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Restorative Justice and Indigenous Courts Within the Penal Continuum: Rethinking Indigenous Over-Incarceration in Canada

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Abstract: Restorative justice has emerged as a comprehensive response to the over-incarceration of Indigenous peoples in Canada. Landmark developments – such as the 1999 Gladue decision and the creation of Indigenous People's Courts (IPC) – have reshaped sentencing by integrating factors like discrimination and adverse socio-economic conditions. Beyond legal reform, restorative justice addresses colonial legacies and social inequalities. This article examines its role in recent Canadian initiatives – specifically the Royal Commission on Aboriginal Peoples and the Sentencing Reform Act (both enacted in 1996) – and draws on three months of fieldwork at the Indigenous People's Court in Ottawa. The analysis focuses on the pivotal role of counseling and innovative restorative or communitarian programs within the IPC framework. Notably, many cases leading to trial do not stem from initial infractions but from failures to comply with conditional sentences under the Gladue principles – which emphasize diversion, probation, and "restoration" through counseling. The flexible notion of restoration – achieved by promoting resilience – facilitates ongoing behavioral profiling and supports emerging networks of experts. These mechanisms broaden the penal net by considering individual backgrounds more deeply and by expanding the range of interventions available that are not perceived as punitive sentences. It is proposed a nuanced perspective that views restorative justice and punitive measures as convergent, thereby revealing policy biases and contributing to the expansion of the penal system and its selectivity.

Keywords: restorative justice; Gladue; Indigenous People's Court; criminal justice system; resilience

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Restorative justice has been developed as a comprehensive initiative to address the persistent over-incarceration of Indigenous people in Canada. However, not being limited to the criminal justice system, it has become a broader effort to tackle social and political issues rooted in colonialism. To explore those contemporary uses of restorative justice in Canada, this article considers that colonialism is not merely a relic of the past but an ongoing process that actively drives Indigenous incarceration (Chartrand, 2019: 69), as suggested by researchers such as Maynard (2017) and Chartrand (2019). However, it is crucial to highlight the transformations within this process – in order to also critically engage with the forms of resistance against it –, which today operates more through inclusionary than exclusionary policies. This is notably evident in the creation of a specific court for Indigenous peoples, relying on the expansion of actors and institutions within the criminal justice system with an assistance-focused bias, including counseling centers that adopt restorative practices, resilience-building initiatives, and community-strengthening programs.

Chartrand (2019) points out to the emergence of the modern justice system in Canada during the early colonization period (1763–1867) and nation-building era (1867–1910) as part of a broader process of national consolidation. At that time, the penitentiary and disciplinary system represented a structure of modern progress. However, as a symbol of humanitarianism and civilization – one that excluded Indigenous peoples – until the mid-20th century, penitentiaries were primarily reserved for white settlers, in an effort to prevent "Indians" from associating with or "contaminating" them. Beginning in the 1950s, the expansion of the modern project and its penal system led to the proliferation of penitentiaries and the "inclusion" of Indigenous peoples, resulting in an increase of the federal Indigenous incarceration rate by 1% to 3% per year starting in the 1960s (Ibid.).

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Nowadays, this inclusion of Indigenous peoples in the new technologies of the social and penal system has resulted in their over-incarceration. According to the most recent statistics, the Indigenous incarceration rate in Canada in 2020/2021 is 42.6 per 10,000 population, compared to 4.0 non-Indigenous people (CANADA. *Over-representation of Indigenous persons in adult provincial custody, 2019/2020 and 2020/2021.* Statistics Canada, 2023. Available at: https://www150.statcan.gc.ca/n1/pub/85-002-x/2023001/article/00004-eng.htm#a1). The over-representation increased by 14% between 2019/2020 and 2020/2021 (IBIDEM). The province of Saskatchewan had the highest adult Indigenous incarceration rate at 100.7, followed by Alberta (54.9), Ontario (32), British Columbia (22) and Nova Scotia (7.9). Despite accounting for approximately 5% of the adult population, Indigenous Peoples make up 32% of all individuals in custody (CANADA. *Parliamentary Committee Notes: Overrepresentation (Indigenous Offenders).* Public Safety Canada, 2023. Available at: https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20230720/12-en.aspx).

Restorative justice emerges in this context as a specific, yet widely applied effort to address the over-incarceration of Indigenous peoples in Canada. Mainly because it is not confined to the criminal justice system but seeks to establish itself as a concept of justice, restorative justice has increasingly been assimilated into what the Canadian government and Canadian organizations consider "Indigenous justice." In Saskatchewan, already in the late 1950s, the province adopted a philosophy of community control, making massive investments in new programs under the assumption that these would replace custodial institutions. However, this did not occur. From 1962 to 1979, the population under the custody of the criminal system tripled (Cohen, 1985: 49). Thus, this article suggests that a closer examination of the collaboration, rather than the opposition, between restorative justice and the punishment of Indigenous peoples should be undertaken, as it appears to function as an underestimated point of intersection between social issues that have been codified as crimes and their processing by the penal system.

More broadly and internationally, restorative justice emerged in the 1970s – a period identified by scholars in the Sociology of Punishment and Criminology as one of significant transformation in strategies of social control. This era witnessed phenomena such as the neoliberal reengineering of the state (Waquant, 2010) and the rise of neoconservative tendencies endorsing tough-on-crime policies, theories advocating a minimal state, and reductions in the welfare state, alongside a critique of prevailing rehabilitation ideals and the dominance of experts (Garland, 2001). Simultaneously, critical movements challenged state centralization by calling for decentralization, decriminalization, and more autonomous, communitarian forms of conflict resolution outside the formal legal system (Ibid.; Cohen, 1985). Restorative justice emerged from these resistances to state control, promoting decarceration, community-based approaches to social control, and alternative models of punishment. Moreover, it is situated within a broader historical context marked by widespread uprisings, anti-authoritarian social movements, and student protests during the 1960s – including events such as May 1968 in France, pacifist opposition to the Vietnam War in the United States, and the rise of anti-psychiatry and penal abolitionist movements.

