

ETHNIC STUDIES 189-A00: INDIGENOUS PEOPLES AND THE LAW

Lecture: Tuesday & Thursday 11-12.20 Sequoyah
Office Hours: Tuesday 2-5 pm Cross Cultural Centre and other times by prior appointment.
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From the point of first contact the law has been utilized as a means of justifying policies of genocidal obliteration, dispossession and oppression against Indigenous peoples. The course will also reflect upon the ambiguities that emerge in the contemporary setting, where Indigenous communities around the globe have utilised the law (either at a national or international level) to pursue claims against the State. Students will examine the claims made for recognition of land, control of cultural possessions and the recognition of Indigenous forms of law. The material covered during this course will draw from the Indigenous peoples of Latin America, North America, Canada, South Africa, New Zealand, Australia and Greenland.

Course Attendance/Participation 10 % total mark

In this week's class students will examine the basis of colonial claims to land and how the law has made representations of Indigenous peoples in the law that have been intended to deny them equal rights. The period of frontier conflict and the failure of the colonial justice system to provide protection for Indigenous peoples will be examined.

Wolfe, Patrick, Land, Labor, and Difference: Elementary Structures of Race. *The American Historical Review* 106.3 (2001): 60 pars. 25 Mar. 2009
 <<http://www.historycooperative.org/journals/ahr/106.3/ah000866.html>>.

Wolfe, P. *Settler Colonialism and the Transformation of Anthropology*, pp.168-190

B Kercher, "R v Ballard, R v Murrell and R v BonJon" (1998) *Australian Indigenous Law Reporter* 3 (3), September 1998: 410-425.

At <<http://www.austlii.edu.au/au/journals/AILR/1998/27.html>>

Further Reading

- Lake, M., & Reynolds, H., *Drawing the global colour line : white men's countries and the international challenge of racial equality*, Cambridge University Press, 2008
- Reynolds, H., *This whispering in our hearts* Allen & Unwin, 1998
- J Hookey, "Settlement and sovereignty", in P Hanks & B Keon-Cohen (eds.), *Aborigines and the Law*, 1984, pp.1-18.
- K Maddock, "Aboriginal Customary Law", in P Hanks & B Keon-Cohen (eds), *Aborigines and the Law*, 1984, pp.212-238.
- H Reynolds, *Aboriginal Sovereignty*, Allen & Unwin, St Leonards, 1996.

WEEK TWO: CONTROL ON AND OFF THE RESERVES – AN INDIGENOUS PRESENCE IN/OF THE LAND

A consistent feature of the colonization of Australia was the use of Aboriginal reserves as an integral part of the policy of assimilation that was pursued in the various States and Territories from the earliest part of the twentieth century. When it was originally thought that the demise of the Aboriginal people was inevitable the missions were considered as a last place of refuge. As it became apparent that the Aboriginal people were not going to fade from existence the reserves were utilized as a form of social control, with entry and exclusion being decided at the discretion of the mission manager, based on spurious distinctions of caste. This paper traces the manner in which reservations made for Indigenous peoples in different nations have developed, from place of refuge, to what were little more than prison camps and then, ultimately, to sites that are under the control of the Indigenous residents. The role of the legislature in creating such reserves is considered and also the manner in which Indigenous people have re-defined their connection to places that were historically sites of oppression.

Prescribed Readings

- Harris, C., *Making Native Space*, UBC Press, 2002, pp.265-292 (electronic reserve)
- Bilosì, T., *Deadliest Enemies: Law and Making the Race Relations on and off Rosebud Reservation*, UC Press, 2001, pp.1-19 (electronic reserve)
- Bilosì, T., "The Birth of the Reservation: Making the Modern Individual Among the Lakota", (1995) *American Ethnologist* Vol.22(1), pp.28-53
- Olund, E., "From Savage Space to Governable Space", (2002) *Cultural Geographies* Vol.9 (2), pp.129-157

