

# Toward Sovereign Indigenous Justice: On Removing the Colonial Straightjacket

*Michaela McGuire (Jaad Gudghiljiwah)<sup>1</sup> and Ted Palys<sup>2</sup>*

## **Abstract**

Canada has oppressed Indigenous peoples' capacity for true sovereignty through colonialism, genocide and attempted assimilation. This devastation is manifest in the disproportionate social ills facing Indigenous peoples and their overrepresentation at all levels of the imposed criminal justice system (CJS). Trauma and internalized colonialism have constrained the capacity of Indigenous Nations to reclaim their place in the world as self-governing peoples. Canada has attempted to 'fix' this problem through creating parallel systems, trying to fit 'Indigenous' conceptions of justice into existing systems, and problematically adopting restorative justice as synonymous with Indigenous justice. The rhetoric of reconciliation and apology mask the continual genocidal, assimilative goals of the state. With these caveats in mind, the need to reject internalized colonialism and develop capacity for the development of sovereign Indigenous justice systems is examined.

**Keywords:** colonialism, Indigenous justice, assimilation, restorative justice, decolonization, self-governance.

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<sup>1</sup> Simon Fraser University, BC, Canada

<sup>2</sup> Simon Fraser University, BC, Canada

## Introduction

The devastating and compounding impacts of colonization, genocide, the incarceration in residential and day schools and within Canadian prisons, attempted assimilation and subordination through introduced systems of the settler state – namely the criminal justice system (CJS), child welfare system, governments and laws – have been extensively documented (Alfred, 2015; Coulthard, 2014; Cunneen, 2011; Starblanket, 2018; Truth and Reconciliation Commission [TRC], 2015). Through these processes and the actions of imposed governments varied Nations, peoples and communities were conflated as ‘Indians,’ and their status as such regulated by the *Indian Act* (Monchalin, 2016).

The *Indian Act* imposed a system of governance that reflected the interests of our<sup>1</sup> colonizers who developed a legal infrastructure that presumes Canadian sovereignty, ignores Indigenous sovereignty when inconvenient, and thereby retains a veto over Indigenous life and lifeways. The colonial system superseded existing governments by introducing band councils whose authority was constrained (Borrows, 2016; Monchalin, 2016), and represented “an assimilative measure to dismantle traditional structures” (Borrows, 2017, p. 121). The impact of imposed systems of governance is perhaps best understood by considering that “First Nations policy development and delivery in Canada is almost exclusively under federal control,” which maintains the state-imposed hierarchy (Borrows, 2016, p. 166).

The introduction of settler-colonial systems of governance and law was part of the assimilative tactics of the state. Green (2011) argues that colonial policies are “essentially genocidal: they are intended to eliminate national and cultural particularity and its political implications in favor of a homogenous settler culture, where rights are without distinction and history has no contemporary consequences” (pp. 17-18). Despite myriad and ongoing attempts to assimilate and destroy our cultures, systems and laws we continue to resist colonial tactics of control. Although the *Indian Act* has gone through significant changes it “still maintains the main tenets of protection, control, and civilization (meaning assimilation),” that privilege the interests of the settler state (Diablo, 2018, p. 23).

One impact of imposed governance is evident through an examination of divisive colonial policies and practices that manifest in us accepting our supposed inferiority and the belief that it is outside of our power to reclaim our own systems. The multitude of social ills Indigenous people face –



including but not limited to addiction, poverty, high suicide rates, victimization, disproportionately poor health, over-representation in all areas of the criminal justice system and within the child welfare system – are the results of ongoing colonial genocidal harm and structural and systemic racism (Coulthard, 2014; TRC, 2015). The hate to which we have been subjected becomes internalized when we “oppress and discriminate against ourselves” (Victor, 2007, p. 11).

Imposed systems of “self-governance” that leave every change still requiring ministerial permission and fiscal control in the hands of the state further impede the potential for fundamental change. Out of fear that they will lose funding, many First Nations elected officials “will not rock the boat”, which means real change is often either ineffective or impossible (Manuel, 2018b, p. 29). As Manuel (2018a) observed, “self-government, as designed by the Canadian government, is a system where we administer our own poverty” while we are fooled into thinking we have control (p. 21). When we accept the colonial governments’ systems of law, justice and governance – foundational cultural institutions – we remain colonized.

This inability to resist imposed systems will continue unless we challenge our own colonial thoughts and educate ourselves as to the true “roots of [our] pain” (Alfred, 2009a, p. 167). Divisiveness was a part of the control-and-conquer mentality of our oppressors and we must do our best to resist this colonial tactic (Monture-Angus, 1995). The feelings of inadequacy that result in our supposed inability to self-govern are symptomatic of colonized thoughts. As Alfred (2009b) explains, “the culture of being colonized takes away a peoples’ ability to resist the racist aggression and political, economic and cultural pressures of the colonial state and settler society” (p. 40). Contesting our supposed inferiority involves the need to “remind ourselves that our experience and understanding are equally legitimate and encompass complete authority” (Monture-Angus, 1999b, p. 56). When we accept imposed systems, remain silent, and fail to disrupt our colonized thoughts we remain complacent with our inferior status.

