

Over-Incarceration of Indigenous Peoples in Canada as Explored through the Theory of Structural Racism

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In Canada today, overall rates of incarceration are decreasing; however, Indigenous peoples in Canada are bucking this trend and suffering a disproportionate share of the correctional population in the Canadian justice system. In Canada, the correctional population includes those who are in custody, both federally and provincially, and those who are serving supervised sentences in the community (Dauvergne, 2012; Malakieh, 2019). Furthermore, the Canadian incarceration rate includes individuals who have been convicted of a crime and are serving their sentences as well as individuals who are in remand or temporary detention (Dauvergne, 2012). In 2010/2011 the number of adults in the Canadian correctional system was down approximately 1% from the previous year and rates were down approximately 7% from the previous decade (Dauvergne, 2012). The reduction in the rates of adults in the Canadian correctional system was caused primarily by a 10% decrease in the rate of adults under community supervision since 2000/2001; however, during this same time frame (2000/2001) the number of adults in custody increased by 5% (Dauvergne, 2012, p. 4).

However, although overall incarceration rates are down, the incarceration rates of Indigenous peoples in Canada are on the rise. In 2017/2018, Indigenous adults accounted for 29% of those admitted into federal custody and 30% of those admitted into provincial and territorial custody even though Indigenous Canadians only represent 4% of the Canadian population (Malakieh, 2019, p. 5). This represents a 9% increase federally and an 8% increase provincially from the previous decade (Malakieh, 2019, p. 5). Additionally, the rates of incarceration for Indigenous females rose considerably, i.e., 66%, between 2007/2008 and 2017/2018 provincially and territorially (Malakieh, 2019, p. 5). Indigenous youth are also

overrepresented both in custody and in community supervised sentences representing 48% and 39% respectively in the reporting jurisdictions in 2017/2018 despite Indigenous youth representing only approximately 8% of youth in Canada (Malakieh, 2019, p. 7). It is also worth noting that although Manitoba and Saskatchewan had the largest Indigenous populations as a share of the overall provincial population (15% and 14%), these provinces also had considerably high numbers of Indigenous peoples in custody, with 75% of those in custody in Manitoba and 74% in Saskatchewan being identified as Indigenous in 2017/2018 (Malakieh, 2019, p. 5). When considered together, this data paints an increasingly concerning picture of Indigenous incarceration rates in Canada.

While overall incarceration in Canada is decreasing for both adults and youths, these same figures for Indigenous Canadians remain disproportionately high and, in some cases, are trending higher rather than falling (Malakieh, 2019; Dauvergne, 2012). The author of this paper argues that institutional racism, as a manifestation of colonial ideologies, is responsible for the ongoing and increasing over-representation of Indigenous peoples in the Canadian criminal justice system.

Literature Review

Scholars and activists have expressed concern and speculated as to the potential causes and contributing factors related to the stark over-representation of Indigenous Canadians in the criminal justice system. One factor that has been identified as a possible contributing factor is the lasting harm caused by the ‘Sixties Scoop’. Although the ‘Sixties Scoop’ was not a specific policy, the term has come to represent an era in Canadian history in which Indigenous children were apprehended by child welfare services in disproportionate numbers, without sufficient cause, and most commonly adopted into non-Indigenous homes (Sinclair, 2007). Furthermore, it has been observed that Indigenous children who are adopted into non-Indigenous homes have suffered considerable hardship, including suicide, substance abuse, and incarceration (Sinclair, 2007, p. 71). Additionally, a 2005 report on the childhood experiences of Indigenous offenders found that 63% of Indigenous offenders had either been adopted or placed in foster or group homes during their lives (Trevethan et al., 2005). Some believe that the policing system in Canada is biased against Indigenous peoples and other minorities. For instance, Fitzgerald and

Carrington (2011) found that racially discriminatory policing explained disproportionate minority contact with the police better than other explanations, such as the explanations that minorities have different risk factors or higher levels of involvement in criminal activity. It has also been shown that racialized identities negatively impact how the public perceives the dangerousness of an offender, and perceived dangerousness was a strong predictor of how harsh the public thought a sentence should be for an offender (Singh & Sprott, 2017). Also, concerning policing, Cao (2014) found that Indigenous Canadians had lower confidence in the police than the non-Indigenous population concerning every item analyzed from the survey data related to policing. Low confidence in the police could be due to both contemporary and historical factors. Contemporarily, Cao's 2014 study found that the measure in which Indigenous respondents negatively diverged most from their non-Indigenous counterparts was whether they felt the police did a good job of treating people fairly. According to Jefferey Monaghan (2013), there is also a historical backdrop in Canada of racialized surveillance of Indigenous peoples by the government, which produced and perpetuated racialized stereotypes of Indigenous peoples that, in turn, being used as a tool for managing the population. Similarly, Vicki Chartrand (2019) notes that penitentiaries are a feature of colonization and have replaced formal assimilation and segregation policies such as residential schools and confinement to reserves but that the colonial relationship remains the same.

