Conference Proceedings

ta-tawâw Student Centre
University of Regina

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Conference Proceedings

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Acknowledgement

The conference committee is deeply grateful for the generous funding support from the University of Regina's Academic Conference grant, ta-tawâw Student Centre, John Howard Society of Saskatchewan, Indigenous Advisory Circle's Indigenization Fund, the Micah Mission, the Elizabeth Fry Society of Saskatchewan and the Department of Justice Studies. The conference committee is thankful to all the session moderators, abstract reviewers and other volunteers. Special gratitude to Lori Walker, Dr. Stuart Wilson, Lynn Thera, Dr. James Gacek, Sheena McCallum, Dr. Donna Swapp, and Heather Peters for their timeless support for the conference.

Executive Summary

On Thursday, November 4, 20201, the University of Regina's ta-tawâw Student Centre and the Department of Justice Studies, in collaboration with the John Howard Society of Saskatchewan, held its first *Decolonization and Justice Conference*. According to conference organizer, Dr. Muhammad Asadullah, an Assistant Professor in the Department of Justice Studies, the conference was designed to promote awareness and foster innovation and creativity in the field of decolonization and justice. "This conference is unique because it brings attention to important justice issues that are prevalent in our communities," he says. "The speakers and presenters shared innovative ideas and practices on decolonization and how it affects law, policing, justice, criminology and even how decolonization affects the mind." This year's event was held virtually to ensure participant safety and to make the conference as accessible as possible. Fees for the one-day conference were low, with subsidies available for those who needed them. "We want to guarantee that everyone who wants to join is able to do so," says Dr. Asadullah. The conference provided a platform for learning and discussion between community members, practitioners, academics, law enforcement agencies, and justice stakeholders. The keynote lecture was presented by Dr. Michael Yellow Bird, Dean and Professor of the Faculty of Social Work at the University of Manitoba. Following Dr. Yellow Bird were numerous speakers from diverse backgrounds who shared their knowledge and wisdom on Decolonization & Law, Decolonization & Restorative Justice and Decolonization & Criminology. Over 220 registered participants from across the Globe attended this virtual conference. Even though the conference was held virtually, a number of tools such as the conference photo booth, networking groups, and customized Zoom background were developed to increase interactivity. The conference was unique and significant for a number of reasons. First of all, this was the first ever conference in Canada focusing on the topic of Decolonization and Justice. Second, this conference was unique in that it offered a generous honorarium for both undergraduate and graduate student presenters. Additionally, a subsidy ticket option was provided to all community members, thus removing all financial barriers to participation in the conference. Third, the collaboration between Indigenous

communities and non-indigenous communities was exceptionally high in this conference. A large number of attendees joined from many nations particularly from File Hills Qu'Appelle Tribal Council, Saskatoon Tribal Council and Yorkton Tribal Council. Finally, prestigious academic, student presenters and community members were well-represented during the entire day of the conference.

Comprehensive Report

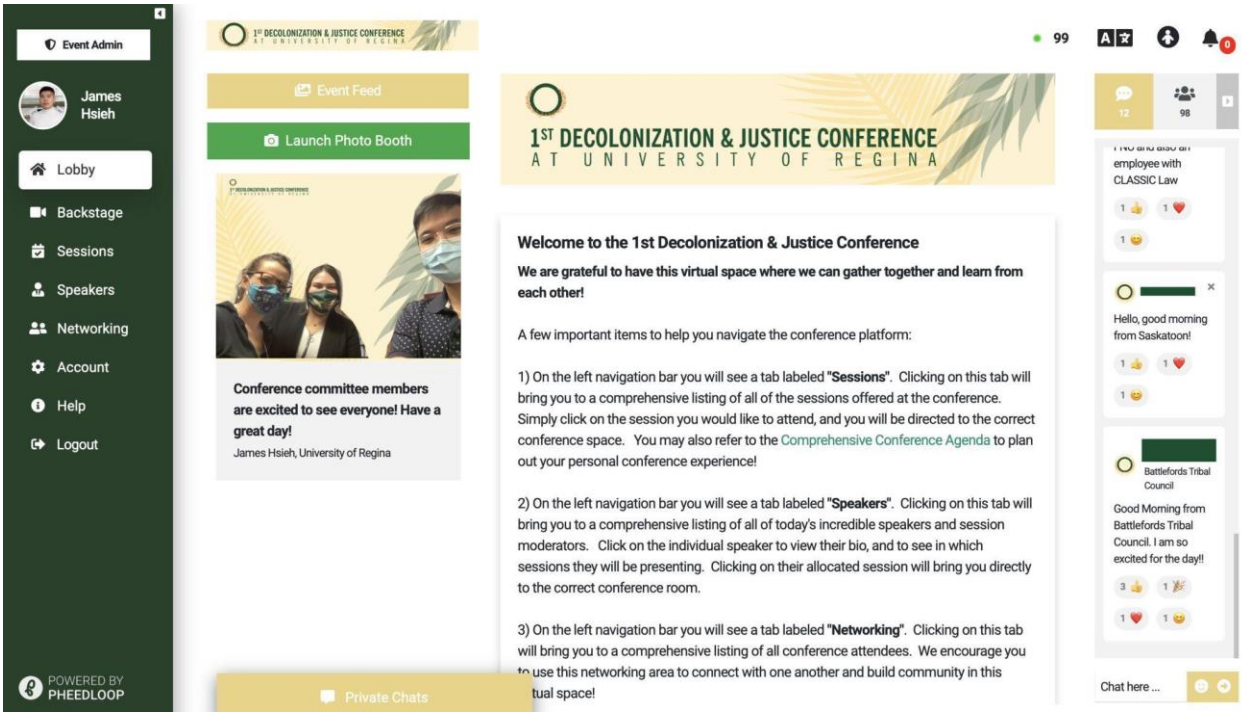
Decolonization

The definition of decolonization varies among scholars. Some take a macro view—meaning decolonization through institutional or societal changes, whereas others take a micro approach—meaning decolonization of mind and intellect (Asadullah, 2021; Monchalin, 2017). Frantz Fanon (1963) identified three forms of decolonization—intellectual, psychological and physical. This conference will stimulate conversations on decolonization in the context of justice. More specifically, the notion of decolonization and law, decolonization and policing, decolonization and restorative justice and decolonization and criminology will be explored in numerous parallel sessions.

The Conference

On Thursday, November 4, 20201, the University of Regina's ta-tawâw Student Centre and the Department of Justice Studies, in collaboration with the John Howard Society of Saskatchewan, held its first *Decolonization and Justice Conference*. The emcee of this day-long virtual conference was misty Longman, Manager of the ta-tawâw Student Centre. According to conference organizer, Dr. Muhammad Asadullah, an Assistant Professor in the Department of Justice Studies, the conference is designed to promote awareness and foster innovation and creativity in the field of decolonization and justice. "This conference is unique because it brings attention to important justice issues that are prevalent in our communities," he says. "The speakers and presenters shared innovative ideas and practices on decolonization and how it affects law, policing, justice, criminology and even how decolonization affects the mind." This year's event was held virtually to ensure participant safety and to make the conference as accessible as possible. Fees for the one-day conference were low, with subsidies available for those who need them. "We want to guarantee that everyone who wants to join is able to do so," says Dr. Asadullah. The conference provided a platform for learning and discussion between community members, practitioners, academics, law enforcement agencies, and justice stakeholders. The keynote lecture was presented by Dr. Michael Yellow Bird, Dean and Professor of the Faculty of Social Work at the University of Manitoba. Following Dr. Yellow Bird came numerous speakers from diverse backgrounds and shared their knowledge and wisdom on Decolonization & Law, Decolonization

& Restorative Justice and Decolonization & Criminology. Over 220 registered participants across the Globe attended this virtual conference. Even though, the conference was held virtually, a number of tools such as the conference photo booth, networking groups and customized Zoom backgrounds were developed to increase interactivity. The conference was unique and significant for a number of reasons. First of all, this was the first ever conference in Canada focusing on the topic of Decolonization and Justice. Second, this conference was unique in that it offered a generous honorarium for both undergraduate and graduate student presenters. Additionally, a subsidy ticket option was provided to all community members, thus removing all financial barriers to participation in the conference. Third, the collaboration between Indigenous communities and non-indigenous communities was exceptionally high in this conference. A large number of attendees joined from many nations particularly from File Hills Qu'Appelle Tribal Council, Saskatoon Tribal Council and Yorkton Tribal Council. Finally, prestigious academic, student presenters and community members were well-represented during the entire day of the conference.



Objectives

There major objectives of the conference were:

- To promote awareness of transformational and decolonizing approaches to justice.
- To examine the concept of decolonization and law; decolonization & restorative justice; decolonization & policing; and decolonization & criminology.

- To foster engagements with diverse stakeholders—community members, government officials, students and academics.

Welcome Prayer & Opening Remarks

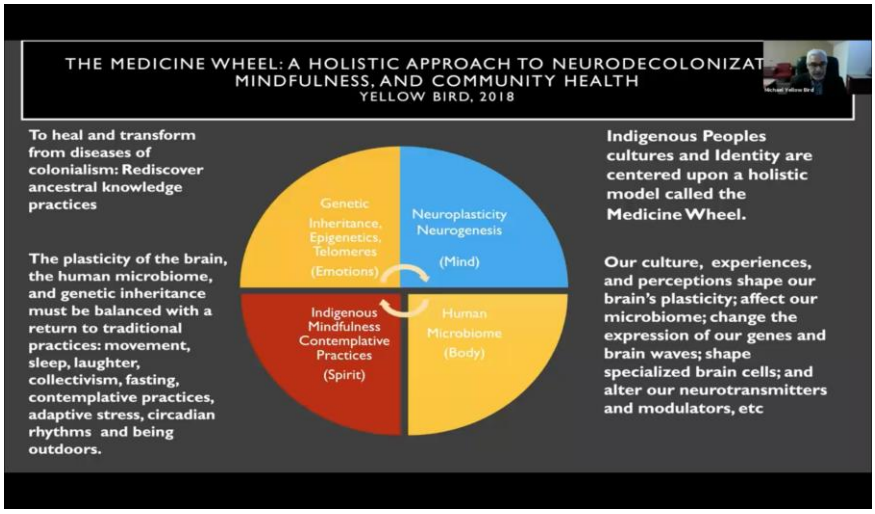
To start off the conference, Elder Frank Badger and Barb Badger began with a welcome prayer. Following Elder Frank was the Associate Vice-President (Indigenous Engagement), Lori Campbell who began with introductions and opening remarks in Cree and then in English giving thanks and acknowledgements. She emphasized recognizing the colonized justice systems, and more specifically, how these systems disproportionately affect Indigenous and minority communities. She also stressed the importance of recognizing the Indigenous traditional learning and knowledge that has been practiced on these lands for centuries. To Lori Campbell, decolonization means being Indigenous in all areas of life-everywhere, and doing so freely. She discussed the importance of decentering whiteness, colonialism and dismantling oppressive systems. She ended her opening remark by stating that we should focus on divesting in police, investing in upstream services, and promoting community-involved healing.

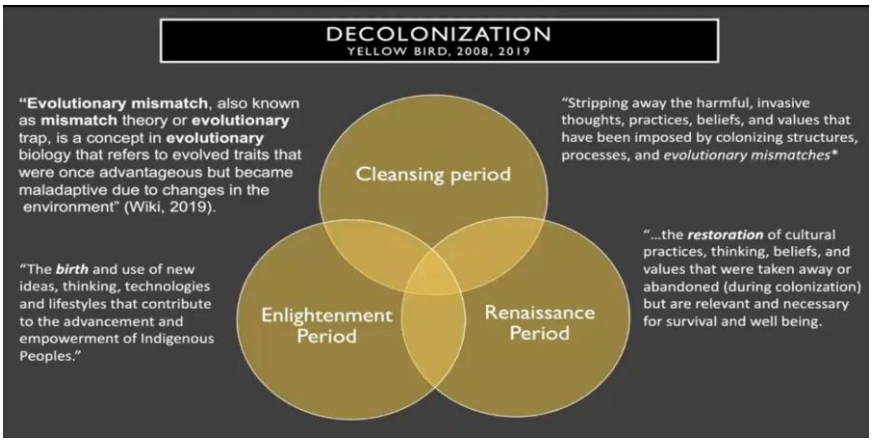
Keynote Address

The keynote speaker for the 2021 conference was Dr. Michael Yellow Bird, Dean and Professor of the Faculty of Social Work at the University of Manitoba. He is the founder, director, and principal investigator of The Centre for Mindful Decolonization and Reconciliation at the University of Manitoba. He serves as a consultant, trainer, and senior advisor to several BIPOC mindfulness groups and organizations who are seeking to incorporate mindfulness practices, philosophies, and activities to Indigenize and decolonize western mindfulness approaches in order to address systemic racism and engage in structural change.

The title of the keynote address was *ReZ DoG Meditations: Decolonization Strategies for Liberation of the mind.* Dr. Michael Yellow Bird's approach to decolonization was neurdecolonization, which focuses on liberation through the mind and body. This involves the effects that colonial trauma has on people, with a specific focus on Indigenous communities, and its impact on spiritual, emotional, intellectual and biological well-being. He provided activities for healing and identified Indigenous mindfulness practices are an important skill when addressing damages done from colonialism and injustice. He suggested that mindfulness, running, dancing, singing, laughter, sweat lodges, saunas, fasting, meditation and cognitive resilience can be tools to address colonial harms. According to Dr. Yellow Bird, these traditional practices and contemplative practices can act as means of resistance and healing in modern-day settings. He went into insightful detail on the concept of Brain-Derived Neurotrophic Factors, Colonial Brain Disorder, molecular colonization, injustice effects on telomeres and other biological aspects such as obesity, etc. Below can be found an image from Dr. Yellow Bird's presentation discussing

neurodecolonization and mindfulness using a medicine wheel model. Following that is another image from his presentation reviewing the different periods that overlap in these decolonization aspects including restoration, evolutionary, colonized structures and practices, and innovative thinking.





Parallel Breakout Sessions

Along with the keynote speech, the conference also included a number of parallel sessions by scholars and students on four major themes—decolonization & law; decolonization & policing; decolonization & restorative justice; and decolonization & criminology. Advanced undergraduate and graduate students across the Globe presented their work for conference presentation.

Themes for parallel breakout sessions:

- **Decolonization and Restorative Justice**:
  - Foster the topic of decolonization and restorative justice
  - Explore basic understandings of decolonized restorative justice praxis

- **Decolonization and Policing**:
    - Enhance a basic understanding of decolonized policing
    - Share examples from First Nation Policing Programs in Canada

- **Decolonization and Law:**
    - Explore the impact of colonization on traditional and indigenous law
    - Navigate pluralistic legal traditions

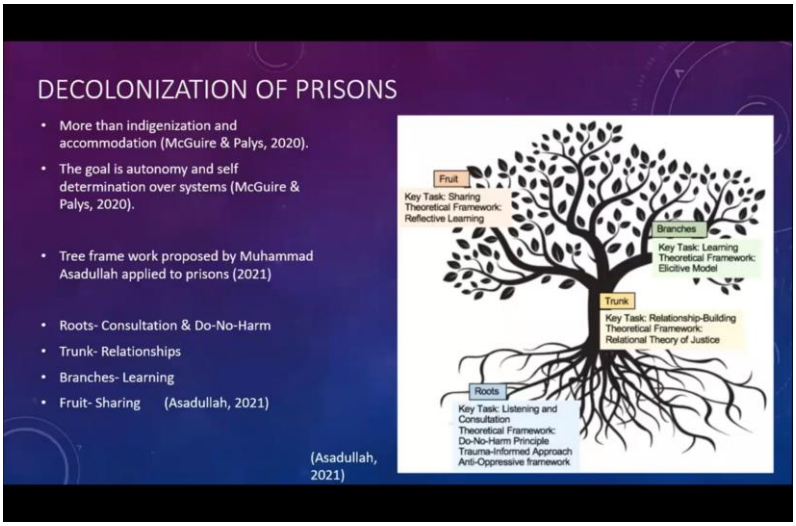
- **Decolonization and Criminology:**
    - Explore Southern Criminology and Indigenous Criminology
    - Offer a comprehensive framework for the decolonized criminology praxis

Guest Speakers in Parallel Breakout Sessions

Three major scholars—Doug White on *Decolonization and Law*; Christianne Paras & Eric Littlewolf on *Decolonization and Restorative Justice*; and Michaela on *Decolonization & Justice* presented in the parallel sessions.

Doug White, a lawyer and a negotiator, and the British Columbia First Nations Justice Council Chair discussed *Decolonization and Law*. The focus of his presentation was on Indigenous legal orders and traditions, the effects of colonialism on Indigenous traditions, and the historical lack of legal advocacy for Indigenous people. He discussed a legal tool in the political space of Canada for Indigenous people, the Gladue Report. He presented a framework to reform the current justice system and restore Indigenous traditions and legal orders. He emphasized the importance of Indigenous legal traditions and the needs for decolonizing the colonial legal system.

Christianne Paras, the Executive Director of Restorative Justice Association of British Columbia, and Eric Littlewolf from the Indigenous Visioning Circle, discussed the process of *Decolonizing Restorative Justice*. They discussed the negative impact of current restorative justice practices in many Indigenous communities around the world. Erica Littlewolf mentioned that the attempt to return to the traditional Indigenous ways requires decolonization of restorative justice. Both speakers shared their vision to decolonize restorative justice.

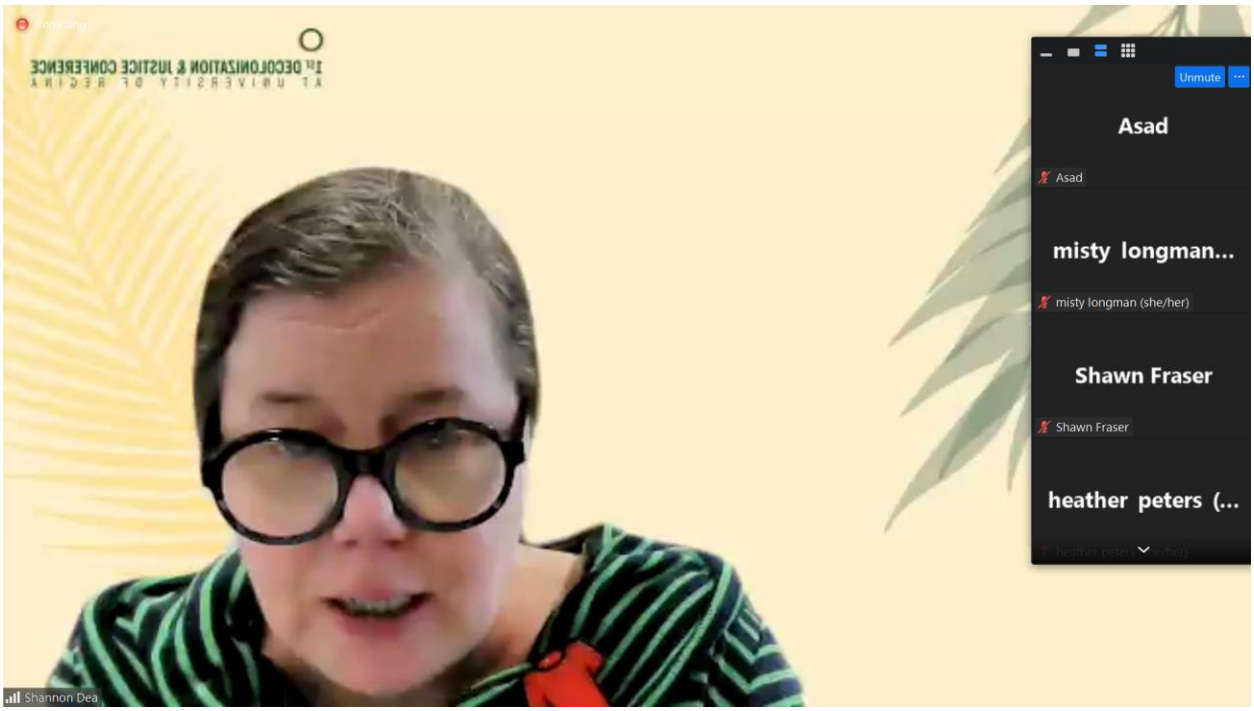


Finally, Nicole Kimber presented on *Duty to Decolonize: Trauma in Canada. She* reviewed colonization, residential schools, decolonization, incarceration, Indigenous youth and law, and negative determinants in mental health. Nicole discussed trauma-informed practices and shared specific examples focusing on case studies that are using cultural practices for healing.

Community Panel Discussion, Closing Remarks and Prayer

One of the salient features of this conference was community dialogue. This conference brought together local restorative justice and indigenous justice-led organizations from all over Saskatchewan. It provided space for everyone to share and learn about best and promising practices in the field.

The community panel discussion was moderated by Heather Peters from the Mennonite Central Committee of Saskatchewan. Joining in the panel were Bev Poitras, the Justice Director from the Five Hills Qu'appelle Tribal Council; Brittany Deschambeault, a justice worker from the Saskatoon Tribal Council; Kayleigh Lafontaine, the Executive Director of the Elizabeth Fry Society of Saskatchewan; Shawn Fraser, the CEO of the John Howard Society of Saskatchewan and, Robert McGavin, the Executive Director from the Restorative Circles Initiative in Saskatoon. The community discussion included acknowledging the harms done in the past and present, and explored ways to decolonize our communities. Dr. Shannon Dea, the Dean, Faculty of Arts, University of Regina offered closing remarks. She thanked the organizing committee, funders, volunteer moderators and student volunteers for their sincere support. The conference ended the way it began, with Elder Frank Badger and his closing prayer.



Closing Ceremony

The 1st Decolonization and Justice conference was organized and run by a small group of passionate, dedicated and thoughtful students and staff volunteers. The conference created many positive ripple effects nationally and internationally. An upcoming book project on Decolonization and Justice, and the proposed Research Centre on Justice and Decolonization (RCJD) are some of the local examples in this regard. Three major highlights of the conference include: 1) the conference provided a platform for community members, academics, and justice stakeholders to interact with and learn from each other; 2) this conference introduced both undergraduate and graduate students to several issues, including the concept of decolonization, indigenous justice, and restorative justice; and finally 3) the 2021 conference will set the stage for future collaboration between the University of Regina, justice agencies and community-based organizations. This is particularly important to the University of Regina, where we believe that "our strength lies in our relationships and our interconnectedness, and that together we are stronger: peyak aski kikawinaw".

Decolonizing Transitional Justice Framework for the Rohingya Crisis

Towkir Hossain

Abstract

In August 2017, over seven million Rohingya people fled to Bangladesh to escape sectarian violence and persecution regarded by many as a 'textbook example of ethnic cleansing' in their homeland conducted by the Myanmar military junta. Influx of Rohingya refugees was previously observed in 1978, 1991-92 and 2012 under successive military regimes of Myanmar, once ruled by the British (1824-1948). To redress the systematic and gross violations of human rights of the Rohingya people, a transitional approach towards justice has been widely discussed and documented within a neo-liberal framework. However, such paradigmatic frameworks have been questioned for their inefficacy due to their depoliticized nature in dealing with such post-colonial country conflicts and their limited mandate in considering structural violence, promoting relational transformation and recognizing implicit colonial legacies impacting the governing structure of the present Myanmar. There has neither been any significant work on addressing these issues nor on devising a decolonized transitional justice framework which can be readily applicable to the Rohingya crisis. In an attempt to resolve this gap, this article employs a qualitative cross-sectional data analysis, document analysis and content/thematic analysis by reflecting on the existing literature (Journal papers, expert articles/interviews, books and official documents). This article argues that we need to adopt an interdisciplinary and self-reflexive transitional justice framework for the Rohingya people which incorporates the ongoing deep structural and socio-economic inequalities present in colonial-style governance complex in Myanmar, take account the colonial legacy and its explicit and implicit interventions in its power relations and emphasize relational transformation-based justice by expanding its mandate. I conclude that to attain a more meaningful and sustainable justice for the stateless Rohingyas, it is necessary to decolonize the depoliticized themes in the current transitional justice framework thereby making it more relevant to the future post-colonial conflict scenarios.

Keywords: Myanmar, colonial legacy, Rohingya, transitional justice, decolonization, depoliticization, post-colonial conflict.

Introduction

The deadly sectarian violence and persecution against the Rohingya population in Rakhine state by the Myanmar government started on 25 August 2017, following an insurgency attack on 20 police posts by a militant group named Arakan Rohingya Salvation Army (ARSA) in the bordering range of the country.[1] The event caused over 742,000 Rohingya refugees to flee into Bangladesh; combining previous refugee numbers from the influx of 1978, 1991-92 and 2012, the total number is around 1.2 million, creating one of the largest refugee crises in the world and the largest refugee settlement in Cox's Bazar.[2] Aside from the massive humanitarian challenges that the Rohingya refugee crisis has unfolded, there is an urgent call to provide humanitarian assistance, ensuring safety and freedom and access to justice to this miserable minority group. While in the present international political context, international court has been regarded as one of the viable justice mechanisms;[3] scholars have also debated for years on developing viable, effective and operational transitional justice mechanisms that could ensure accountability, serve justice and achieve reconciliation in post-conflict Myanmar (Higgins, 2018). Traditionally transitional justice is widely used and discussed as a tool to redress the large-scale persecution and systematic abuse of particular communities who have experienced mass atrocities (ICTJ, 2021). What traditional transitional justice framework misses is that its narrow focus on institutional reforms and rule-of-law arrangements might not work effectively in post-colonial societies like Myanmar and Nigeria whose experiences, socio-political conditions and colonial legacies are unique (Yusuf, 2018). Furthermore, its 'colonized' and 'depoliticized' neo-liberal universalist assumptions tend to eliminate any alternative justice instruments which could work in complementarily with traditional transitional justice tools (Vieille, 2012). While there has been a lot of discussion on decolonizing transitional justice theory, unfortunately there has not been any notable work on developing a decolonizing transitional justice-based framework for the Rohingya crisis. In this paper, I attempt to resolve this gap by posing a central question- *How can we apply a decolonizing[4] transitional justice framework for the Rohingya Crisis?* To achieve this goal, firstly I analyze the colonial and

[1] AFP. (2017, August 25). Dozens killed in fighting between Myanmar army and Rohingya militants. *The Guardian*. https://www.theguardian.com/world/2017/aug/25/rohingya-militants-blamed-as-attack-on-myanmar-border-kills-12

[2] ACTION AGAINST HUNGER. (2021, August 26). *Rohingya Crisis: Challenges in Cox's Bazar Continue | Action Against Hunger*. Actionagainsthunger.Org. https://www.actionagainsthunger.org/story/rohingya-crisis-challenges-coxs-bazar-continue

[3] Bhuiyan, H. K. (2021, August 25). Rohingya exodus: Bangladesh continues to suffer with no end to crisis in sight | Dhaka Tribune. *Dhaka Tribune*. https://www.dhakatribune.com/bangladesh/rohingya-crisis/2021/08/25/rohingya-exodus-bangladesh-continues-to-suffer-with-no-end-to-crisis-in-sight

[4] 'Decolonizing'- the term denotes an ongoing process of decolonization of the current colonized structure, instead of 'decolonized' which denotes a process is completed in its purpose which is not, in the case of the Rohingya crisis.

structural causes of the Rohingya conflict in relation to Myanmar's political-business nexus. Secondly, we problematize the widely discussed transitional justice mechanism adopted for the Rohingya issue and examine its unaddressed critical themes. Finally, we extend our mandate of the transitional justice framework by incorporating six decolonizing themes with an aim to attain meaningful and sustainable justice for the Rohingya people. In conclusion, we summarize our discussion and address necessary recommendations.

Literature review

Scholars have debated over different conceptions and meanings of justice for centuries. One group argues revenge-based retributive justice should constitute the primary locus of the sacred forms of justice. Second group argues justice remains nonetheless a human construct- a dictum that has influenced social contract theorists like Rousseau (1762), Locke (1689) as well as distributive theorists like John Rawls (1971), Amartya Sen (2009). However, all of these different streams merged in transitional justice theory which focuses on using systematic justice to reconfigure the capitals (human and material) of societies undergone through mass atrocities. In addition, transitional justice should always be restorative in nature as the former aims to (re)institute the rule of law in a democratic context and the latter focuses on ensuring accountability to sustain the good governance structure (Stauffer, 2014).

Within this framework, Higgins (2018) discussed the possible options available for addressing the systematic violence and persecution of the Rohingya people. Firstly, the NLD-led Myanmar government can establish Truth and Reconciliation Commission, exile or lustrate the perpetrators, initiate domestic prosecution and/or situate hybrid tribunal. Secondly, the international community can employ the International Criminal Court, United Nations General Assembly-led prosecution tribunal and unilateral prosecution option in Third-Party State through Universal Jurisdiction. Finally, intervention of neighboring states like Bangladesh into Myanmar can be another getaway. However, it is the Third-Party State led unilateral prosecution option that is more viable than the other ones at the present political context (Higgins, 2018).

In the context of Myanmar's democratic transition, Shatti Haque (2017) argued a viable transitional justice framework should incorporate an effective truth commission and inclusive "fair and efficient" institutional reforms respecting the rule of law. However, this approach would only help easing the transition process for the Rohingya people's citizenship status and an overall democratic transition might not be necessary for achieving this; rather solid political will of the government would be a mandatory requirement (Hoque, 2017).

Mainstream literature on the Rohingya crisis tends to overlook the ongoing deep existential problems which induces several misconceptions regarding the crisis. Firstly, the crisis

is neither new nor recent; it has its roots from the British colonial era. Secondly, the problem is not about any single group's oppression but of many groups, many parties and their pervasive deep existential fear against each other. Thirdly, the conflict is not about citizenship rights but about equal rights and participation in the state-governance of Myanmar (Ware & Laoutides, 2019).

Conflicts of Myanmar like post-colonial countries emerge with uniquely different dispositions that challenge and demand traditional transitional justice mechanisms to push their limits. Such conflicts are characterized by subterranean structural economic inequalities, authoritarian political systems, identity politics and weak institutions. In order to deal with the full range of violations and to address the primary causes of structural conflicts and physical, cultural and psychological damage, we need to expand the mandate of transitional justice or otherwise limit its goal (Chelin & Merwe, 2018). In this aspect, there has been a growing need of making transitional justice discourse an interdisciplinary 'field' specially to deal effectively in cases where mere legal frameworks prove inept. By making it interdisciplinary, we decolonize this field from the law's hold and colonize with political science (Bell, 2008).

Drawing on Thomson and Nagys' work, Vieille (2012) extrapolates the colonizing, ethical and strategic challenges that the field of transitional justice pose on other transitional societies. Scholars of transitional justice base themselves on neo-liberal ontology and primarily adhere to a western intellectual enlightenment tradition which promotes structure-oriented solutions based on homogenous and universalist rule-of-law idea to any problem, thereby eliminating any alternative prescriptions. This "one-size-fits-for-all" toolkit of transitional justice often lacks the required historical, social and personal connection to the people of transitional societies thereby failing to meet their local needs and aspirations (Vieille, 2012).

Based on this dialectic between universalist and ethnocentric approaches to the law, Gisel (2020) included ethnocentric assumptions into a balanced transitional justice framework for post-conflict Myanmar. Evaluating Rwanda's local-community based Gacaca courts, he argued post-conflict rule-of-law judiciary should integrate ethnocentric norms of the Myanmar focusing on the unique postcolonial conditions of the country and this process should be built on cultural relativist assumptions of the rule-of-law contrary to the universalist homogenous western idea of rule-of-law (Gisel, 2020).

Furthermore, transitional justice faced critical dilemmas in its application in Nigeria despite her democratic transition opportunity in 1999. Yusuf (2018) contends these dilemmas arise because the mainstream depoliticized discourse of transitional justice does not take account of the complex colonial governance structure of the post-colonial countries which is imbued with structural violence and colonial injustice. Countervailing these dilemmas would

require critical understanding of the colonial legacies continued in the post-colonial societies like Nigeria and Myanmar (Yusuf, 2018).

Methodology

This study uses qualitative research and data collection methods for analytical purposes. The author primarily relies on secondary sources of data such as both online/print formatted academic journal articles, books, news reports, expert opinion, columns, interviews, government official documents and archives of non-governmental organizations. The collected data have been cross-checked cautiously to ensure their accuracy and reliability. The author compared and contrasted the existing transitional justice frameworks and their shortcomings using cross-sectional data analysis, document analysis and content/thematic analysis.

Discussion

The Rohingya Refugee Crisis

The term "Rohingya" is commonly used to describe a particular ethnic, linguistic and religious group of Myanmar whom the government officially disowns and derecognizes as their one. The Rohingya people who primarily lived in the northern Rakhine state of Myanmar, were one of the many ethnic minorities from the country living for centuries. As the government does not officially recognize their citizenship status, the Rohingya people are currently "stateless" having no home or country.

The recent most and biggest exodus of the Rohingya started on August 25, 2017 when Myanmar military supported by the local Buddhist mob and assailants from other majority groups launched a genocidal crackdown and mass atrocities against the minority which forced hundreds of thousands of them to flee in Bangladesh. Along with previous Rohingya refugees from erratic exoduses from 1962, Bangladesh is currently hosting over 1.2 million Rohingya refugees, creating the largest refugee settlement of the world in Cox's Bazar.[5]

The Rohingya population are now facing a grave concern of their fate as their citizenship status having been disregarded by their origin country and also the growing unwillingness of Bangladesh to host them with its own resources.[6] The only plausible political solution could be a repatriation of the refugees to Myanmar after ensuring conducive conditions there which is

[5] ACTION AGAINST HUNGER. (2021, August 26). *Rohingya Crisis: Challenges in Cox's Bazar Continue.*
[6] UNB. (2019, July 31). Hosting 1.1m Rohingyas a big burden. *The Daily Star*.

even at impasse because of the complex political dynamics of Myanmar and related UNSC veto politics (Bhuiyan, 2021).

Colonial Roots

Present denationalization of the Rohingya minority and frequent persecution against them have deep colonial genealogy. Britain had fought Myanmar in three distinctive wars (1824-26, 1852, 1885) and took control finally in 1885 which lasted until 1948. In this short period, the British colonial control over the Myanmar territory left significant markings which ossified the current Rohingya crisis.

a. The sole purpose of the British in the Burman region was security and profit. They had no interest in nation-building of the country. Their administration policy resembled their Indian pattern of control- that is "divide and rule". They mapped the country in a way that encouraged different ethnic groups to live separately (between the hill and valley), thus a persistent division among the ethnic groups always remained and left unassimilated (Alam, 2019).

b. The British government encouraged the then Bengal inhabitants to join as farm laborers over the fertile valleys of the Arakan region. But the government policy was very uncertain about the official status of these new laborers (In British census, it was recorded as these Muslims belonged to the Indian race or assimilated into the Burmese race) (Keck, 2016).

c. Different treatments towards different minorities led to severe distrust among the Buddhist native inhabitants and the newly immigrated Rohingya people. However, the colonial rulers did not consider the threat caused by the latter's Muslim identity which perceived by the native Burmese people. Growing economic solvency of Rohingya under India dominated trade region, broken relationships between different social units and the group's stance with allies in 1943- all of these factors seeded a fearful antipathy among Buddhist Burmans against Rohingya people who were presumed to be anti-Burma and anti-Buddhism (Alam, 2019).

Structural Violence

As the Burma became independent in 1948, the crisis gradually gained its visibility. Previously, the Rohingya people enjoyed limited privileges under British rule as they could educate themselves and work in trade-dominated regions. Now their new Myanmar state-government enacted a unification of Burma hereby governing all the ethnic communities under one umbrella. This change was utterly opposite of the British policy of governing and separating ethnic communities in their individual realms. Besides this, post-colonial Myanmar's three different political regimes devised policies and directed action in making Rohingya more vulnerable and eventually 'stateless'.

a. The Burma Union (1948-1962): U Nu government in this period adopted the Citizenship Act of 1948 stating eight official indigenous races of Myanmar could be nominated for citizenship which did not include the Rohingya community. However, a clause was given with the condition that if their previous two generations of family lived in Myanmar, they could apply for citizenship. Previously, the 1947 Constitution recognized Rohingya as Myanmar citizens. Now this new act under the U Nu government indirectly declares Rohingya as an "indigenous race" (Alam, 2019).

b. The Socialist Republic (1962-1988): General Ne Win in his authoritative military-ruling administrative period brought major changes in the governance-structure to seclude Rohingya people from being effective citizens. Firstly, the administration provided an official list of 135 ethnic races which did not include Rohingya's name contrary to the previous list of U Nu government which included 144 names of ethnic groups. This discriminatory selective listing closed the Rohingya's only option of being recognized. Secondly, this administration made it extremely difficult for the Rohingyas to join any civil services. The previous Rohingya civil servants struggled to keep their job in their offices. Thirdly, the Emergency Immigration Act of 1974 ordered Myanmar citizens to carry their National Registration Certificates (NRC) whereas the Rohingya people were only allowed to carry Foreign Registration Cards (Alam, 2019).

c. The Union of Myanmar (1988-2010): The State Law and Order Restoration Council (SLORC) occupied power in 1988 with a strong mandate of protecting national solidarity and the integrity of the union. In this period, frequent military action against Rohingya became an official routine-work which resulted in fleeing of 300,000 Rohingya refugees into Bangladesh in 1991-92. The government's major concern was the increasing population of Rohingya in Rakhine which might outnumber the local Buddhist population and an increasing activity of the Rohingya guerillas. Secondly, introduction of the "Temporary Registration Cards" without any birthplace identification, "Two-Child Policy" in the Rakhine state and the state-orchestrated violence of the 2000s made the Rohingya's situation even worse. Thirdly, new constitution for ethnic group identification left place for Rohingya extremely unclear and vague; satisfying the condition for Myanmar citizenship for them became an "impossibility" (Alam, 2019).

It is no surprise when U Thein Sein government adopted four "Race and Religion Protection Laws" which made inter-faith marriage restricted, population control law even stricter and conversion of one's religion more centralized, it indirectly resembled the discriminatory policies taken against the Rohingyas for about 62 years of past governments in Myanmar (Rahman, 2015). Structural violence against minority groups has become an ingrained routine-work of the Myanmar political structure that legitimized segregation, sporadic killings and extermination of the Rohingya people (Green et al., 2015).

Government-Business Nexus

The present government-business nexus of Myanmar also has its roots in the colonial period. Britain primarily took Myanmar as a market and trade-route besides India but did not concentrate on increasing its self-sufficiency in local business. The feeble social integrity of the independent Myanmar as well as its weak infrastructure, corrupted institutions and poor technical capacity turned the country's economy into crony capitalism. The present government now heavily relies on external assistance for economic development. Consequently, the country's weak financial bodies and lobbies rely on government projects for their survival. These dependent dynamics promulgated into a clientelist network between the weak government and the weak business sector living on informal bodies of the multiple patron-client relations and excessive nepotism (Hlaing, 2002).

The clientelist network of government-business lends its legitimacy from the country's social capital- Buddhist nationalism. Each political regime invested large amounts in Buddhist religious ceremonies, parades, pagoda renovation and public festivals. It is a one way of saying that Myanmar's politico-business relations cannot sustain without a significant sense of legitimacy from the Buddhist majority (Hlaing, 2002). And the Buddhist nationalism defined political-business relations in such intricate and interdependent manner, that the seclusion and discrimination has become systematic in social, political and economic structure (Singh, 2021).

Dilemmas in Transitional Justice Frameworks

According to the International Center for Transitional Justice (ICTJ), transitional justice refers to the multiple mechanisms that emerging countries from periodic gross violence, conflict and repression take to address the systematic or large-scale human rights violations done to them (Int'l Center for Transitional Justice, 2009a). The main purpose of this legal opportunity is to recognize the wounded dignity of the victims, redress the violence and ferocity to them with acknowledgement and prevent any of such future conflict-occurrence. The United Nations denotes transitional justice as a full set of processes and mechanisms to redress the past-violence of a conflict-worn society which would be a crucial step to establish rule of law by ensuring accountability, serving justice and achieving reconciliation (United Nations, 2010). Traditionally transitional justice frameworks include a process of establishing criminal prosecution as well as truth commissions and introducing institutional reforms as well as reparation programs (Int'l Center for Transitional Justice, 2009b). Similar modes of transitional justice have been widely discussed for the Rohingya crisis. However, a critical understanding of this approach is needed for appreciating its genuine feasibility in resolving the justice problem in the Myanmar situation.

Truth and Reconciliation Commission: Transitional countries often establish truth and reconciliation commissions to deeply investigate the root causes of the crisis and recommend as per policies through non-judicial or quasi-judicial bodies. These commissions conduct their investigation in a non-bias format comprising jurists and experts from national and international arena. One of the obvious recommendations for achieving transitional justice for the Rohingya Crisis has been establishing a truth and reconciliation commission to redress the violation (Higgins, 2018).

Though it is potentially politically feasible, there are major instances of establishing TRC in the Myanmar context suggesting a liberal truth commission might not function well as expected there. For example, the 2012 Rakhine Inquiry Commission acted similarly like a working truth commission but failed miserably for its politicized nature and ruling-confirmation bias. The final report was heavily criticized for its not including any Rohingya representative and its persistent mentioning of Rohingya people as 'Bengali' Muslims. The commission included a report confirming the government's political rationale towards Rohingya- that the 'Rohingya' term is novel and the minority is primarily a Muslim community.[7] Even the UN General Secretary Kofi Annan-led Advisory Commission on Rakhine State was 'forced' to not include 'Rohingya' in its final report which concluded an investigative linkage between citizenship and minority would be a necessary step but did not recommend any citizenship rights for the Rohingya community (Hoque, 2017).

Institutional Reform: Institutional reform is an integral part of a comprehensive transitional justice mechanism as it seeks to reform the institutional procedures and endorse accountability within a domestic legal framework (Fernando, 2014). In the case of the Rohingya Crisis, it has been suggested a holistic approach towards institutional reform is needed to ensure protection of the Rohingya people. This approach includes transforming public institution into "fair and efficient institutions" and fostering a "rule of law" culture thereby reducing systematic violence and discrimination (Hoque, 2017).

While institutional reformation would be an essential step towards resolving the conflict in domestic Myanmar, it has been unaddressed on how this reform could be achieved given the highly authoritative political structure of the country. Would it be done with the help of international institutional intervention? Or should we trust the ongoing military change or any attempts of the country's democratic transition likewise of 2018? Achieving a certain level of rule of law and accountability in the domestic institutions to posit fruitful changes is more of a

[7] Republic of the Union of Myanmar (2013). Final Report of Inquiry Commission on Sectarian Violence in Rakhine State (2013). Retrieved from: http://www.burmalibrary.org/docs15/Rakhine_Commission_Report-enred.pdf

matter of 'will to change' than of suggesting a short-hand 'prescription'. Attaining rule of law also involves multiple actors and processes of reformation which certainly would not be possible without considerable structural changes in the military dominion of the country keeping in mind the complex relationship that exists between security sector and transitional justice process. (Mihr & Sriram, 2015).

Structural Transformation: Transitional justice opportunity for the Rohingya Crisis mostly focuses on structural changes and reforms to redress the human-rights violations through accountability, justice and reconciliation. However, this neo-liberal teleology tends to overlook the deep structural violence that the Rohingya community has been facing since independence. For example, when the President Thein Sein's civilian government was elected in 2010, ICTJ positively appreciated the administration's civil-oriented reformist policies such as loosening restrictions over media, releasing political prisoners and initiating a comprehensive peace-process with all ethnic armed forces. Even so, these reformist policies soon proved unsuccessful as the governments of both Thein Sein and Aung San Suu Kyi refused to acknowledge the abusive past of the country. Without acknowledging the long tradition of structural violence and abuse of the Rohingya community, a durable transformation is unlikely to occur (ICTJ, 2021).

Relating to the needed structural transformation, a *relational transformation* is also required to effectively transform the deeply divided societies of Myanmar which the traditional transitional justice frameworks leave unchecked. As discussed before, Myanmar's different ethnic groups had stayed secluded from each other from the colonial period (Alam, 2019). Thus, any structural transformation would not sustain if the framework fails to address the deep antipathy and hatred that exist among the social constituents, especially the Buddhist antipathy towards the Rohingya people which has violently evolved for 80 years.

