

IMPERIAL LEGISLATIVE DESIGNS AND HUMAN RIGHTS OF INDIGENOUS CHILDREN IN SETTLER COLONIAL CANADA

—*Swati Singh Parmar**

Abstract—Settler colonialism, an inherently eliminatory form of colonialism, involves a silent invasion into a territory and a replacement of the native indigenous populace thereafter. The socio-economic transformations that are brought then by the settler colonizers range from bringing new laws to genocide. A textbook example of such settler colonialism's genocidal outcome has been Canada. In a grotesque discovery, a mass grave of 1,308 indigenous children out of which 215 were found on the site where once the largest Indigenous school in British Columbia, Canada was erected. These residential schools were founded on the logic of 'assimilation' of the indigenous people within Canadian society's white supremacist settler colonizers. Despite the self-determinative politics of aboriginality in the post-Second World War era, the Canadian situation that starkly outlines settler coloniality has not been critically adequately analyzed. Post- Second World War era and the herald of Self-determinative recognition in the international legal discourse highlighted similar atrocities in settler-colonial states of Canada, America, Australia, and South Africa. Tracing these colonial legacies and finding links with the contemporary fissures in such societies have not been undertaken as research. The aim of the present paper is to examine law as an agency of settler coloniality through the case study of indigenous children in Canadian residential schools. This aim is directed by understanding the ways in which settler colonizers marginalized the indigenous

* Assistant Professor in International Law, Dharmashastra National Law University, Jabalpur. <swatiparmar@mpdnlu.ac.in>.

populace through an imperial legislative design in Canada. The paper argues that the imperial legislative designs are the site of birth for settler colonialism's genocidal outcomes. The marginalization of indigeneity can be analyzed by the political, legal, and social changes that the legislative designs created by the European settler colonizers. It attempts to study the legislative design through which this logic of assimilation interacted with the education of indigenous children. To study this imperialist design to civilize and assimilate indigenous children, settler colonialism in Canada is taken as an example to bring out the analysis undertaken in this paper.

Keywords: Mass Grave, Genocide, Settler Colonialism, Discrimination, Neocolonialism

I. INTRODUCTION

The remains were found buried in unmarked graves¹ on the site where once the largest Indigenous residential School of Canada stood- the Kamloops Indian² Residential School (originally named the Kamloops Industrial School). This horrific revelation was made by the Tk'emlupste Secwépemc First Nation in Kamloops on 27th May 2021, announcing in a news release about uncovering the remains of 215 school children at the Kamloops Indian (here Indian refers to the indigenous peoples of Canada) Residential School. Some remains belong to even three years old children. The Chief, Rosanne Casimir, of the Tk'emlupste Secwépemc First Nation informed on 28th May 2021 that more bodies may be found on the school grounds which remain to be radar-searched. The history of the school unearths stark contexts to this incident. Though this may come as a shock for many, there is a lot to be uncovered in the imperial history of Canada. This school is a unit of the Canadian Indian residential school system situated in Kamloops, British Columbia which operated between the years 1890 to 1969. It initially operated under the Roman Catholic administration. It emerged as the biggest school in the Indian Affairs residential school system with around 500 enrolled students during the 1950s making

¹ This horrific revelation was made by the Tk'emlupste Secwépemc First Nation in Kamloops on 27th May 2021, announcing in a news release that a ground-penetrating radar had uncovered the remains of 215 children who were the students at the Kamloops Indian (here Indian refers to the indigenous peoples of Canada) Residential School. Chief Rosanne Casimir of the Tk'emlupste Secwépemc First Nation informed on 28th May 2021 that more bodies may be found in the school grounds which remain to be radar- searched.

² Indian here refers to the Indigenous Canadian people.

it overcrowded and underfunded. Due to the government's insufficient funding for feeding the students in 1910, the situation worsened for the students. In 1924, the dilapidated wood-frame school was ruined by a fire. Later in 1969, the Federal government took over its administration from the Catholic church that no longer conducted the classes for the students and operated the school as a residence for students attending the local day school. The school as a residence was later closed in 1977. The erasure of native cultures and histories continues today. The Residential schools were erected on the logic of elimination³ of native cultures, histories and (in some situations where the natives could not be assimilated) natives. This revelation of the mass grave of children resurfaces the settler colonial debate. The marginalization of indigeneity can be analyzed by the political, legal, and social changes that the legislative designs created by the European settler colonizers.

The questions pivotal to the existence of indigeneity have been pushed to the periphery by the European-Christian portrayal of international law. The effect of settler coloniality is not faded on a time scale and is felt in present-day global politics too. Lorenzo Veracini underscores that *we live in a settler-colonial global present*.⁴ The recognition of indigenous rights by international law has come quite late⁵ and little. Settler coloniality continues to haunt the third world⁶ and the fourth world when seen manifesting in the historiography of international law,⁷ environmental law regimes,⁸ international economic institutions,⁹ and others. On the historiography of international law, Randall Lesaffer argues:

³ Patrick Wolfe, "Settler Colonialism and the Elimination of the Native", 8 (4) *J. of Genocide Research* 387, 387 (2006). Wolfe highlights that the logic of elimination includes (but is not limited to) "summary liquidation of Indigenous people."

