WHY ARE THERE NO ADULT COMMUNITY COURTS OPERATING IN THE NORTHERN TERRITORY OF AUSTRALIA?

by Mary Spiers Williams

INTRODUCTION

Magistrates in the Northern Territory of Australia ('NT') have a long history of attempting to involve community members in justice processes, particularly in 'bush courts', that apparently predates such efforts of other Australian jurisdictions.[1] Since 2007, both wholly local initiatives, such as law and justice committees or court initiated intercultural engagements with mainstream justice processes such as Community Courts, have struggled to gain momentum and have now completely desisted. Given the historical interest and repeated engagements by NT magistrates—and at a time when interest in community participation in summary justice processes in other Australian jurisdictions are enthusiastically pursued—why is it that now adult Community Courts in the NT have stalled?

In late 2011, court workers and other criminal justice system insiders in the NT reported[2] that a view had begun circulating that adult Community Courts could not be held because of a provision in the NT sentencing legislation, section 104A of the *Sentencing Act 1995* (NT). This provision requires that, where there is to be evidence of Aboriginal customary law and cultural practice, notice is to be given before the hearing and the evidence to be adduced must be sworn testimony.

This does not wholly explain some matters however. For example, why is it that after this provision was introduced in the beginning of 2005, some magistrates continued to successfully conduct Community Courts in the Top End, notably Nhulunbuy, including cases that apparently complied with the section? It does not explain why in 2007 the Wild Anderson Report recommended 'Aboriginal courts';[3] and why in August 2007, in response to that recommendation, the NT Government formally endorsed Community Courts? How do we explain why the sole central Australia Community Court only started in mid-2008, struggled to gain momentum and by August 2010, had stopped, about a year before this view began circulating?

This invites closer scrutiny of the provision and whether its interpretation has changed. It also invites an inquiry into what other factors may have influenced the desistance in community participation in summary court sentencing processes. I argue that there are impediments to Community Courts, however these are not legislative inhibitors, rather the political and social context of those laws.

WHAT ARE COMMUNITY COURTS?

The NT Magistrates Courts website states that 'Community Courts harness the cultural strengths and influences of Indigenous communities and embraces principles of restorative justice'[4] although the guidelines[5] state that the process is available not only for Indigenous people. The Community Court is a modified summary court sentencing process that allows community participation. It is not determined by rules or legislation, each magistrate determining the process. Community Courts I observed are similar to circle sentencing processes practiced in other Australian jurisdictions. Community Courts do not implement Indigenous law or customary law in Australia, however, a Community Court recognises that there are other ways of knowing, that there may be better or other ways of doing justice, and can potentially recognise the operation of coexisting legal systems. Best run Community Courts operate within an 'ethos of pluralism'.[6]

WHY DID THE NT INTRODUCE STRICTER RELIABILITY RULES FOR EVIDENCE OF ABORIGINAL CUSTOMARY LAW?

NT courts have always been confronted by the challenges of sentencing in an intercultural setting. Aboriginal people there have not been assimilated by, nor did themselves assimilate to, non-Aboriginal culture to as great an extent as those areas where first contact occurred. Judicial officers in the NT have continuously grappled with these issues and by the 1990s were subject to increasing criticism. Some critics said courts were not sufficiently denouncing but instead tolerating violence against Aboriginal women and children when a sentence was mitigated on the basis

of Aboriginal law.[7] Some argued that offenders' claims about Aboriginal law were unreliable; prosecutors were criticised for not challenging this evidence.[8] Others implied that such violence was a part of Aboriginal law and that Aboriginal law had been accurately represented in court, and asserted that where inconsistent with universal (individual) human rights law[9] should override any community rights or collective Indigenous rights.[10]

Atkinson and others have expressed dismay about claims that family violence was/is inherently part of 'Aboriginal culture'.[11] Blaming 'culture' wrongly suggests that gender violence occurs in some cultures and not others (despite it being a worldwide phenomenon) and that customary law and cultural practices is only about legitimating violence or sexual abuse. It wrongly assumes that gender violence is not strongly resisted and debated within that culture.[12] It ignores the rich depth and complexity of Aboriginal law and custom. The debate involved Aboriginal women, feminist scholars, anthropologists,[13] lawyers and advocates,[14] Aboriginal organisations, communities and governments.

In response to these concerns, the Northern Territory Government introduced section 104A of the *Sentencing Act 1995* (NT) in 2005.[15] Hansard shows that it was intended to improve the reliability of evidence of Aboriginal customary law and community views about that law (only), consistent with evidence law concerning reliability and specialised knowledge or opinion evidence. In the course of the Parliamentary debates, the NT Government expressly recognised a system of Aboriginal law in the NT and expressed the view that Aboriginal law does not inherently condone violence against women and children.

One Community Court case in which the provision was applied, demonstrated how section 104A can enhance (not inhibit) popular engagement with criminal justice processes. In *Police v D*[16] the then Chief Magistrate used affidavit evidence regarding a Yolnu ceremony and D's role in that to determine disposition and the mitigation of penalty. The entire community engaged with this case and it created an unusual opportunity to denunciate the violence, and enhanced other justice outcomes. Despite some practice challenges, section 104A does not stop Community Courts from proceeding. This case demonstrated how customary law can be recognised in the context of criminal justice principles utilising an ethos of pluralism.

SO WHY THEN HAVE COMMUNITY COURTS STOPPED?

The reason Community Courts have stopped is because of laws imposed on the NT by the Commonwealth Government in the 2007 Northern Territory National Emergency Response ('NTNER'), and an officially sanctioned intolerance to Aboriginal customary law and cultural practice that these laws heralded.