Gendered Transition: Transitional justice incorporates mechanisms to address the human-rights violations and persecution against the vulnerable groups such as women, girls and children (UN Women, 2018). Every influx of the Rohingya refugees produces gross amount of sexual assault, rape/gang-rape and murder of the Rohingya women, girl and children. Thus, most of the crisis response plan tend to center on the rehabilitation and resettlement of the gendered groups identified as 'vulnerable', 'marginalized' and 'victims of sexual assault' (R. Nagy, 2008).

Victimized portrayal of women in transitional justice frameworks creates a gendered transition where women are potentially excluded from national justice agenda. This gendered transition makes women's contributing role in justice process unutilized, their voices of sufferings unheard and overall, their autonomous agency unrecognized. In this context, critical feminist approach discourse denounces transitional justice frameworks for their patriarchal

nature and its influence in neo-liberal governance structure that it prescribes (Buckley-Zistel & Zolkos, 2012).

Colonized Justice: Transitional justice is rooted in a universalist assumption of the rule-of-law, a child of western legal tradition which implies rule of law applies to everyone equally. This homogenizing approach risks doing a blind promotion of the rule-of-law in post-colonial countries where European institution-based justice might not suit effectively (Vieille, 2012). Myanmar's rule-of-law cognition may not resemble to that of British or American rule-of-law cognition. Similarly, westernized institutional reform might deteriorate quickly if it fails to match the local context and their particular needs and goals. The key-challenge of this transitional justice project has always been this unsettled tension between international norms and local context (R. Nagy, 2008). Even this project can be a medium of biased justice in neo-colonizing forms that might unconsciously eradicate or marginalize local, non-state, customary judiciary approaches which could prove more operative for securing justice for the Rohingya people (Vieille, 2012).

Nigerian post-colonial experience of transitional justice has great resemblance to the ongoing Myanmar crisis. Colonial legacy and authoritarian military rule held captive both of their population to their rulers. Even after the independence, Nigerian colonial-style governance complex acquired from the colonial period imbued with structural violence and injustice limited the scope and fruitfulness of transitional justice. Colonial legacy resisted any attempts of structural change to redress the systematic abuse and promote institutional reforms (Yusuf, 2018). We have seen similar developments in Myanmar where non-acknowledgement of past abuse is profound; and the colonial scars of physical, social and psychological impact are still present (ICTJ, 2021). Therefore, without acknowledging the colonial legacy of the Rohingya crisis as well as the potential colonial tendency of mainstream transitional justice frameworks, the desired justice would continue to be colonized and imprisoned.

Decolonizing the Mandate of Transitional Justice

Transitional justice has evolved as a neo-liberal paradigm to redress systematic abuse by holding criminals accountable and reforming institutions. This circumscribed view is incapable in dealing with the complex problems that emerge in post-colonial country conflicts like Myanmar, Nigeria or African societies. Thus, we need to expand our mandate of transitional justice to deal with the full-scope of violence that occurs in these societies as well as to repair the physical, social and psychological damage that the victims carry for decades (Chelin & Merwe, 2018). Similarly, for a full range of exploration of the Rohingya crisis, we would require an expanded mandate of transitional justice framework in decolonizing themes.

In this study, decolonizing themes include a. institutional and societal emancipation from the implicit and explicit colonial interventions in the present Myanmar governance structure, b. decolonizing the depoliticized themes in the mainstream neo-liberal paradigmatic transitional justice frameworks. It is important to note here, our decolonizing mandate does not necessarily divert its attention from the goals of transitional justice rather expand it in the forms of reconciliation of the separating ethnic groups, promoting culture of respect, ensuring gender equity and preventing future occurrence of such conflict (Chelin & Merwe, 2018).

'Human'-based Rights approach: When transitional justice considers protecting human rights as its focus, it moves beyond a legal scheme to a more development axis which nevertheless broadens its scope (McEvoy, 2007). However, we need to be very careful in advancing with human-rights agenda as Nepal's Maoist insurgency case shows that when human-rights becomes an elite discourse of civil societies and human rights agencies, the development often backfires as it ends up in a status-quo sustaining tool of elite-civil societies which eventually marginalized the indigenous, lower castes and women (Robins, 2012).

In the Rohingya crisis case, the human rights-based approach to complement the justice framework should shift its focus from the *'rights'* to *'human'*. It suggests the human rights approach should take an inclusive character where local needs, understanding and potential of the Rohingya people are realized. Our human rights should not build around the scheme of only protecting the rights of the Rohingya, rather our efforts should be directed towards protecting the Rohingya people for the sake of humanity.

Agency of Women: Neoliberal paradigm of transitional justice tends to portray women as passive victims of sexual assault which limits their role as autonomous agents. There is a growing need to introduce gendered agency instead of gendered transition in the peace-building and justice mechanisms. For instance, in Bosnian post-conflict period, women peace activists contributed an active role in peace-building and peace-making procedures. Their voices were not merely a passive one, rather they acted as active transformative agents who stepped out from traditional 'women-as-victim' notion (Björkdahl & Selimovic, 2015).

Thinking of Rohingya women in spatial and temporal forms, they might act as transformative agents in transitional procedures of the country. This would contribute to the transformation of the long-practiced gendered transition as well as the patriarchal hierarchies of the domestic structure. An expanded framework might include empowering women to have their own voices, help them realizing their unique experiences of the crisis and having their active role in justice-seeking and peace-building procedure. This gender transformative approach would also need to take a historical understanding of the gendered power relations and norms that have existed in Myanmar since colonial era (Chelin & Merwe, 2018).

Acknowledging the Past: Post-colonial transitional justice experiences of Nigeria aptly illustrates that the problems continuously persist if no acknowledgment of the colonial past with injustice/structural violence is made (Yusuf, 2018). In order to deal with the unacknowledged past, we need to extend the time-frame of transitional justice to incorporate the understanding of historical roots of a crisis and engage with necessary interventions to redress the intergenerational abusive colonial legacies (Chelin & Merwe, 2018).

We have discussed the British unscrupulous dividing policies that contributed to the escalation of the present Rohingya crisis. Civilian and military governments of Myanmar have frequently urged people to forget the abusive past and move forward to a national reconciliation.[8] Such rhetoric till now failed to produce any positive outcome. Instead, we need to acknowledge the scarring colonial past that shaped the present Rohingya's 'statelessness' and the legacies of physical, socio-cultural and psychological damage of the Rohingya community. Any decolonizing framework would be incomplete without having a special mandate regarding the colonial past of Rohingya crisis.

Relational Transformation: The deep antipathy that exists among Buddhist nationals against the Rohingya community is historically staged during British colonial rule. The dividing policies of different ethnic communities successfully mongered an existential crisis among Buddhists which made Rohingya people as 'other', 'unwanted' and 'threatening' (Druce, 2020). Any depoliticized transitional justice framework without recognizing this social-existential crisis is bound to fail as Buddhist community is a strong stakeholder in Myanmar's government-business power relations (Asia Report N°290, 2017; Hlaing, 2002).

Extended mandate of transitional justice should include mechanisms to improve the hostile relations among Buddhists and Rohingya people. This mechanism's political dimension includes the political constituencies' active role in facilitating peace-process among different ethnic communities and social dimension includes the improvement of the relational character among different ethnic groups (Buddhists, Rohingya, Shaan etc.). Critical focus on the latter might help eradicating any biased/misconception/partial negative images of the Rohingya community and foster their acceptance in post-colonial Myanmar.

Transformative Power Relations: Instead of concerning itself only with the structural reforms (TRC, institutional reforms), transitional justice should also concern simultaneously with the unequal power relations that exist in present governance structure in Myanmar (Chelin & Merwe, 2018). This includes discrimination of Rohingya people in all sectors of social, economic and political life as well as the colonial legacies of exploitation that has become a

[8] Aung San Suu Kyi urged her elected NLD members to forget the abusive past and move towards national reconciliation. Mann, Z. (2015, December 7). Forgive Those Who Wronged Us, Suu Kyi Tells NLD. *The Irrawaddy*. https://www.irrawaddy.com/election/news/forgive-those-who-wronged-us-suu-kyi-tells-nld

habitual tendency towards this minority group. Without sufficient focus on it, effective structural transformation would not be possible.

The Canadian Truth and Reconciliation Commission on Indian Residential School case faced similar roadblocks due to a conservative political environment. Indigenous healing and reconciliation failed to observe considerable success as structural transformation did not incorporate remedying the legacy of colonial violence as a priority (R. L. Nagy, 2013). Thus, to gain long-term success in TRC and institutional reforms set in Myanmar, the foremost goal should not be stressing on establishing another TRC; rather we first take account implicit/explicit colonial legacies and exploitative power relations that exist in governance structure and attempt to transform it.

Meaningful and Sustainable Justice: Transitional justice in post-conflict Myanmar should not provide any preemptive solution of justice to the crisis. Rather, justice should be meaningful and sustainable to the local community as well as ethnic groups. This would require a definitive shift from advocating universalist to ethnocentric assumption of rule-of-law. A cultural relativist understanding of justice would provide much sustenance than any universalist homogenizing prescription (Gisel, 2020). Integrating ethnocentric norms into rule-of-law judiciary would provide local meaning and acceptance of transitional justice.

Post-conflict Rwandan pursuit of justice through Gacaca Courts could be a useful example for Myanmar's post-conflict transitional justice framework. Rwandan Gacaca Courts, while different from the traditional notion of *sustainable rule-of-law*, it provided the people with a local sense of justice. These courts acted as a complementary to the national courts and international tribunal. Similarly, post-conflict Myanmar combining grassroots, national and international courts/tribunals can advance its own meaning of justice, unique to its culture, respecting its ethnocentric norms which would prove more sustainable in the long term (Gisel, 2020).

Conclusions

Traditional transitional justice frameworks have shown serious difficulties in its application in Myanmar like post-colonial countries. Especially in the Rohingya crisis, without taking the colonial legacies, structural causes and government-business nexus of Myanmar into account, a full-understanding of the socio-political condition of the problem would remain unachieved. We have discussed the ineffectiveness of Truth and Reconciliation Commission and institutional reforms proposal as well as unaddressed critical themes such as structural transformation, gendered transition and colonial injustice within neo-liberal depoliticized pursuit of transitional justice framework in the Rohingya issue. Addressing these complications would require a decolonizing approach towards transitional justice. To do so, we have proposed to extend the

mandate of the transitional justice framework for the Rohingya crisis which would include critical decolonizing 'depoliticized' themes such as 'Human'-based rights approach, autonomous agency of women, acknowledgement of the past, relational transformation, transformative power relations and meaningful-sustainable forms of justice. It is important to note that decolonizing themes of this framework do not suggest any major contravening against mainstream transitional justice. While agreeing that TRC and other institutional reforms are important facilitatory steps towards achieving a meaningful justice, we suggest these critical themes might act as complementary means of transitional justice to make traditional mechanisms more effective and powerful in the local context. The proposed framework in this study would act as an opening gate towards more critical understanding of transitional justice regarding the Rohingya crisis and similar post-colonial conflict scenarios. However, successful realization of these decolonizing frameworks would require considerable political will and efforts from local, national and international political actors without which transformation of the Rohingya people's adverse fate would remain unlucky.

References

Alam, J. (2019). The Current Rohingya Crisis in Myanmar in Historical Perspective. *Journal of Muslim Minority Affairs*, *39*(1). https://doi.org/10.1080/13602004.2019.1575560

Asia Report N°290. (2017). *Buddhism and State Power in Myanmar | Crisis Group*. https://www.crisisgroup.org/asia/south-east-asia/myanmar/290-buddhism-and-state-power-myanmar

Bell, C. (2008). Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field." *International Journal of Transitional Justice*, *3*(1). https://doi.org/10.1093/ijtj/ijn044

Bhuiyan, H. K. (2021, August 25). Rohingya exodus: Bangladesh continues to suffer with no end to crisis in sight | Dhaka Tribune. *Dhaka Tribune*. https://www.dhakatribune.com/bangladesh/rohingya-crisis/2021/08/25/rohingya-exodus-bangladesh-continues-to-suffer-with-no-end-to-crisis-in-sight

Björkdahl, A., & Selimovic, J. M. (2015). Gendering agency in transitional justice. *Security Dialogue*, *46*(2). https://doi.org/10.1177/0967010614552547

Buckley-Zistel, S., & Zolkos, M. (2012). Introduction: Gender in Transitional Justice. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2267777

Chelin, R., & Merwe, H. van der. (2018). Policy Brief: Transitional Justice and Colonialism. *CSVR-The Centre for the Study of Violence and Reconciliation.* https://www.csvr.org.za/pdf/Transitional%20Justice%20and%20Colonialism%20-%20Policy%20Brief.pdf

Druce, S. C. (2020). Myanmar's Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis. In *Managing Conflicts in a Globalizing ASEAN*. Springer Singapore. https://doi.org/10.1007/978-981-32-9570-4_2

Fernando, B. (2014). Institutional Reforms as an Integral Part of a Comprehensive Approach to Transitional Justice. *International Journal of Transitional Justice*, *8*(2). https://doi.org/10.1093/ijtj/iju010

Gisel, J. (2020). Lessons Learned: A Successful and Balanced Framework for Post-Conflict Transitional Justice in Myanmar. *University of Dayton Law Review*, *46*. https://heinonline.org/HOL/Page?handle=hein.journals/udlr46&id=317&div=&collection=

Green, P., MacManus, T., & de la Cour Venning, A. (2015). [ISCI Report] Countdown to Annihilation: Genocide in Myanmar. *International State Crime Initiative*.

Higgins, E. (2018). Transitional Justice for the Persecution of the Rohingya. *Fordham International Law Journal*, *42*, 101. https://ir.lawnet.fordham.edu/ilj/vol42/iss1/3/

Hlaing, K. Y. (2002). The politics of government-business relations in Myanmar. *Asian Journal of Political Science*, *10*(1). https://doi.org/10.1080/02185370208434203

Hoque, S. (2017). Myanmar's Democratic Transition: Opportunity for Transitional Justice to Address the Persecution of the Rohingya. *Emory International Law Review*, *32*. https://heinonline.org/HOL/Page?handle=hein.journals/emint32&id=572&div=&collection=

ICTJ. (2021). *Myanmar & Transitional Justice*. International Center for Transitional Justice. https://www.ictj.org/our-work/regions-and-countries/burmamyanmar

Int'l Center for Transitional Justice. (2009a). *What is Transitional Justice?* ICTJ. https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf

Int'l Center for Transitional Justice. (2009b). *What is Transitional Justice?* ICTJ. https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf

Keck, S. (2016). Reconstructing Trajectories of Islam in British Burma. In *Islam and the State in Myanmar*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199461202.003.0003

McEvoy, K. (2007). Beyond Legalism: Towards a Thicker Understanding of Transitional Justice. *Journal of Law and Society*, *34*(4). https://doi.org/10.1111/j.1467-6478.2007.00399.x

Mihr, A., & Sriram, C. L. (2015). [Background Paper] Rule of law, security and transitional justice in fragile and conflict-affected societies*. Commission on Global Security Justice & Governance.* www.globalsecurityjusticegovernance.orghttp://www.globalsecurityjusticegovernance.orghttps://twitter.com/BetterGlobalGovTel:+31

Nagy, R. (2008). Transitional Justice as Global Project: critical reflections. *Third World Quarterly*, *29*(2). https://doi.org/10.1080/01436590701806848

Nagy, R. L. (2013). The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission. *International Journal of Transitional Justice*, *7*(1). https://doi.org/10.1093/ijtj/ijs034

Rahman, S. (2015, September 14). *Burma: Four "Race and Religion Protection Laws" Adopted*. Library of Congress, Washington, D.C. 20540 USA. https://www.loc.gov/item/global-legal-monitor/2015-09-14/burma-four-race-and-religion-protection-laws-adopted/

Robins, S. (2012). TRANSITIONAL JUSTICE AS AN ELITE DISCOURSE. *Critical Asian Studies*, *44*(1). https://doi.org/10.1080/14672715.2012.644885

Singh, A. (2021). How Buddhist Nationalism Defines Myanmar's Politics. *The Yale Review of International Studies*.

UN Women. (2018). *Gender Brief on Rohingya Refugee Crisis Response in Bangladesh*. https://asiapacific.unwomen.org/en/digital-library/publications/2017/10/gender-brief-on-rohingya-refugee-crisis

United Nations. (2010). *United Nations Approach to Transitional Justice*.

Vieille, S. (2012). Transitional Justice: A Colonizing Field? *Amsterdam Law Forum*, *4*(3), 58–68. http://www.ictj.org/en/

Ware, A., & Laoutides, C. (2019). MYANMAR'S 'ROHINGYA' CONFLICT: MISCONCEPTIONS AND COMPLEXITY. *Asian Affairs*, *50*(1). https://doi.org/10.1080/03068374.2019.1567102

Yusuf, H. O. (2018). Colonialism and the Dilemmas of Transitional Justice in Nigeria. *International Journal of Transitional Justice*, *12*(2). https://doi.org/10.1093/ijtj/ijy006

Legacy of Bangladesh Police: A Colonial Phantom that was never Exorcised

Abdullah Al Zoyaber

Introduction

Modern policing in Bengal started with the British attempt of establishing a unified police force throughout the Indian colonies. After several experiments, The Indian Police Act of 1861 introduced an organized police force that was mostly unarmed and civilian in nature. Under the Act V of this legislation, the ostensible objective of this force was detection of crime, prevention of public disorder and protection of life and property of Indian people under British rule. However, as a regime founded through conquest, the colonial authority faced a significant amount of resistance and the police turned out to be a tool of political suppression in practice leaving a trail of torture, abuse, cruelty and agony in its wake. The monetary constraints of the colonial authority forced them to keep the number of sworn members at minimum and focus their policing activity in urban areas only. Such a tendency to minimize the cost of the judicial system led to the tendency of acquiring confessions by any means necessary. With tacit assent from the authority, torture in the guise of inquiry became a recurring phenomenon. The brutal ways adopted by the colonial police in the Bengal Presidency appears to be consistent and seemingly uninterrupted in the present day Bangladesh. This paper will illustrate the similarities among the activities and behavior of both Police with a discussion on various reformation attempts and the reason behind their failure.

Colonial Police in Bengal: An overview

Formation and Function

The British colonial authority advocated in favor of replacing the pre-existing Mughal structure of administration from the very beginning of their reign. The formation of police by the enactment of Indian Police Act of 1861 was a direct result of such an attempt (Pervin, 2016). The newly formed police was civilian, mostly unarmed and operated primarily at provincial level. Giuliani argued that the civilian nature of this force was particularly emphasized during its formation (GIULIANI, 2015). Though it can be argued that the British might not necessarily establish the force only to repress people, it is quite certain that the primary objective was securing and maintaining the colonial authority. As David Arnold noted, the bureaucracy of the British colonizers was strongly motivated by the philosophy that a colony earned by military

conquest should be maintained by civil administration (Arnold, 1986). Thus, the police was established as a low-cost substitute for direct military intervention that can perform within the existing administration while maintaining a benign civil appearance and disguising the foreign nature of the European rulers (Rao, 2001). Another important stakeholder for the formation of police was the rebellion of 1857, a large-scale rebellion of Indian personnel in the British military. According to Anandswarup Gupta, the rebellion forced the British to face some bitter truth- occupation and maintenance of the colony, functioning and cost effective administration, immediate suppression of opposition and realization of maximum revenue was impossible without a uniformed police force. (Gupta, 1979).

The district police was confined in the urban and suburban areas whereas the rural population was maintained through a body of local governing elites known as "Panchayet" (GIULIANI, 2015). The colonial authority formalized this arrangement later in Madras and Bombay Presidency. However, the high ranking officials of the Bengal Presidency tried to exert some control over the rural 'Panchayet" through layers of supervision while somewhat maintaining the idea of village autonomy (CHANDAVARKAR, 2007). It is important to note that the rebellion of 1857 was first ignited in this territory and such measure was probably taken due to the political unrest and volatile nature of the region.

The police performed in a way that Deana Heath termed as "Clientist System". She explained that the police members belonging to the lower class of hierarchy were extremely ill-paid and ill-educated. However, they performed most of the field work, handled public communication and worked as a convenient bridge between the people and the colonial authority. These subordinate members of the police came from the local population and used to possess strong cultural ties within the society. Such integration made it impossible to turn them into mindless colonial agents with devotion to authority's agenda (Heath, 2012). They were, as Aijaz Ahmed described, an intermediate and auxiliary class of colonial employees with their own political and social interests (Gould, 2011), (Heath, 2012).

Objectives

The Colonial Police in India was officially sworn to protect the lives and property of the civilian under British rule. As Peter Robb noted, they did little in terms of investigation or crime prevention. The actual objective was to illustrate the dominance of the state and protect its interest. Most police were deployed for the collection of revenue and to maintain a strong presence of the state by neutralizing any political upheaval. Thus the police became-

> "A largely symbolic representation of power and order, playing its part alongside other such instruments rather than being a force for the detection and reduction of crime." (Robb, 2017, p.129)

This representation of police was particularly true for the Bengal province. By the beginning of the twentieth century, the police in Bengal almost exclusively focused on the political crimes committed by the local elites (GIULIANI, 2015). This was the period marked by political insurrections, revolutionary movements and economic campaigns like "Swadeshi" (A call for putting an end to purchase of any European product). The objective of prevention of crime and protection of people turned out to be a minor concern and the police became an apparatus of torture and abuse to coerce compliant behavior among the citizens.

Colonial Police and Torture:

Before delving into the history of torture and police brutality, it is important to discuss the circumstances that led to such practice. Though most of the data available on colonial administration focus on the ICS (Indian Civil Service) officers, they constituted only five percent of the British Raj bureaucracy. An ICS officer was required to be on inspection or tour for a minimum of 210 days. Even with such tight-schedule, it became increasingly difficult for the high ranking officers to visit a village even once a year as each district usually covered an area of 4,000 square miles (Heath, 2012). According to David Potter, the frequency of such inspection of a village was usually once every five years (Potter, 1996). Another challenge arose from the vast linguistic diversity of India. Frequent transfer of the ICS officials resulted in little to no understanding of local people, their culture or grievances by the high ranking officers. Such constraints forced the officers to depend on their subordinates to perform everyday duties. Though the British produced and enforced the legislation, it was the Indian employees who made the ruling possible (Gupta, 1979). As an underfunded organization supervised by officers with little knowledge of the area under their jurisdiction, the colonial police developed a habit of acquiring confessions as an easy method for judicial proceedings. Regardless of the nature of the crime, torture became the primary tool for this purpose. The excessive use of force by the low-ranking native members of the police opened up another opportunity for them- bribery and extortion by threat of violence. As it will be discussed in the later part of this article, this is the phantom that became impossible to exorcise despite several attempts and still haunt the modern day police of Bangladesh.

The Indian Police Commission Report of 1902 noted that the native police carryout their duties through a regular use of violence to elicit confessions from the accused. A commission established in order to investigate allegations of torture by the police in 1854 declared that

> "The police establishment has become the bane and pest of society, the terror of the community, and the origin of half the misery and discontent that exist among the subjects of Government. Corruption and bribery reign paramount throughout the whole establishment; violence, torture, and cruelty are their chief instruments for detecting

> crime, implicating innocence, or extorting money. Robberies are daily and nightly committed, and not unfrequently with their connivance; certain suspicious characters are taken up and conveyed to some secluded spot far out of reach of witnesses; every species of cruelty is exercised upon them; if guilty, the crime is invariably confessed, and stolen property discovered; but a tempting bribe soon release[s] them from custody" (Heath, 2012, p. 3-4) (Commissioners for the Investigation of Alleged Cases of Torture, 1855).

The report also blamed the native officers to be the cause of such oppression, describing them as 'rapacious, cruel and tyrant' while in power or authority. The notion was contested by Anupama Rao, as she argued that preconception of racial inferiority produced a complex situation. She explained,

> "The colonial state often understood itself as struggling to institute a neutral and rational 'rule of law in a situation where ruling over the racially inferior and culturally backward often demanded the imposition of forms of physical and symbolic violence. Hence assumptions of native incompetence and barbarity were self-fulfilling prophecies that necessarily depended on colonial authorities' discovery of scandals such as the prevalence of torture practiced by native police." (Rao, 2001, p.10)

Validity of Rao's argument can be found in the Report itself as the 1855 Report considered violence to be necessary for a perception of effective governance in the eye of the native population themselves. The Report noted,

> "Indeed it seems to be the universal opinion among the natives themselves, that in criminal cases the practice (torture) is not only necessary but right. It excites no abhorrence, no astonishment, no repugnance, in their minds." (Commissioners for the Investigation of Alleged Cases of Torture, 1855, p. 34), (Bhuwania, 2009).

The same page of the Report noted violence to be a "habit of the people' and "time honored tradition" of India. Though the British parliament and newspapers were always vocal about such brutality and abuse, attempts of the British Raj Government to eradicate this practice have always resulted in failure. In addition to poor training, poor supervision and low salary of the native police, the origin of this problem is possible to trace back to the method of policing in India itself. From the very initiation of modern policing, the customary scale of judging the merit of an officer was the number of convictions acquired. The race to achieve more convictions resulted in adoption of so called "Oriental Method" of detection- a method that consists rounding up all the people of questionable character in a locality and put them in incarceration or custody until any sort of clue is found or confession acquired (SINGHA, 2014), (Heath, 2012). This practice of "Detection" opened up opportunities for the use of excessive force and violence in the name of interrogation. The customary use of this recognized technique also indicate the existence of tacit

consent for torture from the higher native officials. It is significant to note that British officials have rarely been accused of such activity with almost no conviction. However, following the arguments of Anupama Rao, such virtuous representation of British officers may originate from the racial discrimination that dominated the Raj administration.

Another reason for such persistence of police brutality was the abysmal leniency that the district magistrates or the judges showed to allegations of torture against police members. The situation can be better understood with a compelling statistics. Between the year of 1906 and 1911, a total of 120 policemen were convicted of torture and maltreatment. Though thirty one victims died from the direct torture of these officials, none of them were convicted of murder of any kind. Another 158 cases never saw a judicial trial and were dropped after initial investigation and 424 cases were simply dismissed by the magistrate without any official inquest (Heath, 2012). Though these numbers are high, the actual occurrences of torture is likely to be much higher. In agreement with Masuma Pervin, legal procedure in the Indian subcontinent has always been costly, unreliable and unpredictable (Pervin, 2016). As Deana Heath showed in her analysis of Hridoy Nath Bose torture and murder case of 1909, even if a case of police brutality made it to the court, the judges usually considered native witnesses as dishonest and went to great lengths to discredit the submitted evidences that prove the accusations (Heath, 2012). The verdict of Nassick torture case of 1854 showed that even in case of a conviction, the perpetrators were usually chastised with trivial punishments. In the incident under examination, a farmer named Gunnoo was tortured and killed in police custody while extracting confession. Six police peon was convicted and awarded a punishment of four years of incarceration with hard labour and four months of solitary confinement. The *Foujdar* or the officer in charge was relieved from his duty but received no punishment (Rao, 2001). Under such circumstances, it is safe to assume that most victims of police brutality submitted to such savagery and kept their silence. However, such leniency wasn't so out of place as it appears to be. The torture conducted by the police served a very important purpose for the colonial regime- suppression of revolutionary ideas by spreading fear and terror. Violent responses, often regarded as 'Act of State', in such conditions were often recommended and even encouraged. The heavy handed approach reserved for political opposition was often extended to day to day dealings with the general population.

Colonial Legislation: Section 54 and 167 of the Code of Criminal Procedure, 1898

Among other colonial legislations, the most abused one is probably section 54 of CrPC (Code of Criminal Procedure. 1898) that allowed law enforcement agencies to arrest a number of citizens without warrant. As the legislation is still in practice and persistently abused in present day Bangladesh, it is important to note this section with care. The part of the section in question follows-

Any police-officer may, without an order from a Magistrate and without a warrant, arrest-

> *Firstly*, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned.
>
> *Secondly*, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking….
>
> *Fourthly*, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such a thing.
>
> *Fifthly*, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody… (The Code of Criminal Procedure 1898).

As Sadeka Jahan noted, this section provides opportunities for arbitrary arrests as there is no clear definition of "Credible Information" and "Reasonable Suspicion", mentioned in the first clause of the section, which can direct arrests under this section by law enforcement agencies (Jahan, 2005). The second clause allows arrests for possession of tools that can be used for house breaking. In absence of a clear direction on the characteristics of such tool, virtually almost any instrument can be considered suited for the task. The fourth clause permits arrest on simple suspicion of theft or possession of stolen property. The fifth clause dictates that an officer doesn't even need suspicion and a sense of obstruction in execution of his/her duty is enough to make an arrest.

In cases of arrests made without warrant under section 54, an investigation report must be submitted within 24 hours. However, section 167 of the CrPC allows further investigation and opportunity to keep the arrested person in police custody for "Remand". How the colonial legacy of avoiding proper judicial procedure and jump to quick convictions have continued through the time in the guise of remand will be discussed in the next part of the article.

Bangladesh Police and Torture

A careful examination of the activities of Bangladesh Police will reveal that like most of the legislations they enforce, their behavior in the field is also similar to colonial period practices. Observing the environment in which police operate, this hardly comes as a surprise owing to the fact that the function, operation and objective of the police have largely remained the same since the British left. The Police have continued to serve the authority while indulging into corruption and brutal practices that are largely ignored by internal affairs, just like the old times.

Political Suppression

Forced Disappearance

Bangladesh has faced severe violent crackdown led by the ruling political party, Awami league (AL), on political oppositions since last decade. According to Human Rights Watch, the law enforcement agencies have repeatedly targeted activists, journalists, leaders of political opposition and critiques of the government (Human Rights Watch, 2019). Statistical data from the same organization suggest that there have been at least 575 incidents of people being forcibly arrested and then disappeared by the Law enforcement agencies from 2009 to 2020 (Human Rights Watch, 2020). Most of these victims were released at a later date or produced before court, some were killed in so called 'crossfire' and the whereabouts of at least 86 people still remains unknown. One of the most prolific of such cases was the disappearance of Ilias Ali, former Member of the Parliament (MP) and Organizing secretary of BNP (Bangladesh Nationalist Party). He was last seen with his driver on 17th April 2012 in Dhaka city. His car was found by the police at a later date but the two men still remain missing. No ransom was ever asked for and no party claimed to have any information on him. However, BNP leaders have repeatedly accused the government of his disappearance for exerting AL control over Sylhet district (The Daily Star, 2015).

A special court in Bangladesh sentenced Mir Quasem Ali, a prominent political opposition of AL, to death on charges of crimes against humanity during the liberation war. His son Mir Ahmad Bin Quasem, an open critic of the court, alleged the procedure to be unfair and started an appeal. In July of 2016, Mir Ahmad Bin Quasem contacted the Human Rights Watch and clearly expressed concern about his own safety. On 9th August 2016, a group of people, claiming to be members of law enforcement agency, raided his house and picked him up in front of his family. It was the last time he was seen. Government officials denied his arrest and claimed to have no idea about his location. However, at the height of media exposure about his disappearance, Bangladesh Police raided his house and his family reported intimidation from the officers (Human Rights Watch, 2021). Hummam Quader Chowdhury, son of another prominent BNP leader and former MP Salauddin Quader Chowdhury, was also abducted by the police and released almost six months later without any charge (Amnesty International, 2017).

The abduction and forced disappearances in the hands of police are hardly limited to political oppositions. MD. Fakhrul Islam, the owner of Swift Cable Network, was picked up by RAB (Rapid Action Battalion), an elite force of Bangladesh Police, on 11th May, 2013. After official denial of any knowledge about his whereabouts from RAB, his family members filed a General Diary (GD). Soon after the GD was filed, his family members reported to Human Rights Watch

that they have been threatened by unnamed RAB officials for 'not taking the matter too far'. Fakhrul Islam remains one of those who never returned (ReliefWeb, 2021).

Brad Adams, executive director of Human Rights Watch's Asia division, noted that critics of the government live in a constant state of fear of being disappeared. The families of the victims have little to no chance of getting justice as a report consisting of 115 interviews of the victims' family members suggest that the authority consistently refuse to investigate such cases (The Human Rights Watch, 2021). There have been no significant progress in any of the cases that alleged the Police of forced disappearance since last decade- a judicial trait of leniency that was easily identifiable in colonial structure.

Extra Judicial Killings

Bangladesh witnessed the first wave of extra judicial killings in 2004 after establishment of RAB by the then BNP government. This particular elite force, formed as a counter-terrorism and anti-crime unit of the police, have become infamous for their excessive use of force and violence. In addition to fighting terrorism, as Meenakshi Ganguly observed, RAB has turned into a governmental death squad (Ganguly, 2017). This highly criticized battalion introduced the practice of so-called "crossfire" to justify and avoid responsibility for the death and suffering they caused for the past two decades. The executions perpetrated by them are usually covered by the same fabricated story over and over again- a citizen is apprehended and interrogated by the RAB, provides 'important' information, taken to a raid based on that information and killed in the mayhem of a gunfight referred as crossfire. The repeated cover story has become so infamous that apprehension by RAB has become synonymous to execution or forced disappearance in public perception. A statistics conducted by Odhikar, an organization dedicated to the protection of human rights, can shed a better light on the situation.

Total Extra-judicial killings (allegedly by few members of different agencies) from 2001 - 2020																										
Year (s)	RAB	Police	RAB-Police	Joint Force	Cheeta- Cobra	Ansar	Army	BGB (Former BDR)	Police-BGB (former BDR)	RAB- Coast Guard	RAB-Police-Coast Guard	Coast Guard	DB Police	Police-Forest Guard	Forest Guard	Coast Guard-Forest Guard	Police-Coast Guard	Jail authorities/Police	Navy	Police and Armed Police Battalion, RAB, BGB	Drugs and Narcotics	Armed Battalion	BGB-RAB	Railway Police	Security Forces	Para Commando	Grand Total
2020 (upto June)	49	81	0	0	0	0	1	19	0	0	0	0	8	0	0	0	0	0	0	0	0	0	0	0	0	0	158
2019	101	203		1			4	56	4			1	20													1	391
2018	136	276						2				2	46		1								2		1		466
2017	33	117					2	1					2														155
2016	51	118	0	1	0	0	0	2	1	4														1			178
2015	53	126		1				5														1					186
2014	29	119		11		1	2	5				3											2				172
2013	38	175	1	8	0	0	0	11	32											64							329
2012	40	18	2			3		2		4								1									70
2011	43	31	4							4								2									84
2010	68	43	9					1		3	3																127
2009	41	75	25			2	3	5				1			1			1									154
2008	68	59	15	1				2				4															149
2007	94	64	3	7			7	1				1			1			1	3		2						184
2006	192	144	1					6				7	4		1												355
2005	111	258			4	1							5			2	15										396
2004	77	133		15	3	1	1	6	3					1													240
2003	0	57		6		2	2	4					3					6	1								81
2002	0	33				4	39	4					1					2									83
2001	0	33		1					9				1														44
Total	1224	2163	60	52	7	14	61	132	49	15	3	19	90	1	4	2	15	13	4	64	2	1	4	1	1	1	4002

Source: Odhikar, 2021

The current government came to power in 2009 under the leadership of Sheikh Hasina Wazed. Since that year, a total of 2,470 people lost their lives in the hands of RAB, Police and the Detective Branch (DB). Another 695 souls perished in police custody in the course of last ten years (Hossain, 2020). The fact that almost none have ever been convicted on charges of extrajudicial killing shows the authority's reluctance to investigate such incidents in spite of overwhelming evidence. The murder of Teknaf Municipality Councilor, Ekramul Haque, demands special attention to understand the situation that exists.

Ekramul Haque was apprehended by RAB on 26th May, 2018. During his illegal containment, he managed to make a phone call to his family moments before he was executed. His family heard him crying and someone asking "Weren't you involved?" Someone replied "No" and the reply was followed by a gunshot. The next day, RAB released his dead body claiming he was killed during a gunfight between them and a group of drug smugglers. As the phone call recording created a public outcry, Home Minister Asaduzzaman Khan promised to establish a committee led by a judicial magistrate to investigate the incident (Alif, 2020). However, two years have passed and any action is yet to be taken by the authority.

Remand: Custodial Torture in Bangladesh

The most dominant colonial culture that still exists in present law enforcement agencies of Bangladesh is the use of torture, punishment, inhumane and degrading treatment in custody. No matter how surprising it is, the racist "Oriental Method" of detection explained previously is still in practice. As the CrPC formulated by the British still functions as the primary legislation on how to process a suspect, the combination of section 54 and 167 is continuously abused to detain civilians and treat them any way the police seems fit. The practice is so prevalent that it is almost impossible to find someone who has been apprehended by the police for any reason but haven't faced any kind of mistreatment (Chandan, 2018).

According to a statistics published by "Ain o Shalish Kendro", 53 people lost their lives in police custody in 2017 alone of which 33 were detainees who had exposed signs of physical torture on their bodies (Dhaka Tribune, 2018). No fewer than 1,426 souls were lost in police custody from 2017 to 2020 (Dhaka Tribune, 2020). An examination of the Nassick torture case and Hridoy Nath Bose torture case of the colonial period shows that even the methods and objective of torture have remained largely the same. According to a description mentioned in one of the reports of Bangladesh Legal Aid and Services Trust (BLAST), one of the detainees illustrated his horrific experience in police custody. He was taken in remand for three days and the police put hot chili pepper in his anus to extract a confession (Hossain, 2015). From a report produced through independent investigation by the newspaper Daily Star, the most common form of custodial torture consists beatings, electrocution, burning and boiling of private parts, whipping and insertion of foreign object through anus (Chandan, 2018). Unsurprisingly, police rejects any allegation of such torture and hardly any accusation reaches judicial trial. However, the judiciary has improved significantly from the racist colonial structure due to introduction of grave punishments in new regulations regarding incidents of custodial torture. As it can be observed in infamous Jony murder case, three ex-cop were convicted and sentenced to jail for life. However, this was a very rare scenario and most victims of torture remains in silence due threat of further violence from the cops.

Reformation Attempts

From the British Bengal Presidency to present day Bangladesh, police have gone through several reformation attempts. This part of the article will primarily focus on the police reforms after Bangladesh was separated from Pakistan and gained independence in 1971.

AMA Kabir Committee, 1977

The Law Commission of 1976 made recommendations on establishment of police training institutes, forensic labs and separate institutions for executive and judicial proceedings. Another committee under the supervision of AMA Kabir, former Inspector General of Police was founded for evaluation of the recommendations. After examination of various aspects of police and considering the population growth, the committee submitted their report on 30th November, 1977 with a plan for expansion and modernization of Police. Most of the propositions of this committee were simply ignored.

Criminal Law Reforms Committee, 1982

Under the supervision of Muhibuzzaman, the then cabinet minister of the government, this committee made some important recommendations. The committee suggested creation of a new cadre in the police solely for investigation purposes and separate crime control and crime investigation units in police offices. The committee also stressed that an officer performing a particular duty must not be bound to perform another.

Brigadier Enam Committee, 1983

Though this committee was tasked with reformation of the whole public service sector, their recommendations played a major role in early police reformation attempts of Bangladesh. After critical examination of the existing structure, the committee recommended to divide the country in 64 administrative zones. The committee also recommended a significant reduction of executive power of the police. Following their instructions, some of the positions of police were also changed- Circle Inspectors were changed to Additional Superintendent of Police (ASP) and the Officer-in-Charge was changed to inspectors.

Taibuddin Ahmed Committee, 1986

This committee was created to analyze several difficulties faced by the police and find a solution. In their report, the committee suggested a number of measures –

- Reorganization of police head quarter so that it can effectively manage at least 74,000 police members.
- Creation of a 'Highway Police".
- Creation of a dedicated medical service for uniformed offices.
- Creation of a separate prosecution branch.
- Establishment of a Police Stuff College to increase the competency and professionalism among the officers.
- Upgrading the posts of the instructional stuff of Zonal Police Institutes.
- Creation of Upazilla Police Office.
- Strengthening and modernization of the communication system.

- Creation of Armed Police Battalions for Presidential Guard and Bandarban Hill Tracts.
- Creation of additional riot divisions.

Justice Aminur Rahman Committee, 1988

Even after the implementation of most of the recommendations by Taibuddin Ahmed Committee, the police continued to be ineffective in practice. A separate commission led by Justice Aminur Rahman made further recommendations concerning long term future plan of the force. Among other propositions, the most significant ones were-

- The number of the members of Police must be increased and the administration should be prepared to employ at least 140,000 members by the year 2000.
- Old Colonial Police Manuals like Training Manual of 1936 and Inspection Manual 1926 should be immediately replaced by modernized versions.
- For effective administration, the Ministry of Home Affairs should create the post of Inspector General.
- More officers should be appointed to assist the duties of Deputy Inspector Generals.
- Establishment of new police stations to support an increased number of population.
- Creation of Detective Branch in all the districts with a minimum number of stuff.
- Establishment of un-armed training facilities, gymnasiums and swimming pools in the Detective Training Schools and Zonal Police Training Schools.
- Formulation of a suitable transportation scheme as the committee observed the lack of proper transportation for troops to be severe.
- Minimum educational requirement for becoming a constable should be raised to Secondary School Certificate (S.S.C.).
- Training of the police should be a continuous process.
- Selection of the new recruits should be done by fairly high level officials.
- Police of the Metropolitan Areas must be trained in special facilities to cope with increased challenges.

Reforms under Caretaker Government

The primary success of the reformation attempts by the caretaker government was the separation of executive and judiciary magistracies. The government also drafted the Police Ordnance, 2007 in order to replace the old Police Ordnance, 1861 to make the police more accountable and socially responsible. However, the draft was scrapped due to strong opposition from the bureaucrats.

Police Reform Program under UNDP

The Police Reform Program (PRP) started in 2005 under the supervision of UNDP was the first comprehensive attempt to increase the professionalism and competency of the police. The main objective of PRP was to transform the colonial police force into police service. The program emphasized on the recruitment of at least 3,000 women officers for increasing the diversity. A separated unit named Police Internal Oversight (PIO) was also formed to check the behavior and performance of the cops. Another important aspect of this program was the introduction of the Trafficking in Human Beings (THB) unit, directly funded by the European Commission. The PRP also started community police programs to assist the existing police administration (Chowdhury, 2018).

As it can be observed from the reformation attempts, the Bangladesh Police was suffering from the same issues that plagued the colonial police even after thirty years of British leaving the Indian subcontinent. The recommendations in the reformation attempts suggest that police was still not adequately funded, under-educated, ill equipped, ill paid and not trained enough. No indication of reducing the "confession extraction" culture can be noted and unsurprisingly, torture and abuse persisted through such loopholes. The PRP under UNDP showed some real potential but the newly formed specialized units are mostly ineffective due to lack of proper training and bureaucratic hindrances. Particularly, the PIO is incapacitated by very little fund as it is still not a recognized part of the police and can only function through the support of IGP (Chowdhury, 2018).

A Short Comparison with Canadian RCMP

The North West Mounted Police, later renamed as Royal Canadian Mounted Police was established in 1873 to protect and serve the Canadian population primarily from American whiskey traders in Cypress Hills. As GouldHawke observed, the real objective was to protect the white settlers and their investments in the region (Gouldhawke, 2020). Though the RCMP took part in a number of conflicts with the indigenous population, the nature of the police and dispute was completely different from the ones in the Indian subcontinent. Participation of RCMP in battles like the Battle of Duck Lake or Fish Creek in 1885 separates them from the Colonial Indian Police as they were predominantly a civilian force who never took part in battles. Both Police used excessive force for suppression of political opposition which were mostly several indigenous communities. However, unlike the territories under British Raj, the elites of Canadian indigenous communities didn't collaborate with their oppressors in persecution of their own. The completion of Canadian Pacific Railway opened a path for mass transportation and made construction of large settlements possible. It is important to note that these settlers were mostly European with Caucasian origin. As a result, customary police brutality has never truly developed in the way it did under the British Raj in India. As discussed earlier in this article, such tendency

of torture in Indian colonies arose from poor education, training and equipment, incompetency and preconception of racial inferiority. On the other hand the settlers of Canada, who comprised the majority of the population, were considered 'Upright men' from white ethnicity. Under such circumstances, the conditions after Canada became independent have gradually improved. As of 2021, Canada has been ranked 6th safest country among 136 nations (World Population Review, 2021).

