Indigenous people have a variety of complex relationships to law in nations such as Australia, Canada, New Zealand and the United States where non-indigenous people constitute the majority of the population. Customary law has been recognised in each of these nations as a source of domestic law, but this recognition has created various tensions. For instance, Native Title looks to customary law for its definition, but non-indigenous society demands that Native Title be managed by modern Indigenous institutions created under non-indigenous law. Issues of federalism and international law influence the interaction of indigenous and non-indigenous law against a background of the history of particular peoples. Culture provides a framework for how each country will handle the ongoing relationship of indigenous and non-indigenous law.

Introduction

I visited Australia to learn about the issues, both historical and current, affecting the relationship between indigenous and non-indigenous peoples and in particular the legal issues. I can report on some themes that seem relevant to me.

There are three quite different types of law applicable to indigenous people — indigenous law, non-indigenous law, and international law, as well as perhaps a fourth category of natural law.
law. And each type of law is itself filled with complexity and subcategories.

The Policy Swings of Non-indigenous People

The British in North America, Australia and New Zealand encountered indigenous people who occupied the land and had a system of rules governing their behaviour - traditional customary law. The specific rules differed markedly between groups in each land. Only in New Zealand was there a common language, but differences in customs and dialect separated even Maori. Nevertheless, certain commonalities existed among indigenous peoples in all these countries: customary law was transmitted orally because there was no written language; rules and values were enmeshed in the cosmology so there was no categorical distinction between law, religion, and correct behaviour; kinship and ritual were central to social functioning; and land was not a commercial commodity.

Each country as it became independent of Britain went through broadly similar periods of policy towards indigenous peoples and their law – from separation and paternalism to assimilation to concern for self-management. Each policy found justification in morality – reflecting the facility to rationalise self-interest and perhaps also the human need to do so. For that very reason, even politically correct current proposals for self-government and reparations should be viewed with a critical eye.

Each era led to another. Advocates justified isolation and the movement of indigenous groups as protection from the inevitable harms that contact caused: protection and control over the lives of indigenous people as necessary to alleviate the consequences of the previous policy; assimilation as the only way to end the harmful results of paternalism; integration in a multi-ethnic community as the remedy for assimilation; and today advocates often urge increasing autonomy and self-government as the solution for the failure of integration.

Isolation

British settlers came into contact with indigenous people in North America in the seventeenth century, in Australia in the eighteenth century, and in New Zealand in the nineteenth century. The context of first contact then was quite different. Early settlers in the Americas included missionaries and traders who sought relationships with the indigenous people, but they also included people looking for land to establish a society in the new country. Natives could use the immigrants for support against their enemies and as a supply for new useful goods. Despite misunderstandings and occasional friction, there was room enough for everyone. This was an era of famed assistance by Indians to provide the food and skills necessary for the new colony to survive – Pocahontas and Squanto are but two of the many helpful natives in North America.

As more colonists arrived and expanded agriculture, they curtailed sources of indigenous subsistence. When a farm replaced a hunting ground, it became a source of conflict. With so much land available on the continent, removal and isolation became the solution for conflict. Instead of neighbours, tribes now sought guarantees that the newcomers would not impair their lands and use force against them. The answer always seemed to be movement or removal.

Paternalism

The destruction of traditional means of subsistence and removal from homes made life more difficult for indigenous people and never seemed sufficient for the needs of the non-indigenous population. The policy of isolation destroyed rather than preserved the integrity of the indigenous culture and non-indigenous people tried to salve their conscience by providing some material goods in concentrated places. In taking responsibility for the harm that prior policies had wreaked, each nation used a different public or private agency with specific responsibility for the care of the indigenous population – the Bureau of Indian Affairs, the Protector of the Aborigines, etc.

Assimilation

Dependency fostered by paternalism further sapped the ability of the indigenous peoples to thrive in the new reality. Governments responded by trying to eliminate the differences between
indigenous and non-indigenous peoples. All four countries in greater or lesser fashion tried to replace the language and culture of indigenous people with English language and values. Compulsory education in English was common to all four countries and isolation from parents in order to inculcate new values was common in North America.

However, compulsion assumes that non-indigenous culture and values are superior to indigenous ones, and that assumption is inherently incompatible with equality. Thus, the policy of assimilation never resulted in equality and created instead tremendous grievances and resentment. It destroyed some languages and many specific cultural practices of specific groups, but it has not destroyed the cultures of indigenous groups completely.