According to its first proponents, restorative justice offers a different way of thinking about crime and responses to it, focusing on the harm caused and seeking to repair it while reducing future harm. The emphasis on the community relies on its constructive engagement with conflicting relationships, aiming at the "cure" of victims and the rehabilitation of offenders (Van Ness & Strong, 2002), through the "active responsibility" of both (Braithwaite & Roche, 2001; Walgrave, 2008). Thus, restorative justice not only seeks to repair the damage but also envisions a change in behavior. In this sense, "restoration" carries a "holistic" meaning, oriented toward the future, complementing "reparation," which refers to addressing past harm (Walgrave, 2008).

Worldwide, proposals and models of restorative justice have diverse origins. Efforts to construct a history of a more genuinely humane justice found resonance with millennial Christian values such as forgiveness, compassion, and community alliances. Similarly, they drew from Indigenous and Native practices from North America, which were associated with "mediation" practices for "conflict resolution", where a mediator facilitates the victim and the offender in jointly developing a plan to address the harm caused. This model quickly spread to other countries, particularly in Europe, with variations in regulatory approaches. In Norway, for example, the National Mediation Service was established in 1981 as a fully state-managed service.

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This article examines the use of restorative justice in recent Canadian legal and governmental initiatives to address the colonial impacts on Indigenous people, focusing on two governmental initiatives: the Royal Commission on Aboriginal Peoples and the Sentencing Reform Act, both enacted in 1996 – the same year the last residential school was closed (The Residential schools were governmental religious schools established in 1880 to assimilate Indigenous children into Euro-Canadian culture, where they were constantly abused, tortured, and killed, practices that caused immensurable consequences. The remains of more than one thousand people, mostly children, have been discovered on the grounds of three former residential schools in the provinces of British Columbia and southern Saskatchewan since May 2021. See: The New York Times. *How Thousands of Indigenous Children Vanished in Canada*. 07/06/2021. Available at: https://www.nytimes.com/2021/06/07/world/canada/mass-graves-residential-schools.html). The analysis also draws on observations gathered during three months of fieldwork at sessions of the Indigenous People Court (IPC) in Ottawa, Ontario.

A more nuanced approach is proposed, emphasizing convergences between restorative justice and the punishment of Indigenous peoples, rather than framing them in opposition. This perspective seeks to contribute not only to a deeper understanding of the rates of incarceration but also to unraveling how policies have reinforced biases and expanded the penal system. Restorative justice functions as a significant, yet often overlooked, mechanism for addressing social issues codified as crimes or misbehavior, frequently managed by organizations closely intertwined with the penal system.

Self-Determination and Restoration

The Royal Commission on Aboriginal Peoples was led by four Indigenous and three non-Indigenous commissioners in 1991 to develop recommendations for stakeholders, including federal, provincial, and territorial governments, as well as Indigenous communities and organizations to help "restore" the relationship between Canada and Indigenous People through an "equitable relationship" (CANADA. *Highlights from the Report of the Royal Commission on Aboriginal Peoples*. Available at: https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018). Its report retraces history by recovering formalized treaties between British, French and Indigenous nations, enshrined by the Royal Proclamation of 1763, followed by the stealing of lands by the settlers inasmuch the exploitation of lands became more important for their new economy and their idea of superiority than exploitation of labor. The Doctrine of Assimilation then gained importance, establishing policies to "assist" and "protect" Indigenous people. The Indian Acts, starting in the second half of the nineteenth century, prohibited Indigenous ceremonies, instituted their isolation and impoverishment in reserves and the first religious governmental residential schools for children by removing and isolating children from their relatives.

Thus, in addition to the genocide inherent to colonial expansion processes, extermination also took place on its "positive", "inclusionary face" through ethnocide. The ethnocide denies recognizing the other but chooses to compel them to conform to the imposed model commonly justified by "humanitarianism" recognitions. If with the emergence of modern penal system, humanism served as the basis for the critique of torture and body punishment, much earlier it also served as a justification to exterminate, when fighting in the name of humanity would presuppose the dehumanization of its enemies – especially Christian humanism (Clastres, 2010; Chamayou, 2012). In some level, the efforts of citizen inclusion presupposed by State building and its modernization works through authoritarian ideals of developing a national unified society – what led the anthropologist Pierre Clastres to assert that "the spirit of ethnocide is the ethics of humanism" (Clastre, 2010: 105). Unlike ethnocentrism, which is the practice of evaluating differences by the standard of one's own culture, found in any society as immanent to culture, ethnocide is specific to societies with a State ("Ethnocide results in the dissolution of the multiple into the One. What does the State mean now? It is, by essence, the use of a centripetal force that tends, when circumstances demand it, to crush the opposing centrifugal forces. (...) Ethnocidal practice and the state machine function in the same way and produce the same effects: under the guise of Western civilization or the State, they always reveal the desire to reduce difference and alterity, the sense and taste for the identical and the One" (Clastres, 2010: 108)). This mechanism intrinsic to the functioning of the State and its "purification" through genocidal and ethnocidal practices is named by Foucault as *State racism (*The emergence of the population as an object to be governed, in the eighteenth century in Europe, occurred as an intrinsic process to the *governmentalization* of the State. Regarding these new range of knowledge as a new technology of power, the *biopolitics* of the population, that has life as its object and objective, that foster the constant

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redefinition and growth of the State, Foucault questions how the right to kill would be exercised if the power related of previous societies, of sovereignty, of "making die and letting live" was receding. Thus, the emergence of this technology of power inserted or enabled the emergence of racism in the mechanisms of the State, as a fundamental mechanism of modern States (Foucault, 2003)), as a fundamental mechanism of modern States (Foucault, 2003; Mbembe, 2021).