Conclusion

The colonial police under British Raj adopted a strategy of torture, violence and excessive force for performing their regular duties. Such violent tendencies of the force were beneficial for the foreign colonizers in suppression of political opposition. As the native population comprised almost 95% of the force, civilians vilified the local members of the police for their brutal treatment keeping the image of white high officials clean. This arrangement led to a circumstance of tacit assent to torture in police custody. The British officials also regarded the people of the Indian sub-continent as savage and considered brutal treatment to be necessary for effective administration. A tendency of eliciting confession by any means necessary also arose among the officers. Independent Bangladesh adopted most of the colonial legislations with a police force that enforced these laws in a method similar to colonial police. Instead of serving a foreign sovereign, Bangladesh police now serve the purpose of ruling political party with ever increasing brutality and torture. Political executions, forced disappearance, arbitrary arrests and torture in custody have become a regular practice for suppression of political opposition. Much like the British parliament during the colonial age, torture by police has also become a burning issue for the members of Bangladeshi parliament and several reformation attempts have been made. As the recent data suggests, those attempts produced little results. However, while the British authority allowed a tacit approval of such behavior, the Bangladeshi government chose to either deny all allegations categorically or simply kept silent.

References

Adil, M., 2020. Policing Ethics: Context Bangladesh. *Bangladesh Journal of Bioethics*, 11(1), pp.10-23.

Alif, A., 2020. Extrajudicial killings: When will they stop?. *Dhaka Tribune*, [online] Available at: < https://www.dhakatribune.com/bangladesh/2020/08/16/extrajudicial-killings-when-will-they-stop > [Accessed 20 October 2021].

Amnesty International, 2017. Bangladesh: Man Released From Long Secret Detention. [online] Available at: < https://www.amnesty.org/en/latest/press-release/2017/03/bangladesh-man-released-from-long-secret-detention/ > [Accessed 19 October 2021].

Arnold, D., 1986. *Police Power and Colonial Rule, Madras, 1859-1947*. Oxford University Press.

Bhuwania, A., 2009. *Very wicked children: "indian torture" and the madras torture commission report of 1855*. [online] Socialsciences.scielo.org. Available at: <http://socialsciences.scielo.org/scielo.php?script=sci_arttext&pid=S1806-64452008000100009 > [Accessed 19 October 2021].

Chandan, S., 2018. Beating suspects not crimes. *The Daily Star*, [online] Available at: < https://www.thedailystar.net/star-weekend/spotlight/beating-suspects-not-crimes-1608055 > [Accessed 20 October 2021].

CHANDAVARKAR, R., 2007. *Customs of Governance: Colonialism and Democracy in Twentieth Century India*. [online] Modern Asian Studies. Available at: < http://dx.doi.org/10.1017/S0026749X06002472 > [Accessed 18 October 2021].

Chowdhury, M., 2018. POLICE REFORM IN BANGLADESH: AN ANALYSIS OF THE ROLE OF SELECTED INSTITUTIONAL ACTORS AND FACTORS IN ITS IMPLEMENTATION. *Dhaka University Institutional Repository*,

Commissioners for the Investigation of Alleged Cases of Torture, 1855. *Report of the commissioners for the investigation of alleged cases of torture in the Madras presidency.*. Madras: Fort St. George Gazette Press, p.42.

Dhaka Tribune, 2020. *3 ex-cops jailed for life in first custodial death verdict under new law*. [online] Available at: < https://www.dhakatribune.com/bangladesh/court/2020/09/09/first-ever-verdict-over-custodial-death-former-si-2-others-sentenced-to-life > [Accessed 20 October 2021].

Dhaka Tribune, 2018. 90 killed by law enforcement agencies over last six months. [online] Available at: < https://www.dhakatribune.com/bangladesh/law-rights/2017/07/01/90-killed-law-six-months > [Accessed 20 October 2021].

Ganguly, M., 2017. *After Narayanganj verdict, Bangladesh should disband RAB*. [online] Human Rights Watch. Available at: < https://www.hrw.org/news/2017/01/19/after-narayanganj-verdict-bangladesh-should-disband-rab > [Accessed 20 October 2021].

GIULIANI, E., 2015. Strangers in the Village? Colonial policing in rural Bengal, 1861 to 1892. *Modern Asian Studies*, 49(5), pp.1378-1404.

Gouldhawke, M., 2020. *A Condensed History of Canada's Colonial Cops*. [online] The New Inquiry. Available at: <https://thenewinquiry.com/a-condensed-history-of-canadas-colonial-cops/> [Accessed 20 October 2021].

Gould, W., 2011. *Bureaucracy, Community and Influence in India Society and the State, 1930s - 1960s*. Routledge.

Gupta, A., 1979. *The Police in British India: 1861 to 1947*. New Delhi: Concept Publication.

Heath, D., 2012. Systemic Violence and the State in Colonial India. In: *42nd Annual Conference on South AsiaAt: Madison, Wisconsin*. Madison, Wisconsin.

Hossain, I., 2020. *The dark secret of extrajudicial killings in Bangladesh - LifeGate*. [online] LifeGate. Available at: < https://www.lifegate.com/extrajudicial-killings-bangladesh > [Accessed 20 October 2021].

Human Rights Watch, 2020. Bangladesh: End Enforced Disappearances. [online] Available at: < https://www.hrw.org/news/2020/08/28/bangladesh-end-enforced-disappearances > [Accessed 19 October 2021].

Human Rights Watch. 2019. *Bangladesh: Violent Repression of Opposition*. [online] Available at: < https://www.hrw.org/news/2019/01/17/bangladesh-violent-repression-opposition > [Accessed 19 October 2021].

Jahan, S., 2005. *Section 54 and 167 of CrPC: Some Recommendations*. [online] BLAST's mission is to make the legal system accessible to the poor and the marginalized. Available at: < https://www.blast.org.bd/issues/criminaljustice/269 > [Accessed 19 October 2021].

Odhikar, 2021. Statistics on Killed by Law Enforcement Agencies. [online] Available at: < http://odhikar.org/statistics/killed-by-law-enforcement-agencies/ > [Accessed 20 October 2021].

Pervin, M., 2016. Enactment of Penal Code, 1860: A Historical Analysis. *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)*, 6(16).

Potter, D., 1996. *India's political administrators, from ICS to IAS*. Delhi: Oxford University Press.

Rao, A., 2001. PROBLEMS OF VIOLENCE, STATES OF TERROR: TORTURE IN COLONIAL INDIA. *Interventions*, 3(2), pp.186-205.

ReliefWeb, 2021. *A Decade of Enforced Disappearances in Bangladesh*. [online] Available at: < https://reliefweb.int/report/bangladesh/where-no-sun-can-enter-decade-enforced-disappearances-bangladesh > [Accessed 20 October 2021].

Robb, P., 2017. The ordering of rural India. *Policing the empire*, p.129.

SINGHA, R., 2014. Punished by Surveillance: Policing 'dangerousness' in colonial India, 1872–1918. *Modern Asian Studies*, 49(2), pp.241-269.

The Code of Criminal Procedure. 54. Available at: http://bdlaws.minlaw.gov.bd/act-75/section-14518.html (Accessed: 19 October 2021).

The Daily Star, 2015. No good news for Ilias' family. [online] Available at: < https://www.thedailystar.net/backpage/no-good-news-ilias-family-77712 > [Accessed 19 October 2021].

The Human Rights Watch, 2021. Where No Sun Can Enter" A Decade of Enforced Disappearances in Bangladesh. [online] Available at: < https://www.hrw.org/report/2021/08/16/where-

no-sun-can-enter/decade-enforced-disappearances-bangladesh > [Accessed 19 October 2021].

World Population Review, 2021. Safest Countries In The World 2021. [online] Available at: < https://worldpopulationreview.com/country-rankings/safest-countries-in-the-world > [Accessed 20 October 2021].

Decolonization and Restorative Justice: A Post-Colonial Justice Re-Think Towards The *"Ubuntu"* Philosophy

Judith Mandillah

Abstract

This paper is informed by the piecemeal application of restorative justice mechanisms by the legal justice system in Kenya despite the constitutional provisions (Kenya constitution 2010 (10:159), chapter (CAP) 4 –Bill of Rights and Acts; 64 and 93 laws of Kenya. In particular the study focused on the post constitution 2010 and emphasis on enactment of laws and policy guidelines in Kenya that recognize the role of Alternative Dispute Resolution (ADR) mechanisms in enhancing access to justice and the subsequent set up of legal and institutional framework on court sanctioned mediation. The paper established the criminal (probation) and civil (Court Annexed mediation-CAM) as Alternative Justice System (AJS) models, assesses their effectiveness in lieu of the Ubuntu philosophy, identifies the gaps and recommends appropriate strategies that will motivate the wholesome implementation of the models for a just society.

> *"A person is a person through other persons. (I am because you are) None of us comes into the world fully formed. We would not know how to think, or walk, or speak, or behave as human beings unless we learned it from other human beings. We need other human beings in order to be human". (Tutu, 2004:25).*

Key Words: Decolonization, Ubuntu, Restorative Justice, Court Annexed Mediation-CAM

Introduction

Legal frameworks are not a monopoly of influencing any given system operations rather other attributes like people's culture count for a systems' survival and performance (–UN, (2015). Against this thinking global states have focused on decolonizing the retributive systems to restorative justice (Kinyanjui, (2010). concurs with this sentiments that recognizing the African traditional conflict management practices shall address the systemic violence experienced within the current justice systems. The value for African indigenous conflict management mechanisms

is anchored on the *Ubuntu* philosophy " *I am because You Are",* creates a sense of belongingness with the capacity for dialogue spaces leading to acceptance, forgiveness and accountability of one's deeds for wholesome restoration of a community.

In the African region, restorative justice mechanisms have been applied in the socio-economic and political contexts. Cases in point post-apartheid South Africa (Truth and Reconciliation Commission) and the post-for Rwanda genocide 1994 (*Gacaca/TIGI*) as reconciliatory platforms (GlobaLex, 2013). Kenya's experience with political turmoil in 2007 necessitated a home grown intervention strategy achieved through the Koffi Annan-led (Emeritus) mediation brokered a peace accord between disputants and subsequent constitutional change that provided for alternative justice mechanisms (Kenya constitution 2010: 10 (159).

The 20th century Scandinavian countries probation practice targeted juvenile justice systems while British legal system preferred it for vulnerable groups like women and children. Probation practice thus centered in Nairobi during early days. Overtime, the practice has evolved in personnel, programming, mandates and services. The constitutional provisions are implemented through the probation and Aftercare Service through initiatives like: assessment and information provision to courts to influence decision-making and offender/bail beneficiaries. The demand for probation services is influenced by the restorative processes and principles applied and the positive change registered in offenders, victims and community resilience.

The Court Annexed Mediation- CAM on the other hand derives its legal mandates from international and national legal instruments Kenya constitution (2010); civil procedure code and mediation rules. The model was arrived at through a participatory approach and inaugurated on a pilot basis in 2016 in six high court stations. Article 48 of the Constitution, the state is obligated to ensure access to justice to all persons. According to Kendagor (2016) Article 159 of the Constitution specifically enjoins courts and tribunals while exercising judicial authority to be guided by several principles; among them, the promotion of alternative forms of dispute resolution mechanisms including mediation.

Table 1.1 Chronology of Justice Decolonization

1946	Probation practice introduced in Kenya by British rule
1963-1964	Enactment of Kenyan laws based on British common Law Probation of Offenders Act 64, Civil procedure code 21, Criminal Procedure Code 75. Penal code 63 , arbitration Act 49 etc

1989	The Justice O'Kubasu Commission-Review of the Extra Mural Penal Employment Community Service Orders Act 1989 (Act 93) , Increase in personnel
1999	Nyumba Kumi Initiative (community policing model) Ubuntu philosophy application ((Ruteere and Pommerolle 2003).
2005	Reviewed Kenya Constitution (rejected)
2007-2008	-Koffi Annan led Mediation -Peace Accord between opposing parties and subsequent coalition government -Truth and reconciliation Commission Act 2008 - National Cohesion and integration Commission-NCIC -Ministry of Justice, National Cohesion and Constitutional Affairs
2010	-Formulation of Kenya new constitution ✓ Bill of Rights (Victim Impact statement, bond/bail to all suspects, 24 hour rule production of suspects in court, resentencing of convicts on life imprisonment/death raw, witness protection Enhanced probation services ✓ (Constitution 2010 m chapter 10 article 159).
2011	Operationalization of Court Users' committees (embraced inclusivity and oversee justice processes for the rule of law).
2013	Enhanced use of community policing through " *Nyumba Kumi Initiative*" at local levels and incorporated into the security agencies
2016	CAM Operationalization nationally. Capacity building of stakeholders More recruitment vetting Mediation policy guidelines and national Mediation Committee
2018	The president's symbolic handshake with opposition leader arrived at voluntarily by the two and their followers
2019-2022	CAM in all registries -Small Claims Court operationalized as well.
2020-2022	Increased number of probation officers 100 to 2256 ; expanded mandates

Context of the Problem

Mayer (2012) argues that structural violence is a conflict motivator yet this state exists in contemporary democracies and systems. Service delivery in the justice system is hindered by challenges encountered from within and without. The conflict analysis focused on the Kenyan

Justice System (KJS) and sort to understand its limitations, demystify the colonial justice notion of 'independence and influence institutions and public towards adoption of home grown conflict management mechanisms. International and national legal instruments (Bangok Rules 2010; Tokyo Rules 1990; Mandela Rules 2015, UN Declaration on treatment of victims of crime and Constitution2010:159) provide a platform for application of restorative justice practices.

The piecemeal application of restorative justice mechanisms by the legal justice system in Kenya despite the constitutional provisions (Kenya constitution 2010 (10:159), chapter (CAP) 4 –Bill of Rights and Acts; 64 and 93 laws of Kenya is hampered by the over-reliance on retributivism. In rejuvenation of the traditional mechanisms in the 21st century has been purposeful as provided for in the constitution 2010. The lack and emphasis on enactment of laws and policy guidelines in Kenya that recognize the role of Alternative Dispute Resolution (ADR) mechanisms in enhancing access to justice and the subsequent set up of legal and institutional framework on court sanctioned mediation. The paper established the criminal (probation) and civil (Court Annexed mediation-CAM) as Alternative Justice System (AJS) models, assesses their effectiveness in lieu of the Ubuntu philosophy, identifies the gaps and recommends appropriate strategies that will motivate the wholesome implementation of the models for a just society.

Anchored on the Ubuntu philosophy; human relations, symbolic restitution and restoration, the analysis and intervention strategies: mediation adoption and enhanced use of community-based supervised sanctions addressed the ultimate inhibitions of structural violence within the Kenyan justice system that are likely to motivate community visible conflicts in Kakamega County within the past five years as outlined in the (Judicial Transformation Framework-JTF 2012-2016).

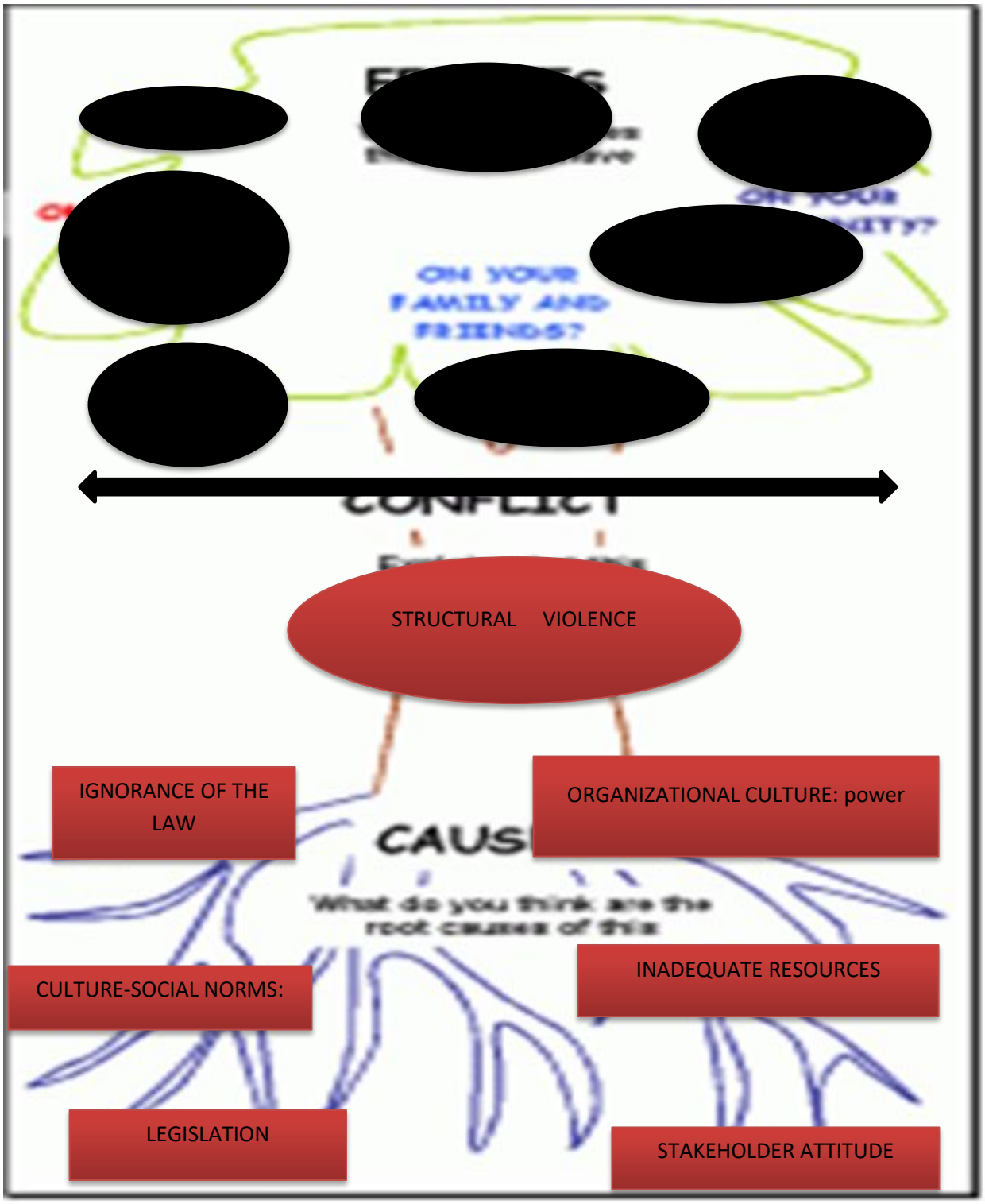


Figure 1.1: The conflict analysis problem tree model: Adapted from Fisher et al 2000 & Lisa, 2013

The probation officers and mediators are implementers of Kenyan restorative justice models in the criminal and civil justice systems and a linkage of the community with the justice system. Though the decolonization of the justice system guarantees social justice to all and mitigates any drivers that sustain community conflict or cause re victimization. The mediation and probation models are court driven thus enshrined in court registries except that mediators are community members while probation officers are employees of the public. Though appointment of a mediators is court driven, the mediators are community members. Decision making powers lie in courts hence restricted operations of the other justice actors.

The inadequacies of expert personnel and other resources has been addressed through volunteer mediators, probation officers and *probono* lawyers. The dual models have restorative justice practice values and the Ubuntu philosophy. There is humanity and the process is less tedious than the court system whose referral rate is low 15% and 85% of criminal conflicts remain unresolved with the prison remand section holding more suspects than convicts (Judicial NCAJ (2012-2015) (488 and 189 respectively) on a weekly basis. Mediation model reduced the case backlog in the Environment and Land Court (ELC) from 3989 to 129 in one year.

The application of home-grown conflict management strategies have in the recent past addressed the gaps of non-holistic case assessment and management and inappropriate treatment orders by creating healthy spaces for dialogue, risk needs responsivity assessments and transformative decisions that build community resilience and peaceful co-existence. The power imbalance and organizational cultures affecting stakeholder attitudes and operations have been addressed through the equal dialogue platforms like the court Users' Committee (CUC) that comprises of all actors.

Retributive and Restorative Justice Model

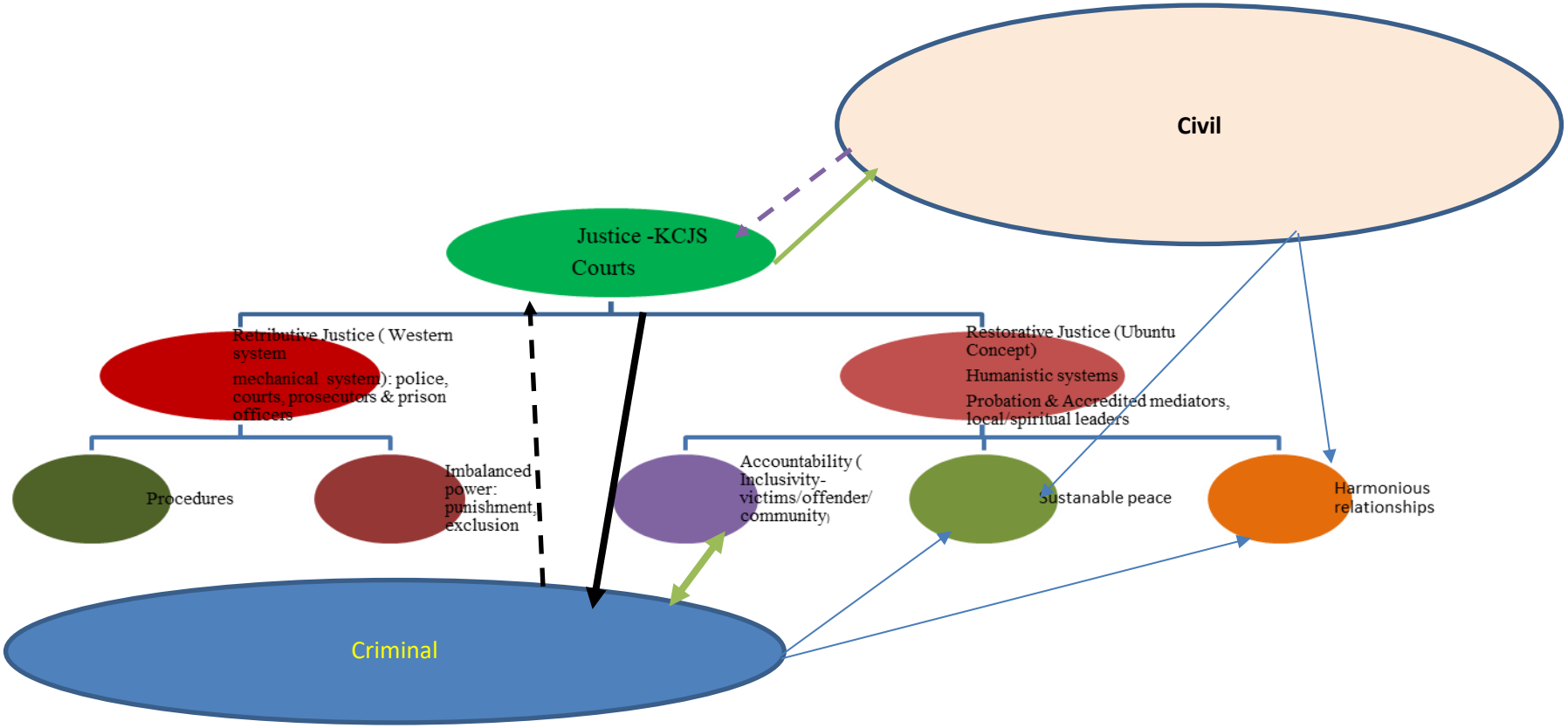


Figure 1.2: *Showing the model of power contrast between retributive and restorative justice (Ubuntu Philosophy)*

Source: *Judith Mandillah (2021): Adapted from Taylor C H & Pope A, (2013)*

The breadth under which the constitutional provisions article 159 not only address the negative impact of retributive justice but the symptomatic elements of structural violence. To decolonize the justice system for sustainable peace emphasis on use of the Court Annexed Mediation -CAM and Community-Based Offender supervision orders have been handy in ensuring the rule of law; unlocking funds locked in litigation to development, resilient communities and creating awareness and understanding of the benefits of restorative justice application (Kenya Judicial Transformation Framework 2016-2021).

Court Mediation Process model

Figure 1.3: *Showing the Kenya Court Annexed Mediation-CAM Process*
Source: *Judith Mandillah, (2021)*

According to CAM guidelines, mediation is an established process for resolving disputes in which disputants have failed to reach a negotiated settlement, are assisted by a mediator to come to a mutually acceptable outcome. Important to note is that in the CAM model, disputants will have failed to reach consensus both on their own and the conflict filed legally in a court of law upon which for one reason or the other, the courts appoint and refer the matter to a mediator. After the mediation process, the decision of the deliberations is filed in court for adoption irrespective of whether a positive of agreement was made by the parties. When there is disagreement decision, the matter is re-adopted and heard through the normal legal processes.

Theoretical Framework

Restorative justice legal frameworks are not limited to the international legal instruments but also on national and traditional beliefs and practices. These may include:

- UN Declaration on Treatment of Victims of Crime 1985
- 2001 UN Vienna Declaration on Crime and Justice

- Tokyo Rules
- Beijing Rules
- Kadoma Declaration
- The Nelson Mandela Rules
- Kenya Constitution 2010
- Kenya Court Annexed Mediation Policy Guidelines
- Acts of parliament: The Probation of Offenders Act-64; Community Service Orders Act 93; Civil Act-21 and many others

Access to justice means: expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies are present (Constitution 2010). The RJ models ensure inclusivity (people centred justice) and is cost effective.

The Ubuntu beliefs that:

i. Justice is realised in a human and relational context, not just a legal or criminal justice court process;
ii. Justice is attained through actions of restitution and reparations, not just through legal theory and codes of law.
iii. Justice is completed through restoration and rehabilitation, not just alienation and punishment

In this case the over-riding limitations and variations in definitions and names of RJ should not be an impediment to its application and benefits. Theories of change

- If the Kenyan Justice sector established the in-depth practicability of the African dispute transformation mechanisms adopted in modern justice context it may reduce case backlog and influence sustainable peace.
- If the Justice system reflected on the significance and implemented the “Ubuntu” philosophy in legal practice recidivism and cyclic conflicts would be history.
- If the challenges and opportunities encountered in application of the restorative justice models in modern justice context more programs would be initiated therefore enhanced community participation in peace decision making.

Taking cognizance of the African home-grown conflict management dimensions and their influence for peace addresses the power imbalance issues.

The rule of law does not lie in processes, laws and bureaucracy rather influence injustices. Mediation as a model is more of volunteerism, less costly leading to transformative decisions and societies. The CAM and probation though judiciary-driven they are less complex (Mediation Policy Guidelines 2016. The models are not foreign to the African Ubuntu philosophy attributes hence the need to enhance its application at all levels and stages of the system.

Ubuntu and Utu philosophy operates on values that foster healthy relations. *UBUNTU* (Belongingness or Togetherness) and *UTU* (Humanity) purpose to create and uphold the universal human Social Justice Rule (Do to others, what you expect them to do unto you). *The* concept embodies the lineage of community and guarantees the restoration of individuals and communities. Victims' needs are addressed while offenders are reintegrated into the community. Integral is the community relationships and social harmony despite its values not being practiced wholesomely (mediator court driven mediation/probation; skilled appointed mediators) there is good will and participatory volunteerism.

Home-grown justice dispensation has community lenses religious elders, disputants and their significant others. Symbolism of volunteerism/forgiveness is restored by eating together donated food *(Esilulu*). Sometimes ridicule through ceremonial songs, tying of banana leaves on perpetrator and mocking or excommunication were administered. This is unlike modern justice where punishment is equivalent of one's wrong doing and where mediation or probation spaces are provided, shaking of hands is symbolic or restitution is encouraged. Nevertheless, human rights upholding remained tricky especially where the victim was of female gender (compensation lesser).

Theoretical Framework

Ubuntu Attributes and Restorative Justice Principles

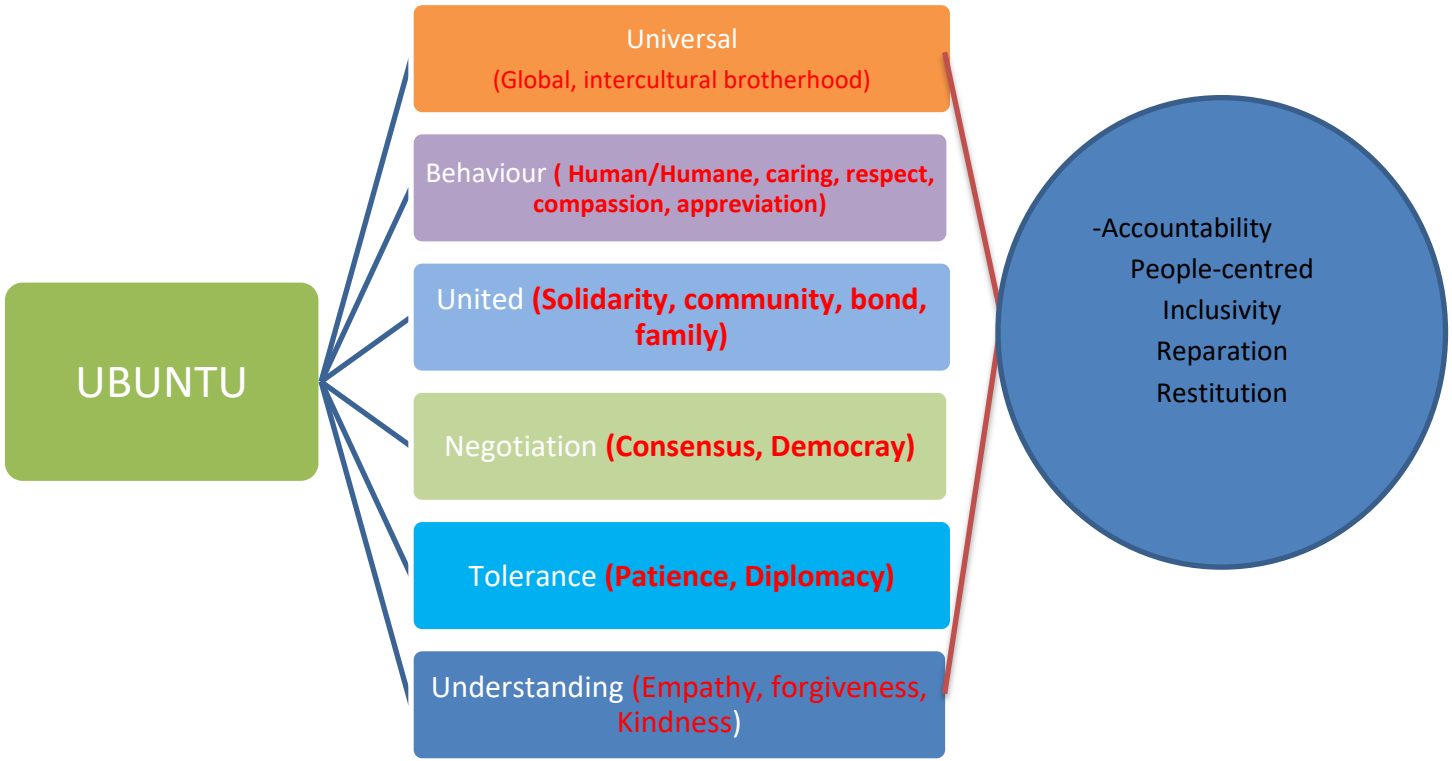


Figure 2.1 *Shows the attributes of the UBUNTU philosophy and Restorative Justice*
Source: *Judith N Mandillah, Adopted from Broodryk (2005)*

Basically, the mediation process is a court driven piloting initiative within the civil justice system of Kenya. The initiative is implemented under the umbrella of Mediation Accreditation Committee (MAC); Alternative Dispute Operationalization Committee (AOC) and Secretariat (Technical Working Group (TWG)) all housed at the judiciary headquarters and field registries at selected courts in the country. My reflection on mediation applications is that it takes cognizance of the informal justice methods rich in values humanity, diversity, potential Mandilah, (2018). In jurisdictions where court annexed mediation is enshrined in law, the parties are not given much choice in deciding whether or not to mediate their conflict before lodging it to the court hence retrogressive to the principles of RJ principle of willingness to participate.

Case Study Analysis

WHO: Stakeholder mapping of the structural violence in the Kenya Criminal Justice System

The case study was within the Kakamega Justice System located in Kakamega County of Western Region. The people in the area are agriculturalists and patrilineal where ownership of land is a sensitive issue and a source of conflict. The targeted respondents included the justice sector actors and religious leaders not forgetting the media and non-state actors. The structural violence is embedded in the limitations of the contemporary justice system. Using the mapping tool as illustrated by Fisher et al, (2000) visualizing and understanding the structural violence within the system's existing relationships, roles and interactions of the stakeholders became vivid. Probation officers and mediators though strategically on the map as one of the key actors they over-relied on the judiciary. Nevertheless the judiciary intake of probation and mediators increased tremendously.

It is difficult to uphold the rule of law in contemporary post-colonial justice settings, organizational cultures and utopia mentality of the judiciary (Judiciary, 2016). The judiciary immense powers contrasts other justice actors defeating the spirit of togetherness and inclusivity. Exclusivity of service consumers is experienced when there is language barrier, lack of expression space, communication channels, sitting arrangements in court rooms all of which is detrimental to the system's goal and people's rights (Article 50(4) of constitution 2010 and Tokyo rules article 7). To the offender, the prosecutor is not an ally unlike the victim when punishment is meted on offender. Decolonization of such mentality and propositions lie in the mediation process where the court representation is not visible but operations based on equality, respect, engagement and win-win situation (Zehr, 2015).

A discriminatory undertaking occurs when private lawyers representing either the offender or victims in a win /loose setting that breaks community relationships since alliances

are not build on genuineness and acceptance. Corrections, police and other actors are limited in resources and capacity to supervise and/or produce accused persons in court within 24 hours in contravention of law (Bill of rights 4). Rarely is reconciliation /diversion initiated at police for lack of expertise or following the orders. Solace in space provision has been visible in the mediation or probation practices and processes that value diversity, dignity, accountability and restoration. 75% respondents confirmed the lack of space or follow up after being victimized by the courts or police rather experienced re-victimization against the existing laws (Kenya constitution 2010-chapter 4, Bill of Rights, Bangok Rules 2010 and Mandela Rules 2015).

The corrections services, more especially probation are visible at the thread end of the justice process so are the mediators despite their role in supervision of court sanctioned supervision in the current dispensation. The agency is smaller in terms of structure, personnel and it receives the least of government funding towards implementation of the offender community-based rehabilitation programmes and external funding if any is inconsistent. With the promulgation of the constitution (2010), and enhanced use of restorative justice models, there has been purposeful increase of probation officers even when government has freezed employment. In 2010, there were 300 officers compared to 2021 (2000 plus)/. While the mediation and probation practices are court driven the court reliance on the earlier's services has been overwhelming due to their influence of attaining the rule of law. As a matter of fact, like a medical doctor's diagnosis guides in the treatment period and drug prescriptions, in the justice system, the probation officer who is like a doctor diagnoses, prescribes the dosage of drugs but the courts decide the period of treatment which in essence is contradictory and a source of injustice and unfair treatment to the offender and victim.

The prosecution on the other hand provides for necessary information to implicate the offender in the conflict and plays the role of victim for the state. In collaboration with other institutions like the private lawyers (counsels), the community in which are the offenders and Victims, civil societies, Faith-based organizations (FBO), both internal and international Non-Governmental Organizations (NGO) are supposed to play a significant role in ensuring social justice and peace for all as provided for in the international laws which Kenya is a signatory. The media as an independent organ has the role to keep the public informed of the government and CJS operations though censorship of information on sensitive matters very evident (police brutality).

The offenders and victims who are at conflict belong to the same community and their dispute in most cases if not always leads to community disharmony. While a section of the community will support the offender, there is another group in support of the victim hence enhanced conflict. This state may create bias and prejudice in the conflict resolution process hence psycho-social and economic dissatisfaction amongst individuals. The state prosecution, courts and probably the entire CJS' cordial relationship ceases to exist with victim when the later loses the case, so is the courts and probably the entire CJS blamed to the relieve,

satisfaction of the offender and praise of the entire system. The same feelings and attitudes are evident when the offender is convicted, incarcerated; he/she will show bitterness to the system, feel humiliated while the victim celebrates and praises the system. It is therefore important to note that there is a very thin line that can separate, define and thus help the public, practitioners and policy makers to understand and effectively mitigate drivers of structural violence.

On the stakeholder's mapping (Figure 3.1) the CJS stakeholders derive their powers and authority from different statutes, recruiting bodies each with a 'top –down' management system independent of each other. Funding sources are varied as well, where the Judiciary has an edge over other stakeholders both at local and international levels. Similarly, it is an arm of government with exempt independent jurisprudence of the executive and public scrutiny and answerable to the Judicial Service Commission-JSC as the authority in administrative issues. The current scenario leaves all other stakeholders inferior and with limited resources and avenue to take charge of their roles in ensuring effective justice delivery but rather work under the direction and discretion of the judiciary. The international community expects the judiciary to foster justice and peace through upholding good governance and subsequently it's the duty of the executive to adequately facilitate its operations without due influence and interruptions on the processes of justice delivery. These facilitation and existing policies are inadequate and they lack uniform operational guidelines to ensure good governance. On the other the demands and expectations of the international countries that subsidise the activities toward good governance as far as dispensation of justice is concerned through grants or donations have been a driver to conflict amongst the CJS stakeholders where inequity support has been sighted as a contentious issue.

Among other things, the constitution implores the judiciary to use TADR mechanisms like mediation, reconciliation, arbitration and any other home grown methods in justice dispensation. It is however questionable as to whether court officials nationally have adhered to the constitutional provisions and as to whether other justice actors and the community at large have embraced the legal provisions. Additionally, while implementing the guidelines of CAM, rule 17 sub clause (4) ' Mediation is to be conducted in accordance with the Mediation Rules.17 Sub clause (4) provides that an agreement between the parties to a dispute as a result of mediation under this part must be recorded in writing and registered with the court giving direction under sub clause (1), and the same shall be enforceable as if it were a judgment of that court and no appeal shall lie against an agreement referred to in sub clause (4)'defeats the purpose of the Ubuntu philosophy and thus RJ principles.

Important to note is that informal mediation which may not require the use of writing and reporting to a higher authority. The codification of mediation rules in the civil procedure Act seems to reflect the concept of mediation as viewed from a Westerner's perspective and not in the traditional and informal way. In addition to the foregoing Kenya's Judiciary efforts towards promoting the use of TADR have been witnessed in the Judiciary ADR Pilot Scheme

that is spreading like bushfire across all courts This is expected to assist in dealing with backlog of cases in the courts that in essence are invisible conflicts that influence increasing crime rate and thus congested penal institutions in the country.

On double lenses, disputes refer to ones values hence settlements viable contrary to conflicts that are more need/value–based, non-negotiable and cannot be wished away easily without addressing the in-depth causal factors. Needs or values are inherent in all human beings and go to the root of the conflict while interests and issues are superficial and do not go to the root of the conflict Mayer (2014). Consequently conflict resolution is that approach which prescribes an out-come based on mutual problem-sharing (Ubuntu communal sharing notion).This calls for conflicting parties cooperation, understanding and respect in order to redefine their conflict and their relationship whereas dispute settlement is an agreement over the issue(s) of the conflict which often involves a compromise and is power-based where the power relations keep changing thus turning the process into a contest of whose power will be dominant.

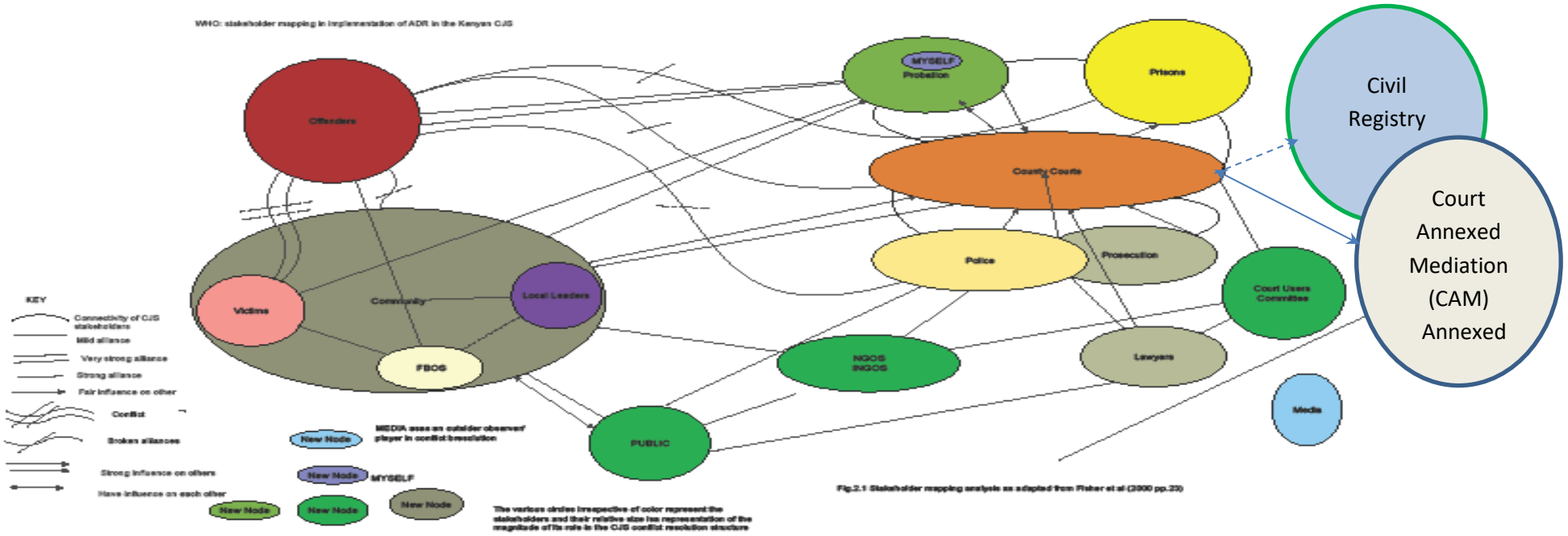


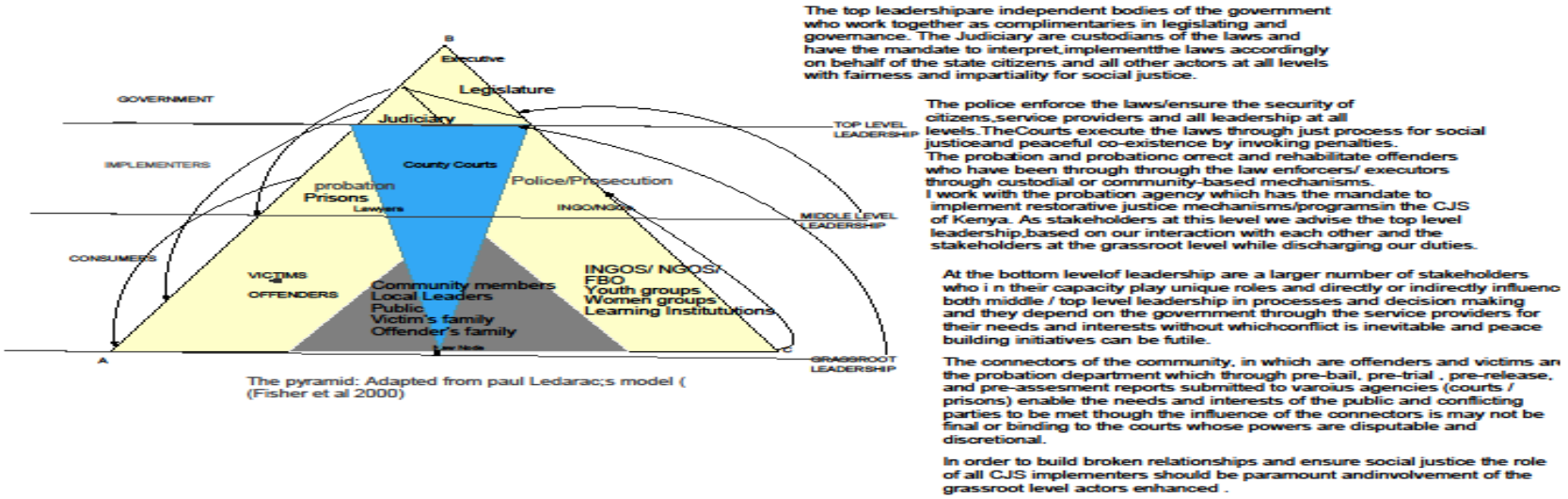
Figure 3.1 *Justice Stakeholder Map Showing the linkage, role and powers of the Kenyan Criminal/Civil Justice System-KCJS*

Source: *Judith N Mandillah (2021)*

The conflict levels in the justice sector is demonstrated in the pyramid model (Figure 3.2) as a tool was useful in identifying and analysing the various levels of power, power imbalances and how they interplay in the conflict at the three levels (Lisa 2013 & Fisher 2000). It identified the key stakeholders in the CJS and the influence each one had at every level of leadership.