The Canadian state began its hegemonic control by positioning Indigenous peoples’ systems, beliefs, governments and laws as inferior. Colonial justice and legal systems were a part of policies of destruction brought forward by Canada to eliminate Indigenous peoples as peoples. Imposed governance structures created through colonization and legislated through the *Indian Act* created a system of dependence that has continually undermined Indigenous peoples’ capacity for exercising sovereignty.

The present paper examines how these systems of colonial harm – both internal and external – impacted understandings of, and pathways to, the recognition of sovereign Indigenous Justice Systems (IJSs). Toward that end, we first consider the evolution of Canada’s policies with respect to Indigenous justice and explain how these have and continue to treat Indigenous justice processes as trivial and inferior. We conclude by considering the development of truly sovereign IJSs as a tangible and realistic possibility. Reclamation of self-governance, laws and justice are within our reach and this paper represents a statement of resistance to the internalized colonial thoughts that keep us oppressed and affirmation of a future where our own systems of justice are restored.

### **Canada’s Evolving Approach to Indigenous Justice**

#### ***Indigenization***

The formation of the reserve system dislocated Nations from their territories and severely limited their economic opportunity.<sup>2</sup> On-reserve life could not offer the looming opportunity that cities did. This, coupled with trauma and the introduction of alcohol, led to severe poverty and a multitude of social ills. With the loosening in 1950 of the more extreme provisions of the 1920 version of the *Indian Act* that had made culture and free movement outside reserves (and many other practices) illegal, Indigenous people began moving to the cities in large number to pursue opportunities that were not available on-reserve. Added to that were thousands of Indigenous people who were dislocated from their home communities into urban areas because of the legislation of identities under status provisions of the *Indian Act*. As Hanson (2009) explains, “leaving the reserve meant facing discrimination and assimilation in urban centres, relinquishing [...] rights,” and losing familial and community connections (para. 17). Those who escaped to cities experienced increased racism, discrimination and stereotyping. Indigenous people soon were being arrested and imprisoned at an unprecedented rate, often for status crimes that were illegal only if you were an “Indian” (e.g., see Cardinal, 1969). By 1967 the federal government finally recognized the growing problem of ‘over-representation’ of Indigenous people in prisons, i.e., where they were being arrested and convicted far beyond their proportion in the population (Canadian Corrections Association, 1967).

Canada’s first response was to promote “indigenization” of the justice system, which Cunneen (2002) describes as “the process of involving



Indigenous peoples and organizations in the delivery of existing or modified services and programmes” (p. 54). Its logic was that if there were more Indigenous faces in the justice system, Indigenous people would come to better understand its workings and settler police, judges, correctional and probation officers and others would come to better understand Indigenous people and cultures (e.g., Tauri, 2016). For the most part, this involved hiring more Indigenous justice professionals in order to appear more ‘culturally sensitive’, without significantly changing the existing system (Martel, Brassard & Jaccoud, 2011).

The downside of the strategy was most notable in two respects. The first was its complete failure to question the status quo; it was still Canadian justice being administered within Canadian institutions. The second was that Indigenous justice was never conceived as anything viable or even worth considering, despite the fact that – regardless of any recognition or lack thereof by Canada – “Indigenous legal regimes exist and operate within Indigenous communities” (Moulton, 2016, pp. 2/3) and sovereign “justice systems are already happening” (Monture-Okanee, 1994, p. 230).

Some Indigenous communities, nonetheless, have opted to accept this Canadian model of justice by enacting their own police forces and special constables under Canada’s First Nations Policing Program (FNPP) (Kiedrowski, Jones & Ruddell, 2017). Reviewing these initiatives, Kiedrowski et al. (2017) suggest that the “administration of the FNPP over the past quarter century is one of benign neglect,” which is in line with a long history of false promises and political rhetoric that does not result in beneficial action (p. 595). Correctional Service Canada (2013) responded to calls to address Indigenous over-representation by creating a myriad of jobs specific to Indigenous people. However, putting more Indigenous people into these positions acts as a distraction from the continued criminalization, incarceration and maltreatment of Indigenous peoples by the CJS.

