



Discussion Paper – UNDRIP
And Turtle Dodem Responsibilities
In Justice, and Criminal Law;

A paper to generate discussion on the implications of the application of UNDRIP
On Federal laws related to Justice

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Introduction

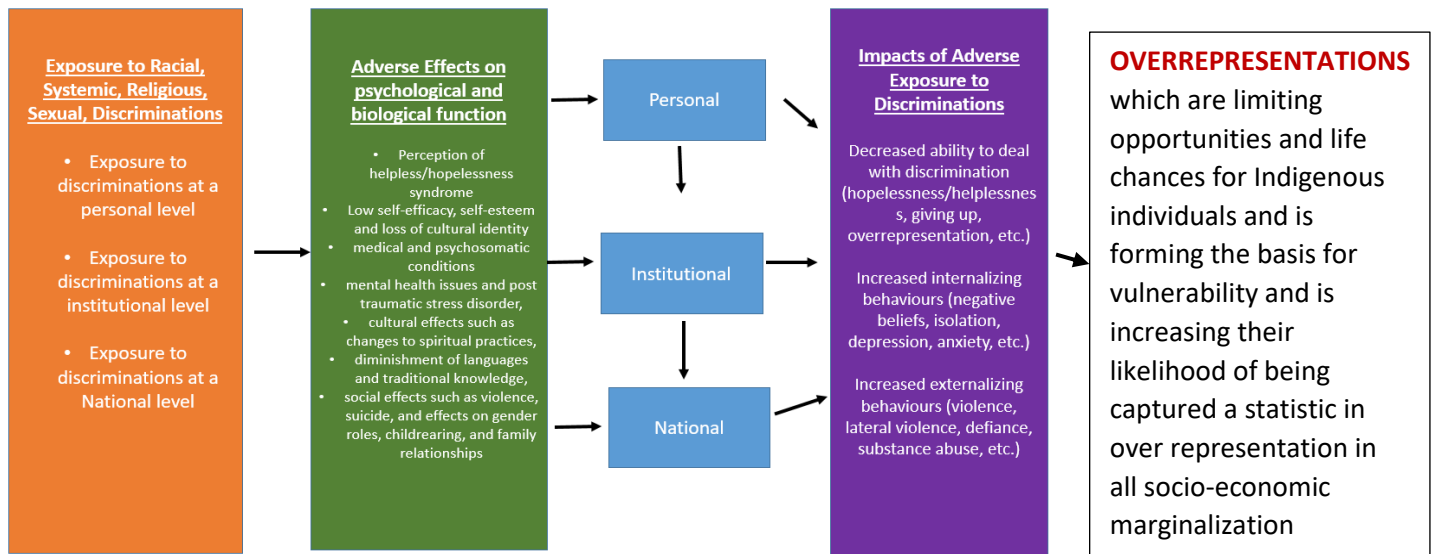
The Anishinabek have been asked to provide feedback on the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples Act*. This Act requires that by June 21st 2023 the federal government, in consultation with First Nations, develop a 10 year plan to implement the United Nation Declarations on the Rights of Indigenous People¹ (“UNDRIP”). This plan is to make all federal laws consistent with UNDRIP over a ten year period. The purpose of this paper is to generate discussion.

We have organized this paper and all related UNDRIP sessions to be based on the Anishinaabe dodem system. According to Gordon Waindebence baa the Anishinaabe Dodem or clan system is a complete form of governance. When the seven primary dodems take care of their responsibilities there would be no other issues for Anishinaabe to be concerned about. The Anishinaabe Dodem system is comprehensive. Edward Benton in his book *Mishomis: The Voice of the Ojibway*, said the people of the turtle clan are responsible for mediation, justice, making laws and helping with decisions if there are disagreements between clans. Turtle clan people are also healers and have knowledge of medicine. If we apply a turtle dodem perspective on the updating of federal legislation and implementation of UNDRIP. There are many current categories of federal legislative responsibility that would be included. The following are some of those dodem responsibilities, issues and relevant UNDRIP articles.