⁴ Lorenzo Veracini, *The Settler Colonial Present* (Cambridge University Press 2015).

⁵ United Nations Declaration on the Rights of Indigenous Peoples, 9 December 2007, UN Doc.A/61/L.67/Annex (2007).

⁶ See Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse", 16 (2) *Wisconsin Int'l L.J.* 353 (1998); Julius K. Nyerere, South-South Option, in *The Third World Strategy: Economic and Political Cohesion in the South* 10 (Altaf Gauhar ed., 1983); Joyeet Gupta, The Least Developed Countries and Climate Change Law, in *The Oxford Handbook Of International Climate Change Law* 741-760 (Cinnamon P. Carlarne et al., eds., 2016).

⁷ See A.B. Lorca, "Eurocentrism in the History of International Law" in *The Oxford Handbook of the History of International Law* 1053- 1056 (Bardo Fassbender and Anne Peters eds., 2012); A. Orford, "The Past as Law or History? The Relevance of Imperialism for Modern International Law", *International Law and Justice Working Papers*, Series 2012/2, University of Melbourne, Legal Studies Research Paper No. 600.

⁸ Karin Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers", 11 (1) *Yearbook of Int'l Environmental L.* 52 (2000).

⁹ Mohammad Bedjaoui, *Towards a New International Economic Order* (UNESCO, Holmes & Meier Publishers 1979). See also James H. Mittelman and Mustapha Kamal Pasha, *Out from Under development revisited: Changing Global Structures and the Remaking of the Third World* (Palgrave Macmillan 1997).

“[W]ithin the grand narrative of the history of international law as it appears from Western historiography, the Ancient Near East holds its place, if only at the fringe.”¹⁰

The identities, culture, socio-political norms, and ethnic identities of indigenous peoples were compromised, subjugated, and robbed by the settler colonizers. Jean-Paul Sartre highlights:

*“In the colonies, truth displayed its nakedness; the metropolises preferred it clothed; they had to get the “natives” to love them...The European elite decided to fabricate a native elite; they selected adolescents, branded the principles of Western culture on their foreheads with a red-hot iron, and gagged their mouths and sounds, pompous awkward words that twisted their tongues.”*¹¹

This revelation of unmarked graves of school children leads to the research undertaken in this article. The aim of the present paper is to examine law as an agency of settler coloniality with Canadian indigenous children at Indian Residential Schools as a case study. This aim is directed by understanding the ways in which settler colonizers marginalized the Canadian indigenous populace through an imperial legislative design. This is discussed especially in the paradigm of the legislative framework for the education and schooling of Canadian indigenous children. Part I introduces the school children at Indian Residential Schools in Canada as a case study for this article. Part II of the paper examines the rhetoric of civilization, the settler-colonial invasion, and the logic of elimination upon which the justification of settler coloniality is erected. Part III discusses the primary markers of the settler-colonial invasion and the conscious elimination of indigeneity in Canada. Part IV examines law as an agent of settler colonization in Canada. It highlights an imperial legislative framework designed by the settler colonizers to strategically rob the indigeneity of Canada. It reveals a fixed federal policy to appropriate the indigeneity of the Canadian indigenous peoples and assimilate them into the *elite* and *civilized* settler colony. Part V of the paper encapsulates the conclusion of this penetrative federal policy of assimilation through the law and genocide of indigenous children as a colonial tool. The limitation of the paper lies in its scope and the lack of generalizability. Since each settler colony is distinct in its nature, characteristics, and relationship with its indigenous populace, therefore the analysis of this paper cannot be generalized to other settler colonies and is limited to the Canadian settler colony.

¹⁰ R. Lesaffer, *Peace Treaties And International Law in European History: From the Late Middle Ages to World War Oneix* (Cambridge University Press 2004).

II. SETTLER COLONIALISM- INVASION AND ELIMINATION

Europe has been built on the logic of civilization and the self-assumed burden of the *civilizing mission*.¹² The white man's burden was silently infused into the international legal society. It was projected as a 'universal' philanthropic mission on which interventionism and coloniality were justified. Stephen Cornell notes that "Europe spun a web about the world, and in the process, the world was remade."¹³ Europeans, the white race, subsumed the semiotic potential of 'whiteness', 'fairness' and 'justness'.¹⁴ Literature was consciously crafted to justify the imperialist tradition. Rudyard Kipling's celebrated composition 'The White Man's Burden'¹⁵ is a notable example of this.¹⁶ Cloaked as a poem, it was a celebration of Victorian imperialism and a display of the benefitted colonized natives. It is an aesthetically disguised justification of coloniality. Mark W. Driscoll remarks on this:

"Directly addressed to the US's reading public and political elites, 'The White Man's Burden' featured two policy recommendations. The most direct urged the US to annex the Philippines. The other was a more general imploring to 'have done with childish days' and gain 'manhood' by joining imperialist Great Britain in the 'glorious' project of global dominion."¹⁷

Several sixteenth and seventeenth-century philosophers like Francisco de Vitoria, Francisco Suarez, and Hugo Grotius have advocated for a universal society, through their works. These scholastic works offered a facade¹⁸ to transport the *universe of Europe* to be regarded as the truly *global universe*.¹⁹ Coloniality has barefaced versions like slavery and undertones like neo-colonialism²⁰ and eco-imperialism²¹ that perpetuate in current-day global society too.

¹² Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, 127 (Cambridge University Press 2002).

¹³ Stephen E. Cornell, *The Return of the Native* 11 (Oxford University Press 1988).

¹⁴ Robert H. MacDonald, *The Language of Empire: Myths and Metaphors of Popular Imperialism 1880* (Manchester University Press 1994).

¹⁵ Rudyard Kipling, *The White Man's Burden*, 10 *Peace Review* 311(1988).

¹⁶ See David Gilmour, *The Long Recessional: The Imperial Life of Rudyard Kipling* (Pimlico 2002); Andrew Hagioannu, *The Man Who Would be Kipling: The Colonial Fiction and the Frontiers of Exile* (Palgrave Macmillan 2003).

¹⁷ Mark W. Driscoll, *White Dude's Burden*, 23 *Cult. Stud.* 100 (2009).

¹⁸ See O.P. Ramon Hernandez, "The Internationalization of Francisco de Vitoria and Domingo de Soto", 15 *Fordham Int. Law J.* 1031 (1991).

¹⁹ See generally J. Kunz, "Pluralism of Legal and Value Systems and International Law", 49 *American J. of Int'l L.* 371 (1955).

²⁰ For instance, see Gunes Gokmen et. al, "The Imperial Roots of Global Trade", 25 *J. of Eco. Growth* (2020).

²¹ See generally Paul Driessen, *Eco-Imperialism, Green Power, Black Death* (Academic Foundation 2003).

Each colony from the British to the French was different in its nature and characteristics. Colonialism has existed in several forms, two of which are widely studied and critiqued- exploitation colonialism and settler colonialism.²² Settler coloniality (primarily in Canada, Australia, New Zealand and South Africa)²³ is essentially eliminatory²⁴ involving intervening in a territory, dissolution of the native territory,²⁵ replacing its indigenous populace, and ultimately creating altered socio-economic clothing of the society.²⁶ It is the “implanting of settlements on a distant territory.”²⁷ Indigenous people are viewed as a ‘problem’²⁸ by the white settler colonizers.²⁹ Settler invasion is regarded as a structure and not an event.³⁰

Settler colonial practices thrive on processes of marginalization and violent assimilation practices for the indigenous people as they are considered ‘unwanted’.³¹ Settler colonialism often changes the fate of indigenous historiography.³² The alterations are brought by the legislative framework, administration,³³ and policies, giving them a garb of legitimate tools of the state agency. The social and legal practices of the settler colonizers are built on a refusal

²² See generally Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (Cambridge University Press 2010); Tadhg Foley, “An Unknown and Feeble Body”: How Settler Colonialism was Theorized in the Nineteenth Century” in *Studies in Settler Colonialism: Politics, Identity and Culture*, (Fiona Bateman & Lionel Pilkington eds., Palgrave Macmillan, 2011). For a history of the settler colonialism’s concept, see Lorenzo Veracini, *Settler Colonialism: Career of a Concept*, 2 J. of Imperial & Commonwealth Hist. 41, 313 (2013).

²³ See generally Annie E. Coombes, Introduction in *Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand, and South Africa* (Coombes ed., Manchester University Press, 2006).

²⁴ See *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (D. Stasiulis & N. Yuval-Davis eds., 1995).

²⁵ See Tracey Banivanua Mar and Penelope Edmonds, “Introduction: Making Space in Settler Colonies” in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity* (Mar and Edmonds eds., Palgrave Macmillan, 2010).

²⁶ See Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (Cassell 1999).

²⁷ Edward W. Said, *Culture and Imperialism* (Vintage-Random 1994) 9.

²⁸ DAVID PEARSON, *The Politics of Ethnicity in Settler Societies* 1 (Palgrave Macmillan 2001), notes “A fate greeted with indifference, relief and the occasional spark of sadness among white settlers or their descendants. They saw the indigenes as ‘a problem’ rather than a threat...”

²⁹ See generally Andrew Armitage, *Comparing the policy of Aboriginal assimilation: Australia, Canada, and New Zealand* (University of British Columbia Press 1995).

³⁰ Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* 1 (Cassell 1999).

