Page 1644 - 1651 **DOI:** *https://doij.org/10.10000/IJLMH.113491*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

Neo-colonisation of Indigenous Communities by State and Justice System through Criminalisation

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ABSTRACT

The civilising mission carried by the Europeans in the colonies was an extremely brutal process based on the notions of superiority and religion. The importance placed in universalism and conformity, which was claimed to elevate the lives of the colonised people seen as underdeveloped, ironically lead to loss of life, property, culture and identity. Colonialism was not merely established through warfare, but by also psychologically attacking the very core of these societies. This violence, weather physical, mental or emotional, was actively backed by law, as the legislative body was made up of the colonisers controlling the State. The independence struggles of these lands fought in order to declare themselves a sovereign was fuelled by the promise of putting an end to this violence. However, in States such as USA, Canada, Australia, etc., even post decolonisation, the indigenous communities continued to be systematically marginalised by the independent state and the earlier notions of 'civilising the savages' continued to exist. Moreover, the state continued to use legislations in order to further their interests and justify their actions. Hence, criminalisation and punishment emerged as one of the primary tools used by the State to discriminate against the natives, continue violence upon land and people, and impose their ideas of life on them. This paper aims to critically analyse the evolution and current state of the criminal justice system and the irrefutable influence colonial past has over it through the example of USA. More specifically, the paper draws a parallel between the pattern of civilizing indigenous communities in the colonial and decolonised world through legislations, where they are viewed with a bias, while reflecting on the justifications provided for the same.

I. INTRODUCTION

Equality before law and equal protection of law has been hailed as one of the foundations of any State and especially in the realm of International law. It has been claimed by the western liberal democratic states that their criminal justice systems are fair, neutral and universal[2], and

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[2] Chris Cunneen, *Postcolonial Perspectives for Criminology*. University of New South Wales Faculty of Law Research Series (2011).

 [ISSN 2581-5369]

the concept of Rule of Law has been propagated on huge lengths. Although, if one looks at the reality of the socio-political aspects of these states, they will find the existence of inequality on a broad scale, and to make it more problematic, these inequalities are promoted through law and legislation. This could be observed in the widespread racial discrimination, state's failure in providing for a fair trial and exercising required duty of care towards those in custody, etc. By further systematically marginalizing the indigenous communities through legislations, the state mirrors the actions of their colonial ancestors who used similar steps with the aim of civilizing these communities and internalize European way of law and life in these areas. Other than providing an extension of historical patterns, the current criminal system also uses criminalisation as a way to restrict these community's political participation.

II. HISTORY

Francisco de Vitoria, in *De Indis*[3], opinionated that Indian states enjoy the same rights as European states, as they too, are legal persons and hold dominion over their land and have their orderly arranged politics, magistrate system, marriage, etc. conveying their use of reason[4]. This brought the issue of determining jurisdiction. He argued that since the Indians hold a degree of reason, they were bound by *jus gentium* which gives the Europeans the right to travel and sojourn in these territories[5]. He theorized natural law which stated that on a universal basis, everyone is governed by the law of nature, and since ownership of land was based on natural law, they could therefore justify colonisation. Hugo Grotius, the father of International Law, laid down the just war theory, stating that war is justified only as self-preservation if someone violates the natural right to trade. Furthermore, he called man a rational merchant and propagated the idea of private property and absolute contract[6]. However, he also argued that indigenous people do not hold the same rights as they, in his opinion, didn't hold the rational faculty required to defend and acquire property. Instead, he propagated the idea of humans being corporal entities capable of being benefitted or injured by other, where God provided superior beings the gift of inferior beings for their utilization[7]. He believed that "*contract breach entitled merchants and settlers to use violence to colonize lands and enslave populations as just punishment*" and this gave rise to what Mikki Stelder calls 'contract colonialism'[8].

[3] Francisco de Vitoria, *de indis* (1532).
[4] Antony Anghie Imperialism Sovereignty and the making of International Law (Francisco de Vitoria and the colonial origins of International law) 20 (Cambridge University Press 2005).
[5] ibid.
[6] Mikki Stelder, *The colonial difference in Hugo Grotius: rational man, slavery and Indigenous dispossession*, 24 Postcolonial Studies Informa UK Limited. 15 (2021).
[7] ibid p 5.
[8] ibid p 14.

