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Précis Paper

Indigenous Justice

A discussion of the ongoing impacts of colonisation upon Indigenous justice within Australia.

Discussion Includes

- Impact of colonisation on Indigenous justice
- Treatment of Indigenous people in the justice system
- Role of Indigenous people in law reform
- The way forward for Indigenous justice

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Indigenous Justice

In this edition of BenchTV, Dr Thalia Anthony (Associate Professor, University of Technology, Sydney) and Dr Holly Doel-Mackaway (Lecturer, Macquarie University, Sydney) discuss the ongoing impact of colonisation upon Indigenous justice within Australia, with a focus upon the injustices occurring within juvenile justice against Indigenous young people.

Impact of colonisation on Indigenous justice

1. When we think about colonisation in law, there are three bases for colonisation:
    1. Conquest – where there is a lawful war,
    2. Settlement – where there are no inhabitants
    3. Treaty – where the inhabitants (indigenous people) have reached an agreement with the incoming people (settlers or colonisers)

2. It is possible to say that in Australia there has been no lawful colonisation on any of the 3 bases. For that reason colonisation is still relevant for Indigenous people as, in their minds, their country was not taken lawfully. Their systems of managing country, managing crime, managing the welfare of their children, managing their language and so on have been, and continue to be, undermined. For Indigenous people, they still believe they have the right to do all of those things and they have never agreed to the colonial system exercising sovereignty and restricting those rights.

3. The landmark case of *Mabo v Queensland (No 2)* (1992 175 CLR 1 over turned the doctrine of terra nullius. The doctrine of terra nullius effectively means that the land belongs to no one, which was a myth that existed from the onset of colonisation. Mabo proved that on the Murray Islands there had been cultivation of the land, and the High Court recognised native title. This recognised use of the land but this is a very limited right.

4. If you consider Eddie Mabo's plight in terms of wanting recognition that this was Indigenous land and not Crown land, then it has been a letdown for Indigenous people. It goes nowhere near the extent of rights under Aboriginal land rights legislation and does not provide any right to ownership, it is merely a limited right to coexisting rights.

5. What is problematic for native title claimants is that they have to prove continuing connection to land and use of country since colonisation. In many cases where Indigenous people deal with these matters they see Indigenous customs and connections to land in this very antiquated, traditional way; it does not accept the culture's dynamic and responsive conditions.

6. The fiction of terra nullius is something that was supposedly overturned with the *Mabo* decision, but really lives on through ongoing colonisation. In *Walker v State of New South Wales* (1994) 182 CLR 45, Mason CJ ruled out, much more categorically than what appeared in *Mabo*, the capacity for there to be two co-existing criminal justice systems. Walker was contending to the Court that Indigenous people could be subjected to their own criminal laws, and non-indigenous people could be subject to the criminal laws of the Anglo-Australian criminal justice system. Mason CJ said that the system is universal and has existed for many years, and therefore cannot be challenged or undermined with inconsistent laws of Indigenous nations. Although *Walker* accepts that terra nullius has been proven to be a fiction it does not therefore continue logically that Indigenous people have the rights to their culture and to their laws.

7. Indigenous nations and communities differ across Australia. For many communities that continue to practice their laws, saying that there is only one criminal justice system does not reflect this reality. The majority of their lives they experience as living under Indigenous law pertaining to their particular area, and then there is an added layer of awareness around non-indigenous laws that they have to comply with. Indigenous people feel that Indigenous laws and non-indigenous laws do not work well with one another.

8. The Lajamanu community in the Northern Territory is an example of an Indigenous community with a strong capacity to put its Indigenous laws and concepts in a way that is translatable for a non-indigenous system. It has even devised law and justice plans on how to work with police and government on how to have this cross-recognition. However within this community there was a police officer who contravened this law and justice agreement between the Indigenous community and police.