These keys to understanding ethnocide and internal war are particularly relevant to this analysis focused on the concepts of reconciliation between the Canadian State and Indigenous peoples, and the *restoration* of their relationship. It's worth to contextualize that the attempt of "restore a positive climate at the negotiating table – and a new political framework for negotiations" (CANADA. *Highlights from the Report of the Royal Commission on Aboriginal Peoples*. Available at: https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018) as it was put by the Royal Commission, occurred in a moment when Indigenous protests and road blockades unleashed in Canada, such as the Mohawk community protesting a golf club expansion on their land, in Quebec, an example of the "difficult time" as defined by the report (IBIDEM). Indigenous movements for self-determination and land claiming such as the Struggle of the Algonquins of Barriere Lake against the Northern Gateway Pipelines and the Idle no More movement, in the 2010's, demonstrate their fight against the extractive capitalism perpetrated by oil companies, hydroelectric, tourism, forestry, alongside with what Crosby and Monaghan (2018) defined as *security state* – the fusion of different local and national surveillance and policing agencies as well as supposedly neutral regulating agencies, such as the National Energy Board and Indigenous and Northern Affairs Canada on targeting Indigenous movements. The lands of the Algonquins of Barriere Lake, comprising areas within and around the Ottawa River, that were never ceded, have had the original treaties dishonored, like the Treaty of Niagara of 1764 which establishes a nation-to-nation relationship framework recognizing Indigenous lands. Furthermore, contemporary amendments to the Indian Acts have been considered attempts to exploit more lands.

Against those movements, extensive partnerships of the state security agencies and police repression continuously develops criminalizing and intentionally flexible labels such as "Aboriginal extremism", expressions of how colonial practices in Canada are still ongoing (Ibid.). Something that was further accelerated in the responses to subsequent movements, such as Idle No More that erupted in 2012 opposed to legislative attempts to erode environmental protections and Indigenous lands and waters, especially the Bill C-45, a piece of legislation proposed by the Canadian government that aimed to amend the Indian Act, the Navigation Protection Act, and the Environmental Assessment Act, among others.

Thus, since the Royal Commission on Aboriginal Peoples, by choosing to contemplate the effects of the "colonial legacy" rather than acknowledging that colonial practices continue to exist, not only fails to dismantle them, but also seeks to dilute their effects by holding Indigenous peoples themselves responsible for their condition. As will be seen below, state violence is translated by the need to channel their "intergenerational traumas" through criminalizing categories – notably alcohol and drug abuse and sexual abuse – to be processed within the penal system. Consequently, in this context, the "restoration" of the "post-colonial" state through the pacification of uprisings emerges as a response to both broader political initiatives and the penal system itself.

Regarding conflict settlement, Indigenous practices contrast sharply with Western conceptualizations of justice, crime, punishment, prevention, and the policing of communities. Restorative justice as a flexible and adaptable concept of justice, far from being lenient, reveals its extensive penal net by comprising "proactive" and "preventive" strategies taken as Indigenous approaches (Chartrand and Horn, 2016: 3). Hence, what is portrayed through a western gaze as indigenous or "holistic" approaches (Barmaki, 2022) has actually played a role of assimilation of indigenous people by "including" them in the penal system.

Penal Expressions of Colonialism

An important historical milestone in the emergence of Restorative Justice in Canada was the establishment of Community Justice Initiatives (CJI) in 1982, which provided significant impetus for the expansion and development of its framework across the country. CJI originated from Probation Programs experiences in the end of the 1960s, and with the subsequent development of the Ontario's Victim Offender Reconciliation Project (VORP) in 1974 (University of Waterloo. *Community Justice Ministries*. Available at: https://uwaterloo.ca/mennonite-archives-ontario/mennonite-organizations-

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and-institutions/mennonite-central-committee-ontario/community-justice-ministries), taken as a result of the "Elmira case" in Ontario, in which a judge ordered two young men guilty of vandalism to make restitution directly to their victims. Following this landmark, and one of its myths of origin, restorative justice has been expanded and institutionalized. This includes the use of peacemaking circles as part of the "Aboriginal Justice Strategy" created in 1991 to, according to its official website, "support a range of community-based justice initiatives such as diversion programs, community participation in the sentencing of offenders, and mediation and arbitration mechanisms for civil disputes" (The Aboriginal Justice Strategy. Available at: https://www.justice.gc.ca/eng/rp-pr/jr/jr15/p9.html).

Since the mid-1990s, restorative justice has been the subject of considerable governmental funding and policy support, as well as consultations about its uses, leading to the establishment of the documents Values and Principles of Restorative Justice in Criminal Matters (Justice Canada, 2003a) and Restorative Justice Program Guidelines (Justice Canada 2003b). In 2012 another step toward institutionalization was the establishment of the Canadian Restorative Justice Consortium, aimed at promoting restorative justice at the national level and supporting practitioners, programs, agencies and networks/associations. In the province of British Columbia, the Community Accountability Program (CAP) was created in February 1998, to offer support and funding to community-based restorative justice programs for minor offenses. Now there are more than 70 community-based service providers across the province receiving approximately 17,000 referrals each year from several sources such as the police, the Crown (prosecution office), schools, and community (Asadullah; Morrison, 2021). These programs have also increasingly expanded through restorative justice, not only to address what are considered crimes to be sentenced, but also with community programs comprising prevention and/or complementary approaches. The North Shore Restorative Justice Society (NSRJ), for example, a community-based nonprofit CAP operating in North and West Vancouver (BC), offers the programs Restorative Response, Restorative Awareness Dialogues, Restorative Responses to Adult Abuse and Neglect and Restorative Approaches in Schools (Ibid.).

