. 5). The destructive effects of colonialism on Indigenous ways of living cannot be underestimated; however, the Haida people have kept their cultural roots and teachings alive by passing them down in stories.

As McGuire (2019) explains, in some of the Haida stories and laws passed down, for example: *yahguudang, ad kyanang kunGasda* (to inquire first), the universe is as sharp as the edge of a knife (balance), everything depends on everything else, duty, and *tll yahda* (make right) (p. 7). Haida laws also have a different relation to crime and accountability than those of the Canadian criminal justice system. To illustrate, consider that the term *tll yahda* (make right) does not reference punishment by means of incarceration or even justice. *Tll yahda* only seeks to recognize and restore or make right the harm caused. It is flexible and fluid –restorative – unlike the criminal justice system. Furthermore, the Haida laws see crime as detrimental to their societies rather than an expected outcome.

For example, according to McGuire (2019), violations of Haida law were taken very seriously, and the consequences were far-reaching socially. “If you were a nephew and you misbehaved your uncle would have to die, and you would have to carry that with you’ (Sam). Maternal uncles and aunties played a key role in children’s lives and acted as second parents and mentors for children” (p. 7). The story illustrates the relationship that family and law share within the HJS and also the serious and far-reaching repercussions of crime. It underlines the importance of family and how harm not only affects the ‘victim’ of crime but the entire family. The HJS differs from the existing criminal justice system because family and community play an integrated role, it is culturally relevant, and it aims for restoration.

This restoration can be understood in numerous ways. As McGuire (2019) notes, payment, apology and reciprocity were all ways in which restoration could occur (p. 10). Also, in severe cases such as sexual assault, men would be hoisted away from the community and women would take spruce branches and strike the men in the penis as their punishment (p. 8). This kind of punishment may be seen as inappropriate in the eyes of the criminal justice system but it is Haida law. This form of punishment is deemed culturally appropriate and allows Haida women to seek restoration in the form of teaching their aggressor a lesson. This has been considered effective because it gives Indigenous women the power to address their aggressors, seeking meaningful resolutions that allow for cultural self-determination which in return empowers the Haida community.

To sum up Haida law, or culture and justice within the framework of a decolonized restorative justice practice, one could say that using their own practices accords the Haida people the respect and dignity of self-determined governance. This decolonized restorative practice upholds the inherent rights and dignity of the Haida people since it recognizes their unique culture and laws as being neither above or below Canadian laws and customs. Furthermore, as argued by McGuire (2019), the Haida Justice System would replace the colonial mechanism of the criminal justice system responsible for centuries of harm (p. 3).

### **Limitations to Decolonization of Restorative Justice**

Colonialism is still ingrained in the social institutions of settler-colonial States. In other words, restorative justice is created within and practiced under colonial systems, and therefore cannot be implemented to its full capacity. When Indigenous cultural approaches to crime operate within colonial structures, it could be argued that decolonization is not being fully achieved. As in the case of restorative justice, decolonization is under the control of the very Western institutions that were forged through its processes. For example, in family group conferences, the Maori may have enjoyed more opportunities for participation, but the conferences were formed and operated by the State. The Haida Justice practices illustrate a system that is separate from the Western justice system and advocates for self-determination. It is also noteworthy that other limitations can be found within traditional conflict resolution processes such as the Pashtun *Jirga*, which is critiqued as patriarchal and lacking female representation (Yousaf & FarrukhZad, 2020). Recognizing such limitations can assist in identifying possible ways of improving decolonization processes and succeed in getting the monster out of restorative justice.

## Conclusion

Since the European ‘discovery’ of the new World, Indigenous peoples have been oppressed by colonial structures that aimed to eliminate the Indigenous way of life by forcing assimilation and implementing processes of genocide including cultural annihilation. Colonialism is known to be destructive and its negative impacts on Indigenous peoples have perpetuated the multiple social injustices of the colonial system, such as poverty, over incarceration, and destruction of land. Colonialist structures have characterized Indigenous practices as less effective or simply not important enough to fully implement. On the other hand, European approaches are the only ones considered worthy of inclusion (Yousaf & FurrukhZad, 2020). Restorative justice is often fathomed as a holistic Indigenous approach offering a much-needed alternative to the punitive Western criminal justice system. However, restorative justice has not been sufficiently representative of Indigenous peoples and their practices; rather, it has been romanticized and modified to fit colonial frameworks.

This homogenization of restorative justice fails to consider the cultural differences that exist between different Indigenous cultures (Tauri, 2005). Colonialists have created a generalized Westernized restorative justice paradigm by omitting the significant aspects of cultural relevancy and appropriateness. Also, celebration of ‘traditional Indigenous’ practices of conflict resolution through restorative justice within the criminal justice system creates a popular idea that Indigenous peoples’ needs are being considered when they clearly are not.

The process of decolonization highlights the importance of raising awareness around the impacts of colonialism (Monchalin, 2016). The cultural differences among Indigenous peoples must be recognized. Meaningful consultation with elders and other community members is vital and ensures that cultural appropriate methods are practiced (Busija et al., 2020). As demonstrated in the cases of the Maori of New Zealand, the Pashtun *Jirga* of Pakistan, and the Haida of Canada, the potential exists for including cultural practices within mainstream Western justice systems. To get the monster out of restorative justice, decolonization would also foster the full integration of Indigenous practices. This will afford self-determination to Indigenous peoples, while addressing other harms produced first by colonization and maintained through contemporary colonialism.

## Discussion Questions

1) Describe ways in which Asadullah’s decolonization tree framework that illustrates (trauma-informed method and an anti-oppressive structure, local communities, and cultural competency and local teachings) can be used to decolonize oneself since one must first decolonize themselves?

2) In your own view, which best enhances the decolonization of restorative justice, micro form, or macro forms decolonization?

## Recommended Activities

1) Watch Wilkinson’s, “How economic inequality harms societies” [https://www.ted.com/talks/richard\\_wilkinson](https://www.ted.com/talks/richard_wilkinson).

2) Watch “Decolonization: Crash Course European History #43” and understand the rejection of European rule in colonies.



One or more interactive elements has been excluded from this version of the text. You can view them online here:  
<https://opentextbooks.uregina.ca/decolonizingjustice/?p=55#oembed-1>

3) Take Kathy Obear “But I am not racist quiz” and learn to identify different racist behaviours and attitudes.  
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# 7. Decolonization and Mental Health

NICOLA KIMBER

## **Title: Duty to Decolonize: Trauma in Canada**

### **Abstract**

*Gaining insight into a few of the effects of colonialism faced by Indigenous peoples in Canada is a difficult but necessary task. The Canadian Justice System's role in not only the initial harms of colonization but also the continuation of harm against Indigenous people in Canada is explored through multiple case studies each focusing on different aspects of negative mental health affects in Indigenous peoples. The case studies help to shed light on how Canada as a country not only should but can do better with respect to the decolonization of mental health.*

### **Introduction**

The field of decolonization is broad, complicated, and oft-misunderstood—yet it is extremely important. Unfortunately, denial and avoidance are the common responses to decolonization approaches. The Canadian justice and criminal justice systems are infamous for causing and perpetuating problems related to colonization and decolonization attempts. While there has been more widespread emphasis on decolonization and reconciliation recently, specifically by the Indigenous peoples of Canada's Truth and Reconciliation Commission (2012), there is still a long road ahead. Even with the official report of the TRC, it is telling that the TRC recommendations have mainly not been implemented or at least not effectively – such as the revision of history textbooks and materials in public schools. The TRC findings have, however, triggered a large body of Indigenous research and helped inform the public and academia about the legacy of mental illness related to the direct trauma and intergenerational trauma infused into Indigenous cultures in Canada through colonialism, and the need to fathom decolonization.

Many significant issues both broad and specific arising from colonization directly affect Indigenous peoples in Canada. Many programs originate from the mental health side of colonization and contemporary colonialism; likewise, many programs now use a decolonized lens to focus on mental health. Designed with mental health in mind, decolonization practices are practical and becoming more and more accessible. Mental health, decolonization, and the Canadian Justice System are intricately intertwined and influenced by one another. Some of the decolonization practices in Canada center on mental health, such as trauma-informed education for Indigenous children in foster care, culturally relevant addiction treatment centres, and specialized healing lodges for female Indigenous offenders.

### **Impact of Colonization**

While it is easy to see colonization as an historical event, the impacts of colonial history have been sustained and thus perpetuated by society. The influence of colonialism lingers in numerous institutions and structures of society, such as educational institutions, governmental policies, or economic practices. From within these structures, the effects of colonialism ooze into everyday life, having transformational effects on the individual and thus greatly impacts communities. Canada is no exception; the warped value-base of colonialism affects 'mainstream' Canadians and Indigenous people differently. It is important to note that privilege can be as simple as a lack of additional obstacles and thus not always easy to identify. While all age groups of Indigenous peoples face unique challenges with respect to their unique situations, mainstream Canadians are unknowingly privileged by the same structures that perpetuate colonialism.

The impact of colonization on the mental health of Indigenous peoples of Canada is immeasurable. Troubling statistics reveal the overrepresentation of incarcerated Indigenous people. While the Indigenous Peoples make up only five percent of the Canadian population, they represent over 30 percent of Canada's incarcerated population (Office of the Correctional Investigator, 2020). In addition, the rates of suicide among the Indigenous populations are three times higher than those of non-Indigenous Canadians (Kumar & Tjepkema, 2019). Such glaring and alarming problems are all profoundly attributed to mental health.

### **Impact of Colonization on Indigenous Children**

The effects of colonialism on Indigenous children are devastating. In Canada, 7.7 percent of all children under the age



of 14 are of Indigenous heritage, yet 52.2 percent of them are currently in care, under Canada's child protection services (Government of Canada, 2020). The connection between colonial practices and the overrepresentation of Indigenous children in care may not be obvious but it does exist.

To expose the connection, a historically corrective lens must be applied. While it is not inaccurate to date the colonization of Indigenous people of Canada back to the first settlers landing, colonization must neither be seen as a single act nor be pinned down to a single event in Canada; colonization generally can refer to the formation of permanent settlements established by French and British colonizers upon rightful land of the Indigenous Peoples having previously inhabited it. Colonization, of course, did not end there. One of the major components of colonization is the perpetuation of colonial structures and thus the value systems they support. To achieve this, the Indigenous culture was essentially criminalized (Bartlett, 1978). To ensure a culture is not passed on to subsequent generations, however, one must target the youngest generations. The infamous Residential School System would serve this function from 1834 to 1996. The stated goal of the residential schools was to deprive Indigenous children of their cultural heritage by separating them from their cultural community and families and teaching them their native language and customs were uncivilized and wrong. Most attendees also experienced physical, emotional, sexual, and spiritual abuse (Corrado & Cohen, 2003). As a result, residential school survivors have commonly been burdened with unemployment, poverty, familial violence, substance abuse, and incarceration (Stout & Kipling, 2003). Many survivors were not equipped for parenting, carrying traumatic past experiences from their own childhood. This has allowed for intergenerational trauma, a result of the modus operandi of colonization in displacing children from their families.

#### ***Impact of Colonization on Indigenous Youth***

Colonization also continues to have a significant, life-altering effect on Indigenous youth. In Canada's youth justice system, Indigenous youth now account for 43 percent of those in the correctional system despite representing only 8.8 percent of Canadian youth (Malakieh, 2020). Offenses committed by Indigenous youth tend to yield more serious repercussions than those of their non-Indigenous counterparts (Latimer & Foss, 2004). Statistically one out of six Indigenous youth in custody are "suspected or confirmed" to have fetal alcohol spectrum disorder (Malakieh, 2020, p. 11). Perhaps the most distressing findings among researchers is that one in five Indigenous youth is reported to have attempted suicide while in custody (Latimer & Foss, 2004). Although these serious problems may seem unrelated to the colonization of Canada, a closer look reveals patterns linking the two.

To begin with, the overrepresentation of Indigenous youth in Canada's correctional system is a clear indicator of a bigger problem. Tracing backwards through the history of Canada's residential school system, multiple studies have found that intergenerational residential school attendance is a strong determinant of mental health problems, such as depression, substance abuse disorders, and suicidal ideation (Wilk et al., 2017). These mental health problems have not simply disappeared over the generations. Intergenerational trauma is trauma passed down from one generation to the next, through parental inabilities to cope with trauma caused by the loss of traditional language, culture, familial ties, as well as inadequate education (Kaspar, 2014). Interestingly, children of residential school survivors have more mental health issues such as substance abuse and suicide than the generations who attended the residential schools (Hackett et al., 2016). Given that the schools were a major component of colonization in Canada, the detrimental mental health of Indigenous youth is a direct consequence of colonial practices.

#### ***Impact of Colonization on Indigenous Adults***

Like Indigenous youth, Indigenous adults face many colonial challenges within the Canadian Justice System and criminal justice system. There are still many living survivors of the Residential School system in Canada. Other Indigenous adults have been affected by the system whether personally or through familial ties, producing similar outcomes including higher rates of mental health issues (Wilk et al., 2017). An analysis study by Grant in 1996 found that some 85 percent of the Indigenous adults engaging in drug and substance abuse treatment programs at the time were survivors of residential schools. While these numbers may not be as high today, it is still indicative of a problem caused by a colonial practice. What is unique to Indigenous adults is the impact colonization perpetuates on rates of Indigenous incarceration and recidivism. Non-Indigenous male offenders in Canada statistically re-offend at rates of 24.2 percent, while for Indigenous male offenders that rate rises to 37.7 percent (Stewart et al., 2019). In other words, 37.7 percent of Indigenous male offenders reoffend. For Canada's non-Indigenous female offenders, rates of recidivism

are 12 percent while the rates are 19.7 percent for Indigenous female offenders (Stewart et al., 2019). Overrepresentation with recidivism for Indigenous adults is also indicative of Canada's colonial history.

As Canada's criminal justice system was founded on colonialist settler ideologies, not only are incarceration facilities suited to these ideologies, so too are the ways of reducing reoffending. When rehabilitation programs are created by and for colonial settlers, rates of satisfaction and success are higher. Without offender programs built on Indigenous perspectives, Indigenous offenders face additional challenges benefitting from ideologies they do not traditionally share. Without culturally appropriate structures, Indigenous adults are at a higher risk of both offending and reoffending (Stewart et al., 2019). To claim that Indigenous adults simply offend and re-offend at a higher rate than non-Indigenous adults is to be ignorant of these colonial structures. The effects of residential schools along with a culturally inadequate criminal justice system greatly impacts the psychological, and legal challenges faced by Indigenous adults.

The impact of colonialism affects Indigenous peoples in numerous ways. Breaking down its effects by age group helps organize and more clearly illustrate the unique circumstances of the Indigenous Peoples in Canada today. Colonization began five centuries ago by the British and French starting in the late 15th century, which continued under British rule until 1867. This lengthy history of colonization illustrates how deeply ingrained colonial ideas are, having been entrenched centuries before Canada became a sovereign nation. As long as a country was once colonized, so long will the impact of that colonization exist.

### **Defining Decolonization**

To understand decolonization, one must first understand colonization or colonialism. Colonialism can be largely defined as the stealing of a rightful peoples' land and the creation of a structure which perpetuates types of genocide and racism against Indigenous peoples (Barkaskas & Buhler, 2017). The colonization of Canada was heavily based upon epistemological racism, which is the idea that one's belief system and knowledge is "superior to that of others" and the only type of "valid" knowledge (Nadeau, 2020, p. 73). For example, the notion that the British perspective on justice is the only correct perspective makes any other perspective (e.g., Swedish, Australian, or Canadian Indigenous) inferior by contrast. That is colonial thinking. Colonialism is not unique to any country and always involves exclusionary socio-economic values and ideology. Many countries have colonial histories. Some are still in the process of colonizing another country, while many others are recovering from colonization. As elsewhere, the colonial system implemented in Canada was historically justified by the Eurocentric idea that Indigenous culture and knowledge was inherently inferior and thus needed to be replaced (Nadeau, 2020).

Decolonization is the reverse of colonization. Since historical aspects cannot be undone, decolonization refers to the unraveling of structures within a society which create, follow, and uphold colonial ideology. Because the day to day of colonization was unique to the colonizer based on the realities of the target society and location, the process of decolonization must also differ (Asadullah, 2021). A clear definition of decolonization has been widely debated; however, the two main arguments take into account the existence of micro and macro forms of decolonization (Asadullah, 2021). The micro form of decolonization refers to more specific associations with the individual and is known as decolonization of the mind, body, and spirit. Aspects of society such as language and cultural practices are considered micro forms of decolonization (Asadullah, 2021). The macro form of decolonization refers to more structural associations of colonialism such as social, political, and economic structures (Alfred, 2009) and public institutions.