9. The officer was doing routine traffic policing when, in the process of looking for someone, entered ceremonial land and intervened while a ceremony was going on. For the Warlpiri people this was a huge violation of their laws because even Warlpiri people who are not part of the ceremony cannot be present. This led to many meetings to try and address this, but in the end the Warlpiri people felt that it was not adequately addressed. There was no prosecutions under the *Northern Territory Sacred Sites Act (NT)* which is still pending commencement. In practice, the system is not adequate in bringing to account police officers in their dealings with Indigenous peoples.

<u>Treatment of Indigenous people in the justice system</u>

10. Indigenous people have been governed since the invasion essentially by a series of practices and then legislation under the *Aboriginal Protection Act 1869* (Vic). This involved the segregation of Indigenous people on missions, reserves or settlements, and the exercise of

control over every aspect of their lives while they were segregated. In Australia this protectionist regime basically went into demise when Indigenous people became subject to what was known as the assimilation policy.

11. From about the 1960's and 70's, this saw them leave settlements and go into towns and communities where they would not live under these Acts. From the 1970's we saw the development of a land rights movement and a citizenship movement, so there was a greater recognition of indigenous rights.

12. However, in 2007 a set of racially discriminatory policies that had all of the echoes and resonances of the *Aboriginal Protection Act 1869* (Vic) was introduced in the Northern Territory. The rhetoric around the intervention was that as a government, there was a need to save Aboriginal children from Aboriginal communities. This is the same rhetoric we heard at the time of the stolen generations' policy that Aboriginal families and communities cannot look after their children.

13. The Australian government went in with the army and descended on Aboriginal communities in 2007, setting the tone for the intervention which would then introduce policy through the federal government called the *Northern Territory Emergency Response Act 2007* (NT). This Act basically saw restrictions to land rights with the removal of the permit system which required someone to have a permit to enter protected Indigenous land. It forced leasing onto their land and removed the right of social security payments, forcing them to have cards where they could only spend their money on certain items.

14. This legislation forced Indigenous people into discrete enclaves of policing because it gave the police more powers over Indigenous communities that did not exist in relation to non-indigenous people. Police could search and seize items, all without a warrant because of these powers.

15. The Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) found that there was systemic failures in youth detention and was sanctioned at the highest level of mistreatment of children. It recognised that problems exist there for Indigenous children, but it is suggested that the Royal Commission did not go far enough in suggesting what needs to change.

16. Discrimination against Indigenous children, young people and adults is systematically built into the justice system. It is argued that in the criminal justice system, prisons are now the new reserves as the guards of the prison have total control. Evidence before the NT Royal Commission was that Indigenous young people felt not only less human, but they described themselves as if they were like dogs in a cage.

17. These children were subjected to mechanical restraint chairs, were hooded and gassed with chemicals prohibited under the Convention on Chemical Warfare. This gas was known as C.S gas which blinded some of these young people and led to respiratory problems. The children were left indefinitely in isolation cells where they were denied food, the right to hygiene and were denied access to natural sunlight and air flow.

18. Indigenous children are seen as second class citizens and as a threat to the Anglo-Australian norm because they represent the future of Aboriginal nations and cultures. As a society we are taking them out of communities and putting them into both prisons and child protection centres, basically restricting them from the well-being that they receive from community.

19. There has been a lot of voices of Indigenous children from the NT Royal Commission, but there has not been a concerted effort to really analyse what Indigenous children are saying about their experiences in both juvenile justice systems and child protection systems.

Role of Indigenous people in law reform

20. Dylan Voller who was a victim of the injustices that occurred at Don Dale Youth Detention Centre in the Northern Territory has been a symbol of strength for Indigenous people who have had very traumatic experiences in detention. He has been very active in sharing his story and organizing the 'Shut Down Youth Prisons' movement in Alice Springs.

21. If one considers how the Northern Territory council conducted itself in the Royal Commission it is clear that they were completely partial to the guards in detention and not at all supportive of the children in detention. Even though they were locus parentis to these children while they were in detention or child protection, they did not come to the Royal Commission with the intention of supporting the children, they only came with the intention of supporting the guards, the prison managers, and the politicians.

