Gendered Violence in Indigenous Communities: A Restorative Justice Approach

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Abstract:

In 1996, the Canadian government implemented reforms to the Criminal Code regarding sentencing in an attempt to reduce the overpopulation of Indigenous people in the judicial system, a problem which was seen as partly a result of colonialism and systemic discrimination. Included in these amendments were the restorative justice principles of reparations and responsibility, and a requirement for sentencing judges to consider reasonable alternatives to imprisonment, especially for Indigenous offenders. Unfortunately, a review of the recent literature indicates that judicial reform and sentencing innovation have failed to mitigate the overrepresentation of Indigenous people in the incarcerated population. It is apparent that what these reforms have failed to address are the broader systemic issues, such as poverty and lack of education, that contribute to the high incidence of Indigenous people committing criminal offences. Restorative justice has many goals, including enhancing accountability for one's actions, increasing voluntary dialogue, and reconnecting the individual with the traditional community. However, these actions also need to be targeted at preventative measures, rather than focusing on sentencing and offender reintegration. Thus, in order for a restorative justice approach to legal issues to be effective, social workers have an obligation to strive for the creation of more programs specifically targeted at Indigenous people, especially those for women and youth.

Introduction

In recognition that the high rates of incarcerated Indigenous men and women in Canada is in part due to systemic racism within the criminal justice system, legislative amendments were imposed that required judges to factor in Indigenous background during sentencing. However, these amendments have not made a difference in diverting Indigenous people from the criminal justice

system, and incarceration rates have steadily increased. The lack of systemic change for criminalized Indigenous individuals is in part due to conflicting case law and a lack of community resources. Colonization has altered traditional values of Indigenous justice such as healing relationships and restoring balance within the community environment; restorative justice is one measure to reclaiming this holistic cultural identity. However, Indigenous people need to push for self-governance to alleviate pervasive social inequalities. Further, sentencing circles need to be critically informed by Indigenous feminists in order to develop a safe, trauma-informed, and supported response to gendered violence—especially in intimate partner relationships—in Indigenous communities.

Gendered Violence in Indigenous Communities

Gendered violence (systemic gendered discrimination which results in violent acts towards women, including physical or sexual assault, and which includes intimate partner abuse) is a product of the historical and ongoing colonization of Indigenous people in Canada (Balfour, 2008; Cameron, 2006; Milward & Parkes, 2014; Snyder, 2014). Dickson-Gilmore (2014) describes gendered violence as an epidemic with dire consequences for Indigenous women. Indeed, Indigenous women have internalized sexual violence and sexism and often face intersectional abuses and vast social inequalities (Balfour; Snyder). Indigenous women need to be respected and empowered to reclaim their traditional revered positions within their communities in order to heal the historical and continued wounds of oppression (Balfour). As Balfour clarifies, the "squaw narrative" utilized by defense lawyers to show their clients as "pathetic" in order to receive sympathy among the jurors has done Indigenous women a disservice (p. 115). Instead, the narrative brought to court should illuminate the ongoing oppression faced by Indigenous women from communities fraught with systemic poverty, substance abuse, and gendered violence, and a criminal justice system that ignores their safety and oppressed status (Balfour). Part of the challenge to achieving a shift in perspectives is the lack of understanding amongst the public, the ubiquity of violence in Indigenous

communities, and an absence of culturally appropriate programs to raise awareness (Baskin, 2002; Dickson-Gilmore).

As Roach (2000) states, restorative justice has the potential to overcome its challenges to become an effective and safe response to gendered violence. Through critical Indigenous feminist analysis and input, a victim-centered restorative justice model that is trauma-informed and supportive is possible (Randall, 2013). Restorative justice can heal relationships and does not require an ending of the union; risk to the victim is present, however, and there is the possibility of coercion to participate in the restorative sanctions (Dickson-Gilmore, 2014). Dickson-Gilmore therefore suggests that restorative justice measures be partnered with retributive oversights to enhance relational healing and ensure the victim's well-being. I contend, however, that this retributive oversight should come from consultation and engagement with the Indigenous community, rather than solely through the mainstream justice system. Community leaders, band members, survivors and families should have a voice at the table, and traditional and contemporary cultural aspects should be included in any retributive response. Otherwise, mainstream retributive sentencing principles such as deterrence, denunciation, and separation might overshadow the more positive aspects of restorative sentencing.