It must be realized that decolonization involves more than the deconstruction and reconstruction of societal problems. By the same token, social justice movements are not inherently decolonial. What makes a movement a decolonization initiative is for the movement to be supporting Indigenous culture and practices and aiming for the "reparation of Indigenous land and life" (Tuck & Yang, 2012, p. 1). The Canadian justice system requires decolonization because it was part of the colonial system imposed on the Indigenous peoples in North America.

Decolonization is a huge term that is largely misunderstood and misinterpreted. Defining decolonization is challenging because what is considered a decolonial practice is well defined and because the practices can be very different depending on the cultural group targeted. As the impacts of colonization are highly situational, decolonization must be just as diverse, as it is the deconstruction of colonization.

### **Decolonization and Mental Health**

In the context of Canada's justice system, decolonization delves into the functions of the justice system itself. Since

the Canadian Justice System and criminal justice system were first imposed upon Indigenous peoples, its practices, and outcomes amount to colonial residue. This is not to say that every aspect of the Canadian Justice System needs to be replaced in order to decolonize, but it does mean that aspects of the system function specifically to the detriment of Indigenous peoples. For instance, many Indigenous peoples suffer from trauma, whether familial, cultural, or emotional. These negative experiences often manifest into problems with their mental health (Wilk et al., 2017).

While Canada's criminal justice system claims to accommodate for mental health, there are many problems with service availability, accessibility, and delivery within the system. There are even more problems in the system when considering Indigenous peoples. Considering the impact of mental health within the Canadian Criminal Justice System, it is a necessary area for decolonization. This means bridging the cultural gap between Indigenous and non-Indigenous mental health services, practices, and subsequent outcomes. As the mental health of Indigenous peoples is in many cases worsened by colonial structures in Canadian society, decolonization of all mental health services is essential.

### **Decolonization and Trauma-Informed Practices**

Much of Canada's criminal justice system does not acknowledge the unique challenges and situations surrounding the Indigenous peoples of Canada. As many Indigenous peoples of Canada have experienced trauma whether personally or through familial history as a direct or indirect result of colonization, decolonization of Indigenous mental health is essential. In other words, to decolonize Canada's mental health system, the lasting negative effects of colonialism need to be overturned. This involves the implementation of trauma-informed practices within Canada's justice system and mental health system; thus trauma-informed practices are decolonial practices.

In order to decolonize mental health issues, awareness and understanding of trauma are essential. Trauma can be defined as the result of an extremely negative experience. These experiences commonly involve feelings of helplessness, terror, and overall devastation (Hopper et al., 2010). Extreme cases can result in further mental health problems such as posttraumatic stress disorder (PTSD). Trauma-informed practices, also known as trauma-informed care (TIC), are specifically constructed around this notion of trauma. TIC strives to recognize and understand the psychological, physical, emotional, and spiritual complexities impacted by trauma and utilize appropriate methods of dealing with such issues. This means that trauma-informed practices must recognize that an individual's behaviour has the potential to be greatly influenced by historical and social factors (Nadeau, 2020). Trauma-informed practices generally involve strengths-based approaches, as well as "culturally specific approaches to healing" (Nadeau, 2020, p. 82; Hooper et al., 2010). Elaborating on this, trauma-informed practices seek to avoid re-traumatization in order to ensure lasting healing and empowerment.

Part of targeted trauma-informed practice includes acknowledging Indigenous perspectives. When considering decolonization, many people unfortunately disregard or neglect the rights of Indigenous peoples to collaborate on programs directly meant to benefit them (Nadeau, 2020). The persistence of this evidence colonialism. As Nadeau (2020) argues, social programs generally are developed by social workers, whose profession is historically rooted in Christian values and ideologies as well as "colonialist views and practices" (Hunt, in Sterritt, 2019). This presents a conflict of interest, as a program aiming to decolonize from a colonial perspective will present clashes in root ideologies. While this is not to say that social workers cannot aid decolonization, without proper education and acknowledgement of this contradiction this can perpetuate the notion of a "Great White Helper" (Nadeau, 2020, p. 86). The Great White Helper label represents a need to "liberate" the "uncivilized", effectively empowering themselves, not the group they claim to be helping (Nadeau, 2020, p. 86). This is simply another form of colonization. To decolonize this dangerous paradigm, the creation of programs must actively integrate and value Indigenous perspectives with no bias. Trauma-informed practices involving Indigenous perspectives were left out in the creation of the Canadian Justice System as a whole, disempowering Indigenous values.

### **Indigenous Children**

Just as there are many current problems arising among Indigenous children because of colonization, many of these can potentially be alleviated through the implementation of trauma-informed practices. Many Indigenous children face multiple types of abuse. From these traumatic experiences comes the need for trauma-informed practices and approaches to healing.

While the historical roots of colonialism can never be undone, the process of decolonization must ideally begin at

birth. It may seem impossible or inapplicable to consider decolonizing practices among infants, toddlers, and children, however, even early on in life there are colonial practices at work. Exemplifying this is the overrepresentation of Indigenous children in Canada's foster care system. Decolonization is not only to undo institutional structures but also to help individuals with problems ensuing from colonization. As children grow into teenagers and young adults, hidden problems may surface, meaning that decolonizing programs and practices should be introduced as young as possible. Sadly, when these societal forces collide, the likelihood of Indigenous adults having run-ins with the Canadian Criminal Justice System increases.

The inclusion of trauma-informed practices within foster care helps stop the cycle of colonial trauma, thus it is an important aspect of decolonization. Traditionally Indigenous ways of child rearing must be respected so long as they do not conflict with Canadian law. Indigenous decolonization of the child protection system can sound daunting, but that is not to say it is impossible.

### **Indigenous Youth**

Many unique challenges faced by Indigenous youth are a result of colonization. Decolonial practices can be implemented through culturally appropriate mental health services and trauma-informed practices.

Trauma-informed practices can be implemented in a variety of methods. Currently the majority of Indigenous youth offenders have committed legal wrongdoings as a way of coping and dealing with trauma or traumatic situations (Oudshoorn, 2015). This is not to justify their wrongdoings, however, to prevent its own offenses, the criminal justice system must acknowledge the root causes of offender behaviour. The recognition that trauma plays a substantial role in the manifestation of mental disorders and substance use disorders is crucial to forming trauma-informed practices (Substance Abuse and Mental Health Services Administration, 2014). In many cases, alcoholism arises from mental health issues, as abuse of substances introduces a method of coping. The Canadian Indigenous population has long been overrepresented in Canada's incarceration centres, thus it is imperative for the development of projects and programs aiming at intervening with mental health issues that have triggered the substance abuse, which then becomes a complicating factor to rehabilitation and re-integration. Once causes are identified, solutions can be theorized and implemented. If the majority of Indigenous youth offenders offend as a direct or indirect result of trauma, then culturally relevant, anti-colonial focused trauma-informed practices that take addiction (self-medication) into account is a logical direction to take.

### **Indigenous Adults**

Trauma-informed practices and approaches can help heal these personal traumas experienced by many Indigenous adults. Children who attended residential schools are considered survivors, yet they carry the traumatic experiences with them to this today. Substance use disorders greatly affect Indigenous adults as well as youth. In fact, almost 79 percent of residential school survivors have reportedly struggled with substance use in the province of British Columbia (Corrado & Cohen, 2003). Frequent alcohol abuse is known to dramatically raise an individual's likelihood of participating in criminal acts, thus putting those suffering from alcoholism at risk of conflict with the law (Oudshoorn, 2015).

Regarding incarcerated Indigenous adults, it is important to emphasize strengths rather than weaknesses when applying a trauma-informed approach. Simply acknowledging the existence of trauma is not sufficient. By acknowledging and highlighting strengths, individuals can hone their strengths to heal from trauma and prevent or reverse negative outcomes. Trauma-informed practices therefore take the acknowledgement of the impact on the individual of trauma further, working to unravel and heal past traumas (Nadeau, 2020).

Methods of healing simply acknowledging the damage of colonization and colonial practices on Indigenous peoples can be implemented. Since many Indigenous peoples suffer from trauma, whether familial, cultural, or spiritual, the need for trauma-informed practices is obvious. As the traumas have been caused by colonization, the implementation of trauma-informed practices is a form of decolonization and must recognize the colonial structures that perpetuate trauma.

### **Case Study: Knucwénte-kuc re Stsmémelt.s-kuc "We are all helping our children"**

Over half of the children in Canada's foster care system are Indigenous despite only 7.7 percent of children under 14 in Canada being of Indigenous heritage (Government of Canada, 2020). Furthermore, Indigenous children graduate from grade 12 at rates between 9-17 percent lower than non-Indigenous children (Johnson, 2014). A study in British

Columbia utilized a trauma-informed practice for Indigenous children to combat these concerning statistics. A Canadian social worker collaborated with the Secwepemc First Nations to create a trauma-informed education system within their foster care system. This research project was named Knucwénte-kuc re Stsmémelt.s-kuc, or in English, “we are all helping our children” (Johnson, 2014, p. 156). While the system was created for academic study, it provides valuable findings and recommendations for a trauma-informed practice aiming at Indigenous children in foster care living on Secwepemc territories. Having operated on unceded traditional Secwepemc First Nations land, the foundation of the program politically recognizes and respects the rights of the Secwepemc peoples. The very recognition of ceded or unceded Indigenous land may seem to be redundant; however, when considered in relation to the colonial history of Canada, it in itself is a form of decolonization. When settlers came to what is now known as Canada, they essentially stole the land from the Indigenous peoples, claiming it as their own (Nadeau, 2020). Acknowledging the ancestral rights of, therefore, is a form of decolonization for the Secwepemc peoples, as it identifies a historical wrongdoing.

The actual creation of the project involved Elders of the Secwepemc peoples, gaining Secwepemc perspectives on programming directly affecting the Secwepemc peoples. The name of the project, Knucwénte-kuc re Stsmémelt.s-kuc came from a Secwepemc Elder. The English translation “we are all helping our children” represents the collaboration of the Secwepemc peoples and researchers united in a common goal (Johnson, 2014, p. 156). Elders also actively aided researchers and ensured that the heart of the project followed traditional Secwepemc cultural practices, which were used to create a program – as opposed to a program being created by the mainstream and imposed upon Indigenous practices (Johnson, 2014). Local First Nations individuals and an Inuit educator as well as a Métis social worker were involved in the planning and construction of Knucwénte-kuc re Stsmémelt.s-kuc (Johnson, 2014).

The project involved talking circles, respecting Indigenous culture, as well as Indigenous methods of knowledge. In many Indigenous cultures, knowledge can be obtained not only through physical research, but also through dreams (Johnson, 2014). Most colonial ideas consider dream interpretation to be trivial, therefore the inclusion of this type of knowledge-gathering is a decolonial practice.

The purpose of the Knucwénte-kuc re Stsmémelt.s-kuc project was to acknowledge the trauma, analyze, and provide potential solutions to the unique educational challenges of Indigenous children particularly in the context of child protection systems. By acknowledging the issues against which many Indigenous children in care struggle, trauma-informed practices are recommended for alleviation and healing (Johnson, 2014).

### **Case Study: Sunrise Healing Lodge**

The Sunrise Healing Lodge is an addiction treatment centre located in Calgary, Alberta and its mission is to “provid[e] a path to recovery through spirituality and culture” (Sunrise Healing Lodge, 2021). The centre’s philosophies specifically revolve around traditional Indigenous cultural and spirituality. The challenge in decolonizing an addiction treatment centre originates largely from colonial ideologies at their foundation.

For instance, one of the most well-known substance abuse programs is the Alcohol Anonymous 12-Step Program. A quick read of the program reveals many colonial elements. For instance, step three is to “[make] a decision to turn our will and our lives over to the care of God as we understood Him” (Brandt, 2021). This means that “God” in the Christian context is ingrained in this widely known and popular 12-step program, steps five, six, seven, and eleven also name the Christian “God”. This is extremely telling of a Christian-based exclusionary mindset of superiority, which is also an aspect of colonialism. In this case, the lack of identification with the Christian God is deemed a failure that creates a divide between those who are Christian and those who are not. While this alone is not inherently wrong, religion becomes a colonial practice when imposed on societies of another faith. This exclusion can create and strengthen trauma. There are alternatives to the AA program, as well as alternative names and cultural substitutions to modify the program, which cites a Christian God, although these are inherently biased to individuals who are Christian. Decolonization of these steps must involve replacing inherently Christian-based ideologies with ones that are culturally relevant when working with non-Christian individuals.

While as an addiction treatment centre the Sunrise Healing Lodge has been hugely influenced by Alcoholics Anonymous (AA), the Sunrise Healing Lodge takes AA’s 12-Step program and fuses it with traditional Indigenous, values, spiritual teachings, and practices. Cultural activities include sweat lodges, pipe ceremonies, and sharing circles, all of which are derived from various Indigenous traditions in North America. Residents of the Sunrise Healing Lodge are

appointed a team of counsellors, including Aboriginal Elders who focus on spiritual teachings (Sunrise Healing Lodge, 2021). This program is not exclusively for Indigenous individuals; however, it uses traditionally Indigenous culture and spirituality as a basis for healing. Each of these traditionally Indigenous practices allow for individuals to express their challenges and traumas in an open, nonjudgmental environment and form a decolonial trauma-informed practice.

#### **Case Study: Four Seasons Horse Teaching program**

Established on Nekaneet First Nation territory, the Four Seasons Horse Teaching program is located at the federal Okimaw Ohci healing lodge in Saskatchewan. The Four Seasons Horse Teaching program aims to rehabilitate offenders through physical, social, mental, emotional, and spiritual methods and practices (Martell, 2021). The program is unique because it actively involves interacting with and caring for horses as part of the healing process. Classified as a social rehabilitation program by Corrections Services Canada, the program utilizes decolonial practices in the care and healing of offenders. The Okimaw Ohci healing lodge is in Cypress Hills, an area initially historically named by the Cree as “Thunder Breeding Hills” (Reardon, 2010). In honour of the historical significance and present goals of the healing lodge, the name of the healing lodge itself, Okimaw Ohci, means Thunder Hills (Reardon, 2010).

By including horses in the rehabilitation of offenders, attendees go through a unique form of equine therapy using animals as spiritual teachers in the healing process. Attendees begin their healing journey with a talking circle. Offenders are not referred to as offenders, but “residents of the lodge” (Stefanovich, 2018). The inclusion of horses throughout the healing process is both unique and effective. As explained by Mosquito, an instructor at the Four Seasons Horse Teaching program, horses do not judge people (Martell, 2021). This helps residents to be open and honest, creating a spiritual bond with the animals along traditional Indigenous lines.

Many of the activities offered at Okimaw Ohci healing lodge involve traditional Indigenous practices such as storytelling, circle teachings, and ceremonies. Decolonization means the renewal of practices that came before colonization, thus traditional Indigenous practices are decolonial practices. Historical perspectives are also taught to residents. This is especially important as it allows Indigenous residents to better understand their unique circumstances through decolonial education and validation of their roots. Indigenous residents can then reconnect with the land, which is a traditional aspect of Indigenous identity (Martell, 2021). The acknowledgement of trauma also allows for Indigenous individuals to express themselves through compassionate, culturally appropriate means with the aid of trauma-informed support and practices.

These programs and academic study all move towards the goal of decolonization. Only by acknowledging the harm caused by colonization can healing and reparation be pursued. Decolonization may appear to be more of an intangible concept than a practice, but more and more programs and strategies prove that just as colonization was a system that became the reality, so too can decolonization.

#### **Limitations and Areas for Future Research**

Since this paper aims to educate about decolonization, certain limitations must also be acknowledged. This paper is not representative of an actual study, interviews, or physical research involving the author. Given the scope and length of the paper, the data for each case study analyzed is also somewhat limited. This paper was written as an advanced undergraduate project aiming to analyze a select few decolonial practices and inform generally about the need for trauma-informed practices within such a framework. Regarding the limitations of this area of study itself, suffice it to say that the academic study of decolonization is a relatively new area. There is a dearth of resources on the topic of decolonization and even less on the intersection of decolonization and mental health.

Areas for future research include additional scholarly analyses of the case studies looked at in this paper. Moreover, inclusion of these decolonial issues in academic programs would greatly increase the opportunities for future decolonial studies and programs. An overarching reliance on the findings of Canada’s Truth and Reconciliation Commission, which is integrate decolonial practice and the connection between theory and Calls to Action, in this research would help in the move towards decolonization.

#### **Conclusion**

With dangerously high numbers of Indigenous peoples suffering from mental health problems, it is imperative to investigate explanations for this overrepresentation. An examination of the various unique situations faced by Indigenous peoples of Canada reveals that the remnants of colonization are still very present and real. The effects of

the forced displacement of land, criminalization of Indigenous cultural practices, and the attempted assimilation of the Indigenous peoples of Canada are perpetuated in various ways across generations. Through decolonization, harmful structures of power and ideologies in the Canadian Justice System can be dismantled and replaced with decolonial practices that value and respond to Indigenous cultures and peoples. The effects of colonization on Indigenous children, youth, and adults cannot be overstated. As a common factor of these negative, harmful effects on Indigenous peoples, extensive trauma lived by Indigenous people makes the need for decolonization apparent.

Mental health is largely sidelined within the Canadian Justice System, including the criminal justice system's failure to take the trauma of Indigenous peoples into account. As many Indigenous peoples suffer from various forms of trauma, the decolonization of mental health through culturally appropriate trauma-informed practices can alleviate these harms and encourage healing and reconciliation. The use of culturally relevant education for Indigenous children in child protection services is a decolonial practice, as it values Indigenous culture and reunites Indigenous children with their ancestral heritage, language, traditions, spirituality, values, and traditional support systems. As these aspects of Indigenous life were either damaged or lost due to colonization. The restoration of culturally relevant education is a decolonial practice, recognizing familial trauma. Creating healing lodges for the treatment of addiction adds a decolonial element to drug rehab, creating a space for traditional Indigenous ways of healing, many of which are already aligned with decolonial trauma-informed practices. As addictions are a mental health issue, this practice decolonizes treatment. Healing lodges are another decolonial practice for mental health in Canada. Equine therapy is another practice carried out in a non-judgmental environment and involves reconnecting with Indigenous spirituality and traditional Indigenous values. These kinds of decolonial practices, valuing Indigenous teachings and philosophies, are needed for the Canadian Criminal Justice System to effectively deal with those afflicted with colonial trauma.

As Canada was established through colonialism, it is Canada's responsibility to enforce decolonization in areas negatively affecting Indigenous peoples. As many Indigenous peoples have undergone various traumatic events both personally and through familial heritage, trauma-informed practices are necessary if effective solutions are to be obtained. The inclusion of trauma-informed practices in the treatment of Indigenous mental health issues related to the socio-economic exclusion of is a decolonial practice. Colonization largely contributes to the trauma inflicted upon Indigenous peoples today, which then creates various mental health problems. The decolonization of mental health through the use of trauma-informed practices is a real, viable, and ethical solution to the overrepresentation of Indigenous peoples in Canada who are suffering as a result of colonialism.

### **Discussion Questions**

1. What does decolonization look like in a post-colonial state such as Canada? Discuss whether it can ever be completely achieved and why or why not.
2. How does the concept of equity vs equality play a role in the decolonization of mental health?

### **Recommended Activities**

1. Watch the documentary *We Were Children* (2002) by Tim Wolochatiuk and consider the challenges residential school survivors continue to go through today both in their own families and within society.
2. Research the response of both the Canadian government and the Catholic Church regarding residential schools in Canada. Consider whether they are striving to achieve reconciliation with the Indigenous peoples of Canada. What could be done to reconcile the harm done to the Indigenous peoples of Canada?

### **Recommended Readings**

- 1) United Nations General Assembly. (2007). United Nations declaration on the rights of indigenous peoples. *UN Wash*, 12, 1-18.
- 2) Nadeau, D. M. (2020). *Unsettling Spirit: A Journey into Decolonization*. McGill-Queen's University Press.

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# 8. Decolonizing Mental Health Services in Prisons

KAYLA SCHICK

**Title: Decolonizing Mental Health Services in Correctional Settings: Is Indigenous Self-Governance and Healing the Answer?**

## **Abstract**

*Canadian correctional institutions, such as prisons, have an overpopulation of racial minorities and disproportionately high rates of mental illness. It's no secret that more and better mental health supports are needed, especially in areas with large populations of racial and cultural minorities. Decolonization, for which there are multiple definitions and theories, offers a way to build more inclusive, holistic, and therefore effective approaches to mental health care. This chapter will highlight the work of key scholars in the field of decolonization and initiatives around the world aimed at decolonizing mental health programs and supports in prisons. Colonization has impacted the field of mental health and the prison institution in Canada. Additionally, psychology and correctional systems have been used as methods of assimilation throughout Canadian history. Ultimately, this chapter argues that decolonizing mental health in correctional facilities is necessary to ensure community and individual healing.*

## **Introduction**

On October 19, 2007, Ashley Smith, after a lengthy and well-known history of self-harm and suicidal ideation, died by suicide in her prison cell while being videotaped and in sight of correctional officers who were told not to intervene if she was still breathing. Although Ashley Smith's death was ruled a homicide and charges were laid against the guards and supervisor, these charges were later dropped (CBC, 2010). On August 23, 2010, Edward Christopher Snowshoe was pronounced dead by suicide on his 162nd day locked in solitary confinement which Correctional Services Canada deemed a necessary precaution to protect himself and others (White, 2014). Snowshoe's death followed multiple suicide attempts in his three years of incarceration during which he battled multiple mental illnesses. On December fourth, 2016, Soleiman Faqiri was arrested during a schizophrenic episode and was taken into custody, rather than hospital, where he was killed 11 days later by correctional guards' excessive use of force; his family is still fighting for justice (Nasser, 2019) five years later. These tragic realities highlight the failings of correctional institutions regarding mental health treatment and services. This is due in part to the inherently colonial nature of correctional institutions that aim to punish rather than heal and do not implement adequate or culturally competent mental health services and policies.

Prison populations are known to have an overrepresentation of both individuals with mental illness (Bakken & Visher, 2018) and racialized groups (Malakieh, 2020). Given the large overrepresentation of minority groups in correctional institutions, especially of Indigenous people, it is right to infer that these populations are also disproportionately affected by mental health concerns. Despite this, mental health practices, research methodologies, and policies remain rooted in colonial ideology. This chapter will discuss the importance of recognizing how colonization has impacted the mental health of many Indigenous people in Canadian correctional institutions through intergenerational trauma from colonization, the colonial lens in which research and program creation appear, and the limited access to quality and culturally appropriate services for racialized populations. Lastly, promising practices will be discussed in relation to multicultural family counselling, the Kunga Stopping Violence Program, and healing lodges.

## **Impacts of Colonization**

The impact of colonization on Indigenous peoples in Canada is far-reaching and particularly harmful to their mental health. Many mental health professionals, scholars, and Indigenous communities have noted that colonization continues to directly affect the mental well-being of Indigenous people (Gone, 2013). This has led to the acknowledgement of historical or intergenerational trauma, a term that encompasses the complex and self-perpetuating trauma caused by the colonial economic agenda and assimilation practices. These practices were implemented with the specific purpose of destroying Indigenous culture, and therefore an entire way of life, in an inherently violent way. The modus operandi of the colonial system includes stolen lands, the Canadian Residential School system, the Sixties scoop, and methods of clearing the plains using starvation and disease. These acts of government-sanctioned genocide now contribute to a loss

of identity and culture, resulting in greater mental distress across an entire group of people, generation after generation. Studies on the psychological impact of residential schools show that individuals who attended have higher rates of depression, suicidal ideation and attempts, and are more likely to have survived childhood abuse and neglect (Boksa et al, 2015). Additionally, negative social determinants of health such as poverty, unemployment, and homelessness are also linked to colonization and contribute to both mental health outcomes and criminal offending (Boksa et al, 2015). Therefore, colonization is a root cause of the disproportionate mental health issues in Indigenous communities and the overrepresentation of Indigenous individuals in Canadian prisons.

Colonization has also impacted the way mental health issues are identified and treated; not only has colonization led to mental health concerns among Indigenous people, but it continues to perpetuate harm through colonial models of healing. Meanwhile, the history of psychology itself is also linked to the systematic colonial oppression and assimilation of Indigenous peoples. This is shown most clearly through the biomedical model once used to classify and blame minority groups by claiming the perceived issue was inherent to the person or their culture, which led to inappropriate, forced treatment or criminalization of the behaviour. Treatments were often physically and/or psychologically harmful, adding to the distress suffered by the individual (Joseph, 2014). It is important to note that little research exists on forced psychological treatment of minority populations, which Joseph (2014) suggests is due to the political and social context in which these practices were performed. There is clear evidence, however, of an overrepresentation of racialized individuals in forensic mental health systems that is believed to be the result of both racist diagnostic processes and treatment services (Mackenzie, 2004). Being a person of colour with a mental illness increases the likelihood of contact with the Canadian justice system, and this is because the justice and mental health systems and practices were largely used for the purpose of securing colonization and assimilation.

The overrepresentation of racial minorities in Canadian prisons is a known fact. In the 2018/2019 fiscal year, 31% of provincial and 29% of federal prison admissions were Indigenous despite comprising only 4.5% of the general Canadian population. Moreover, Indigenous women accounted for almost half of provincial and federal prison admissions (42% and 41% respectively), almost double that of their male counterparts (Malakieh, 2020). It must also be noted that overrepresentation is especially high in the prairie provinces with 75% of adult admissions to Saskatchewan correctional facilities in 2018/2019 being Indigenous despite the local Indigenous population comprising only 14% of the province's total population (Malakieh, 2020).

Monchalin (2017) notes that this overrepresentation is due to the inherently colonial nature of the Canadian Justice System which has insidiously worked to criminalize and assimilate Indigenous peoples since its conception. Current policies increase the likelihood of Indigenous people being incarcerated as they have a greater likelihood of living below the poverty line, making it difficult to pay fines or hire their own lawyers (Monchalin, 2017) among other impacts. Monchalin (2017) insightfully argues that the overrepresentation of Indigenous individuals as both victims and prisoners is often presented as an issue inherently internal to Indigenous communities, rather than as a legacy of historical and modern-day colonial practices implemented to achieve "Indigenous people's silent surrender" (p. 145). The complex and multi-faceted impacts of colonization on Canadian prisons is beyond the scope of this chapter; however, it is important to understand that colonial roots underlie all aspects of correctional institutions and, therefore, how forensic mental health treatments are created, implemented, and accessed.

Popular mental health practices stem from European clinicians and research from primarily White study participants. Existing policies and governing structures within the psychology profession continue to promote the colonization of mental health services. Therefore, a top-down decolonized approach is required, beginning with the full implementation of the United Nations Declaration of Indigenous Peoples and a strategic diversification of psychology governing boards and structures (Lucero, 2011). Despite current calls within the mental health and justice communities for culturally competent clinical and research practices, more extensive work must be done to decolonize the field. This is evidenced by the quantitative data supporting the perceived need of decolonized mental health services for successful outcomes in treating mental illness and distress (Hatcher et al., 2016). The need is also shown by the insufficient research on Indigenous mental health and a lack of funding available for these projects (McIntyre et al., 2017), racism within offender support programs and justice institutions responsible for ensuring access to healing services (Thompson et al., 2016), and the justice system's slow response to informed recommendations for decolonization and lack of long term

funding for culturally competent healing initiatives (Shepherd & Phillips, 2016). Therefore, institutional change must occur to shift the fields of psychological research, justice interventions, and forensic mental health practices towards a decolonized approach.

### **Defining Decolonization**

Before one can address how to decolonize existing systems and institutions, an operational definition of decolonization must be established. While a general definition of decolonization has historically been understood as colonies becoming independent of the colonizer, the required method of decolonization is now a subject of scholarly debate. For instance, McNamara and Naepi (2018) define decolonization as the removal of all colonial influences. However, the authors argue that taking a decolonial stance means there are no redeemable qualities within the existing system, and it therefore must be dismantled and reconstructed. This perspective is seen by some to be too extreme, potentially harmful, and perhaps even unrealistic. Therefore, McNamara and Naepi (2018) argue for the Indigenization of existing systems, which they define as implementing Indigenous elements into existing structures to build integrated institutions that balance the diverse Indigenous and colonial-centered practices and values. Indigenization has proven a popular tool in courts and correctional institutions, leading to the implementation of sentencing circle practices and healing lodges.

An opposing school of thought on decolonization has become more popular in recent years. It views Indigenization as harmful and counterintuitive to the intended goals of those seeking to decolonize. McGuire and Palys (2020) define decolonization as being free of responding to colonial structures and restraints in all areas of being and continuously engaging in the act of rejecting and resisting mechanisms of colonization. In the authors' view, Indigenization has only served to reinforce internalized colonization within oppressed groups while appearing to contribute to reconciliation through accommodation rather than genuine change. Internalized colonization as addressed by Victor (2007) shows how the colonial methods succeed in convincing colonized individuals that justice can only be achieved through the current Canadian systems. This reinforces a belief that self-governance and differential methods of Indigenous justice are impossible while promoting one-size-fits-all Indigenous accommodation within current systems (McGuire & Palys, 2020). Therefore, McGuire and Palys (2020) advocate for Indigenous self-governance and argue that systems must be separate and distinct from colonial structures to be truly decolonial.

Monchalin (2017) interprets decolonization as the “unlearning and undoing of colonialism” (p. 293) which consists of understanding and engaging with colonial systems, structures, and notions to effect change through a resurgence of Indigenous culture and traditions and a simultaneous devaluing of colonial knowledge, values, and practices. This requires decolonization on a macro level through changes in governance structures, justice systems, and policy as well as on a micro level with the decolonization of minds, relationships, social values, and practices (Asadullah, 2021). Monchalin (2017) embraces Dr. Michael Yellow Bird's belief that cultural traditions and ceremonies are imperative to collectively healing from colonial trauma and that this is the first step in decolonization on a macro scale; individuals must know about and believe that decolonization is possible for it to occur. This approach to decolonization incorporates McNamara and Naepi (2018)'s argument that current colonial systems must be changed by promoting and respectfully incorporating Indigenous traditions and practices; however, it also stresses the need of McGuire and Palys (2020) to be free from responding to and acting within colonial systems and structures. Ultimately, the importance of self-determination and cultural reclamation is always paramount. This aspect of decolonization is reflected in the Two-Eyed Seeing approach, which recognizes that Indigenous knowledge can co-exist with Western approaches by understanding each other as equals in research methodology, program creation, and system implementation (Marsh et al., 2015). This chapter will primarily adopt a Two-Eyed Seeing approach to decolonization to review current literature and program initiatives.

### **Decolonizing Mental Health in a Correctional Setting**

Now that definitions of decolonization have been discussed, it must next be understood in the specific context of mental health. As has been previously established, colonization has contributed to the greater likelihood that Black, Indigenous, & People of Colour (BIPOC[1]) will experience a mental illness, and it also underlies the methods used to treat mental health concerns. Western psychotherapy models dominate mental health practices around the world, which poses many issues; primarily, the fact that psychotherapy models are influenced by, and greatly reflect, the

culture in which they were created making multicultural use without informed modifications problematic (Koç & Kafa, 2019). Attitudes and approaches to mental health differ across cultures as they are informed by cultural context, history, values, and practices (Koç & Kafa, 2019). Therefore, decolonized approaches to mental health treatment must come from the communities they intend to serve, and this requires practitioners who understand the consequences and realities of intergenerational trauma caused by historical and perpetuated mechanisms of colonization. This is especially true in correctional settings where inmates are disproportionately Indigenous and thus have often experienced some form of trauma and are more likely to experience mental illness. The decolonization of mental health must occur at both the micro and macro levels. In the micro, this includes decolonizing therapeutic interactions between clients and professionals as well as working with clients to deconstruct conditioned colonial thinking and decolonize their own mindset. In the macro, decolonization must occur in and be the focus of research practices, boards and accreditation requirements, mental health laws and policies, and program development.

While decolonizing mental health practices in correctional settings is the focus of this chapter, it must be understood that decolonizing prisons is a foundational step in this process. Mental health care within correctional institutions, whether directly through individual counselling or in a program setting such as substance abuse treatment, is designed for and by the institution. Therefore, the operations of mental health treatment are dependent on the policy and structure of the institution served. Accordingly, correctional institutions such as prisons must either be decolonized first or in tandem with the mental health services they provide. From the perspective of scholars like McGuire & Palys (2020), this means the acceptance and implementation of distinct Indigenous justice systems created by and for Indigenous communities. As Monchalin (2017) points out, this would require the implementation of culturally competent practices and programs created, implemented, and controlled by Indigenous peoples. Until this is realized, changes to mental health interventions will likely continue to reflect Indigenous accommodation rather than decolonization.