**Integration**

Integration into a multi-cultural society was justified as necessary to respect the values of indigenous people, but that overlooked the distinction between indigenous people and other minority groups – that they were the prior occupants of the land and ruled themselves when non-indigenous people arrived. Land and sovereignty distinguish indigenous people.

The current policy wrestles with land claims through native title recognition and in some respects urges indigenous self-government, but no nation is willing or even considers it just to restore all land and surrender the ability to govern. All nations have an interest in being perceived as fair, but that only goes so far. It remains as to whether later generations will find the proposals and policies of today well-founded and just. Good intentions have never been the standard for good outcomes.

**Land**

Non-indigenous people regarded land as a commodity. It could be bought and sold. Coming to a new country might be sparked by the desire to acquire land, and government policy began with the idea of purchasing land from the existing owners. But the people who occupied the land did not regard it as a commodity.

Stories of creation of land by ancestral beings and responsibility of groups for rites and ceremonies with respect to the land were common in indigenous society, and made land central to the indigenous people as communities – indeed it was so central that there were no practices of commercialising it as property. Seizing the land from those that occupied and used it was obviously unjust, but land ownership under British law proceeded from grants by the Crown and property was thereafter alienable by the grantees. Indigenous people had a different concept of property and their rights predated British contact. Where one group recognised the rights of the people who lived on the land and those people did not regard the land as transferable, how could the systems mesh?

One response relied on abandonment rather than transfer. Although land was not sold in indigenous culture, people did end their occupation of it, sometimes abandoning it for land with more resources in order to survive, sometimes forced to leave by threats or warfare with other indigenous groups, sometimes providing areas for occupation by others as a gift, or acknowledging the occupation of other peoples as a measure to settle intergroup disputes. Thus, indigenous people understood to some degree the surrender of the land. Treaties between non-indigenous
people and indigenous peoples often began as statements of peaceful relations, but soon they were in the form of a surrender of land, often with a reservation of some of the total. The motive for the surrender might be promises of goods or intangibles like education or promises to control the behaviour of non-indigenous people to reduce friction, but the people surrendering the land would rarely conceptualise it as a “sale”. Such surrenders were more easily accomplished when the group had a defined political structure so that individuals could act as agents to sign the treaty or agreement of surrender. The treaty or agreement was the common method in North America and New Zealand to mark the surrender of land to the Crown or federal government.

In this respect, Australia was unique because it had no treaty or agreements on land until recently. On a practical level, non-indigenous people forced indigenous people to remove and often spelled out by statute or regulation the places to which indigenous people were compelled to go – but indigenous people did not agree to the dispossession and non-indigenous people did not recognise ownership in indigenous people even of the area to which they were confined.

Non-indigenous law also attempted to mesh with indigenous rights in land by converting the land into the property cognisable by the non-indigenous law. The occupation of land was transmuted into ownership by the occupiers under the non-indigenous title system. For example, during the allotment era, the United States simply determined that land held by a tribe should be divided among the members of the tribe in fee so that each individual would hold land personally with the ability to alienate their rights.

In New Zealand, rather than converting group land into individually owned parcels, the Maori Land Act created titles held by members of the relevant group as tenants in common. That left land which had not been surrendered and not been converted by statute into recognisable non-indigenous title form. Such land remained in theory in the hands of its indigenous people under the customs they had with respect to it. Native title recognises indigenous law as an independent source of property rights, but it incorporates that law into the non-indigenous legal system and transmutes it in the process.

Each of the four nations recognises “native title” as rights of occupation and use based on the traditional law of the indigenous peoples at the time of contact, but the long delay in recognition in Australia has had curious consequences. Because Canada, New Zealand and the US recognised indigenous rights to the land from the beginning, they sought written cessions from the people in the form of treaty rights or court determinations of ownership. Where land rights are dependent on treaty, grant, or case decision, succession follows on continuous existence as a body but it has nothing to do with continuing the old customs of that body and the existence of customary law is irrelevant. Thus, when the US court found that the Oneida Indian nation sale of land to New York was invalid in the eighteenth century, the Oneida could sue for that land in the last part of the twentieth century. There was no inquiry into the continuance of custom or tradition or continuing connection with the land, because tribal identity was clear based on descent and corporate structure.