Other challenges to the effective implementation of restorative justice for gendered violence include public opinion and conflicting case law. Crimes of a sexual nature or spousal violence are deemed to necessitate a severe response (Doob, 2000). Further, inconsistent interpretations by Canadian courts have perpetuated a belief that the limited scope of restorative justice makes it inapplicable to serious or sexual offences, a belief which has stagnated any substantive changes to the incarceration landscape for Indigenous people (Pfefferle, 2008). Nonetheless, restorative justice can be a more meaningful approach in some cases, if the safety of the victim is paramount and community programs are financially and publically supported (Randall, 2013).

Critical Analysis

Sentencing innovation has not alleviated the over-incarceration of Indigenous people in Canada; in fact, the situation has continually gotten worse since the judicial reform in 1996 (Pfefferle, 2008). It is clear that the issues facing Indigenous people that have led to high crime rates—poverty, addiction, dislocation, and intergenerational trauma caused by the forced and assimilative residential schooling system, for examples—are ongoing products of a colonizing government (Pfefferle). Urban Indigenous populations are even worse off, with an increased social dislocation and poor judicial understanding of the challenges that continue to face off- reserve Indigenous populations, as evidenced by the sentencing judge's decision in *R. v. Gladue* (1999) (as discussed later in this paper) (Pfefferle). A lack of training and community resources has largely made restorative justice measures ineffectual, despite research (albeit limited) that shows a positive outcome in victim and offender satisfaction, reduced recidivism rates, and restitution compliance (Latimer et al., 2005; Roach & Rudin, 2000).

Anand (2000) suggests that money would be better spent outside of the judicial system on targeted social programs that address the underlying causes of crime (such as substance abuse, poverty, and mental health issues). Indeed, the criminal justice system is highly punitive and is more concerned with formal equality (equality of treatment) than substantive equality (equality of outcome) (Rudin, 2013; Turpel-Lafond, 1999). Substantive equality is the motivation behind sentencing reform requiring judges to consider circumstances facing Indigenous people in order to offset systemic oppression (such as longer sentences and more onerous prison sanctions) and social impacts of colonization (including loss of identity). Further, implementing restorative justice through the criminal justice system has assimilated traditional Indigenous justice to be more compatible with the Western system (Vieille, 2013). However, restorative justice has been effective at highlighting social injustice in the Canadian environment (Roach, 2000).

Restorative justice implemented through the mainstream criminal justice system cannot even begin to heal Indigenous communities, according to Miller and Schacter (2000); however, I believe

it is still a worthy endeavour. On one hand, the criminal justice system is an oppressive, colonial system that perpetuates the social inequalities facing Indigenous people (Snyder, 2014). On the other hand, the restorative justice movement challenges the judiciary to become self- reflective about their unequal treatment of Indigenous people and is a method to decolonize the pervasive racism within the system, call for the creation of community programs, and alter public perceptions (Turpel-Lafond, 1999). Hand et al. (2012) suggest a two-pronged approach to reclaim Indigenous justice—to work within the mainstream system to advance culturally appropriate measures, and to extend self-governance initiatives outside of it. In addition to targeting the systemic racism within the system that has led to criminalization through strict judicial sanctions and over- policing, it is also important that holistic health care, accessible early childhood education, and the proliferation of social programs are implemented to target crime beforehand (Miller & Schacter).