Dodem Sub Topics and Issues

In order to create an understanding of challenges, barriers, overrepresentations within the justice that are long standing issues within the criminal justice system, we need to first understand colonization. Through colonization Indigenous people were forced to conform to European concepts of decision-making, law-making, heterosexual and patriarchal norms or values that placed higher value on men’s political, economic and cultural roles while devaluing women². This included limiting political and property rights exclusively to men. Ultimately creating gender inequalities and many other impacts such as cultural alienation, territorial dispossession, intergenerational trauma, systemic discrimination and socio-economic marginalization that led to damaging, destructive and harmful effects and waves for the lives of many Indigenous people today. For instance; there is causal links resulting from exposures to discrimination at a personal, institutional (correctional services), national (Indian Act, other legislative authority that enforces systemic racism and discriminations).³

Figure: Causational links resulting from exposures to Discrimination and Racism



¹ <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

² <https://www.justice.gc.ca/socjs-esjp/en/women-femmes/wg-ff>

³ Racial Discrimination and Adverse Birth Outcomes: An Integrative Review Authors: Leanne L. Alhusen, PhD, CRNP, RN, Kelly Bower, PhD, RN, Elizabeth Epstein, PhD, RN, and Phyllis Sharps, PhD, RN, FAAN

Colonization also affected many First Nation traditional values, beliefs, customs and more importantly the traditional governance systems such as the Dodemaag systems and collective decision making processes. The Dodemaag system is consensus-based and is a bottom up leadership model in which Elders, women, men, youth and children all are able to contribute and have their voices heard.

Decision Making

It has been studied that prior to colonization, First Nations implemented a collective community process where major decisions over how to address issues that arose within the communities were typically determined through a collective community process⁴.

A historical example of a collective decision-making process is found in the Mayamaking Case where Anishinabek law was used to address a harm that occurred in French River, Ontario in 1838. The incident and the way that it was dealt with by the community was recorded by William Jarvis, Superintendent of Indian Affairs. In this instance, a man named Mayamaking began to act very strangely one winter, first devouring a whole deer at two meals and later tearing open his veins with his teeth drinking his own blood. Eventually the man began to refuse all food and took off his clothes in the snow continuing to drink his own blood. The community was extremely alarmed and feared that Mayamaking had turned into a Windigo (an Anishinabek legal concept describing a very harmful or dangerous person and might pose a threat to the children). A council was called and a difficult collective decision was made to incapacitate Mayamaking through death in order to protect the safety of the community. A close friend of Mayamaking was chosen to carry out the decision, as the friend would resent anyone else who did it. This friend pledged to provide services to the father of Mayamaking for the rest of his life.

A collective community process was an important role that children, youth, adults and Elders had in decision-making and policy development for their community. The collective process included all stages of life, respectfully discussing these things in ways that honor a person's stage of life, and on the land, in creation, where the sanctioning of that discussion begins with the recognition and understanding of the peoples, humanity's relationship to creation, first.⁵ However this process was undermined in colonial decision-making processes which led to inequalities and injustices towards Indigenous individuals.

Law Making

Indigenous people have the inherent right to self-determination and have law-making authority under sections 81, 83 and 85.1 of the Indian Act. First Nations who have adopted a land code pursuant to the Framework Agreement on First Nation Land Management can make laws in relation to lands, development, protection and possession, however, enforcement of these laws create numerous challenges. These challenges include concerns from law enforcement that by-laws made by First Nations under the Indian Act may not be compliant with the Indian Act or Canadian Charter of Rights and Freedoms and therefore cannot be enforced. There were also complexities relating to involvement of different levels of government, various federal departments and police forces, limitations of the First Nations Policing Program and a need for education on First Nation laws for law enforcement.