At international levels organizations like World Bank, UNDP, and UNODC and INGOs play a key role of funding government initiatives toward good governance practices. Coupled with legal provisions ((International legal Instruments-Tokyo, Bangok, Mandela Rules, UN 1985 declaration on Victims) form a base for practice. The alliances for effective justice delivery are not a monopoly of the judiciary but also other actors. The linkages however become weak with the public who are the majority. Nevertheless, at the base where the public is the majority. The probation department's and mediator position (my place) at all levels of leadership is significant in influencing policy formulation and actualizing the implementation for the rule of law. At regional/ state, the systemic challenges/violence inhibit good governance and the rule of law as expected of them and the public is less involved in justice dispensation.

The Levels of Conflict



The pyramid: Adapted from paul Ledarac;s model ((Fisher et al 2000)

Fig. 3.2: The pyramid model showing the context of conflict in the Kenyan Justice System- KJS

Source: Judith N Mandillah (2017), adapted from Fisher et al 2000

In figure 3.2 it is observable that more power and authority is at the top where the public is at the receiving end in retributive justice systems. The rethink of justice dispensation as per the new models are inclined towards bottom up justice approach. The complexity of the processes, exclusion and limited knowledge on policies that have made justice evasive can be rejuvenated in application of restorative justice mechanisms alongside other methods. The rights of expression may be salvaged through mediation and reconciliatory processes rather than strict rules.

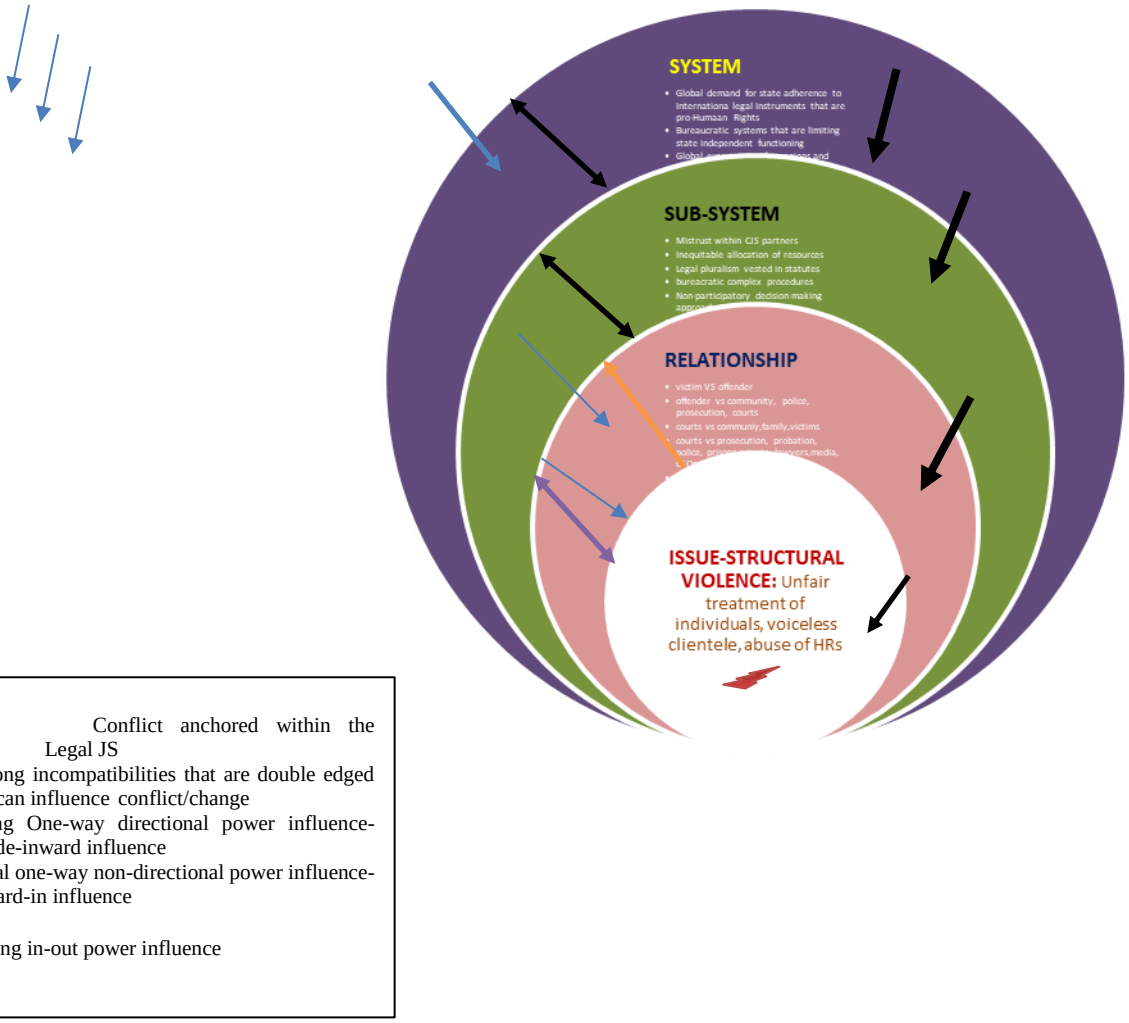


***Fig.3.3**: Dugan's nested model, showing the relationships that support conflict & influence use of RJ*

***Source:** Judith N Mandillah (2017), adapted from Fisher 2000*

In figure 3.3 the international powers are vested in their policies and any assistance (donations, aid, grants) towards reforms hence demand for loyalty. The post-colonial enslavement is revealed from creating spaces of dependency from global south countries.

The adoption of the African home-grown mechanisms like mediation, community-based offender supervision and rehabilitation reduces the dependency and power syndrome. At sub-system level, political interference, nepotism and corruption is rampant and has been limited by party's' willingness to address their own conflicts without interference from outside. At relational levels, where harm has broken relationships between people, the circle processes, payback through community work, bail assessment, VIS and probation orders communities have been empowered to manage their own affairs hence limited conflicts and crime incidence. The limitations leading to structural violence in colonial based justice systems were addressed with the constitutional provisions of the Bill of Rights and alternative justice application, the parties in the conflict are reconciled and win-win situation gotten given the space for free expression and inclusivity.

In table 3.1 and figure 3.4

Table 3.1: Table showing dividers, symptoms and connectors in CJS:
Adapted from CAPP, Lisa 2013

Dividers	Early warning signs of conflict/ symptoms	Connectors of peace or intervention opportunity indicators
Disjointed policies	-Increased criminal acts -confidence erosion in system	Awareness Increased use of RJ
Power Imbalance	-Arbitral arrests by police -Increase number incarcerated	- Capacity building -Increase advocacy
Attitudes	Parties refusal to accept mediation Less referrals	Increase awareness
Communication channels	Propaganda, appeals	Open communication channels
Cultural beliefs that foster violence	Increased GBV, Sexual assault	Demystify beliefs through education

Power imbalances and restorative justice

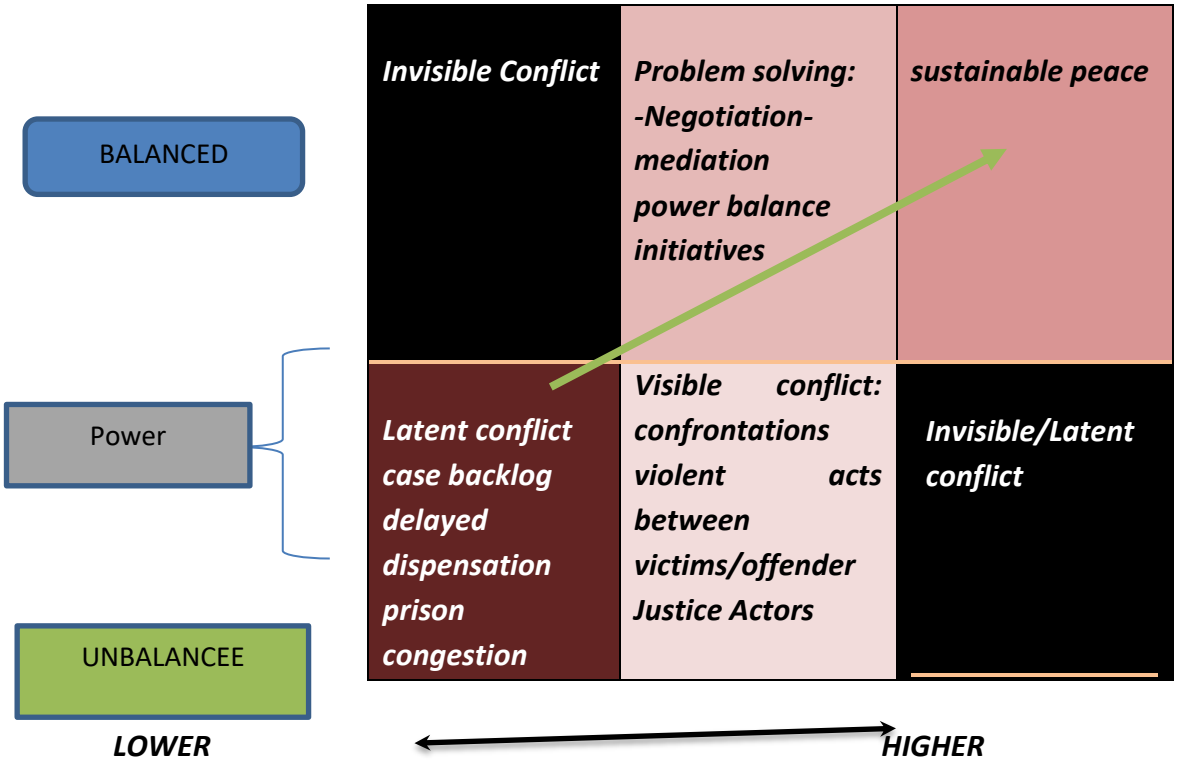


Fig.3.5: *The Curle model showing systems' levels of conflict*

Source: *Judith N. Mandillah (2017), Adapted from the Curle levels of conflict model*

Inference to Table 3.1 and figure 3.4 the power and means in the conflict is the manifest of the limitations within the criminal justice system that are invisible overtime and sometimes accepted as normal by the community/individuals until that time when individuals engage in visible conflict (destructive violent acts/crime) that it becomes societal concern to resolve and manage. In the process of resolving, for one reason or the other, the victims/offenders may experience unfair treatment from CJS agencies and more often than not their needs and expectations are rarely fulfilled. When victims are side-lined by the state (where the latter becomes victim) and the real victim is subjected to a humiliating long process as witness, this may culminate to revenge and further retaliation. Similarly, the inhumane procedures and harsh penalties meted on offenders can result into further retaliation. Nevertheless in cases where mediation is employed by courts referring matters for risk and needs assessment to probation officers, guaranteed peace has been registered. Through my encounter with the CJS stakeholders, it was evident that they are aware of their responsibilities in ensuring effective justice dispensation however institutional limitations, inadequate policy guidelines and none uniformity coordination of activities that emanate from scattered statutes remain dividers in the system.

My role in the justice conflict

Who am I in relation to the justice stakeholders and the conflict?

An advocate and implementer of restorative justice. The linkage role is a platform for influencing change in the system.
I will capitalize on my skills, long experience as probation officer, mediator, and therapist to empower communities/justice actors towards RJ in various spaces.

What past and present experiences drive my beliefs, values and inspiration to achieving my goal?

Forgiveness propels healing. I have personally experienced visible and invisible violence while seeking justice. This experience propels my passion to impart/practice RJ knowledge and skills to others and all spaces. Reflecting on the Ubuntu "I am Because You Are" motivates my social justice advocacy.

Why did I purpose to analyse the issue?

To inspire magistrates/Judges as leaders of justice towards restorative justice practice.

How do I use my means of power to address the CJS structural violence?

Through dialogue change attitudes. Through skills empower, mentor and coach. Focus on evidence-based initiatives, healing and influencing change in others.

Where do I fit on the perimeters of the issue on the basis of my understanding of the context?

I fully understand the micro and macro levels of the systemic violence hence able to inform change through research, policy and academia.

When should I intervene to address the issue? Immediately

Conclusion

The post-colonial rejuvenated justice models are void of the drivers to systemic violence like power imbalance, inadequate resources, cultural beliefs and many other**.** This has been enabled by communities understanding the richness in their culture and reverting back to the traditional conflict management mechanisms like mediation. While some elements of retributive mechanisms still exist, the journey towards actualization of restorative justice is strong given the constitutional provisions of RJ.

Ubuntu philosophy influences probation and CAM in various ways. The stakeholder mapping and Dugan's models demonstrated the power levels and their influence on justice (Fisher et al, 2000). For instance, through probation and mediators though strategically (linkage role) on the map as an implementer of restorative justice, they remained inferior and dependant on court directions with only 15% referral intake of the 1646 criminal matters registered. The models though on upward trend and benefits the practice does not fully utilize the tenets of the Ubuntu and RJ values.

The challenges impeding operations of RJ are not limited to systemic inadequacies but attitudes of both practitioners and the public. In ensuring change, morning public briefings at the court grounds and outdoor public sensitization forums have come in handy. Advocates and demand for probation intervention by the courts/public for information that influence court decisions have been overwhelming.

The constitution (2010) envisages the rule of law whose guarantee lies in restorative justice application. Access to justice imperatives to wit: expeditious; proportionality; equality; fairness; party autonomy; cost-effectiveness; satisfaction and inclusivity, all of which are found in RJ practices abated by the Ubuntu ideology.

The judiciary is the pillar of justice in terms of mandate and decision-making as it actualizes law enforcement, prosecution and corrections through maintaining of the law. In this case, police, prosecution and probation play subordinate roles in justice dispensation so does the community and disputants.

The conflict tree, figure 2.1 and table 3.1 as a lenses identified the symptoms, causes and impact of retributive justice and thus the gaps in the implementation of the restorative justice models: probation and CAM (Lisa 2013-pg 123). Important is that the justice system actors' limitations hinder effective justice delivery and may lead to infringement of human rights. To address the limitations, there has been deliberate efforts for advocacy and community awareness initiatives carried out by the court users' committee across the country.

Systems' piecemeal application of RJ that have strong values in cultural practices need to be prioritized at all levels of systems. Cases of interest lie in the minimal arbitral arrests,

witness protection and inclusivity forums created within probation and mediation spaces. Inauguration and expansion of CAM model in 2016 by the judiciary envisages a completely separate community driven mediation and void of court interference as this will minimize people's suffering, socio-economically, emotionally and psychologically.

Recommendations

To actualise the home-grown Ubuntu philosophy, there must be healthy spaces for inclusivity, freedom of expression, reciprocity, dignity, humanity and mutuality of interest to recover, reconstruct and restore communism with justice (Kinyanjui 2010). This means that the system should endeavour to maintain identity and interconnectedness hence a need to re-think contemporary justice operations.

While the models are in operational, matters pending and/or being handled retributively need to be diverted to RJ methods for justice.

Government should purpose to invest in policies and community peace structures than in retributivism.

The learning institutions at all levels should engage and impart knowledge and skills in restorative justice models of peace building and crime prevention.

Reference

Fisher et al (2000), Working with Conflict: skills and Strategies for Action. Zed Books, Birmingham UK & New York USA.

Kendagor C (2017), The Judiciary Court Annexed Mediation, *"A Solution by You for You".* A Paper presented to ISPAK professional Forum, Mombasa; 1st March 2017.

Kinyanjui S M (2010) Restorative Justice in Traditional Pre-colonial Criminal Justice Systems' in Kenya, Tribal Law Journal, accessed on http://lawschool.unm.edu/tlj/volumes/vol10/Kinyanjui.pdf

Laden M T, (2013), "Towards Complementarity in African Conflict Management Mechanisms". Retrieved 18/7/2016 http://mtladen.blogspot.com

Lisa S (2013), Conflict assessment & Peacebuilding Planning: Toward a Participatory Approach to Human Security. Kumarian Press, Boulder, London.

Mayer B S (2012), The Dynamics of Conflict: A Guide to Engagement and Intervention (2nd ed.), Bossy-Bass Sanfrancisco.

National council for Administration of Justice –NCAJ, (2012-2016) Judicial Annual Report LRI Nairobi, Kenya.

Obondi C. A, O (2010), *"Effective Resettlement of Offenders by Strengthening "Community Reintegration Factors*": Kenya's Experience, 145th International Training Course – Participants and Observers Papers, Resource Material

United Nations Development Programme-UNDP, (2005); Programming for Justice: Access for All. A Practitioners Guide to a Human Rights-Based Approach to Access to Justice.

Zehr H, (2015), The Little Book of Restorative Justice. Good Books, Virginia, USA.

JSRC, (2001), "Recommendations of the Judicial System Reform Council: For a Justice System to support Japan in the 21st Century". Downloaded; http://www.kantei.go.jp/foreign/judiciary

Intersectionality and Sexual Violence in the Rwandan Genocide

Tamikani Jessie Nkhata

Abstract

Thus far, research and prosecution of sexual violence in wars and genocides has not extensively included nor applied the intersectional theory. This presents a problem as it decontextualizes the unique experiences of women in these genocides and confounds their converging oppressions and the hierarchies of power that critically influence their weaponization in wars or genocides. The application of the intersectional theory to the experiences of sexual violence by Tutsi women in the Rwandan genocide points to the vilification and weaponization of Tutsi women in order to destroy the social fabric of the Tutsi community. Intersectionality uncovers a connection between the translation of converging oppression in the Tutsi woman's life and their manifestation into the family or ethnic group from which the woman belongs.

Approximately "1 million Tutsis and moderate Hutus" were killed in a 100-day rampage known as the Rwandan genocide (Denov et al, 2017, p.3288). This genocide was officially ignited by the assassination of the Rwandan president and the Burundian president on the 6th of April 1994. The Hutu elites and militants blamed the assassination on the Tutsi-run Rwandan Patriotic Front (Denov et al., 2017). The genocide was planned and directed by the "Akazu (meaning "little house") and enacted by the militia known as the Interahamwe and the Presidential Guard (Denov et al, 2017, p.2). The genocide was a well-oiled machine that involved every level of society, including civilians, political and military leaders, and the media (Denov et al., 2017, p.2). The leaders of the genocide passed down orders to kill all Tutsi and any sympathizers as well. These killings spread across Rwanda and were coupled with different forms of sexual violence such as sexual mutilation, individual rape, gang rape, rape with objects, or sexual slavery.

Before the Rwandan genocide, sexual violence was regarded as a spoil of war, utterly unrelated to the militants' motives or interests. Additionally, academics ignored the meticulous work of sexual violence to translate its victims' shame and experience into the community. Also, it created a gap between empirical evidence and the cultural frameworks and realities that allow for women's successful weaponization and a perpetual attack on the woman's community. This perspective marginalized and decontextualized the experiences of

the victims of sexual violence. It established a reductionist Eurocentric perspective that has continuously been entrenched into most research and policy of sexual violence in genocides.

In Rwanda's context, such a perspective also eliminates the behemothic influence of colonial structures and forces that have distorted and exploited traditional hierarchies of power. There is a "danger in a single story" that strictly propagates logistical factors but does not see the implications of excluding a community's hierarchy of power and the resulting intersections of social categorizations or converging oppressions such as class, gender, and ethnicity (Adichie, 2009). Genocides are geographically diverse, and a strictly Eurocentric perspective in this field silences the voices of the women it wishes to highlight. Across all boards, nothing can be done to sustainably challenge the occurrence of sexual violence in genocide or support the women affected without fully understanding how or why sexual violence occurs in that context.

The end of the twentieth century introduced the development of a theoretical framework coined by Kimberlee Crenshaw known as intersectionality, which emphasized the importance of contextualization and the consideration of the ways in which intersecting identities such as gender or ethnicity in a given context influence the way in which we experience events. Crenshaw recognized the importance of ensuring that these intersecting identities were not studied or analyzed in isolation but in conjunction (Crenshaw, 1991). Unfortunately, the theoretical framework has not been meaningfully implemented in the research or policy of sexual violence in genocide. This essay will look at how intersectionality explains the use of sexual violence against Tutsi women in the Rwandan Genocide and its effect on the Tutsi population. The essay will argue that the application of the intersectional theory to the experiences of sexual violence by Tutsi women in the Rwandan genocide point to the vilification and weaponization of Tutsi women in order to destroy the social fabric of the Tutsi community. Intersectionality uncovers a connection between the translation of converging oppressions in the Tutsi woman's life and their manifestation into the family or ethnic group to which they belong.

The essay unfolds in five sections, each drawing from and expanding upon Crenshaw's theoretical framework of intersectionality. The sections will include an in-depth historical background of sexual violence as a weapon of war, intersectionality, and social hierarchies of power in the context of Rwanda. Finally, sections will include an analysis of patrilineage and women's gender roles in Rwanda and the unique vilification of Tutsi women through gender hate propaganda before the genocide. This will work to show the factors that propelled the weaponization of Tutsi women in the genocide and the reasons why sexual violence was so successful in causing destruction in the Tutsi community.

Background

The occurrence of sexual violence in conflicts is not a new phenomenon. However, it was not until 1992, in the thick of the Bosnian genocide, that the international community saw sexual

violence as a strategic weapon of war and genocide due to the systematic and organized nature of Muslim women's sexual violence. This recognition led to the development of International Criminal Tribunals for the former Yugoslavia and Rwanda, which would prosecute those who oversaw and enacted "mass rape and systemic sexual violence" (Koomen, 2013, p.255). However, regardless of this milestone, research and policy continue to be influenced by pre-1992 reductionist Eurocentric perspectives such as "The sexed story" and the "gendered story" (Baaz & Stern, 2012, p.17). These early theorizations of sexual violence in conflicts set a tone for research and policy that would strictly focus on one-dimensional explanations of the prolific nature of sexual violence. These theories uncover research gaps in acknowledging the converging identities of women who experience sexual violence in genocide.

The "sexed story" is framed by the Biological Urge/Substitution Theory which contains two arguments. The first argument characterizes sexual violence as "integral to warring" as genocides and wars are "enacted by men and men" are naturally "subject to their biologically driven heterosexual needs" which drive them to rape (Baaz & Stern, 2012, p.17). The second level of this argument develops the proposition further through the substitution theory, which states that when these biological needs are not met in the context of war, sexual violence acts as a substitution for "normal access to women" (Baaz & Stern, 2012, p.17). Therefore, the pattern of "recreational rape" by soldiers results from the soldier's lack of free and willing sexual partners (Baaz & Stern, 2012, p.17). The sexed story finds its anchor in a belief system about predestined gender roles that render male heterosexuality uncontrollable. This theory normalizes and "depoliticizes rape in war and waylays efforts to stop its occurrence" (Baaz & Stern & Stern, 2012, p.19).

Critics of the sexed story argument redirected the conversation of sexual violence towards the "gendered theory". This theory focuses on the "hierarchical power relationship between men and women" and establishes a clear-cut distinction between masculinity and femininity (Skjelsbaek, 2001, p.218). In this case, masculinity is associated with "protecting, warring and killing" while femininity relegates women to silent victims who need protection (Baaz & Stern, 2012, p.20). Sexual violence such as gang rape acts as informal socialization for combatants to develop a united group and become militaristic masculine men (Wood, 2009, p.138). Sexual violence kills the "women" in the soldiers who aim to "live up to the myths of militarized manhood" (Baaz & Stern, 2012, p.20). This process breaks individual combatants down to group members with a strong allegiance to one another and an unquestioned "and coordinated obedience to commanding officers" which would be useful in conflict (Wood, 2009, p.138). The gendered story argues that perpetrators of sexual violence are "gendered as masculine" and militaristic masculinity is something they are socialized into (Baaz & Stern, 2012, p.21)

The danger of the "gendered story" and the "sexed story" is that both theories eliminate the destructive effects of sexual violence in the woman's life and the life of her

community. The theories function to confine the experiences and effects of sexual violence to the conflict itself and not beyond this. Remnants of the gendered and sexed story are constantly reframed in a majority of research and policy today. Although there is the acknowledgment of the effects of converging forms of oppression such as race, gender and ethnicity, as characterized by unique power relations, these different factors are still perceived and studied as separate and non-converging entities. Sexual violence in genocides entrenches itself alongside the social framework and realities in which it functions. Therefore, sexual violence occurs as a direct attack and exploitation of these victimized women's converging identities. Additionally, the experience of sexual violence by women in genocide is informed by their place in the social hierarchy according to their race, ethnicity, class, or gender and is characterized by the interests of the genocidaires. Without these considerations, policy and research will continuously try to identity a single surface level cause and analysis of sexual violence that can easily be replicated in different contexts where sexual violence occurs.

This works to generalize the experiences, impacts, and legacies of sexual violence across all genocides and ignores the context in which they occur. In the context of the Rwandan genocide, a majority of research has ignored the converging oppressions that functioned in the context of a patrilineal society and a society with ethnic and class tensions heavily influenced by colonialism. These realities formed the Tutsi women's identities and experiences before, during, and after the genocide. Research and policy must adopt the theory of intersectionality to expand on how sexual violence weaponizes women from targeted communities who function and are victimized in the confines and expectations of their culture, ethnicity, race, class, or gender.

Explanation of Intersectionality

Kimberlee Crenshaw pushed forward intersectionality as a rebuttal against movements, policies, and research that function to analyze violence against women of color through a one-dimensional lens. The one-dimensional approach supports "monistic definitions" and explanations of sexual violence, "which define sex" ethnicity and class "as mutually exclusive categories" and therefore characterize the "simultaneous experience" of factors in sexual violence as "invisible" (Carasthathis, 2014, p. 306). Intersectionality challenges this and "[conceptualizes] the relation between systems of oppression which construct our multiple identities and our social locations in hierarchies of power and privilege" (Carasathis, 2014, p.304). The framework shows that if we understand these women's converging oppressions, we can understand why sexual violence is more than a spoil of war and how it ultimately affects the whole population. In her 1991 essay "Mapping the Margins," Crenshaw highlights three components of the definition of intersectionality, which include structural, political, and representational intersectionality. Political Intersectionality works as a critic of the reductionist research and policies that have been developed to explain sexual violence in the Rwandan genocide. Political intersectionality focuses on "the fact that women of color are

situated within at least two subordinated groups" which are often analyzed separately and, in this way, "one analysis often implicitly denies the validity of the other" (Crenshaw, 1991, p. 1251). Intersectionality explains that when ethnic, gender and class "factors are examined in the context of rape, intersectionality" can be a tool to "map the ways in which" ethnic and class tensions and patriarchal societies have influenced "conceptualizations of rape" to outline the "unique vulnerability" of Tutsi women "to these converging systems of domination (Crenshaw, 1991, p.1266).

Crenshaw outlined structural intersectionality as a focus on how factors such as classism, racism, and ethnic tensions intersect and oppress women of color and influence their experiences in various areas. In the context of the Rwandan genocide, structural intersectionality recognizes the "ways in which the location of women of color at the intersection of" gender, class, and ethnicity make their experience of sexual violence "qualitatively different than that of" Hutu women (Crenshaw, 1991, p.1245). Structural intersectionality highlights the institutionalization of the vilification and sexualization of Rwandan Tutsi women compared to the glorification of Hutu women in the Hutu 10 commandments, which normalized and justified sexual violence against them.

Representational intersectionality focuses on the "production of images of women of color" prompted by "sexist and racist narrative tropes" which marginalize women of color (Carasathis, 2014, p.304). In the Rwandan genocide, representational intersectionality focuses on the "cultural construction" of Tutsi women in a patriarchal society that regards women as second-class citizens and in a society in which colonial influences confound ethnic and class tensions (Crenshaw, 1991, p.1245). The definition brings light to how the development of images of Tutsi women collaborate with "prevalent [stereotypical] narratives" of gender, ethnicity, and ethnicity, which weaponize and objectify Tutsi women (Crenshaw, 1991, p.1283). Crenshaw argues that there is a "possible [connection] between these images and the tolerance of violence against women" as seen with structural intersectionality (Crenshaw, 1991, p.1285).

Class and ethnic relations in pre-colonial Rwanda

The application of intersectionality highlights the historical contexts and backgrounds in which the intersecting identities of Tutsi women function. The Rwandan genocide was centered around the Tutsi/Hutu dynamic, which was mainly characterized by "the complex interaction of class and ethnicity" influenced by western colonial powers (Smith, 1995, p.58). In pre-colonial Rwanda, the Tutsi were a "ruling nobility" while the Hutu were "[subjects"] or "[servants]" (Smith, 1995, p.60). This created a "class dichotomy," which was then cemented in the colonial period (Smith, 1995, p.60). Colonial forces exploited the class divisions and confounded them with "a more rigid ethnic or racial interpretation of such identity groups" (Hintjens, 1999, p.250).

The "European religious and racial value system" lent itself to the restructuring of the Rwandan social hierarchy (Hintjens, 1999, p.253). Relations between the Hutus and Tutsis were racialized and characterized the Tutsi's as superior as they were "bronze Caucasians" due to their slightly Eurocentric features while the Hutu were just "Black Africans" and were thus inferior (Smith, 1995, p.60). This new social structure introduced policies that would heavily marginalize the Hutus and benefit the Tutsis. Every aspect of society was restructured due to the racialized class divisions, which emphasized Tutsi superiority. Class and ethnicity converged, and this conjunction would prove to be a heavily dynamic entity that would continuously be exploited. Tutsis and Hutus internalized the preaching of otherness and saw one another as distinct. Colonial preferential treatment would swing towards the Hutus, who would eventually revolt and gain power.

The Hutu elite saw themselves as the "only authentic indigenous leadership of Rwanda" and wished to end the power and influence of the Tutsis (Hintjens, 1999, p.254). A switch in power relations characterized the once superior Tutsis as "lazy, parasitic" invaders (Hintjens, 1999, p.255). The Hutus continuously painted the Tutsi as tyrannous and would begin a campaign to marginalize and repress them in society. The Hutu elite was convinced that the entire Tutsi community and their allies must be eradicated in order to eliminate the possibilities of a return to colonial Rwanda, which would threaten the newly established Rwandan Hutu majority (Hintjens, 1999, p.261). Hatred and distrust of the Tutsis were proliferated by hate speech and campaigns and propaganda. A popular Rwandan newspaper called the Kangura created the Hutu Ten Commandments and marginalized the Tutsis as "cockroaches" and "snakes" (Nikuze, 2014, p.1094). This instigation period saw the official introduction of intersections between gender, class, and ethnicity of Tutsi women. Through gender hate propaganda and the spread of old-age stereotypes, Tutsi women were treated and represented differently than Hutu women. There was the institutionalization of their vilification and sexualization by the Hutu 10 commandments, which represented them through "sexist and racist tropes" (Carasathis, 2014, p.304). The formation of class and ethnic tensions influenced the relationship between the Tutsi and Hutus and the social location of Tutsi women in the social hierarchy of Rwanda.

Patrilineage and Women's gender roles

Intersectionality points to the converging oppressions of gender, ethnicity, and class of Tutsi women in a culture primarily characterized by patrilineage, traditional perceptions of women and ethnic and class tensions. The consideration of patrilineage and women's gender roles in Rwanda's context enables us to map the social location of Tutsi women in the social hierarchy of Rwanda and conceptualize what occurs when gender meets with class and ethnicity. In pre-colonial Rwanda, patrilineage was the "fundamental structuring element of society" and worked as an institution that oversaw the community's socio-economic sectors and implemented a safety net for everyone in the community (Burnet, 2012, p.100).

This patrilineal kinship system influenced the social locations of different members of society. Due to this, all women and children got their "social identities and rights to land from the men to whom they were related" (Burnet, 2012, p.100). Therefore, women extensively relied on the men in their families to determine their place in society and children acquired the ethnicity and identity of their father and not their mother. Women were seen as "the economic, spiritual, and moral center of" their communities (Burnet, 2012, p.101). Women gained great honor and drew power from their role as image-bearers and cultural upholders through "productive and reproductive capacities and from the protection of their patrilineage" (Burnet, 2012, p.101).

By 1994, women were seen as second-class citizens and categorized as "legal minors [under] the guardianship of fathers, brothers, husbands or sons," and so were not free to make any decisions without a man's approval (Burnet, 2012, p.102). Women's gender roles were influenced by the expectation of women being able to "uphold a cultural model of the "modest virgin" and ignore sexual urges (Burnet, 2012, p.105). A woman's identity was woven into the community's social fabric showing that a deviation from the role of a "modest virgin" or an attack on a woman's gender roles would eventually affect the community as well (Burnet, 2012, p.105). In the Rwandan genocide, intersectionality works to culminate all the intersections of a Tutsi woman's identity as influenced by social structures and points us to the way in which the resulting social location led to their vilification and weaponization. Sexual violence was used to advance the Hutu extremists' interests by exploiting the social structures that purported otherness or marginalization.

Vilification and Sexualization

The vilification and weaponization of Tutsi women in the genocide was influenced and institutionalized by gender hate propaganda. Through representational intersectionality we see an and establishment of strong stereotypes and negative images of Tutsi women that went against the gender roles and expectations that all Rwandan women were meant to uphold and fulfill. This gender hate propaganda worked to cement a divide between what it meant to be a woman in Rwandan society as a Hutu or a Tutsi. There was the belief that "Tutsi women were made for sexuality and beauty" (Nowrojee, 1996, p.14). Tutsi women were seen as more beautiful than the Hutu women and unattainable, "which bred hate against them" (Nowrojee, 1996, p.14). In the years before the genocide, gender hate propaganda cemented a stereotype that portrayed Tutsi women "as arrogant and looking down on Hutu men" whom they believed were inferior to them (Nowrojee, 1996, p.12). Gender hate propaganda was used to sexualize Tutsi women and normalize the sexual violence that would eventually be enacted against them as "retribution for long-standing grievances" and tensions (Wood, 2006, p.327).

Structural intersectionality points to the institutionalization of the vilification and sexualization of Tutsi women through the Hutu 10 commandments. In these commandments,

Tutsi women were specifically targeted and weaponized as "sexual infiltrators" working as "pistols" for the end goal of Tutsi domination (Green, 2002, p.1). Three of the commandments focused on the demonization of Tutsi women and prohibited intermarriage between Tutsis and Hutus. Marriage with a Tutsi was not tolerated and was seen as traitorous. The commandment was a manifestation of othering between Tutsi women and Hutu women. Another commandment portrayed Hutu women as the Hutu community's virtuous moral centers who would protect Hutu men and the Hutu community from the hypersexual Tutsi women. These commandments are tied to post-independence Rwandan society where "Rwandan Hutu political elite" would often "choose wealthy Tutsi women" as wives or "mistresses (Hintjens, 1999, p.250). This created an "undercurrent of sexual jealously and resentment" and many believed these women were evil seductresses working to exploit the Hutu elite (Hintjens, 1999, p.250).

Tutsi women were also sexualized through cartoons, which reinforced the image of them as "sexual infiltrators" (Green, 2002, p.1). There was a cartoon released that "portrayed Tutsi women in sexual positions with various politicians" and also portrayed "using their sexual prowess on UN peacekeepers," such as General Romeo Dallaire, who was drawn with undressed Tutsi women (Nowrojee, 1996, p.17). Gender hate propaganda vilified Tutsi women and consistently portrayed them as sexual objects. The portrayals and the eventual experiences of sexual violence would work as an attack on the community's image-bearers. Gender hate propaganda was a tool to humiliate Tutsi women and permanently shatter their position and image in society.

Situating the sexual violence in Rwanda

Approximately "350,000 Rwandan women and girls" experienced sexual violence in the Rwandan genocide in 1994 (Denov et al, 2017, p.3289). Widespread sexual violence was encouraged and enacted by Interahamwe, the Rwandan Armed Forces, and the presidential guards (Denov et al., 2019). They created an environment in which sexual violence was normalized and allowed for Hutus to reclaim power. In the genocide, the forms of sexual violence included individual rape, gang rape, rape with objects, sexual mutilation, public rapes, rape of corpses, and multiple rapes (Nowrojee, 1996). The sexual violence would ingrain shame into the Tutsi community that would be reaped continuously after the genocide by victimized women and their communities. Hutu extremists vilified and weaponized Tutsi women as hypersexual tools used by Tutsi men to confused Hutu men and destroy the Hutu community. Hutu extremists aimed to take control of this narrative and manipulated this ideology further by weaponizing Tutsi women through sexual violence and using them to obliterate the Tutsi community as a whole. Sexual violence "[dehumanized] and [subjugated] all Tutsi" and furthered the Hutu extremists' interests to eliminate the Tutsi and destroy any ideologies of Tutsi superiority (Nowrojee, 1996, p.2).

Intersectionality draws out Tutsi women's experiences in a culture characterized by traditional perceptions of women and the sexualization of their existence. Sexual violence was successful in the genocide because it entrenched itself in cultural gender roles and norms that determined women's sexual virtue. In Rwandan society, women were expected to "uphold a cultural model of the "modest virgin," and their identities were woven into the community's social fabric (Burnet, 2012, p.105). Therefore, women were representatives of their community, and gender hate propaganda worked to vilify the Tutsi community through their women's vilification and the establishment of a divide between what it meant to be a woman and a Tutsi and a woman and a Hutu.

Sexual violence worked to challenge any ideas of the Tutsi community being superior, and this was done by challenging ideologies of Tutsi women being powerful and unattainable "sexual infiltrators" (Green, 2002, p.1). Additionally, the enactment of sexual violence portrayed the successful campaign of sexualizing Tutsi women. In a testimonial account, a Tutsi woman named Alexia who was once married to a Hutu man states that she was "forced by the Interahamwe to undress and ordered to run and do exercises "in order to display the thighs of Tutsi women" (Russell-Brown, 2003, p. 372). Whilst being raped in the same incident an Interahamwe stated "let us now see what the vagina of a Tutsi women takes [sic] like" (Russell-Brown, 2003, p.373). Many survivors of sexual violence recount hearing their attackers say "we want to see if a Tutsi woman is like a Hutu woman" or "we want to see how sweet Tutsi women are" or "you Tutsi women think that you are too good for us" and "you Tutsi girls are too proud" (Nowrojee, 1996, p.14). There was the "sexualized representation of ethnic identity" and this highlights the way which factors such as gender, class and ethnicity made Tutsi women's experience of sexual violence unique (Russell-Brown, 2003, p. 373).

Hutu militants frequently carried out rape and gang rapes of Tutsi women in public spaces "in front of family and community members," leading to detrimental levels of embarrassment and shame (Denov et al., 2018, p.705). When women were killed right after they were raped, they were often left with their legs splayed apart, and the militia would even "[rape] the corpses of women they had just killed or women who had been left for dead" (Nowrojee, 1996, p. 24). The disregard for Tutsi women's dignity and their belief in the characterization of Tutsi women enabled the Hutu militants to dehumanize the Tutsi women and enforce shame.

Women who were held in sexual slavery collectively or individually were subjected to rape or gang rape by a militia group in order to "sexually service" them (Nowrojee, 1996, p.31). In individual sexual slavery, the women were held in forced marriages and were called "women of the ceiling" as they were hidden in ceilings. Individual Sexual slavery was provided as an alternative to death by Hutu militants, and many women consciously remained in the situation in order to preserve their lives (Nowrojee, 1996, p.33). A testimonial account by a woman called Nadia details her experiences in individual sexual slavery where the man who

held her would come to her “five times” and threaten her with death if she did not submit to his sexual advances. Many women felt shame in this form of sexual violence and believed that being “taken as a wife” in such a way was “a form of death” (Nowrojee, 1996, p. 35). In these cases, Militants would rationalize sexual violence as a way to humiliate proud Tutsi women and would also brag to others that they had finally seen “how Tutsi look” (Nowrojee, 1996, p.36).

When Tutsi women experienced rape and mutilation, it often involved “the mutilation of sexual organs” (Nowrojee, 1999, p.37). The mutilation of sexual organs included “the pouring of boiling water into the vagina” and the “cutting off breasts” (Nowrojee, 1996, p.37). Hutu extremists directly assaulted the Tutsi ethnicity of many Tutsi women and specifically mutilated “features held to be characteristic of the Tutsi ethnic group” such as long fingers and thin noses (Nowrojee, 1996, p. 37). The experiences of Tutsi women in the genocide emphasized the delicate connection that exists between the translation of intersecting points of identity in the Tutsi woman’s life, such as gender, ethnicity, and class, and their translation into the Tutsi community as a whole.

The legacies of sexual violence

Tutsi women were sexualized and weaponized to advance the Hutu extremists’ interests to gouge out existing ideologies of Tutsi superiority. The impacts and legacies of sexual violence were far-reaching and were intimately connected to intersections between Rwanda’s general patrilineal society, standards of gender set up for women, and class and ethnic relations. The campaign’s success against Tutsi women was conflagrated by the eventual internalization and permeation of Hutu extremists’ narratives spread about the Tutsi women and the Tutsi community. After the genocide, many rape survivors saw themselves as “dirty and morally inferior,” and their community believed that they had survived and betrayed their community by allowing the Hutu militants to rape them (Brysiewicz & Mukamana, 2008, p.383).

The community characterized them as loose women, and the victims likened themselves to a “prostitute” as an indication of the embarrassment they felt due to the sexual violence (Brysiewicz & Mukamana, 2008, p.383). These women felt that they had deviated away from the roles that they were supposed to assume as women in Rwandan society. Sexual violence restructured the “social interactions between the rape survivors and their community members,” and the women incurred immense dishonor and were often ousted from their families or communities ((Brysiewicz & Mukamana, 2008, p.382). Hutu extremists imploded the Tutsi group from the inside out and attacked the social cohesion of the group.

Intersectionality emphasizes the vilification and weaponization of Tutsi women, which destroyed the Tutsi community’s social fabric. In the Rwandan genocide, sexual violence was productive to the interests of the Hutu extremists, and the forms of sexual violence used were chosen to topple and denigrate any ideologies of Tutsi women or the Tutsi community as superior in class or ethnicity. Additionally, sexual violence allowed the Hutu extremists to

weaponize the Tutsi women in more brutal ways and restructure their roles as "sexual infiltrators dedicated to humiliating Hutu men and furthering Tutsi dominance" (Green, 2002, p.1). The intersectional theory places the different forms of sexual violence used and the interests of the genocidaires in the genocide against the backdrop of the social characterizations of class, gender, and ethnicity. The theory outlines the dynamic between class, ethnicity, and gender of the Tutsi women in the genocide.

Divisions in the community were aggravated by the introduction of children born of rape, who are often called "little killers" and "children of hate" (Denov et al., 2017, p.3293). These children were characterized as "[illegitimate] and were marginalized due to their "biological association with the "enemy" (Denov et al., 2017, p.3290). Some of these children are never truly accepted in their mother's community, and their existence is ensnared "within the father's status as an "enemy,"…, or ethnic "other" (Denov et al., 2017, p.3292). Patrilineage in Rwanda ensured that the child would adopt the ethnicity and identity of their Hutu father. Therefore, their existence and identities as Hutu children born of a Tutsi woman in a Tutsi community turned them into emblems of the successful infiltration and "[subjugation]" of the Tutsi community as a whole (Nowrojee, 1996, p.2).

The experience of sexual violence in the genocide by Tutsi women was characterized by the stereotypes purported by the gender hate propaganda and the "irreducible dimensions" of class and ethnicity that developed over time (Smith, 1995, p.58). Tutsi women were vilified and sexualized as an attack on their superiority and roles in society, and sexual violence worked as a tool for Hutu extremists to obstruct Tutsi women's prowess and the dominance and threat of the Tutsi community. The enactment of sexual violence attacked the Tutsi community's social cohesion through stigmatization and children born of rape. When analyzing the use of sexual violence in genocides and its implications in the community that is affected, more needs to be done to apply intersectionality and avoid generalizing the unique experiences of the individual women and the community. The implementation of intersectionality allows for contextualization and the consideration of factors that allow for the successful use of sexual violence. Intersectionality goes beyond the confines of the genocide itself to analyze the social hierarchies of power that existed before the genocide and how they influenced people's identities and places in society. Without intersectionality there are significant blind spots when researching and prosecuting sexual violence in genocide as nothing is done to understand the context and unique realities of the women who experience sexual violence in wars and genocides.