Regarding the criminal justice system more specifically, in the same year the Report of the Royal Commission on Aboriginal Peoples was published, the Sentencing Reform Act of 1996 added the section 718.2(e) to the Criminal Code to direct judges to consider alternative sanctions to imprisonment for Indigenous people. As a response to the high incarceration of Indigenous people, the section states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders" (Canada, 1999: 690).

Section 717 of the Criminal Code also provided a legal authority for alternative measures, and an explicit acceptance of public and private partnerships in the justice realm (La Prairie, 1999), opening room for restorative justice experimentations by different actors. Section 742.1 allowed for the serving of a two years less a day sentence in the community if certain risk and other conditions are met; and Section 71/1, following the provisions of the 1982 Young Offenders Act (YOA), formalizes in legislation the use of alternative measures for adults. However, it includes many impediments: its use has excluded in some provinces the offenses of theft, possession of stolen property, fraud and any kind of assault (Ibid.).

In 1999, the Supreme Court Decision *R. v Gladue* was considered a landmark interpretation of section 718.2(e), when the Supreme Court held that widespread discrimination and adverse socio-economic factors serve as the source of Indigenous over-representation in the criminal justice system and that alternatives need to be fully considered in sentencing. The Gladue decision stated that "judges should take judicial notice of systemic and background factors, and the priority given to restorative approaches in Indigenous approaches to justice" (DEPARTMENT OF JUSTICE CANADA, 2017: 12).

As a direct outcome of the legal recognitions of the colonial practices and to address the over-incarceration problem, Courts specializing in Indigenous matters were created soon after, also known as Gladue Courts, since they are "considered one of the most direct and representative implementations of Gladue principles" (IBIDEM: 41). Those Indigenous People Courts (IPC) largely base their work on what is called Gladue report, prepared by experts, to inform lawyers and judges about the individual background and community. In Toronto, for example, where the first Indigenous Court in Ontario was established in 2006, this expert work is made by Aboriginal Legal Services of Toronto. The first Indigenous Court in Canada was established in 1991 in Yukon, known as the Yukon

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Territorial Court's First Nations Court. It was also in Yukon that the earliest known use of sentencing circles, using restorative approaches, took place in Canada (A 26 years-old aboriginal man was placed on probation and live with his family, having to attend an alcohol treatment program for Aboriginal men. A few years later, sentencing circles was already criticized for working as additions to existing system, ready to apply traditional punishment sentencing (Monture 1994)).

The decision on R v. Gladue states that restorative justice is linked to better approaches to treat Indigenous crimes because it considers systemic and background factors for Indigenous offenders as the "causes of the criminal conduct" (Ibid.: 17). In this sense, Gladue is considered *per se* a restorative approach. It's worth to mention that the consideration of social backgrounds, the demand of reports and inclusion of non-judicial personnel, such as probation officers and counseling around attempts to humanize the prison, is not a new strategy, but evokes the early constitution of criminology itself and its attempts to be launched as a science – a science of the criminal individual, supported by the knowledge from the already established human sciences, such as anthropology, psychology, and psychiatry (Cohen, 1985; Garland, 2018).

In Canada, governmental discourses that propose restorative justice as a solution to mitigate the excessive incarceration of Indigenous peoples – as a means to acknowledge colonialism, cultural clashes, systemic discrimination, socioeconomic disparities, victimization, substance abuse, and inadequate social services – present these factors while simultaneously problematically associating them with Indigenous identity as a whole. Gladue frames restorative justice as "a comprehensive theory of justice in itself" (Department Of Justice Canada, 2017: 23), not opposed or incompatible with deterrence and traditional sentencing. This has led to the emergence of a specialized niche in the country comprising social workers, lawyers, and other experts on restorative or Indigenous issues who operate within courts, government agencies, private organizations, and funding structures.

To impose a "fit sentence" (Canada, 1999: 734), according to de decision,

> The sentencing judge is required to take into account all of the surrounding circumstances regarding the offense, the offender, the victims, and the community, including the unique circumstances of the offender as an Indigenous person. Sentencing must proceed with sensitivity to and understanding of the challenges Indigenous people have faced with both the criminal justice system and society at large (Ibid.: 731).

Consequently, this practice has led to the creation of a profile for a specific population group by monitoring individuals through conditional and probation sentences. Systemic factors such as poverty, lack of education, substance abuse, and isolation – although real consequences of colonial and assimilationist practices – have become inherently associated with Indigenous people in the process of profiling.

More than two decades ago, during the first institutionalizations of restorative justice within the criminal justice system, the optimism relied on its emphasis on a greater role to "community control" than did previous alternative movements, seen as a key justice platform for Indigenous control over justice to principally reduce aboriginal prison populations (La Prairie, 1999). The blind spot of its application in courts, according to LaPrairie (IBIDEM) at that time, would have been the systematic exclusion of those most vulnerable to imprisonment because of more criminal records from participation in these alternative approaches.

Nowadays, crimes considered more serious and violent keep being treated without Gladue dispositions that prioritizes alternative sentencing (Department of Justice Canada, 2017). However, what did change is that those individuals facing minor offense sentences are more scrutinized through the application of Gladue, as an inclusionary and broader strategy by considering background factors that would have led to a criminal behavior. Moreover, this enlargement of scope and length of application is due to the tracking of defendants subjected to an endless array of alternative and individualized measures shaped by predictable failures in compliance with judicial enforcement.