### **Accommodation**

A second tack initiated in the 1970s and 1980s involved efforts to accommodate Indigenous justice processes within the Canadian system. Judge Barry Stuart, for example, in *R. v. Moses* (1992) introduced “sentencing circles” in which, after determining guilt, he would sit with Elders and other community members in an effort to develop a consensus on how the offender might be sentenced. While a provocative move at the time, Monchalin (2016) notes that sentencing circles are “presided over by

judges, which, in effect, makes the sentencing circle little more than a minor reorientation of a traditional court proceeding” (pp. 283/284). Accommodation was also occurring in Canada’s prisons, where Elders came to be recognized as spiritual guides, and healing places such as sweat lodges became permitted to allow a generic Indigeneity. Some courts also began to be created as “Aboriginal courts,” if that is not too much of a contradiction in terms, that presumably bring a generic Indigenous character to an otherwise Canadian justice forum.

Tauri (2005) summarized the issues inherent to both indigenization and accommodation when he stated,

*The critique of [these strategies include], the token nature of the indigenisation process. A number of commentators on the Canadian context ... argue that indigenisation serves as an inexpensive and politically expedient strategy that allows the Government to be seen to be ‘doing something’ about the indigenous crime problem, without significantly altering State control of the justice portfolio...[however,] that indigenisation is based not on the empowerment of Indigenous peoples, but instead on co-opting their justice philosophies and practices within forums that are controlled by the State...indigenisation continues the colonial process by furthering the judicial disempowerment of Indigenous peoples (p. 12).*

Such programmes are incapable of meeting the complex and diverse justice needs of Indigenous peoples. They represent a ‘quick fix’ solution that falls short of implementing real change by perpetuating pan-indigenized notions of justice. Alfred (2009a) suggests that although “its methods have become more subtle and devious...the state’s goal is still clear: to assimilate Native people” (p. 154). Sentencing circles are a prime example of this push. The colonial system will only accommodate or indigenize at a level that is convenient.

The above-mentioned programmes and indigenization processes allow the colonial state to accommodate without overhauling existing systems. Monture-Okanee (1994) states that the “conversation about Aboriginal justice is becoming solely a conversation about the mainstream system accommodating us” (p. 228) while ignoring the pre-existence of varied Indigenous ways of doing justice. This move towards accommodation occurred following criticism of the CJS’ treatment of Indigenous peoples and



resulted in the “[implementation of] criminal justice policies and practices geared at taking into account Indigenous issues, cultures and traditions,” in order to more effectively meet their justice needs (Martel et al., 2011, p. 236). We must not accept these colonized or pan-indigenized notions of Indigenous programmes and processes as the end goal, not least because they conflate all Indigenous peoples as one and the same. As Alfred (2009a) explains, “the greatest [myth] is that Indigenous peoples can find justice within the colonial legal system” that has continually criminalized and imprisoned us (p. 107) while treating us as a homogeneous “other.”

### ***Parallel Systems***

Canada’s third wave approach to Indigenous justice came in the form of “parallel systems”, promoted in large part by the federal Department of Justice’s Aboriginal Justice Strategy (AJS) since 1991. Typically, these programmes address a range of minor offences where Indigenous individuals willing to plead guilty and take responsibility for their actions are diverted to a community-based programme in which a healing path appropriate for them is decided in a consensus-driven community forum. This option became available after more than a dozen commissions and inquiries concluded that racism was systemic in the CJS and that Indigenous people were ill-served by a “foreign” justice system.

Now known as the Indigenous Justice Program (IJP), the federal government administers a Community-Based Justice fund whose objectives are,

*to allow Indigenous people the opportunity to assume greater responsibility for the administration of justice in their communities; to help reduce the rates of crime and incarceration among Indigenous people in communities with cost-shared programs; and, to foster improved responsiveness, fairness, inclusiveness, and effectiveness of the justice system with respect to justice and its administration so as to meet the needs and aspirations of Indigenous people.<sup>3</sup>*

Money is available as long as the community applying aspires not to develop a justice system in keeping with its own values and traditions, but rather to be delegated limited responsibility for administering Canadian justice. While

“fairness, inclusiveness and effectiveness” are encouraged, this is to be done within the confines of the Canadian CJS. The IJP programme and its predecessors have been helpful in promoting the development of a justice infrastructure across the country that includes 197 community-based programmes serving more than 750 communities. However, questions Palys (2004) posed well over a decade ago have yet to be answered:

*[A]fter 15 years of supposedly supporting “Aboriginal justice” through programme initiatives and special events, the federal government still holds all the money, still sets all the priorities, and still effectively tells Canada’s Indigenous peoples what their justice systems can look like. Any funds that do come are “soft” funds that may or may not be there next year. No mainstream system can develop with such uncertainty. How can [IJS’s] be expected to do so? And how can it be “Indigenous justice” without Indigenous direction and control? (p.2)*