#### **Current Research on the Need for Decolonized Mental Health Practices**

The justice system is often critiqued for its slow and reluctant response to numerous recommendations on improving mainstream services for Indigenous peoples. Institutional change and a cultural shift within justice systems is needed to successfully implement culturally appropriate programs and educate staff (Shepherd & Phillips, 2016). Shepherd and Phillips (2016) add to the growing support for the need to decolonize and diversify institutions before meaningful change to services can begin. Moreover, the involvement of Indigenous communities and individuals at all levels of program conception, creation, and deliverance is highlighted as a key component to purposeful, long-lasting structural change (Shepherd & Phillips, 2016). Additionally, the need for culturally appropriate mental health services in corrections is a known fact and acknowledged in the Mental Health Strategy for Corrections in Canada (Correctional Service Canada, 2012); yet much work lies ahead. For meaningful change to occur, decolonization is needed at both macro and micro levels to reshape mainstream justice and psychology practices.

#### **Macro Decolonization Needs**

The most foundational step in decolonizing any system or institution is recognizing which legal and human rights are not being met. Lucero (2011) emphasizes the role of policy in regulating mental health practices, and how legal change is needed to decolonize mental health by acknowledging Indigenous sovereignty rights. Indigenous sovereignty as outlined in official government legislation and documents must be embraced and implemented, allowing Indigenous peoples access to all forms of treatment including traditional options within their communities (Lucero, 2011). In the Canadian context, relevant documentation includes the United Nations Declaration of Indigenous Peoples (UNDRIP), The Canadian Charter of Rights and Freedoms, and treaty agreements. UNDRIP, which was ratified by Canada in 2016, includes clear language on the rights of Indigenous peoples to be actively involved in the development of social institutions such as health and justice (Article 34), traditional medicines and healthcare practices (Article 24.1), and access to the highest quality of mental health services (Article 24.2) to name only a few (United Nations General Assembly, 2007). The commitment to UNDRIP by the Canadian government reveals that officials recognize the Indigenous right to create their own justice and mental health systems but have yet to acknowledge these rights in any meaningful way.

Lucero (2011) emphasizes the need to decolonize psychological research methods and diversify decision-making boards and bodies. In this way, decolonizing mental health requires a top-down approach that includes accreditation

organizations, funding opportunities, and research methods to move beyond a frontline clinical focus (Lucero, 2011). As accreditation organizations determine the qualifications and training required to practice as a psychologist, therapist, or social worker, they are best positioned to make using decolonized methods and Indigenous-informed practice mandatory for all mental health workers. Accreditation criteria created by specific Indigenous communities would ensure cultural relevancy and be a step towards self-governance in relation to mental health services, extending to Indigenous individuals in Canadian or Indigenous justice systems. Including accreditation for decolonized practice would also help ensure it makes its way into the mental health curriculums of accredited post-secondary programs. Additionally, long-term funding must be made available for research into Indigenous mental health and forensic mental health programs (Shepherd & Phillips, 2016). Without adequate funding, prison initiatives lack longevity and true decolonial intent. However, as McGuire and Palys (2020) acknowledge, funding bodies are also problematic as they influence what research is done and how programs operate. Therefore, opportunities and initiatives for Indigenous communities to fund and direct their own research and services must be supported.

McIntyre et al. (2017) examined existing surveys on Indigenous mental health in Australia, Canada, New Zealand, and the United States of America (U.S.) to determine whether the information needed for quality health services is being collected. The results of this study were disconcerting, revealing the quality of information collected to be inadequate and disproportionate to that of non-Indigenous, despite the disproportionate mental health issues faced by Indigenous individuals compared to non-Indigenous populations in all four countries (McIntyre et al., 2017). This means one of the most at risk and affected communities is not being accurately assessed, and their unique needs are not being met. Therefore, greater assessments are needed to ensure that barriers to care are identified and solutions implemented. These findings are important to decolonizing mental health in justice systems going forward; without information on what barriers Indigenous individuals face and the unique needs that must be met, change will not occur inside or outside of a correctional facility.

#### **Micro Decolonization Needs**

A study analyzing parole officers' perspectives on mental health services available to individuals on parole found that racial minorities are less likely to receive mental health interventions and aid than their White counterparts (Thompson et al., 2016). Previous research exposed the many access barriers to adequate and culturally competent mental health treatment for racial and ethnic minorities. This is especially concerning given the disproportionate rate of Black, Indigenous, and People of Colour in the justice system. The study's results also counter previous research findings where parole officers reported adequate mental health and substance abuse resources with little to no racial discrimination. There has always, however, been an agreement over the lack of cultural diversity exists in programs and service providers (Thompson et al., 2016). This suggests a colonized mindset within the parole system, making it harder for parole officers to fathom the need for culturally appropriate counselling in order to provide adequate mental health services. This is evidenced by the study's findings that White parole officers did not see issues of racism in accessing mental health supports, but parole officers of Colour did (Thompson et al., 2016). Therefore, this research showcases not only the need to decolonize justice systems surrounding mental health, but also how the colonial mindsets of those working with mentally ill offenders can impact development and access to needed services.

In terms of decolonizing individual therapeutic practices and relationships, Nuttgens and Campbell (2010) highlight multicultural counselling rooted in self-awareness, knowledge of the Other, and therapeutic practice. The authors state that historic colonial harm combines with current Western models of service delivery to make Indigenous peoples less likely to seek or continue accessing mental health services. Nuttgens and Campbell (2010) rightfully claim that implementing culturally competent therapy is an ethical obligation of all mental health workers. Therefore, the onus is also on individuals to ensure they engage with clients in a decolonized manner. This includes understanding ingrained colonial and racial bias on the part of the service worker as well as all existing power differentials within each therapeutic relationship with a client. Mental health workers must understand how colonization has impacted their client's life and how this has contributed to their current state of mental health and relative inability to access treatment services.

Finally, mental health interventions must ingrain understanding and be respectful of the relevant cultural beliefs and values around healing (Nuttgens & Campbell, 2010). This can be difficult to achieve as many Indigenous people

identify with multiple cultures or have diverse needs (Weaver & Yellow Horse Brave Heart, 1999). The perspective on decolonization taken by Monchalin (2017), however, includes the incorporation of traditional ceremony and the involvement and leadership of Elders from the client's own cultural group. In a correctional setting, multicultural competence in mental health professionals is crucial given the disproportionate representation of racial minorities. Moreover, since prisons continue to deny operating under a mere guise of rehabilitation, it is therefore the duty of the institution and all those who work within it to implement the appropriate services best suited to treating mental illness in the prison population – in other words, a decolonized approach to care.

### **Two-Eyed Seeing**

Two-Eyed Seeing can be used to decolonize at both the macro and micro levels of a national society and structure. Integrating a Two-Eyed Seeing approach into research is becoming a more common means of decolonizing research. This is seen in the way it combines Western and Indigenous ways of knowing and knowledge translation while promoting inclusion and trust that has been severely lacking in forensic psychology (Marsh et al, 2015). Additionally, when applied to program development the Two-Eyed approach fosters a relationship of mutual intercultural respect and utilizes or merges the best of both cultural views on healing (Marsh et al, 2015). This way of seeing can also be beneficial to individual therapy practices as it provides a framework for culturally competent counselling and healing practices. Overall, Two-Eyed Seeing acknowledges both cultures as distinct but not opposing; therefore, an acceptance of the co-existence of these worldviews may provide an important foundation for decolonization work in the field of forensic mental health.

### **Promising Praxis**

While there is ample academic evidence that the field of psychology must be decolonized, especially in relation to forensic mental health services, there is little research available on current initiatives being implemented in correctional settings. Shepherd and Phillips (2016) attribute this in part to the lack of funding and long-term planning for Indigenous initiatives as many programs are piloted but few permanently implemented. However, common themes in research pertain to methods of decolonizing services in the form of multicultural counseling practices, Indigenous wellness, and intervention programming in prisons, and healing lodges. Lastly, the practices discussed are largely forms of Indigenous existing correctional practices, which in the view of McGuire and Palys (2020) will not sustain decolonization. Unfortunately, when discussing a colonized system within the colonial institution of prison, mental health services are reliant on the direction and functions of the institution. This means that forensic psychology programs will never be fully decolonized until the prison institution is decolonized or the programs are created as separate and distinct systems from the mainstream.

### **Multicultural Couple and Family Counselling in Prison**

Multicultural Couple and Family Counseling is a promising theory of a practice that could be implemented in prisons. Tadros et al. (2019) discuss this method of counselling in response to the overrepresentation of minority groups in incarcerated settings. Multicultural Couple and Family Counseling also addresses the negative effects, such as emotional and financial strain, that incarceration can have on family members when it separates an individual from the family unit (Tadros et al., 2019). This is an important factor to consider in terms of decolonization, given that the Canadian Justice System has been separating Indigenous families since its conception through legislation like the Indian Act which mandated compulsory attendance at residential schools. Therefore, group counselling could aid in building and maintaining family cohesion during a significant period of separation.

Multicultural counselling adapts to the specific cultural needs of the client while remaining informed and culturally competent, rather than remaining mired in Eurocentric and colonial ways of thinking (Tadros et al., 2019). Additionally, this method looks to support the family unit and the individual's support system as a whole and recognizes the need to move from an individualistic to a collectivist approach in order to repair and strengthen the relationships damaged by crime and incarceration. Therefore, a holistic approach to healing is provided when treating the mental health of the individual and preparing them for life outside the institution (Tadros et al., 2019). A multicultural approach to counselling allows offenders to express the cultural and spiritual needs required for healing and encourages the incorporation of traditional practices into counselling sessions. This should include the presence of chosen family members, beyond the immediate family if desired, the inclusion of traditional prayers and/or practices, and the guidance of Elders and

community leaders. It is crucial that multicultural practices be specific to the individual and not take the one-size-fits-all approach, which McGuire and Palys (2020) remark often happens with current Indigenization initiatives in the justice system. Lastly, the theory of multicultural family and couple counselling in prison could be implemented in Canada if a Two-Eyed Seeing approach to structure is ensured, meaning that Indigenous communities are consulted, have leadership roles in implementation, and their worldviews are incorporated and respected.

#### ***Kunga Stopping Violence Program in Australia's Alice Springs Correctional Centre***

The Kunga Stopping Violence Program (KSVP) provides a strong example of decolonizing mental health services in prison for Indigenous women (Atkinson, 2020). The program, approved by the North Australian Aboriginal Justice Agency, is a month long and runs twice a year at the Alice Springs Correctional Centre. The Kunga Stopping Violence Program (KVSP) works with Indigenous women in the prison who have a history of, or are currently incarcerated for, a violent offence with the aim of operating with an educational approach, what Atkinson (2020) deems *educaring*. *Educaring* revolves around the idea that education on colonial history and how colonization has affected the lives of Indigenous peoples, specifically those in the program, is an essential part of healing from intergenerational trauma. The program was created under three assumptions: firstly, that the ways of life for Indigenous peoples have been attacked by colonization; secondly, reclamation of practices and pride in Indigenous self and culture is imperative to a successful educational approach; and thirdly, that the program must be trauma-informed and incorporate culture-specific Indigenous healing methods such as reflection, conversation, and storytelling (Atkinson, 2020).

The KVSP consists of three vital components of healing. The program begins with a circle of wellbeing aiming to create a sense of safety while grounding participants in the cultural process, and each day starts with a mediative practice to foster personal reflection (Atkinson, 2020). This self-contemplation and inner listening are ceremonial practices associated with cultural healing. Conversations are part of this and pertain to the circle's eight points of wellbeing: spirituality, environment, relationships, emotions, physical body, sexuality, stress, and life purpose (Atkinson, 2020). The program thus creates a safe and non-threatening space to reflect on the aspects of emotional pain or trauma of each participant.

Next, the Kunga Stopping Violence Program addresses issues of anger, violence, boundaries, and safety through visual artwork of the tree and its components created on a board or a wall. It was initially called "the violence nonviolence tree" (p. 299) later becoming the "feeling-healing tree" (p. 299), a name suggested by some participants while adding words onto the displayed tree to describe their emotions (Atkinson, 2020). In the original violence nonviolence tree, roots reflect the causes of violence, the trunk the contributing factors, the branches the outcomes or impacts of violent acts, and the leaves the feelings emitted under the influence of all these factors. As the tree metamorphosed into the feeling-healing tree, flowers were added with participant's written reflections on healing intentions. Given the mainly oral traditions within many Indigenous cultures – not only handing down knowledge but making it relevant to the new generations – it is no surprise to see the use of stories on this section of the tree. As Atkinson (2020) so aptly states, "working with stories is meaning making, transformative political healing action" (p. 300) as participants come to recognize the injustices they have faced and discover auto-motivation to create change. Talking circles were used throughout the program to ensure everyone had the opportunity to speak and be heard (Atkinson, 2020).

Lastly, the KSVP program addresses loss and grief through a process of history mapping (Atkinson, 2020). This is carried out individually with a program staff worker supporting participants reflecting on instances of loss in their life. This was followed by creating artwork, through painting, of their life story from birth to present day as a timeline of memorable experiences, both positive and negative. This revealed that many of the women had experienced significant trauma including common themes of witnessing abuse, community violence, feeling unsafe, racism, sexual assault, and fractured relationships. The participants were provided the opportunity to discuss their feelings about the reflective exercise and memories identified throughout the process in a sharing circle with the group providing support. Moreover, they were able to revisit their timeline throughout the program to add additional reflections or fill in gaps previously too difficult to acknowledge (Atkinson, 2020).

Alice Springs Correctional facility's Kunga Stopping Violence Program (KSVP) promotes a decolonized approach to mental health programs in prison through the incorporation of Indigenous values and practices while addressing the impacts of colonization on the lives of individual participants. The continued reflection and group discussion



facilitated group learning by engaging the participants in mutual understanding, growth, and in educating each other and acknowledging themselves as the experts of their own lives and healing processes (Atkinson, 2020). Moreover, the women are encouraged to speak their preferred language when talking to each other, rather than being discouraged to do so as often happens with prison guards (Atkinson, 2020). This not only recognizes that English is not the mother tongue of many participants, but also encourages a celebration of culture and reclamation of Indigenous languages that colonizers attempted to silence. The KSVP provides a safe and decolonized space within the colonial structure of prisons. It fosters personal healing through a process of reflecting on life experiences that contributed to the participant's offending. This in turn facilitates confrontation of injustices faced and harm caused, thereby moving away from a purely punitive approach, towards holistic healing.

### ***Healing Lodges in Canada***

Healing lodges aim to incorporate Indigenous practices and values into prison settings while taking a holistic approach to rehabilitation and healing. These facilities emphasize the need to address intergenerational trauma and reconnect with Indigenous cultures and traditions (Nielsen, 2016). Some Indigenous scholars promote participation in cultural practices as a holistic form of healing, especially the effects of colonial trauma (Gone, 2013). In this way, healing lodges are an example of one attempt to decolonize mental health practices in prison. They provide a holistic approach grounded in culturally rooted services. Healing lodges are widely praised for their implementation of Indigenous culture and healing practices and have shown to increase feelings of safety, control, and support by inmates (Hart-Mitchell & Pfeifer, 2003). However, reviews of state- and community-run lodges have shown a disparity of funding and resources for Indigenous operated facilities (Nielsen, 2016), revealing how colonial institutions continue to undermine attempts at self-governance and decolonization within the scope of the justice system. Some view the community-run facilities as an enhanced decolonized practice because they are run by Indigenous communities and offer greater cultural programming within the extent allowed by Correction Services Canada regulations (Nielsen, 2016). Therefore, community-run Healing Lodges constitute a best practice.

The Stan Daniels Healing Centre, a community run facility opened in Edmonton, Alberta in 1999, is one of the first and longest-operating healing lodges in Canada (Nielsen, 2003). Programming at Stan Daniels includes education and employment preparation, life-skills training, guidance from Elders, and education on Indigenous history and issues as part of an individualized healing plan for each resident (Nielsen, 2003). Moreover, Indigenous values –including balance, healing, autonomy, and interconnectedness – underlie all activities and interactions. These programs are examples of a decolonized approach to healing that aims to improve mental health but also general well-being. Saskatchewan's Spiritual Healing Lodge is operated by the Prince Albert Grand Council, which includes an advisory group of Elders from all four sectors of the council (Prince Albert Grand Council, 2014). Programs at the Spiritual Healing Lodge include weekly sweats, talking circles, pipe ceremonies, individual conversations with Elders, smudging, traditional parenting teachings, and other traditional ceremonies and knowledge sharing (Prince Albert Grand Council, 2014). The involvement of Elders from all sectors of the Grand Council reveals how Indigenous-run facilities do not take a one-size-fits-all approach to cultural teachings and counselling, a common criticism of federal initiatives according to Boyce (2017), McGuire & Palys (2020), and Nielsen (2016).