Alcohol abuse, for example, is often addressed in the Court by the crime of attempted theft. Having alcohol abuse as an effect of colonial practices and a contributor to subsequent criminal behavior and recidivism (Milward, 2022) – as well as other drugs, commonly drawn by research that attempt to discriminate which type of drug is associated with which type of crime (Bennet et al, 2008) – will likely lead to a sentence of counseling for alcohol behavior and the imposition of conditions such as not drinking and to not go back to the store of the crime occurrence. The failure to comply with those conditions will then lead to the enlargement of restorative justice through counseling alongside the perpetuation of the individual in the penal system cycle.

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Thus, the question is how behaviors taken as "background factors" are brought into Court and how they have been codified by the penal system. Still regarding alcohol, Indigenous people are also associated with having more "Fetal alcohol spectrum disorders" (FASD), a term used to describe a range of birth effects caused by prenatal alcohol damage, recognized as a "legacy of colonialism" (Department of Justice Canada, 2017: 37) (Fetal alcohol syndrome (FAS) was first described by researchers in the late 1960's that observed common features in children of considered alcoholic women (Aboriginal Healing Foundation, 2003). People diagnosed with FAS are considered to have IQ from well to "severely mentally retarded range" (Ibid.: 8), and the diagnostic categories includes those that confirm "maternal alcohol exposure" as well as those for whom it's not possible to confirm, which according to the American Institute of Medicine is a category useful for children that were in the foster care system, were foreign adopted children or adults who were fostered and adopted in their childhood years (Ibid.: 9). Features that can be also problematic when it comes to relate to what are Aboriginal people's natural common facial features (Ibid.: 11)) and often raised and utilized by the Court as a risk behavior.

Poverty, in turn, as one main outcome of the ethnocide of colonialism times, would have conditioned Indigenous people living in neighborhoods considered as having low social and economic conditions, which would explain the disproportionate occurrence of crimes committed by Indigenous people as police-reported offenders (Fitzgerald and Carrington, 2008: 525). Under the influence of the ecological analysis of crime (Consolidated by the criminologists of the Chicago School in the 1920s and 1930s and still influential in criminology, deviance is understood as the product of disorganization and lack of social control, a fragmentation of the social bond, notably in poor areas, often comprised of immigrants, with one of the solutions being the restoration of community control. This later influenced the "broken windows" theory, a pseudo-science developed in the 1980s in New York that underpinned the zero-tolerance doctrine), research considers that these conditions also reflect their real difficulties and disorganization to solve their problems (Ibid.).

Hence, the penal system, with the "broad" scope of restorative justice approaches, is playing a central role in addressing political and social problems. It is important to note that since its early enactment under Gladue, restorative justice was widely supported not because it is a non-punishment and non-incarcerated approach, but precisely because of its ability to include all elements of the traditional retributive justice system, including the already foreseen rehabilitative and deterrent goals of sentencing (Roach, 2006). Furthermore, the application of restorative approaches in considered less serious cases helps legitimate the need for punishment and deterrence in more serious cases (Ibid.). By defining restorative justice as a perception that "all things are interrelated, and that crime disrupts the harmony which existed prior to its occurrence" (Canada, 1999: 726), it's worth to explore its "proactive" and "preventive" elements that have been allowing its application before, during, and after the criminal process. More specifically, its objective of promoting "healthy interpersonal relationships (...) without relying on criminal justice sanctions" (Chartrand; Horn, 2016: 4) has, contrary to what is assumed, contributed to the expansion of punishments.

Inclusion through the penal system: observations of a Court

Fieldwork was conducted in the Indigenous People Court (IPC) of Ottawa, where I have regularly attended the sessions of its audiences over three months (from January to March of 2024). Prior to this, I observed one session, in October 2023, to make a first contact with that space. At that moment, I witnessed for the first time the ceremony that opens every session, performed by a representative of the "Indigenous community" without great distinctions among different peoples. In the following sessions, the sense of inadequacy caused by this initial ceremony was always there. From the discomfort of lawyers and court professionals receiving the "blessing" by the ceremonialist, clearly unfamiliar with the meaning of the tobacco being blown onto their bodies, to the explicit expression of strangeness and no identification regarding that ritual and language by the Indigenous defendants themselves. At the end, the ceremonialist says "thank you" in Anishinaabemowin (Anishinaabemowin is the language of the Anishinaabe people, situated in North America, that includes the Ojibwe, Odawa (Ottawa), and Algonquin peoples). Some respond with the same word, some with "thank you" in English. There was always an air of awkwardness at that moment, as well as when the IPC representative pronounced the name of the defendants, with a fear of mispronouncing.

Sometimes the representative and ceremonialist may intervene during the session, blessing the defendant as a form of consolation, as was the case in a sentencing hearing for traffic violations and

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"counterproductive behaviors" stemming from addictions. The judge and the Crown first recalled the concept of "intergenerational traumas", the residential schools, the sufferings from mental health challenges, and "addiction". The Crown suggested a 5-year prison sentence – 8 and a half years, but with a reduction due to the application of Gladue factors. The judge then asked the defendant if he wanted to say anything, and finally, said she would not sentence him that day. "I need time. Because I need to think and be able to look into your eyes and sentence you. I need to apply considering your individuality and indigenous factors. Keep working in these programs. I'll be certified to classify you to a place to practice indigenous... Culture" (Fieldwork observation in Ottawa Indigenous People Court, 02/29/2024).

That first time I have been in the IPC, the defendant was an Indigenous woman that had "attacked" (in the words of the Crown lawyer) someone in the street. The defense lawyer claimed that the defendant suffered from intergenerational trauma, alcoholism in the family, a schizophrenic father, a single mother, domestic violence, sexual abuse, and reading and comprehension difficulties since adolescence. A defense that comprised all the important key words for being recognized as part of the "Gladue factors" – intergenerational trauma, alcoholism, domestic violence.