But when native title has its source in traditional customary law, the courts ask whether that law still exists, considering that its abandonment would end the rights it created. Since the existence of
law is not abstract, the Australian courts look into the question of whether specific people today engage in practices and customs traceable to traditional customary law. In that sense, the law not only recognises customary law, but it puts a premium on anthropologists in Canada and Australia. (The doctrine of continuity makes sense in terms of abandonment of rights, but less so in the context of a society that engaged in campaigns to destroy the culture, which perhaps should shift the burden to opponents of native title to show voluntary abandonment of customary ties.)

Traditional or Customary Law

If traditional law as an integral part of indigenous identity must be respected to attain equality, there are a variety of issues to confront. Can it function in modern society? Can it coexist with non-indigenous law? Can it even perhaps operate on a par with non-indigenous law to be the basic governing structure for indigenous people?

Substance

Where the values and understandings of the past are transmitted to current generations, indigenous traditional customary law survives as an integral and inseparable part of indigenous heritage.

Orality helps preserve the ideal of immutable and unchanging law from ancestral rather than human origin. It also enhances the authority of elders, who presumably are those who know the law. In many indigenous societies, traditional customary law is intertwined with a cosmology that linked the people to the land.

The focus in native title law on ancient custom and its continuation raises issues of whether traditional law is an anachronism in the new world. Even where there is no identifiable law-making body, customary law has still adapted to new conditions. In New Zealand, Maori eliminated slavery, cannibalism and infanticide from their concepts of appropriate behaviour, influenced by missionary preaching rather than coerced by other external forces. In Australia, the death penalty for violation of customary law has basically been eliminated by the influence of non-indigenous law, and monetary compensation sometimes is used for wrongs within the practices of the parties. Operating by analogy (like the use of native words for paint you can eat to describe flour), traditional systems are more flexible than they appear. They can and have incorporated and adapted to modern conditions, retaining treasured values like kinship obligations and concern for the land and shedding unworkable ones. Thus, customary law survives independently of non-indigenous systems of law – sometimes forbidding what non-indigenous law condones and sometimes condoning what non-indigenous law forbids. However, as long as the behaviour of the group in communicating norms and gaining obedience to traditional law does not itself violate non-indigenous law, the traditional law may coexist. Traditional rights under indigenous law may exist in land where non-indigenous law concludes to the contrary. Both laws exist. The non-indigenous court and enforcement machinery will not recognise the indigenous law, but the indigenous people may continue to consider they own the land under traditional customary law.

The desperate problems of disproportionate involvement with the criminal system in all of these countries have led to suggestions (e.g. Moana Jackson in New Zealand) that indigenous
law be strengthened and be applied as the basic law for indigenous society at least in the criminal law area. One basis for this suggestion is the vision of a golden era when members of the community behaved themselves and respected the traditional customs. If customary law is flexible and adaptive, why shouldn’t it be the law applicable to indigenous peoples?

There are limits to the ability of traditional law to cope with the modern world. Some communities that continue to apply traditional law see the kinds of crimes that come with the modern world – motor vehicle offences, commercial crimes, alcoholism and crimes committed while impaired as appropriate for non-indigenous jurisdiction because they were not part of traditional concerns. The more openly adaptive customary law becomes, the less able it is to claim legitimacy from its ancient source. Further, the kind of collective responsibility that worked in small groups to ensure that no one in the group would be injured by making the members responsible for all cannot be transferred to a world where wrongdoers are so mobile and the alternative system rejects collective liability. With resources destroyed and a sustainable isolated life extremely difficult, indigenous people must operate in close contact with the non-indigenous world to survive and that world will not accept for itself these values.

Procedure

While some rules flow from traditional ways of behaviour, others are specific current decisions. Some indigenous “law” is simply elder decision-making, like when to go to war. Such rules may be made democratically or hierarchically depending on the structure of the indigenous society. Rangatira in New Zealand and chiefs in the Americas represented groups to the outside world and had complex decisional power within their societies. However, any attempt to strengthen the community by insisting that traditional ruling structures be imposed on fractious groups is unlikely to be acceptable to a society steeped in democracy.