³¹ See generally GIORGIO AGAMBEN, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998); GIORGIO AGAMBEN, *Means without End: Notes on Politics* (University of Minnesota Press 2000); Katherine Ellinghaus, *Biological Absorption and Genocide: A Comparison of Indigenous Assimilation Policies in the United States and Australia*, 4 Genocide Studies & Prevention 59 (2009).

³² See L. Russell, *Colonial Frontiers: Indigenous-European Encounters in Settler Societies* (Manchester University Press 2001); J. Axtell, *After Columbus: Essays in the Ethnohistory of Colonial North America* (Oxford University Press 1988).

³³ For instance, see E.O. Egbah, “British Colonial Administration and the Legal Control of the Forests of Lagos Colony and Protectorate 1897-1902: An Example of Economic Control under Colonial Regime”, 9 J. of The Historical Society of Nigeria 70 (1978).

to recognize the human rights of the indigenous peoples. The Indigenous populace of settler colonies has experienced depopulation, inaccessibility of their land,³⁴ extermination (active and passive), curtailed religious freedom,³⁵ other forms of human rights violations and mental trauma resulting from these.³⁶ For settler invasions, the cultivation of ideologies to justify the superiority of colonizing race and the inferiority of the colonized had to be constructed.³⁷ There is conscious cultivation of the *other* identity of the indigenes, while simultaneously exotic othering³⁸ of the White European is created. The exotic *Other* or the great *Other*³⁹ (*grand autre*) relies on the self-constructed ideologies of superiority and dominance. Othering is an ideology to establish the colonizer's standards, identity and cultures as the yardstick and is showcased as a natural.⁴⁰ Partha Chatterjee calls the reproducing identities to maintain *difference* and *inequality* 'the colonial rule of difference'.⁴¹ This othering forms the base of the logic of elimination of the indigenous peoples. Ashcroft highlights:

*"It meant that the relation between the colonizer and colonized was locked into a rigid hierarchy of difference deeply resistant to fair and equitable exchanges whether economic, cultural or social."*⁴²

The othering of the indigenes forms the rationale for their exclusion from the 'civilized' European society on the indigene's native land. This *othering*⁴³ of the indigenes undergirds violence against them, one of which we encounter in the recent Canadian genocide revelation. The othering creates social

³⁴ See generally Paul Tennant, *Aboriginal People and Politics: The British Columbia Indian Land Question, 1849-1989* (University of British Columbia Press 1990).

³⁵ See Jennifer Reid, *Indian Residential Schools: A Governmental Assault on Religious Freedom*, 44 *Studies in Religion/Sciences Religieuses* 441 (2015); L.G. Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion", 44 *J. of Church & State* 135 (2002); B. McLachlin, (2004) *Freedom of Religion and the Rule of Law: A Canadian Perspective in Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (D Farrow ed., 2004); J.R. Miller, "The State, the Church, and Indian Residential Schools in Canada" in *Religion and Public Life in Canada: Historical and Comparative Perspectives*. (M. Van Die, ed., 2001).

³⁶ See generally L.J. Kirmayer, G.M. Brass, C.L. Tait, "The Mental Health of Aboriginal Peoples: Transformations of Identity and Community", 45 (7) *Canadian J. of Psychiatry* 607 (2000); Joseph P. Gone, "Redressing First Nations Historical Trauma: Theorizing Mechanisms for Indigenous Culture as Mental Health Treatment", 50 (5) *Transcultural Psychiatry* 683 (2013).

³⁷ See B. Ashcroft et al., *Key Concepts in Post-Colonial Studies* (Routledge 1998).

³⁸ See generally V. Segalen, *Essay on Exoticism: An Aesthetics of Diversity* (Duke University Press 2001); D. Sibley, *A Geography of Exclusion* (Routledge 2002).

³⁹ R.E. Usher and R. Edward, *Postmodernism and Education* (Routledge 1994).

⁴⁰ Genda MacNaughton and Karina Davis, "Beyond 'Othering': Rethinking Approaches to Teaching Young Anglo-Australian Children about Indigenous Australians", 2 (1) *Contemporary Issue in Early Childhood* 83, 87 (2001).

⁴¹ Partha Chatterjee, *The Nation and its Fragments* 19 (Princeton University Press 1993).

⁴² B. Ashcroft et al., *Key Concepts in Post-Colonial Studies* 46 (Routledge 1998).

⁴³ Othering refers to prejudice creating and propagating group-based inequality and marginality.

perceptions and contempt for the indigenous people, their identity, and their cultures. Since children have a high receptive threshold for the assimilative process, policies affecting children are a significant area of study. The legislative frameworks for the Canadian school children display the logic of elimination and assimilative practices employed by the settler colonists. Such social contempt perpetuates in the contemporary social structures in Canada.