References

Adichie, C. N. (2009). *The danger of a single story* [Video]. Ted Conferences. https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story/up-next?language=en.

Baaz, M. E., & Stern, M. (2013). *Sexual violence as a weapon of war? problems in the Congo and beyond* (Africa now (Zed Books)). London; New York: Zed Books.

Baines, E. (2003). Body Politics and the Rwandan Crisis. *Third World Quarterly, 24*(3), 479-493. Retrieved from http://www.jstor.org/stable/3993381.

Burnet, J. (2012). Situating Sexual Violence in Rwanda (1990-2001): Sexual Agency, Sexual Consent, and the Political Economy of War. *African Studies Review, 55*(2), 97-118. Retrieved from www.jstor.org/stable/43904824

Carastathis, A. (2014). The Concept of Intersectionality in Feminist Theory. *Philosophy Compass, 9*(5), 304-314.

Crenshaw, K. (1991). Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. *Stanford Law Review, 43*(6), 1241-1299. doi:10.2307/1229039

Denov, M., Woolner, L., Bahati, J. P., Nsuki, P., & Shyaka, O. (2017). The Intergenerational Legacy of Genocidal Rape: The Realities and Perspectives of Children Born of the Rwandan Genocide. *Journal of Interpersonal Violence*, 088626051770840. doi: 10.1177/0886260517708407

Fox, N. (2011). "OH, DID THE WOMEN SUFFER, THEY SUFFERED SO MUCH:" Impacts of Gendered based violence on Kinship Networks in Rwanda. *International Journal of Sociology of the Family, 37*(2), 279-305. Retrieved, from http://www.jstor.org/stable/23028814.

Green, L. L. (2002). Gender hate propaganda and sexual violence in the Rwanda genocide: Argument for intersectionality in international law. *Columbia Human Rights Law Review, 33*(3), 733.

Hintjens, H. (1999). Explaining the 1994 Genocide in Rwanda. *The Journal of Modern African Studies, 37*(2), 241-286. Retrieved from http://www.jstor.org/stable/161847

Koomen, J. (2013). “Without These Women, the Tribunal Cannot Do Anything”: The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda. *Signs, 38*(2), 253-277. doi:10.1086/667200

Mukamana, D.,& Brysiewicz, P. (2008), The Lived Experience of Genocide Rape Survivors in Rwanda*. Journal of Nursing Scholarship, 40: 379-384*. doi:10.1111/j.1547-5069.2008.00253.x.

Mullins, C. (2009). 'WE ARE GOING TO RAPE YOU AND TASTE TUTSI WOMEN': Rape during the 1994 Rwandan Genocide. *The British Journal of Criminology, 49*(6), 719-735. Retrieved from www.jstor.org/stable/23639596

Nikuze, D. (2014). The Genocide against the Tutsi in Rwanda: Origin, cause, implementation, conseuenes, and the post-genocide era. *International Journal of Development and Sustainability, 3(5), 1086-1098.* Retrieved from https://francegenocidetutsi.org/NikuzeGenocideTutsi.pdf.

Nowrojee, B. (1996). *Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath*. United States: Human Rights Watch.

Russell-Brown, L.S. (2003). Rape as an Act f Genocide. *Berkeley Journal of International Law, 21(350), 350-374*. Retrieved from https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1241&context=bjil.

Skjelsbæk, I. (2001). Sexual Violence and War: Mapping out a Complex Relationship. *European Journal of International Relations, 7*(2), 211-237. doi:10.1177/1354066101007002003.

Taylor, C. (1999). A Gendered Genocide: Tutsi Women and Hutu Extremists in the 1994 Rwanda Genocide. *Political and Legal Anthropology Review, 22*(1), 42-54. Retrieved from http://www.jstor.org/stable/24510845.

Wood, E. J. (2009). Armed Groups and Sexual Violence: When Is Wartime Rape Rare? *Politics & Society, 37*(1), 131-161.

Power Politics and Law: An Analysis of the Colonial Legacy of Rape Laws in Bangladesh

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Abstract

The main characteristics of colonialism can be demonstrated as such; political and legal domination over a foreign society and practice of imperial power exploitation over that society. The aberration of colonialism is still practiced in the administrative and judicial system of Bangladesh as there exists a politics-administration dichotomy (Panday, 2020). As a result, the powerheads are exercising power politics which enable them to get away with crimes as heinous as rape. The presumption of Criminal Law is that the accused is innocent until proven guilty which has been the cornerstone for many high-profile rape cases to bar justice. The colonial definition of 'rape' in the Penal Code of 1860 does not elaborate on the act of penetration where it does not include men and the third gender as rape victims (Kabir, 2014). The law does not cover marital rape over the age of 14 without consent. There are many other loopholes that are used as getaways for the powerful to date. The objective of this study is to investigate the characteristics of the current rape law and its execution in relation to the colonial bureaucracy. The study aims at excavating the cause of the persistence of century-old rape law and scrutinizing the powers that get benefitted from the faulty laws. It also focuses on both positive and negative aspects of the modification of rape law in times of decolonization. The study has been conducted by analyzing 10 high-profile rape cases in Bangladesh. In addition, secondary materials from various journals, newspapers, and reports have been extensively checked for ensuring the high validity of the research.

Keywords: Colonization, Rape Laws, Power politics

Introduction

The term 'rape' originates from latin word rapere or raptus denoting "to snatch, to grab, or to carry off" which legally connote as a British law to the nonsexual crime of violent theft ("Stanford Historian Examines the Politics of Sexual Violence," 2013). It has always been complicated to define the term 'rape' in an actual manner as it is a legal term that is

susceptible to political and cultural differences both spatially and temporally. The literal meaning of ‘rape’ manifests that the offence is not merely sexual, rather politically defined social construction of heinous act which is defined in a patriarchal manner by the politically powerful. By politically powerful, we seek to explicate the colonial rape laws which did not get repelled in the course of time in many parts of the world that were colonized before. Long after the period of decolonization, Bangladesh is yet to reform colonial rape laws which only worsens overall scenario of rape victims in Bangladesh. The current situation of rape in Bangladesh strikes the necessity for this study as at least 14,718 victims including 6900 women and 7664 children were raped where 2823 cases were gang-raped within the years of 2001 to 2019 in Bangladesh (Odhikar, 2001, as cited in al Mamun et al., 2021). During the pandemic this scenario has deteriorated indicating increase in rape victims. From January 2020 to March 2021 total rape victim is 1855 where 1103 are children (Odhikar | Protecting Human Rights in Bangladesh, 2021). The study aims at scrutinizing the characteristics of colonial rape laws existing in Bangladesh contrasting to its execution in relation to the colonial bureaucracy. Power politics of rape laws are to be investigated in light of ten rape cases of Bangladesh through case study methodology in a qualitative research design. The validity of the research is ensured contrasting the analysis with global perspective on colonial rape laws and its holdover during the time of decolonization in different parts of the world. Drawing from global perspective of rape laws, this study aims at recommending reformations and policies to take on the modernistic wave of decolonization.

Colonization and rape laws: Global perspective

To understand the aspects of colonialism and its relation to rape laws one needs to shed light on the historical background of rape laws which date backs to 1900 BC. In the code of Hammurabi it is penned down that, if a man should force the "betrothed wife" of another to have sexual intercourse with him, he shall be put to death and the woman ‘shall go free’ where the ‘shall go free’ phrase depicts the victim of the rape is the betrothed husband-the legitimate possessor of the woman (Gold & Wyatt, 1978). As in the Code of Hammurabi in Deuteronomy as part of the Laws of Moses too, for the crimes of rape and adultery, the woman is charged with the offense of consent where victim of the crime is her husband (Topical Bible: Rape: The Law of Moses Imposed Death Penalty For, n. d.). Rape laws during the era of colonialism vividly reflects the rape laws of the past and most of them still exists in this post colonialism era of decolonization.

Rape as property crime

As in the past, during colonization, the victim of the crime is the man to whom the women belongs and there is no legally cognizable harm done in this case because a husband cannot "take" from himself something which is already rightfully his and thus making rape as property crime. As mentioning ‘rightfully his’ is the precedence of not considering marital

rape as crime and British Empire's legacy of sexual offences laws indicates that there was no such concept as rape in marriage. According to the statement by Sir Matthew Hale in 1736, "*the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract*" (Braun, 2014).

This scenario is evident in Anglo American society as well. With the advent of European colonizers they misconstrued nudity and sexual autonomy for promiscuity and immorality where rape was uncommon in traditional matrilineal Native societies and as a consequence early Anglo-American rape law sought to control women and preserve their chastity where they were just property to be protected from other men (Gerollami, 2015).

The impact of colonization is far reached to the middle-eastern Asia as well where Article 308 of the Jordanian penal code, which is remnant of the Ottoman rule imported from French penal code, says that a rapist can escape punishment if he agrees to marry his victim and if the marriage lasts for less than three years only then he will have to serve his time (Osman, 2017). This practice is not Islam rather it is the product of colonization which consider women as property of their husbands and only marrying off the victim to the offender solves the crime by entitling the woman as property of a man. Besides, even in colonial period the laws were different in the colony and for the colonizer. For example, in 1828, a Parliamentary Act set the age of consent in India at eight years where In England, it was ten. Colonial theories about the early age at which females in tropical environments "ripened" were used to justify the discrimination through the differences in the Indian and English laws (Kolsky, 2010).

Gender role and sex specific offences

Women were considered as property and subject to protection by the male authority throughout the colonialism period which incorporated sex specific rape provisions, meaning that they only apply where the victim of rape is female. For instances, there were provisions against "defilement of girls" under a certain age, offences called indecent assaults known as insults to modesty etc. are all Victorian-era formulated sex-specific offences that in effect create a divide between the types of offences that can be committed against females and those that can be committed against males (Braun, 2014). For example, during mid-nineteenth century India in trial after trial, the judges focused on the looks, size, and social status of the victim as factors relevant to determining the likelihood of whether she could have been raped considering her 'comeliness', by the defendant assuming female mendacity posing doubts about the credibility of female complainants (Kolsky, 2010).

Unnatural offences

Commonwealth countries have trouble recognizing consensual and non-consensual intercourse between men just like Victorian era where a male victim of rape in jurisdictions

that retain these colonial laws falls to be vindicated under the buggery law rather than the rape law (*British Library*, n.d.). Even till this date a loving male couple can be convicted and sentenced in exactly the same way as the male rapist as rape is considered to be a sex specific offence which cannot be committed against another man according to English rule. Where the maximum sentence for rape is often life or death, for male rape, it is more likely to be in the order of 10-15 years and is penned in another section named 'unnatural offences' (*The Penal Code, 1860 | 377. Unnatural Offences*, 2019). According to Braun (2014), in twenty one out of the twenty six countries that have gender-specific rape laws the punishments are different for rapists depending on whether their victim is male or female which clearly defies the gravity of the offence and bespeak gender stereotypical mindset of colonialism. From cases of India, Malaysia and Uganda we can see the colonial hangover of criminalizing homosexuality as 'sodomy' under unnatural offence section. Section 377, did not respond to Indian society or its "values or mores" at all rather British colonial governors imposed it on India undemocratically whereas section 377 of Malaysia's penal code, which also criminalizes "carnal intercourse against the order of nature.", and similarly section 140 of the criminal code of Uganda's law punishing "carnal knowledge against the order of nature", was also a British colonial inheritance (*This Alien Legacy*, 2015).

Decolonization and rape laws

Though there has been a great success in introducing the concept of gender neutrality all over the world, rape still applies only to female victims in twenty six out of fifty three Commonwealth countries where half of the Commonwealth still retains the British colonial formulation of rape as a crime that can only be committed against females (Braun, 2014) and in 18 Commonwealth countries, it is legal for a husband to rape his wife (*Commonwealth Map - Marital Rape Exemptions*, n.d.). Nineteen of the fifty three countries of the Commonwealth have non gender-neutral sexual assault laws, so those indecent assaults that amount to something less than rape where in forty one out of fifty three Commonwealth countries anal intercourse is criminalized regardless of consent or location or age of the parties which basically criminalize LGBT relationships and almost eighty percent still retains these colonial legacy of rape laws (Braun, 2014). Whereas most post-colonial countries have retained rape laws of medieval period, Canada has far reached towards modernity where The Criminal Code does not even contain an offence of "rape" rather the law criminalizes "sexual assault", which is defined as sexual contact with another person without that other person's 'consent' (The Criminal Code of Canada and Sexual Assault, 2010).

Rape laws of Bangladesh

Rape is considered as a heinous crime and a punishable offence in Bangladesh. To combat this crime against womanhood there are four statutes which includes definitions, procedures and penalties of rape. These four statutes are:

1. Nari O Shishu Nirjaton Daman Ain, 2000 (Amendment 2003) (Women and Children Repression Prevention Act, 2000)

2. Penal Code, 1860

3. Evidence Act, 1872

4. Code of Criminal Procedure, 1898

Let us now discuss the rape laws in these four statues briefly to understand different aspects of Rape laws in Bangladesh discussed in the next section.

Women and Children Repression Prevention Act, 2000

Among four of these, Nari o shishu Nirjaton Damon Ain (Act xviii of 1995) is the only one introduced during the decolonization period and in post independent era of Bangladesh. This is a specialized law which deals with the violence's against women and children that passed into law and came in force on 17 July 1995 which has been amended for two times up to date, one is in 2000 and another is in 2003 introducing some more precise provisions.

Section 9 of the Act illustrates rape, death due to rape and punishment for those. According to the act, Section 9(1) of the Act depicts that for committing rape with a woman or a child, the offender shall be punished with rigorous imprisonment for life and with fine; 9(2) depicts, if in consequence of rape or any act by him after rape, the woman or the child so raped, died later, the offender shall be punished with death or with transportation for life and also with fine not exceeding one lac taka; 9(3) says if more than one man rape a woman or a child and that woman or child dies or is injured in consequences of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not exceeding one lac taka; 9(4) demonstrates (a) if a man tries to murder or hurt after rape to a woman or a child, the man shall be punished with rigorous life imprisonment and also with additional fine, (b) if tries to rape, will be punished with imprisonment not more than ten years and rigorous imprisonment not less than five years and also with additional fine; 9(5) illustrates if a woman is raped in the police custody, each and every person, under whose custody the rape was committed and they all were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine (Women and Children Repression Prevention Act, 2000). Section 10 of the Act illustrates offences of sexual harassment of molestation and its punishment.

Penal Code, 1860

Definition of rape is penned in Section 375 in chapter XVI of 'offences affecting the human body' of Penal Code, 1860. A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling

under any of the five following descriptions which are firstly against her will, secondly without her consent, thirdly with her consent, when her consent has been obtained by putting her in fear of death, or of hurt, fourthly with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married and fifthly with or without her consent, when she is under fourteen years of age (The Penal Code, 1860 | 375. Rape, 1860). According to the same section of the code, penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape and sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

Section 376 of the code determines punishment for the offence of rape: whoever commits rape shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both (The Penal Code, 1860 | 376. Punishment for Rape, 1860).

Sexual assault against men falls under section 377 which is not considered as rape, rather it falls under 'unnatural offences'. The section illustrates as such: whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine and to commit the crime penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section (The Penal Code, 1860 | 377. Unnatural Offences, 1860).

Evidence Act, 1872

According to the Section 155 (4) of the Evidence Act, 1872 which provides that when a man is prosecuted for rape, it may be shown that the complainant was of immoral character (The Evidence Act, 1872 | 155. Impeaching Credit of Witness, 1872) which raises the question of the victim's character as a justification of rape.

Code of Criminal Procedure, 1898

Section 561 has special provisions with respect to offence of rape by a husband is written in the supplementary provisions in the Miscellaneous chapter XLVI. According to Section 561(1) notwithstanding anything in this Code, no Magistrate except the Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall (a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or (b) send the man for trial for the offence. And 561(2) depicts, who to employ in the investigation.

Loopholes in rape laws of Bangladesh

Vague Definition

Current laws have partially described rape with a vague definition which is incomplete and so rape cases are difficult to prove in the courts in Bangladesh. Bangladesh still follows a primitive definition of rape that fails to punish the culprits and provide proper justice to the victims. The definition of rape is being followed for the last 160 years that happens to be a colonial holdover. The country had three laws before its independence and after independence, it got three more laws but none of them could define rape properly. The Penal Code restrictively defines rape as an act of penile-vaginal penetration, being blind to the fact that rape can also be anal or oral and not limited to only penile-vaginal penetration. The laws that cover rape do not define penetration. This problem in the definition of rape laws is limiting justice for the victim and allowing the perpetrators to escape accountability of this crime. For example, in a gang rape case in Noakhali, Bangladesh, where the police claimed that the woman was not raped as the perpetrator used hands and sticks for penetration, even though the survivor herself described that she was repeatedly raped. Due to the vague rape law, an ambiguity regarding whether the perpetrators would be punished for an attempt for rape or committing the offence of rape aroused. (Jahan & Islam, 2020) It is an irony that even though the rape laws have been amended three times in 1995, 2000 and 2003, the amendments fail to provide proper justice to the victims. (Hasan, 2018)

Lack of Inclusivity

On August 19, 2019, Jamir Ullah, a 45 years old man hanged himself after being raped by 10 men in Sreepur. Even if Jamir took action and filed a case against the perpetrators, he would not get justice as current rape laws in Bangladesh do not recognize men or transgender as possible victims of rape. (Huda, 2019) There have been growing reports of abduction, beating and gang rapes of transgender people in Bangladesh. A report by the business standard, a popular daily of Bangladesh claimed that almost 99% of the transgender people have faced rape or any kind of sexual assault at least once in their lifetime. (Jahan, 2020). Although Bangladesh has laws that are meant to protect the vulnerable victims only who are women and children from sexual abuse, it is very unfortunate that there is no such law in Bangladesh that safeguards the rights of transgender persons. For example, in Nari nirjaton Daman in 2003, one of the major rape laws in Bangladesh, the title of the act is 'Nari O Shishu' which means 'women and children' only which depicts the lack of inclusivity in the rape law. (Mitra, 2018) Thus such loophole presents of a scenario where no provision may protect the transgender people if they face sexual assault or get raped. Moreover, none of the rape laws in Bangladesh are anti discriminatory which will specifically protect sexual minorities or recognize diverse gender identities. There is a provision under Section 377 for

unnatural sexual offences, however many transgender persons have reported that they face further scrutiny and harassment while they seek for justice under this section (Jahan, 2020).

Absence of the concept of marital rape

The legality of marital rape came under scrutiny in mid twentieth century as England itself outlawed marital rape in 1991, however, British-mandated exemption of marital rape still exists in Bangladesh. (Khyum, 2020). Bangladesh is yet to criminalize marital rape. Even laws in Bangladesh simply exempt marital rape from the offence of rape itself. The Penal Code, the chief provision for the definition of rape in Bangladesh explicitly states that, 'sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.' Such clause makes it impossible for a man to rape his wife who is over thirteen years of age which means a wide number of wives who are more than thirteen years of age and are victims of rape by their husbands are incapable of seeking recourse in law. Moreover, this exemption is inconsistent with the section 375(2) of the Penal Code of Bangladesh where age of consent is found to be 14 years and which states that 'if a woman is under fourteen years of age, sexual intercourse with or without her consent is considered to be an offence of rape.' However, a lower age of consent, 13 years of age, is applied to child brides. (Huda, 2017)

Ambiguous interpretation of consent

In the section 375 of the penal code statutory rape is defined as 'with or without her consent when she is less than 14 years of age.' While provision of the Penal Code indicates that the age of sexual consent in Bangladesh is 14 years, in section 9 of the Prevention of Oppression against Women and Children Act 2000, the age of consent is 16 years which is conflicting with the provision of the Penal Code 1860. Such instability regarding the age of sexual consent creates ambiguity in the rape laws in our country. (Rabbani & Akhter, 2020)

Moreover, section 375 of the penal code has 5 descriptions for the offence of rape if sexual intercourse happens. However, any clause relating to consensual sex where the consent given by the woman is obtained by force or by promise of future marriage is absent in the Penal Code 1860. Clause 2 of section 375 of the penal code 1860, when read with section 90 that states 'sexual intercourse against a woman's consent which is given under a misconception of fact' as rape. However, what the term 'misconception of fact' refers to has not been clarified by any of the courts in Bangladesh. (Ali, 2020)

Woman's character to be questioned

In Bangladesh, large numbers of women deter from going to courts due to a number of social and legal factors. Bangladesh Legal Aid and Services (BLAST), a national legal aid service organization, has identified several main reasons for which women have little to no access to justice. In their research it was identified that section 155(4) of the Evidence Act

1872 relating to the character evidence in rape cases is one of the prominent barriers for the women in accessing legal assistance after facing sexual assault or getting raped. Section 155(4) of the evidence act states that 'when a man is prosecuted for rape or an attempt to rape, it may be shown that the victim was of generally immoral character.' Such a provision that attempts to show a person was immoral or indicates to prove a good character in order to secure justice is humiliating and degrading for the survivor. This section is a relic from the British colonial era which has been repealed in the UK long ago but remains in existence in Bangladesh (Dutta, 2016).

Lack of witness protection scheme

In Bangladesh there have been plenty of cases where the rapist threatened the victim and the family if they involved the police. Therefore, many survivors find it risky to reach to the police after being a victim of rape. In most cases the rapist already had an advantage of power which makes it more difficult for the survivor to seek justice. In addition to that a witness protection scheme which could ensure the legal protection of the victims and also the witnesses is absent in the rape provisions in Bangladesh. Victims who face threat remain silent and the witnesses never speak up for the victim out of fear. Therefore, many rape cases remain unreported in our country.

Power politics and rape law

Rape is inherently political and an exercise of power where the perpetrator and the victim of the crime have access to differential form of power. Rape is also an exercise of gender power where men exercise control over women. For centuries rape has been used by soldiers as a weapon of war to inscribe total authority of the superior over the oppressed population. In a war, the relationship between power politics and rape is nakedly visible. However, when this crime is committed by an individual against another in a no-war context, the power relations are invisible. (Arun, 2018) Susan Brown Miller, in her book titled ‘Against Her Will’ argues that rape is actually the “perpetuation of male domination over women by force.” Throughout history, rape has been used as a means of controlling women by men. (Chatterji, 2018)

In the Colonial era, women were treated as less powerful who were a part of the matrimonial property and rape was conceived as a property crime against her husband or her father not a crime against the woman in her own right. Moreover, the assumption of impossibility of marital rape or denying the fact that a woman can be raped by her husband or not having a provision for this crime embedded a principle of lawful male ownership of women's bodies. Such Victorian era formulations still exist in most of the Commonwealth countries including Bangladesh.

Bangladesh has a long history of Colonial rule and laws that were made in the colonial era were power-driven and command-based. (Islam, 2021) Prosecutions for rape

against females under British law focused on the character and sexual history of the women. Therefore, women's character often ended up being on trial. There was a need for approve of physical resistance or a prompt complaint that could prove her as innocent and a victim of rape offence which depicts that a woman's testimonials are inherently unreliable. Such laws are not only a disgrace to women but also a form of inequality which is a byproduct of the colonial legacy. (Braun, 2014) Nonetheless, these contemptible rape laws are still prevailing and often applied by the courts in Bangladesh. Lawmakers in Bangladesh have had ample opportunities to reform these laws but seem to have consciously chosen to retain which reflects sexist power dynamics that exist in the patriarchal culture of Bangladesh. Years after decolonization, Bangladesh and its society still hold a perception of the subjugated role of women. (Huda, 2017) Thus, the legacy of British colonial laws has a very pernicious impact on the rape laws of Bangladesh.

Colonial features in rape cases of Bangladesh

The colonial features ("Colonialism," n.d.) that will be discussed in this section explaining the cases are political and legal domination, relations of economic and political dependency, exploitation of power and cultural inequality. One of the important feature is political and economic dependency which can be traced in the politically controlled justice system, where they tend to patronize the economically powerful beings in criminal cases thus resulting in lengthy trial process in rape cases. This is evident in the Banani rape case of May, 2017 where the perpetrator was Shafat who is the son of Dildar Hossain Selim, one of the owners of Apan Jewellers, one of the leading jewellery business in Bangladesh (Correspondent, 2017). The trial of the case began on July 13, 2017 but it is still pending with Dhaka Women and Children Repression Prevention Tribunal-7 due to non-appearance of witnesses due to threats against their lives by the families of the accused and negligence of officials concerned where only twenty eight out of forty seven prosecution witnesses have testified before the tribunal in the last three and half years ("Apan Jewellers Owner's Son, 4 Others Plead Not Guilty in Rape Case," 2021). The accused was grant bail on health condition ground in non-bailable case and again was sent to jail above cancellation of bail which only delayed the case proceedings ("Banani Rape Case: Shafat Granted Bail," 2019). This case depicts the misuse of colonial bureaucratic system of judicial process which only downturn the proceedings of rape cases.

This study analyzed the case of gang rape in Noakhali on October 2020, where the prime accused is Delwar who joined Jubo League's politics and formed "Delwar Bahini" (Delwar Army) which has 40-50 members and they committed crimes like rape, extortion, land grabbing and robbery, and used drugs to recruit youths of the village to the "Bahini" (Army) (The Daily Star, 2020). If Delwar was arrested for his previous crimes, the woman in Noakhali could have been saved from being gang-raped and tortured by him and his gang members. Another example of such case is gang rape of Sylhet's MC College, on September 2020 where all the rapists were involved with Bangladesh Students League which is a

student political organization of the ruling party which indicates that without political patronage such commission of crime is not common (United News of Bangladesh, 2020). These cases can be linked into a pattern of political domination where the perpetrators are showcasing their political power funneling through sexual power exercise over a vulnerable being, which is a feature of colonialism. This is salient to note that both these cases saw light of justice and accused faced speedy trial due to heavy protest by mass all over the country. Whereas right to justice regardless of race, sex, ethnicity, nationality is the basic human right in the period of decolonization, protesting for getting justice for rape victims are just the glimpse of brutal colonialist attributes.

The aberration of colonialism is still practiced in the administrative and judicial system of Bangladesh as there exists a politics-administration dichotomy which means there has been paradigmatic shift of transformation in the behavior of politicians and administrative officials from being the servant of the republic to the master of the republic (Panday, 2020). This is an important feature of colonialism that indicates political dependency and exploitation of power. Rape in police custody is an evidence of this theory where the protector of law and order violates the law itself by exploiting power over vulnerable beings. It is evident in the statistics that in 1995, police were the alleged rapists in thirty nine cases where seven of them took place inside a police station (BANGLADESH: Police Role in Rape Case Triggers Huge Protests, 1997). A significant case is the Yeasmin murder after rape in 1995 by members of Bangladesh police where three officers drove the victim to a secluded spot, where she was gang-raped and strangled to death ("Yasmin Murder 1995: Media Played a Brave Role despite Threat," 2017). Mass protest erupted after the publication of the news and Police fired on protesters killing 17 and injuring about 100 people (*Yasmin Rape and Murder Day Today*, 2013). Against immense pressure from women's rights activists and the civil society, the government was compelled to introduce speedy trial of the case and those convicted were executed by hanging in 2004 (Salam, 2015). In Seema rape case of October 1997, after the unexpected judgement acquitting four policemen accused of the rape case as the police alleged Seema was a prostitute, women's groups and the press have joined hands to protest against the verdict (BANGLADESH: Police Role in Rape Case Triggers Huge Protests, 1997). A common linkage is followed in such cases is that a number of innocent protestors lose their lives to the bullets of the protectors of those very lives. When the accused is powerful, it is almost impossible to get justice for the powerless victims without much protests. This behavior of the police is not gender specific rather it is about exploiting the power they are entrusted with. A thirteen year old street child was raped by two police constables on patrol in Dhaka in July 1993 who escaped hospital after three days of treatment in fear of threats from the police (Amnesty International, 2021). In this case two constables were suspended, but no charges have been brought against them which is the common scenario of any rape cases in Bangladesh that, without much media focus, these cases do not see light of justice where the perpetrator is the dominant group of society. The cultural inequality which is the basis of characteristics of

features of colonialism, is evident in the rape cases of hill tracks by Bengali settlers, law enforcement personnel and even by the military who are the very protector of the area (GDC, 2020).

Discussion

Laws legalizing the criminalization of consensual same-sex acts, relinquishing marital rape and blasphemy legal proceedings have their roots in British colonial era. From 1860 onwards the British Empires drafted a specific set of legal codes throughout its Colony with a moral and religious mission in mind and most of the former British colonies still stick to those repressive institutional legacies. (Ketchell, 2018)

Rape is a common serious social problem affecting millions of people each year throughout the world. Although various measures have been taken to prevent rape against women, the colonial legacy in rape laws and its proceedings constitute a higher percentage of victims of violence which is increasing in an alarming rate. Early rape statutes were heavily influenced by the English Common Law definition of rape where rape was defined as 'carnal knowledge of a woman forcibly and against her will' by Blackstone. The definition was narrow, proving rape centered on the degree of resistance provided by the victim. In the 1960s, reformers wrote a Modern Penal Code where the definition was slightly expanded, thereby a conservative revision of the common law statute. Owing to the common law tradition, countries heavily influenced by British rulers, including Bangladesh, have long refused to hold backdated laws as unconstitutional and preferred to retain them following the colonial legacy. During the post decolonization era the table is turning and attitudes are changing towards these laws which demonstrates that such discrimination is not inherent to the societies in which we currently find them rather a product of colonization. Laws are being repealed and modified, actualizing the true nature of the crime. For instances, in Bhutan marital rape is illegal and has gender neutral definition of rape. As a reaction to massive protest after the gang rape in Delhi in December 2013, India passed a bill containing legal reforms of existing rape laws. The new law expands the definition of rape and agrees on the fact that absence of physical struggle does not imply to consent. However, the reform still follows the existing patriarchal attitudes in society and fails to address marital rape as a crime. (Biswas, 2013) This situation can be contrasted with that of Pakistan, which was also under colonial rules and inherited the same Penal Code from the British, which removed the marital exemption clause in 2006.

Our neighboring countries are far ahead in reforming rape laws where we are still preserving colonial definition of rape in Penal Code of 1860. Not much reformations have been introduced in rape laws in Penal Code of Bangladesh. We need to acknowledge that the reluctance in reforming rape laws is rooted in the medieval mindset of the patriarchal society that could not leave the colonial legacy behind. Several anti-rape protests broke out in Bangladesh till date. In 2013, six human rights organizations, including Ain o Salish Kendra

and Bangladesh Legal Aid and Services Trust (BLAST) filed a writ petition against the two finger test of a rape victim. The two finger test a violation of right to privacy of the rape victim and it has no scientific and legal merit. Moreover, the two finger test contradicts the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 and the International Covenant on Economic, Social, and Cultural Rights 1966. Therefore, the High Court of Bangladesh has prohibited the controversial use of the two finger test in 2018 stating that all rape case would follow this order. However, Bangladesh still has provisions that support patriarchal attitudes and judicial inequality in its major rape laws. Most recently in October 2020, 17 Human Rights organizations issued a 10 point demand on rape law reforms to end impunity for rape. Sadly, none of the demands were heard by those who have the power to implement them. Rather a new law has been enacted finalizing death penalty as a punishment against rape which has been criticized by the human rights experts.

Bringing in the death penalty as a harsher punishment is easy but this is not what is needed to ensure justice for the rape victims. What is needed is to change the definition of rape that includes all victims irrespective of their gender or marital identities, prohibiting the use of character evidence in rape trials and most importantly investigating the rape laws with proper attention and without any political interference. Gender-sensitive training programs need to be introduced to the judges and officials dealing with violence against women. Moreover, the Government needs to pass the witness protection law which was drafted 15 years ago but has never been moved forward (Ganguly, 2020).

Along with reforming existing laws and legislations here is a great need for research on violence against women. Lack of data on rape cases lead us to undermine the severity of this problem. Therefore, a dedicated website to record rape complaints online need to be developed. Many survivors are unaware of the legal and medical support provided by the government and non-government organizations. Awareness projects need to be initiated to raise concern and educate the survivors about the existing laws that might help them to get through the legal process. A state compensation fund for the rape survivors has to be established. Currently, the lack of such a facility allows rapists to purchase impunity by offering money touted as compensation to the victims as an exchange for the withdrawal of the criminal case. Moreover, there is a need for enacting relevant laws including section 375 of the Penal Code 1860, section 9 of the Nari O Shishu Nirjatan Daman Ain 2000 and section 155 of the Evidence Act, 1872 to ensure conformity with international human rights standards.

Conclusion

Rape is a social problem that occurs throughout the world. Each year hundreds of thousands of people, be a woman, man or transgender and children, are being victims of this heinous

crime. However, in most countries, there is a scarcity of research conducted on the problem. Majority of rape cases remain unreported as rape laws that were drafted to protect the colonial governments and their control over the natives still exists in most of the commonwealth countries. These laws allow the perpetrators to escape legal proceedings, resulting in recurrence of the offence, trauma of the victims and violation of human rights. Although Bangladesh has entered into the digital era, lawmakers in this country are yet to ascertain a substantive law for the crime of rape. Although government and non-government organizations have taken initiatives to increase comprehensive support to the survivors of rape, there are significant challenges faced by both the victims and the officials working for them. While there are various legal interventions that maintain the standard of international treaties and treat the victims and survivors with respect and play a vital role in preventing rape, there is still some significant 'attrition'. The challenges remaining in the current rape laws and the lengthy legal proceedings of rape cases in Bangladesh make the whole process troublesome for the survivors who strive to get justice. The power politics prevailing in the patriarchal society of Bangladesh needs to be demolished and the Bangladeshi legal system, which consists of the legislative, the executive, and the judiciary branches, has to be decolonized to ensure accountability of the perpetrators and justice for the survivors.

Reference

al Mamun, F., Hosen, I., & Mamun, M. A. (2021). Sexual violence and rapes' increment during the COVID-19 pandemic in Bangladesh. *EClinicalMedicine*, *34*, 100817. https://doi.org/10.1016/j.eclinm.2021.100817

Ali, S. (2020, November 5). Establishing Consensual Sex as Rape Retrospectively upon Breach of the Promise to Marry: Laws and Practice. [Blog post]. Dhaka Law Review. https://www.dhakalawreview.org/blog/2020/11/establishing-consensual-sex-as-rape-retrospectively-upon-breach-of-the-promise-to-marry-laws-and-practice-5034

Amnesty International. (2021, June 5). *Bangladesh: thirteen-year-old boy raped by police in custody - other children illegally detained, held in shackles or tortured*. Retrieved October 18, 2021, from https://www.amnesty.org/en/documents/asa13/011/1993/en/

Another custody death puts Bangla police in the dock. (1997). *Rediff on the Net*. http://www.rediff.com/news/mar/03bangla.htm

Apan Jewellers owner's son, 4 others plead not guilty in rape case. (2021, August 29). *Dhaka Tribune*. https://www.dhakatribune.com/bangladesh/court/2021/08/29/apan-jewellers-owner-s-son-4-others-plead-not-guilty-in-rape-case

Arun, T. (2018, April 17). Rape as democracy deficit. The Economics Time. https://economictimes.indiatimes.com/blogs/cursor/rape-as-democracy-deficit/

This Alien Legacy. (2015, April 29). Human Rights Watch. Retrieved October 16, 2021, from https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism

Banani rape case: Shafat granted bail. (2019, December 7). *Dhaka Tribune*. https://www.dhakatribune.com/bangladesh/court/2019/12/08/banani-rape-case-shafat-granted-bail

Topical Bible: Rape: The Law of Moses Imposed Death Penalty For. (n.d.). Bible Hub. Retrieved October 20, 2021, from https://biblehub.com/topical/naves/r/rape--the_law_of_moses_imposed_death_penalty_for.htm

BANGLADESH: Police Role in Rape Case Triggers Huge Protests. (1997, July 31). Inter Press Service. Retrieved October 18, 2021, from http://www.ipsnews.net/1997/07/bangladesh-police-role-in-rape-case-triggers-huge-protests/

Biswas, S. (2013, March 28). Explaining India's new anti-rape laws. BBC News. https://www.bbc.com/news/world-asia-india-21950197

Braun, T. (2014, June). *Dark Side of the Moon: The Legacy of British Sexual Offences Laws in the Commonwealth* (Institute of Commonwealth Studies, Ed.). https://www.humandignitytrust.org/wp-content/uploads/resources/British_colonial_sexual_offences_legacy-Tea_Braun.pdf

British Library. (n.d.). The British Library. Retrieved October 15, 2021, from https://www.bl.uk/collection-items/the-buggery-act-1533

Chatterji, S. (2018, April 16). The Politics of Rape. The Citizen. https://www.thecitizen.in/index.php/en/newsdetail/index/7/13546/the-politics-of-rape

Colonialism. (n.d.). [E-book]. In *Colonialism and Imperialism* (pp. 5–12).

Correspondent, C. (2017, July 13). Banani Rape: Shafat, Nayem, 3 others indicted. *The Daily Star*. https://www.thedailystar.net/backpage/banani-rape-shafat-nayem-3-others-indicted-1432900

Commonwealth map - Marital rape exemptions. (n.d.). CRIN. https://home.crin.org/commonwealth-map-marital-rape-exemptions#:%7E:text=The%20Commonwealth%20%2D%20Countries%20retaining%20marital,as%20property%20of%20their%20husbands.

The Code of Criminal Procedure, 1898 | 561. Special provisions with respect to offence of rape by a husband. (1898, March 22). Laws of Bangladesh. Retrieved October 15, 2021, from http://bdlaws.minlaw.gov.bd/act-75/section-22144.html?lang=bn

The Criminal Code of Canada and Sexual Assault, 2010. (CAD.).

Dutta, I. (2015, June 16). A “rape shield” law for Bangladesh. *The Daily Star.* https://www.thedailystar.net/op-ed/%E2%80%9Crape-shield%E2%80%9D-law-bangladesh-97516

The Evidence Act, 1872 | 155. Impeaching credit of witness. (1872, March 15). Laws of Bangladesh. Retrieved October 15, 2021, from http://bdlaws.minlaw.gov.bd/act-24/section-5271.html

Ganguly, M. (2020, October 13). Death Penalty Not the Answer to Bangladesh's Rape Problem. \Humans Rights Watch. [Blog Post]. https://www.hrw.org/news/2020/10/13/death-penalty-not-answer-bangladeshs-rape-problem

GDC. (2020, November 15). *Hidden Truth: Rape, Violence and Brutality in the Chittagong Hill Tracts by Bangladesh Military*. Global Defense Corp. Retrieved October 18, 2021, from https://www.globaldefensecorp.com/2020/02/29/hidden-truth-rape-violence-and-brutality-in-the-chittagong-hill-tracts-by-bangladesh-military/

Gerollami, G. (2015). *Rape as Colonial Legacy*. Against the Current. Retrieved October 15, 2021, from https://againstthecurrent.org/atc183/p4703/

Gold, S., & Wyatt, M. (1978). The Rape System: Old Roles and New Times. *Catholic University Law Review*, *27*(4). https://scholarship.law.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2391&context=lawreview

Hasan, K. (2018, December 8). No Reform of Rape Definition in 160 years. *Dhaka Tribune*. https://www.dhakatribune.com/bangladesh/law-rights/2018/12/08/no-reform-of-rape-definition-in-160-years

https:\/\/www.lawyersnjurists.com\/article\/nari-o-shishu-nirjaton-daman-ain\/#author. (2019, July 2). *NARI O SHISHU NIRJATON DAMAN AIN | The Lawyers & Jurists*. The Lawyers & Jurists | Barristers, Advocates & Legal Consultants. Retrieved October 15, 2021, from https://www.lawyersnjurists.com/article/nari-o-shishu-nirjaton-daman-ain/

Huda, T. (2017, July 26). Why is marital rape still legal in Bangladesh? The Daily Star. https://www.thedailystar.net/opinion/society/why-marital-rape-still-legal-bangladesh-1438600

Islam, T. (2021, August 14). How Colonial Rules Shape Bangladesh. Risingbd.com. https://www.risingbd.com/english/campus/news/81606

Jahan, N. (2020, November 17). Transgenders of Bangladesh: A community forsaken by society and forgotten by the law. The Business Standard. https://www.tbsnews.net/thoughts/transgenders-bangladesh-community-forsaken-society-and-forgotten-law-154789

Kabir, L. (2014). *Lectures on the Penal Code with Leading Cases*. Ain Prokashon.

Ketchell, M. (2018, May 15). How Britain's colonial legacy still affects LGBT politics around the world. The Conversation. https://theconversation.com/how-britains-colonial-legacy-still-affects-lgbt-politics-around-the-world-95799

Khyum, K. (2020, November 25). Marital rape, hardly considered a crime. Dhaka Tribune. https://www.dhakatribune.com/bangladesh/2020/11/25/marital-rape-hardly-considered-a-crime

Kolsky, E. (2010). The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805–57. *The Journal of Asian Studies*, *69*(4), 1093–1117. https://doi.org/10.1017/s0021911810002937

Mitra, Puja. (2018, November). Human Rights Violation of Transgender People: A Critical Analysis on Bangladesh Perspective. Kathmandu School of Law Review. 6(2), file:///C:/Users/User/Downloads/212-Article%20Text-354-1-10-20200522.pdf

Odhikar | Protecting human rights in Bangladesh. (2021). Odhikar. Retrieved October 20, 2021, from http://odhikar.org

Osman, H. (2017, December 29). *Laws that allow rapists to marry their victims come from colonialism, not Islam*. The Independent. Retrieved October 15, 2021, from https://www.independent.co.uk/voices/rape-conviction-laws-marry-rapist-jordan-egypt-morocco-tunisia-came-french-colonial-times-ottomon-rule-a7872556.html

The Penal Code, 1860 | 375. Rape. (1860, October 6). Laws of Bangladesh. Retrieved October 15, 2021, from http://bdlaws.minlaw.gov.bd/act-11/section-3231.html

The Penal Code, 1860 | 376. Punishment for rape. (1860, October 6). Laws of Bangladesh. Retrieved October 15, 2021, from http://bdlaws.minlaw.gov.bd/act-11/section-3232.html

The Penal Code, 1860 | 377. Unnatural offences. (1860, October 6). Laws of Bangladesh. Retrieved October 15, 2021, from http://bdlaws.minlaw.gov.bd/act-11/section-3233.html

Panday, P. (2020, October 21). Revisiting Politics - Administration Dichotomy | Daily Sun |. *Daily Sun*. https://www.daily-sun.com/printversion/details/513024/Revisiting-Politics--Administration-Dichotomy

Rabbani, A. & Akhter, T. (2020, December 20). Instability of laws about the age of sexual consent. The Independent. https://m.theindependentbd.com/post/257452

Salam, U. (2015, August 21). REMEMBERING YASMIN. *The Daily Star*. https://www.thedailystar.net/in-focus/remembering-yasmin-130435

Stanford historian examines the politics of sexual violence. (2013, September 11). *Stanford University*. https://news.stanford.edu/news/2013/september/politics-sexual-violence-091113.html

The Daily Star. (2020, October 8). Political patronage of rapists, criminals must stop. *The Daily Star*. https://www.thedailystar.net/editorial/news/political-patronage-rapists-criminals-must-stop-1974785

United News of Bangladesh. (2020, September 29). MC College gang rape: All accused now in police custody. *Unb.Com.Bd*. https://unb.com.bd/category/Bangladesh/mc-college-gang-rape-all-accused-now-in-police-custody/58214

Yasmin Murder 1995: Media played a brave role despite threat. (2017, February 23). *The Daily Star*. https://www.thedailystar.net/backpage/yasmin-murder-1995-media-played-brave-role-despite-threat-1366270

Yasmin rape and murder day today. (2013, August 24). Risingbd Online Bangla News Portal. https://www.risingbd.com/english/national/news/5792

Why Mennonites Can't Dance & Other Tales of white Settlers Moving Towards Transformative Justice

Amanda K Gross

It was children's time during the Sunday morning worship service inside the cool yellow brick building that was both artificially air conditioned and shaded by several tall, hundred-year-old oak trees. After the service, we would run down the clover-covered slope to play in the honeysuckle and poison ivy. But for now, we were summoned by the smiling adult in charge to make our way to the front of the church sanctuary and sit on the shallow, carpeted row of steps that hid the inground baptismal. The baptismal pool along with the large wooden cross suspended on the front wall were the only remaining evidence of the Pentecostal congregation the structure had been built for. At some point before my family begun attending this, the only Atlanta-area Mennonite church at the time, the Pentecostals had moved out, probably to the suburbs, and the Mennonites, less concerned about the crime rates and dropping property values, had moved in.