The plight of Indigenous justice in Canada parallels in many ways the situation of Māori of Aotearoa/New Zealand. Tauri (2004) explains how the expanding restorative justice (RJ) industry has appropriated cultural practices and “justice philosophies” in a manner that undermines the ability of Indigenous Nations to re-implement their own responses to justice issues (p. 2). As part of a “bi-cultural” initiative to incorporate more Māori peoples into governance, Tauri (2004) outlines how the New Zealand government essentially took Māori justice, sanitized it, and came out with “family group conferencing,” which the government then offered back to communities as “Māori justice” (pp. 5-7), which it most clearly was not. Academics in the RJ community have been quick to embrace practices such as “family group conferencing” through a kind of willful ignorance that avoids engaging critiques put forth by Indigenous authors (e.g., Tauri, 2015). A second way in which academics have been complicit is in accepting their own lionization along with that of the state’s justice practitioners, creating the paradoxical situation where settler lawyers, social workers, police officers and academics become the recognized ‘experts’ on Māori justice at the expense of Māori scholars and community members who are under-utilized, maligned, or simply ignored (e.g., Jackson, 1990; Tauri, 2004, 2016).

Canada has taken steps to copy a similar pan-indigenization and sanitization of Indigenous justice – essentially rearranging things to best suit colonial interests. Justice programmes funded by the AJS and IJP initiatives





are allowed [sic] to operate within the confines of existing justice system parameters, presumably to create 'equal opportunity' for both Indigenous and settler communities, which is accomplished by touting RJ as neutral common ground. We see this 'gift' to Indigenous peoples as more of a Trojan horse, a colonial version of Indigenous justice appropriately sanitized for broader consumption.

Conflating RJ with Indigenous justice leads to the misconception that the colonial system already has IJP's. In reality, RJ exemplifies the appropriation and pan-indigenization of Indigenous cultures as is represented by the amalgamation of 'traditions,' such as circles, the "four directions [...] [use of the] talking stick", and an overall focus on 'holistic' understandings of the world (Ross, 2014, pp. 50-56). Andersen (1999) observes that "selected notions of Aboriginality are put into practice in [RJ] initiatives", which may ingrain romanticized versions of Indigenous peoples within the existing colonial system (p. 318). Hand et al. (2012) go as far as to title their article "Restorative Justice: The Indigenous Justice System", with little appreciation that RJ is a colonial conception that operates to continue the assimilative goals of the state. RJ privileges the interests of the colonial state and "reproduces the role of the law and processes of criminalization," with a softer edge it is simply an "add-on to existing" CJS policies and practices (Cunneen, 2012).

RJ is often portrayed as an alternative to the Western CJS that is more culturally sensitive. We see parallels with Moyle and Tauri's (2016) analysis of family group conferencing whereby "the 'one world view and one size fits all' approach [...] permits state appropriation of Māori cultural practice to support Eurocentric policy construction," limiting their capacity (p. 97). RJ programmes arose at a time when it was "commonplace for policy workers in settler-colonial jurisdictions to respond to Indigenous justice 'issues' by creating and/or importing indigenised justice forums that utilized 'acceptable' (meaning civilized) elements of Indigenous cultural practice" continuing the assimilatory tactics of the state (Tauri, 2015, pp. 184-185). RJ thereby becomes complicit in the amalgamation of varied peoples into culturally homogeneous 'Indigenous' peoples in order to more easily control and ultimately assimilate them into the colonial way of life. RJ has been marketed as an 'Indigenous' way of responding to justice issues and as Tauri (2016) notes, "too often, a community or an individual has been given little choice but to receive these culturally appropriated gifts," through the misinformation and exaggeration of Indigenous involvement put forward by

the global RJ industry (p. 58). There is in fact, “no ‘one size fits all’ approach,” and this conflation ignores the diversity amongst Indigenous legal traditions and laws (Friedland, 2014, p. 8). The potential for Indigenous community involvement in RJ programmes may fool people into thinking they are reclaiming their own ways of doing justice when in fact they are actually contributing to the stifling of that reclamation.

RJ operates within and on the fringes of the colonial CJS that has imprisoned, controlled, and regulated Indigenous peoples since first contact. Cunneen (2002) argues that,

*if the outcome of [RJ] practices is the further integration of colonized peoples into the dominant legal system, then we surely cannot claim for [RJ] that it is socially and politically transformative or a radical alternative to existing justice practices (p. 44).*

Regardless of their intentions, RJ practitioners undermine the possibility for sovereign Indigenous justice. Colonial control is imminent within all RJ initiatives. Parallels can be drawn between RJ and the colonial push for reconciliation through apology insofar as both constrain true action towards self-determination and Indigenous justice. They represent the easy route towards appeasing both settler minds and colonized Indigenous minds – recognition without any need for subsequent action.