The defense lawyer continued by stating that the Gladue factors were in play in her defense, and that the defendant had a daughter whose care meets the requirements of the "best interests of the child". The defendant gave her testimony, saying that she was working very hard on her mental health, for her daughter. The mother of the defendant was in the session and could speak. The judge blamed her for her daughter, saying that a lot of the defendant's problems are due to her mother. Her father also had sent a letter to the court, commenting on her mental problems and saying that he loved and supported her – "she is doing well; she needs support and not jail". Continuing the session, the judge cited restorative justice and the importance of community restoration. He then read a letter from the mother, claiming that her daughter, the defendant, grew up immersed in the community: at the age of ten, her daughter hunted her first fag with her father; at the age of 12, she began to have mental problems – psychosis. The final sentence handed down by the judge was conditional discharge with probation, and the obligation to continuing attending medical appointments. The judge's final words were: "I understand that your problems are not your fault. When we are well, we are well. Hope you keep the demons to the ground and don't let them win" (Fieldwork observation in Ottawa Indigenous People Court, 10/31/2023).

Although I wasn't tracking cases involving Indigenous youth as defendants in the court, children and young Indigenous were very present in the IPC sessions around the custody matter. Again, it is important to note that the government recognizes the losses caused by the residential schools for Indigenous people in Canada, which resulted in genocide and ethnocide of Indigenous children from 1833 until the late 1990s. As previously mentioned, at least 150,000 Indigenous children were forced into these schools, suffering continuous sexual, physical, and emotional abuse, alongside with attempts to eliminate Indigenous culture and lives – between 1867 and 1912, half of the children in residential schools died (Maynard, 2017). However, attention is drawn to the production of governmental discourse that, in some ways, can legitimize and perpetuate policies promoting assimilation. For example, according to a recent report by the Department of Justice of Canada regarding the Overrepresentation of Indigenous Youth in Canada's Criminal Justice System, which gathered Indigenous youth to listen to their "voices" about their "strength and resilience" towards the defense of restorative justice as a community and "family based" approach to "lead Indigenous youth away from criminal activity" (Department of Justice Canada, 2019: 11), youth underscored that the identity loss resulting from "a lack of cultural connection cannot be addressed within families or communities where the basic structure has been broken. Many participants spoke to the desire to escape their families because of family violence, abuse, and addiction issues in the home" (IBIDEM: 8).

This assumption is very problematic when considering the history of children's welfare. In the 1960s, child protection agencies apprehended Indigenous children from their families *en masse* (Maynard, 2017). In the present, Indigenous children and youth make up 30 to 40 percent of all children in state care in Canada, more than at any time in the country's history, even if the rates of child abuse are not significantly higher in Indigenous families than in non-Indigenous (IBIDEM). In current times, the theft of children by the State from their communities over centuries is being addressed with the continuous association of Indigenous adults and youth with behaviors framed as "risk factors", such as alcoholism and domestic violence – two elements strongly present during the Indigenous trials in the IPC.

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Alcoholism was mentioned practically every time risk factors or Gladue factors were discussed during the hearings. The most common accusations were due to small thefts. For example, in a plea hearing, the defendant had stolen items from a dollar store, which he refused to return. He fought with the security guard and then stole ice cream from a store 100 meters away. Afterward, he went to a nearby market where the police stopped him using a taser. The sentence was 12 months of probation and counseling. The principal type of small theft is of alcoholic products at liquor store – the charge that the defendant had "entered an LCBO [Liquor Control Board of Ontario], selected merchandise not exceeding $5,000, making no attempts to pay" was endlessly repeated.

In a plea hearing, the defendant had been released on January 17th under the condition of not going to any LCBO (Liquor Control Board of Ontario). However, two days later, he went to one store again and stole 7 bottles of vodka. The security guard restrained him, and he spat in the guard's face.

In one case, the defendant had tried to steal 6 bottles of alcohol and was sentenced to probation, which he failed to comply with when attempting to steal $120 in products from a grocery store. He received another probation, which he again did not comply with when, along with friends, they tried to steal beer worth less than $100 from the same grocery store. The repeated failures to comply with probations seemed like a joke to the judge, who commented, "you must walk by these places, and they probably turn on a red light and say, 'watch out'" (Fieldwork observation in Ottawa Indigenous People Court, 02/29/2024).

In another matter, the defendant had previously tried to steal bottles at one liquor store. He was sentenced with a probation; however, he didn't comply with the restriction of returning to the same chain of liquor store, but instead tried again to steal a few bottles and reusable bags when he was recognized by the guards. Then, in the session I observed, he pleaded guilty. His matter was being translated by a professional since he didn't speak English or French. When the translator had to translate "Do you plead guilty or not guilty?", it was possible to notice that this opposition of words in his language doesn't exist. He answered "guilty" without, it seems, understanding exactly what was going on, clearly just looking to his lawyer for the confirmation he was doing the right thing, as if it were the only possible answer. The Clerk repeated all the matter, everything he did that was framed as a crime. He seemed completely exhausted, confused, and afraid. The Crown complemented, giving more details. Finally, the judge finalized the session with a speech before sentencing:

They say that sentencing is the hardest part of court proceedings. Your case is a perfect example of this. Sentencing is an individual process and is solely about the crime. Therefore, I have to consider the facts – that you pleaded guilty, as well as the Gladue factors. We know that Inuit and First Nations people are overrepresented in jail. This court aims to reduce the number of people in jail. Minimizing incarceration. In loyalty to this country, I respect the First Nations. It is a responsibility for the entire country. According to Gladue, you've been using alcohol for a large part of your life, leading to a state of addiction. We often see theft in court driven by the need for more alcohol, creating a cycle. Therefore, rehabilitation is important. You started in 2011 and accumulated dozens of convictions until 2023. The offenses are numerous. You have the potential to contribute to society. The easiest course of action for me would be to sentence you to a long period in custody, which would be a crushing blow to your rehabilitation (Fieldwork observation in Ottawa Indigenous People Court, 02/20/2024).