III. DARK CANADIAN HISTORY OF SETTLER COLONIALISM

The imperial legacy of the Canadian Indian residential school system reflects the concerted colonial action against the indigenous peoples in Canada. Kamloops Indian Residential School was one of more than 130 such residential schools that were operational in Canada between the years 1874 and 1996. Such residential schools are aimed at ‘acculturating’ indigenous children taken from families across the country. These residential schools were instituted as part of the government larger policy of ‘forced assimilation’⁴⁴ and an explicit intent to ‘kill the Indian in the child’.⁴⁵ For 150 years, from 1863 to 1996, over 150000 children were forcibly removed from their families and communities to be put in these residential schools and be attuned to the ‘civilized’ non-indigenous culture. In the 1920s, the Indian Act,⁴⁶ a legislation that gave the government sweeping powers and made attendance compulsory at Indian Residential Schools for children between the ages of 7 to 15. Aboriginal children were removed forcibly⁴⁷ from their homes once attendance became mandatory. The parents were put under a warning of imprisonment if they declined the removal of their children from their homes to be sent to the residential school. The children at the school were not permitted to speak their native language or practice their faith.

The residential school children were put under the ‘care’ of the staff of the school, the Roman Catholic church, and the Federal Government, who are seen as responsible for the mass abuse and systematic killings of the children. There have been accounts of severe physical, emotional, and sexual abuse too. The mortality rate in such residential schools has been shockingly recorded to be

⁴⁴ Truth and Reconciliation Commission of Canada, ‘They Came for the Children’ 2012, <https://publications.gc.ca/collections/collection_2012/cvrc-trcc/IR4-4-2012-eng.pdf>. (Accessed on 2 February 2021). See generally Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (Cassell 1999).

⁴⁵ “Killing the Indian in the Child” in *Stolen Lives: The Indigenous Peoples of Canada and the Indian Residential Schools* (2015).

⁴⁶ Indian Act, Revised Statutes of Canada, 1985.

⁴⁷ Truth and Reconciliation Commission of Canada, ‘They Came for the Children’ 2012, <https://publications.gc.ca/collections/collection_2012/cvrc-trcc/IR4-4-2012-eng.pdf>. (Accessed on 12 February 2021) The child removal of aboriginal has been acknowledged as an issue peculiar to settler colonialism. See Robert Manne, “Aboriginal Child Removal and the Question of Genocide” in *Genocide and Settler Society* 219 (A. Dirk Moses ed., 2005).

between 40-60%. This revelation has not been a new one as the Tk'emlups Chief, Rosanne Casimir, says the community “had knowledge”⁴⁸ of the missing children. The Truth and Reconciliation Commission of Canada runs the ‘Missing Children Project’⁴⁹ to document the deaths and burial places of children who died while in residential schools. The Missing Children Project had earlier reported about the large numbers of aboriginal children sent to the residential schools who never returned to their families or communities. Some children ran away, while others faced abuse and died at the schools. Many children never returned to their families and those who did had traumatic accounts of horror. The Truth and Reconciliation Commission has identified the names of more than 4,100 children whose reason for death has been a disease or an accident while attending a residential school. The Truth and Reconciliation Report released in 2015 called the Residential schools “a systematic, government-sponsored attempt to destroy Aboriginal cultures and languages and to assimilate Aboriginal peoples so that they no longer existed as distinct peoples.”⁵⁰ The original school building has a commemorative monument erected in its front with an inscription, “This monument is dedicated to honor all survivors... who all suffered the genocide period in the history of the Kamloops Indian Residential School; and to honor all survivors who are not with us today but are with us in spirit.”⁵¹

On the ghastly discovery, there have been responses from the Canadian Prime Minister, leaders, the Indian Residential School Survivors Society (IRSSS), and international media. The discovery has triggered the childhood traumas of the survivors, who bore the remnants of the past embedded within them. Canada’s dark history of Residential Schools has resurfaced the intergenerational trauma.

IV. LEGAL ESPOUSAL OF THE IMPERIAL DESIGN

Scholars distinguish classical colonialism from settler colonialism as the latter involves the *displacement* and thus destruction of indigenous peoples, their identities, and cultures to establish the colonizers as the rightful inhabitants. Patrick Wolfe underscores settler colonialism as a system that perpetuates the erasure of the indigenous as a prerequisite for settler expropriation

⁴⁸ Press Release, Office of The Chief for Immediate Release, Tk'emlúpste Secwépemc, 27 May 2021 <<https://tkemlups.ca/wp-content/uploads/05-May-27-2021-TteS-MEDIA-RELEASE.pdf>> (Accessed on 14 February 2021).

⁴⁹ *Truth and Reconciliation Commission of Canada: Missing Children Report*, <<http://www.trc.ca/events-and-projects/missing-children-project.html>> (Accessed on 21 February 2021).

⁵⁰ National Centre for Truth and Reconciliation Achieves: Kamloops Residential School, University of Manitoba, <<https://archives.nctr.ca/Kamloops-Residential-School>> (Accessed on 1 March 2021).