The over-incarceration of Indigenous peoples is not a phenomenon confined to Canada. It has been observed that there are similar trends of Indigenous over-incarceration in other former British colonies such as Australia and New Zealand (Roberts & Reid, 2017). This observation further strengthens the argument that colonialism and neocolonialism is a significant factor in the issue of Indigenous over-incarceration (Roberts & Reid, 2017). In analyzing the effect of over-incarceration of Indigenous people, it is important not to lose sight of the severe and life-altering impacts that incarceration and discrimination have on individuals. Jena McGill (2008) points to the patterns of prejudiced, discriminatory, and abusive treatment that Indigenous women face in the Canadian prison system, which has led to substantial physical and psychological harm, and in tragic cases, death. Similarly, in Australia, Indigenous over-incarceration was directly related to the high number of deaths of Indigenous people in custody (Cunneen, 2016). In Australia, the analysis of 99 deaths of Indigenous Australians in custody by The Royal Commission into Aboriginal Deaths in Custody found that Indigenous identity was a significant factor in an

individual's placement in custody as well as contributed to an increased likelihood of death while in custody (Cunneen, 2016).

Theory of Structural Racism

This article is an exploration of the issue of Indigenous over-representation in the Criminal Justice System through the lens of structural racism. This section will define structural racism and other interrelated concepts. When discussing structural racism, it is important first to understand racial categorizations and racial hierarchies. Racial categories were first formally organized around the twentieth century when early anthropologists attempted to identify and classify human beings into distinct biological categories based on physical characteristics (Lavenda & Schultz, 2017). These racial categories were arranged into a hierarchy that placed the theoretically most evolved races at the top and the least evolved races at the bottom of the hierarchy. This hierarchal arrangement was used to justify the domination of those lesser evolved races by the most evolved race at the top of the hierarchy (Lavenda & Schultz, 2017). These hierarchies were characterized by prejudice, which is the feeling of superiority that was attached to these racial categorizations (McMullin, 2009, p. 83). Discrimination occurs as a result of prejudiced beliefs and are the actions that are related to or caused by prejudice (McMullin, 2009, p. 83). These concepts of racial hierarchy, prejudice, and discrimination are important because they were used as justification for colonial conquest and the subjection of colonized Indigenous peoples in Canada and around the world. In the colonial context, the racial hierarchy was arranged on a continuum of the most to least civilized races, and it was the responsibility of the Europeans, who considered themselves the most biologically and socially advanced, to civilize the other races such as the Indigenous peoples of North America (Reasons et al., 2016, p. 76).

Although race is now widely accepted academically as a social construct rather than a biological one, race has become a real and accepted categorization in the minds of many, which has tangible consequences in society (McMullin, 2009, pp. 66-68). The process of an abstract concept becoming real, such as the concept of race, is referred to as reification (McMullin, 2009, p. 66). One such consequence of the reification of race is the continuation of racially-based hegemony. Hegemony is the domination of one group by another based on ideological consent and political coercion. Ideological consent involves the acceptance of ideas about racial

categories and the social organization that occurs based on those categories. Political coercion is the official or organized enforcement of those categories. Finally, structural racism is the result of racist ideologies, prejudice, and discrimination within social structures (McMullin, 2009, p. 76).

Structural racism is what Eduardo Bonilla-Silva referred to as the racialization of social systems. In societies with racialized social systems, individuals are placed in racial categories that determine their placement within a hierarchy (Eduardo Bonilla-Silva, 1997). This hierarchy determines the social relations between races as well as the resources and social advantages and disadvantages a racial group experiences (Bonilla-Silva, 1997). The social systems themselves are racialized because they are, in part, structured by the placement of the actors into the racial categories (Bonilla-Silva, 1997). A key component to Bonilla-Silva's conceptualization of the role of racism in society is that racism goes beyond the individual interactional level of society (McMullin, 2009, pp. 76-77). In effect, this means that racism is not simply perpetuated by single actors whose behaviours are informed by ideologies, instead there is an interrelationship between individual actors and social structures with each informing the other.

Analysis of Over-Representation of Indigenous Peoples in the Criminal Justice System Using the Theory of Structural Racism

As mentioned previously, there are those who have drawn connections between the over-incarceration of Indigenous Canadians and the legacy of colonization. The position taken in this paper is that colonialism provided the ideological framework for historical and contemporary racism in Canada as well as the social structures that perpetuate those racist ideologies. For instance, the Indian Act of 1876 is arguably one of Canada's most definitive examples of structural racism. This Act was intended to define who was an Indian, to civilize those who were defined as Indians, and to manage the Indian population and their lands (Cora Voyageur as cited in Monchalin, 2016, p. 109). It is evident in the intention of the Indian Act that there are ideologies involving both racial categorization and racial hierarchies. In this context, Indigenous Canadians are defined in a legal sense as per the Indian Act and are managed by European colonizers who see themselves as more capable and, therefore, in charge of managing the Indigenous peoples and their land. The characteristics of the Act are compatible with Bonilla-

Silva's description of racialized social systems (1997, p. 469). The Indian Act also criminalized the Indigenous lifestyle by outlawing cultural practices such as ceremonies, the donning of regalia, and the freedom of movement without restriction (Monchalin, 2016, pp. 109-110). It can be argued that this Act was fundamental to the future over-incarceration of Indigenous peoples because the Act discriminatorily criminalized Indigenous people on the basis of their identities while also contributing to a racialized criminal justice system.