 [ISSN 2581-5369]

Consequently, the Europeans upon reaching the territories of indigenous people, offered them contracts to sell off parts or entirety if their lands, which were biased in nature, and moreover they waged war, when the natives resisted, in the name of self-preservation, as was seen in the Banda Island Genocide of 1621[9]. These absolute contracts used to render the natives responsible for their own dispossession. Grotius was of the belief, that the indigenous communities should surrender their sovereignty to the European invader in order to achieve a better civilisation[10]. They further justified their invasion based on the concept of *res nullius,* where Europeans believed that improper cultivation renders the land unclaimed and hence could be claimed by the colonizers[11], which was further expanded upon by Alberico Gentili[12]. This resulted in European states colonizing the land of the indigenous communities and forming a parent-ward relationship with them claiming to be benevolent. In the words of Chris Cunneen, "*the 'remaking' of indigenous people was a violent process, attacking both the body and the identity/culture of the native*"[13]. However, in order to takeover a state, physical colonisation through warfare was not enough, but psychological route was required. Once jurisdiction was established, replacing the existing indigenous criminal justice system was a fundamental step in order to increase their degree of control over the indigenous communities, making their administration stronger, and hence dominating the 'weaker group' by proclaiming their 'superior laws'.

III. REPLACING INDIGENOUS JUSTICE SYSTEM

Colonisation started with the main aim of facilitating trade and commerce, but the civilising mission became a core factor. The method of administration among these indigenous communities and the concepts of social controls, crime, law, community, etc. was significantly different than the European's[14], but the latter, not being one to accept diversity, branded their own way of life and laws superior. The invaders internalised the ideas of inferiority in the natives and replaced their criminal justice system with a European model. Children were forcefully transferred to Christian boarding schools where they were taught from an early age

[9] Arthur Weststeijn, *Love Alone is Not Enough : Treaties in Seventeenth-Century Dutch Colonial Expansion*, Oxford: Oxford University Press, 19-44, 37 (2014).
[10] Supra 5 p 13.
[11] Elizabeth A Sutton, Capitalism and Cartography in the Dutch Golden Age (Chicago: University of Chicago Press, 119).
[12] Richard Waswo *The Formation of Natural Law to Justify Colonialism, 1539-1689* 27 New Literary History 743-759, 747 (1996).
[13] Chris Cunneen *Colonial Processes, Indigenous Peoples, and Criminal Justice Systems* . The Oxford Handbook of Ethnicity, Crime, and Immigration, 386-407, 392 (2014).
[14] Lujan, Carol Chiago, and Gordon Adams. *U.S. Colonization of Indian Justice Systems: A Brief History* 19 no. 2 Wicazo Sa Review, 9-23, 10 (2004).

that their native lifestyle is that of a savage and their laws are merely naïve customs[15] and were instead given Christian names and were forced to internalise a European lifestyle. Other steps taken in the similar direction led to indigenous communities facing loss of land[16], marginalization, open warfare, extensive government controls, expropriation, banning of cultural and spiritual practices, all through imposition of an alien justice system[17]. All of this could be traced back to the idea of universalism. Under colonial rule, the Europeans settlers sought a certain level of security and stability and hence emerged the aim of making uniform laws around a fixed idea of Rule of Law. This idea of universalism was further carried into the neo-liberal order where, with the expansion of Globalization and the increasing influence of the Doctrine of Effective Control, the state continued to marginalize and exclude the indigenous communities in order to safeguard the state from what they considered is a 'threat to national security', as would be discussed further in this paper. The indigenous communities were discriminated against by centring around an imagined community based on the notion of morality. Individuals outside this boundary were seen as crime prone and susceptible to state violence. Thus, one of the major factor behind the colonizing process, which later became a core part of the state's operation in its governance of indigenous communities, was Criminalization and punishment[18]. It was argued by Colin Sumner that when looking at criminal law, one "*must inevitably turn us towards colonialism…crime is not behaviour universally given in human nature and history, but a moral–political concept with culturally and historically varying form and content*"[19]. Through such practices the European colonizers imposed their western rules and laws in these communities imposing European notions of justice, and thus International law was developed by positivists justifying such practices through *opinio juris* in the name of civilizing where the universal idea of rule of law was legally enforced. Carneades argued, deterring universalism and proclaiming, that law is merely as that which is useful or profitable for a given state and at a given time[20]. The way Europeans interfered with the natives' cultural system and handled replacing the indigenous justice system is anything but a reflection of Carneades' opinion. Universalism continued to reflect itself even post de-colonization when the newly independent states were considered sovereigns and hence

[15] ibid p 14-15.
[16] Paul Havemann, *Indigenous Peoples in Australia, Canada, and New Zealand. Auckland, Australia*, Oxford University Press (1999).
[17] Chris Cunneen *Conflict, Politics, and Crime: Aboriginal Communities and the Police*, St Leonards, NSW: Allen and Unwin (2001).
[18] Luana Ross, Inventing the Savage: The Social Construction of Native American Criminality (Austin, TX: University of Texas Press 1998).
[19] Colin Sumner, *Crime, Justice, and Underdevelopment*. London: Heinemann (1982).
[20] Supra 10 p 751.

subjected to the international law already framed by the western nations. The State reflects the colonial idea of holding order and conformity of more importance than diversity leading to systematic discrimination.