It is important to recognize that Healing Lodges face much criticism, including concerns that the justice system uses the concept of healing to distract public opinion away from the current injustices against Indigenous peoples (Boyce, 2017), and federally run lodges have disproportionately less Indigenous programming (Nielsen, 2016). Current scholarly study stresses the importance of these facilities being Indigenous operated and controlled with programming specific to individual cultural needs (Boyce, 2017; Nielsen, 2003; Nielsen, 2016). Regardless, community operated Healing lodges are an example of a decolonized carceral setting that itself allows the type of mental health services that can be implemented to be more culturally specific and trauma informed. As many Indigenous scholars have stated, healing mental health issues often requires the revival of and participation in cultural practices and ceremonies (Gone, 2013). Moreover, to overcome the issue of Correctional Services Canada regulating healing lodges which limits Indigenous self-governance, Nielsen (2016) proposes the creation of private Indigenous prisons which would allow Indigenous communities to have significantly more control over how they operate and the type of mental health and cultural programming provided. This would engender a move away from Indigenousization and accommodation practices within

inherently colonial systems and allow Indigenous communities to rehabilitate and heal Indigenous offenders according to traditional means. In Canada, this may present as Indigenous governments implementing and regulating their own correctional facilities, which would require true Indigenous self-governance with recognition of their own power to enforce Indigenous justice practices at their discretion. Implementing a Two-Eyed Seeing approach to healing lodges ensures the active involvement of Indigenous communities to temper the current Western theories of clinical psychology practice. Both models of healing are available to promote the healing of all. Overall, healing lodges, when executed properly and in a culturally competent manner, have been shown to provide a decolonized approach to forensic mental health services in Canada.

### **Summary**

Multicultural family counselling in prisons, the Kunga Stopping Violence Program (KSVP), and Indigenous-operated healing lodges provide examples for decolonizing forensic mental health services at both the micro and macro levels. Multicultural family counselling can be used by individual therapists to decolonize their own practice and with individual clients, while the KSVP and healing lodges exemplify system-based approaches to decolonization. Additionally, the KVSP reveals a possible structure for decolonized mental health and well-being programs within the existing prison structure while healing lodges aim to decolonize prison settings and in turn the mental health interventions provided. Each case study recognizes the necessity of Indigenous and culturally specific traditions and ceremony in the healing process and illustrates the importance of addressing multiple areas of the individual's life rather than looking at mental health as a silo. Such initiatives reflect a holistic approach that takes the family, history, and culture of each individual into account.

### **Limitations and Future Research**

This chapter is not grounded in any specific method of research but rather provides a review of existing literature on decolonizing mental health practices in correctional settings. The greatest limitation of this chapter is that the decolonization of mental health in prisons is reliant on the decolonization of correctional institutions. Because the institution regulates and mandates the types of treatment and programming offered in corrections settings, no truly decolonized approach is viable until the colonial perspective underlying prisons is dismantled. Until then, Indigenous initiatives continue to be accommodations within the colonial system rather than steps towards decolonization and self-governance (McGuire & Palys, 2020). Additionally, the focus of this chapter on Indigenous perspectives is a limitation to analyzing decolonization in Canada as a whole. While Indigenous populations are certainly a major group that has been ceaselessly and deeply impacted by Canada's colonial history, other racialized groups not discussed in this chapter are also uniquely affected. Future research should include the effects of colonization on forensic mental health services for these other groups including, but not limited to, African Canadians who are also impacted by colonization but often left out of decolonization literature and practices in Canada.

### **Conclusion**

Colonization has affected all parts of Canadian society and mental health is no exception. The residual European and colonialist values and practices in psychology and calls for decolonizing clinical and research practices are becoming harder to ignore as studies reveal the harm caused by lack of access to culturally competent practices. Impacts of the colonial initiatives to assimilate Indigenous peoples, such as the Canadian Residential School System, the Indian Act, and the Sixties Scoop, have created a loss of Indigenous culture, resulted in intergenerational trauma, and thus contributed to increased mental health issues among Indigenous populations. Moreover, the impacts of intergenerational trauma as well as the inherent colonial nature and history of Canada's justice system has also fostered the overrepresentation of Indigenous individuals in prisons. Clearly, there is an urgent need to decolonize the treatment of mental health as well as the institution of prison.

There are many views of what decolonization should look like. Two-Eyed Seeing promotes the belief that Indigenous and Western worldviews and governing structures can co-exist and provide a strong theoretical framework for decolonizing practice, policy, and program creation. Regardless of the decolonization method, all efforts must involve Indigenous communities and work towards fostering self-determination and healing. Multicultural family counselling, the Kunga Stopping Violence Program (KSVP), and healing lodges provide insight into possible methods of decolonizing mental health within correctional facilities. Review of these initiatives provides greater insight into the work being done and the continued need to ensure a truly decolonized mental health framework for research and practice.

Decolonization saves lives, and with the growing mental health epidemic and ever-increasing prison populations in Canada, decolonization is not a suggestion but a necessity.

### Discussion Questions

1. Discuss the impacts of colonization on mental health. How has it shaped mental health supports in prison? What other justice institutions are affected by the impacts of colonization on mental health?
2. What does decolonization mean to you? What do you believe is the best approach to decolonizing mental health in prisons? Is this even possible within the prison system as it exists today?
3. Discuss the case studies presented in this chapter. How do they implement or differ from the theoretical frameworks of decolonization?

### Recommended Activities

1. Using any method (e.g., chart, mind map, illustration/creative piece), compare and contrast colonized and decolonized approaches to mental health and mental health supports. How do we see these differing approaches in our correctional systems and methodology?
2. Research local initiatives and programs working to decolonize mental health in prisons and invite them to share their knowledge and experience of the field.

### Recommended Readings

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[1] “The BIPOC” project aims to build authentic and lasting solidarity among Black, Indigenous and People of Color (BIPOC), in order to undo Native invisibility, anti-Blackness, dismantle white supremacy and advance racial justice”. (BIPOC, 2021).

#### **Author's Note**

The research and writing of this chapter were conducted by a descendent of European settlers on Treaty 4 territory, the traditional territories of the Cree, Ojibwe, Saulteaux, Dakota, Lakota, and Nakota, and the homeland of the Métis/Michif Nation.

# 9. Decolonization and Policing

STEPHANIE DAWNDYCK

## **Title: Decolonizing Policing: How Can It be Achieved?**

### **Abstract**

*The purpose of this chapter is to identify how colonization has impacted the discipline of policing and to highlight the urgent need to decolonize this field of inquiry. Using a comparative analysis of Aboriginal policing models in Canada, the United States, Australia, and New Zealand, this chapter seeks to uncover the good and the bad of these alternative policing models and how they have impacted their respective countries. As it stands, the traditional policing model does not uphold the standard we as a society should strive for. Community-based policing and Aboriginal policing models raise the bar on policing standards and may ultimately hold the answer to how we can achieve decolonized policing.*

### **Introduction**

Political unrest related to the criminal justice system has been on the rise over the last year. The case of George Floyd, a black man whose death at the hands of a Minneapolis police officer was captured on film, sparked global discussion around racialized policing practices and calls for police reformation. Similarly, in Canada, the case of Colten Boushie, a young Indigenous man killed on a rural Saskatchewan farm, was just one of the many landmark cases calling for a review of policing practices with regards to race. The fact that these cases were not isolated events evidences the need to decolonize policing. The list of individuals victimized through racialized policing practices remains endless and those on it deserve recognition in their own right. There exists a police culture in which a “code of silence” stifles internal reporting, making protecting the “brotherhood” more important than doing the right thing. Victims of the horrendous acts inflicted by police are not always treated like victims; they may be criticized by the media, their images torn apart, and treated like criminals. These impacts of colonization are deeply rooted within the justice system and leave Indigenous groups, in particular, less well off.

While the police are a very important component of social protection and the maintenance of order, this idea of protection does not extend to all citizens. Decolonization of policing is clearly needed if Indigenous communities and other racialized groups in Canada are to be served equitably. To justify its treatment of Indigenous people, the colonial system strategically debased and criminalized Indigenous people in Canada. This resulted in social exclusion, greatly limited socio-economic potential, and caused associated mental health issues, which can all be fathomed as precursors to criminal behaviour and help to explain why Indigenous people are overrepresented by 500% within the Canadian justice system (John Howard Society, 2017). Police are the frontline of the justice system and must entertain no racial or personal bias, which implies the need to enforce a level of cultural and personal awareness among police officers. Initiatives such as First Nations Policing programs offer a more comprehensive and culturally sensitive policing model that better reflect the communities in which they police. Community-based policing programs work to restore/build trust between the community and the police. They operate in such a way as to help the police better understand the communities they serve and to involve local community members in decision making. Decolonizing the practice of policing may be a tricky feat but it is an important one. Looking to existing practices aimed at reducing inequalities and ensuring more cultural awareness in policing is a good place to start.

### **Impact of Colonization**

Settler colonialism has left a daunting impact on Canada’s Indigenous communities. Through horrific policies such as in the Indian Act (1876), the sixties scoop by child protection, and the Canadian residential school system, Indigenous people were stripped of their land, culture, and traditions by means of forced assimilation and dispossession. The impacts of these policies continue to marginalize Indigenous communities and maintain a colonial culture whereby Indigenous people are deemed less-than-equal in today’s society. Racialized policing practices serve as an example of how systemic racism stems from the racism institutionalized through colonial practices: “Racialized policing is part and parcel of settler colonialism as it reinforces and naturalizes structural inequalities” (Stewart, 2018, p. 186). Racialized

policing goes beyond individual officers; rather, it is part of a policing culture ingrained by the colonial system and protected by “a code of silence” that prevents officers from holding one another accountable.

One of the most notable impacts of racialized policing practices is found in the Starlight Tours. The Starlight Tours was an unofficial practice whereby Saskatoon police officers would drive Indigenous people to the outskirts of town in below-freezing weather and leave them to walk home as a form of punishment or a way to “cool down” (Stewart, 2018). In November of 1990, Neil Stonechild became among one of the Indigenous men who lost his life due to this unethical practice. On the night of the 24th, after having had a few drinks with friend, Jason Roy, Neil Stonechild decided to split off from Roy to go pay an unwelcome visit to his ex-girlfriend (Stewart, 2018). Though quite intoxicated, Stonechild was able to navigate his way to his ex-girlfriend’s apartment where police were eventually dispatched to remove him from the property. Shortly after arriving, the police cleared the scene indicating that Stonechild was not there (Stewart, 2018). Later the very same night, Jason Roy was stopped by police while he was walking home and reported that his friend, Neil Stonechild, was in the backseat of the police car, covered in blood and “screaming that the police were going to kill him”. Stonechild died of hypothermia later that night (Stewart, 2018, p. 188).

The code of silence, fortified by built-in protections within the culture of policing allowed this practice to take the lives of at least three Indigenous men and proved to be “emblematic of an ongoing process of settler colonialism” (Stewart, 2018, p. 192). Neil Stonechild was vilified throughout an investigation concluded in just three shifts (Stewart, 2018). The final report indicated that Stonechild died from hypothermia during his walk back to the youth facility where he was staying, and the marks on his body were said to be from “his body settling into the frozen grass and impressions made by the frozen grass, snow, and twigs” (Stewart, 2018, p. 188). This unconscionable practice and the cover-ups would continue for more than ten years after Stonechild’s death.

While the Starlight Tours eventually came to an end, the impacts of settler colonialism persisted. According to Michelle Stewart, racialized policing serves a much larger role under settler colonialism than is commonly thought and should be understood as “delivering different forms of justice to different groups of people” (Stewart, 2018, p. 196). The many cases of missing and murdered Indigenous women and girls exemplify just that. As well, because Indigenous women were systematically devalued and treated as lesser people within society, they became a vulnerable target for predators and acts of violence. There has been a long history of police putting in little-to-no effort into solving or investigating cases of missing or murdered Indigenous women. This represents an “utter failure of police and other government officials to investigate these cases, or even take them seriously” (Monchalin, 2016, p. 185).

Stewart (2018) argues that the relationship one holds with the police is a direct reflection of social privilege or lack thereof. The values of colonialism, such as systemic racism, remain the basis of the blatant inequalities within the justice system and racialized policing is a by-product. This has created a climate where people are fearful or distrustful of police and question their ability to carry out justice. This is seen in many Indigenous communities, where relations with police are virtually non-existent thanks to victimization and racialized practices like the Starlight Tours and the lack of initiative regarding missing and murdered Indigenous women and girls. To mitigate the challenges and inequalities that Indigenous people and other racialized groups unjustly face within the Canadian justice system, decolonized policing practices need to be implemented and significant reform must be achieved.

### **Defining Decolonization**

Decolonization is a term that holds many different meanings to many different people. Monchalin (2016, cited in Asadullah, 2021) defines decolonization as “both a goal and process to bring about a fundamental shift in colonial structures, ideologies and discourses” (p. 1). “Fanon (1963) saw decolonization as a process of both unlearning and undoing the harms of colonization” (Asadullah, 2021, p. 1). Decolonization is about restoring Indigenous views, cultures and traditions, as well as shifting to a narrative that “replaces Western interpretations of history with Indigenous perspectives of history” (Indigenous Corporate Training, 2017). Many scholars view decolonization in either its micro or its macro forms; some believe decolonization must encompass both. While there is no catch-all definition for the concept, it is generally agreed that decolonization is a process intended to bring about positive change. Decolonization will not happen overnight. Undoing the colonial structures and systemic racism that are deeply rooted within Canadian systems will take time. There is much harm to repair and a dire need for conciliation. Decolonization is a process that must be achieved, but how and when this will happen remain key questions.

As noted above, there are two forms of decolonization: micro and macro. Micro decolonization focuses on the “mind, body, language, culture and ceremonies” (Asadullah, 2021, p. 3). At this level, decolonization serves to restore culture, ceremonies, traditions, and praxis that have been lost through colonization and works to undo these harms. Ngũgĩ wa Thiong’o argues that “decolonizing the mind can lead to healing” (cited in Asadullah, 2021, p. 4). Decolonization at a micro-level would also encompass the restoration of language as a means of “re-centering and healing” (cited in Asadullah, 2021, p. 4). The loss of language was one of the many assimilation tactics used by the Canadian government to control Indigenous people. Other assimilatory practices imposed through the Indian Act included strict laws prohibiting Indigenous people from practicing ceremonies that had long stood the test of time. Other elements, such as “restoration of singing, drumming, and traditional teachings”, also play an important role in healing from restored traditions (Asadullah, 2021, p. 4). Moreover, learning from Elders is a key component of micro decolonization as they are “important knowledge keepers, and they also help to ensure cultural continuity” (Hele, 2021).

Macro decolonization “involves structural and institutional change” (Asadullah, 2021, p. 3). In this form, decolonization is about changing policy and the systems they inform as a means of retaking power. Prior to colonial contact, Indigenous communities had their own political systems and effective forms of governance. A key component of macro decolonization is the sense of self-governance it would afford, along with the realization that “The authenticity of indigenous law and governance is not measured by how closely they mirror the perceived past, but by how consistent they are with the current ideas of their communities” (Borrows, 2005, p. 200). Asadullah points out that macro decolonization also “requires systemic institutional change of public services, from education to government” (2021, p. 5). This includes ensuring that non-Indigenous people have a good understanding of Indigenous cultures and the impact that colonization has had on their communities. Transfer of land is also considered to play a significant role in macro decolonization, as it did under colonization. Land is sacred to Indigenous people and interconnected with their spirituality. Alfred Taiiaki argues that achieving decolonization will require a “massive transfer of land back to the Indigenous peoples” (cited in Asadullah, 2021, p. 5).