The baptismal dunk tank, however, was rarely used. The Mennonites I grew up around more often than not preferred a light sprinkling or a gentle pour of the symbolic holy water rather than full immersion. I stifled my giggles when witnessing adults getting sprinkled. It reminded me of deterring a misbehaving housecat. When I got baptized, I insisted the top-secret floorboard be removed, and the baptismal tub be filled. I was all in.

But the particular children's time I'm referring to was over a decade before my baptismal plunge. It was the first, but not the last time I remember hearing the story of Dirk Willems. The story began in a 16th Century Dutch jailcell. It was cold, dark and mice scurried along the floor. Dirk begins to look for a way out. He's already been convicted for his faith and sentenced to death, but (so the story goes) still had no peace about God's will for him. He moves around the cell, eventually pushing against a metal latch on a window that gives way. Dirk scrambles out the window and makes a harrowing escape. Running as fast as he can, he notices that he's being chased by a prison guard. There's only one on duty that night, so if he can outrun him, he might escape execution. Dirk's run takes him across a frozen pond. He hears the ice cracking beneath his feet and keeps going as fast as he can. Suddenly there's a loud crack and a big splash. The guard has fallen through. At that same time, Dirk's heart breaks too, and is "filled with faith and love" (McGinnis, 2000). Instead of reaching for freedom, Dirk turns back and extends his hand to help the guard out of the frozen pond.

Once out, the guard marches him back to prison to await execution. As one version rendered especially for children tells it, at that moment "the wind blew tears of joy from Dirk's eyes" (McGinnis, 2000).

The Dirk Willems story was one of several tales of Anabaptist and Christian martyrdom that seeped into my childhood. The 1,100-page book of stories (with illustrations!) lived on the bookshelf in our family room, stacked under a family Swiss-German genealogical text and antique hymnal. As a child, the messages had been clear: God wanted us "to turn the other cheek" in the face of violence. While others might succumb to returning violence with violence, we were faithfully exceptional in our interpretation of scripture. Righteous in our victimhood, we relished joy in our suffering.

There is much to problematize in unpacking these early childhood narratives.

For one, teaching children to glorify victimhood and suffering is dangerous. In the stories of my childhood, Dirk and his martyr friends not only put their bodies in harm's way, they glorified God for the privilege to do so. When I felt uncomfortable by my Sunday school classmate's inappropriate touch, I did not initially tell him no. Instead, like my martyred role models, I evaded him when I could, suffered silently, and ultimately befriended him. Just as in other religious institutions, child and sexual abuse is pervasive in Mennonite ones. Survivors in Anabaptist communities continue to reveal the abuses of historically celebrated peace theologians, pastors, and educators whose abuse has been systematically allowed to exist by administrators and other institutional gatekeepers (IntoAccount, 2021; IntoAccount, 2020).
We know that cycles of trauma repeat. Once victimhood is glorified and suffering is normalized at home, how easily can it be imposed upon the homes of others. It should not be surprising then, that Mennonites have perpetuated abuses in non-Mennonite spaces, too, including as teachers at forced boarding schools for Indigenous children, such as at the Carlisle Indian Industrial School whose missions of cultural genocide resulted in largescale abuse and murder (Littlewolf, 2016). More recently, an Anabaptist Christian Aid Ministries' staff member sexually abused minors in Haiti while distributing food, clothing, and religious literature (Smith, 2019). These are two instances among many others. It should perhaps also not be surprising then that the rampant patterns of systemic abuse in the Catholic Church—an institution that my Anabaptist ancestors critiqued at the cost of their lives—are mirrored in the abuse and cover up in Mennonite institutions. If Mennonite identity exclusively revolves around nonviolence, as we have come to internalize, it cannot possibly involve perpetrating violence.

While the martyred tales of my ancestors were offered to me at age four, in my thirties I am only now accessing my family's histories of colonization. I'm learning that just as the early Anabaptists were key players in threatening the power hierarchies of their day, their descendants were pivotal in the establishment and maintenance of white dominance. I'm

learning that my Mennonite ancestors used their ploughshares, a symbol upheld as creative nonviolence, to reap as much havoc as swords. I'm learning that Mennonites of European descent were strategically invited as "loyal foreign protestants" (Mitchell, 1997, p. 27.) to buffer Indigenous resistance to Virginian colonization. I'm learning how my community's approach to being "silent in the land" and "in the world but not of it,"[1] rather than a faithful sacrifice, in actuality provided protection to them at great costs to others.
Over and over again, the righteous martyr narrative eclipses acknowledgements of white Mennonite complicity. Within a dualistic worldview, it is impossible to be both innocent victim and evil perpetrator. You can only be the good guy or the bad guy, with us or against us, a true believer or a heretic. Or, as Mariame Kaba (2021) describes in "We Do This 'Til We Free Us," within the context of the Criminal Injustice System, our society seeks out a "perfect victim" when prosecuting someone. Kaba defines perfect victims as "submissive, not aggressive; they don't have histories of drug use or prior contact with the criminal legal systems; and they are 'innocent' and respectable" (p. 80).

Of course, who gains access to the mantle of perfect victimhood has been very much shaped by race, including white Mennonite's access to it. In a race-based society, on land that continues to be occupied, the Mennonite martyr narrative facilitates a cultural myth that white settler Mennonites, as historically righteous victims, cannot concurrently be complicit in or responsible for violence. It is connected to what Eve Tuck and K. Wayne Yang (2012) refer to as "settler moves to innocence." In *Decolonization is Not a Metaphor*, Tuck and Yang write, "Settler moves to innocence are those strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all" (p. 10).

Of course, Mennonites with European ancestry are not the only group of white-assimilating settlers to prefer the innocent victim script, or what Strategies for Trauma Awareness & Resilience (STAR) describes as "chosen traumas" and "chosen glories." According to the STAR Manual (2010), chosen trauma, "when an individual or group is victimized and the resulting hurt, powerlessness, shame, and humiliation prevent complete mourning. Groups then:

- do not move on in healthy ways and so experience complicated grief
- become obsessive about the trauma
- develop an unchanging narrative and can come to have a sense of entitlement about what they are owed
- use the unhealed trauma to justify acts of aggression/violence against others, acts that are seen as helping to regain what was lost
- make the chosen trauma an important part of group identity

[1] Both are biblical phrases referencing Anabaptist theology and practice. From Psalms 35: 20 and James 1:27, respectively.

On the other hand, a *chosen glory* is marked by:

> High points, often victories in a group's history and story that are a source of pride for a group, often but not always won at the expense of another group. A chosen trauma and chosen glory may be the same event(s)" (p. 11).

These chosen traumas/chosen glories persist as many "settler moves to innocence." 21st Century wars, famine, and poverty in Europe justify patriotic immigration towards the "American Dream." Suffering from ethnic prejudices hides white advantage for people of Irish, Italian, and Eastern European descent. Centuries of anti-Semitic persecution consecrate the occupation of the Palestinian people and obscure Ashkenazi Jewish access to whiteness. These chosen trauma/chosen glory stories erase the histories of how European settlers used deliberate and strategic admission into white settler structures such as the police force, union organizing, and segregated neighborhoods to prove allegiance to whiteness through direct violence towards Black, Chinese, and other communities of color. They erase the historic and ongoing relationship European settlers have to the people who were already here.

I had probably reached adolescence the first time I heard the legend of the Kitchener Experiment. Less concerned with the honeysuckle, now my peers and I ran out of the sanctuary to throw an ultimate disc or kick a soccer ball. For me, it was a time of both awesome community and piercing isolation. I had become much more concerned about my body and how others perceived it. I had become determined to subvert its sexual desires and stubborn curves. But as distracted as I may have been by counting calories there was something about what the guest speaker shared that caught my attention. I would later hear this tale several more times as I studied Conflict Transformation at Eastern Mennonite University's Center for Justice and Peacebuilding:

It is 1974 in Kitchener–Waterloo, Ontario. The offenders: a couple of drunk teenagers gone on a vandalizing spree. Their victims: neighborhood residents and homeowners at the site of the crimes. The heroes: two white Mennonite men working for Mennonite Central Committee (MCC), who through this particular case lobby the judge to allow direct contact between the offenders and their victims in the form of apology and compensation for damages. The result: MCCers, Mark Yantzi and Dave Worth, along with the emergent Victim-Offender Reconciliation Program, are oft cited as the origins of the modern Restorative Justice (RJ) movement (London, 2013, pp.1–6).

However, several notable scholar-practitioners take a slightly wider view, acknowledging (both vaguely and historically) RJ's roots in Indigenous cultures and practices, sometimes explicitly accrediting the communities who nurtured their learning, including Kay Pranis's apprenticeship under Yukon guidance (Pranis, 2013) and Howard Zehr's acknowledgment of the influence of First Nations People and the Māori (Zehr, 2002, p. 7). Taking a more

horizontal approach, Carolyn Boyes-Watson parses RJ into four areas, each with distinct origins (criminal justice reform, youth behavior management, democratic peace movements in post-conflict zones, and movements for Indigenous cultural and political self-determination) (Boyes-Watson, 2018).

Yet despite the breadth and depth of connections between a diversity of Indigenous influences and the modern-day packaging of RJ (Living Justice Press, 2017) the Kitchener Experiment is still widely cited throughout Mennonite communities as well as "in the field"—even though the Kitchener Experiment in its ahistorical identification of victim and offender neglects to calculate how the neighborhood residents had come to acquire their homes in the first place, from whom, and at what cost.

There is much to problematize in unpacking this narrative as well.

For one, this particular white Mennonite origin story claims the territory of RJ, simultaneously assuming the role of protagonist while erasing RJ's Indigenous origins and the actual humans, cultures, and societies who contributed to them. In keeping within both an analysis of white supremacy culture (Jones & Okun, 1997) and the enduring Mennonite interpretation of violence, it views harm as individualistic, isolated to interpersonal bodily violence (or in this case, to property!). This RJ origin story supports the idea of a clear-cut overly simplistic victim/offender binary, isolated to a one-time act of harm that was easily and directly rectified. Within this narrative, RJ becomes limited in its usefulness in supporting anti-racist and decolonization justice methodologies.

I am by far not the first to point this out. In "Colorizing Restorative Justice: Voicing Our Realities," edited by Edward C. Valandra (2021), twenty authors of color identify the contradictions of using Indigenous methodologies to reinforce white settler societies, many of whom have been voicing these critiques for decades. We know that RJ and TJ (Transformative Justice) have long existed as grounded in, developed by, and shaped for BIPOC communities and recently, an array of resources have been further pointing this out. In "The Little Book of Race and Restorative Justice: Black Lives, Healing, and US Social Transformation," Dr. Fania Davis (2019) locates "restorative justice and the indigenous ethos in which it is founded" (p. 10) in African Indigenous justice traditions:

> "While our modern Eurocentric justice framework focuses tightly on the individual causing harm, restorative justice, consistent with indigenous justice, expresses a more expansive and communal concern by focusing on the needs and responsibilities of those causing harm, those directly harmed, and all other affected persons and communities. Attention to the entire collective distinguishes restorative justice as a communal, holistic, and balanced justice" (p. 31).

Viewing RJ through its Indigenous and African origins not only serves to keep RJ relevant and inclusive, Davis asserts, but ultimately leverages RJ as a tool for challenging structural racism (p.42).

Likewise, Kaba (2020) situates TJ as:

> "a community process developed by anti-violence activists of color in particular, who wanted to create responses to violence that do what criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this to happen, and how that context can be changed so that this harm is less likely to happen again" (p. 104).

The clarifying of RJ/TJ origins offer, among other possibilities, pathways for white settlers towards the nonlinear work of decolonization, justice, and accountability processes, particularly to "figure out how the broader context was set up for this to happen, and how that context can be changed so that this harm is less likely to happen again" (p. 104). Specifically, given my body and life and work and context and role and conditioning and access, I am interested in how the cultivation of embodied cultural practices support white settlers in multigenerational trauma healing to address root causes so that we might concurrently engage in and sustain RJ/TJ methodologies towards dismantling racism, decolonization, and collective liberation. And, given my own conditioning, how do I reorient my own paradigms and practice to do this with (and not on/for/about/to/apart from) my family and community?

Tuck and Yang's insistence on a concrete rather than a theoretical practice of decolonization offers another starting point by refusing to center European Mennonite histories of persecution and flight as justification for colonization, confronting the physical impact of our ploughshares, and challenging the origin stories of our contributions, even and especially when those contributions are in the name of justice. Moving away from the metaphorical includes grounding our movements in the body. While wisdom traditions coming out of Black, brown, Indigenous, and Asian communities have long integrated somatics (DeGruy, 2017; Hozumi, 2020; Menakem, 2017; Yellow Bird, 2014), in my lineage, embodiment practices have been made intentionally inaccessible.

We know on the individual level that fear can induce a traumatic response in the human brain, triggering flight, fight, freeze, or fawn mechanisms and that, as psychologist Bessel van der Kolk (2019) identifies, "traumatized people cut off their relationship to their bodies." What does that mean for the bodies of those of us who have been racialized as white? How has assimilation into whiteness kept us stuck in cycles of trauma, serving to further perpetuate oppression? What embodied wisdom traditions have we forfeited in our allegiance to whiteness? How has this state of freeze kept us from acknowledging our

complicity, holding ourselves accountable, actualizing repair, and moving into the possibility of transformative relationship?

The work of therapist and somatics practitioner Tada Hozumi scales up this understanding of traumatic dissociation in unpacking the cultural somatic context of white culture (Hozumi, 2019). Hozumi (2017) locates "white-ness" in our bodies, and specifically in the hips as it is reinforced by cultural practices that restrict lower body movement:

> "The major muscle in our body that holds trauma is our iliopsoas which connects our spine to our pelvis. It is the muscle responsible for engaging us in our stress reactions of fight, flight and freeze. Trauma locks up the use of this muscle, which in turn reduces the range of movement of the spine. Westernized/colonized life reinforces trauma to produce a rigid, reactive and disassociated embodiment—what we call white-ness.
>
> How I understand white-ness now is that it is an energetic imbalance caused by a loss of spinal fluidity and awareness of the lower body. Emotional energy becomes concentrated in the upper body, particularly gathering in the mind. To live in a world dominated by white-ness is to live in an environment that denies and protects white-ness as embodied trauma.
>
> When you look at it this way, white-ness is traumatization itself. The white body is in freeze: a state of disconnection between mind and body. It is ungrounded and cannot feel the earth. We see this pained energy of white-ness play out in our society through violence towards sexuality, emotional vulnerability, and ecology, amongst other things."

When I was eighteen, I lived in Germany for a year. The now defunct Mennonite work program that took me there started as a way to repair relationships between European and North American Mennonites in the aftermath of World War II. I spent the first half of the year as an au pair taking care of five children on a dairy farm and the second half as a nurses aide. On the farm, the nine-month-old was my youngest charge. I spent the majority of the workday with her on my left hip, while I cooked the farm's noon meal, got her siblings ready for school, did dishes, scrubbed things, and cleaned the floors.

Meanwhile back home, my little Mennonite congregation was coming apart. I read my mother's emails during afternoon break on the family's computer, getting bits and pieces of the conflict. Our beloved pastor had announced his leave and a search committee was formed. Some on the committee were asking ridiculous questions: *Should we consider women as applicants?* My father, serving on the committee, said, "of course not, because the Bible says so." My mother, in a rare instance of public dissent spoke up, "isn't that putting God in a box?" Ultimately, another cis-white man was offered the position, but in

the meantime the congregation shrank to one-third its size. That the question had even been raised was the last straw. Some of the community left for more progressively minded congregations, others for more conservative ones. A small group of our white moderate mothers held on.

I, too, was beginning to feel disillusioned. I was getting tired of arguing with my fundamentalist father who increasingly doubled down on his problematic politics. I was frustrated with my mother who would rather avoid tense conversations than engage. The young gaggle of my peers who had been the energetic heartbeat of the community graduated and left, eventually moving out of town, out of state, and out of country. As the years progressed, I checked out of Mennonite congressional life and, to some extent, my family—choosing to be in, but not of them. Just like my parents had and my mother's parents before, I fled to a place where my family had very little connection.

I remember sitting alone in my former partner's car at a park on land where my ancestors had been some of the earliest European colonizers. It was spring, but not the kind I grew up with. Unlike southern springtime which gloriously announced its arrival and then stuck around to play, Pennsylvania spring teased like a cat tormenting its prey. It drifted between blue skies and gray slush, redbuds and snowflakes. I remember the season because I was cold and grouchy about it. I sat in the front seat trying to absorb the late day's waning rays. As other, much more appropriately dressed park-goers walked by, I tilted my head down hoping they wouldn't notice the tears on my face or how it was turning magenta with anger.

I was on the phone with my mother who was 700 miles away and expressing her displeasure with my latest blog post. It was the first time I had written about family matters. The blog was a new venture for me. Though I had written for school and at work, never before had I written so publicly *and* so personally. Perhaps I should have been prepared, but her quivering voice took me by surprise.

My mother was not one to express discord. On the contrary, with the exception of protecting her children, she was one of the most accommodating and supportive people I knew. The rarity of my mother's offense made me that much more distressed. I wanted, and naively, had expected her support. But in speaking in a public way about "private" family dynamics, I had violated an unspoken cultural norm, a boundary I had not previously tested or realized existed.

I was upset that she was upset. Really, I was afraid. In hearing her list her concerns, a jolt of fear went up my spine. I got defensive at first. “That’s what I honestly felt. I’m just writing my truth.” Then denial showed up. “I don’t really have relationships with them anyway,” meaning the cousins who were upset with my post. Next came distancing, “there’s not much relationship there to lose.” Failing to win her over, I pivoted towards false harmony. I changed the subject to something less volatile, perhaps the weather or planning an upcoming gathering. I probably chose the weather.

But underneath my attempt at false harmony was the extreme discomfort of discord and deeper fears of what alienating my mother might mean for me. None of our previous challenges had tested our relationship the way my blogging about my family and white Christian patriarchy had.

I don’t remember the exact way we ended our call, the words we used, or how we left it, but I do remember a deep unsettling that shook me to my core. I drove back to Pittsburgh wavering between shock and grief. Sure, I had chosen to distance myself, but that distance had been on my terms.

It was one thing to call out a racist act in the workplace like I had been practicing in my new job, but a whole other to bring that same information home. It was one thing to argue with my dad about his harmful politics as I had for years, but another to challenge the very cultural fabric of my family all the while staying invested in being part of the change. It was one thing to critique loosely held family relationships, yet entirely different to potentially risk my most foundational one. I had often dismissed my family members’ rejections while feeling hurt about (once again) not being seen or heard. It was one thing to find solace in my own internalized righteous martyrdom yet a whole other to accept the reality which I was just beginning to glimpse: this process of working with my family was going to be slow, painful, scary, and not at all guaranteed to result in lasting relationship or unconditional love.

While a coping mechanism, moving so quickly to my internalized victimhood and martyrdom, may have ultimately increased my feelings of isolation. Sure, breaking silence and cultural norms within my family was terrifying. I’ve had to call upon deep (dare I say ancestral) courage in disrupting these multigenerational norms. But just as chosen trauma/chosen glories keep white people from denying racism, my orientation towards righteous victimhood ultimately kept me from taking responsibility for my actions and impact. Ironically, this stellar personalized victim narrative I nurtured within my family for years has often thwarted the connections for which I have so deeply yearned.

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Like many white settlers, I began to realize my whiteness through exposure to non-white communities, as I began to see how my body and mind were deeply shaped by race and racism. I especially learned this through embodied spiritual practices that didn't come from my ancestry. I was welcomed into the East Indian practice of Raja Yoga, taught to me by a lineage of Black women. Later as I began working for a social justice organization, our youth organizing trainings were occasionally arts and movement based.

I was at one such training that was all about being embodied. I love to dance. I was at this training addressing trauma and healing and we were being taught samba and house steps. I was loving it, building confidence, and fully participating.

At the end we formed a circle. Each person danced in the middle, something done in slightly different ways in many cultures. It was a freestyle moment—to share and celebrate our unique individuality yet in a collective way. Needless to say, it was a very supportive environment.

When it was my turn, I froze. Panic set in. Then, after everyone had had their turn, it returned to me. I reluctantly slid to the middle and did whatever came to my body. There was instant release and I burst into tears and fled the space. It was uncomfortable in so many ways.

As I was outside in the courtyard bawling white lady tears of humiliation and release, I reflected on dancing in my tradition, or rather the absence of it. The trainer shared about how the Black Panthers would celebrate together after an intense day of organizing by dancing. I became furious and incredibly sad that there was no such tradition of dancing for me to draw on. In fact, Mennonites of Swiss-German ancestry historically forbade dancing; some still do. For generations we forfeited this profoundly human way of knowing… and healing. In my subculture, so much of celebration and pleasure is seen as evil—sex, play, really anything that is not productive is either sinful or a waste of time (which is also sinful).

The circle moment was both terrifying and liberating for me and there were many witnesses. And some of us wonder why white Mennonites can't dance.

The more I have been exposed to the movement practices of other cultures, the more I have realized the dissociation of my own. Uncomfortable to realize, my honing of an anti-racist analysis, the stack of books, the scrutiny I've imposed upon my family might actually be reinforcing the problem. Perhaps some of the answers I'm looking for lie in the awkwardness of my body, in reading less and more public hip wriggling.

What I get most from Hozumi's articles is not the identification of white-ness as embodied trauma (although it's certainly a helpful framework), but rather the invitation to discomfort in our bodies as a means of healing. The vulnerability of appearing unskilled and out-of-

control, the awkwardness of getting it wrong, the discomfort in not being dominant or centered in the ways white people have been taught to expect, and the call to notice, feel, and be fully in the icky newness that comes with dancing while white Mennonite isn't in a how-to manual, or the diligence of hard work. The transformation isn't in perfecting anti-racism, but instead emerges through the embarrassing, unpleasant, uncoordinated movements of Mennonites, in community, learning to dance.

My adopted city went into lockdown the day after I had completed a Pre-Natal Yoga Teacher Training. The yoga studio across the river on stolen Haudenosaunee land had large windows at the front that invited in the early spring sunshine. After many months of cold and gray, my class was ready for sun exposure. We embraced the unseasonably warm days by stretching out our lunch breaks. We were also tired. Unlike our previous 200-hour training, this instructor did not have an anti-oppression lens. It showed. My classmates' digestive tracts were suffering. One of them spent an entire day on her back in a restorative pose. The chronic knot in my upper trapezius was beginning to spread across my shoulder blades and down my spine.

Lockdown came as I was beginning to have doubts about teaching yoga. In the past, I had long justified teaching yoga as a white person because my studies had been grounded in an anti-racist lineage and I had studied with a Black woman who taught holding the complexities of seemingly contradictory things. But now I was becoming less sure.

I had not originally wanted to be a yoga teacher. After taking her YogaRoots On Location[2] classes for several years, founder Felicia Savage Friedman began putting me at the front of the class and asked me to teach. Taking her teacher training seemed an organic next step. Since I was already teaching, I reasoned, I might as well get certified. Besides, I loved learning and especially learning from her. But after a few years, I was having doubts. Was I talking about cultural appropriation in my anti-racist organizing but actually engaging in it by practicing and teaching Raja yoga? What did it represent for my body to enter majority Black spaces to teach children and young people? Even though I was teaching for a Black-owned business, my students' interactions with me might be the first and/or only encounter some ever had with yoga.

As the class wrapped up, the Covid-19 pandemic hit and everything was put on pause, including the weekly yoga classes I facilitated. I was also awakening to the distance I had placed between myself and my family. As several close relationships in Pittsburgh were ending, I yearned for support. Feeling both lonely and also convicted to lean into my discomfort around teaching yoga, I decided to offer a donation-based weekly yoga class for family and close family friends. In my head I called it *Anti-Racist Yoga for Colonizers*. I

[2] Learn more about Felicia Savage Friedman's work at https://www.yogarootsonlocation.com

tiptoed past my housemate's bedroom door each Saturday morning to teach the virtual class in the room painted Asparagus Green.

It was still cold when we started to move our bodies and warm up our joints as I had been taught by my teacher to do. With Hozumi's work in mind, I paid special attention to hip and heart-openers, also building up the core. We played with balance. I cued breath and bodily-awareness and encouraged following one's impulses. At the end of each class, we concluded with a moment of stillness to acknowledge the land we're on, its history, and the Indigenous people of the land and our relationships to them. We paused to acknowledge each other, our fellow humans with whom we've just shared space, and then we closed by honoring the East Indian origins of the practice. Weekly family yoga is ongoing.

My favorite part is just after we close. Almost every week people linger, catching up with each other, exchanging news, or planning a family thing. We started out with two or three people, including my mom, but we've slowly grown the email list. It's not unusual for someone who comes infrequently to show up one week, get what they need, and then pop up again several sessions later.

A few months into weekly family yoga, the openings began to emerge. I had just written a blog post for an online Mennonite publication on anti-racism[3] and shared the link with family. As I was preparing for class, I received an alert that my mother was already online. I opened the computer to learn that she was on early to talk about my blog post. Unlike our phone exchange, she was enthusiastic and supportive of what I had written and also curious. My blog post had resonated with her and made her think.

Soon after, she wanted me to send over the Anti-Racist Sunday School Curriculum for majority white congregations an intern of mine had developed.[4] Next, she wanted to talk about land acknowledgement and reparations. Specifically, my home congregation was part of a joint service with other Mennonite churches centering decolonization. *What!?* My jaw dropped. I took a deep breath and felt my feet on the ground. The community of white moderates who had held so strongly to the status quo were investigating uncomfortable histories and examining their complicity. I quickly sent over the resources I had used in white affinity spaces along with an article written about another Mennonite congregation I'd been connected to who was adding a reparations line item to their budget and continuing ongoing self-study.[5]

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[3] https://www.mennoniteusa.org/menno-snapshots/loving-the-enemy/
[4] Developed by Jennifer Arnold: https://canvas.instructure.com/enroll/HJ7FNX
[5] Some of the resources I shared included: https://resourcegeneration.org/land-reparations-indigenous-solidarity-action-guide/, https://nativegov.org/beyond-land-acknowledgment/, https://native-land.ca, https://healingmnstories.wordpress.com/2021/03/14/one-churchs-path-towards-reparations-donating-its-property-tax-equivalent-to-black-and-indigenous-lead-organizations/

Her response contrasted to the year before. I'd created a Cost-Benefit Analysis as she and my father prepared to sell their home, located in a gentrifying central city neighborhood. Wanting to disrupt patterns of racist generational wealth construction,[6] I had compared and contrasted several options including donating the lot and had costed out the multigenerational benefit for a family to access affordable housing. After receiving my carefully researched spreadsheet, she had responded politely and pragmatically that those options wouldn't work for them.

My surprise at her openness eventually turned into gratitude for the deepening of relationships. When a significant move happened in my life, we took a break from yoga, but then revived it once spring returned just in time for another family conflict.

My awareness of it began via an email thread. The family reunion for the descendants of my great grandparents had been postponed due to Covid. *How did people feel about meeting in person in August?* Then, my mom's cousin emailed the thread to alert the family to racist, misogynist, and transphobic social media posts by another cousin. In her email, she also shared that harm had been directed at Black, brown, and LGBTQ family members, her children included, and that she, along with some siblings and families, would boycott the reunion.

At first there was silence, expected from a family conditioned into the European Mennonite culture of conflict avoidance. But then my aunt, and mother of my Latina cousin, replied with support. Soon other supportive voices appeared in my inbox. The email floodgates had been unleashed. As if permission had suddenly been granted to speak, the moderates began to chime in, too, asking for peace and reconciliation, sharing passive aggressive sermon notes on forgiveness. *Couldn't we all just get along?*

The responses from young people of my generation were quick and biting. Accountability and punishment got conflated. There was a proposal to draft a family values statement against racism and homophobia. If family members didn't sign on, they would be expelled from the family table. Yet, the actual perpetrators and their siblings remained loudly silent. My second cousin accused all the white people of being complicit: the white family masses had insufficiently addressed the harm—which was true. I could smell the fear of the white liberals in their refusal to further engage. Those who had long ago committed to silence, doubled down. Those who were committed to fighting, kept emoting into the void. Several people asked to be removed from the email thread.

With each email, I noticed my heartrate increasing and my nervous system wearing thin. I reached out to my mother and then my aunt to attend to our family branch. Eventually a second cousin of mine who'd read my email reached out to see we could do together. We

[6] Felicia Savage Friedman suggested I cost out the "hidden" costs.

decided to start with white affinity anti-racist education. Days later, I was on a video call with two of my second cousins. I'd only met them a handful of times, back when I was preoccupied with sucking in my tummy. Their faces were warm and inviting. They seemed genuinely curious about supporting our family through this painful mess. They were looking for guidance. They reached out to me, citing the wisdom that came through between the lines of my emails. They reached out, too, because they followed their instincts and listened to their gut.

I had emailed the family:

> *Hello All,*
>
> *As I sit here reading through the email thread and anxiously waiting for the jury to share its verdict in the trial of the police officer Derek Chauvin for the murder of George Floyd, I keep coming back to the ideas of abolitionism. In my understanding, Abolitionism is an orientation that is unapologetically opposed to dismantling violent structures and ideologies. Abolitionism opposes what bell hooks* (2010) *calls "imperialist white supremacist capitalist patriarchy" in all its forms and recognizes that not only do our systems (of policing, of imprisonment, of militarization, of family, etc.) not adequately address the harms they claim to address, but they also cause more harm and violence, especially to Black, brown, and LGBTQ folks.*
>
> *Abolitionism, (sometimes called Abolitionist Futures), is also unapologetic in striving for accountability processes that do not replicate the violence of our systems. Mariame Kaba* (2020) *talks about how in this society, we've so deeply internalized colonized, violent ways of being in relationship with each other that even if all our systems were done away with, we would still likely replicate their punitive models. Our transformation has to happen in both dismantling violent systems, ending harm, and tending to healing, and also in transforming our replication of structural violence. She also talks about her experiences with accountability being conflated with punishment and says an Abolitionist model embraces accountability but does away with punishment.*
>
> *Too often, especially in the white Mennonite communities I've experienced, naming a harm or conflict gets associated with causing the harm or conflict. The courageousness of family members to name harm and violence is not causing additional harm. It is bringing attention to what many of us, especially white family members, myself included, were not previously aware of or tuned into. There is important and specific work, especially for those of us in the family who have been racialized as white to do. I have been in conversation with a few family members about opening up a white affinity space specifically for anti-racist education and I continue to be open and committed to supporting our family's growth in this way.*

I don't presume that most of you on this thread will share an Abolitionist orientation, but nevertheless, I am faithful to practicing accountability processes that move beyond the replication of punishment models. I am faithful to the co-creation of new ways for us to be in relationship. I deeply believe that we can both uncompromisingly prioritize the safety of marginalized family members while also manifest accountable processes that honor each of our potential for deep transformation.

Sending love and care on this difficult day,

Amanda (A. K. Gross, personal communications, April 16, 2021)

The planning call went better than I could have imagined. We drafted a beginning strategy. We co-created while learning to know each other. We were honest about who could bring what to the table. We got clearer about which tables we wanted to set and which tables we were ready to turn over in righteous rage.

We scheduled dates. We extended the invitations. Twenty family members joined us for three evenings of self-reflection and learning. A healing reparations fund was concurrently established for Black and brown family members. Many in my grandma's branch have kept meeting, currently discussing how white supremacy shows up in our family culture and are co-creating and committing to alternatives. My second cousins began attending family yoga. One of them has been helping me edit my writings.

There still are many pitfalls. I worry: Are we centering whiteness? Is there enough tangible change? Are the BIPOC folks around us feeling our impact (positively)? Yes…No…It depends who you ask… Still we are in process together. Still the work persists.

I am reminded of Dr. Leticia Nieto's wisdom drop at the Embodied Social Justice Summit:

> "What's really amazing is that under oppression every single interaction should be really dead… but sometimes they're not. Why? Under oppression that we connect at all is an absolute miracle" (Nieto, 2020).

References

Boyes-Watson, C. (2018). *Looking at the past of restorative justice.* (T. Gavrielides, Ed.). Routledge International Handbook of Restorative Justice.

brown, a. m. (2020). *We will not cancel us*. AK Press. Kindle Edition.

DeGruy, J. (2017). *Post traumatic slave syndrome: American's legacy of enduring injury and healing.* Joy DeGruy Publications Inc.

Hooks, b. (2010). *Understanding patriarchy.* Louisville Anarchist Federation Federation. https://imaginenoborders.org/pdf/zines/UnderstandingPatriarchy.pdf

Hozumi, T. (2017, June 11). Why white people can't dance: They're traumatized. *Selfish Activist Blog.* https://tadahozumi.com/why-white-people-cant-dance-theyre-traumatized/

Hozumi, T. (2019, January 18). The key to healing whiteness is understanding cultural somatic context. *Selfish Activist Blog.* https://tadahozumi.com/the-key-to-healing-whiteness-is-understanding-cultural-somatic-context/

Hozumi, T. (2020, September 9). On somatics being an Asian practice. *Tada Hozumi.* https://tadahozumi.com/on-cultural-somatics-being-an-asian-practice/

IntoAccount. (2020). Reports: Survivor reports, stories and other downloadable documents. *IntoAccount.* https://intoaccount.org/reports/

IntoAccount. (2021). Our stories untold: survivors of sexual violence speak out. *IntoAccount.* http://www.ourstoriesuntold.com

Johnson, M. Z. (2015, June 14). What's wrong with cultural appropriation? These 9 answers reveal its harm. *Everyday feminism.* https://everydayfeminism.com/2015/06/cultural-appropriation-wrong/

Johnson, R., Nieto, L., & Williams, A. K. (2021, January 27). *What is Embodied Social Justice?* [Panel]. Embodied Social Justice Summit, online. https://learn.theembodylab.com/library

Jones, K. & Okun, T. (1997). White Supremacy Culture. *Changework.* http://www.cwsworkshop.org/pdfs/CARC/Overview/3_White_Sup_Culture.PDF

Kaba, M. (2021). *We do this til we free us.* Haymarket Books.

Kaba, M. (2021, March 9). *Mariame Kaba: Chicago reparations and the fight for an abolitionist future.* Webinar.

Kimmerer, R. W. *Braiding sweetgrass: Indigenous wisdom, scientific knowledge, and the teaching of plants.* Milkweed Editions.

Littlewolf, E. (2016, May 24). Boarding schools and the Indian child welfare act. *Anabaptist World.* https://anabaptistworld.org/boarding-schools-indian-child-welfare-act/

London, R. (2013). A new paradigm arises. In G. Johnstone (Ed.), *A Restorative Justice Reader 2nd edition* (pp. 1–6). Routledge.

McGinnis, M. (2000). Chapter eleven: Dirk turns back. *Brother Dirk & other stories.* Biographiks. https://www.homecomers.org/mirror/bd-11.htm

Menakem, R. (2017). *My grandmother's hands: Racialized trauma and the pathway to mending our hearts and bodies.* Central Recovery Press.

Mitchell, R. D. (1997). From the ground up: Space, place, and diversity in frontier studies. In M. J. Puglisi (Ed.). *Diversity and accommodation: Essays on the cultural composition of the Virginia frontier*. The University of Tennessee Press.

Nieto, L. (2021, January 29). *Looking into the well: Action practices for sustainable justice* [Presentation]. Embodied Social Justice Summit, online. https://learn.theembodylab.com/library

Pranis, K. (2013). Peacemaking circles. In G. Johnstone (Ed.), *A Restorative Justice Reader 2nd edition* (pp. 1–6). Routledge.

Smith, P. (2019, June 13). Ohio-based mission worker accused of abuse in Haiti. *Pittsburgh Post Gazette.* https://www.post-gazette.com/news/faith-religion/2019/06/12/Christian-Aid-Ministries-Haiti-Mennonite-Amish-sexual-abuse-covernigs/stories/201906110110

STAR. (2010). *Strategies for trauma-awareness and resilience level I participant manual.* Eastern Mennonite University.

Tuck, E. & Yang, K. W. (2012). Decolonization is not a metaphor. *Decolonization: Indigeneity, Education & Society. 1*(1), pp. 1–40. https://uwaterloo.ca/faculty-association/sites/ca.faculty-association/files/uploads/files/decolonization_is_not_a_metaphor_a.pdf

Tuck, E. & Yang, Y. W. (2014). R-words: Refusing research. In Paris, D. & Winn, M. T. (Eds.), *Humanizing research: decolonizing qualitative inquiry with you and communities*. (pp. 223–248). SAGE Publications, Inc.

van der Kolk, B. (2019, December 26). *How trauma lodges in the body.* On Being with Krista Tippett. https://onbeing.org/programs/bessel-van-der-kolk-how-trauma-lodges-in-the-body-mar2017/

Yellow Bird, M. [Cheryle Easter]. (2014, January 24). *Decolonizing the mind: healing through neurodecolonization and mindfulness* [Video]. Vimeo. https://vimeo.com/86995336

Zehr, H. (2002). *Little Book of Restorative Justice.* Good Books. http://restorativesolutions.us/restorative-justice-blogposts/the-indigenous-origins-of-circles-and-how-non-natives-learned-about-them (2017, October 20). Restorative Solutions.

Colorizing restorative justice: Voicing our realities. E. Valandra Ed. (Waŋbli Wapȟáha Hokšíla). Living Justice Press (2021).

Decolonizing Sex Work: An Exploration into Canadas Response to Violence Against Indigenous Sex Workers

Natassia D'Sena

Abstract

In Canada, sex work is a profession in which women are subject to high rates of violence and stigmatization. Many sex workers within Canada are of Indigenous background, as deep-rooted systemic issues have exhausted alternative forms of work. Rates of violence, stigma and racism towards Indigenous women has been heavily highlighted throughout current literature, adding to the already pressing issue of Indigenous women's safety. In this paper, I will explore the treatment of Canadian Indigenous sex workers by various actors within the criminal justice system, including police, judges, and juries. I draw on the Canadian cases of R. v. Barton and R. v. Pickton, both in which Indigenous sex workers were victims of murder, to explain and provide examples for the ways in which the criminal justice system has failed Indigenous sex workers. As an attempted response to the pressing issue of the safety of Indigenous women, the Canadian government launched the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG). Nineteen recommendations were highlighted in this report, however, many of these recommendations have yet to be addressed. To ensure the safety of Indigenous sex workers, there must be a change in the Canadian criminal justice system. Drawing from the MMIWG report, this article concludes with recommendations for policy and program implementation to provide Indigenous sex workers with the proper resources required, and suggestions for improvement of the current sex work legislation.

Introduction

Although sex work is criminalized in Canada, there is still an abundance of those who engage in the profession (Rotenberg, 2016). As reported by Statistics Canada, there were 16,879 prostitution-related offences reported by police between 2009 and 2014 (Rotenberg, 2016). Sex work can be an extremely dangerous, stigmatized and harmful profession, with high rates of violence against those who sell sexual commodities (Weitzer, 2017). Despite this, sex work remains a main source of income for many women (Long et al., 2011). The most

common violent offences against prostitutes are sexual assault, trafficking in persons, and common assault (Rotenberg, 2016). To add to this concern, there were 294 murder cases involving sex workers as victims between the years of 1991 and 2014. Of these murders, 34% remain unsolved, and nearly a quarter of victims of known ethnicity were Indigenous (Rotenberg, 2016).

Indigenous women account for the majority of sex workers in Canada. Although Indigenous women only account for around 3% of the total population, they account for over 50% of street-based sex workers in Canada (Wilson, 2020). Studies have shown that rates of sexual assault and spousal violence are three times higher for Indigenous than rates for non-Indigenous women (Department of Justice Canada, 2017). Indigenous girls under fifteen years old further face a higher rate of physical and sexual violence compared to Indigenous boys, a rate of 14% and 5%, respectively (Department of Justice Canada, 2017). Violence against Indigenous sex workers specifically is a cause of concern within Canada. For example, the rate of homicides of Indigenous women is 16%, compared to 34% for Indigenous sex workers (Rotenberg, 2016). This demonstrates that the issue of violence is not merely a culturally specific phenomenon, but also holds a deep gendered aspect as well.

The concern for the safety of Indigenous Women has been identified by the Canadian Government in their National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) (2019). This report outlines the "human rights and Indigenous rights abuses committed and condoned by the Canadian state" (Calls for Justice, 2019; p. 53). The report overviews the various systemic, racial, and gendered issues which contribute to the violence of Indigenous women and girls, and 2SLGBTQQIA people. The report briefly mentions issues with violence towards Indigenous sex workers. Several different narratives from the media which paint sex workers as high-risk may be to blame for violence against sex workers, as this contributes to societies general acceptance that sex workers are "deserving" of these consequences, as they have chosen to be in this line of work (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019). However, as this paper will outline, the media is not solely to blame for these misconceptions about Indigenous sex workers. This is supported by the MMIWG report, which identifies mistreatment by police, intergenerational trauma, and denial of basic rights as contributing factors to the general mistreatment of Indigenous women and girls (2019). Eventually, the Inquiry resulted in 231 calls for justice, and two years after the publication of the Inquiry, many of these calls for justice have yet to be addressed (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019).

This article aims to outline the role various criminal justice actors play in the mistreatment of Indigenous sex workers. We will overview two cases, *R. v. Barton* and *R. v. Pickton*, both of which involve Indigenous sex workers as victims. In *R. v. Barton*, we will identify the dehumanization and disregard for justice by the court. In *R. v. Pickton*, we will discuss the inaction on behalf of police in regard to various missing Indigenous sex workers

in Vancouver's Downtown East Side. This article will end with a discussion on how various aspects of the criminal justice system, including police, lawyers, jury and judges, need to improve to effectively respond to the alarming number of missing and murdered Indigenous sex workers.

Case Studies

R. v. Pickton

During the 1980s, an alarming number of Indigenous sex workers began to disappear from Vancouver's Downtown Eastside (Cui, 2021). The Downtown Eastside is known for high HIV rates, drug users, and sex workers, with these issues being highlighted as an "epidemic" by Public Health Canada (Culhane, 2003). Although the families of these missing women advocated for police action in 1989, there was no display of concern or worry from the police about the many Indigenous women who had gone missing in the area (Cui, 2021). Twelve years later, a task force was assembled and began compiling DNA samples of missing women from the Downtown Eastside (*R. v. Pickton,* 2010). Most of the missing women identified by this task force were "drug dependent", Indigenous sex workers (Cui, 2021).

Lisa Grant was the first identified victim of Pickton (Cui, 2021). Although she was murdered in 1984, it was not until 2002 that Picktons residence was searched and he was subsequently arrested (Cui, 2021). Pickton was a pig farmer who ran a pig butchering business on his property in Port Coquitlam (Cui, 2021). During this search, remains and belongings of the missing women were found at various locations on the property (Cui, 2021). In 2010, over twenty years after the initial call for action from family members of missing women, Robert Pickton was charged with 27 counts of first-degree murder, but was only convicted of six counts of second-degree murder (Cui, 2021).

This case highlights the inaction on behalf of the police with regard to Indigenous sex workers. Although the families of the missing women alerted the police in 1989, it took over ten years to take action, and over fifteen years to identify and convict Pickton as the offender. The dismissal of Indigenous concerns by police is well documented. In their study of 23 Indigenous women who self-reported their sexual assault to police, Murphy-Oikonen et al. (2021) found that their participants were dismissed or not taken seriously when reporting their sexual-assaults. Many participants were not formally interviewed and were not provided the opportunity for a recorded statement, and further, many were forced to wait 5-24 hours before an officer took their informal statement (Murphy-Oikonen et al., 2021). To add to this frustration, women reported feeling like perpetrators of a crime rather than victims. Participants reported being interrogated and were questions such as "why didn't you fight him?" (Murphy-Oikonen et al., 2021; p. 13). Finally, many studies have highlighted the disparities between the response to sexual assault reported by white

women versus Indigenous women. White women are shown to be taken more "seriously" by media, police and courts (see Murphy-Oikonen et al., 2021; Dusome, 2020).

The blatant disregard for Indigenous sex worker's safety is clear in the case of Robert Pickton. After multiple disappearances, years of advocating for Indigenous women, and finally, the eventual conviction of serial killer Robert Pickton, this situation leaves us with the question: how many lives of Indigenous sex workers could have been saved if the police took action in 1989?