Indigenous Law

Even as the courts and the statutes recognise traditional customary law as the source of native title, they insist on new legal structures to hold and defend that title. In New Zealand, the iwi attains a prominence it never had in the nineteenth century because it is an easier group for government to deal with and reach settlement; in the United States tribes adopted the Constitution and laws in the form drafted by the Department of the Interior to be sure they would be acceptable to Congress in exercising power, the band in Canada is a structure for Canadian government, and Land Councils and holding corporations in Australia are also characteristically imposed as a new and non-traditional rulemaking body.

As has been remarked particularly of Indian Courts in the United States, they may be sovereign law-making bodies but there is little customary law there. In some sense, customary law and sovereignty for indigenous people may clash – certainly native title law in virtually every country demands it. In creating an entity that can handle assets or the delivery of service that bridges the non-indigenous world, it is critical that the representatives of the indigenous people be able to go back and forth.

The problem that this suggests for organisations such as Land Councils is one of legitimacy and skill. If the group representing indigenous people is not a traditional one, will it have legitimacy with its own members? If it is laced with traditional elders, will they have the skills
and expertise to do the job? The *Western Australia Law Reform Commission* report on application of customary law spends a lot of time and effort with respect to issues of self-government rather than traditional customary law. It urges that structures and proposals come from the community, but it does not really explain how this takes place and no one has found it easy to implement. When the function to be served by the body goes beyond the small community, how do you select the body? Can you give recognition to kinship issues and rules in structuring who decides on what, and can gender roles in decision making be translated in a society that demands gender equality?

Since each nation has similar problems, it may be useful for Australians to look at the corporations formed to hold assets in the settlements reached in New Zealand.

**Non-indigenous Law**

On the other hand, you cannot simply borrow or apply the rule or institution of one nation without fully considering the difference in context for each land. Indigenous people are governed by indigenous law to some extent, but there is a sharp question about how non-indigenous law relates to them.

In every country, non-indigenous law provides general rules applicable to indigenous peoples and has special provisions applicable to indigenous people alone – in the simplest form a law that creates a department of indigenous affairs is a law specifically applicable to indigenous people and not to others.

**Federalism and Indigenous Self-Government**

Every nation has a different structure with respect to indigenous issues. Canada, Australia and the United States are all federal nations with a Constitution that allocates powers between the central government and the states or provinces. New Zealand, in contrast, is a unitary state without a written Constitution. Each nation has found a locus of authority with the power to override indigenous laws, but differences in that location and in the political power of the indigenous people have resulted in significant differences in the degree of both indigenous self-government and indigenous ability to affect non-indigenous law.

In the Americas, authority to enact laws dealing with indigenous peoples was given in the first place to the central authority. In the United States, the Supreme Court ruled early in the nineteenth century that states had no authority to enact laws that would govern behaviour on Indian lands. Since states are generally responsible for basic civil and criminal laws, that gave tribes large amounts of responsibility for self-government in contract, property and tort as well as criminal law to the extent the federal government has not intervened. (When you get into details, there are lots of practical problems with this self-government – funding, state give-backs, federal control of criminal process, etc.)

Canada did not find the same immunity from provincial law. Its relationships with First Nations are largely governed by treaties and the degree of self-government within First Nations on reserved land has been negotiated. Recently, the Inuvialuit have succeeded to broad political power by the creation of the separate territory of Nunavut in which they are an overwhelming majority and thus exercise the territorial law-making power. Further, unlike any of the other nations, Canada
has placed guarantees of recognition for the aboriginal and treaty rights of its indigenous peoples in its Constitution which may result in exceptions for indigenous peoples to general laws that would violate those rights.

In Australia the constitutional source of power to deal with indigenous peoples has been with the states and so the question of immunity from law did not arise in the same way. Even after native title recognises indigenous group land rights and statutes have provided for large land grants so there is a land base from which groups could exercise governance rights, the High Court has not suggested that the 1967 constitutional amendment extending power to the Commonwealth deprived states of power to pass general laws applicable to indigenous people in the absence of specific Commonwealth legislation. Thus, indigenous people here may enact minor local laws in some form, but not the kind of general laws that are possible in the US.