Acceptance of RJ within Indigenous communities is another consequence of colonialism that operates as a veritable straightjacket limiting the potential for reclamation of IJSs. This limitation is evident when one considers that RJ in the Canadian context is most often utilized for less-serious crimes, allowing for the continuation of Indigenous over-representation and punitive sanctions within the CJS (Cunneen, 2002). Contrary to the notion of indigeneity portrayed by RJ advocates and marketing materials, “many Indigenous societies had harsh punitive sanctions” in response to wrongdoing (Milward, 2008, p. 110). Romanticized portrayals of Indigenous peoples as living in peaceful harmony disregards the rigidity of some societies, existence of laws and values, and undermines our capacity to develop IJSs today. IJSs will be as diverse as conceptualizations of wrongdoing and justice and appropriate resolution may vary considerably (Alfred, 2009a; Cunneen, 2011; Friedland, 2014; Milward, 2008). Decolonization necessitates critical thinking that questions the legitimacy of RJ and indigenized programmes within the colonial



“confines of the Canadian [CJS]” (Cunneen, 2002, p. 45). Education as to the implications of accepting RJ is a necessary component in facilitating a shift towards recognition and implementation of IJSs.

Even within more RJ and healing-oriented justice traditions that presumably operate on more egalitarian, neutral ground, mainstream programming is embraced and supported while Indigenous programming is relegated to shoestring budgets and soft money. A case in point is our experience in Canada with Vancouver Aboriginal Transformative Justice Services (VATJS), British Columbia’s flagship IJP, that has been funded by government sources since 1999. Being placed at the outset under an “alternative measures” programming umbrella meant that the programme could receive referrals from the Regional Crown authority in a limited array of (minor) cases. This limitation was supported at the time with the promise that it was but a “first step” toward more extensive jurisdiction. Although the programme developed into a highly respected organization, a notable contrast arose in 2008 when the BC government established a “Downtown Community Court” (DCC) to deal with a clientele that overlapped with that of VATJS. Despite the DCC being an ‘experimental’ programme that sought to implement healing ways with a population fraught with poverty, mental health and addiction issues while VATJS was by then well-established and highly regarded, the differences in their treatment were notable in terms of jurisdiction, support and funding. VATJS has not yet become the central hub for Indigenous accused where it decides who should be referred to other agencies and courts rather than settler institutions deciding on which accused should be placed with VATJS. It remains under the alternative measures/RJ umbrella, still operating under time-limited funds that can be terminated at any time (Palys et al., 2014).

Martel et al. (2011) suggest that “colonialist countries have used whitestream criminal justice systems as a series of colonial policies and practices that have resulted in delegitimizing First Nations’ social institutions, and in eroding worldviews” (p. 236). When we accept pan-indigenized justice we place limitations on our own abilities to de-colonize our own ways of responding to wrongdoing (Victor, 2007). Tait (2007) suggests that these programmes “have most often only extended colonial impacts”, compounding existing harm (p. 1). The Canadian CJS “was created to produce the results it has been producing” (Monchalin, 2016, p. 78). Canada has imposed a hierarchical relationship that privileges its interests

and oppresses Indigenous peoples (Coulthard, 2014). This hierarchy was established to benefit our colonizers' claim to our land, rights and way of life.

Regardless of the denial of self-determination, "Indigenous peoples have tried to create their own vision of how they should live, despite Canada's assimilative insistence that they internalize, submit to, and replicate perceived 'correct' constitutional forms" through indigenized programming (Borrows, 2016, p. 126). The existence of Indigenous systems operating alongside Canada's systems should be seen as an attainable goal; we must decolonize our minds and reclaim what is rightfully ours.

## **Toward Sovereign Justice Systems**

### ***Moving Beyond the Colonial Straightjacket***

Canadian government rhetoric operates to mask Indigenous self-determination and to allow for the internalization of the helplessness, insecurity and inferiority that was imposed upon us. Victor (2007) suggests that "internal colonialism tricks us into thinking that in order to achieve 'justice' we need to mirror or model the Canadian system," and that reclaiming our own systems is impractical and impossible (p. 14). We remain colonized when we believe we are unable to reclaim what is rightfully ours, to revitalize and reawaken our own ways of being in the world.

Indigenous peoples have been continually subject to false promises and apologies that do little to move towards decolonization. Support for the formation of sovereign IJSs is but one example of a colonial promise that has yet to come to fruition. The Canadian government and multiple reports have recognized the inherent right to self-government – including the right to sovereign IJSs (Department of Justice Canada, 2018; Royal Commission on Aboriginal Peoples [RCAP], 1996a, 1996b, 1996c; TRC, 2015). However, tangible action focussed on 'fixing' Indigenous peoples operates as a stalling tactic delaying true action and steps towards decolonization. Recognition of Indigenous rights and sovereignty is only allowed insofar as it does not disrupt the colonial state's dominance.

