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Indigenous People in the Canadian Criminal Justice System: a Recognition Dilemma

Abstract: This article examines the overrepresentation of Indigenous people in the Canadian criminal justice system as a result of enduring effects of colonial-era policies that continue to contribute to trauma within the Indigenous population in Canada. It explores the role of recognition, which affects Indigenous people's representation and experiences in the criminal justice system as offenders. The article discusses some changes and challenges related to the recognition of Indigeneity in the Canadian criminal justice system. It argues that beyond political rhetoric condemning the legacy of colonization in Canada and acknowledging the harm it has caused to Indigenous people, a recognition dilemma persists in criminal justice sentencing. The interplay between criminalization and victimization plays a crucial role in creating the recognition dilemma. Moreover, even when Indigeneity is considered a mitigating factor—particularly in the case of Indigenous female offenders—they often rely on overly simplistic interpretations that overlook the significance of structural inequalities and the intergenerational trauma of colonialism. The purpose of the article is to contextualize the experiences of Indigenous people within the criminal justice system in order to better understand the role of the recognition dilemma in their overrepresentation.

Keywords: indigenous people, overrepresentation, criminal justice system, Canada, colonialism, recognition dilemma.

The overrepresentation of Indigenous people in the Canadian criminal justice system is a well-known and widely discussed phenomenon. Indigenous people in Canada constitute 3% of the adult population, while Indigenous men account for 28%, women—43%, and youth—46% of those convicted of crimes (Clark, 2019). Multiple inquiries have identified this as a longstanding issue and have emphasized the need for urgent change (Palmer, 2018; McGuire and Murdoch, 2022; Tetrault, 2023). Nonetheless, debate continues over its causes and explanations. Although researchers agree that the phenomenon is far more complex than a problem of deviance within the Indigenous community, they offer different explanations (Arbel, 2019; Chatrand, 2019; Clark 2019; Murti 2023). One of the most frequent explanations is that Canada's colonial past continues to have a negative impact on Indigenous people. The intergenerational trauma resulting from broken bonds with family and community—caused by residential schools and other uprooting policies—is identified as a major contributor to higher rates of mental problems and delinquency among the Indigenous population. Another explanation points to systematic bias against Indigenous convicts in the criminal justice system. Others explain criminalization rates in terms of marginal conditions in Indigenous communities and reserves.

In 2015, the final report of the Truth and Reconciliation Commission of Canada called on governments to commit to eliminating the overrepresentation of Indigenous people in custody. Serious attempts have been made to make the justice process more inclusive for Indigenous people, including restorative justice initiatives, alternative sentencing options for accused Indigenous offenders, and reintegration strategies for offenders upon release. Nevertheless, these strategies have not yielded satisfactory results in remedying the problem of overrepresentation. Sentencing practices and judicial narrative have been identified as areas within the criminal justice system where the issue of overrepresentation could potentially be addressed (Murti, 2023). Of course, sentencing is not separate from the multiple socio-cultural causes of incarceration, but it offers an intriguing glimpse into how cultural biases may operate as a framework for recognition in a socio-political context shaped from its inception by risk assessment and statistics. Judicial narrative adopts a form of reasoning, which, although essentially principled and logical, is used to rationalize competing notions of justice. In this sense, the central place of community and tradition in Indigenous responses to delinquency stands in stark contrast to the depersonalized process of Western criminal justice with its professionalized abstraction (Milward, 2012; Borrows, 2017). Moreover, Indigenous legal traditions and resources are often depicted as a challenge to the nature and purpose of Western criminal justice, with frequent references to the critical history of Indigenous encounters with Western legal institutions (Friedland, 2012). Furthermore, even when specific representations of Indigenous offenders are interpreted as mitigating, they are frequently associated with dysfunctional portrayals of a community marked by violence, substance abuse, or poverty

(Wilk et al., 2017). Perhaps such associations would not carry such weight were they not rooted in a history and ongoing legacy of colonialism, in which the criminal justice system played a major role in eradicating Indigenous culture and tradition in the name of forced assimilation.