Further Reading

- Duthu, B., *American Indians and the Law*, Viking, 2008

WEEK THREE: WRITING THE AUTHENTIC INDIGENOUS PRESENCE

The colonial project of dispossession and obliteration was in large part legitimized through the representations of Indigenous or "native" populations as savages and un-civilised. Through the period of colonial rule to the current day the law has been deployed for the formulation and determination of the "legitimate Indigenous Other." While the colonial experience was essentially concerned with repressive or discriminatory measures, intended to regulate the lives of Indigenous peoples, the issue remains no less of relevance in the twenty-first century disputes concerning rights of membership to particular tribes and

Prescribed Readings

- Backhouse, C., "Race definition run amok" in Kirkby, D & Coleburne, C., *Law Colonialism and History*, Manchester University Press, 2001, 65-77
- Garrouette, E., The Racial Formation of American Indians: Negotiating Legitimate Identities within Tribal and Federal Law *The American Indian Quarterly* – Volume 25, Number 2, Spring 2001, pp. 224-239
- Garrouette, E., *Real Indians*, UC Press, 2003 (available via electronic version)
- Dietz, G., "From Indigenismo to Zapatismo: The struggle for a Multi-ethnic Mexican society", in Postero, N & Zamosc, L. (eds) *The Struggle for Indigenous Rights in Latin America*, pp.32-80.

WEEK FOUR: BEFORE THE LAW - THE CRIMINALISATION OF INDIGENOUS PEOPLES

One of the key issues that emerged from the Royal Commission into Aboriginal Deaths in Custody was the disproportionate over-representation of Aborigines in the prison system. Depending upon the source of data an Aborigine is between ten and 23 times more likely to be imprisoned than a non-Aborigine. The classes this week look at the factors which have contributed to this staggering statistic and how the operation of discretionary powers in the criminal justice system might operate to discriminate against Aborigines. The conflict between police and Aboriginal communities will be considered, along with the issue of over-policing.

Prescribed Reading

- Morris, B. (2001) 'Policing Racial Fantasy in the Far West of New South Wales', *Oceania*, Volume 71, Number 3, pp.242-262.
- Cunneen, C., "Judicial Racism", in McKillop, S. (ed) *Aboriginal justice issues : proceedings of a conference held 23-25 June 1992 Australian Institute of Criminology, 1993* (AIC Conference Proceedings; no. 21)
- K Pirie S Cornack, "What is Obscene - the Language or the Arrest that Follows?", in S McKillop (ed) *AIC Conference Proceedings: No 21 Aboriginal Justice Issues*, AIC, Canberra, 1993, pp.139-150.

Further Reading

- E Eggleston, *Fear, Favour or Affection*, pp.19-60.
- M Foley, "Aborigines and the Police", in P Hanks & B Keon-Cohen (eds.), *Aborigines & the Law*, 1988, pp.160-190.

WEEK FIVE INDIGENOUS WOMEN & THE LAW/ THE STOLEN GENERATIONS INQUIRY

Jocelyne Scutt, a lawyer and author, has observed that Aboriginal women suffer discrimination both as women and as Aborigines. This week's classes will seek to address the reasons for this discrimination, considering the historical and contemporary factors which have rendered Indigenous women invisible before the law. The issues that doubly disadvantage Indigenous women when they must deal with the machinery of the law will be considered with specific reference to the legislation which removed children from their mothers and the discrimination suffered by Aboriginal women in rape cases. Specific attention will be paid to the "Bringing them Home" Royal Commission which examined the taking of generations of Aboriginal children.

Prescribed Reading

- Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination*

- and Violence against Indigenous Women in Canada*, 2004
- Smith, A., *Conquest: Sexual Violence and American Indian Genocide*, South End Press, pp.7-33
- R Wilson, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, AGPS, Canberra 1997.