The racialization of the criminal justice system has persisted to the present day. As mentioned previously, in 2017/2018, Indigenous adults and youth were over-represented in the criminal justice system in Canada (Malakieh, 2019). Importantly, the issue of Indigenous over-incarceration is worsening while at the same time, the over-all adult incarceration rate is declining (Malakieh, 2019). This issue can be explained in part by policies that are more likely to affect Indigenous Canadians and lead to their incarceration. For example, tough-on-crime policies that restrict community-based conditional sentences and require mandatory minimum sentences can disproportionately affect Indigenous Canadians due to contemporary and historical factors (Marshall, 2015). Substance abuse in Indigenous communities has been linked to both the legacies of the residential school system and the 'Sixties Scoop' (Marshall, 2015; Sinclair 2007). However, the tough-on-crime policies are also seen as anti-harm reduction and the subsequent cancellation and cut to harm reduction programs remove much-needed resources while simultaneously increasing the likelihood of drug-related incarceration (Marshall, 2015).

Furthermore, Canadians with racialized identities may be more likely to be stopped by police due to a combination of factors including racial stereotypes concerning criminal involvement, drug use, and violence (Marshall, 2015; McGill, 2008; Fitzgerald and Carrington, 2011). For example, The Aboriginal Justice Inquiry found that among complainants, there was a perception that Indigenous peoples experience increased scrutiny by police while also being subjected to stereotyping (Policing, para. 17). Racial stereotypes concerning Indigenous people are connected to the colonial view of Indigenous peoples and the formation of racial categories through racist racial projects. For example, the Indian Act prejudicially prohibited the selling of liquor to an Indian or the possession of liquor by an Indian until 1930 and other restrictions concerning possession of liquor or intoxication were not fully removed until 1970 (Monchalin, 2016, p. 116). These types of legal restrictions placed on Indigenous Canadians perpetuate racist

racial projects through negative stereotypes while also confirming the racial hierarchy within a racialized criminal justice system. Not only does racialization increase the chance of an Indigenous person coming into contact with the police in Canada, but it may also affect how the police treat those individuals. For instance, the infamous ‘starlight tours’ that led to the freezing deaths of three Indigenous men in Saskatoon had garnered national attention and highlighted discriminatory practice and police brutality against Indigenous peoples (Monchalin, 2016, pp. 261-262). The ‘starlight tours’ were the practice of police taking Indigenous individuals who they had apprehended usually for the appearance of alcohol intoxication and driving them to the outskirts of the city where they would be abandoned and left to find their own way back to the city (Monchalin, 2016, pp. 261-262). This practice occurred during the winter, and as a result of the discriminatory and negligent behaviour of the police three Indigenous men died on the outskirts of the city of Saskatoon (Monchalin, 2016, pp. 261-262). The officers involved in these cases were only charged with minor offences related to the deaths, or not charged at all (Monchalin, 2016, p. 262). This example shows that there are different standards of behaviour for those on different levels of the racial hierarchy, and these standards affect how individuals are treated and their life chances.

Structural racism not only affects the likelihood of Indigenous peoples coming into contact with the police and, therefore, their rates of incarceration, but it also affects how people are treated at the individual level once they are incarcerated. Once in the criminal justice system, Indigenous prisoners are less likely to be granted full parole. If they are granted some form of parole or release, it usually occurs later in their sentence than their non-Indigenous counterparts (Chartrand, 2019, p. 70). This type of discrimination within the system acts to bolster the racial hierarchy not just between Indigenous inmates and the administrators of the system but also between the Indigenous and non-Indigenous inmates.

Summary and Conclusion

Colonialism was not a point in time or a political campaign which has since ceased to exist, as Patrick Wolfe described it, “invasion is a structure, not an event” (as cited in Chartrand, 2019, p. 70). Although the Canadian government is working to make amends for the wrongs of its colonial past, such as with the creation of the Truth and Reconciliation Commission, the

original ideologies and frameworks created and employed during colonization are still present in Canadian society today. The language and policies of society may have evolved over time, but the ideologies have remained the same, and the racial hierarchy has remained intact. Although the Indian Act no longer prohibits Indigenous cultural ceremonies or makes it illegal for an Indigenous adult to be in possession of alcohol, the racialization of social systems remains. Instead of criminalizing the Indigenous lifestyle as a means of controlling and assimilating the Indigenous population, the ideologically-driven goals of colonization are now reached by more covert measures. Structural racism still exists, it is just more difficult to see but the effects are similar. Prejudicial beliefs are still integral to the policies of the criminal justice system and the actions of those who inhabit the system. These attitudes result in various discriminatory behaviours such as over-policing of minorities, the abuse of Indigenous peoples by the police and correctional services staff, and the discriminatory prison terms and differential treatment concerning release from prison (Fitzgerald & Carrington, 2011; Monchalin, 2016; McGill, 2008; Chartrand, 2019).

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