Overrepresentations of Indigenous People in Correctional Institutions

According to census data, in 2021 the Indigenous population in Canada was 1,807,250, representing 5% of Canada's total population. However, in 2020/2021, Indigenous people in Canada were incarcerated at a much higher rate than non-Indigenous people. On an average day that year, there were 42.6 Indigenous people in provincial custody per 10,000 population compared to 4.0 non-Indigenous people. The incarceration rate for Indigenous adult men (77.8) was much higher than for Indigenous adult women (9.4). Still, the statistics for Indigenous women were disproportionate compared to non-Indigenous population, where the incarceration rate for men was 7.6 and for women 0.5 (Robinson et al. 2023). In conclusion, the Indigenous incarceration rate was about 9 times higher than the non-Indigenous incarceration rate when adjusted for age and sex differences between the two populations.

Moreover, Indigenous people represent the youngest population in Canada (about 28% were under the age of 25 in 2021). Younger adults (aged 18–30 years) exhibit the highest overrepresentation of Indigenous persons in custody compared to middle-aged (31–50 years) and older adults (over 51 years). Between 2019 and 2021, almost 8% of Indigenous men aged 25–34 years experienced incarceration. In comparison, only 1% of non-Indigenous men in the same age group were incarcerated during the same period. Indigenous women aged 25–34 years also experienced incarceration at a higher rate than their non-Indigenous counterparts (2.3% compared to 0.2%) (Robinson et al., 2023).

Furthermore, Indigenous people, particularly women, are more likely to be victims of violent crimes. According to the 2018 Survey of Safety in Public and Private Spaces, more than six in ten (63%) Indigenous women have experienced physical or sexual violence committed by either an intimate or non-intimate partner, such as an acquaintance, colleague, or stranger (Perreault, 2022). Indigenous women have experienced victimization in various contexts, many of which stem from the detrimental effects of childhood maltreatment, social disorder in neighbourhoods, and substance abuse. Several studies have shown that systematic discrimination against Indigenous women also influences the risk of victimization (Kaiser-Derrick, 2019; Murdocca, 2020; McGuire, Murdoch, 2022). Moreover, women in rural Indigenous communities often lack access to support services and emergency shelters to escape from violence.

Impact of Colonialism: Non-Recognition vs Misrecognition

Although the history of colonialism has been widely recognized in Canada as having had a significant impact on Indigenous people in various contexts, the courts tend to discuss the background circumstances of Indigenous offenders as if divorced from it (Kaiser-Derrick, 2019; Murti, 2023). The substance abuse, trauma, and mental health factors of the accused individual are considered merely as personal issues, separate from the connection between these factors and ongoing effects of colonialism. It must be understood that the process of colonialization succeeded in assaulting the very core of Indigenous societies by disempowering them and threatening their existence (Wolfe, 2006). Colonialism caused the loss of land and culture, the desecration of spiritual and religious sites, and the breakdown of relational systems. The loss of lands and ways of life has contributed to systemic socioeconomic issues, which, as one well-known Indigenous scholar concluded, exposed Indigenous people to “the corrosive influence of the welfare state” (LaPrairie, 1989, p. 85). LaPrairie suggested that the sense of community built within Indigenous groups through inter-reliance on other members was practically dissolved with the loss of their lands and ways of life, subsequently resulting in a loss of self-esteem. He explained that this dependency was not consistent with traditional Indigenous views of status and purpose. As a result, he believed that growing dependence on external aid led to low self-esteem and a loss of self-worth, which shaped the depth of Indigenous trauma.

However, the legacies of colonialism in Canada have come under close public scrutiny because of the residential school system. Indigenous communities were not only removed from their ancestral lands, but many children were also taken away from their families and forced to attend residential schools. The residential school system deprived children of close family and community ties and exposed most of them to physical and sexual abuse. Inhumane conditions in the schools led to student malnutrition, starvation, and disease. Howard and Jones (2018, p. 27) defined intergenerational trauma as “the effect of a previous unresolved trauma passed on to subsequent generations of an individual’s family, community, and culture.” The term intergenerational trauma is almost directly related to the experience of Indigenous children in the residential schools. Moreover, various authors have discussed the effects of residential schools that continue to resonate in subsequent Indigenous generations, not just among survivors themselves (Bombay et al., 2014; Wilk et al., 2017). They have argued that intergenerational trauma is an important determinant of social issues such as high rates of domestic violence, mental health problems, and substance abuse.

Although colonialism is usually spoken of a past phenomenon, its consequences continue to have a detrimental impact on Indigenous people. Colonialism

aimed to marginalize Indigenous peoples by reducing their self-determination and suppressing their traditional cultures, religions, and languages. The influence of intergenerational trauma has served to destroy Indigenous families. The abusive treatment Indigenous children experienced at the hands of residential school officials may have led to dysfunctional relationships that lacked traditional role modelling. As Morissette (1994, p. 385) reported, children living with residential school survivors were sometimes removed from their homes by child welfare workers due to the treatment they received at home. This further disrupted families as children were placed in foster care or in environments that were not supportive of the Indigenous ways of life. The cycles of violence that began in the residential schools continued to play out through the dysfunction of the family structure (Kaiser-Derrick, 2019, p. 12).

As a result of recognition of colonial injustices, there have been legislative changes and landmark court decisions to address the overrepresentation of Indigenous offenders in prison (Murti, 2023). The turning point for Canadian law was the introduction of Bill C-41 in 1996, adding section 718.2(e) to the Criminal Code—the first sentencing provision specific to Indigenous individuals in the criminal justice system. The new section instructed judges to consider all alternatives to imprisonment for all offenders, with particular attention to the circumstances of Indigenous offenders. The first case to consider this section was *R v Gladue*. In the case, an Indigenous woman, named Jamie Gladue, was convicted of manslaughter and sentenced to three years of imprisonment. The Supreme Court decision in *R v Gladue* affirmed the legal duty of trial judges to sentence all Indigenous offenders using a different methodology that takes into account their unique background circumstances and all alternatives to incarceration that may be more appropriate. However, as Indigenous incarceration rates have continued to increase, Indigenous leaders and scholars became sceptical about the implementation of these sentencing guidelines (Murti, 2023, p. 24–25). Moreover, some have begun to claim that systematic racism against Indigenous people persists within the judicial system (Woolford and Gacek, 2016; Palmater, 2018; Chatrand, 2019). Sentencing has been recognized as a point in the criminal justice system where the problem of the Indigenous overrepresentation could potentially be addressed. Furthermore, since the beginning of colonization, Indigenous criminality has been a scapegoat for many coercive policies imposed on Indigenous people in Canada. It has created a misconception that punishment for crimes means the oppression and subjugation of Indigenous people. In conclusion, the courts accept a role of exceptional circumstances in recognizing that Indigenous communities provide unique conditions for the offender. However, such recognition does not undermine the pervasiveness of the common law or state sovereignty. Indigenous principles are therefore in the shadow of the fairness of legal order.

A number of specialized Indigenous sentencing courts have been established over the past few decades to address the issue through a more community-centred

process. However, the majority of Indigenous cases are still being heard in mainstream courts (Miller, 2022, p. 101). Moreover, in recent years, there has been a growing body of scholarship arguing for the importance of revitalizing and recognizing Indigenous law in Canada at a philosophical or political level, and discussing legal and theoretical frameworks for imagining that possibility (Milward, 2012; Borrows, 2017). Furthermore, the question of judicial punishment remains at the heart of Indigenous claims to self-governance and the practice of their own laws.

Nevertheless, practical engagement with Indigenous legal resources and traditions raises significant challenges (Friedland, 2012; Borrows, 2017). One of the fundamental legal obstacles is that Indigenous laws are typically not readily available. This means that it is difficult to identify what Indigenous laws are due to the lack of written reasons citing Indigenous laws. Moreover, without a deep knowledge of the language and culture, either recognition or understanding based on resources and traditions embedded in these laws is impossible. It seems that they are too vague and imprecise to serve as standards for conduct. Finally, the challenge of Indigenous laws lies in their current relevance and utility, as they are clearly perceived as the remnants of the past, and some of them may not be applicable to modern issues for various reasons.

The formal recognition of Indigenous laws and resources represents a call for justice and redemption from the evil of colonialism, especially in the contemporary context of the Canadian multicultural mosaic. However, this recognition does not provide a sound basis for legal recognition, especially as courts increasingly question the functionality of Indigenous laws. As a result, the issue of Indigenous overrepresentation in the Canadian criminal system seems to be suspended at the intersection of criminalization and victimization. It also reveals a recognition dilemma.