Overhauling existing systems is presented as an unrealistic pipe dream, while 'reconciliation' is limited to apology or restitution with little to no institutional change. The colonial rhetoric reinforces our subordinate, dependent position and contesting this situated position represents a challenge to settler colonialism (Whyte, 2018). Strategic, well-written apologies serve our colonizers well as they overshadow inadequacies in the



treatment of Indigenous peoples. This is particularly so when such apologies are conceived as ends in themselves. This conveniently ignores the veritably universal Indigenous tenet that an apology is no more than a first step toward achieving a just resolution; “taking responsibility” also means undertaking concrete action to make things right.

Corntassel and Holder (2008) argue that governments “tend to favor solutions that minimize settler-colonial territorial and material sacrifice while maximizing political/legal expediency,” i.e., opting for the least disruptive solution to dealing with the ‘Indian problem’ (p. 47). Reconciliation and apology are presented as the solution to ongoing colonial devastation instead of supporting “Indigenous self-determination” (Coulthard, 2014) and capacity building (p. 123). The rhetoric of reconciliation and apology situates “Indigenous subjects as the primary object of repair, not the colonial relationship” (Coulthard, 2014, p. 127) that reinforces our supposed inferiority. Further, the rhetoric of reconciliation leads the Canadian state and settler society to believe they are taking action on issues facing Indigenous peoples. This belief results in the “erasing [of] support for real resistance,” in terms of the ongoing battle for Indigenous rights and self-determination (Alfred, 2015, p. 8). We must reject the notion that reconciliation is a tangible possibility in favour of working towards decolonizing our minds, communities and Nations and continuing to “challenge Canada in a respectful way” in order to assert our rights (Monchalin, 2016, p. 293).

We must contest the continuing denial of our Nationhood instead of accepting our position within Canadian society. As Alfred (2009a) explains, “the settler state has no right to determine Indigenous futures” (p. 71). The Canadian state portrays Indigenous sovereignty as an impossible dream by “raising fears about the potential loss of territorial integrity, internal political instability, violent chaos and secession,” leading to a lack of support from settler Canadians (Napoleon, 2005, p. 3). This discourse frames relations between Indigenous and settler peoples as an adversarial one – a zero-sum game where Indigenous gains somehow involve Canadian losses. But according to what logic does the subjugation of one set of peoples by another benefit Canada? Is Canada not better when all thrive? We agree with former UN Special Rapporteur James Anaya, whose most recent report on Canada (Anaya, 2014) noted that “this situation creates an unnecessarily adversarial framework of opposing interests, rather than facilitating the common creation of mutually beneficial development plans” (para. 76).

The imposed hierarchical relations of the state have resulted in “the illusion that they [settler nations and citizens] stand on moral ground in their treatment of Indigenous peoples,” while continually oppressing them in their abilities to reclaim their place in the world (Whyte, 2018, p. 282). Public statements often glaze over and/or misrepresent the ongoing genocide to which Indigenous peoples are subject while presenting our desire for sovereignty as an impossible dream instead of a necessary reality (Monchalin, 2016). These statements often result in the blaming of Indigenous peoples for their own misfortune – representing convenient amnesia to state harm.

Palmater (2019) suggests that the ongoing lack of action, apology and general government rhetoric constitutes “engaging in a political dance of distraction” while continuing to inflict colonial harm (p. 146). The perpetuation of the notion that Indigenous peoples must be civilized and assimilated (Reasons et al., 2016) has continually been presented through policy and statements that privilege the interests of the settler state. These apologies, statements of the need for reconciliation and inquiries operate as colonial band-aids offering surface-level solutions that ignore the underlying issues. The rhetoric around reconciliation is often superficial including taking down statues or “[removing] names on [buildings],” while the colonial state continues to perpetuate colonialism through the tactic of “deny, deflect and defer” (Palmater, 2018, pp. 75/76).

The impact of colonization is manifest in the acceptance of imposed systems, indigenized programming and accommodation as steps forward instead of recognizing them as old gifts in new wrapping. These programmes dismiss existing Indigenous systems in favour of solutions that are streamlined, assimilative, and subject to Canadian authority. The use of pan-indigenized propaganda, symbolism and healing techniques has become institutionalized within and outside of the Canadian CJS. Challenging imposed systems and reclaiming our own IJSs necessitates education and critical conversation around the ways in which we have internalized colonialism. Palmater (2018) argues that we need to “lay the blame properly at the feet of our colonizers” and recognize how covert their tactics truly are in order to unravel colonialism (p. 78). Any solution that is one-size-fits-all or can be brought forward quickly should be questioned as it is likely one that will further embed our subjugation within existing systems. Resistance, resilience and reclamation are the pathways through which we may begin to reconstitute ourselves as sovereign Nations.