Cindy Gladue

In 2011, Cindy Gladue, a Cree sex worker, was murdered in a hotel room in Edmonton, Alberta (Strega et al., 2020). Ms. Gladue met Bradley Barton twice, one night before her death and the subsequent night of her death, and the two engaged in "rough" sexual intercourse (Tucker, 2016). Throughout his police interviews, Barton gave various versions of events which led to the death of Gladue. Initially, Barton informed the 911 operator that he had no prior interactions with Gladue, and that she merely asked if she could use his shower, in which he later found her dead (Balfour, 2021). Investigation into Gladue's death found that she had died from excessive bleeding as a result of an 11-centimetre tear in her vaginal wall (Johnson, 2019). Further, her toxicology report indicated that her blood alcohol level was four times that of the legal driving limit (Tucker, 2016). It was discovered that Barton had attempted to clean up the remains of Gladue and had even checked out of the hotel room before returning to call the police (Tucker, 2016). Despite this incriminating evidence, and the fact that Barton was the last person seen with Gladue on hotel CCTV footage, he was later acquitted of his first-degree murder charge for the death of Gladue (Johnston, 2021; Balfour, 2021).

Many aspects of this case were proven to be inhumane and dehumanizing. During the investigation, an Edmonton police detective found a "long metal rod" in a dumpster near the hotel, however, this was not considered a key piece of evidence (Johnston, 2021). Further, during the trial, Barton admitted to causing Gladue's death, but claimed it was an "accident" (*R. v. Barton,* 2019). Although Barton discussed his intercourse with Gladue during the trial, there was no effort on the part of the court to judge the admissibility of his evidence and testimony (*R. v. Barton*, 2019).

In Canada, a jury is required to be "impartial, competent, and to some extent representative" (Israel, 2003; p. 38). In Gladue's case, the jury was composed of only two women, nine men, and had no Indigenous representation (Collins, 2017). Throughout the trial, Gladue was referred to as "Native" or "prostitute" repeatedly, showing little regard to the other aspects of her personality and simply reducing her to a marginalized member of society (Baboulas, 2021). By doing so, the prosecution or Crown may have intentionally, or unknowingly, set cognitive biases against Gladue (Baboulas, 2021). Further, the prosecution

utilized the stigma around Gladue's social class, profession, and ethnicity to justify the sexual encounter with Barton as consensual (Baboulas, 2021).

Arguably, the most alarming and dehumanizing part of this trial is the Crown's request to display Gladue's vagina to the jury as evidence (Collins, 2017). The Crown argued that autopsy photos were not clear enough to demonstrate to the jury the extent of Ms. Gladue's injuries and deemed that her physical body must be presented to the court (Collins, 2017). This unnecessary presentation of Gladue's body shows a clear disregard for her life, family, and Indigenous culture, and is said to be "the first time human tissue has been presented as evidence in a Canadian trial" (Purdy, 2015). Gladue's family was further escorted out of the court room when pictures of Gladue's body in the bathtub she was found were displayed on a projector for the court (Baboulas, 2021).

After Indigenous women's organizations and sex work advocacy groups highlighted the issues brought to light after displaying the remains of Gladue's vaginal wall for the court, Barton was re-trialed for unlawful act manslaughter and received a sentence of 12.5 years (*R. v. Barton*, 2019; Balfour, 2021).

Discussion

An analysis of the Pickton and Barton cases leaves us with one question: why does the Criminal Justice system disregard the importance of cases concerning Indigenous sex workers? It is difficult to determine exactly why this is, as there are various systemic, racial, cognitive, and environmental factors which can come into play. Regardless, it is certain that the Canadian Criminal Justice system needs improvement. After a twenty-year delay in the conviction of serial killer Robert Pickton, and the nearly ten-year delay in the conviction of Bradley Barton, the need for reform is evident.

Current Legislation: Bill C-36

We will begin our discussion with the legislative issues around sex work. Bill C-36 is the current governing sex work legislation. Bill C-36 was put into effect on December 6, 2014, as a response to the *Attorney-General v. Bedford* ruling by the Supreme Court of Canada (Galbally, 2016). In this case, the Supreme Court unanimously agreed that there are various provisions within the Canadian Criminal Code which were unconstitutional with regards to sex work (Galbally, 2016). After the conviction of Pickton in 2007, there was heightened public awareness and concern for the safety of sex workers (Galbally, 2016). Tasked with the responsibility of writing a new law to address these issues within one year of the Bedford case, the Conservative government under Steven Harper responded with Bill C-36 (Valverde, 2019).

The Conservative government stated various reasons for enforcing Bill C-36, many of these reasons focused on the idea that prostitution is inherently exploitive in nature and

those who engage in prostitution (such as purchasers, third parties, or the sex worker themselves) subject themselves to psychological and physical harm when engaging in the act (Department of Justice Canada, 2017). It was the view of the Conservative Government that by criminalizing all acts related to prostitution, and by stopping the exploitation of prostitution, this will lower the demand for sex work and encourage sex workers to leave their field. As stated in their overview of Bill C-36, the Department of Justice Canada maintains their standpoint that "… the best way to avoid prostitution's harms is to bring an end to its practice" (2017).

Bill C-36 outlines three goals of the government in regard to sex workers: "protect those who sell their own sexual services; protect communities, and especially children, from the harms caused by prostitution; and reduce the demand for prostitution and its incidence" (Department of Justice Canada, 2014). Although the first goal displays the clear need for safety on behalf of sex workers, it is evident in the cases of Robert Pickton and Bradley Barton that the criminal justice system does not act in the best interest of sex workers. Sex work is often considered legitimate form of income for many women and is often times liberating for the sex worker (George et al., 2010). Alternatively, some women are forced into sex work by family members or by the need for income due to lack of job opportunities (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019). Regardless of the reason for entering sex work, it is important that those who engage in the act are provided equal and impartial support from those in the criminal justice system.

Canada is not the first country to enforce barriers in sex work. In many countries, the act of prostitution is legal and legitimate, but all acts associated with soliciting or purchasing prostitution are illegal and criminalized (George et al., 2010). These countries have implemented the "Nordic Model", which was first enforced in Sweden, followed by Norway, Finland, Ireland and France (Vuolajärvi, 2018). When Bill C-36 was enacted, it was done so in an abolitionist approach, and mirrored the Nordic model's aim to eliminate prostitution and sex work (Goodall, 2019). However, critics of Bill C-36 view the new offences and amendments as draconian and anti-feminist, which are far more severe than the Nordic model implemented in other countries (Valverde, 2019).

The *Protection of Communities and Exploited Person Act* obtained royal assent on November 6, 2014 and was put in force on December 6, 2014. At the time of enactment, the bill was opposed by all opposition parties. During the 2015 election campaigns, many Liberal candidates expressed their disagreement with Bill C-36, arguing that the bill puts sex workers in danger, and showed interest in "getting rid" of the bill (see Browne, 2019; Hensley, 2019; Ling, 2018). Further, Justice Minister Jody Wilson-Raybould, a member of the Cabinet of Canada, stated in 2015 that she was committed to reviewing prostitution laws (Ling, 2018).

Although many promises and statements were made regarding Bill C-36 during the election campaigns of all parties in 2015, there has been no effort to review or reform

municipal or federal prostitution laws. Before the 2019 federal election, the Young Liberals of Canada showed their interest in repealing sex work laws and called upon the Liberal party to enact on these concerns (Browne, 2019). However, no political party other than the Green Party addressed the issues around sex work, prostitution, and Bill C-36 in their 2019 election campaign and platform (Browne, 2019).

Why do Indigenous Women Engage in Sex Work?

Sethi (2007) argued that colonization and capitalism have had a large impact on Aboriginal communities where violence, abuse (sexual, physical, and drug related), and suicide have all drastically increased. In The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (Buller et al., 2019), various interviews were conducted among sex workers, relatives and friends of sex workers, and professionals who work for anti-trafficking programs. Various methods of recruitment are identified among interviews, including luring vulnerable children who are unfamiliar with their surroundings, bribing children with money or material objects, and providing housing for women or children who are suffering from homelessness (Buller et al., 2019). Other factors such as abuse (emotional, physical, sexual, and neglect), childhood trauma, and witnessing violence within the household are identified as experiences various women and girls reported as increasing their vulnerability towards sex trafficking (Buller et al., 2019). Some women are drawn to sex work as a response to the increased number of young male pipeline or mining workers within their communities, most of whom have disposable incomes.

In her qualitative study which researched Aboriginal females and children and their experiences within trafficking in the Canadian prairie provinces (Saskatchewan, Alberta and Manitoba), Sethi found that many of the women and children within these communities felt as though they "have no choice but to leave their communities in search for a safer place" (2007: p. 61). Many women and girls who are undereducated might also turn to sex work since they are denied opportunities which could be bringing them higher income (George et al., 2010). Instead of punishing women for their choice to willingly enter sex work, or their forced involvement in sex work, the Canadian criminal justice system should be providing the adequate support on behalf of the police, judges, and lawyers involved in cases concerning Indigenous sex workers.

Recommendations and the MMIWG Calls for Justice

There were 231 calls for justice outlined in the 2019 National Inquiry, and many of these have yet to be addressed. Within the report, there is a strong emphasis on the impact of colonization, intergenerational trauma, marginalization, and a disregard for the voices of Indigenous women and girls. Further, it recognizes that the sex industry is highly stigmatized, making women hesitant to report violence or mistreatment to the police. There

are sex worker-specific recommendations in the Calls for Justice. For example, in section 3.4, there is a recognized need for mental health and trauma services for Indigenous women and girls who are victims of sexual exploitation. Section 4.3 calls for increased funding to programs and services for those within the sex industry.

Current legislation, Bill C-36, makes it difficult for women to come forward and report sex work-related violence. As Krusi et al. explain, "Neoliberal ideology is implicated in rewarding those women who exit prostitution and take on a victim subjectivity and denying the most basic citizenship rights to those who do not" (2016, p. 1145). The approach by the Canadian conservative government aims to bring an end to prostitution, with no regard for those who choose to utilize sex work as a legitimate source of income. This view of sex work is mirrored in the courts, police system, and even in current media. Indigenous sex workers are denied victim status in cases of exploitation and violence, allowing for men to continue with their actions with impunity (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019). In the Calls for Justice, section 5.3 encourages the federal government to "review and reform the law about sexualized violence and intimate partner violence" (2019; p. 183). The government should further be encouraged to review Bill C-36 and consider the harms it might impose on sex workers.

There are many ways the criminal justice system can improve to adequately response to the issue of violence against Indigenous sex workers. This need is identified in the Calls for Justice under section 5.4(ii), which calls for the audit of Indigenous police services and misconduct (2019). First and foremost, there needs to be a shift away from normalizing the harms associated with sex work. As seen in the Pickton case, a lack of response and action from police led to a twenty-year delay in the conviction of a serial killer. Indigenous policing training should be mandatory for all officers who work at the municipal, provincial, or federal level. There are courses offered through the Canadian Police College which offer professional development for police officers, such as "Indigenous Gang Reduction Strategies (IGRS)", "Integrated Approaches to Interpersonal violence and Abuse (IAIVA)", and "Strategic Policing through Action and Character leadership development course (with an Indigenous lens) (ISPAC)" (Government of Canada, 2021). Although these courses may be beneficial for professional development, it is important to include courses which outline the history behind high rates of Indigenous involvement in the criminal justice system.

At all levels of the criminal justice system, an involvement of Indigenous perspectives and practices would be extremely beneficial when approaching Indigenous issues. It is important that criminal justice actors do not employ black and white thinking and take into account cultural and social factors (Collins, 2017). This can be done by considering or utilizing Indigenous knowledge systems, philosophies or values when making decisions regarding Indigenous victims or perpetrators. An acknowledgement of the historical oppression of Indigenous people by the Royal Canadian Mounted Police and the

Government of Canada through residential schools, the sixties scoop, and reserves will provide criminal justice actors with an understanding of the continued intergenerational trauma, marginalization, and racism faced by Indigenous people today.

Conclusion

As exemplified by the Pickton case, there is a lack of concern on behalf of the police regarding missing sex workers. As exemplified by the Barton case, there is a lack of concern on behalf of the court, jury, prosecution and Crown. Further, the unnecessary dehumanization and reduction of mother of three to a single body part exhibits the plain and simple disregard for justice. Based on these cases, change within the criminal justice system is evident. Utilizing these cases provides us with a direct example of how the justice system does not have Indigenous sex workers' best interests in mind. The issue of Indigenous injustice further extends beyond the discipline and practice of criminal justice. As outlined in the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019), Indigenous injustice needs to be addressed in various systems, including health and wellness, media and social influencers, education, and the general public.

Reference

Baboulas, T. E. (2021). What if They Called Her Ms. Gladue? *Voices of Forensic Science*, *1*(2), 105-115.

Balfour, G. (2021). Decriminalizing domestic violence and fighting prostitution abolition: Lessons learned from Canada's anti-carceral feminist struggles. *International Journal for Crime, Justice and Social Democracy.* Advance online publication. https://doi.org/10.5204/ijcjsd.1993

Browne, R. (2019, October). Demands grow for Canada to decriminalize sex work after the election. *Global News.* https://globalnews.ca/news/5970549/canada-sex-work-decriminalization/

Buller, M., Audette, M., Eyolfson, B., & Robinson, Q. (2019). National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada). *Reclaiming power and place: The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. https://www.mmiwg-ffada.ca/final-report/

Calls for Justice. (2019). Reclaiming power and place. *The Final Report Of The National Inquiry Into Missing And Murdered Indigenous Women And Girls*. https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf

Collins, A. M. (2017). The Colonial Legacy–The Legal Oppression of Indigenous Women and Girls in Canada. *Glendon Journal of International Studies/Revue d'études internationales de Glendon*, *10*.

Cui, L.A. (2021). Missing and Murdered Indigenous Women in the Case of Canadian Serial Killer Robert Pickton. *Voices of Forensic Science, 1*(2), 29-38.

Culhane, D. (2003). Their Spirits Live within Us: Aboriginal Women in Downtown Eastside Vancouver Emerging into Visibility. *American Indian Quarterly, 27*(3/4), 593-606.

Department of Justice Canada. (2014). Prostitution Criminal Law Reform: Bill C-36, *the Protection of Communities and Exploited Persons Act.*

Department of Justice Canada. (2017). Technical Paper: Bill C-36*, Protection of Communities and Exploited Persons Act.* https://www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html#sec1

Department of Justice Canada. (2017). Victimization of Indigenous Women and Girls. *Research and Statistics Division. https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/july05.pdf*

Dusome, J. (2020). Lost and Forgotten: Missing and Murdered Sex Workers on Vancouver's Downtown Eastside. *INvoke*, *6*.

Galbally, P. J. (2016). Playing the Victim: A Critical Analysis of Canada's Bill C-36 From an International Human Rights Perspective. *Melbourne Journal of International Law, 17*, 36.

George, A., Vindhya, U., & Ray, S. (2010). Sex Trafficking and Sex Work: Definitions, Debates and Dynamics—A Review of Literature. Economic and Political Weekly, 45(17), 64-73.

Goodall, Z. (2019). United by the Problem, Divided by the Solution: How the Issue of Indigenous Women in Prostitution Was Represented at the Deliberations on Canada's Bill C-36. *Canadian Journal of Women and the Law*, *31*(2), 232–265. https://doi.org/10.3138/cjwl.31.2.02

Government of Canada. (2021). Indigenous Policing. https://www.cpc-ccp.gc.ca/programs-programmes/indigenous-autochtones/index-eng.htm

Hensley, L. (2019, December). Sex workers say Canada's laws put them in danger – and demand the new government fix them. *Global News*. https://globalnews.ca/news/6073593/canadas-sex-worker-laws-bill-c36/

Israel, M. (2003). The Underrepresentation of Indigenous Peoples on Canadian Jury Panels. *Law & Policy, 25*(1), 37-62.

Johnson, C. (2019). "Willing Victims": The Prevalence of Violence and Public Discourse Against Indigenous Women and Girls. *Invoke, 5,* 27-35.

Johnston, J. (2021, January 13). 'Considerable' force needed to fatally injure Cindy Gladue, jury told. *CBC News. https://www.cbc.ca/news/canada/edmonton/edmonton-cindy-gladue-manslaughter-trial-1.5872340*

Krüsi, A., Kerr, T., Taylor, C., Rhodes, T., Shannon, K. (2016). 'They won't change it back in their heads that we're trash': the intersection of sex work-related stigma and evolving policing strategies. *Sociology of Health & Illness, 38*(7), 1137-1150.

Ling, J. (2018, September). Governments have failed Canada's sex workers – and they're running out of patience.

Maclean's. https://www.macleans.ca/news/canada/governments-have-failed-canadas-sex-workers-and-theyre-running-out-of-patience/

Long, S. L., Mollen, D., & Smith, N. G. (2011). College Women's Attitudes Toward Sex Workers. Sex Roles, 66(1–2), 117–127. https://doi.org/10.1007/s11199-011-0088-0

Murphy-Oikonen, J., Chambers, L., McQueen, K., Hiebert, A., & Miller, A. (2021). Sexual assault: indigenous women's experiences of not being believed by the police. *Violence against women*, 10778012211013903.

National Inquiry into Missing and Murdered Indigenous Women and Girls. (2019). Reclaiming power and place. *The Final Report Of The National Inquiry Into Missing And Murdered Indigenous Women And Girls.* https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf

Purdy, C. (2015, April 2). Prosecutors to appeal acquittal in Cindy Gladue murder case. *The Globe and Mail*. https://www.theglobeandmail.com/news/alberta/alberta-prosecutors-to-appeal-acquittal-in-cindy-gladue-murder-case/article23763166/

Rotenberg, C. (2016). Prostitution offences in Canada: Statistical trends. *Statistics Canada. 85*, 24.

R. v. Barton, 2019 SCC 33

R. v. Pickton, 2010 SCC 32

Sethi, A. (2007). Domestic Sex Trafficking of Aboriginal Girls in Canada: Issues and Implications. *First Peoples Child & Family Review*, *3(3),* 57–71. https://doi.org/10.7202/1069397ar

Strega, S., Shumka, L., Hallgrimsdottir, H. (2020). The "Sociological Equation": Intersections Between Street Sex Workers' Agency and Their Theories about their Customers. *The Journal of Sex Research, 58*(3), 1-12.

Tucker, A. (2016). Media and the Perpetuation of Western Bias: Deviations of Ideality. *Community Prosperity Student Research Award Program 2015-2016.*

Valverde, M. (2019). From Bad to Worse via a Successful Constitutional Challenge: The Tragedy of Feminist Engagement with Prostitution Law Reform in Canada. *University of Minnesota Press*.

Vuolajärvi, N. Governing in the Name of Caring—the Nordic Model of Prostitution and its Punitive Consequences for Migrants Who Sell Sex. *Sex Res Soc Policy* 16**,** 151–165 (2019). https://doi.org/10.1007/s13178-018-0338-9

Weitzer, R., & Tuch, S. A. (1999). Race, Class and Perceptions of Discrimination by the Police. *Crime & Delinquency*, *45*(4), 494–507.

Wilson, S. N. (2020). Decolonizing Sex Work in Canada: Assessing the Impact of Government Regulation on the Wellbeing of Indigenous Sex Workers. *The Kiessling Papers, University of Toronto.*

Decolonizing Prison: A Framework and Practices for Revisioning Incarceration

Megan Korchak

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, Brassard & Jaccoud, 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, 2017). 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, 2017). 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, 2017).

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 (Monchalin, 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 (Monchalin, 2016). Decolonization should permeate everyday life by reaffirming ways of cultural existence and practices (Yellow Bird, cited in Monchalin, 2016)

Macro decolonization is the big picture (Asadullah, 2021). It is the dismantling of the colonizing tendencies of societal systems, institutions and policies (Monchalin, 2016). Decolonization on a macro level is much more complex as colonialism is reinforced through several different layers of each system (Monchalin, 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" (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 (Monchalin, 2016). Prisons that continue to reinforce colonialism inevitably create social harms and reduce any attempt at reconciliation (Monchalin, 2016). In order to align with the Truth and Reconciliation Commission's Calls to Action under the justice section, decolonization is necessary (Monchalin, 2016).

Decolonization of prisons means more than simply Indigenizing 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 prions 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" (Nielson, 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 (Nielson, 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 (Nielson, 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 (Nielson, 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 (Nielson, 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 (Nielson, 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 (Nielson, 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 (Nielson, 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, 2021). Prison theatre was used as programming in a prison in Auckland, New Zealand (Hazou, 2021). 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, 2021). Preparations for the play included weeks of rehearsal as well as workshops focused on mask work and storytelling (Hazou, 2021). The play conveyed themes of morals, right and wrong, and humility (Hazou, 2021). 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, 2021). The group of prisoners was guided by a *kaumatua,* an elder Maori who led the group through cultural protocols in the play (Hazou, 2021). Facilitators of the theatre program ensured acknowledgement of Maori practices with efforts to not reinforce colonial practices (Hazou, 2021). 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, 2021). This decolonial approach to prison theatre allowed the group to explore and share parts of their culture stifled by colonialism (Hazou, 2021). There was an overall sense of pride and cultural connectedness amongst inmates who participated in the theatre program (Hazou, 2021).

The play employed the use of puppets, which served as a useful medium for free expression distanced from the individual (Hazou, 2021). Using the puppets, they were able to work on empathy and emotions and portray themselves in a different way (Hazou, 2021). There was a focus on repairing evil with ties to Maori culture and the impacts of colonialism (Hazou, 2021). Theatre in prison challenges colonialism and can help prisoners express themselves (Hazou, 2021).

Prison theatre is very transformative as it takes place in an environment where people are confined and controlled (O'Connor & Mullen, 2015). In a typical prison setting, inmates are encouraged to comply and conform to those in power (O'Connor & Mullen, 2015). Inmates also experience a sense of lost autonomy, liberty and control over their own bodies (O'Connor & Mullen, 2015). Theatre counters this by providing an outlet for self expression and roleplaying (O'Connor & Mullen, 2015). 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, 2015). 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 prions 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?

Activities

1) Watch *APTN Investigates: Indigenous people in Canada behind bars* at 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?

Recommended Readings

Monchalin, L. (2016). *The colonial problem: An Indigenous perspective on Crime and injustice in Canada*. Toronto, ON: University of Toronto Press

Regan, P. (2010). *Unsettling the settler within: Indian residential schools, truth telling, and reconciliation in Canada*. Vancouver: UBC Press

References

Agozino, B. (2003). What is institutionalised? The race-class-gender articulation of Stephen Lawrence. In B. Agozino and S. Pfohl (Eds.), *A counter-colonial criminology: A critique of imperialist reason*. London: Pluto.

Asadullah, M. (2021). Decolonization and restorative justice: A proposed theoretical framework. *Journal of Decolonization of Criminology and Justice*, *3*(1), 27-62. Retrieved from https://ojs.aut.ac.nz/dcj/article/view/25/20

Bamarki, R. (2016). Blocking their path to prison: Song and music as healing methods for Canada's Aboriginal women. *The Canadian Journal of Native Studies 36*(1): 1-27. Retrieved from https://login.libproxy.uregina.ca:8443/login?url=https://www-proquest-com.libproxy.uregina.ca/scholarly-journals/blocking-their-path-prison-song-music-as-healing/docview/1826236513/se-2?accountid=13480

Boyce, M. (2017). Carceral recognition and the colonial present at the Okimaw Ohci Healing Lodge. *Palmerston North14*(1): 13-34. DOI: http://dx.doi.org/10.11157/sites-vol14iss1id345

Browning, W., Ryan, C., and Clancy, J. (2014). *14 patterns of biophilic design: Improving health and well-being in the built environment*. Report. Terrapin Bright Green Corporation. Report. Retrieved from https://www.terrapinbrightgreen.com/reports/14-patterns/

Chartrand, Vicki. (2019). Unsettled times: Indigenous incarceration and the links between colonialism and the penitentiary in Canada. *Canadian Journal of Criminology and Criminal Justice 61*: 67-89. https://doi.org/10.3138/cjccj.2018-0029

Connolly, A. (2019, January 8). White and non-Indigenous offenders made up 11% of those in healing lodges last year. *Global News.* Retrieved from https://globalnews.ca/news/4825631/demographic-breakdown-healing-lodges-canada/

Correctional Service Canada. (2019, September 9). Programs for offenders. *Government of Canada.* Retrieved from https://www.csc-scc.gc.ca/002/002-index-en.shtml

Correctional Service Canada. (2021, March 20). Indigenous healing lodges. *Government of Canada.* Retrieved from https://www.csc-scc.gc.ca/aboriginal/002003-2000-en.shtml

Crozier, C. (Video journalist). (2017). *APTN Investigates: Indigenous people in Canada behind bars* [Video]. APTN National News. Retrieved from https://www.aptnnews.ca/investigates/aptn-investigates-indigenous-people-in-canada-behind-bars/

Cunneen, C. (1997). Community conferencing and the fiction of indigenous control. *Australian & New Zealand Journal of Criminology 30*(3): 292-311. https://doi.org/10.1177/000486589703000306

Department of Justice Canada. (2018) Indigenous overrepresentation in provincial/territorial corrections. *Just Facts. Research and Statistics Division.* Retrieved from https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/docs/nov01.pdf

Elliott, E. (2011) *Security with care: Restorative justice and healthy societies.* Halifax: Fernwood Publishing

Griffiths, C. & Murdoch, D. (2018). *Canadian corrections* (5th ed.). Toronto: Nelson Education.

Hartnett, S. (2011). *Challenging the prison-industrial complex: Activism, arts, and educational alternatives*. Urbana: University of Illinois Press.

Hazou, R. (2017). *Repairing the evil: Staging puppet Antigone at Auckland prison.* Manuscript submitted for publication.

Heydon, G., & Naylor, B. (2018). Criminal record checking and employment: The importance of policy and proximity. *Australian & New Zealand Journal of Criminology 51*(3): 372–394. https://doi.org/10.1177/0004865817723410

Hughes, J. (2005). *Doing the arts justice: a review of research, literature, practice and theory*. In A. Miles and A. McLewin (Eds.). United Kingdom: The Unit for the Arts and Offenders Centre for Applied Theatre Research.

Ling, J. (12 August, 2019). Canada's prisons are failing. *CBA National.* Retrieved from https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/canada-s-prisons-are-failing

Llewellyn, J. (2011). Restorative justice: Thinking relationally about justice. In Downie, J. and Llewellyn, J. (Eds.), *Being relational: reflections on relational theory and health law*. (pp. 89-108). Vancouver: UBC Press.

Martel, J., Brassard, R., & Jaccoud, M. (2011). When two worlds collide: Aboriginal risk management in Canadian corrections. *The British Journal of Criminology 51*(2): 235-255. Retrieved from https://www.jstor.org/stable/23639877

McGuire. M., & Palys, T. (2020). Toward sovereign Indigenous justice: On removing the colonial straightjacket. *Decolonization of Criminology and Justice 2*(1): 59-82. Retrieved from https://ojs.aut.ac.nz/dcj/article/view/16/13

McIntosh, T. & Workman, K. (2017). Māori and prison. In *Australian and New Zealand Handbook of Criminology, Crime and Justice*, edited by Antje Deckert and Rick Sarre. (pp. 725–35). Melbourne: Palgrave Macmillan.

Monchalin, L. (2016). *The colonial problem: An Indigenous perspective on Crime and injustice in Canada*. Toronto, ON: University of Toronto Press (UTP).

Nielsen, M. O. (2016). Aboriginal healing lodges in Canada: still going strong? Still worth implementing in the USA? *Journal of Legal Pluralism and Unofficial Law 48*(2): 322–345. DOI: 10.1080/07329113.2016.1157377

O'Connor, P & Mullen, M (2011) *Prison theatre: Letting the light in to disciplinary relationships* NJ: *35*(1): 133-145. DOI: 10.1080/14452294.2011.11649547

Office of Hawaiian Affairs *(2012). The Native Hawaiian Justice Task Force Report* (Honolulu: Office of Hawaiian Affairs). https://www.oha.org/wp-content/uploads/2012NHJTF_REPORT_FINAL_0.pdf.

Prison. (n.d.). In *Oxford Languages*. Retrieved from https://languages.oup.com/google-dictionary-en/

Quince, K. (2007). "Māori and the criminal justice system in New Zealand." In *Criminal Justice in New Zealand* (Warren Brookbanks and Julia Tolmie, Eds.). Wellington: Lexis Nexis

Schar, C. H., Biewenga, N. & Lombawa, M. (2020) Decolonizing prisons. *Journal of Architectural Education 74*(2): 263-271. DOI: 10.1080/10464883.2020.1790936

Tauri, J. (2019). Reducing our prison population: Past failures and new approaches. *Decolonization of Criminology and Justice 1*(1): 106-116. Retrieved from https://ndhadeliver.natlib.govt.nz/delivery/DeliveryManagerServlet?dps_pid=FL50344282

Trevethan, S. D., Crutcher, N., Moore, J. P., & Mileto, J. (2007). *Pê Sâkâstêw Centre: An in-depth examination of a healing lodge for federally incarcerated offenders*. Research Report. Correctional Service of Canada. Retrieved from https://www-deslibris-ca.libproxy.uregina.ca/ID/226471

Wener, R. (2012). *The environmental psychology of prisons and jails: Creating humane spaces in secure settings*. Cambridge, UK: Cambridge University Press

Wilson, A. (2006). Biophilia in practice: Buildings that connect people with nature. *Building Green 15* (7). Retrieved from https://www.buildinggreen.com/feature/biophilia-practice-buildings-connect-people-nature

Withers, L., & Folsom, J. (2007). "Incarcerated fathers: A descriptive analysis." Research Report. Correctional Service of Canada. Retrieved from https://www.csc-scc.gc.ca/research/092/r186-eng.pdf

Legacy of Colonialism: Colonized laws which holds back for Reformation and Liberal Criminological Perspective in Bangladesh

Maisha Tabassum Anima

Introduction

Recent efforts to 'decolonize' knowledge frameworks and social structures within post-colonies appears to be a part of a decades-long movement to reform ancient colonial ideological foundations of knowledge and adapt colonial institutions to contemporary contexts. Bangladesh, India, Pakistan, post-colonial regions of the Southern part of Asia, have legal frameworks and penal codes that reflect this significantly more clearly than anywhere else. The legal framework also has an effect on the parameters of criminology within a particular country; from defining crime in terms of legislation, the overall crime prevention strategy, and the law enforcement forces that protects it. Colonizers enacted laws primarily to establish their own identity, as well as a means of regulating the most dangerous aspects of a seemingly rebellious community. If, on the other hand, a country's laws proceed to be centered on those enacted during the colonial period, which placed a focus on controlling the masses of the occupied country, post-colonial countries risk being misled in their efforts to maintain control over their own citizens, rather than choosing to focus on rehabilitation and other advanced and modern criminological perspectives.

Countries in Asia continue to sustain colonial-era legislation, which maintains the foundation of imposing control over local communities driven by ideological tensions. The paper provides an in-depth analysis of Bangladesh's legal practices, as well as the citizenry's interpretations of legal consequences inflicted by colonial-era legislation. Through a historical backdrop and an assessment of the current legal landscape, this paper will focus solely on the background perspective of assembling the legal frameworks of pre-colonized Bangladesh. By concentrating on the negative effects of colonial laws, the main objective will be to try to set some ideas for this region to spring up from the colonial antediluvian laws, most of which are not liberal for this modern world.

> 'In India, there are several tribes of people who became thieves during the tumultuous anti-British period. They are slowly being rehabilitated and will eventually become

productive members of society, but for now, they hold on to their criminal heritage and are tough to deal with. By the way, what are your plans for these people's political rights? They're referred to as vermin by the locals, yet I assume they'll be voters just like everyone else.

- R. Kipling, Under the Deodars

South Asian countries share common traditions, common ancestry, shared culture, and shared history. As a result, it is not perplexing that Bangladesh, India, and Pakistan all end up sharing a colonial legacy of repressive and authoritarian laws, colloquially referred to as the "colonial hangover." When those laws were enacted, their tone, objective, and approach were all designed to limit and oppress the people on behalf of the imperial overlords, rather than to protect their rights, affirm their dignity, and confirm their freedom.

The Penal Code 1860, the Police Act 1861, the Evidence Act 1872, the Code of Criminal Procedure 1898, and the Jail Code, all British colonial legacies, are all still in effect in Bangladesh with very minor changes to the language and execution. The philosophy of constitutional law, the precedents of the Supreme Court, international treaty obligations and the adaptation of specific laws all influence the way criminal justice is administered in Bangladesh. There is a widespread belief that Bangladeshi law today is heavily influenced by colonial precedents.

When it comes to British legal changes in this land, Akbar Ali Khan says they were revealed as "isomorphic mimicry," which seemed to be a western analogue but was really the byproduct of exploitation for the poor and marginalized.

The result of colonized laws: A mode of retaining power

The colonial drafting pattern outcomes in laws with colonial features that are geared toward the executive, are incapable of ensuring accountability, and foster a social attitude of defying and sidestepping the law. A colonial statute encourages colonial governmentality, which refers to the particular techniques utilized by colonial rulers to enslave the locals. Colonial administrations were protected by these laws. Hegemony and domination are tools employed by colonial administrations to exert more power and keep their subjects under constant watch. Section 5 of the Official Secrets Act of 1923, for example, states that any communication not in the interest of the state is illegal. It's crucial to remember the term "in the interest of the state." Having control of a colony was important because it provided a resource pool for the state. In this way, the interests of such governments were at odds with those of citizens living in colonial areas.

People's lives have been impacted by colonialism. Former colonial powers' legacies live on and affect the functioning of countries exposed to colonial control decades or even centuries afterwards. When a colonial power withdraws its hold on a region, but another takes it over, the situation worsens dramatically. Such encounters often leave a mishmash of perceptions, which may lead to mistrust, confusions, and even immaturity.

In her study on how colonial laws affected the overall scenario, Arpeeta Shams Mizan, 2007, highlighted three main reasons. When indigenous community-based codes were replaced by colonial laws, it disrupted legal practices and public views of law throughout the Indo-Pak and Bangladeshi subcontinents. Bangladesh then contradicts the goal of the law by complying to colonial laws and drafting traditions without acknowledging historical, cultural and social disparities between independent Bangladesh and the colonial subcontinent. It also reinforces colonial ideas about law as government rather than as a protection, eroding public confidence in it (Arpeeta Shams, 2007)

History

Following the Sepoy Mutiny in 1857, the Crown established rule in India, and colonial subordination began formally. This progressively prepared the way for the codification of laws (which was completely foreign to the Common Law system) and the formation of a court structure, so offering a 'comprehensive ideology through which to dominate' (Barry, 2012).

> *In the colonial culture, identification with the aggressor bound the rulers and the ruled in a dyadic relationship. The Raj saw Indians as crypto-barbarians who needed to further civilize themselves. It saw British rule as an agent of progress and as a mission. Many Indians in turn saw their salvation in becoming like the British, in friendship and in enmity.*
>
> - A. Nandy, An Intimate Enemy: Loss and Recovery of self under Colonialism, 1994

Emergence of the colonial history

Bangladesh, located in the Ganges delta, has long been a popular destination for settlers and has been exposed to a variety of outside influences. With this exposure and the influx of immigrants, the cultural mix was widened and a lifestyle that was freely inspired by a wide range of sources (Huque, 2015). Bengal was ruled by autonomous lords and only seized by the British Empire during the Mughal era, in contrast to central India, which resisted foreign invaders' raids and annexations.

Following the dissolution of the Mughal empire, "hereditary noblemen ruled East Bengal as semi-independent rulers, paying a minor tribute to the British government" (Huque

1988). The British colonial authorities attempted to handle the administration and control of Bengal using a variety of means, including boundary redefinition.

Attempts by the British Governor-General to divide Bengal for administrative reasons had failed because an Indian-led campaign tried to overturn the decision. Demand for the establishment of Pakistan increased as the nationalist movement gained steam, and the Indian subcontinent was divided into two states as a result of this increase in demand. Pakistan's eastern wing was created by dividing Bengal, which eventually became Bangladesh.

Since East Bengal (future Bangladesh) was bordered by India on three sides, the fact that India and Pakistan had a tense relationship didn't help much. Military war erupted between East and West Pakistan because of Pakistan's political elite's discriminatory policy, their refusal to share national assets with Bangladesh, and their refusal to transfer power (Jahan 1972). People in Bangladesh were outraged by political and economic injustice, as well as by the cultural superiority of Pakistani rulers. Pakistan's colonial control over Bangladesh finally crumbled as a result of the system's failure to keep up under pressure. In 1971, the nation proclaimed its independence and has since been well-known around the globe.

Bangladesh's birth generated high hopes among the country's population and authorities. Protracted years of colonial dominance and marginalization of nationalist ideals had only reinforced the people's drive to achieve their objectives. Nationalist leaders utilized this mindset in their struggle against Pakistani control, emphasizing the inequalities and unfairness associated with a colonial system and promising to abolish colonial rule's "evils" upon taking power.

Shaping of Bureaucracy following the British legacy

Several conclusions may be drawn from Bangladesh's experience in creating an administrative and political structure. It's unsurprising that there were suggestions to replicate the United Kingdom's parliamentary democracy model. This was presumably done to isolate the political leadership from Pakistan's presidential system.

The age of exploration impacted not just the elite, but also the general populace. Citizens got increasingly politically involved as a result of increased chances to express and organize opposition. Bangladesh adopted a quickly produced written constitution. Many of the country's legislation were influenced by British parliamentary democracy and aimed to create a stable political environment. Pakistan's history of unrest and military intervention, on the other hand, would quickly weaken British influence. Faced with threats to their power and legitimacy, Bangladesh's leaders have violated and amended the constitution, turning it into a farce.

Consequently, parliament had turned into a weapon in the power struggle, just as in Pakistan. This legacy of colonialism permeates every aspect of Bangladeshi politics, from the way parties operate to their organizational structures. Several people seemed to want democracy, and many political parties pledged to work toward that end. However, the history of Pakistan bred authoritarian tendencies in these political groups. Because of this uncertainty, they've either been strongly opposed to the regime or unwavering supporters. The advent of personality cults has aggravated the matter even more, unfortunately.

Because of Pakistani administration, the military has always had a privileged status. Government inefficiency and corruption, civic unrest, and the threat of foreign intervention have all been used by Bangladeshi generals to grab power. On one hand, they have clearly learnt from their experiences and avoided becoming involved in politics whenever possible. Bangladesh's bureaucracy developed in a similar way after the country gained its independence. As the most well-organized and competent entity in society, it has become a crucial administrative instrument by relying on Britain's tradition of impartiality and neutrality. It has, however, been accused of adhering to Pakistan's habit of meddling in power politics. To safeguard their positions, senior civil and military bureaucrats have rejected all previous attempts to alter governmental administration and the social structure. The situation may improve with the assumption of power by an administration that is expected to rely on the support of bureaucracy.

Impact of Colonialism

Indeed, colonial experience has the potential to be beneficial in that it speeds up progress by bringing in new ideas and influences. In this way, colonial rule exposed many developing countries to western and liberal philosophies as well as educational institutions. As a result, pupils of the colonial educational system have gone on to spearhead anti-colonial movements. As the political and administrative structures of conquering powers are enforced, democracy, equality, basic rights, and equity are all strengthened.

At the same time, indigenous peoples have suffered under colonial control. Ruler intolerance, oppressive tactics, and strict law and order enforcement are all examples of how colonial powers violated democratic principles in their colonies. The indigenous peoples are caught between the policies of two colonial powers, and they must make a choice. Following independence, indigenous nationalist leaders are drawn to the colonial power's democratic, egalitarian, equitable, and balanced political and administrative structures. However, in order to impose their authority in the face of dissent and criticism, such leaders had to employ the colonial powers' other (negative) tactics. Governments become repressive, exercising severe supervision in the name of law and order. As a result, utter chaos reigns as leaders adopt governing techniques according to their whims.

How colonial rules have shaped Bangladesh

Although the British left the subcontinent 74 years ago, their colonial rule continues to have repercussions in numerous aspects of modern Bangladesh. In 1970, the National Parliament was convened with elected members of Pakistan's Provincial and National Assemblies to lead the country following the Liberation War, and a constitution was drafted within nine months. The constitution allows for a multi-party system of government, the protection of fundamental rights, a parliamentary form of government, the judiciary's independence, and the constitution's four guiding principles were democracy, socialism, secularism, and nationalism. In 1975, control of the military commenced and lasted 15 years. The British colonial legacy may still be observed in Bangladesh's form of administration. The idea of a parliamentary system of government came from the British.

In his speech to the Privy Council, Lord Macaulay made it clear that the Indian people did not want to accept a British legal system, and that the British would establish one in order to keep the Indians under control.

British law maintained a number of pre-existing concepts. As with the Moghul administration before them, the colonial masters thought that personal law was determined by a person's religious beliefs. As a consequence, Muslims and Hindus adhered to distinct sets of rules. This distinction is still maintained in India, Pakistan, and Bangladesh.

A festering culture of non-accountability

The best instance of ambiguity is the "good faith clause." The word "good faith" originates in the realm of contractual obligations. On the other hand, the colonial criminal laws of the Indian subcontinent are filled with provisions requiring good faith. There is no definition of good faith anywhere, and it has grown to mean "lack of intent to break the law," "operating in good faith," and so on throughout the decades. In effect, this means that any conduct or omission that would ordinarily constitute a crime will not be regarded an offense if committed by a state authority in "good faith." Without a clear idea of what constitutes good faith on the part of an officer, one must depend on executive orders and judicial interpretation, only after a violation has occurred.

The Official Secrets Act of 1923 does not provide a definition of the term "state interest." In a similar vein, the Penal Code of 1860 does not provide a term for "modesty of a female." A 2018 statute, the Digital Security Act, maintained that tradition by explicitly prohibiting any characterization of "religious feeling."

The formation of police

The Indian Act of 1857 established the police force. The police force undertook the operation in order to probe the British East India Company's misdeeds. The British imprint may still be observed in the Bangladesh police force. The Bangladesh Police Training Academy was founded in 1912 in Rajshahi's Sarada district and continues to function following the colonial heritage.

Lower constables, middle inspectors, and higher superintendents are British-administered titles that are still in use in the Bangladesh Police ranks. Bangladesh Police Department is responsible for preserving law and order and ensuring the public's protection. Section 54 of the Criminal Procedure Code is yet another evidence of the police having the authority to arrest someone on the basis of "mere suspicion."

The majority of British Raj executive officers being White, and the few "local" Indian Civil Service officials were also groomed to serve the colonial system in a similar manner as Whites. Officers were pitted against the general public as a result of this strategy. Not the people, but the Crown's servants were in charge of them all. A good example of administrative dominance may be seen in provisions that ban "false, frivolous, and vexatious claims." While they appear to be pro-victim, they were actually playing the role of a safeguard for white British settlers of Indian mofussil communities seeking protection from charges brought by native Indians.

For the powerful

The following feature is an excessive reliance on the executive. Written laws with common law roots are often centered on clarity, ensuring that the law's intended meaning is transmitted properly. However, colonial legislation were designed using unnecessarily lengthy phrases in order to enable the government and the judiciary to bend the law in whichever manner suited their interests. Because of the high level of openness, the executive branch was able to use discretion. Many Bangladeshi legislation (written after 1971) feature the term "any or all such as the Government may declare by publishing in the Official Gazette," for example. Consequently, a person may never completely comprehend the scope and implications of a certain piece of law.

Colonial laws: Psychology behind it

In most cases, European colonial powers used a tactic of 'superimposing' state laws, that is, putting laws enacted by the colonial powers on top of laws enacted by other sources (CUP, 2002). Since most pre-colonial Indian laws were customary, colonial rulers perceived India as possessing no legal system at all (Rattigan, 1885). The colonial regulations formed to be a part

of the European powers' civilizing effort in Africa and other parts of the world. According to Luigi Nuzzo,

> 'The birth of colonial law proper occurred in tandem with…the problem of establishing law governing relations with peoples of another religion or peoples considered to be on a lower level of civilization had assumed a central role in the international law debates of the West'.

According to European legal academics, the colonial laws were viewed as a step in the establishment of 'colonial consciousness,' which was intended to psychologically manipulate colonized populations into engaging in European expansionist ambitions (Luigi Nuzzo, 2011).