⁵¹ Indian Residential School History & Dialogue Centre, Vancouver: The University of British Columbia, <<https://collections.irshdc.ubc.ca/index.php/Detail/entities/46>> (Accessed on 4 March 2021)

of resources, laying down the foundations of multicultural neoliberalism.⁵² The expropriation of the indigenes is marked by controlling the socio-cultural values, economic status, sexuality⁵³ and a controlled education system.⁵⁴

A. Law as a tool for colonial elimination

Settler colonialism functions through the invasion⁵⁵ and replacement of indigenous people which in the case of Canada, was attempted through imperial legislative frameworks. The Canadian Constitution Act of 1982 in Section 35 recognizes and affirms aboriginal rights. It provides:

“35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

The Canadian Supreme Court in *R. v Calder*⁵⁶ and *R. v Sparrow*⁵⁷ widely interpreted aboriginal rights including cultural, social, political, and economic rights. Though the Canadian Constitution and its interpretation by the Canadian Supreme Court⁵⁸ envision an inclusive Canadian society for the aboriginals by recognizing their rights, this has been aspirational⁵⁹ and still far

⁵² Patrick Wolfe, “Settler Colonialism and the Elimination of the Native”, 8 *Journal of Genocide Research* 387 (2006).

⁵³ See Jean Barman, “Taming Aboriginal Sexuality: Gender, Power, and Race in British Columbia, 1850-1900”, 115/116 *British Columbia Studies* 237 (1998); Winona Stevenson, “Post-Colonial Reflections on the Past and Future Paths of Canadian Aboriginal Women”, 11 *London J. of Canadian Studies* 1 (1995).

⁵⁴ See David Wallace Adams, “Excerpts from Education for Extinction: American Indian and the Boarding School Experience 1875-1928”, in *American Families: A Multicultural Reader* 20-58 (S. Coontz ed., 1999).

⁵⁵ See Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* 2 (Cassell 1999) noting this kind of invasion as a structure and not an event.

⁵⁶ *R. v. Murray Calder*, 1996 SCC OnLine Can SC 32: (1996) 1 SCR 660.

⁵⁷ *R. v. Sparrow*, (1990) 1 SCR 1075 (Canada).

⁵⁸ See Mildred C. Poplar, “We were Fighting for Nationhood, not Section 35”, in *Box of Treasures or Empty Box? Twenty Years of Section 35*, 27-28 (Ardith Walkem and Halie Bruce, eds., 2003).

⁵⁹ See Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Methuen 1984).

from reality.⁶⁰ Scholars criticize that though the Aboriginal rights have been recognized the remedies available for the violation of aboriginal rights have been unexplored. Kent Roach remarks that the fact that judicial remedies for violations of Aboriginal rights are unexplored may deter some judges from recognizing Aboriginal rights.⁶¹

Scholars like John Borrows have revealed an interpretive inconsistency of Section 35 (1) of the Constitution Act, 1982 that adversely affects the indigenous peoples and their rights.⁶² Tracing the parochial interpretation of indigenous rights by the Canadian Supreme Court, he underlines:

“The Supreme Court of Canada has created a narrow framework for recognizing Aboriginal and treaty rights in Canada’s Constitution by reference to historic moments of contact, assertions of sovereignty, and negotiated agreements”.⁶³

Law as an agency of the state was (ab)used to nurture the European adventurism and the Canadian imperial realities⁶⁴ that continue to drive the Canadian settler society even today.⁶⁵ The legacy of genocide towards Indigenous people is rooted in the 144 years old Parliamentary Act that came into power in 1867 and its remnants are still in force. Through this legal framework, one can accurately see a glimpse of the Canadian settler colonialism model. The Act was enacted to alter the power dynamics between the European settlers and the indigenous people.⁶⁶ Indigenous people were robbed of their indigeneity through an enacted law. The Canadian Constitution Act titled, ‘Indian Act’, gave exclusive legislative jurisdiction to the Parliament over Indians and the land reserved for Indians.⁶⁷ The other colonial legislations- Gradual Civilization Act and Gradual Enfranchisement Act- were made a part

⁶⁰ See Patricia Monture-Angus, “Constitutional Renovation: New Relations or Continued Colonial Patterns?”, in *Thunder in My Soul: A Mohawk Woman Speaks* 152-168 (1995).

⁶¹ Kent Roach, “Remedies for Violations of Aboriginal Rights”, 21 (3) *Manitoba Law J.* 498, (1992).

⁶² John Borrows, “(Ab)Originalism and Canada’s Constitution”, 58 (1) *The Supreme Court L. Rev.: Osgoode’s Annual Constitutional Cases Conference* (2012).

⁶³ John Borrows, “Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism”, 98 (1) *The Canadian Hist. Rev.* 114 (2017).

⁶⁴ Adam J. Barker, “The Contemporary Reality of Canadian Imperialism: Settler Colonialism and the Hybrid Colonial State”, 33 *Am. Indian Quarterly* 325, (2009).

