Week 2 Topics for Discussion: Indigenous Customary Law

1. In your own words explain the concept of 'law' for Indigenous peoples.

Dreamtime Law, kinship, circle sentencing

- simplistic term
- basis for law – spiritual, ethical and philosophy
- conjures up notion of the sacred
- narrative of the past, present and future
- principle of order
- guide to the norms of conduct and obligations

2. Anthropological research has provided the framework for understanding customary law. Why is this research important from a legal perspective?

Anthropology has been the source of oppression divisive/racist undermining existence of customary law. Anthropology also source used for realisation of land rights (though not without limitations).

3. How could this research benefit Indigenous peoples? How could it operate to their disadvantage?

Historical exclusion of women from research due to patriarchal mindset of male researchers (translated to a patriarchal view of customary law). One benefit could be to further understand the way in which laws operate for Indigenous people.
Women have been central to native title claims (Wohlen p 73).

- dreaming stories connecting to land (men and women)
- knowledge of women's business:

- child-birth, rearing
- rituals related to courtship and marriage
- healing powers, medicines, spiritual power of sacred sites
- mourning rituals, funeral rites
- rituals for dispute resolution and punishment

women are the transmitters of culture

4. What are some of the problems facing Indigenous communities now that they are subject to Australian law? Focus on the coverage in the chapter.

- Incorporation of customary law is severely limited by state sovereignty
- patriarchal bias – bullshit law favours men
- clash of laws such as in the Jupurru's Case (Wohlan p 107)
- can be undermined

- Hindmarsh Island Bridge Case
- Northern Territory Intervention
- limited scope of native title law

- The assumption underlying incorporation continues to maintain basic liberal principles of equality and unity – assimilate Aboriginal law. We have come as far as accepting multiculturalism (Ab culture) but legal needs will be met by Australian law
- Australian law constructed as capable of addressing the needs of indigenous peoples – but within the scope of Australian law

5. What is the status of Aboriginal customary law in Australia? Give examples.

Method has been incorporation so as to not undermine Australian law – ie no plural system of law exists

- institutional over-representation reflects breakdown of law by intervention of Australian system – lack of recognition of customary law in sustaining indigenous families and societies
- incorporation perpetuates state sovereignty – the state decides which laws to incorporate and how
- as long as Aboriginal customary law exists there is an informal plural system of law
- customary law is the foundation for indigenous cultural identity – is incorporation enough to protect cultural identity?

6. How could Aboriginal law be given greater recognition in Australian law?

Focus on incorporation not on creating plural system of law

- 1986 ALRC Report

functional rec in areas

- marriage
- children & family property
- criminal law and sentencing
- hunting, fishing and gathering rights
    - 1998 NT Draft Constitution (cust law para 2.1.1)
    - 2000 CAR recommendations
    - 2003 Report of the NT LR Committee
    - 2006 LR Commission of WA

7. How far should the operation of Aboriginal law extend?

A basic precondition for the recognition of Aboriginal customary laws is the simple assertion that it exists as a real force, influencing or controlling the acts and lives of those Aborigines for whom it is 'part of the substance of daily life.

It should be dealt with alongside "white law", but not to the effect that it clashes with the law. We do not want a pluralistic set of laws, but laws that apply to both Indigenous and non-Indigenous peoples equally; where both groups understand the operation of the law.

Students could devise a research topic in this area by considering the lessons that can be learned from the treatment of Indigenous systems of law and governance in other jurisdictions (see p 119 references to a range of places where Indigenous legal systems have been recognized in their own right.)

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Week 6 Chapter 6 – Native Title: an Overview of Development in Aust

- Native title in America was recognised by common law in 1823
    - In Australia native title was not recognised until 1992
- overseas authorities: European understanding that taking land was either by conquest,, cession or settlement
    - Legal witchcraft: Ingenious people had failed to make a use of the land
    - Mabo was another triumph of the common law
- Australia: