JUSTICE OF THE COMMUNITY AND FOR THE COMMUNITY: INDIGENOUS LEGAL AUTHORITY AND ROADBLOCKS TO ACHIEVING RESTORATIVE JUSTICE

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Supplanting the existing Indigenous legal structures of the peoples from Turtle Island with colonial ones is a fundamental part of the orchestrated suppression campaign that has never ended. The variety of legal traditions from long before settlers stepped foot on this land have been repeatedly dismissed and devalued, despite the evidence that similar methods, like Restorative Justice, strongly contribute to positive outcomes for the community (Hewitt, 2016). By applying both restorative and preventative justice systems and following the cultural values of the given nation, strong steps towards decolonization and Indigenous sovereignty can be achieved (Gray & Lauderdale, 2007). However, not enough has been done to uphold both culturally informed Indigenous legal traditions and the communities that would benefit from them. The Canadian government must provide both the resources and the authority for the decisions reached by Indigenous courts to go unchallenged by its own colonial structures.

The ability to practice one's own legal traditions is an integral prospect of sovereignty. While some Indigenous nations have control over their own governance systems, if their legal decisions are not recognized by the government of Canada and could be overturned, then the colonial system maintains the final say on justice. One example of when Indigenous laws have been overtrodden by colonial laws that benefit settlers is in the case of L'nu fishing licenses and their legal battle with the Canadian government over fishing rights on their lands (The Eastern Door, 2020). In reality, "the Sipekne'katik fishers are fishing under the licensing scheme of the Sipekne'katik First Nation, enacted under authority of the Indigenous legal order of *Netukulimk*, as protected under section 35 of the Canadian Constitution" (The Eastern Door, 2020), yet the people continue to face violence from settler fishers, their rights unprotected by the federal government. Indigenous law continues to be disregarded in this country.

Many Indigenous legal traditions have similarities to the practice of Restorative Justice (RJ), yet they are not interchangeable. As acknowledged in a report commissioned by the Canadian Department of Justice, "most, if not all, Indigenous legal traditions contain principles and mechanisms that can be described as promoting community healing, reconciliation, and the reintegration of the offender," (Department of Justice Canada, 2016, p. 3) which are key to RJ, but the diversity of Indigenous cultures rejects the notion that they can be considered indistinguishable.

There are multiple examples of places in Canada where Indigenous-led court systems are already in place, notably in Yukon Territories and Saskatchewan, and they are being introduced in urban areas of British Columbia and Alberta (Boothroyd, 2019). However, these courts are often only allowed to preside over minor crimes, and the final say often lies with outsider judges (Boothroyd, 2019).

The struggles of these courts shows that for Indigenous legal traditions to be authoritative, a decolonizing of Canadian law at large is required. Settler colonialism brought a different understanding of law to a land that already had many of its own: a demand for "objective" truth. Many Indigenous legal traditions instead recognize that "truth's objectivity is subjectively informed by experience, perspective and reputation" (Hewitt, 2016, p. 320). This defocusing of community health and expectation of one singular perspective on truth stands in opposition to many Indigenous nations' values and desired outcomes from justice. As Cree scholar Jeffrey G. Hewitt states:

> [t]here are essentially three deficits in the Canadian criminal justice system that are the primary focus of restoration: crime is viewed as harm against the state, not as against the collective society and the individuals who comprise it; the criminal justice system focuses on punishment while neglecting victims, except perhaps through limited financial compensation; and finally, there is little emphasis on offender reintegration into society. (Hewitt, 2016, p. 327)

The current colonial systems have already failed when it comes to many systemic injustices committed against Indigenous peoples, including in the litigation used to address the crimes of the Residential School system. The Euro-Canadian norms simply do not go far enough to admit all wrongdoings and offer enough resources for healing, as the scale of the problem "challenge[s] our western legal conceptions of individualism and… our conceptions of what wrongs or injustice consist of" (Menkel-Meadow, 2014, p. 621). One alternative offered to help address massive crimes of the past is the model of transitional justice (Park, 2016), but it is unclear how well these methods work to address the ongoing effects of colonialism. Augustine S. J. Park, scholar of justice and settler colonialism at Carlton University, argues community-based restorative justice has the potential to contribute "to decolonization by placing Indigenous cultural practice at the center of the… work," especially in the case of mass violence (Park, 2016, p.425).

In the example of intimate partner violence occuring in Indigenous communities, Jane Dickson-Gilmore highlights the importance of women being involved in the work of creating effective restorative justice systems, and although systems that prioritize preventative measures might be more difficult and expensive to enact, "surely that expense will be less, in both human and monetary terms, than perpetuating the inconsistent success of criminal justice interventions" (Dickson-Gilmore, 2014, p. 437). Restorative justice without including these preventive measures "breaks the Circle of Justice and leaves individuals and the community without the necessary cultural foundational structures to heal and prevent crime" (Gray & Lauderdale, 2007, p. 218).