⁶⁵ For instance, the “historical consequences of colonialism” resulted in the “diminished sense of self-worth, self-determination and, culture” among Aboriginals. Mai Nguyen, “Closing the Education Gap: A Case for Aboriginal Early Childhood Education in Canada, A Look at the Aboriginal Headstart Program”, 34 *Canadian J. of Edu.* 229, 229 (2011).

⁶⁶ Adam J. Barker, “The Contemporary Reality of Canadian Imperialism, Settler Colonialism and the Hybrid Colonial State”, 33 *Am. Indian Quarterly* 325, (2009).

⁶⁷ John Milloy, “Indian Act Colonialism: A Century of Dishonour, 1869-1969”, National Centre for First Nations Governance (March 2, 2021), <<https://fngovernance.org/wp-content/uploads/2020/09/milloy.pdf>> (Accessed on 2 February 2021).

of the Indian Act in 1876, to pervasively displace the indigenous peoples from the Canadian socio-cultural landscape. It is highlighted:

*“This provision of the Indian Act was in place for close to 75 years and what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came to this country.”*⁶⁸

The Act assigned sweeping powers to the Canadian government with respect to First nations’ identity, political structures, cultural practices, and education. Further, the powers restricted Indigenous freedoms. Measured indigenous rights and benefits were allowed by Canadian officials. The Act strictly controlled the aboriginal identity by defining the prerequisites for being a ‘status Indian’ under Section 2 (1). It read “Indian means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.” Practising religious ceremonies and cultural gatherings were made illegal for First Nations people under the Act. Indian festival, dance, or any other ceremony was banned in 1895. Hiring lawyers or bringing land claims against the Canadian government was made illegal for First Nations people in 1927. Such imperial gimmicks imposed “a spatial discipline with a profound capacity to modify Native life.”⁶⁹

B. Imperial Motivations and education

Subsequent amendments to the Act between 1894 and 1920 mandated First Nations children to attend residential schools. The Indian Act was loathed with several restrictive and oppressive measures that are the legacies of colonialism. The Indian Act has been an intrusive piece of legislation to ‘homogenize’ Canadian society by legalizing the exclusion of Indigenous people, and their native cultural identities. The Act has created distorted cultures and identities for generations in Canada.⁷⁰ Indian Act not only established the colonizer’s exorbitant rights but also symbolizes the doubly unjust process of legitimization of inequality and upsetting the established rules of indigenous societies by the colonizers.⁷¹ Indian Act is an account of the intended termination of the

⁶⁸ Alfred Scow, Transcriptions of Public Hearings and Round Table Discussions, Royal Commission of Aboriginal Peoples (March 7, 2021), <<http://scaa.sk.ca/ourlegacy/permalink/30466>>. (Accessed on 22 April 2021).

⁶⁹ Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (University of British Columbia Press 1997).

⁷⁰ Wayne Dougherty & Dennis Madill, *Indian Government under Indian Act Legislation, 1866* Department of Indian Affairs and Northern Development, Ottawa: Treaties and Historical Research Centre (1980).

⁷¹ Albert Memmi, *The Colonizer and the Colonized* (Beacon Press 1965).

cultural, social, economic, and political distinctiveness of Indigenous peoples in the garb of ‘assimilation’. This imperial legislative framework rooted in European cultural logic ignited racial and ethnic contempt that, amongst others, became the reason for such horrific killings.

Indian Act has generated critical debate, anger, and sorrow in Canadian history.⁷² The Final Report of the Royal Commission on Aboriginal Peoples noted:

“Control over Indian political structures, land holding patterns, and resource and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors.”⁷³

The indigenous Peoples’ social representation, political participation, and cultural identities were buried through legislation and other policies. The civilizing mission of the Europeans in Canada continued under the ‘acculturation’, ‘assimilation’, and ‘enfranchisement’ process. The colonizers not only imposed their cultural values, religion, and laws on the indigenous people but also robbed the indigenous people of their indigeneity. The Constitution Act of 1867, The Gradual Civilization Act of 1857, and The Enfranchisement Act of 1869 were brought with the motive to seize the land of indigenous peoples and control their access to resources and trade. The dependency of the indigenous peoples on the colonizers was legislatively created. The relationship between the indigenous people and the European explorers, which initially began as mutually benefitting, was later revealed to be complex, abusive, and parasitic.

The constructed altruistic appeal of the ‘civilizing mission’ and the corollary moral obligation was harvested by the colonizers as coercion for the colonized under the Indian Act. The contemptuous spuriousness of the civilizing mission was veiled under law, to say the least. Section 114 (1) mandates:

“114 (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with

- (a) the government of a province;
- (b) the Commissioner of Yukon;
- (c) the Commissioner of the Northwest Territories;

⁷² Ken Coates, *The Indian Act and the Future of Aboriginal Governance in Canada*, National Centre for First Nations Governance (March 27, 2021), <<https://fngovernance.org/wp-content/uploads/2020/05/coates.pdf>> (Accessed on 30 March 2021).