Interplay of Criminalization and Victimization: Recognition Dilemma

The characterization of a typical Indigenous offender is a contradiction between an object of sympathy and an object of risk (Anthony, 2013; Kaiser-Derrick, 2019). The judicial recognition of Indigeneity as a form of cultural representation flows between tolerance and exclusion in distinguishing the difference and its attendant limitations. The distinction is not simply constructed in relation to the Indigenous offender, but also the Indigenous community of which the offender is a member. Recognition, therefore, involves the imposition of the common law while maintaining its relevance to Indigenous difference. The focus is on determining whether Indigenous factors are relevant to reducing a sentence. Moreover, judicial recognition of Indigeneity arises from sentencing principles provided by the common law. The court retains the right not to acknowledge

an Indigenous background where the offender does not meet the courts' criteria for relevant Indigenous identity or where the court considers other sentencing principles (such as the seriousness of the offence or the case of recidivism) to be of greater importance (Murti, 2023).

When Indigenous circumstances are the basis for mitigation, they are in fact constructed around two dominant images of the offender (Anthony, 2013, p. 2–3). One is an offender from remote communities, while the other is an offender from urban areas. Both images are conceived according to hypothetical narratives, in which one is connected to a distinctively traditional culture, while the other is an outcast in the outside world, shaped by the vices of idleness, poverty, and addiction. Indigenous cultures are thus assigned greater value in those cases where they are seen as helping to return the offender to her/his native roots and provide deliverance from the evil (Anthony, 2013, p. 8). In other words, Indigenous circumstances are taken into consideration to reduce culpability where they disadvantage the offender or reconcile the offender with her or his tradition. In a certain way, this creates grounds for expectations of Indigeneity in order to rationalize the application of mitigatory principles.

However, recognition of Indigenous principles is not applied universally, as severe and violent crimes are committed by Indigenous offenders. The seriousness of such crimes isolates offending from its social context. This resonates with Bentham's (1962, p. 579–580) argument that punishment should be imposed through sanctions that are infinitely gradable to match seriousness. In that sense, seriousness based on harm presumes individuals to be autonomous and rational agents, and neglects the fact that severe social disadvantages may be a root cause of offending. The doctrine of seriousness is also accused of enforcing the criminal law's blind universality, because a model that assumes individual autonomy does not correspond to offenders whose behaviour is shaped by cultural values or community pressures (Anthony, 2013 p. 16–17).

Alternatively, the measure of a crime's seriousness is associated with the interests of the victim (Chatrand, 2019; McGuire, Murdoch, 2022). Victimization is measured by the harm to the victim, making it inseparable from the notion of seriousness. Moreover, victimization provides empathy and shocks to the sentencing process. Therefore, the victim's harm justifies greater penal severity.

The principles of seriousness and victimization are applied to decrease the recognition of Indigenous circumstances. The effect has been not only to undermine Indigenous factors in reducing culpability, but also to ascribe harmfulness to Indigenous cultures as violent and victimizing, and thus requiring a deterrent message through harsh sentencing. It constructs a recognition dilemma because Indigenous culture is either seen as too "problematic" to be fully recognized or as prone to disappearance because it poses an obstacle to modern legal norms. As a results, Indigenous circumstances are dismissed in favour of a view that a dysfunctional environment has created a criminogenic effect on individuals, and

the community is perceived without regard for its victims. The view coincides with a scale of Indigenous crimes that creates public moral panics over violence and dysfunction in Indigenous communities.

Another significant issue facing the recognition dilemma is the intersection between criminalization and victimization of Indigenous women (Kaiser-Derrick, 2019; McGuire, Murdoch, 2022). On the one hand, for a significant number of Indigenous women, there is such a strong correlation with victimization that they not only face more serious and frequent intimate partner violence, but are also more likely to be victims of all forms of violence (Murthy-Oikonen et al., 2022). On the other hand, Indigenous women are vastly overrepresented in Canada's federal prisons and represent the fastest growing prison population in the country (McGuire, Murdoch, 2022). Although substance abuse is usually linked to coping with trauma and is prevalent in Indigenous communities as a result of experienced and intergenerational trauma from the residential school era, destructive colonial influences are also embedded in understandings of Indigenous people's lack of self-control in relation to substance use (Ogden, Tutty, 2023). Moreover, substance abuse is cited as a major factor leading to domestic violence, an issue disproportionately experienced by Indigenous women (Ogden, Tutty, 2024). The implication is that media reports of Indigenous domestic violence and sexual abuse describe the causes of Indigenous crime in terms of alcoholism and welfare dependence (Murthy-Oikonen et al., 2022). In other words, economic stress and substance abuse are vividly portrayed as preventing Indigenous people from exercising personal responsibility and as creating conditions that nurture criminality. The connection between a lack of self-control and substance abuse suggests the individual is responsible for succumbing to criminal impulses.