22. Dylan Voller's credibility was hugely attacked by the Northern Territory government council which in turn played out in the media. After Dylan, there was no children who came before the Commission publicly, they spoke in private and used pseudonyms because they feared being attacked by the Northern Territory government. To a very large degree, Dylan still experiences a lot of what he experienced in Don Dale because he is now a public figure.

23. Dylan's rights under the United Nations Convention of the Rights of the Child (1990) were breached during the Royal Commission inquiry whose sole aim was to improve the treatment of children in the Northern Territory. The Royal Commission was called due to the public outcry about the torture of Indigenous children in Don Dale, but then this inquiry continued the penetration of abuses.

24. We have seen the Royal Commission into Institutional Child Sexual Abuse (2017) show a lot of respect for victims, providing them a platform of healing to enable their stories to be heard. This is not only for legal justice, but also for public recognition and public acceptance that these people were wronged, and that is an important aspect of justice. The Royal Commission into Aboriginal Deaths in Custody (1991) set up procedures to accommodate Indigenous communities, for example holding meetings in culturally appropriate venues, whereas in the Northern Territory Royal Commission (2017) there were many hours' worth of proceedings in a very court-like way. The Royal Commission did not use its discretion to use procedures that were appropriate for young people.

25. The process used enabled the Northern Territory government to cross-examine Dylan Voller in a way that basically sought to undermine his evidence. There was a line of questioning about whether he really tried to self-harm or whether he was making it up for the purpose of his claims about the wrongfulness of the system. The purpose of this Commission was to try and interrogate the system and the harm, not interrogate the victims of the system. However this is just one example of the power relationships within the Royal Commission that unfortunately prevented a lot of young people from coming forward. This therefore meant there was less evidence of wrongfulness able to be disclosed to the public.

26. There was little interrogation of those that caused the harm to show remorse, and there was no apology given. There was no sense of justice or accountability from the process. Instead for the perpetrators it was an opportunity for them to provide justifications and rationalizations. Guards, detention managers, the former Attorney-General and the Corrections Minister were seen as criticizing the young people and victims.

27. The Northern Territory Royal Commission at times felt like an inquiry into the children's conduct instead of an inquiry into the guards and the system that enabled the abuses to occur. There was CCTV footage of children's heads getting smashed into walls or against concrete floors, young girls being forcibly strip searched by male guards, children locked in isolation after self-harm attempts, aggravating their mental health issues. It can be argued that if these crimes that were committed against Indigenous children occurred against non-indigenous children that there would be far less inquiry into the behaviour of those non-indigenous children.

28. We have a system of discrimination which perpetuates ongoing colonisation. There is discrimination within detention, but also in policing in criminal justice procedures that has led young people into detention.

29. In Don Dale where almost all of the children in detention are aboriginal, and most of the guards and other staff are mostly non-aboriginal, the environment of a confined space gave

rise to a lot of racist language and other prohibitions. For example children who spoke in their language, who often have English not as a first language and chose to speak with other children in their language, were yelled at or ridiculed – they were denied the very basic right to communicate. On a number of occasions children were denied the right to see their family. For example, where one child's mother had died, rather than being given rights to see family or to go to the funeral, he was locked in an isolation cell.

The way forward for Indigenous justice

30. The Royal Commission highlighted two key areas in terms of moving forward:
    a. Need for greater community involvement in actually caring for children. For example taking them out of child protection which is often a pipeline into juvenile justice, and giving Indigenous people greater strength to support their children.
    b. Accountability – Experts and the community want the people in detention, and also people at the top of the Northern Territory government and the federal government to be accountable for what has occurred in detention and in Indigenous communities.

31. One of the recurring comments from Indigenous people across Australia is that there is a need for a Royal Commission into youth detention nationally. While there are extremities in the Northern Territory, there are also problems that have emerged in other states such as in Queensland and Western Australia.