The high prevalence of gendered violence in Indigenous communities is one consequence of colonialism (although it is important not to romanticize pre-settler communities as free of violence) (Snyder, 2014). The lack of current victim resources, conflicting case law, public misperceptions, and the need to build capacity and culturally informed sentencing alternatives within Indigenous communities has challenged restorative justice initiatives from being utilized in serious or sexual offences (Milward & Parkes, 2014). Snyder further suggests that the legal realm has perpetuated gendered oppression against Indigenous women in both the mainstream and Indigenous justice systems, as both systems are predominantly patriarchal institutions that ignore gender relations. To decolonize the system and to change the negative outcomes for Indigenous women as both victims and offenders, we need to challenge rigid gender norms, highlight intersectional oppressions, and subvert heteronormative standards (the traditional and socialized notions of heterosexuality and gender binaries) (Snyder). As such, women need to be encouraged towards positions of power in the legal system—as lawyers, judges, and victims' advocates.

Criminal Code of Canada

In spite of 1996 amendments to the *Criminal Code* (1985) intended to alleviate the overrepresentation of Indigenous people in the prison system, the situation for Indigenous persons in Canada is still critical. Although they compose only approximately four percent of the Canadian population, nearly one in four incarcerated men and more than one in three women in prison claim Indigenous ancestry (Sapers, 2014). The amendments were made to the sentencing provisions contained under section 718 within the *Criminal Code*, which specifically required sentencing judges to give "particular attention to the circumstances of aboriginal offenders" under section 718.2(e). This clause, and its subsequent interpretations by the Supreme Court of Canada, was a progressive measure as it was intended to remediate the overrepresentation of Indigenous people in the criminal justice system and it brought focus on discriminatory practices from the judiciary (Anand, 2000; Milward & Parkes, 2014; Turpel-Lafond, 1999). However, as Milward and Parkes state, these amendments have not made a difference, and the criminal justice system continues to fail Indigenous people in Canada.

Conflicting retributive and restorative sentencing values have hampered systemic change within the criminal justice system (Milward & Parkes, 2014). Retributive sentencing principles, such as deterrence, denunciation, and separation, are often prioritized over restorative goals of reparations and responsibility (Anand, 2000; *Criminal Code*, 1985). Thus, the retributive values will negate any positive impact of alternative sentencing for Indigenous people; indeed, sentences have remained the same as they pertain to length and severity for Indigenous and non-Indigenous individuals alike (Anand, 2000). In addition, Welsh and Ogloff (2008) have found that circumstances arising from being Indigenous (such as intergenerational trauma from Indian Residential Schools or high rates of child welfare system involvement) are not considered as mitigating factors as required by the legislative reform. Instead, universal issues such as addiction are factored into sentencing. Aggravating factors such as seriousness of offence or extensive criminal history therefore often counteract any alleviating conditions for Indigenous people (Welsh & Ogloff). Even so, the

fallacious notion that Indigenous people are given preferential treatment in the Canadian criminal justice system is perpetuated in the public arena (Anand). However, as Turpel-Lafond (1999) clarifies, there is a difference between equal treatment and equal outcome; sometimes, it is necessary to have a different sentencing process to ensure equality of outcome for Indigenous individuals. For example, once sentenced, Indigenous people often serve more of their sentences before release, and are more often sent to higher security settings where they face institutionalized racism from correctional staff.

Conditional sentences—sentences served in the community with strict conditions—that fell under the guise of restorative justice were also increased through the 1996 amendments made to the *Criminal Code* (1985). As expected, this has led to net-widening (which is more intrusive sentencing than previously, such as utilizing conditional sentences over a probation period) and the imposition of longer terms of incarceration for breach of conditions (Roach & Rudin, 2000). Although viewed as restorative justice measures, conditional sentences can be more punitive than probation through onerous sanctions such as strict curfews and mandated and intensive community treatment (Balfour, 2008). For Indigenous people, these conditional sentences may also overburden already limited culturally appropriate community resources (Turpel-Lafond, 1999).