Decolonizing the way we interact with the world involves challenging the internalization of our subordination. Monture-Angus (1999a) posits that decolonization “is a state of being free from responding to colonial forces,” through the reclamation of Indigenous ways of being (p. 73). Attempts to indigenize have only reinforced colonialism by trying to fit Indigenous peoples into existing colonial systems, structures and processes (Alfred & Corntassel, 2005). Through decolonization, we can begin to imagine our futures free from colonial restraints. It reinforces colonial thinking when we tell ourselves and each other that such a future is unattainable. We must believe in our abilities to reawaken existing systems, to build capacity and reclaim our rightful place as Nations. This is not to say that decolonization will be an easy journey. Monture-Angus (1999a) called for a “revolutionizing [of our] thoughts” (p. 87), essentially interrupting our self-doubt and internalized colonialism. We must continually question state interpretations of IJSs, sovereignty and accommodation while pushing for true recognition. Sovereignty should not be seen as an unrealistic dream.

### **Decolonization Will Embrace Sovereign Indigenous Justice**

Alfred (2018) argues that “reconciliation is recolonization,” as it results in a lack of responsibility and a continuation of hierarchical colonial relationships (p. 11) such as the imposed CJS. Moving towards decolonization involves reclaiming our place in the world as sovereign Nations capable of governing ourselves. Our sovereignty was never surrendered to a Canadian state that has come to believe its own declaration of sovereignty superseded our rights, settled on our territories and imposed its systems of governance on those of us who have survived (Borrows, 1997; Monchalin, 2016). We continuously clamour to reclaim our rights in Canadian courts that are not representative of our laws or values (Borrows, 2016; Coulthard, 2014) and which were founded on our desecration and literal and figurative demise. The very foundation of Canada is based on a fiction: the omission and erasure of pre-existing sovereign Indigenous Nations in order to maintain “colonial domination” (Moulton, 2016, pp. 10-11) and the oppression of Indigenous peoples. Why is it Canada is never the one required to prove the basis of its title (Borrows, 1999)?

Justice seems to be yet another example of the use of government rhetoric to ward off Indigenous peoples’ frustration at lack of action. In keeping with the minimal principles outlined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Canada’s Department of Justice

(2018) presumably recognizes Indigenous self-determination. However, tangible steps promoting Indigenous peoples' reclamation of our justice systems are not identified despite being specifically addressed in the UNDRIP. The most recent public support for IJPs was the report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019), which recycled many of the former calls to action of the RCAP in 1996 and the TRC in 2015, as well as countless other reports and investigations. Unfortunately, solutions put forward by extensive, expensive and often time-consuming inquiries are often shelved with little action taken only to be reinvestigated years later. Witness, for example, the dozen or so commissions of inquiry cited by the Department of Justice itself, all affirming that Indigenous people were ill-served by a foreign system and that there should be a place for Indigenous justice controlled by Indigenous peoples.<sup>4</sup> The implication of this lack of action in the enduring spectre of over-incarceration, over-criminalization and death of Indigenous people in Canada within colonial systems and institutions.

The co-existence of Indigenous sovereign systems of governance, law and justice and the Canadian CJS are presented as impossible realities. The main issue with Canadian CJS involvement is that "these institutions have been built on colonial ideologies of racism and eurocentrism that perpetuate discrimination and oppression" and as a result of this foundation cannot adequately respond to calls for Indigenous justice (Victor, 2007, p. 17). However, reclamation and reawakening of Indigenous legal orders are ongoing regardless of their recognition by the state (Yoon-Maxwell, 2019). Manuel (2018b) posits that "unless we forcefully demand our rights, including our fundamental right to self-determination, we will not receive them" (p. 30). The era of subservience is long past.

Indigenous conceptions of justice are incredibly varied. Responses to wrongdoing may include more punitive sanctions as well as a prioritization of "respect, harmony and balance" that is often missing from the Western CJS (Monchalin, 2016, pp. 55/56). The potential for parallel governance and legal systems has been recognized. However, as we move towards the reassertion of IJS's we must be cognizant of the multitude of social ills and complexities intertwined with justice (Borrows, 2016; La Prairie, 1995). Genocidal trauma has run roughshod over our peoples and overcoming that harm will be no small feat. Our communities grapple with poverty, addiction and mental illness that are often intertwined with colonial conceptions of criminality. Although we had ways of responding to wrongdoing we were not





dealing with the same level of trauma and subsequent social ills that we are today and this must be kept in mind as we move forward (Monture-Okanee, 1994). Regardless of our traumatization, we cannot sit idly by as the colonial state continues to disregard our existence. Reclaiming what is ours is a necessary component to healing the pain inflicted upon us.