#### **Decolonization Contextualized for Policing**

Policing practices are entangled with colonial mindsets and racialized practices. For Amanda Porter, the idea of decolonized policing “may be more an oxymoron than an ideal objective for future reform” (2016, p. 561). In other words, decolonizing policing could result in something that may not even resemble what is understood to be policing. Such a paradigm change, however, would require looking beyond the criminal justice system and current forms of policing toward alternative policing models and “community empowerment” (Porter, 2016, p. 561). Decolonized policing does not require radical reform per se, but agencies must come to better reflect cultural understanding and awareness of Indigenous communities.

Under the macro view, decolonized policing would require institutional change including redirecting authority to Indigenous communities. First Nations Policing and Indigenous Patrols are examples of a decolonial model of policing. They encompass cultural values that reflect the communities they serve and incorporate the current ideas and voices of those community members as well. Meaningful collaboration with Indigenous communities is an important step forward in decolonizing policing. This is seen in the way community-based policing focuses on relationship-building and information sharing. The micro view of decolonizing policing would require Indigenous representation within police forces and officers who are able to speak the languages of the communities they police. A balanced micro/macro level of decolonized policing would ensure that all officers have cultural-awareness and trauma-informed training to ensure understanding of the Indigenous cultures being served.

#### **Discussion of Decolonized Policing**

The blatant inequalities within the justice system tied to colonialism and the global cries for police reform of dated policing practices make decolonized policing a must. The impacts of colonization on policing in Canada demonstrate the clear need for a decolonized policing framework. While some scholars are calling to defund police and replace existing agencies with new ones, there will be no meaningful improvements within our justice system unless Indigenous communities are consulted. By looking at case studies of existing policing models that strive to promote culturally informed practices and self-determination, a better understanding of what needs to change and what is needed to achieve decolonization becomes clearer.



While the primary focus of this paper is decolonization within a Canadian context, included are case studies of Aboriginal policing programs in the United States, New Zealand, and Australia. In highlighting models around the world, the goal is to gain comparative insight into what is and isn't working in each respective country. Broadening knowledge through information sharing will be a key component to decolonizing policing, and gaining an understanding of the models implemented by other countries for a better administration of justice to their Indigenous population can help in the construction of a decolonized policing model for Canada.

## **Case Studies**

### ***Community-based policing***

Community-based policing strives to bridge the gap between community members and the police. According to the Office of Community Oriented Policing Services of the United States (COPS), “community policing has three components: community partnerships, organizational transformation, and problem solving” (Nalla & Newman, 2013). In Canada, community-based policing is important in the context of decolonization, where trust between the police and Indigenous communities is broken. For many Indigenous communities, ‘police’ is almost a dirty word. A community-based policing model should serve as an aspirational practice for realizing “policing by communities” rather than “policing with communities” (Nalla & Newman, 2013). Rebuilding trust and forming a relationship with communities will begin to break down some of the barriers and help combat any toxic elements of contemporary police culture.

The Starlight Tours was indeed a defining moment for policing practices in Saskatchewan and illustrated the need for serious reform. Starting in 2003, the Little Chief Community Policing Station in Saskatoon was run under a community-based policing model to strengthen the ties between the community and police. As a cost-saving measure, the city of Saskatoon dismantled the program in 2011 calling it unsuccessful, even though its budget was only \$100,000 – which essentially indicated it was built to fail (CBC News, 2011). The effects of the dismantlement were felt largely in the community and there has yet to be a meaningful replacement program. Indigenous leader Walter Linklater has been working with Saskatoon Police Chief Russell Sabo to develop recommendations for the institution of better relations between police and Indigenous communities. Linklater states that police need to get more involved in Indigenous ceremonies to grasp what is culturally appropriate, develop more cultural awareness overall, and forge trust (Hubbard, 2004).

### ***First Nations Policing in Canada***

In 1991, the federal First Nations Policing Program (FNPP) was successfully implemented in Canada through the tripartite agreement “to provide police services that are effective, professional and tailored to meet the needs of each community” (Lithopoulos, 2007). The First Nations Policing Program was enacted as a way to respond to dissatisfaction about the pace of self determination and the inequalities that Indigenous communities face within the justice system. Two policing models exist under the Federal First Nations Policing Program: The First Nations Community Tripartite Agreement (CTA) and Self-Administered Policing. In Self-Administered Police services, First Nation communities are responsible for “developing, managing and administering all aspects of the police service” to their respective communities (Jones et al., 2014, p. 43). CTAs on the other hand, contract policing services (primarily the RCMP) to work within Indigenous communities and provide policing services (Jones et al., 2014). Although different in application, the models serve the same goals: to “(1) enhance the personal security and safety of FN communities; (2) provide access to policing that is professional, effective, and culturally appropriate; and (3) increase the level of police accountability to FN communities” (Nalla & Newman, 2013, p. 85).

In a study aimed to uncover officer attitudes regarding the effectiveness of First Nations Policing Programs in Canada, respondents were asked a series of sixteen questions related to their perceptions of the FNPP (Ruddell & Lithopoulos, 2011). All respondents agreed that the FNPP was successful in delivering culturally sensitive services that were respectful of the community's cultures and traditions, and that the self-administered policing was reflective of community needs (Ruddell & Lithopoulos, 2011). Moreover, “53.0% of the RCMP” and “49.1% of their FNA counterparts” agreed that First Nations had an effective role in governing their police service (Ruddell & Lithopoulos, 2011, p. 13). Consultation is a crucial aspect in achieving a decolonized policing model, while improvements need to be made in this area, it is important not to discount the work being done. In concluding this study, the respondents agreed that First Nations

Policing Programs are generally more effective when the officers understand cultural values and have linguistic skills that are relevant to the communities they serve (Ruddell & Lithopoulos, 2011).

The File Hills First Nation Policing Service (FHFNPS) is the first and only Self-Administered First Nations policing program in Saskatchewan. Developed under the tripartite agreement, the FHFNPS strives to “implement and maintain a level of policing that is culturally sensitive to First Nations Values” (File Hills First Nations Policing Service, n.d.). According to Daniel Bellegarde, a chair member of the Board of Police Commissioners at File Hills First Nations Police Service, Self-Administered Policing has contributed to an astounding 22% decrease in crime and a 36% decrease in homicide rates (2021). While these policing programs, along with the FHFNPS, give Indigenous communities sovereignty and self-determination over their jurisdictions and prove to be successfully implemented, they certainly do not come without limitations. Funding has proven to be an ongoing challenge for many First Nations Policing Programs, which hinders their abilities to police their communities let alone promote decolonized policing models.

### **Aboriginal Policing Globally**

First Nations Policing has been conceptualized in many different regions to better serve the cultural and historical contexts of their Indigenous communities. Australia, New Zealand, and the United States similarly to Canada, all have relatively high Indigenous populations that face similar challenges within their respective justice systems (Jones et al., 2014). The United States adopted American Tribal Policing as a response to growing crime problems on Native reserves (Jones et al., 2014). Tribal Policing allows Indigenous communities to have more control and authority of policing practices within their jurisdictions. Australia similarly has Indigenous patrols and Aboriginal Community Liaison Officers who work with the community and strive to promote more culturally relevant policing practices. In contrast, New Zealand has one police force that works at both the national and local levels and is divided into twelve districts (Jones et al., 2014). While New Zealand follows the Māori Responsiveness Strategy to incorporate Māori culture into the government, Indigenous Liaison Officers are employed to improve police and community relationships (Jones et al., 2014).

### **The United States**

In the United States, Tribal policing formed as a response to the growing rate of crime among Indigenous communities that arose from the forceful displacement of Indigenous people in the 19th century (Jones et al., 2014). While thought to be largely autonomous and self-administered, the authority of Tribal Policing is restricted to the reservations in which they police. This has created many complexities within reservation policing and as a result, there exist various legal frameworks in which departments may be organized: “(1) Public Law 93-638; (2) Bureau of Indian Affairs; (3) self-governance agreement; (4) tribally controlled; and (5) Public Law 83-280” (Jones et al., 2014, p. 96). Public Law 93-638 remains the most common framework among Indigenous communities. Under this provision, Indigenous communities “assume greater departmental governance over policing programs” (Jones et al., 2014, p. 96). The complexities of jurisdictional matters have pushed many communities to enter cross-deputization agreements. Through these agreements, local police gain authority to enforce laws on Indigenous lands, while Indigenous communities gain increasing authority to enforce laws beyond their jurisdictions. Although many communities are reluctant to accept this agreement and give state police authority on Indigenous reserves, they nonetheless “provide enforcement agencies opportunities to better meet the needs of tribal communities” (Jones et al., 2014, p. 103).

### **Australia**

Under the National Indigenous Law and Justice Framework, Indigenous patrols were developed as a way “to Close the Gap in Indigenous disadvantage, particularly in relation to community safety” (cited in Jones et al., 2014, p. 99). Australian states and territories have since used this framework to develop policing strategies within their respective jurisdictions that include actions plans that “focus on recruiting members of the Indigenous community to (1) educate police agencies about Aboriginal customs and traditions; (2) promote mutual understanding; and (3) better represent the communities they serve” (Jones et al., 2014, p. 100). These strategies aim to empower Indigenous communities through increased community partnership and to reduce the rate at which Indigenous peoples come into contact with the Australian justice system. In the more remote areas of Australia, Police Aboriginal Liaison Officers are deployed to compensate for the lack of police presence (Jones et al., 2014).

### **New Zealand**

Unlike the jurisdictions previously mentioned, the New Zealand Police “is the only agency responsible for policing at both the local and national levels and has sole jurisdiction over all criminal investigations and law enforcement” (Jones et al., 2014, p. 96). To help reduce the overrepresentation of Māori people in New Zealand’s justice system along with improving police and Māori relations, The Māori Responsiveness Strategy was developed to increase consultation with Māori people, develop a greater capacity to include Māori people in decision making, provide increased accountability, gain a better understanding of Māori culture, and develop an internal infrastructure (Jones et al., 2014).

In accordance with these goals, Indigenous Liaison officers are employed to build and improve Māori and police relationships. Māori Wardens, similarly, work within Indigenous communities to provide community empowerment and safety at a volunteer level (Jones et al., 2014). While these Wardens are uniformed and conduct police-related duties, their work is not compensated. “As a result, the Wardens experience high turnover rates and poor job satisfaction” (Jones et al., 2014, p.105). Another strategy used by the New Zealand Police to reduce crime is Neighbourhood Support. Similar to Māori Wardens, individuals within Neighbourhood Support work at a volunteer level to reduce crime, provide support to victims and act as a bridge for the community and police. Neighbourhood Support proves “moderately effective in both the reduction of local crime and in building community support” (Jones et al., 2014, p. 107).

**Table 1.1 Comparative analysis of Aboriginal policing programs**

	<b>Program</b>	<b>Goals/Objectives</b>	<b>Legal Framework</b>
<b>Canada</b>	First Nations Policing program	“(1) Enhance security and safety of FN communities; (2) Provide access to policing that is professional, effective, and culturally appropriate; and (3) increase the level of police accountability to FN communities” (Nalla & Newman, 2013, p. 85).	Federal First Nations Policing Program: Community Tripartite agreement, Self-administer policing
<b>Australia</b>	Indigenous patrols/ Community Liaison officers	“(1) educate police agencies about Aboriginal customs and traditions; (2) promote mutual understanding; and (3) better represent the communities they serve” (Jones et al., 2014, p. 100).	The National Indigenous Law and Justice Framework
<b>New Zealand</b>	Indigenous Liaison Officers	Increase consultation/inclusion of Māori people in decision making, increase police accountability, develop an understanding of Māori culture, and create an internal infrastructure	The Māori Responsiveness Strategy
<b>United States</b>	American Tribal Policing	Provide Indigenous populations with more control and authority over policing practices within their jurisdictions	“(1) Public Law 93-638; (2) Bureau of Indian Affairs; (3) self-governance agreement; (4) tribally controlled; and (5) Public Law 83-280” (Jones et al., 2014, p. 96).

**Limitations**

While community-based policing programs and First Nations Policing services constitute decolonized policing models, they have their limitations. Funding is still one of the greatest challenges for First Nations Policing programs and service delivery. The funding requirements to run these programs are not being met by the federal government, and funding for officers, infrastructure, and equipment are out of the pockets of first nations communities (Public Safety Canada, 2020).

Jurisdiction problems remain problematic for these models as well. The authority of First Nations Policing Services is restricted to the reserves they police, yet non-Indigenous policing agents continue to police on First Nation lands. In tribal policing, cross-deputization offers a remedy but is problematic because it increases the rate at which State police forces can exercise authority on First Nation reserves (Jones et al., 2014). While self-administered policing is thought to give autonomy and self-governance to indigenous communities, the models continue to be restricted through excessive government control. For example, although the File Hills First Nations Policing Service is a self-administered policing program, they are only allowed to police to the extent that “the government sees fit” (Bellegarde, 2021). The File Hills First Nations Policing Service has to respect and obey Canadian government policing policies and their officers must be trained through the Police college.

Data surrounding the effectiveness of First Nations Policing Services and Community-based policing programs need

to be evidence-based. (Ruddell & Lithopoulos, 2011). With few studies by non-governmental scholars on these areas, it is difficult to obtain the full picture of how well these programs are operating and if they provide more effective services than non-Indigenous policing strategies (Ruddell & Lithopoulos, 2011).

### **Conclusion**

The impact of colonization has led to many racialized policing practices that leave Indigenous groups in Canada less well off. Racialized policing practices serve as an example of systemic racism stemming from colonial practices. The Starlight Tours, the overall marginalization and victimization of Indigenous women, and the “code of silence” demonstrate that policing agencies serve to keep the contemporary colonial status quo in place. These are among a small number of the many cases that illustrate the need for a decolonized policing model. Police are frontline and therefore the first contact with the justice system for victims and perpetrators of crimes alike. This makes it imperative that policing agents have relevant cultural awareness and be able to recognize and refrain from personal bias.

Australia, New Zealand, and the United States all have relatively high Indigenous populations that face similar challenges as Canada’s Indigenous populations. Looking comparatively at Aboriginal policing models offers greater insight into promising policing practices that are currently employed and practices that should be avoided as to not contribute further harm to indigenous communities. Understanding the decolonial policing frameworks employed by each region and the effectiveness of their implementation serves as a reminder that policing practices don’t have to incorporate colonial mindsets and racial inequalities. Policing must be decolonized, and colonial policing practices can no longer be tolerated.

Community-based policing and First Nations Policing Programs enhance community and police relationships, convey culturally appropriate services that reflect the communities they serve, increase police accountability, provide effective services, and decrease the rate at which Indigenous people come into contact with the criminal justice system. While there may be limitations to these models, the limitations are not in the practices themselves, but rather are seen through government imposition. Lack of funding, jurisdictional concerns, increased government control, and lack of non-governmental data hinder the ability of decolonized policing structures to thrive. As it stands, Community-based policing and First Nations Policing Services offer the most promising paths forward in the decolonization of policing practices. Through more autonomous control, these practices could evolve into a new and reformed policing model.

### **Discussion Questions**

1. Discuss the impacts of colonization on policing. In what ways have they shaped the policing we see today?
2. What do you think Stewart (2018) means in saying the relationship you hold with the police reflects your privilege or lack thereof in society? Do you agree with this statement?
3. What does decolonized policing look like to you? Would it resemble pre-existing policing models or something entirely different? In your opinion, how can decolonized policing best be achieved?

### **Recommended Activities**

1. Watch the short documentary *Two Worlds Collide* (2004) by Tasha Hubbard. Why do you think the Starlight Tours went on “undetected” for as long as it did? In what ways have these events impacted the trust Indigenous communities hold with the police? Do you think this trust will ever be repaired? If so, how? [https://www.nfb.ca/film/two\\_worlds\\_colliding/](https://www.nfb.ca/film/two_worlds_colliding/)
2. Research local policing programs (i.e., community policing) in your area and highlight some of the initiatives they are taking to strengthen community and policing relationships. What recommendations would you give these programs to better promote decolonization?