The sentence: 90 days in prison and probation until 2025.

In another sentencing, the judge mentioned the overrepresentation of Indigenous people, said that the defendant had been away from home, lost a sister – "a trauma we see over and over". He cited the recent colonization and said that he was overly optimistic with the probation as a sentence; that only a few days in prison were more than enough to recognize it.

Cases in which the defendant "admitted" a problem with alcohol were also very common during the sessions. In one audience, the defendant had robbed a hospital security guard and pleaded guilty. She was in a reserve in Alberta because her mother had died. Previously, her father had died of cirrhosis. Both parents were survivors of the Residential Schools. The defendant was considered addicted to alcohol, and the defense lawyer was trying to negotiate a conditional discharge so that she could stay in the reserve in Alberta. He argued that Alberta now has several programs to address alcohol addiction issues. In his report, he searched for the name of the program and cited "Indigenous healing center". When asked if she had something to say before being sentenced, the defendant said:

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"I'm an alcoholic. Without proper support, it has been difficult. When I drink this gets me more into trouble. That's *kinda* where I am". The judge said she needs culturally appropriated programs and sentenced her with 12 months of probation and "counseling".

In another session during which the defendant had tried to reach out his ex-partner at her house, without consent, the judge said to the defendant: "You have never complied with any court conditions". He answered: "because of the alcohol. It's evil". The judge said she believed it and continued:

If I put you on probation, I don't know if you will comply. This is the dilemma. You even had a *rendezvous* with your son in a house you were not allowed to go to. It surprises me that it took three violations before you were detained. So how long is enough for you to register the conditions in your brain? 17 days in custody won't do it. An additional 30 days and 3 years of probation for alcohol abuse (Fieldwork observation in Ottawa Indigenous People Court, 03/19/2024).

The "inequities" that contribute to a significant number of guilty pleas by Indigenous people are already recognized, through restorative justice practices, alongside with other initiatives such as "cultural competency training for justice system professionals" being recommended to address the issue (BRESSAN; COADY, 2017). According to a report commissioned by the Department of Justice (IBIDEM), "vulnerable people" may plead guilty to access alternative justice processes or specialized courts, such as the Indigenous People Courts and the mental health court. Regarding Indigenous people specifically, language barriers and values – the word "guilty", for example – and distrust of the justice system are also considered important elements, among others. It is common for the Clerk to have to ask the defendant to say "guilty" louder.

Also interesting in the report (IBIDEM) is the note that the guilty plea is often part of a plea deal to a lesser charge, reduced sentence or admission to an alternative justice program. Based on testimonies from lawyers, the report found that guilty pleas are primarily entered to avoid a custodial sentence. The conclusion drawn is that in such cases, a guilty plea is not considered an aggravating factor leading to incarceration, but rather a mitigating factor (IBIDEM: 11), also considering that incarceration disrupts family and community connections. Therefore, it is also possible to conclude that the solutions, considering the testimony of interviewed lawyers, involve restorative justice programs and all the work that now is increasingly incited inside the specialized courts. Specialized lawyers are considered fundamental in mitigating sentences, as highlighted in the governmental report, which also states that "Indigenous people may be at greater risk of justice system contact and guilty pleas because of their social vulnerabilities related to income, housing, addictions, and mental health" (IBIDEM: 19).

With those assumptions, it's worth noticing that the vicious cycle originates much less in the Indigenous people's conditions themselves, but in the enunciation around their "vulnerability" associated with a tendency to commit crimes, which requires a continuous production of legitimizing speech of the penal system. Alcohol abuse – that would lead to crime – and sexual/domestic assault, as the most common accusations, were already very well foreseen by the organizations providing counseling as required by the judge and/or support to navigate "throughout the court", always ready to give their cards and approach the defendant and their lawyer after the first hearing.

Preventive and Proactive Control Approaches

During the field observation, two organizations proved to be predominant in their presence and role within the court. Tungasuvvingat Inuit organization, whose values are anchored in "resilience-building principles" provides 30 services of support for Inuit people in Ontario. Its Pisiksik Justice Department (PJD) works "to reduce the number of Inuit clients from entering or reentering the system" having as goals "resiliency, healing and wellness to ensure Inuit maintain healthy and productive lives" (Available at: https://tiontario.ca/programs/pisiksik-justice-department-pjd). It's asserted that "TI will support and help you so that you do not repeat crime and that you don't end up back in prison" (Available at: https://tiontario.ca/programs/pisiksik-justice-department-pjd/what-we-can-do) by making a "healing plan" individualized. Thus, its staff comprises "Gladue Writers", "Navigator", "Probation Worker", "Restorative Justice Caseworker" and "Restorative Justice Liaison" that connects Inuit people, the courts, and the community to address cases to be complied by the Restorative Justice program. Restorative Justice can then replace traditional punishment, figuring as a diversion program and is accepted depending on the case.

Another organization, the Odawa Native Friendship Centre, is financed by governmental departments, Banks, and Foundations, such as The Indigenous Reconciliation Fund, and accepts

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"donations from 73 Catholic Dioceses across the country, and to advance healing and reconciliation initiatives" (Available at: https://irfund.ca/en/welcome/). The Centre, funded in 1975, was strongly working at the Court with "Criminal courtworkers" to assist Indigenous youth and adults to "navigate" the criminal process at all phases, and have several other professionals like "traditional helper" and "bail supervisor", working mainly in the court. Hence, its justice programs work similarly to the TI organization, addressing sentenced Indigenous people to diversion programs.