In contrast, Indigenous feminist scholars claim that a preoccupation with the empirical details of substance abuse and violence belittles and circumscribes what should be a broader study of Indigenous women under patriarchy (McKinnley et al., 2021). The historical and social construct of Indigenous offending and victimization cannot be understood apart from the process of colonization and its role in criminalization (McGuire, Murdoch, 2022). According to them, the victimization Indigenous women may very well be linked to their rates of over-incarceration, especially if Gladue factors are not properly taken into account in the sentencing stage (Kaiser Derrick, 2019, p. 38–39). The victimization-offending continuum is evident in the life histories of incarcerated Indigenous women, which reveal a cyclical relationship between experiencing abuse and becoming institutionalized through apprehension and placement in foster care, and later, in prisons (Kaiser-Derrick, 2019, p. 249). The label of incarceration constructs Indigenous women as angry, mentally unstable, and inherently violent. Moreover, these characteristics are intentionally connected to substance addiction and domestic violence rather than to the compounding effects of trauma (Murdocca, 2020, p. 58). The use of punitive measures that are not trauma-informed only exacerbates

pre-existing trauma within the prison setting. Therefore, the criminalization of incarcerated Indigenous women is situated within their respective experiences of trauma, precarity, and abuse resulting from the colonial project (Chatrand, 2019; Kaiser-Derrick, 2019, McGuire, Murdoch, 2022).

In the instance of Indigenous female offenders, the judiciary not only regards the women as disavowing their responsibility, but also imputes irresponsibility to the Indigenous community (Laskin, 2021). Incarcerated Indigenous women are often pathologized through the lens of risk assessment tools. Responsibility coincides with an ideology of risk assessment in which autonomous individuals are charged with minimizing their risk through responsible behaviours. Punishment is thus the coercive form of risk control where self-discipline fails. Constructed as mentally unstable, violent, and addicted, Indigenous female offenders are classified according to dangerousness (McGuire, Murdoch, 2022). Risk reduction is activated in a punitive sense through incarceration and incapacitation, alongside other interventions and supervision, which instil feelings of security from unpredictable individuals in the community. At the same time, where harm is purportedly linked to Indigenous culture or the Indigenous community context, the Indigenous community is seen as a source of victimization because its dysfunction such as domestic violence or substance abuse poses a risk to further victims (Brownridge et al., 2017). In this respect, courts consider that the Indigenous community requires a special message of deterrence. However, such a punitive turn is usually regarded as the use of incarceration that perpetuates colonial harm and keeps Indigenous female offenders engulfed in trauma, because the systemic nature of the law impedes efforts at resolution.

Conclusion

The outcomes of the discussion about the overrepresentation of Indigenous people in the Canadian criminal justice system show that it cannot be exclusively attributed to the number of Indigenous offenders. There are two compelling explanations for the overrepresentation of Indigenous people. One implicates the criminal justice system (and sentencing in particular) for its discriminatory process, while the other accounts for higher levels of Indigenous criminality. However, both explanations reveal conflicting results in the treatment of Indigenous defendants during sentencing. Moreover, statistics are used to normalize Indigenous punishment and overrepresentation by appearing to correspond with the seriousness of the offence and other aggravating factors. Conversely, they also reveal their limitations in relation to broader considerations of Indigenous circumstances and social relations.

The image of the Indigenous offender is the result of an intertwined understanding of destructive colonial influences and higher levels of social vices related to substance abuse and family violence. While overall Indigenous social problems are rooted in the socio-historical legacy of the colonization process, the causes of

Indigenous crime are interpreted in terms of individual and collective risks. This creates a recognition dilemma between sympathy for the victim and the perceived risk of crime. One way to avoid this recognition dilemma is to reduce Indigeneity to a factor that presumes a legitimate criminal justice system. Indigeneity is thus taken into account for the purpose of rationalizing the mitigation process. In contrast, according to postcolonial scholars, viewing crime as embedded in colonization processes and institutions is key to understanding Indigenous overrepresentation in the criminal justice system. Consequently, formal recognition of Indigenous laws and resources is perceived as a true call for justice and a suitable solution to the recognition dilemma. Although such claims appear to be compelling in light of cases where courts fail to recognize Indigenous circumstances, the central place of community and tradition in the Indigenous approach to delinquency stands in contrast to legal norms and standards.

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