Further Reading

- L Behrendt, "Aboriginal Women and the White Lies of the Feminist Movement", (1993) 1 *Australian Feminist Law Journal* pp.27-44.
- D Bell & P Ditton, *Law: the Old and the New*, AIAS, Canberra, 1990.
- C Iorns, "Aboriginal Women and Bias in the Criminal Justice System", (1995) *Aboriginal Law Bulletin* Vol.3 (70): 8-10.
- A Keely, "Women and Land: the Problems Aboriginal Women face in providing gender restricted evidence", (1996) *Aboriginal Law Bulletin*, Vol.3 (87): 4-7
- M McKay & S Smallacombe, "Aboriginal Women as Offenders and Victims: the case of Victoria", (1996) *Aboriginal Law Bulletin*, Vol.3 (80): 17-23.
- G Nettheim, "Women's Business and the Law", (1996) *Aboriginal Law Bulletin* Vol.3 (80):24-26.
- M Paxman, "Women and children first!", 1993 (4) *Alternative Law Journal*, pp. 153-157.
- K Pringle, "R v Robyn Bella Kina", (1994) *Aboriginal Law Bulletin* Vol.3 (67): 14.
- S Payne, "Aboriginal Women and the Law" in C Cunneen (ed) *Aboriginal Perspectives on Criminal Justice*, AIC, Canberra, 1992, pp.31-45.

WEEK SIX: INDIGENOUS JUVENILES & THE LAW

In this week's class we will examine both the nature of the discrimination suffered by young Indigenous children and also how legislation has been enacted with the implicit purpose of assisting the government policies of assimilation. The final point for consideration will be the a consideration of the impact of discriminatory policing and sentencing regimes directed against Indigenous juveniles.

Prescribed Reading

- Walmsley, C., *Protecting Aboriginal Children* [electronic resource], UBC Press, 2005

Further Reading

- Gibson, D., "Mandatory madness" *Alternative Law Journal*, (2000) Vol.25(3): 103-107
- McCulloch, J., "Mandatory sentencing: creating an incarcerated generation" *Arena* (2000) Vol.47, pp.33-36

WEEK SEVEN: RECOGNITION OF RIGHTS TO LAND AND CUSTOMARY LAWS

The classes this week will concentrate upon the debate concerning the recognition of Aboriginal customary law and the related issue of legal pluralism. The status of Aboriginal customary law within the wider framework of the Australian legal system remains vague and undefined. In 1986 the Australian Law Reform Commission produced a comprehensive report on the recognition of customary law and more recently the Western Australian Law Reform Commission has produced a comprehensive review of the question of recognizing

Indigenous customary law. This class will also examine the development of tribal courts within the Canadian and US bodies of law and the questions and issues that have emerged with the recognition of such issues as tribal membership and child placement.

Prescribed Reading

- Borrows, J., *Indigenous Legal Traditions in Canada*, Law Commission of Canada, 2006
- Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, 2006, ch1 (Challenging Customary Law Myths and Misconceptions) ch. 4 Recognition of Customary Law
- Nesper, L., "Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State", *Current Anthropology* 2007 Vol 48 (5) 675-699

Additional Reading

- Miller, B., *The Problem of Justice*, University of Nebraska, c2001

Relevant Cases

- R v Williams* (1976) 14 SASR 1.
- R v Charlie Limbiari Jagamara* (1985) 12 ALB 11.
- R v Minor* NT CCA (unreported)
- R v Wilson Jagamara Walker* NT Supreme Crt 1993 (unreported)

WEEK EIGHT: PROTECTION OF CULTURAL HERITAGE

The issue of protecting Indigenous cultural heritage has become particularly relevant in the conflict between archaeologists and communities over the ownership of skeletal remains. In addition to the control of cultural materials, Indigenous communities are also agitating for the return of skeletal remains that were gathered by museums and universities during the 19th Century. Apart from archaeologists, cultural heritage issues have relevance for archivists, arts administrators and museums. Apart from disputes involving Indigenous Australian communities (most notably the Hindmarsh Island case from the 1990s) we will also reflect open the operation of the NAGPRA (Native American Graves Repatriation Act) scheme in the US and the moves for further recognition of the rights of First Nations peoples to have cultural materials returned to them.