It's important to remark that diversion programs are already foreseen by the traditional criminal justice system, when it comes to what is considered minor offenses committed by considered vulnerable groups, and that they work in collaboration with the police. Police officers decide if the "criminal situation" meets the eligibility criteria of the Ottawa APCD program (Adult Pre-Charge Diversion Unit) to be absorbed directly by the Odawa Native Friendship Centre and the Tungasuvvingat Inuit, as well as other two organizations not restricted to Indigenous people assistance – The Elizabeth Fry Society of Ottawa, for criminalized women and "gender-diverse people" (Available at: https://efry-ottawa.com/about-us/), and The John Howard Society of Ottawa, for a broader "vulnerable" individuals "in conflict with the law" (Available at: https://johnhoward.on.ca/ottawa/). This partnership is aligned with the City of Ottawa's Community Safety and Well-Being (CSWB) Plan for "helping to reduce or eliminate the number of minor criminal activities in our community" (Available at: https://www.ottawapolice.ca/en/who-we-are/adult-pre-charge-diversion-program.aspx#:~:text=The%20Adult%20Pre%2DCharge%20Diversion,towards%20programs%20and%20support%20services).

Therefore, it's important to emphasize that the work of these community-based treatment and healing organizations does not occur autonomously and independently from the State and the criminal justice system. This issue has been present since the initial applications of restorative justice programs, as the understanding that the community is a spontaneous form of association that provides resolution of its conflicts contradicts the role of state agencies that often design, create, implement, sanction, finance, and personalize which cases to divert to restorative justice (Pavlich, 2005). Likewise, the question of the voluntariness of restorative justice processes as foreseen by its main regulations (Notably Cf. ECOSOC (United Nations Economic and Social Council). *Basic principles on the use of restorative justice programmes in criminal matters*. E/2002/INF/2/Add.2. 2002[a]) is weakened when these processes are often intertwined with conditional sentences and counseling programs. In practice, case monitoring and evaluation of individual conduct progress are assessed by the judge, and in many cases, "treatment" complements traditional penal measures such as probation and conditional sentences.

Moreover, what is particularly novel in the use of restorative justice and the work of organizations that support Indigenous people within the criminal justice system is the integration of concepts like resilience with Indigenous practices. For context, the concept of resilience originally emerged from ecology and the natural sciences, referring to the capacity of a material to deform and return to its original state (IPCC apud UNDP, 2014). Since the 1970s, the term has expanded far beyond, becoming central to security and social policies at both local and global levels, continuously reinforced resilience as an aspect of individual conduct, emphasizing the prediction and internalization of potential risk situations (Walker and Cooper, 2013; Aradau, 2015).

In the penal field, contemporary risk identification has been closely tied to the rise of neoliberalism, serving as a financial and politically efficient management strategy and a mechanism for distributing penalties (Garland, 2001). This approach has also heightened profiling, policing and racialization processes, that alongside the erosion of social safety nets resulted on intensification of criminal sanctions and over-incarceration (Wacquant, 2009; 2010, 2024). However, this represents only one dimension of neoliberalism. Rehabilitative principles and alternative sentencing approaches have not been entirely abandoned and, in fact, remain compatible with it (Heath-Kelly and Shanaah, 2022). A complementary aspect of risk identification is its mitigation by the "at-risk" individual, with resilience framed as a set of presumed personal responsibilities. These responsibilities are cultivated through continuous modulation toward pacified and securitized behavior, impeding disruption and revolts. Rather than merely linking prevention and risk identification techniques to neoliberal rationality (Foucault, 2008), contemporary practices reveal a significant investment in human capital – not solely for economic ends – and in promoting safe behavior. Proactive control strategies make this investment apparent, requiring the participation of individuals in the governance of both themselves

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and others. Restorative justice has thus become central as a mechanism that bridges these strategies, playing a pivotal role in community control and engagement programs.

Conclusions

Addressing the over-representation of Indigenous people in Canada requires shifting the focus from merely noting a lack of policies or acknowledging over-representation to critically examining the policies in place and the underlying patterns of representation. In the observed case of the IPC, the strategy centers on incorporating what is deemed "Indigenous" into the courtroom, thereby broadening the penal net through a deeper consideration of individual backgrounds and by expanding the range of possible programs, not perceived as sentences. Counseling plays a pivotal role in the IPC framework, as many of the "crimes" leading to trials are not initial infractions but failures to comply with conditional sentences under the Gladue principles, which emphasize diversion, probation, and "restoration" through counseling.

The flexible notion of "restoration," achieved by promoting resilience, enables the continuous modulation and profiling of behavior. Consequently, a growing network of experts and emerging knowledge systems – focused on resilience, restoration, and healing – has developed within a state-mandated vision of community. In this model, conflicts are not resolved autonomously within communities but are instead funneled into the courtroom, reinforcing the authority of central figures such as police and judges. Restorative justice, as applied here, functions both as a proactive strategy intertwined with state regulation and as a mechanism to redefine individuals as morally accountable for either the restoration or deterioration of their communities. This leads to the individualization of social issues, treating deviations in conduct that result in criminal behavior as problems to be mitigated through behavioral pacification.

Simultaneously, the association of deviant conduct is produced for a specific group of the population, whose "community" must also be modulated accordingly. Thus, rather than serving as a neutral or mitigatory policy, restorative justice embodies the dynamics of expanding a penalized clientele by incorporating elements traditionally viewed as part of the "social" sphere. Moreover, its logic and effects are evident in its role as a response to historical-political events, including protests and revolts against colonialism and its extractivist capitalist practices.

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