### **Recommended Readings**

1. Monchalín, L. (2016). *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada*. University of Toronto Press.

2. Porter, A. (2016). Decolonizing policing: Indigenous patrols, counter-policing and safety. *Theoretical Criminology*, 20(4), 548–565.
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# 10. Decolonizing Restorative Justice

JENNA SMITH

## **Title: Decolonization Restoration: Reconstructing Restorative Justice Practices**

### **Abstract**

*Restorative justice can and needs to be decolonized. When analyzing the impacts of colonization, defining decolonization, and exploring decolonized practices, one sees that decolonized versions of restorative measures can and indeed do occur within post-colonial societies. Asadullah's decolonizing tree framework offers a reasonable and appropriate framework to deconstruct colonial elements and augment decolonial values within existing restorative practices. Upon embracing the information within this essay, it is my hope that students and restorative justice practitioners understand and adopt decolonized mindsets in order to reimagine restorative justice and continue their education with the intent to deconstruct colonial values.*

### **Introduction**

Since the 1990s, the use of restorative justice practices has increased exponentially in post-colonial countries such as Canada and New Zealand (Tauri, 2009). Restorative justice is an alternative form of justice that focuses on victims, communities and offenders (Vogel, 2006). Compared to retributive forms of justice, restorative justice offers a collaborative approach that is trauma-informed and harm-reducing (Vogel, 2006). The theory behind restorative justice is that offenders, through community-based, mediated collaborative punishment, take responsibility for their actions, which in turn will create stronger communities (Vogel, 2006). Victims, like offenders, are key stakeholders throughout the restorative justice process and are encouraged, alongside the community, to play an active role in the justice process (Vogel, 2006). Despite the glowing reputation and seemingly solid theory behind restorative justice measures, the widespread use of restorative justice in post-colonial States has illustrated a disconnect within the justice community. Notably, once post-colonial States adopt practices of restorative justice, it often becomes falsely categorized as Indigenous justice (Breton, 2012). Such categorization is no mistake. It means that post-colonial States adopt restorative practices into a Western crime-control model then claim these practices are to aid Indigenous offenders (Daly, 2002). This false categorization is extremely damaging and harmful to Indigenous peoples within the post-colonial States that have introduced restorative justice measures (Findlay, 2000). It also illustrates the lack of awareness among policy makers and program developers about Indigenous culture and the extent of its difference to mainstream culture. Restorative and Indigenous justice share similar practices, but the way in which each justice method is executed and applied to individuals within communities is different and therefore Indigenous justice and restorative justice cannot be considered equal (Braun, 2019). There is a need to decolonize restorative justice and its practices, which have been purposely misrepresented throughout its existence in post-colonial States such as Canada (Tauri, 2021). This misrepresentation most likely began when the Government of Canada implemented restorative justice as a smoke screen to seem “more inclusive” towards Indigenous offenders.

In order to decolonize restorative justice, one must assess the implications of colonization on the justice system and the people it serves. This requires an active effort to find relevant working definitions of decolonization in order to promote it within the context of restorative justice and in daily life of average Canadians through education delivery. Dr. Muhammad Asadullah's decolonizing tree framework offers an approach for recognizing the colonial aspects of restorative justice practices that make it fail Indigenous people, the very group it purports to help (Asadullah, 2021). In order to conceptually test a decolonized restorative justice practice, Asadullah's framework can be used to deconstruct case examples to determine if the practice is decolonial. Decolonizing restorative justice is possible, but not without a usable and transferable framework that encompasses the cultural needs of Indigenous peoples and other minorities over-represented in the justice system.

### **The Impacts of Colonization**

The implications of colonization are tangible in most post-colonial States. In fact, colonization and globalization processes have massively contributed to the suffering of Indigenous peoples (Tauri, 2016). Through the process of

colonization, many Indigenous populations were annihilated as settlers arrived in their areas (Diamond, 1999). For example, approximately 90 million Indigenous peoples are believed to have resided in the Americas prior to the arrival of European explorers and settlers (Diamond, 1999). As part of the colonial system, settlers forcefully imposed their ideals on Indigenous peoples (Hand, Hankes, & House, 2012). As part of this process, anti-Indigenous laws, norms, practices and social values were adopted by white settlers. Through colonial assimilation, the collective identities of the Indigenous peoples were stolen and many of their collective (cultural) memories lost (Lavalley & Poole, 2009). Under settler rule, Indigenous people were forbidden to practice their cultural ceremonies or speak their languages (Lavalley & Poole, 2009). Indigenous people were ethnologically suffocated by the colonizers, and the implications of this cultural genocide continues to plague Indigenous peoples in post-colonial societies today (Hand, Hankes, & House, 2012).

This process of colonization through assimilation, exploitation, general social exclusion, and criminalization has had lasting effects on the current criminal justice system, alternative justice measures such as restorative justice, and the Indigenous peoples of the post-colonial States (Cunneen, 2002). Not only were formal justice systems based on the settler-colonial ideology, but its discriminatory values continue to hamper post-colonial societies even as they move closer to positive, decolonized forms of justice (Breton, 2012). The problems within many current postcolonial justice practices have affected the ways restorative justice has been introduced, developed, and implemented (Tauri, 2016). The impacts of colonization within the current, colonially influenced justice system and its rehabilitation practices include the Indigenisation of restorative justice, which perpetuates the colonial loss of identity among Indigenous peoples.

#### ***The Absent Emotion Factor***

The foundations of the traditional Western legal system of most post-colonial States are rooted in colonialism (Asadullah, 2021). This colonial influence has embedded a legal 'etiquette' throughout the justice system that conveys, maintains, and perpetuates itself. Thus, the therapeutic element of emotion has been removed from legal proceedings in colonized States. The Canadian Court, for example, is performative rather than emotive in that an offender's legal advocate or lawyer stands before the court and presents most of the defense. Lawyers and legal advisors portray the needs and circumstances of their client. Within this process, it is rare for an offender to testify about how they feel about their crime. There are many reasons for this, such as fear that an act of empathy or apology could lead to suspicions about their innocence or intent (Karstedt, 2002). The restorative justice approach of the offender acknowledging responsibility in front of stakeholders allows for transformation in terms of emotional healing. Victims also lack enforceable rights to share their feelings and achieve emotional healing within the criminal legal proceedings of post-colonial States (Karstedt, 2002). Although victim impact statements may be read, they aim to clarify the seriousness of a crime committed rather than offer a way for victims to obtain closure or offenders to admit, understand, and explain their accountability as well as guilt.

Emotion is central to changing behaviour and understanding one's responsibility (Vogel, 2006). Despite the use of victim impact statements, the emotional element of humility within justice is quite absent (Karstedt, 2002). This absence of emotion is a colonial attribute normalized within current legal criminal proceedings and in the tomes of legal literature. Legal research relating to the current, colonially influenced criminal justice systems also lacks explorations of the role of emotion (Karstedt, 2002). The role of emotion can be demonstrated by displays of crying, apologizing, expressing remorse and addressing the community. Taking responsibility and transforming emotions are vital to the success of restorative practices (Vogel, 2006). It can thus be said that the restorative power of emotion is not recognized in current criminal justice proceedings or restorative justice practices in postcolonial states.

#### ***Indigenisation of Restorative Justice***

Moving from colonial criminal justice proceedings to restorative justice is often seen as positive in post-colonial States (Daly, 2002). Restorative justice as an alternative justice model was widely adopted throughout post-colonial States starting in the 1990s (Tauri, 2009). As restorative measures began to gain traction within criminal justice systems of post-colonial States around the globe, governments turned restorative justice into a Western-centric crime-control model (Daly, 2002). This model was then held up as concurrent with Indigenous justice and popularized by the government as a way to help Indigenous offenders (Tauri, 2009). The ensuing misconception of restorative justice can be seen as a "purposeful misrepresentation" within the restorative justice industry (Tauri, 2021). This misrepresentation

of restorative justice as Indigenous benefits the governments of post-colonial States by wrongly implying inclusiveness of Indigenous peoples into justice practices (Tauri, 2021).

The purposeful exclusion of Indigenous peoples within justice systems is another method used by post-colonial governments to silence Indigenous people. On the one hand, the Indigenisation of restorative justice is harmful because it pretends to promote the goals of Indigenous advocates who have fought extremely hard for their sovereignty in justice matters (Breton, 2012). On the other hand, when Indigenous justice is categorized and advertised as restorative justice, the miscategorization weakens the Indigenous fight for sovereignty within postcolonial States and perpetuates systemic injustice (Breton, 2012). Thus, it is critically important to separate the practices of restorative justice and Indigenous justice in post-colonial societies. Currently, most restorative practices in post-colonial States exhibit a top-down approach that is applied within the Western crime control model. The top-down approach means implementation of strategies for restorative justice at the highest levels of government in the vague hope they will trickle down to communities and individuals. This strong State involvement directly opposes traditional Indigenous values and conflict-resolution or justice measures in previously colonized lands (Tauri, 2021). The Indigenization of restorative justice is directly tied to colonization because it is a way that post-colonial governments maintain control over Indigenous peoples.

### **Loss of identity**

Needless to say, colonization has impacted Indigenous peoples tremendously. One devastating implication of colonization is the loss of Indigenous identity (Lavalley & Poole, 2009). Through the process of assimilation paired with the other negative effects of colonization, Indigenous identities across the globe have been suffocated (Lavalley & Poole, 2009). Historically, post-colonial states such as Canada used laws to ban Indigenous peoples from practicing their ceremonies and traditions (Lavalley & Poole, 2009). An example of such legislation is the implementation of residential schools across Canada. Despite extreme pressure by the government, the Indigenous peoples managed to retain aspects of their culture, largely because colonial values and assimilation processes were so unjust they could stand in the way of but never replace Indigenous knowledge and traditions (Wolfe, 2006).

Many attempts to save their identities have been made by the Indigenous peoples of post-colonial States. Indigenous peoples have asked for their sovereignty and well as self-governance (McGuire & Palys, 2020). Sovereignty and self-governance could ensure culturally appropriate justice practices and measures that would uphold Indigenous community values. Thus, sovereignty and self-governance for Indigenous peoples are vital steps towards decolonization. However, there is widespread reluctance from the government to afford Indigenous peoples the right of self-governance. This reluctance stems from colonization, as post-colonial governments are quick to radicalize Indigenous peoples (Tauri, 2016). Notably, it is common practice at all levels of post-colonial governments to dismiss Indigenous people's ideas, values and justice practices (McGuire & Palys, 2020). Despite this, Indigenous peoples continue to fight for and restore their decimated cultural identities and rights.

### **Defining Decolonization**

Decolonization is a dynamic concept, it can be understood and conceptualized in many ways (Sium & Desai, 2012). Decolonization is sustained through the incorporation of Indigenous practices and Indigenous knowledge (Braun, 2019). Decolonization can be understood as a deconstruction of Western ideals that depend on colonizer values. Decolonization has macro and micro forms and can happen in many ways (Asadullah, 2021). Macro forms of decolonization target large-scale, institutional and systemic change (Asadullah, 2021). Macro forms of decolonization are thus vital for decolonized justice practices within postcolonial States. Notably, micro forms of decolonization are also extremely important (Asadullah, 2021). Micro forms of decolonization target the worldview of individuals (Asadullah, 2021). An example of micro decolonization is the decolonization of one's mindset as a person can redefine themselves and what motivates them once they have broken down the barriers that colonial values reinforce (Asadullah, 2021). Both micro and macro forms of decolonization are integral to the deconstruction of colonial values within postcolonial States. As suggested by this discussion of micro and macro forms of decolonization, there are multiple ways to conceptualize decolonization, but it must always aim to ensure the rights of all citizens, not just those of the mainstream core. This can only be achieved through the decolonization of spaces, policies, practices, and people's minds.

### **Decolonizing Spaces**



In order to decolonize post-colonial States, the Indigenous peoples need to be consciously welcomed back into spaces from which they have been exiled (Cunneen, 2002). Since Indigenous peoples were victims of assimilation by the settlers, the Indigenous peoples' territory and resources were also lost (Wolfe, 2006). This hostile takeover of resources and land was the settlers' primary motive and the reason for forced assimilation of the Indigenous peoples (Wolfe, 2006). This is because land was and is considered an extremely valuable resource and the colonial system was specifically designed to create wealth for the mother country through the exploitation of natural and human resources (Wolfe, 2006). A relationship with the land was a central tenet of Indigenous people that was lost when they were relocated and put upon reserves (Cunneen, 2002). Moreover, because of the twisted implications of colonization, these reserves are also linked to social views on Indigenous criminality since they served to radicalize Indigenous people in the eyes of the public (Cunneen, 2002). The decolonization of spaces is a necessary step in rebalancing authority lost through the assimilation process and must focus on letting Indigenous peoples into spaces from which they have been ideologically excluded (Cunneen, 2002). These spaces include government establishments and local justice organizations (Cunneen, 2002). Further, pathways for change must be created in order for Indigenous peoples to regain land rights and become part of conversations about sustainability on all fronts (Cunneen, 2002). Once there is decolonization of spaces, Indigenous people can safely practice Indigenous knowledge once more.

### ***Decolonizing our minds***

The aspect of decolonizing the mind is hard for most of us to fathom. To decolonize one's mind is to forfeit motivations brought forward by Western ideologies and become open to the possibilities of more equitable ideals that are unbeknownst to the mind (Cunneen, 2002). This type of decolonization is arguably the hardest to achieve because the colonial system also worked to brainwash settlers and Indigenous peoples into believing there is only one cultural reality, and this persists in postcolonial States. The one cultural reality that was presented consisted of Western ideologies. These Western ideologies are based on status, an unquestioning approach to authority and celebration of individual self-interest. It is extremely difficult to distance oneself from this deeply embedded white-settler narrative (Sium & Desai, 2012). Moreover, the decolonization of individual minds will also depend upon a reimagining of the colonial power structures that keep this thinking alive (Cunneen, 2002). A questioning of such power structures in postcolonial states and why is paramount in bolstering individual cognitive awareness. Not only do individuals' minds need to be open to the concept of decolonization, a collective push for the systemic change needed to decolonize society will also be required.

### ***Rights must be recognized***

In order to decolonize post-colonial societies, Indigenous rights must be properly granted (Cunneen, 2002). Since the arrival of the settlers within postcolonial countries, the rights of Indigenous peoples have been neither properly sustained nor addressed. Treaty rights should be upheld in all countries that signed them and the many wrongs of colonial and postcolonial governments in terms of human right contraventions should be righted. In order to right these wrongs, the governments of postcolonial States must publicly address the power imbalances within their societies in a clear move towards reconciliation (Asadullah, 2021). That said, Indigenous advocates must be part of the process. Their voices must be heard and properly considered at all levels of government. Indigenous peoples are being punished for living on land that is rightfully theirs. This punishment comes in many forms in Canada, such as over-policing on reserves and a lack of clean drinking water (Environment Climate Change Canada, 2021). The possibility of decolonization cannot even be glimpsed until Indigenous peoples receive basic human rights in postcolonial states.

### ***Restorative Justice and Decolonization***

All justice systems in postcolonial states must be decolonized. In terms of restorative justice, decolonization must take place at both the institutional and personal level to satisfy its macro and micro forms (Asadullah, 2021). First, restorative justice must be decolonized at a level of the State institution (Asadullah, 2021). This form of decolonization happens when power structures are questioned and deconstructed in the aim of creating systemic change (Asadullah, 2021). This macro form of decolonization could be accomplished by changing restorative justice protocols to ensure standardized and properly categorized applications. The government's role in restorative practices must also be deconstructed, as government initiatives for restorative measures can contribute more harm than good (Asadullah, 2021). Essentially, decolonizing power relationships at institutional levels deconstructs settler narratives by ensuring less of a power

imbalance between certain groups of a postcolonial state and the government (Asadullah, 2021). This approach to addressing the power imbalances within the criminal justice system would constitute macro decolonization having the potential to create institutional change (Asadullah, 2021).

Secondly, the decolonization of restorative justice must occur within the minds of individuals (Cunneen, 2002). People must be taught to reflect on the implications of colonization for society and educate themselves instead of being defensive regarding privileges they may have within that society. The personal decolonization of one's mind is a micro form (Asadullah, 2021). Doing this will require postcolonial states to provide citizens with information about Indigenous values, traditions, and practices to pave the way to the Indigenous sovereignty and self-determination. It will be nearly impossible to escape the colonizer mindset; however, since the ideology of postcolonial societies is rooted in colonization (Sium & Desai, 2012).

Overall, the need for a decolonized restorative justice is great. Decolonization of restorative justice would introduce change within justice systems founded on colonial values. Moreover, both macro and micro forms are involved in the push to decolonize restorative justice, which will include the deconstruction of institutional practices and personal motivations.

### **A Decolonizing Framework for Restorative Justice**

Since decolonization has no standard definition, there have been many frameworks presented for the purpose of creating successful restorative practices. An inclusive, extensive example of a restorative justice framework for decolonization is the “decolonizing tree” created by Muhammad Asadullah (Asadullah, 2021). The decolonizing tree offers a framework for identifying the essential attributes of a successfully decolonized restorative justice practice (Asadullah, 2021). Through the decolonizing lens, these attributes are expressed through the roots, trunk, branches and fruit (Asadullah, 2021).