Criminal Law

Although systemic discrimination has been identified in policing, courts and in corrections and its institutes by the Supreme Court (in cases, R. v. Gladue, R v. Wells, and R. v. Ipeelee) and by several commissions of inquiry for well over 30 years, yet, Indigenous ancestry still appears to be highly associated with incarceration. Presently, 23% of the federal incarcerated population is Indigenous and since 2005-2006, there has been a 43% increase within the Indigenous inmate population and one in three federally sentenced women are Indigenous⁶. Indigenous women are also most likely to be a victim of a violent crime as compared

⁴ Anishinabek Legal Summary; Anishinabek Legal Traditions Law Report; ASKEW and BURROWS

⁵ "Anishinaabe time": temporalities and impact assessment in pipeline reviews; Sâkihitowin Awâsis1 Western University, Canada

⁶ <https://www.oci-bec.gc.ca/cnt/comm/presentations/presentations20121022-eng.aspx>

to general population. Indigenous youth are also overrepresented in the youth justice system and are more likely to be placed in custody when compared to their non-Indigenous peers. In 2017/18, slightly over half of girls held in provincial and territorial custody were Indigenous.⁷

Restorative Justice

Restorative justice is an approach to justice that seeks to repair harm by providing an opportunity for those harmed and those who take responsibility for the harm to communicate about and address their needs in the aftermath of a crime. When utilizing and integrating Indigenous knowledge, traditions and instilling grass roots of Anishinaabe legal traditions and customs of restoration with a focus on community healing within restorative justice models, it has effectively reduced recidivism rates by less than five (5) percent. A prime example of an Indigenous led model is the Biidaaban Restorative Justice program. The Biidaaban program has been researched and is a proven method of reducing recidivism and starting the journey of community healing. However, the model has not been replicated due to unavailable funds⁸.

Gladue Principles

In Canada within the criminal justice system, if an individual identifies as Indigenous and is charged with a crime, the courts and judge must apply the Gladue principles. Gladue principles is a method for judges to consider the unique circumstances of Indigenous individuals. These unique circumstances derives from the adverse effects of colonization, racism, loss of language, removal from land, Indian residential schools, child welfare and foster care systems.

An important component of the Gladue process is the availability and accessibility of culturally appropriate rehabilitative programs, often referred to as community-based justice programs. Often times, there is minimal services and rehabilitative programs due to lack of funding and lack of support from government. Although Gladue has been implemented since 1999, the over-representation of Indigenous peoples in the criminal justice system has only increased.⁹

Conclusion

Addressing root causes and implementing UNDRIP articles and protections can help to decrease overrepresentations within criminal justice system, otherwise, it is noted that continuing problems of colonialism, social and economic marginalization, and systemic discriminations will continue to occur and result in adverse effects. (Figure: Causational links resulting from exposures to Discrimination and Racism)

Relevant UNDRIP Articles

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

⁷ <https://www.justice.gc.ca/socjs-esjp/en/women-femmes/wg-ff>

⁸ Pp. 319. Indigenous Restorative Justice: Approaches, Meaning and Possibility; Author: Jeffery G. Hewitt; 2016.

⁹ Department of Justice; <https://www.justice.gc.ca/eng/cj-ip/rj-jr/index.html>

Article 8

- 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
- 2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

- 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
- 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

- 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
- 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Questions for Discussion:

1. Are there any other justice related matters missing from the above discussion?
2. What justice issues do you see as priority and that should be included in Canada's federal *UNDRIP* Action Plan?
3. What discrimination should be addressed in regards to justice matters within criminal law?
4. What kind of legal recognition or protection is needed for Indigenous justice matters in Canada?
5. How can the federal government help to improve the judicial circumstances of Indigenous peoples in Canada? Access to funding, discrimination, other?
6. What kind of legal recognition to Indigenous peoples' laws, traditions, ceremonies, customs and need?
7. What kind of processes would you like to see over the next 10 years to make federal legislative change in the social realm for Canadian federal laws to be reflective of *UNDRIP*?