Case Law

In *R. v. Gladue* (1999), the Supreme Court of Canada first interpreted the amendments made to the *Criminal Code* (1985), including the new section 718.2(e) regarding Indigenous background sentencing considerations. This case involved an Indigenous woman convicted of manslaughter against her common-law spouse (*R. v. Gladue*). It was determined that the sentencing judge had erred in not considering her Indigenous status as requiring special consideration because she had been living in an off-reserve, urban community (*R. v. Gladue*). Perhaps the most significant part of this case law is the clarity given to the remedial intention behind section 718.2(e) and the emphasis for the implementation of non-custodial sentences, when appropriate (*R. v. Gladue*). The Supreme Court of Canada made it explicit that the goal of section 718.2(e) was to reduce the

overrepresentation of Indigenous people in the prison system, irrespective of where or how they were living, whether on-reserve following traditional paths or not. Rather, *R. v. Gladue* emphasized the systemic discrimination still prevalent in the judicial system, which often unfairly punishes Indigenous people with longer, more severe sentences by not considering such circumstances arising from Indigenous identity as, for example, social dislocation (Pfefferle, 2008).

More recently, in *R. v. Ipeelee* (2012), it was once again affirmed by the Supreme Court of Canada that alternative sentencing sanctions are required due to historical and ongoing colonization of Indigenous people. *R. v. Ipeelee* involved the appeal of the breaches of long-term supervision orders for two Indigenous offenders, both with background addiction issues and violent criminal histories. It was outlined that limiting the decision in *R. v. Gladue* (1999) to less serious offences hindered the efficacy of section 718.2(e) in diverting Indigenous people from the criminal justice system and was, therefore, a misinterpretation of the remedial intent of the clause (*R. v. Ipeelee*). Gladue factors (the mitigating aspects arising from the offender's Indigenous status) need to inform different sentencing methodology, even for long-term supervision orders (*R. v. Ipeelee*). Neglecting to consider alternatives to imprisonment would be to deny the "fundamental principle of sentencing" which is to consider both the offender's responsibility and the gravity of the offence (*R. v. Ipeelee*, 36). As Rudin (2013) notes, this creates a problem when minimum sentences are imposed, as this negates the Court's discretion at utilizing information obtained regarding the Indigenous person's heritage to construct a proportionate sentence, which may be less than the mandatory minimum sanctions. Therefore, the Court must have the ability to impose conditional sentences, if deemed proportional to the offence, in order to meet the remedial nature contained in section 718.2(e) (Rudin).

Restorative Justice

As stated, the amendments to the *Criminal Code* (1985), added principles of restorative justice (such as rehabilitation, reparations, and responsibility) to the purposes of sentencing. Restorative justice is a democratic and reintegrative approach, which includes input from the

victim, offender, and the community (Tomporowski, Buck, Bargen, & Binder, 2011). Further, it offers a more culturally appropriate response for Indigenous people, as it is premised on key Indigenous values such as healing, harmony, and balance (Baskin, 2002; Hand, Hankes, & House, 2012). In addition, restorative justice strives to be holistic, flexible, and inclusive, and can be measured relationally through positive social outcomes (Llewellyn, Archibald, Clairmont, & Crocker, 2013).

It is important to include opportunities for restorative justice for Indigenous offenders in the highly punitive and hierarchical criminal justice system in order to reduce social injustices that have arisen due to colonization in Canada (Hand et al., 2012). In addition to ideological discrepancies, colonization has resulted in the denial of traditional justice systems, the acculturation of western worldviews, and imposition of cultural racism against Indigenous people (Hand et al.). Although retributive principles of deterrence and denunciation are still utilized during sentencing, restorative justice is seen as preferential treatment by the public (Anand, 2000; Pfefferle, 2008). Thus, one challenge to full implementation has been the view that restorative justice provides a race-based leniency on sentencing; this erroneous belief has perpetuated cultural discord between Indigenous and settler societies (Doob, 2000).

According to Latimer, Dowden, and Muise (2005), restorative justice is a superior system as it enhances victim and offender satisfaction, increases restitution adherence, and lowers recidivism rates. Moreover, it is better at restoring balance within the community and denouncing unlawful conduct for repeat offenders (Moss, 2013). Surprisingly, restorative justice appeals to people for different reasons—to the left-wing for its focus on healing, and to the right-wing for its cost efficiency (Doob, 2000; Roach, 2000). Restorative justice is, however, difficult to implement through the mainstream criminal justice system and is highly subjected to public criticism (Doob; Owen, 2011). According to Tomporowski et al. (2011), further challenges to restorative justice include a lack of comprehensive research on its effectiveness, limited community programs and funds, tenuous connection with traditional Indigenous justice values, and the contested views on its

applicability to serious and sexual offences. As outlined in this paper, these assertions should be addressed through increased research, enhanced community programs, self-governance initiatives, and critical input from Indigenous feminists on the development of culturally appropriate, yet safe, community responses to serious and sexual crime.