Prescribed Reading

- Brown, M., *Who Owns Native Culture*, Harvard University Press, 2003
- Mihesuah, D.(ed) *Repatriation reader: who owns American Indian remains?* University of Nebraska Press, c2000 (electronic resource)
- Ross, M First Nations sacred sites in Canada's courts [electronic resource] UBC Press, 2005

Relevant Legislation

- Protection of Moveable Cultural Heritage Act* 1986 (Cth.)
- Aboriginal & Torres Strait Islander Heritage Protection Act* 1987 (Cth.)
- Archaeological & Aboriginal Relics Preservation (Amendment) Act* 1984 (Vic.)
- Native American Graves Protection and Repatriation Act*, 25 U.S.C. 3001 et seq. [Nov. 16, 1990]

Relevant Cases

Foster v Mountford (1976) 29 FLR 233.
Onus v Alcoa (1981) 36 ALR 425.
Pitjantjatjara Council v Lowe & Bender (1982) 4 ALB 11.
Western Australia v Bropho (1991) 5 WAR 75.
 Kennewick Man lawsuit (*Bonnichsen et al., v. U.S.*, No. 02-35994 DC)

WEEK NINE: INDIGENOUS INTELLECTUAL PROPERTY

The unauthorised use of designs is one example of the exploitation of Aboriginal art and culture. There are also a number of cases which relate to the failure of anthropologists or scientists to observe obligations in their dealings with materials entrusted to them by Tribal elders. In Australia this matter has arisen most notably in the so-called "carpet case" of *Milpurrru v Indofurn*, which concerned the unauthorised reproduction of Aboriginal art on carpets that were manufactured in Vietnam and subsequently sold in Australia.

Prescribed Reading

Coombe, R., *The Cultural Life of Intellectual Properties*, Duke, pp.208-247
 Janke, T., *Our Culture Our Future*, 1997, AIATSIS, pp.1-41 (available online on WebCT)

Relevant Cases

Bulun Bulun & Milpurrru v R & T Textiles (1998) 41 IPR 513.

WEEK TEN: SOVEREIGNTY AND INDIGENOUS PEOPLES IN THE TWENTY FIRST CENTURY

The dawn of the new millennium has been significant for a number of initiatives that acknowledge the rights of Indigenous peoples. Most notably in September 2007 the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Significantly the only nations to oppose the text of the Declaration were the settler societies of Australia, Canada, New Zealand and the USA. There has also been the ratification of the new Bolivian Constitution in February 2009 that gives greater recognition to the rights of the Indigenous population and set the path for reform of land ownership. The Brazilian Supreme Court in March 2009 also handed down a decision that granted significant land holdings to the Indigenous peoples on the Raposa Serra do Sol. This class will reflect on how the emerging Indigenous politics and power might be. While these events would appear to signify a shift towards the acknowledgment and accommodation of Indigenous rights we will reflect on the questions raised by the increased international presence of Indigenous peoples at various forums and how this is reflected in their dealings with both national governments and multinational corporations.

Readings

Battiste, M., *Reclaiming Indigenous voice and vision*, UBC Press, 2000, pp.115-180
 (available as electronic resource)
 Bilosi, T., "Imagined geographies: Sovereignty, indigenous space and American Indian struggle", (2005) *American Ethnologist* Vol.32(2): pp. 239-
 Denesdale, J., *Carving Navajo National Boundaries: Patriotism, Tradition, and the Diné Marriage Act of 2005* *American Quarterly* - Volume 60, Number 2, June 2008, pp. 289-294
 Hale, C., "Rethinking Indigenous Politics in the Era of "Indio Permitido", (2004)

NACLA Report on the Americas Vol.38(2), pp.16-21

Kēhaulani, K *Hawaiian blood: colonialism and the politics of sovereignty and indigeneity* Duke 2008

Walsh, C., “(Post)Coloniality in Ecuador: The Indigenous Movement’s Practices and Politics of (Re)Signification and Decolonisation”, in Morana, M. et.al.(eds) *Coloniality at Large, Duke*, 2008, pp. 506-518

International Treaties

United Nations Declaration on the Rights of Indigenous Peoples

Further Reading

Barker, J (ed) *Sovereignty Matters: locations of contestation and possibility in indigenous struggles for self-determination*, U of Nebraska Press, 2005

Reynolds, H., *Aboriginal sovereignty : reflections on race, state, and nation*, St Leonards, NSW : Allen & Unwin, 1996