First, one must examine the roots of the decolonizing tree when considering a restorative justice practice (Asadullah, 2021). This bottom-up approach to decolonization ensures there is a do-no-harm principle attached to the restorative justice practice in question (Asadullah, 2021). All restorative practices must thus be informed by a trauma-informed lens and involve a consultation aspect with Indigenous peoples and the local community (Asadullah, 2021). Validating the roots of a restorative justice practice is foundational in creating an anti-oppressive restorative practice (Asadullah, 2021).

Secondly, the trunk of the decolonizing tree must be analysed in order to verify decolonized restorative justice practices (Asadullah, 2021). The trunk of restorative justice within the decolonizing tree framework is composed of local cultures and traditions that ensure practices are culturally relevant (Asadullah, 2021). Certifying restorative practices as relational is vital for decolonization (Asadullah, 2021). The trunk of the decolonizing tree also symbolizes the need for strong, collaborative leadership within the community that is inclusive of Indigenous people.

Thirdly, the decolonizing tree framework has branches to ensure grassroots wisdom and guidance throughout the restorative justice process (Asadullah, 2021). The branches also point to the need to acknowledge and learn from other culturally relevant and similar restorative practices around the world (Asadullah, 2021). When examining similar practices, one can recognize and personalize those that may have potential in one's own community. In short, the success of a decolonial restorative practice is vital to build upon other relevant practices of a similar nature (Asadullah, 2021).

Finally, the fourth concept within the decolonizing tree framework is fruit the tree bears (Asadullah, 2021). The fruit symbolizes the sharing of successful, decolonial, restorative practices with other communities in need of similar practices (Asadullah, 2021). The desired outcome here is to have locally grown and owned restorative practices in a given community (Asadullah, 2021). Reflection and sharing are decolonial concepts that complement positive restorative justice measures and should be implemented to ensure the success of any community based, bottom-up practices (Asadullah, 2021).

In sum, the decolonizing tree can be used to ensure that the appropriate decolonial elements exist in a given restorative justice practice. Such elements include the roots, which are foundational to each practice and ensure a bottom-up approach that pays special attention to trauma-informed justice (Asadullah, 2021). The next element is the trunk, which ensures the practice is composed of or collaboratively includes local, Indigenous influences and leadership (Asadullah, 2021). The tree branches ensure the practice is culturally relevant to the community (Asadullah, 2021). Finally,

the fruit of the program is an essential element as the practices can be shared among communities who can use them for their own purposes (Asadullah, 2021). The decolonizing tree allows for easy understanding of decolonizing practices within restorative justice as it lays out a framework for the essential attributes of decolonized practice (Asadullah, 2021).

### **Decolonized Restorative Justice Practices**

#### ***The Production of 'Cellfish'***

Prison theatre programs include multiple practices that are considered restorative in nature. These theatre programs are created by prisoners to be performed before external communities and internal communities within the prisons themselves (Hazou, 2017). One specific aspect of prison theatre looking to a decolonized form of restorative justice is the New Zealand production, *CellFish* (Hazou, 2017). The production of *CellFish* fosters the reparation of harm, as it itself enacts restorative justice principles (Hazou, 2017). *CellFish* was written by Miriama McDowell, Rob Mocaraka and Jason Te Kare (Hazou, 2017). It speaks to the implications of colonization including dehumanization and the absence of emotion within the criminal justice system of New Zealand (Hazou, 2017). The production takes a critical look at the current retributive system and how it can be restored through restorative justice principles (Hazou, 2017). Within the production, both professional actors and prisoners have been able to perform, making it a hybrid opportunity for people to learn and feel the legacies of colonialism within the prison system while ensuring a safe space (Hazou, 2017). *CellFish* can be deconstructed within the decolonizing tree framework in order to further examine the production's relationship to colonialism and community.

First, in terms of the decolonizing tree's root element, the production of *CellFish* is grounded in consultation with Indigenous people (Hazou, 2017). The production of *CellFish* was built upon the experiences of prisoners incarnated in New Zealand (Hazou, 2017). It touches on themes of colonization and the implications with imprisonment rates of the Māori peoples and offers appropriate representation of this cultural group (Hazou, 2017). Notably, the production is aptly focussed on the Māori peoples, as they have the highest incarnation rates in New Zealand making them both the most affected and the most disadvantaged within the justice system (Hazou, 2017).

Secondly, the trunk of the decolonizing tree can also be found in *CellFish*, as the production is built upon culturally relevant instances and historical notions of incarnation (Hazou, 2017). The many examples of culturally relevant practices for the Māori include traditional dances such as the haka pōwhiri (Hazou, 2017). In addition, Indigenous understandings inform about the interconnections of family relations and the restoration of balance (Hazou, 2017). *CellFish* focuses on cultural practices and identity within prisons (Hazou, 2017), satisfying the trunk aspect of the decolonizing tree.

Thirdly, the decolonizing tree's branches are also found in *CellFish* in the form of prison theater itself, since the concept of prison theater has influences from the rest of the world (Hazou, 2017). An example of the restorative power of prison theater is the Shakespeare Behind Bars program founded in the United States (Hazou, 2017). Upon finding greatly reduced recidivism rates after offenders attended the program Shakespeare Behind Bars, the foundation of the program was made transferable to other nations. Thus, *CellFish* and the theories supporting its production are built upon an extremely strong foundation.

Lastly, completing the elements of a decolonized restorative justice practice, is the fruit. Through articles and other ways of disseminating information, productions such as *CellFish* will be shared with other prison populations and citizens alike. The production conceptualizes healing through the lens of Indigenous approaches to justice and will be influential across all platforms (Hazou, 2017).

#### ***Community-Based Restorative Justice***

There have been many successes with community-based justice systems. A community-based justice program was implemented by Augustine Park in Red Deer, Canada which began in 2014 in response to an Indigenous community grieving children who died at residential schools. The restorative program was set in motion to commemorate the children of Indigenous people who were forcibly placed by the Canadian government into abusive residential schools. Other goals set by Augustine Park's community-based restorative justice practice included claiming cemeteries where Indigenous children were buried, providing education on the topic of residential schools and aiding in reconciliation (Park, 2016). Community-based restorative justice by Augustine Park in Red Deer is a prime example of a practice that can be deconstructed through the decolonizing tree framework.

First, this community-based justice program has great roots within the context of the decolonizing tree framework.

The practice was created through a partnership between the Indigenous Church and the Remembering Children Society, both practices consulted throughout the process and are interested in decolonization. Feedback from members and partnerships was encouraged to ensure a voice for local peoples. Moreover, the practice was created within the Cree context and all tactics of justice came from Cree values and approaches, which ensured bottom-up creation (Park, 2016).

Secondly, this community-based restorative justice practice embodied all the vital elements of the trunk. All included elements were culturally relevant and community leaders played a vital role (Park, 2016). Moreover, Indigenous peoples were made central and practices including feasting and spirituality were conducted according to Indigenous beliefs and worldviews, allowing for cultural resurgence (Park, 2016).

Thirdly, the branches of this partnership practice can be understood through the decolonizing tree. The process was developed in the knowledge that culturally relevant practices are important and can be found by reaching out to other successful restorative justice programs. Principles of other community-based restorative practices were also applied in the participants' interest as they were harm reducing and information oriented (Park, 2016). Importantly, throughout the process of community-based restorative justice there were instances of transformed relationships (Park, 2016).

Finally, the fruit of the decolonizing tree can also be applied to this practice. One of the goals of this community-based restorative justice program was to help other communities who needed closure and could use similar practices. Thus, in ensuring their goal of sharing, this program formed the basis of a restorative practice that was both locally created and locally sourced—and local approaches offer a particularly effective way of achieving justice (Park, 2016).

#### **Limitations**

Limitations are common within the examination of all case studies. Both the production of *CellFish* and the community-based justice practice are solid examples of decolonized practices that fit the decolonizing tree framework. However, there are limitations related to the examination and analysis of the studies presented. The greatest limitation within this research is that there is no participant feedback. The lack of participant feedback means that the majority of the information presented within the articles comes from the author which in turn creates an absence of reflection by participants. Therefore, through analyses, one has limited access to all accounts within the given practice. When deconstructing restorative justice using a decolonial framework, the absence of multiple accounts and perspectives can be discouraging as decolonization is never limited to only one person or one person's account of events that took place.

#### **Conclusion**

Decolonization of restorative justice practices is needed in post-colonial states. After the mass adoption in the 1990s of restorative justice practices within postcolonial States, their governments began falsely associating Indigenous justice with restorative justice (Tauri, 2021). This Indigenization of restorative justice is extremely harmful and needs to be repaired (Findlay, 2000). Restorative justice practices are supposed to be positive, with a focus on relationship building and offender responsibility (Vogel, 2006). It is time that the greatest offenders, the governments of post-colonial States, take responsibility and ensure the decolonization of justice practices in both macro and micro forms that will allow Indigenous peoples into spaces from which they have been barred.

In the quest to decolonize restorative justice, one must assess the implications of colonization on current justice practices and on Indigenous people and the mainstream populations of colonized States. The implications of colonization include an absence of emotion in criminal proceedings, the Indigenization of restorative justice practices, and the loss of Indigenous identity in postcolonial states. Decolonization can be carried out on spaces, mindsets, and through the establishment or renewal of Indigenous rights (Cunneen, 2006). The use of both macro and micro forms of decolonization will contribute to and promote the overall decolonization of restorative justice practices (Asadullah, 2021). Decolonization of restorative justice is possible for postcolonial societies but must be approached from a reasonable and structured decolonial framework. If justice is to be reimaged in our post-colonial societies, it is up to us to practice restorative justice in the intent of deconstructing colonial values.

#### **Discussion Questions**

1. In what ways have the governments of postcolonial States ensured that Indigenous needs are misrepresented? Please discuss why these misrepresentations are harmful and what can be done at a government level to stop

misinformation.

2. Reflect upon your own understanding of restorative justice. In what ways has your perception changed after reading about the impact of colonization?

### **Recommended Activity**

In order to take the necessary steps to reimagine restorative justice, researchers must take a personal interest in decolonization. When reimagining and deconstructing colonial values it is important to examine one's own motivations and influences. Much of what we know to be normal and productive is based on colonial values (Breton, 2012). Thus, I would recommend taking time out of your week to do some reflective writing. Ask yourself if any of the practices in your life reflect colonial values. Then, reflect on whether those values are serving you and your community in a positive manner and write down the answers. Once you become comfortable analyzing your own life, you may begin to critically reflect upon what the programs, education and media you submerge yourself in and what ideals are perpetuated throughout such mediums. Remember, decolonization is not supposed to be comfortable.

### **Recommended Readings**

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# Back Cover



# Versioning History

This page provides a record of changes made to this toolkit. Each set of edits is acknowledged with a 1.00 increase in the version number. The exported files for this toolkit reflect the most recent version.

Version	Date	Change	Details
1.00	January, 2022	Decolonization and Justice: An Introductory Overview open pedagogy textbook published in the University of Regina Pressbooks catalogue.	



# Authors Bios

Dr. Muhammad **Asadullah** is an Assistant Professor at the University of Regina's Department of Justice Studies. Prior to joining UofR, he taught at Simon Fraser University, the University of the Fraser Valley, and Kwantlen Polytechnic University. He is the recipient of multiple awards and scholarships, including Neekaneewak Indigenous Leadership Awards, Contemplative Social Justice Scholar Award, ACJS Doctoral Fellowship Award,, Liz Elliott Memorial Graduate Scholarship, President's PhD Scholarship, and Law Foundation Scholarship in Restorative Justice. Asadullah is deeply grateful to the Elders in Treaty-4 territory who guided him to walk on this land with humility and respect.

Charmine **Cortez** is an undergrad student currently pursuing a Bachelor of Human Justice with a Certificate in Law and Society. She is an advocate towards racial and transformative justice in an intersectional and decolonial lens. Charmine previously presented in MCC's Advocacy Peace Conference (2019) about Engaged Citizenship through social media platforms. She aspires to bring about positive change and decolonization of the current justice system.

Stephanie **Dyck** completed her undergraduate degree in Human Justice at the University of Regina. She is currently pursuing a Bachelor of Social Work through the same institution. Stephanie has grown up and lived on Treaty 4 territory her entire life, living in Swift Current, Saskatchewan, before moving to Regina to pursue higher education. She is passionate about social justice and advocating for decolonial frameworks within the justice system. Stephanie hopes to one day work with individuals suffering from addictions and substance abuse problems to reduce barriers and promote a life of dignity and respect.

Geena **Holding** is a first-year student at the University of Saskatchewan College of Law with an undergraduate degree from the University of Regina in Human Justice. She grew up on a farm in rural Saskatchewan on Treaty 4 territory and is interested in sustainable agricultural practices, human rights and decolonization. Geena hopes to make a difference within the justice system through the recognition of Indigenous sovereignty and the promotion of equal access to justice services.

Nicola **Kimber** is an undergraduate student at the University of Regina currently pursuing a Bachelor of Arts in Psychology with a Diploma in Justice Studies. Nicola grew up in Regina, Saskatchewan on Treaty 4 territory. She is passionate about human rights, the justice system, mental health, and how criminology, psychology, and decolonization fit into our current world. Nicola hopes to work in the human justice field in the future with a focus on psychology and mental health.

Megan **Korchak** is a 5th year undergraduate student at the University of Regina pursuing a Bachelor of Arts degree in both Human Justice and Psychology with a certificate in Non-Profit Sector Leadership and Innovation. She grew up on a farm in rural Manitoba on Treaty 2 Territory before moving to Regina on Treaty 4 Territory for school. Megan is interested in human rights, equity, and helping people. She hopes to do work with rehabilitation in the future and also create progressive and positive change in the human services sector.

Kudzai **Mudyara** is an undergraduate student in her final year of the Justice Studies degree program at the University of Regina and holds a diploma in Business Studies from Niagara College. Her pursuits include a strong quest in the eradication of poverty and decolonization. Kudzai is extremely passionate about Pan-Africanism and reforming the negative narratives concerning Black Indigenous and People of Colour in her society. Outside of her academics she is one of the co-founders of the Princess of Hope Foundation Trust that assists single parents, widows, and orphans in Zimbabwe. She aspires to work as a researcher with the United Nations and hopes to one day write a best-selling novel of the year.

Hamza **Said** or Hamza Said Abdullahi is a fourth-year student at the University of Regina; he is majoring in both Human Justice and English Literature. Hamza is a Somali-Canadian who grew up in both Somaliland and Toronto. He is passionate about helping people and animals, and after graduation is planning to apply to law school. Throughout his university years, Hamza has, and continues to work alongside the Toronto District School Board, Ontario Court of Justice, the University of Regina Justice Department, and Saskatchewan's Ministry of Justice in several projects that aim to incorporate a bottom-up-approach, diversity, and inclusion.

Kayla **Schick** is currently completing undergraduate degrees in Human Justice and Psychology (Honours) at the University of Regina. Kayla is passionate about human rights, trauma-informed interventions, and understanding how to improve and support practices and policies at all levels of the Justice system. She hopes to one day work with victims and witnesses of crime as a clinical psychologist and conduct research in the area of forensic psychology. Kayla was born and raised on Treaty 4 Territory in the city of Regina, Saskatchewan.

Noor **Shawush** graduated with a Bachelor in Human Justice from the University of Regina in 2021. Noor is Libyan-Canadian and grew up on Treaty 4 territory. She is a certified Gladue Writer and works at the Integrated Justice Program as a Gladue Project Associate. She worked at the Regina Open Door Society during her undergraduate studies and developed a passion for working with marginalized children and youth. Noor is a social justice advocate with a specialized interest in environmental and climate justice. She is involved in the SpurChange program and has recently presented on Climate Justice as it relates to human rights. Her notions of justice and equality have become further nuanced through her experiences in the workforce as she recognizes the divergent experiences of marginalization.

Jenna **Smith** is a fourth-year student at the University of Regina and is currently pursuing an undergraduate degree in Human Justice. Jenna grew up on an acreage within Treaty 4 territory and has a vast range of interests that include decolonization, forensic science and nurturing teaching practices. Outside of academics, Jenna spends a lot of time with her family and is an assistant coach for the Special Olympics in Regina, Saskatchewan. It is Jenna's aspiration to lead others in creating a justice system that is more accessible and nurturing for the betterment of all. She can be reached at [jennarozlin@gmail.com](mailto:jennarozlin@gmail.com).