IV. AFFECTS OF THE NEW JUDICIAL SYSTEM IN USA

Disposing the natives off their land and systematically marginalizing them further turned them towards alcoholism, drug abuse, mental illness, child negligence, etc.[21] Evidently, Grotius' belief of natives receiving a better civilization under European rule did not stand. Moreover, he wasn't the only one holding this belief. It was argued by James Lorimer on huge lengths that absolute equality is a myth and there is a requirement for inter-ethnic recognition[22]. He propagated that race determines what kind of class recognition a state will receive, and since Europeans have a rational will which 'barbarous communities' lack – being fundamentally non progressive and stationary- they do not hold the right to statehood. Only states ruled by a superior class can flourish[23]. One of the ways suggested by him for development of Indians was subjugation i.e. continue to live under English tutorship[24]. But this only lead to physical, mental and cultural violence.

However, even after decolonization, such practices continued in the newly independent states mirroring Lorimer's idea of centrality of race, which could be better understood by taking a look at the United States of America. In the state of USA, even post-independence, congress initially had limited authority over Indian affairs as per the treaty defining federal-Indian relationship. But ironically, the same was not respected by the federal authority and the police, or the Supreme Court, which was biased and provided the natives no relief. This can be seen in the way Justice Marshall referred to the discovery doctrine claiming that Indian's stake on their land is merely through occupancy[25] and could be acquired by conquest, mirroring the ideas of Grotius and Gentili. He also reiterated the guardian-ward relationship between the state and the natives which was later brought up in the Kagama case[26] branding natives as helpless wards under the wing of the BIA and the Congress, providing them plenary power over Indians[27] leading to the federal authorities expanding their control over the indigenous justice system.

[21] David Baker, *American Indian Executions in Historical Context*, Criminal Justice Studies: A Critical Journal of Crime, Law, and Society 20(4), 315-373, 353 (2007).
[22] Martti Koskenniemi *Race, Hierarchy and International Law: Lorimer's Legal Science* Oxford University Press, 27 no. 2 The European Journal of International Law, 415-429, 420 (2016).
[23] ibid p 423.
[24] ibid p 428.
[25] Supra 13 p 13.
[26] United States v. Kagama, 118 U.S. 375 (1886).
[27] Supra 13 p16.

 [ISSN 2581-5369]

After the Hitchcock case[28], in a very hypocritical turn of events, USA decided to break their treaty with the natives and many states assumed jurisdiction over them, dissolving their indigenous courts[29]. Due to the inequalities and the class differences internalized by the American population reflecting Lorimer's idea of centrality of race, the communities continued to be subjected to violence and aggressive federal policies of territorial expansion such as 'termination'[30]. Lorimer's ideas were further reflected when Court of Indian offences was established targeting the indigenous communities and forcing them to abandon their traditional practices, labelling them 'heathenish' practices[31]. For example, natives faced conviction or their rations were cut off if they were caught participating in a ritual, customary practice, or just consulting a medicine man[32]. Furthermore, Customary jurisdiction was met with legal and military violence. A parallel can be drawn here between the actions of the State and the methods adopted by the Europeans in order to psychologically internalize inferiority among the natives in order to make their administration over them stronger and hence establish a colonized state. Other supreme court cases such as Oliphant[33] and Akinson[34] undermined the criminal and civil jurisdiction of the Indian courts respectively. Evidently, remaking the Indians in the image of white Americans was a highly violent process. Despite Grotius' belief of man's nature being social, innumerable violent acts were committed in order to exert dominance and furthering profits. This reflects Hobbes' idea of man's real nature being war as humans are greedy and live in constant competition with each other. Any resistance to the same was branded as savage behavior. As fanon coined it, violence begets violence, but the self-proclaimed superior race, with their superior warfare, ended up what they believed was defending their natural right. The unabashed coercive destruction of the indigenous justice system carried out by the state devasted the natives' sovereignty, human and civil rights, and government functions.