Codification: The First Blow of Colonization over the Legal System

Codification has frequently been used as a weapon of imperialism (Elizabeth Kolsky, 2005). Many English experts criticized the IPC 1860 as "suitable only for backward overseas colonies" (Wing-Cheong, 2013). Partha Chatterjee argues in his book The Nation and Its Fragments that such a stereotypical separation exists between the colonizer and the colonized, which he thinks is the source of colonial authoritarian behavior. As a feature of colonization, the dual standard of codified laws favored the executive's priorities (Partha, 1993). The 1871 Criminal Tribes Act is an example. Because of their tribal origins, certain Indians would be treated as born criminals under this law. The Act claimed that certain tribes were "addicted" to the "systematic conduct of non-bailable offenses," and that the Local Government Officer designated by the colonial government would be the sole judge of whether a tribe possessed such criminal proclivities (Criminal Tribes Act, 1871).

Colonial Impact in Drafting: The Bangladesh Case

By fusing ancient and new concepts, incoherent colonial and modern legal patterns coexist in a single textual body. For example, rape is defined as having sexual relations with a wife under the age of 13 in the Penal Code 1860 (section 375), but the Suppression of Violence Against Women and Children Act 2002 did raise the age to 14 (section 9) and the most recent Child Marriage Restraint Act 2017 highlights the age to 18 (section 9).

In terms of specific crimes

In accordance with the colonial tradition, laws are formed in a power-driven, command-based, and top-down manner. When it comes to legislative deliberations, there is limited place for public participation, and citizens' prospects of gaining justice are usually minimal.

Under British rule, independence fighters and others only suspected of having similar political leanings were often prosecuted under Sections 122 and 123 of the colonial Penal Code (which included "Offence of Sedition"). Speech that undermines state sovereignty or endangers public safety is illegal in Pakistan, which has strengthened various characteristics of this repressive colonial rule. This legislation is still in effect in Bangladesh. In an interesting outcome, numerous newly enacted legislation – such as the Information and Communication Technology Act – prohibit defamation of any person using cyber-technology in a manner similar to the one outlined in this chapter. Compared to colonial tyranny, this method has striking similarities to it.

The pursuit of justice and sound government has been pushed to the back burner. Indeed, the judiciary was a subordinate institution to the colonial government. It behaved more like an extension of the bureaucracy than a check on it in certain instances. For example, in the 1930s, specialized courts were set up to try freedom fighters like Bhagat Singh and the people behind the Chittagong Armory Raid.

India's struggle for judicial independence started as soon as the country was partitioned in 1947. Both the bureaucracies in India and Pakistan opposed efforts to separate the lower criminal courts from the administration. Unlike judges, magistrates were vested with both legal and administrative powers. As the colonial authority had predicted, they were now able to use more force. The judicial responsibilities of judges in India were separated from their executive functions in 1975, and Pakistan followed suit in 1997. In December 1972, Bangladesh's constitution established an independent judiciary, but the courts were stripped of their independence in 1975 and returned to their previous subservient position. In 2007, the lower criminal court was finally separated from the executive branch of government, a move that had been anticipated for years. These actions were taken in line with a Supreme Court decision from 2000 imposing what is known as "judicial separation."

Bangladesh's rape legislation is based on Section 375 of the Penal Code 1860, which was passed during the British colonial period of the country's history. Rape is classified as a gender-specific crime under Section 375 of the Code, a holdover from the time period (i.e. by a man against a female, who is not his wife). When it comes to sexual intercourse, the law considers fourteen-year-old girls to be incapable of consenting, thus any sexual activity with one of them will always be treated as an infraction of their civil rights under the law. Those found guilty of rape face a prison sentence of up to 10 years or maybe life in prison (section 376). Marital rape is a crime if the victim is a minor under the age of thirteen. Raped men and hijras (transgender people) are not included in the related sections.

The infamous Section 155(4) of the Evidence Act 1872, which allows defense attorneys to demonstrate that a rape complainant has a "general immoral character" in order to undercut her credibility in court, is another example of Victorian morality influencing our laws today. Section 155(4) of the Evidence Act 1872, which allows defense attorneys to

demonstrate that a rape complainant has a "general immoral character" in order to undercut her credibility in court. Because the defense's focus on a woman's morality unavoidably leads to interrogation about her lifestyle, attire, and sexual history, Section 155(4) is eventually used to prosecute the victim of rape rather than the defendant of rape.

The 2000 Act went further in reform than its predecessors, introducing minimum victim safe guards such as a restriction on disclosing the identity of a rape victim (section 14), closed-door examinations of rape victims in court (section 20), and a strong emphasis on the necessity of conducting immediate medical examinations of rape victims (section 32). This law also included a new offense of failing to prevent custodial rape, which carries between five and 10 years in prison.

Successive administrations have ignored the constitutionality of discriminatory legislation such as section 375 of the Penal Code and section 155(4) of the Evidence Act, which clearly contradict the Constitution's core principles of non-discrimination and gender equality. Unfortunately, despite our successful efforts to free ourselves from colonialism in 1947 and again in 1971, rape victims in our nation are still subject to the outdated laws imposed on us by our occupiers.

Among other statutes, the Official Secrets Act, 1923 (OSA) is a commonly used statute that is currently in force in Bangladesh, India, and Pakistan. The law is commonly referred to as anti-espionage statute and covers all aspects of secrecy and confidentiality pertaining to the government or state affairs. Sections 3 and 5 of OSA are the most frequently used. Among other things, Section 3 criminalizes espionage, while Section 5 criminalizes the unauthorized release of secret government material, which covers everything from a secret official code to a password to a drawing to a plan to model to article to document to any secret official code. However, the OSA has come under criticism for the manner in which it has targeted the media and press. Investigative journalism, in particular, has suffered the most severe consequences.

Reformation:

Bangladesh has made some significant strides toward developing a legal system free of colonial remnants. However, more work remains to be done. Allowing Bangla, the native language, to be used in court alongside English was a critical move. The Rules of the Supreme Court's High Court Division were revised to reflect this in 2012.

Additionally, the judiciary has become more proactive in defending human rights and personal freedom. Probably the most visible manifestation of this tendency is public interest litigation (PIL). The word refers to the fact that courts accept cases brought by public-spirited individuals on behalf of everyone else, even if they are not personally impacted. PIL lawsuits disproportionately assist the vulnerable and marginalized segments of society who lack access to the courts for a range of reasons.

The Supreme Court of India pioneered PIL, and supreme court judges in Bangladesh and Pakistan quickly followed likewise. The PIL has altered public perceptions of the judiciary. It enables the court to handle allegations that might not be addressed otherwise. It establishes a framework for holding government officials responsible.

In a 2016 public interest litigation (PIL) decision, Bangladesh's Supreme Court provided guidelines on how to interpret Section 54 of the Code of Criminal Procedure 1898. As a consequence, the police were only able to detain people if they had a warrant in their possession. Similarly, the Supreme Court found that a provision requiring the consent of the government before prosecuting public employees was unconstitutional in another instance. According to the Supreme Court in another instance, officers of the security forces are not exempt from punishment if someone dies in jail while participating in an anti-terrorist operation.

These kind of decisions signal a shift away from the colonial legacy of shielding government personnel from the consequences of any action committed in ostensibly "good faith." These are positive steps. Bangladesh, however, does have a long way to go before ensuring that government institutions never operate above the law.

Conclusion (Continuing the Colonial Legacy)

Bangladesh's independence leaders' aim for a new legal system capable of meeting the needs of the nascent nation has mostly been unattained. The legal system of the emerging nation has not been decolonized.

Our laws have retained their colonial character. We have a strong supporter of coloniality in our legal system, and notably in our administration. A period when governments exercised great influence over individual liberty was the context in which these legislation were created. At a time when human rights are being fought for, colonial laws are not only out of date, but they are also plainly anti-human rights. And what's even more disturbing is that when it comes to legislating, an independent and sovereign Bangladesh still follows the same patterns and characteristics. Due to the retention of these colonial statutes, the Bangladeshi legal system – which is made up of three departments: the legislative, executive, and judicial – works in a way reminiscent of the British Raj.

Reference

A. Nandy, *An Intimate Enemy: Loss and Recovery of Self under Colonialism* (Delhi: Pluto, 1988), p. 34.

Arpeeta Shams Mizan, *Continuing the Colonial Legacy in the Legislative Drafting in Bangladesh: Impact on the Legal Consciousness and the Rule of Law and Human Rights*, 6 I.J.L.D.L.R. 3 (2017).

Barry Wright, *'Macaulay, the India Penal Code and Labour in the British Empire'* (Universiy of Queensland Conference, March 2012) Retrieved from: https://ssl.law.uq.edu.au/calendar-of-events-files/law-research-seminar-series.pdf

Criminal Tribes Act 1871

Elizabeth Kolsky, *'Codification and the Rule of Colonial Difference: Criminal Procedure in British India'*, (2005) 23(3) L.His.R. 632

Huque, A. S. (1988). *Politics and Administration in Bangladesh*, Dhaka, University Press Limited.

Huque, A. S. (2015). *The impact of colonialism : thoughts on politics and governance in Bangladesh The impact of colonialism : thoughts on politics and governance in Bangladesh*. *March 1997*. https://doi.org/10.1080/714041319

Lauren Benton, Law and Colonial Cultures (CUP, 2002)

Luigi Nuzzo, *'Colonial Law', European History Online (2011)*. Retrieved from: http://ieg-ego.eu/en/threads/europe-and-the-world/European-overseas-rule/luigi-nuzzo-colonial-law

Official Secrets Act, 1923

Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (PUP 1993)

R. Kipling, *Under the Deodars (New York: United States Book Company 1891)*, p. 210.

Wing-Cheong Chan, Barry Wright,Stanley Yeo, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate Pub. Ltd., 2013)

W.H. Rattigan, *'Customary Law in India'* (1884-85) 10 L. MAG. & L. Rev. 1,3-4

Decolonization and Criminology: An Analysis on Knowledge Production

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Abstract

Mainstream criminology provides a significant role in the development of our current policies and legislation. This chapter evaluates the influence of the settler-colonial ideology in the Justice System along with the implications of the current criminological structure in the academic discipline. With the use of case studies from Southern, Indigenous, and Africana perspectives, this chapter reflects on the imposition of contemporary colonial and imperialist processes in the settler-colonial state and the discipline of criminology which continuously harms Indigenous peoples and other marginalized communities. By addressing the injustices and gaps within the aspect of knowledge production, we argue that there is a need for a post-colonial discipline that provides a better response to how society views and conducts the perception of crime, justice, and punishment.

Introduction

Theory holds an important aspect in the way that allows us an opportunity to analyze and critique our understanding of the world. It can provide deep insight into our realities, belief systems, and knowledge of the world which can be applied in the real world. Researchers within the interdisciplinary field of criminology; the study of crime and criminal behaviour, engage in tremendous scientific research to provide a rational explanation that supports their theories. If used effectively, these theories could provide potential strategies to design programs and impact policies within the Justice System (Williams & McShane, 2016). What is constitutes a good theory can improve the social, political, and economic conditions of our environment. It can also impose real-life consequences, depending on the purpose and intention of the concept. Our current policies and legislations are often guided by criminological philosophies, thus why, there is importance towards analyzing the implications for these policies and understanding the social and historical context that influenced the theories and research behind it.

By way of addressing the social and economic injustices towards Indigenous peoples and their current relations to the Canadian Justice System, one could conclude that there exists an ideological implication that our current Justice System is set up to fail Indigenous

people in society and continuously impose other factors of injustices amongst marginalized communities. These types of socioeconomic inequalities do not occur as an isolated phenomenon, it involves systematic and structuralized undertakings to maintain a powerful Eurocentric ideology of imperialism and capitalism (e.g, see Agozino, 2021; McGuire & Palys, 2020; Monchalin, 2015). One that benefits the settler-colonial state to which, this paper argues, the discipline of criminology is complicit. There is importance towards dismantling the current systems of oppression through criminalization, and one of the ways of doing so is through changing the perceptions of society and its view towards crime and punishment. This involves finding alternatives to the way academics conduct research methods and creating a paradigm shift towards the theoretical framework of mainstream criminology. This paper reflects on the powerful ideological implications of our current criminological structure and how it continuously harms marginalized communities through the Western Justice System. This paper also attempts to define what decolonization means in the discipline of criminology and what post-colonial criminology looks like using case studies from diverse perspectives including Southern, Indigenous, and African theories in order to explain how there is a need towards a post-colonial discipline that provides a better response to how society views and conducts the perception of crime, justice, and punishment.

Impact of Colonization

The imposition of colonial ideology was applied into the settler-colonial systems of governance to which are 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 on capitalist, imperialist, and patriarchal law-making that structures the development of hierarchal 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 the state-imposed hierarchy maintains the fragmentation of Indigenous systems, legal traditions, and culture through policies such as *The Indian Act* (1985) to maintain the colonial tactics of control today. Divisiveness plays a fundamental role in the process of colonization, to which the concept of “inferiority” and “superiority” establishes and maintains settler-colonial domination over the “Other” (Indigenous peoples and marginalized communities) to justify the processes of dispossession, social and cultural exclusion, and policies of disenfranchisement (Cunneen & Tauri, 2019; Blagg & Anthony, 2019).

This imposed system of the internal and external colonial process has ensued in a myriad of social, economic, and political intergenerational harms to marginalized communities. Westernized systems of crime control and criminology have taken advantage of these harms, resulting in the significant over-representation of Indigenous peoples in all

aspects of the Justice System. To put this in context, according to Statistics Canada (2011), Indigenous peoples (those who have partaken and reported as of "Aboriginal Identity") comprise of 4.3 percent of the Canadian population with First Nations people representing 60.8%, Métis with 32.3%, Inuit with 4.2% of the total identified population, and the rest of 2.7% identified of multiple Aboriginal backgrounds or another Aboriginal background. This statistic has its limitations due to the "ethnic mobility" of Aboriginal backgrounds, influenced by various social factors as well as the legislation of *The Indian Act* (Bill C-31) that imposed and/or denied "Indian" status to certain Indigenous communities (Monchalin, 2015). Nonetheless, the systematic exclusion and marginalization of the Indigenous peoples is reflected in the significantly higher rates of poverty (25.3% total in all of Canada) (CPJ, 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 socioeconomic factors are interconnected with the over-representation of criminalization and victimization of Indigenous peoples in the westernized system of crime control. Poverty, lack of education, and unemployment are considered "disadvantages to access to a competent legal service as well as 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 account for 29% in federal admission and 31% in provincial admission, both of which are higher in the provinces Saskatchewan (75%) and Manitoba (75%) where Indigenous peoples represent approximately 15% of the population. In addition, Indigenous youth represented 43% of admissions to correctional services; 47% in custody admissions and 40% in community admissions despite representing 8.8% of the Canadian population.

According to Cunneen & Tauri (2019), Indigenous people are more vulnerable and susceptible to victimization in the Justice System due to the ongoing colonialism, oppression, and legacies of traumatic experiences, thus, Indigenous people are twice as likely to report being 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 imposition of colonial-patriarchal views amongst Indigenous communities, Indigenous women have become the most vulnerable population as repeated victims of violent assault than any other non-Indigenous women in Canada, and these experiences of victimization frequently began in childhood (Monchalin, 2015; p. 145). The ongoing intergenerational violence places Indigenous women at risk for early involvement in the sex trade for sexual exploitation (Monchalin, 2015). According to the 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 these higher levels of criminalization and victimization are a direct result of the ongoing colonialist and

discriminatory perceptions in social and political institutions that are brought on by westernized theorizing, which labels Indigenous peoples as the "problem" in society (Cunneen & Tauri, 2019). Many Indigenous and non-Indigenous scholars argue that one of the ways of implementing violent subjugation, coercive assimilation, and control of the "Other" is through the westernized approach of the Justice System in handling such cases of victimization and criminalization (Blagg & Anthony, 2019).

Definition of Decolonization

Due to the extensive contextual nature of what decolonizing is and its purposes, there exists a myriad of definitions for the term 'decolonization' from both Indigenous and non-Indigenous scholars all over the world. Regardless of the various interpretations, these authors often advocate for decolonization as a response towards colonial structures and ideologies that continuously 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 of colonization (Monchalin, 2015), it involves unlearning colonial ideologies through "intellectual, psychological, and physical forms and it won't happen by magic, happenstance, or friendly agreement" (Asadullah, 2021 p. 3). This process occurs from both a micro and macro perspective. Micro-forms 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 developing these forms into their definition, Monchalin (2015) and Cunneen & Tauri (2019) refer to decolonization as unravelling and reversing colonialism in both micro and macro forms. As for Agozino (2019) and Kitossa (2012), there is a focus on the macro-form of decolonization, specifically within the institutions and production of criminological knowledge.

Decolonization can occur in a variety of disciplines and settings, specifically within the Criminal Justice System. Police, court, and corrections encompass settler-colonial ideologies and structures that generate a cycle of harm and maintains inequalities amongst Indigenous people and other marginalized communities (Cunneen & Tauri, 2019; Smith, 1999). Thus, it is imperative to analyze what influences such policies and practices that impose these societal harms. Agozino (2004) argues that "Criminology is a social science that served colonialism more directly than many other social sciences" (p. 343). Criminology focuses on the involvement of social science research methods to conceptualize and define crime and provide an effective response to it in order to utilize a crime control model in society. Its criminological theories, epistemology, and policies were developed through a Eurocentric lens, therefore contemporary criminology has often ignored and continuously failed 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 contemporarily, as learning from history allows us to construct new foundations that do not partake in the interests of the legacy of colonialism. In addition, Indigenous peoples must be prioritized at the forefront of criminology, not as subjects for westernized research, but as leaders, researchers, and scholars for knowledge and methodological production (Cunneen & Tauri, 2019; Smith, 1999). Decolonization requires moving away from the westernized approach of research methodologies such as the rule of objectivity; domination of construction and dissemination of knowledge; and impassive reasoning. As an alternative, incorporating a localized, holistic, and non-hierarchal approach that is guided by Indigenous social and cultural context (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 reflects directly within the cultural context (Asadullah, 2021).

These structural and institutional changes provide a space to which the micro-form of decolonization begins. As post-colonial criminology re-defines 'crime' and the responses to it, there is more focus on acknowledging deeper societal harms that leads to 'crime' or criminal behaviour and implementing Indigenous contextual ways of healing. There is no hierarchal structure around the process of decolonization as macro and micro-forms guide and inform each other and can occur at the same time. Overall, decolonizing criminology calls for incorporating Indigenous knowledge and approaches to social science research methods that benefit and reflect the experiences of Indigenous peoples in the Justice System (Cunneen & Tauri, 2019).

Analyzing the Discipline of Criminology

The discipline of Western criminology developed around the early eighteenth century to the late nineteenth century in Europe to formulate basic ideas about the criminal justice system and the processing of 'crime' and criminal behaviour (Williams & McShane, 2011). The Classical school of thought focused more on the lawmaking and criminal process which held beliefs about criminal behaviour as an act of a human being's free will and rationality whereas the Positivist school studied 'criminal' behaviour through social, biological, and psychological traits that produce criminogenic effects. Both schools of thought were inspired by the Enlightenment period, one that utilized and legitimize scientific methodologies such as observation and using objective reasoning to make sense of human realities and criminological knowledge (Williams & McShane, 2011; Smith, 1999). Criminological theories such as classical and positivist focused between the current social structure and individual factors to explain the phenomena of crime. These schools of thought were guided by their existing social and intellectual ~~context~~ ideologies? held within the European colonial context. Thus, the theories, methodologies, and policies are argued to

be rooted in expanding and justifying imperialistic ideologies (Smith, 1999; Agozino, 2019). Furthermore, the institutionalization of these theories conducted by the traditional scientific method left myriads of possibilities to justify the harmful implications towards marginalized societies.

Decolonization scholars such as Agozino (2004), Smith (1999), and Kitossa (2012) argue that criminology is a fundamental feature of imperialist and colonial reason. This process occurs in two reasonings: First, the Enlightenment context is grounded on imperial policies and practices that asserts moral claims related to the concept of "civilized" man in order to process the dehumanization of "uncivilized" societies and led to racial categorization in criminology (Smith, 1999). The perception towards who is deemed as a 'criminal' is distinct from 'normal' populations; an anomaly that requires a retributive or punitive response from state institutions. Second, 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 resulted in the imposition of Westernized rationality and conceptualization as a tool for dismissing the knowledge and traditions of the "Other" in the discipline. Cunneen and Tauri (2019) state that policymakers look towards authoritarian and administrative criminologists for empirical validation, creating theoretical and conceptual binaries in an equivalent way that the West and "Other" operate (i.e., Offender/Victim, Crime/Criminal, and Moral/Immoral) (p. 25).

When reflecting on the social ills of the "Other" and how it interconnects with the over-representation of Indigenous peoples in all aspects of the Justice System, it becomes clear how Western criminology administers the concept of crime and criminal process. These systems and ways of thinking still reflect our current policies and practices which allows us to understand and realize that criminology is a "control-freak" discipline, one that legitimizes the mechanism of oppression through systems of control and social exclusion (Agozino, 2004). Furthermore, criminological ways of knowing directly collide with imperialism since the higher rates of Indigenous victimization and criminalization in the Justice System are viewed as a 'reaction' to unfortunate circumstances of history (Kitossa, 2012). By conducting criminological research in a Eurocentric discipline, these social ills and Indigenous communities are treated as sole objects for analyzing the "Aboriginal" problem. Thus, perpetuating further internalized colonialism that allows non-Indigenous researchers to dominate the construction and dissemination of crime-control knowledge and enforce inferior beliefs towards Indigenous people by reducing them into statistical data and inherently part of the Justice system (Cunneen & Tauri, 2019; Smith, 1999).

Lastly, mainstream criminology maintains the relations of internalized colonialism and the political economy of criminalization through "avoiding the socio-historical critique and implications of its practice, epistemology, and theory" (Kitossa, 2012). The ongoing narrative surrounding crime as either an individual problem or constructed by specific socio-

economic dysfunction (such as poverty or unequal opportunity) purposely averts the theory of criminalization as a direct consequence of imperialism/colonialism, racism, and other institutional/systemic ways of oppression (Agozino, 2019; Kitossa, 2012). Analyzing the current representation of criminologists within the academic discipline is one way to reflect on this issue. The dominance of white, authoritarian criminologists in the field and their inclination to Western theorizing limits serious alternative and oppositional theorizing on crime and criminal behaviour (Kitossa, 2012). Criminologists who identify as Black, Indigenous and people of colour are underrepresented and continue to struggle towards implicating a counter-colonial and counter-imperial discourse to criminology under a Eurocentric normative institution. As mentioned earlier, the state-vested interests in the authoritarian/retributive approach to crime-control also mean that there will always be limitations in researching decolonial alternatives, inadequate enough to implement them fully within the Justice System. The key to a post-colonial criminological discipline is embedded within more representation of Black, Indigenous, and criminologists of colour. Many post-colonial scholars and academics around the world have made efforts towards challenging the colonial discipline in which will be mentioned in the next section.

Case Studies

One of the ways in which the scholar(s) within the discipline could determine and establish the principles and values of post-colonial criminology and its inner workings is by looking towards an 'alternative' criminology that challenges the notions of colonialist and imperialist reason. Providing case studies from Southern, Indigenous, and Afrocentric Criminology allows the opportunity to seek knowledge from academic scholars and practitioners that offers insight into 'colonized' experiences, how the discipline of criminology operates against the racialized "Other", and lastly, offer alternative ways of research and methodologies that benefit the overall well-being of marginalized communities.

Southern Criminology

Southern Criminology places the discipline of criminology in a globalized context, through the lens of Global North and Global South. The power relations of the Global North are conceptualized regarding the sites of the colonizers, their analysis, its colonized places (Global South), and the consequences and effects of colonialism (Blagg & Anthony, 2019; Carrington et. al., 2016). In terms of criminological thought, the Global North is guided by capitalist and imperialist ideologies at the expense of the Global South through exploitation, subjugation, and state violence. According to Carrington et. al. (2016), imposing Western imperial power in the "Southern" societies resulted in establishing white-settler dominant communities, the imposition of colonial borders on local, ethnic, and tribal boundaries, and more importantly, exploited labours and the depletion of southern resources. As such, this

had an immense impact on societies that are now considered to be settler-colonial states that continuously deal with legacies of colonialism such as Canada and other post-colonial states such as Australia and New Zealand that base their cultural and political identity on their European settler populations (Carrington et. al., 2016). Furthermore, this immense impact has considered social ills as consequences of the processes of industrialization which led to criminological theory assuming that crime was an urban phenomenon rather than a direct consequence of imperialism.

The criminological thought in Southern criminology acknowledges the global North's linear and binary ways of thinking (i.e., developed/developing, first/second/third world). Post-colonial discipline includes confronting those thoughts to consider the colonial experience when attempting to theorize contemporary social conflict (Blagg & Anthony, 2019; Carrington et. al., 2016). The criminological field would benefit from seeking more inclusive patterns of crime, justice, and security outside of the global North perspective. The global South plays a role in incorporating new and diverse perspectives to criminological research agendas to benefit colonized societies, and in a way, democratizing the discipline of criminology through engagement with non-European perspectives. With this, post-colonial discipline utilizes the global South's epistemologies, methodologies, and ontologies which places the westernized knowledge system in the 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 how Southern criminology confronts the power imbalance is through a paradigm shift in criminological topics that focuses on the topics of power and class between the North and South. Moosavi (2019) provides a non-western centric lens by highlighting the arguments of Syed Hussein Alatas, a Southern criminologist who created efforts to decolonize the social sciences. Moosavi (2019) encourages Western criminologists to go beyond their scope, engage with the works of Alatas and other Southern criminologists to further understand criminological topics through a Southern lens. By analyzing the influence of Western crime control models in Southern societies, Alatas argues that non-Western intellectuals are in an 'intellectual bondage,' acquiescing to Western ways of knowledge production which recycles the impositions of imperialism and continues to allow Western systems of control and exploitation (Moosavi, 2019). Furthermore, Alatas proposes a criminological focus on the 'crimes of the powerful,' a crime that constantly occurs but is 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 it ties in along with holding the elite class accountable for their wrongdoings at the expense of the underprivileged class (Moosavi, 2019). Overall, there is a need for the criminological knowledge production to look towards Southern Criminology to analyze the gaps in our current theories and methodologies that engage with the colonial power, class inequalities 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, 2019). This is done as a way of response towards the current socio-economic injustices that colonialism has caused, acknowledging the colonial tools such as cultural and land dispossession, and the disavowal of Indigenous knowledge and ideologies. Thus, resulted in the replacement of Euro-centric systems of governance that disregarded the Indigenous Justice System. In addition, the current criminological discipline tends to ignore and invalidate Indigenous epistemologies as there is much preference and normalization towards Western theorizing and the use of scientific research methods that were developed during the Enlightenment period (Smith, 1999). The mainstream criminology's response towards the over-representation of Indigenous people is through "indigenization" of the Justice system (Mcguire & Palys, 2020). It is where settler-colonial states "fit" Indigenous traditions and customs, without its social and historical context, 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). Thus, there is wariness and caution amongst contemporary theories and methodologies that claim to integrate Indigenous traditions and customs into the non-Indigenous structures as these methods are more than likely to misappropriate certain community traditions and further impose colonial harm towards marginalized communities.

Cunneen & Tauri (2019) argue that the post-colonial discipline intends to move away from the mainstream discipline and instead, replacing it with Indigenous epistemologies and methodologies that benefit localized communities. With that being said, it is important to note that the term "Indigenous" encompasses a wide range of varieties of First Nations, Metis, and Inuit cultures and traditions that have their interpretations of the main principles according to their communities. Indigenous ways of knowing are often transmitted through storytelling, rituals, art, dance, and ceremonies and valued knowledge that is local, holistic, and verbalized as well as passed down from dreams, the ancestors, stories, and experiences (Cunneen & Tauri, 2019; Monchalin, 2015). Indigenous principles involve "harmony, balance, and circular thinking" that emphasizes the interconnection between human beings and all other living things (Monchalin, 2015). This principle is also applied to a traditional justice system and its responses to criminality which includes the involvement of an entire community during the judicial process and aims for the goal of "healing" for all modes of crime (Monchalin, 2015). Smith (1999) says that these sorts of Indigenous knowledge and principles can be implemented within the post-colonial discipline, as long as Indigenous academics and scholars are highly involved and considered to be the key and senior roles, with the knowledge of both contemporary and historical traditions. Indigenous knowledge and ideologies must also be protected by intellectual property rights during the research process and have the outcomes shared amongst the local community (Cunneen & Tauri,

2019; Asadullah, 2021) as well as driven by Indigenous protocols, containing explicitly outlined goals, and with the consideration of the impact of the proposed research to ensure that it is beneficial and not harmful towards individuals and the community (Smith, 1999). Smith (1999) also created a list of strategies that non-Indigenous researchers must follow to become more culturally sensitive with context to Maori communities, the strategy of avoidance where the researcher avoids dealing with the issues and instead, partake in personal development and learn Maori language and become more knowledgeable about Maori concerns; consult with Maori communities where efforts are made to seek support and consent; and "making space to recognize and attempt to bring more Maori researchers and 'voices' into the organization (p. 176-177). Having a more localized, holistic, and non-hierarchal approach towards post-colonial criminology guided by Indigenous cultural context allows the discipline to take on empirical research on the questions and issues that are the most important to Indigenous people and their communities (Cunneen & Tauri, 2019; 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. Thus, why Agozino (2021) argues that decolonizing criminology requires recognition of the social and historical struggles of the colonized African populations as these experiences are more than likely interconnected with the current injustices that occur with the rest of the world. Furthermore, Agozino (2012) suggests that the criminological field ought to conduct research and knowledge-production based on data reception rather than data collection. This means researching and receiving the current experiences of 'colonized' peoples in the Criminal Justice System from colonized voices themselves and applying that to the realization of our perceptions of 'crime' and justice, rather than making sense of data collected through the researchers lens (Agozino, 2021). Providing a focus on the Afrocentric context of crime and liberation aids criminologists in the understanding of decolonization by reflecting on the theory of political economy of criminalization and acknowledging the current Afrocentric struggles towards decolonization (Agozino, 2021).

Criminologists often have willful ignorance towards the consequences of capitalism, colonialism, and imperialism, operating on its legacies that regulate and maintain these social conditions, especially with the influence of state institutions, thus why Agozino (2021) argues that the discipline of criminology is considered to be a "control-freak" discipline. Agozino (2021) also argues that both political economists and criminological (anomie) theorists have often misinterpreted the hypothesis surrounding class inequalities and societal reactions to crime, contending that poverty and unequal opportunity causes deviance, when in fact, many rich and powerful individuals also commit a crime and are more likely to get away with it. Western contemporary criminology such as feminist and

critical criminology are also complicit in the silence on the institutionalized crimes against African populations (i.e., slavery, apartheid, and other socioeconomic exploitation) (Agozino, 2019). To fill this knowledge gap in the discipline, one must consider the contributions of liberation criminology. African scholars such as W.E.B Dubois, Frantz Fanon, Kwame Nkrumha, Amilcar Cabral, Angela Davis and Biko Agozino have provided tons of contributions to the development of criminological theories, they often talk about the struggle for emancipation by utilizing a Marxist approach to the current political climate (Agozino, 2021).

Liberation criminology considers the historical contexts of deviance and social control 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 of the 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 does not happen overnight or through a specific set of methods that is applicable within all societies affected by Eurocentric oppression. There will 'constantly be a struggle towards 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 a way that one could weaponize the concept of theory by changing a societies' perception of crime and criminal behaviour. However, this often comes to a conflict with the opposition of mainstream authoritative criminologists and theorists that constantly benefit from the legacies of colonialism. Representation of Indigenous and other marginalized scholars within the interdisciplinary field of criminology can often provide new ways of thinking about combating the socioeconomic injustices that 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 which includes the lack of substantive data in the practicality of such theories. In addition, decolonization is a rather new concept within the discipline and thus, there is a lack of availability in the scope of research that suggests a stronger argument towards the ideology of decolonization. However, there is an effort in involving and resourcing Indigenous scholars and non-Indigenous academics, whose works reflect on their personal and professional experiences to suggest a more inclusive and anti-oppressive approach that will benefit future decolonization academics in the field.

Conclusion

To analyze a criminological theory, it is important to ask the following questions: Who conducts the research? What are the main purpose and intentions of the research? What methods will be utilized? Whose interests does it serve and who will benefit from it? Who has designed its questions and framed its scope? Who will write it up? How will its results be disseminated? (Cunneen & Tauri, 2019). Colonialism and imperialism have left lasting social, economic, and political impacts in our society, specifically towards Indigenous people and marginalized ethnic communities, and it continues to do so through the westernized systems of crime control. There is danger in the criminological perception that this socioeconomic marginalization are 'reactions' to unfortunate circumstances in history as it implicates a narrative that marginalized communities are inherently tied within the justice system. A way to combat this perception is through the concept of decolonization which occurs in a holistic and localized approach. By encompassing the need to challenge ourselves as settler-colonial beings and address the need for systemic and institutional change, especially within the discipline of criminology. Decolonization occurs when we can critique and analyze Western criminology including the Indigenous perspectives and reflect in ways regarding its relations to Indigenous people and other marginalized ethnic communities.

Post-colonial criminology can look like a wide range of theories that encompasses Southern, Indigenous, and Afrocentric ideologies. These challenge the power imbalance in society, taking 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. Learning about the social and historical context is imperative for researchers and academics to determine the ideological implications of contemporary theories for future policies and practices. Both imperialism and colonialism have considerable influence on the way that academic disciplines conduct scientific research. Whether or not this has brought positive changes in the field, it came at the expense of disavowing Indigenous knowledge and traditional ways of thinking. Therefore, decolonizing criminology attempts to resist these colonial structures by revitalizing Indigenous systems that are localized, holistic, and non-hierarchal approaches, with the involvement of Indigenous people as senior roles in the knowledge production. I have hopes that the post-colonial discipline of criminology can change the way we theorize about crime and criminal justice in the future because it is beneficial in more ways beyond the Justice System. It has the ability to acknowledge systemic injustices and allow Indigenous peoples and our own traditional practices to guide us into healing from the conflicts imposed by colonial, imperial, and capitalist methods. In doing so, this leads to a more sustainable and peaceful way of living with ourselves and with others.

Discussion Questions

1) How and in what ways have certain criminological theories framed the crimes affecting Indigenous peoples?
2) What are the pros and cons of implementing either Southern, Indigenous, and/or Africana ideologies into mainstream criminology?
3) Why is it important to consider the historical and societal context of criminological theories and how does this affect our current perceptions of crime and criminal behaviour?

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/). How have the attitudes of settler communities towards Indigenous peoples in the 60s reflect the perspectives we have today? Explain why there is a significant focus on the socioeconomic conditions of people in reserves and how do they justify the 'integration' of Indigenous peoples in settler society?

2) Explore and reach out to Indigenous community-based organizations in your area. Do a comparative research on local Indigenous practices and governance and figure out the similarities and differences between their responses to crime.

Recommended Readings

Agozino, B. (2003). *Counter-Colonial Criminology: A Critique of Imperialist Reason.* Pluto Press.

Fanon, F. (1961). *The Wretched of the Earth.* New York: Grove Press.

Reference

Agozino, B. (2004). Imperialism, crime, and criminology: Towards the decolonization of criminology. *Crime, Law, and Social Change 41:* 343-358.

Agozino, B. (2019). Humanifesto of the Decolonization of Criminology and Justice. *Decolonization of Criminology and Justice 1(1),* 5-28.

Agozino, B. (2021). Africana Liberation Criminologies. In *The Routledge Handbook of Africana Criminologies,* pp. 18-31.

Asadullah, M. (2021). *Decolonization and Restorative Justice: A Proposed Theoretical Framework.*

Blagg, H. & Anthony, T. (2019). Introduction: Turning Criminology Upside Down. In *Decolonising Criminology in a Postcolonial World.*

Citizens for Public Justice. (2015, October). *On the Margins: A Glimpse of Poverty in Canada.* https://cpj.ca/wp-content/uploads/On-The-Margins.pdf

Cunneen, C. & Tauri, J.M. (2019). Indigenous Peoples, Criminology, and Criminal Justice. *Annual Review of Criminology 2, 359-381.*

Cunneen, C. & Tauri, J. (2019). Critical Issues in the Development of an Indigenous Criminology. In *Indigenous Criminology* 151-164*.* Bristol University Press.

Kitossa, T. 2012. Criminology and Colonialism: The Canadian Context, *The Journal of Pan African Studies*, 4(10), pp. 204-226.

Monchalin, L. (2015). *The Colonial Problem: An Indigenous perspective on crime and injustice in Canada*, University of Toronto Press.

McGuire, M. & Palys, T. (2020). Toward Sovereign Indigenous Justice: On Removing the Colonial Straightjacket. *Decolonization of Criminology and Justice 2*(1), 59-82.

Moosavi, L. (2019). Decolonising Criminology: Syed Hussain Alatas on Crimes of the Powerful. *Critical Criminology 27,* 229-242.

Malakieh, J. (2020). Adult and Youth Correctional Statistics in Canada, 2018/2019*. Statistics Canada* Catalogue no. 85-002-X. Ottawa.

National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) (2019). *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf

Statistics Canada (2013). *Aboriginal Peoples in Canada: First Nations People, Métis, and Inuit, National Household Survey, 2011.* Ottawa.

Smith, L. (1999). Responding to the Imperatives of an Indigenous Agenda: A Case Study of Maori. In *Decolonizing Methodologies: Research and Indigenous Peoples.* pp. 163-178.

Duty to Decolonize: Trauma in Canada

Nicola Kimber

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 evidences 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" (Brande, 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, recognising 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-judgemental 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.

References

Alfred, T. (2009). Restitution is the real pathway to justice for Indigenous Peoples. In G. Younging, J. Dewar, & M. DeGagné (Eds.). *Response, responsibility, and renewal: Canada's truth and reconciliation journey* (pp. 181–187). Ottawa: Aboriginal Healing Foundation.

Asadullah, M. (2021). Decolonization and Restorative Justice: A Proposed Theoretical Framework. *Decolonization of Criminology and Justice, 3*(1), 27-62. https://doi.org/10.24135/dcj.v3i1.25

Barkaskas, P. & Buhler, S. (2017). Beyond Reconciliation: Decolonizing Clinical Legal Education. *Journal of Law and Social Policy, 26,* 1-20. https://digitalcommons.osgoode.yorku.ca/jlsp/vol26/iss1/1

Bartlett, R. H. (1978). The Indian Act of Canada. *Buffalo Law Review, 27*(3), 585. https://core.ac.uk/download/pdf/236350538.pdf

Brande, L. (2021). Alcoholics Anonymous: 12-Step of AA Recovery Program. American Addiction Centers. https://www.recovery.org/alcoholics-anonymous/

Corrado, R. R., & Cohen, I. M. (2003). *Mental health profiles for a sample of British Columbia's Aboriginal survivors of the Canadian residential school system*. Ottawa: Aboriginal Healing Foundation.

Government of Canada. (2020). Reducing the number of Indigenous children in care. https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851

Grant, A. (1996). *No End of Grief: Indian Residential Schools in Canada*. Pemmican Publications, Inc.

Hackett, C., Feeny, D., & Tompa, E. (2016). Canada's residential school system: measuring the intergenerational impact of familial attendance on health and mental health outcomes. *Journal of Epidemiology and Community Health, 70*(11), 1096-1105. 10.1136/jech-2016-207380

Hopper, E. K., Bassuk, E. L., & Olivet, J. (2010). Shelter from the Storm: Trauma-Informed Care in Homelessness Services Settings. *The Open Health Services and Policy Journal, 3*(2), 80-100. 10.2174/1874924001003020080

Johnson, S. (2014). Knucwénte-kuc re Stsmémelt.s-kuc Trauma-informed Education for Indigenous Children in Foster Care. *Canadian Social Work Review, (31)*2, 155-174. Retrieved from https://www.jstor.org/stable/43486319?seq=1

Kaspar, V. (2014). The Lifetime Effect of Residential School Attendance on Indigenous Health Status. *American Journal of Public Health, 104*(11), 2184-2190. 10.2105/AJPH.2013.301479

Kumar, M. B., Tjepkema, M. (2019). Suicide among First Nations people, Métis and Inuit (2011-2016): Findings from the 2011 Canadian Census Health and Environment Cohort (CanCHEC). *National Household Survey: Aboriginal Peoples*.

Latimer, J. & Foss, L. (2004). A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II. *Department of Justice Canada*. https://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/yj2-jj2/yj2.pdf

Malakieh, J. (2020). Adult and youth correctional statistics in Canada, 2018/2019. *Statistics Canada*. https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm#mi-rs

Martell, C. (2021). Horses help women at healing lodge. *Eagle Feather News*. https://www.eaglefeathernews.com/news/horses-help-women-at-healing-lodge

Nadeau, D. M. (2020). *Unsettling Spirit: A Journey into Decolonization*. McGill-Queen's University Press.

Office of the Correctional Investigator. (2020). Indigenous People in Federal Custody Surpasses 30%: Correctional Investigator Issues Statement and Challenge. *Government of Canada*. https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx

Oudshoorn, J. (2015). A Framework for Trauma-Informed Youth Justice. In *Trauma-informed youth justice in Canada: A new framework toward a kinder future*. Canadian Scholars' Press.

Reardon, T. (2010). Nekaneet Horse Program: Inside the Okimaw Ohci Healing Lodge. *Canadian Cowboy Country Magazine*. https://www.cowboycountrymagazine.com/2010/08/horses-as-healers/

Stefanovich, O. (2018). What life is like inside the Okimaw Ohci Healing Lodge housing child killer Terri-Lynne McClintic. *CBC News*. https://www.cbc.ca/news/canada/saskatchewan/inside-okimaw-ohci-healing-lodge-terri-lynne-mcclintic-1.4860490

Sterritt, A. (2019, April 24). 'I felt like I was betraying my own': Indigenous social workers open up about challenges. *CBC News*. https://www.cbc.ca/news/canada/british-columbia/indigenous-social-worker-speaks-out-1.5107655

Stewart, L., Wilton, G., Baglole, S., & Miller, R. (2019). A Comprehensive Study of Recidivism Rates among Canadian Federal Offenders. *Correctional Service Canada*. https://epe.lac-bac.gc.ca/100/201/301/weekly_acquisitions_list-ef/2019/19-30/publications.gc.ca/collections/collection_2019/scc-csc/PS83-3-426-eng.pdf

Stout, M. D., & Kipling, G. D. (2003). *Aboriginal People, Resilience and the Residential School Legacy*. Aboriginal Healing Foundation.

Substance Abuse and Mental Health Services Administration. (2014). SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach. *HHS Publication*. Retrieved from https://nicic.gov/samhsas-concept-trauma-and-guidance-trauma-informed-approach

Sunrise Healing Lodge. (2021). *About Us*. http://nass.ca/about-us/

Truth and Reconciliation Commission of Canada. (2012). "Calls to Action." *Truth and Reconciliation Commission of Canada*, 2012, http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf.

Tuck, E., & Yang. K. W. (2012). Decolonization is not a metaphor. *Decolonization: Indigeneity, Education & Society, 1*(1), 1-40.

Wilk, P., Maltby, A., & Cooke, M. (2017). Residential schools and the effects on Indigenous health and well-being in Canada –a scoping review. *Public Health Rev, 38*(8), 1-23. 10.1186/s40985-017-0055-6.

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Kashfia Kaba Shejuti is currently an analyst at Center for Research and Information (CRI). She has worked on several research projects with the Department of Criminology, University of Dhaka; Asia Foundation; CID Bangladesh; and Rapid Asia, Bangkok. Kashfia is a Master of Social Science in Criminology from the University of Dhaka and received a good number of scholarships throughout her academic life. Her primary research interest is the criminal justice system, women and gender.

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Amanda K Gross is an anti-racist organizer and artist living and working on the ancestral land of the Cherokee in Asheville, North Carolina. She blogs about the interconnectedness of racism, patriarchy, capitalism, and white womanhood at MistressSyndrome.com and is currently working on a full-length book on that same theme. A certified yoga instructor trained by YogaRoots On Location's Anti-Racist Raja Yoga School, she holds an M.A. in Conflict Transformation from Eastern Mennonite University's Center for Justice and

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Maisha Tabassum Anima has completed her Graduation from the Department of Criminology, University of Dhaka, and is currently pursuing her Master's from the same Department. She has an inquisitive mind for knowing the historical context behind the formation of laws and the future of the Criminal Justice System, depending on the changing crime patterns and the rehabilitative measures which can be applied for a better future. Maisha has formerly worked on International Research projects of UNICEF, USAID, Pathfinder Bangladesh, FHI 360, focusing on the rights and empowerment of Women and Youth. She has also worked with the Counter-Terrorism and Transnational Crime Unit of Bangladesh on their Project.

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