In New Zealand, parliament has plenary power to make laws affecting indigenous people (the Maori). Beginning in 1865, Maori land was converted to a form of title that precluded the kind of reservation communal ownership that exists in the other nations. The Maori Land Courts converted native title into land held by the individual members of an iwi as tenants in common rather than by the iwi as a unit. With no land base over which to exercise jurisdiction, Maori self-governance has not been in the form of laws that must be respected by non-indigenous persons, but in corporations formed to manage assets negotiated in settlements with the government and in participation in government. With nearly 20 percent of the population claiming Maori ancestry, the indigenous population has significant political power on Maori issues, especially when coupled with the institution of a separate Maori electorate and Maori seats in parliament and the new mechanisms for proportional representation. New Zealand also had the advantage of a single indigenous group and a treaty which could provide a basis for discussion and assurance of participation in matters affecting those things held valuable to the Maori. Unlike the backward looking jurisprudence of native title, the Waitangi Treaty Tribunal bases its decisions on the “spirit of the treaty.”

Application of Indigenous Law

Every nation recognises the customary law of its indigenous population in its domestic laws for at least some purpose. For example, in Canada, aboriginal rights are protected by section 35 of the Canadian Constitution, but those rights depend on identifying the practices, traditions and customs central to aboriginal society prior to contact because

“the practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact.”

But there are questions for non-indigenous law’s recognition of indigenous law – to what extent should non-indigenous law recognise and support indigenous law, should it apply indigenous law outside the narrow confines of native title litigation, and what role should indigenous people play in the enactment, regulation and carrying out of laws of the nation?

Jurisdiction

Federal nations are used to the concept of divided powers allocated to different government
bodies. The United States employed it to find independent jurisdiction for Native American bodies to enact and enforce their own law. Canada has done so where its indigenous people constitute a controlling majority in a traditional political unit. Australia has not done so, in part because of its historical allocation of powers and in part because indigenous people are such a small part of its population. However, as High Court decisions recognise Commonwealth power and international law begins to recognise rights of indigenous peoples, there may be room to consider both of these options in the future.

Incorporation

The Australian Law Reform Commission in the 1980s and most recently the Western Australia Law Reform Commission have issued reports on the application of customary law. There has also been a good deal of discussion in the media and in Parliament on the issue. But no one has proposed the incorporation of traditional customary law into non-indigenous law (i.e. that indigenous peoples be governed in non-indigenous courts by a different law).

Most of the furore has been over the consideration of indigenous customs in decisions to charge and in sentencing. Canadian law does have specific reference to such considerations in sentencing, but judges in Australia have paid attention without any statutory requirement that they do so. The problem is recognised throughout the world and the issue has more to do with multiculturalism than specific indigenous concerns. It is the application of western concepts embedded in the criminal law of motive, duress, provocation and the like that must wrestle with questions of behaviour in the context of a different culture. What does non-indigenous law mean by these terms?

In New Zealand, Maori speak of Tikanga. By substituting that word for customary law, thinking would not be tied up in knots by concern over whether there is inequality or an application of two laws. Instead, the issue would appear even more clearly as being whether behaviour so motivated poses the same kinds of dangers and requires the same punishment. As long as the legal system attempts to do justice to individuals by considering their particular circumstances in assessing blame and in sentencing, it must consider the context for persons with different values.

International Law

Finally, all nations have sought to justify their behaviour under international law. But international law was created by treaties and customary practice of western colonial powers and it tended to sustain their behaviour. If the law of nations involves only nations, minorities of any kind within a nation are outside its scope – or were outside its scope when the twentieth century began.

The United Nations Declaration on the Rights of Indigenous Peoples, passed in 2007 signals the current flow of contemporary thought on international law, where rights of self-determination, recovery of culture, and redress for loss of lands may be recognised. Australia, New Zealand, Canada, and the United States all voted against its adoption, and they were the only nations to do so. The Declaration is not legally binding on nations, but it provides an aspirational standard. As incipient international law, it may be stillborn – but it remains extremely important for Australia despite its negative vote because reliance on international engagements and on international concerns has been a potent source of power for the Commonwealth government.

Notes

1 Ideas were communicated through symbolic drawings, just as exists today in aboriginal art. Like written language, symbols require someone to teach others how to read them. In indigenous society, however, the meaning of the symbols is only the beginning, because the connection of the drawing to the cosmology requires a knowledgeable person to orally communicate it.
2 Each era of policy has counterexamples and shifting datelines. They are used heuristically rather than literally. For example, Maori were anxious to have non-indigenous people living among them in order to provide goods. Missionaries sought indigenous company to proselytise. Nevertheless, the settler avarice for land often collided with indigenous people and the remedy for frontier conflict was to move the frontier.