Even a century later, the marginalization of indigenous communities has continued where new forms of dominations, through economic, legal and administrative controls, create a form of dependency on the state. The discrimination against the indigenous communities was furthered by centering around the idea of an imagined community which was based on the notion of morality. Anyone outside the boundaries of this moral community was considered to be susceptible to state violence. In historical context, Aboriginals were 'civilised' in order to fit in

[28] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[29] Supra 13.
[30] ibid p 13.
[31] Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze* 18 Arizona Law Review 504-577, 553 (1976).
[32] Supra 13, p 8.
[33] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[34] Tweddle v Atkinson EWHC J57 (QB), (1861).

the said boundaries as they were considered 'savages'. Even today these minority communities are seen with a bias as they are viewed as criminals. Since crime is seen as a threat to the state, criminalisation becomes an integral part of securing the nation state through excluding those who lie outside of the moral community. This becomes more problematic when criminology detaches itself from the historical context as certain characteristics such as alcoholism, drug abuse, child negligence, etc. are seen as 'risk factors' while being removed from social, political and economic factors and are instead reproduced as individual factors. No attention is paid to the roots of these 'risk factors' or the circumstances due to which the indigenous communities landed in their current situation and this leads to these communities being viewed as risky and crime prone. Universalisation, as previously discussed, was carried into the neo-liberal order where in order to prevent against what the state considers as 'threat to national security', they exclude the indigenous communities from the conversation due to leading to systematic discrimination. Furthermore, the positivists' idea of considering resistance from such communities as crime is also present in the current criminal justice system where Fanon's idea of violence begetting violence is ignored entirely. These group's primary definition is centred on the type of risk characteristics associated with them and their rights are viewed as secondary and therefore, any sort of claim to self-determination is seen as a threat to the national fabric. Criminal systems in nations states such as USA, Australia, new Zealand, etc. often disregard and undermine the human rights issues surrounding these indigenous communities. All these factors combined leads to over-representation of indigenous communities in criminology. For example, due to over-representation, a considerable population of indigenous community do not hold the right to vote due to felony disenfranchisement following various USA restriction, which restricts the minority group's political participation[35]. This reflects how authority of the indigenous people was curbed in history which lead to the colonizers taking over the administration of the land.

V. CONCLUSION

Replacing the indigenous criminal system with an European model was one of the significant steps taken to establish dominance and colonize these territories. Not only did this encourage violence, it also led to class based discrimination and racism, and deteriorates their living conditions. Since justice was equated with law laid down by the colonial power, their rights were also defined by them[36]. When one takes the example of the USA, it can be noticed that the

[35] Supra 12, p 392-393.
[36] Moana Jackson, *Changing Realities: Unchanging Truths*, 10 Australian Journal of Law and Society, 115-129, 117–18 (1994).

same was carried into the neo-liberal world post decolonization where rule of law was selectively applied between the indigenous communities and the rest of the American population. With the idea of one-nation state and universalism, State, through law, has further marginalized the indigenous communities presenting an extension of their colonial past. New forms of domination came into picture to further marginalise these communities through legal, administrative and economic controls, which created a form of dependency of the natives on the state, such as the felony disenfranchisement. The natives were continued to be subjected to the legal systems built on denial of the natives' legitimacy and are systematically racist in nature. This led to internal colonialism. The irony is quite evident when equality before law is seen as a fundamental principle but at the same time there is a substantial gap between how rule of law is applied to these minority communities and the rest of the population. This colonization of law and legal process leads to systematic discrimination. The communities are continued to be subjected to legal processes which are systematically racist and are built on denial of legitimacy of indigenous communities' concept of law and justice. For example, American judges and law enforcements can be seen racially stereotyping based on over-representation of these communities as crime prone population which leads to the individuals facing arrests more often, receiving longer prison sentences and receiving lower rates of probation sentences. Such inequality is justified by the State by placing more importance on national security but in a nutshell they merely deny the indigenous communities their basic rights as the sense of superiority held by the colonizers has been noticeably passed down through history. The assumption of rational will being absent from the natives and them being branded as nonage and imbecile came from lorimer's idea of inequality which was based on biological determinism and limited readings. These ideas of superiority and ownership can be traced back to the ideologies of natural law, society and fellowship shaped by Vitoria, Grotius and Gentili and how it influenced the international law. This could be seen not only in the concept of universalism but also how Grotius' idea of *pacta sunt servanda*[37] still exists in Article 2(2) of the UN Charter[38]. The inequalities faced by the Indians in the USA are justified by placing more importance in protection of national security but realistically it denies the natives basic rights which is an extension of the colonial past.

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[37] agreements must be kept (in good faith).
[38] Charter of the United Nations, Article 2(2).