⁷³ *The Report of the Royal Commission on Aboriginal Peoples*, 1 LOOKING FORWARD, LOOKING BACK, Ottawa: Canada Communication Group (1996).

- (c.1) the Commissioner of Nunavut; and
- (d) a public or separate school board.”⁷⁴

This is prominent, especially in Section 116 which made attendance compulsory for every Indian child between the age of six to sixteen. Section 116 (1) provides:

“116 (1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.”⁷⁵

The killing of 1,308 children has been an ugly turn, out of many, in the systematic patterns of colonial dispossession and violence in Canada, that have gathered visibility. The killing of school children resurfaces the relationship between settler colonialism and the subjugation of indigenous peoples. The school staff, the federal government and the Church are responsible for the deliberate actions and inactions that led to the death of these children. The moral, as well as legal responsibility for deliberate and systematic killings of indigenous children, must be assigned to the choices that staff, teachers, principal, the Roman Catholic Church, the federal government, and the British Crown made. The forgotten grave of children reveals a forgotten history. Those children who avoided any misfortune and survived, have disturbing accounts of their experience of school hood.⁷⁶ There have been several accounts of atrocities that indigenous peoples had been subjected to by the ‘civilized’ colonizers including their displacement from their lands and their history. Indigenous peoples were made ‘civilized’ through fear and violence. The distortions by the settler colonizers of not only the tangibles but also of the intangibles have not been recorded in Canadian History. The Indian Act has been central to the colonial history of Canada.⁷⁷ Though several amendments have been made to the Indian Act, undertones of systematic oppression and discrimination continue for the indigenous peoples in Canada. With the Canadian Supreme Court’s reflection of the Canadian society that is rooted in the colonial past, logic of elimination and social contempt, there is less than the Constitution Act has been able to attain.

V. CONCLUSION

While the quandary of the colonized could be redressed to a certain degree in the decolonization era, the predicament of the settler colonized (the indigene in a settler colony) could not be addressed in international law. The plight

⁷⁴ Indian Act, Revised Statutes of Canada, 1985.

⁷⁵ Indian Act, Revised Statutes of Canada, 1985.

⁷⁶ Roland David Chrisjohn, Michael Maraun & Sherri Lynn Young, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Theytus Books 2002).

⁷⁷ Mary-Ellen et al., *Talking Back to the Indian Act: Critical Readings in Settler Colonial Histories* (University of Toronto Press 2018).

of the indigenous populace in settler colonies remains unsettled, where societal fissures can be traced. Settler colonizers who crossed mountains and seas to invade native lands functioned on the logic of elimination. Eliminating the indigenes and their socio-cultural identity became a characteristic feature of the settler colony. This logic of elimination is closely associated with the creation of *superior-inferior identity* boxes for the settler colonizers and the indigenes respectively. Othering and contempt for the indigenous *other* not only accentuated the displacement of the socio-cultural ethnicity, and indigenous identity of the natives, but also in extreme examples, manifested in the elimination of the indigenous peoples.

Gayatri Spivak highlights, “The colonizer constructs himself as he constructs the colony. The relationship is intimate, an open secret that cannot be part of official knowledge.”⁷⁸ Altering the socio-cultural fabric of indigenous Canada while maintaining the colonizer’s *exotic othering* was important to construct the settler identity of the colonizers. The Canadian genocide of children revealed the links regarding community displacement that had long been actively repressed. Indian Act heralded a range of legally sanctioned policies to abolish indigenous identities, cultures, and histories that perpetually shaped contemporary Canada’s socio-cultural character. The legislations-Constitution Act of 1867, The Gradual Civilization Act of 1857, and The Enfranchisement Act of 1869- gave legal clothing to illegitimate imperialism projects in Canada. A strategic imperial policy successfully hid under the positivist-amoral construct of black letter law. Ignoring and violating indigenous identities and rights now had legal backing. The Indian Act shaped the relationship between the European settler colonizers and the indigenous peoples of Canada for many years. It is noteworthy that the appropriation of the indigenous peoples was carried out on all possible fronts- economic, cultural, and educational. Indigenous peoples’ economic status was scaled down by provisions that placed the Indian land tenure within the Crown sovereignty. Their cultural identities were curtailed by banning their cultural dance in public places, and marking the (and confining) boundaries of tribal homelands.

The undocumented genocide of indigenous children has revealed a public secret of the horrific stains of Canadian imperial history, while other unaccounted atrocities remain buried in the colonial legislative frameworks. While this legislation may be one of the overt acts, there may remain other unknowable covert acts that translated the Canadian indigeneity into a neocolonial ‘homogenous’ society.

⁷⁸ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*, 199 (Harvard University Press 1999).