Sentencing Circles

Sentencing circles, one practice of restorative justice, develop a culturally and socially appropriate sentence through Gladue reports (outlining the offender's Indigenous heritage, mitigating factors, and alternatives to incarceration) in conjunction with input from all involved parties-- including the victim, the accused, Elders, and other community members (Turpel-Lafond, 1999). There are many benefits to sentencing circles over mainstream court sentencing procedures. For example, according to Baskin (2002), sentencing circles are based on traditional circle speaking values that enable and empower the victim to break the silence, and hold the offender responsible to their community (which leads to lower reoffending rates). By involving the community, the tendency to blame the victim as in a contested court proceeding is reduced, and the root social causes of crime (according to some theories) are highlighted and addressed (Belknap & McDonald, 2010). Further, sentencing circles provide a platform for people marginalized by the Canadian justice system to speak out and also draw attention to the intersectional oppressions facing Indigenous people (Linker, 1999).

On the other hand, sentencing circles are focused on the offender and fail to consider the emotional and safety needs of the victims, often risking the safety of female victims of gendered violence who are encouraged to speak out against their abuser (Belknap & McDonald, 2010; Cameron, 2006). Thus, the existence of safe, voluntary, and inclusive victim services for women should be an essential component for any restorative sanction (Cameron). Further, to be utilized as an alternative conditional sentence, culturally appropriate community resources must be created (Belknap & McDonald). However, according to Cameron, as sentencing circles fail to advance

Indigenous self-governance initiatives or increase funding for community programs, they are inauthentic restorative justice measures.

Although there are a number of reasons to be optimistic about the potential success of sentencing circles, it is also important to be cautious and self-reflective (Belknap & McDonald, 2010; Edwards & Haslett, 2011). For instance, sentencing circles are still part of the criminal justice system, and there is an expectation that the individual will plead guilty (even if they are not) in order to participate. It is possible that the offender is entering a guilty plea for sentencing leniency, which could hinder true remorse if they are guilty and endanger an outspoken victim due to feigned remorse (Owen, 2011). Also, during sentencing circles, the presence of conflict resolution skills, neutral language, and impartiality can remove the offender's violent actions from the discussion; the focus, instead, on conflict between the offender and victim could lead to revictimization (Edwards & Haslett). In addition, it is imperative that the judiciary involved in sentencing circles also receive training to increase their awareness of the intersectional issues and available community resources, decolonize the sentencing process, and ensure proper support for the victim is provided (Belknap & McDonald; Turpel-Lafond, 1999).

Conclusion

In conclusion, restorative justice and the practice of sentencing circles can be an appropriate and effective means of responding to gendered violence in Indigenous communities. However, there are a number of challenges to overcome in order to achieve this goal. For example, sentencing circles need to be critically evaluated in a self-reflective manner to ensure that they are victim-centered and trauma-informed. Although the victims should be empowered to speak out, they should not be coerced, and their safety needs to be ensured through community oversight. Further, the offender needs to be held accountable through non-coerced guilty pleas where sentencing leniency is not levied. A circumspect or cautious approach is essential, one which involves community participation, increased funding for culturally informed, holistic programs for serious offenders, and enhanced judicial education for lawyers and judges working

with Indigenous people. The oppressive consequences of ongoing colonization within the criminal justice system need to be highlighted to the media, frontline social service workers, taxpayers, and government workers, and Indigenous self-governance needs to be advanced outside of the mainstream criminal justice system as well as others. In this manner, we can decolonize our relationships and institutions, reduce the root social causes of crime and high incarcerations rates, and lessen the epidemic of gendered violence (particularly the most prevalent form of intimate partner violence) in Indigenous communities.

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