32. There is a national issue as to how we treat Indigenous people in Australia, and by focusing the Royal Commission on the Northern Territory we ignore that problem. This shows us that the government is not ready to come to terms with the relationship between the Anglo-Australian system as a whole in relation to Indigenous nations.

33. Indigenous people represent about 28% of the prison population, yet only 2 to 3 percent of the general population. This figure has doubled since the Royal Commissioner into Aboriginal Death in Custody in 1991. This alarming figure highlights that the problem effectively goes back to how we as a nation relate to Indigenous people, including how we impose our criminal justice systems without any consultation and through highly discriminatory practices.

34. Rehabilitation and diversion are concepts that are often referred to in terms of fixing this problem, but this does not just mean putting young people in a better institutions with more therapeutic procedures, what is needed and what is regarded as therapeutic within Indigenous nations and organisations is a sense of self-determination and control over their affairs.

35. There is a need to enable communities who are best placed to know the needs of young people to have control over the affairs of young people. There must be national changes to better involve Indigenous people, but those national changes lack meaning unless there is self-determination at local level. Equally, self-determination at local level lacks capacity unless you have a government that is positioned to support young people.

36. The Australian Law Reform Commission has recently begun discussing justice reinvestment. Justice reinvestment is the idea that we can stop spending billions of dollars on prisons and youth detention and divert that spending to build communities that support people, providing the appropriate facilities and services. The aim is to minimize the pressures and risks that lead people to the criminal justice system, and to minimize the criminal justice interventions in people's lives. The overall aim is to shift the paradigm towards having a focus on communities that support rather than criminalize and detain.

37. Justice reinvestment is a useful concept and framework that came from the United States and the United Kingdom. However, we need to respect the strengths that already exist in communities and shift our discourse away from indigenous communities as being a problem and look at them as something that can have capacity.

38. There is a need to change our thinking to enable us to reimagine a criminal justice system that is not the central component of the government strategy in relation to Indigenous communities. We must recognise the importance of self-determination and the importance of Australia acting on our obligations around the United Nations Declaration on the Rights of Indigenous Peoples (2007). This declaration states that we must treat Indigenous peoples and nations with respect, and if we are not doing that then all of the problems in the system and all other violations of human rights will flow.

39. It is essential that we move away from assumptions of Anglo-Australian superiority and recognise that Indigenous people have lawful claims. There must be a dialogue that enables us to move forward in accepting why whiteness has been a problem and move towards mutual respect.

BIOGRAPHY

Dr Thalia Anthony

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Dr Thalia specialises in Indigenous criminalisation and Indigenous community justice mechanisms. Her research is grounded in legal history and understandings of the colonial legacy in legal institutions. She has developed new approaches to researching and understanding the role of the criminal law in governing Indigenous communities and how the state regulates Indigenous-based justice strategies. Her research is informed by fieldwork in Indigenous communities and partnerships with Indigenous legal organisations in Australia and overseas.

Dr Holly Doel-Mackaway

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Dr Holly Doel-Mackaway graduated with a Bachelor of Laws (1st Class Hons) from the University of Technology along with a Bachelor of Social Work (Hons) from Sydney University. Holly was admitted as a solicitor to the NSW Supreme Court in 2004 and is currently a lecturer with the Macquarie Law School. Her 2016 PhD from the Macquarie Law School explores possibilities for Aboriginal children and young people's participation in law and policy development in line with article 12 of the CRC. Over the past ten years Holly has worked for the United Nations and various international non-government organisations as a lawyer providing specialised advice on international human rights law pertaining to children and young people. She has held senior legal and managerial positions across a range of child focussed agencies including UNICEF Pacific, Save the Children and with the NSW Department of Community Services. Prior to becoming a lawyer Holly worked for seven years as a social worker with women and children who had experienced domestic violence and sexual abuse.

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