Many Indigenous Ways of Knowing include the grand importance of harmony among humans and also the rest of the natural world, acknowledging that "[s]ocial diversity, the recognition that humans are part of nature (not separate from it), and harmony are essential to justice" (Gray & Lauderdale, 2007, p. 222). The Great Law of Peace of the Haudenosaunee Peoples is an example of providing deep-rooted cultural measures to inhibit individuals from breaking the peace, as well as motivation to stop

others from breaking it as well (Gray & Lauderdale, 2007). The healing method of Biidaaban, which translates from Ojibwe into “dawn comes,” or “it is daybreak” (Biidaaban), is informed by Anishinaabe cultural values of healing the community after an offence and requires the participation of both the victim and the perpetrator (Hewitt, 2016). While RJ and Indigenous justice strategies provide positive statistics, in lower recidivism rates and other positive outcomes for the community, RJ has yet to be widely adopted by Canadian legal systems (Hewitt, 2016). Jeffrey G. Hewitt argues it provides a space for decolonialization, that “Indigenous models of justice assist in revitalizing Indigenous laws through practice” (Hewitt, 2016, p. 317), which could explain why the colonial structure of the Canadian federal government would fail to act on it.

Although the Canadian government should be providing Indigenous nations with the resources needed to instate their own justice systems and courts, decision-making power must always remain with the community, as “Canada runs the risk of simply appropriating Indigenous legal traditions and using them to recolonize by determining what supports will be offered” (Hewitt, 2016, p. 334). There is a danger of colonial structures forcing RJ methods developed in one Indigenous community onto others, failing to acknowledge the diversity of each nation and instead enforcing colonial power (Tauri, 2016). In the case of the Wagga Wagga model, declared to be based on Māori community-based Family Group Conferencing legal traditions, Ngati Porou criminologist Juan M. Tauri argues colonial powers co-opted RJ to instead exert their power and “commodify… traditional Ways of Knowing” (Tauri, 2016). Benefiting from the desire for Indigenous-led legal methods in Indigenous communities, “[t]he appropriation of Indigenous life-worlds’ components by state functionaries and criminologists to “Indigenize” crime control products and “culturally sensitize” systems and products is a well-documented phenomenon” (Tauri, 2016, p. 53). Tauri describes the “standardization” of what could have once been Indigenous legal strategies, stating that “one of the great self-deceptions of justice practitioners and policy makers in settler-colonial jurisdictions is that justice forums derived from western criminal justice and

criminological paradigms can work for everyone or anyone regardless of 'race', differences in social or historical context" (Tauri, 2015, p. 187).

In this sense, the romanticization of Indigenous justice without actual grounding in community values is a danger. The use of a façade of Indigenous justice to cover colonial control could also make it seem less viable to outsiders, leading to arguments underestimating its potential to support decolonialization, as with Padraig McAuliffe in his article "Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse," written in 2013.

RJ also faces criticism for not being objective, based on its reliance on community leadership in legal matters, but as argued above, the subjectivity stemming from those who know the people involved is considered a strength in the pursuit of healing (Boothroyd, 2019). Another angle that must be considered in the implementation of Indigenous legal systems like courts is the adoption of the community's native language. Languages are inherently connected to worldviews, and thus are linked to the community's conception of justice, which supports the need for Indigenous languages to be used in Indigenous legal processes (Boothroyd, 2019). However, the accessibility of speech for the community, including limiting legal jargon, is a necessity in many Indigenous legal traditions (Boothroyd, 2019), and Indigenous people who do not speak the language of their community still deserve to be a part of community-based legal processes. Multi-lingual strategies need to be developed to address this need, which would be best done by those within each nation in accordance to their peoples' desired outcomes.

Indigenous communities cannot fully experience sovereignty without access to their traditional legal ways, and the authority to uphold decisions made by their courts. The government of Canada has a responsibility to provide the resources for this progression but has so far failed to do so. Although RJ has proven to provide more beneficial outcomes for the health of the community, colonial retributive

methods are still used, even in the process of addressing massive structural crimes against Indigenous peoples (Menkel-Meadow, 2014). For instance, at the conclusion of the National Inquiry into Missing and Murdered Indigenous Women and Girls, it is seen that "[e]nding the genocide which is embedded in state institutions and society as a whole, will require immediate and urgent remedies that match the scope and character of these grave human rights violations – i.e. a comprehensive national action plan that is well-resourced and focusing on transitioning Canada out of genocide" (Palmater, 2020). An action plan is needed to provide sweeping changes in the way law is administered within the borders of this country, and by whom. Restorative Justice has the potential to facilitate true decolonialization and healing when it is conducted by the community and for the community.

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