### **Beyond the Colonial Straightjacket**

Re-asserting who we are as sovereign Nations and reclaiming our control over justice involves challenging the internalization of colonialism and the government rhetoric of inclusion. If we are expecting our colonizer to become our saviour we have been fooled. As Monture-Angus (1999b) observes, “Canada does not have the answer for us” (p. 22) and acknowledging this limitation is essential for us to move away from a relationship of dependence. What we need from Canada is not more prescription but rather the space to make our own decisions about how to proceed and the control over our own territories that would enable us to fund them.

RJ and reconciliation are manifestations of colonialism and as such will be ineffective in meeting our varied justice needs. Pathways to self-determination and IJS will be fraught with challenges but they should not halt our progress (Monture-Okanee, 1994). Instead, we must learn from our mistakes and move forward as we strive to overcome compounded trauma. The colonial state’s imposed CJS is ideologically divergent from many of our Nations’ own responses to wrongdoing (Monchalin, 2016). There is not, nor should there be, a straightforward solution to addressing the varied justice needs of Nations across Canada who have had to grapple with insurmountable trauma including the imposition of Western systems of law and governance. Cunneen (2011) posits that “a postcolonial vision might see the potential fragmentation of centralized [CJS’s] as an opportunity for progressive change and development,” led by Indigenous peoples themselves (p. 314). We must be critical of imposed systems of hegemonic rule as we explore the possibilities for sovereign IJSs (i.e., plural).

Instead of waiting for our colonizers to support us we must build capacity and educate ourselves as to potential avenues through which we can reclaim our rightful control over our own respective IJSs. Capacity building involves education not just in the Western sense but in terms of our languages, lands, culture, protocols, laws and the impact of colonialism on our way of life. As Alfred (2018) argues, “the way to fight colonization is by re-culturing yourself and re-centering yourself in your homeland” (p. 12).

The education that can be found when we do this is much more profound than any textbook can offer as it garners an understanding of what we are fighting to protect and inspires innovation in our strategies to reclaim our systems. Without connection to land, culture and way of life we are simply lost colonized souls who passively claim Indigenous identity with no true knowledge of our pre-colonial roots. We cannot reject the trivialization and appropriation of our culture if we do not understand the impact of colonialism on devastating our identities through the obliteration of our homelands, murdering, criminalizing and torturing our peoples and outlawing our cultural and political practices. If our colonizers were serious about taking action then we would not still be facing fourth-world (see: Manuel, 1974) conditions on small parcels of reserve land while our resources, families and cultures are desecrated by the state (TRC, 2015).

It is essential that we resist colonialism in our thoughts, in our actions and in our (lack of) acceptance of imposed systems (including RJ and Indigenized programming). Alfred (2009a) suggests that

*the lesson of the past is that Indigenous peoples have less to fear by moving away from colonialism than by remaining bound by it. In their resistance they demonstrate an inner strength great than that of the Nations that would dominate them (p. 58).*

The easy solution is to accept the indigenized solutions of the colonial government; but, we have not resisted, fought, and survived genocide, to opt for mere accommodation. Settling for imposed systems is a disgrace to our ancestors' resilience; those of us who have fallen prey to indigenized notions of justice must disrupt our colonized thoughts.

Ancestral memory, culture and place cannot be discounted as essential components to rediscovering who we are as sovereign Nations. Despite the battles we face every day we walk through life with

*a constant surge of ancestral memory running through our veins [that] has empowered and enlivened us and given us the gifts of tenacity, anger, patience and love, so that the people may continue and so that the generations that are yet to rise from the earth may know themselves as the real people of their land (Alfred, 2018, p. 11).*



The power that we hold as first peoples is in our resilience and tenacity to not only survive but to reinvigorate our cultures and see our Nations thrive according to our own laws, values and governance. My own reclamation of self has led me to an understanding of the vicarious trauma, colonialism and racism that have impacted me since birth. Walking under ancient totem poles in my ancestors' footsteps, a sunken feeling of grief, strength and duty was bestowed upon me. That experience is what brought me to pursue justice for my Nation a sovereign Haida justice system that embodies our laws, beliefs and values (see McGuire, 2019). The power of the land, of our ancestors and our cultures is essential to rebuilding our communities' resilience and capacity. Our colonizer's justice is inadequate and we must challenge our internalized colonial thoughts by rejecting its imposition.

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### **Endnotes**

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<sup>1</sup> First person references within this paper are from the first author's perspective and lived experiences as a Haida/Ojibwe person.

<sup>2</sup> They were often displaced from traditional hunting and fishing grounds, as well as areas that would provide for agricultural endeavours.

<sup>3</sup> <https://open.canada.ca/data/en/dataset/52fddeb0-75ac-4e6b-ae42-3fecbe7c50c6>

<sup>4</sup> See "Background" at [https://www.justice.gc.ca/eng/rp-pr/aj-ja/0205/1\\_1.html](https://www.justice.gc.ca/eng/rp-pr/aj-ja/0205/1_1.html)