The Commonwealth Government response to the debates about violence against Aboriginal women and children was radically at odds with the ethos of pluralism that animated the then NT Government policies. This has affected the manner in which court cases are now conducted both directly and indirectly.

Section 91 of the *NTNER Act 2007* (Cth) ('NTNER'), for example, prohibited evidence of customary law and cultural practices being used to mitigate or aggravate a sentence.[17] This section was simply ignored by courts for several years. Eventually, the section was interpreted to mean that it applied only to *Aboriginal* customary law, despite no reference to race in the provision. This has resulted in perverse outcomes. In some cases, no sense can be made of the offence without reference to Aboriginal customary law and cultural practice, and where a court is not permitted to rely on this evidence to affect the choice of disposition or the length of the sentence leads, there is a miscarriage of justice.[18] The effect of section 91 in the context of NT sentencing law, is that practitioners now see no point in leading evidence of Aboriginal customary law, that is, wasting time and resources to ensure this evidence is reliable by giving notice and swearing affidavits, because magistrates and judges are not allowed to use it. Aboriginal law has disappeared from NT courts.

This does not wholly account for the desistance of Community Courts. It is helpful at this point to consider the Yuendumu Community Court.

YUENDUMU COMMUNITY COURT

The only Community Courts convened in central Australia were in Yuendumu between 2008 and 2010. From the outset, some legal practitioners and magistrates had doubts about whether community involvement served any practical benefit, and were concerned instead about causing unintended negative consequences arising from such proceedings; most magistrates were cautious and slow to implement the Government decision to have Community Courts. The cases concerned minor traffic and *Liquor Act 1979* (NT) offences that would not result in a prison term. Some research participants suggested that magistrates were concerned they had insufficient knowledge about the local circumstances to judge the proceedings' impact, which is related to the lack

of resourcing for Community Court workers. Others suggested that magistrates and prosecutors after some years in practice or on the bench had formed opinions about the local Aboriginal cultural practices and beliefs, and believed that holding a Community Court would have unforeseen negative consequences. Prosecutor practice was to object to any matter involving domestic violence due to concerns about reprisals against the victim or their family, or that the victim was unable to fully and freely participate.

There has not been a Community Court in Yuendumu since August 2010, that is, since fighting started in September 2010 and become increasingly out of control.[19] The Yuendumu Justice Mediation Group was ready to recommence in August 2011, but on the day were told informally that it would not; no explanation has been given to community members. Some suggest that magistrates believe that holding Community Courts would encourage Aboriginal community members in the mistaken belief that their law and cultural practices can be taken into account in sentencing or that practicing Aboriginal law outside that courtroom is tolerated. Others suggest that magistrates do not trust Aboriginal people to responsibly participate, and fear that it could inflame tensions in the community. Others report that magistrates talk of the contaminating effect of Aboriginal cultural practices.

Magistrates' attitudes to Aboriginal community members appear to have hardened. How?

'TERRITORIAL STIGMATISATION' AND ABORIGINAL COMMUNITIES

One explanation may be 'territorial stigmatisation'. Territorial stigmatisation appears to have been deployed with devastating effectiveness in the NTNER. Wacquant has predicted and observed elsewhere the impacts of stigmatisation on a place.[20] Wacquant observed that the stigmatisation of a place (he was concerned with 'ghettos') gained a cognitive traction that other strategies of marginalisation did not. He noted the impact of stigmatisation could be observed throughout the social field, especially in the media, bureaucracy, political field, legal field, scholarly field, and those in the stigmatised space/group. From his ongoing observations, Wacquant predicts impacts of the effect of territorial stigmatisation. These impacts could be observed in central Australia after the NTNER was commenced. I'll attempt to explain Wacquant's theory further as I apply it to the NT.

Reports about Aboriginal community dysfunction, specifically child sexual abuse from media sources and scholars influenced the Federal Government decision to instigate the NTNER in 2007. The mechanism by which this was done was to define Aboriginal settlements and other places where Aboriginals live in the NT as a 'prescribed area' under NTNER enabling legislation. New offences were introduced that applied only in these areas, special stricter restrictions on pornography were introduced, and penalties were increased for liquor offences. Big blue signs were erected on the perimeters of these areas warning not to commit the new offences. There were more police, and police powers were increased. Differential policing practices were regularly seen on main streets of regional centres. These combined strategies established a formidable and powerful construct of Aboriginality in the NT, one of dysfunctional place, denigrated culture and stigmatised individuals.

Aboriginal people are now policed differently and subject to different rules in criminal courts. A senior practitioner from Alice Springs implied that this stigmatisation of Aboriginal communities, and by association the people and the 'culture' of the people who come from them, is manifesting in intolerant juries and vituperative magistrates.[21] Increasingly, courtroom discourse denigrates Aboriginal communities, that are 'both condemned and in need of rescue'.[22] This 'symbolic violence' creates powerful cognitive and practical effects *on* and *about* individuals who have the misfortune to be associated with these places.

Following Wacquant's thesis, a cognitive impact of this stigmatisation is that magistrates become unwilling to engage with members of the stigmatised community in a Community Court, in order to avoid also being tarnished by the stigmatisation—professional reputation, media scrutiny, attacks by politicians, for example. Some magistrates may also believe that involving community members in Community Courts may mislead Aboriginal people to believe that their law, their way of life is recognised and respected by the criminal justice system. At least one local practitioner has suggested that it is best to disavow them of such hopes, as there is now 'no place for Aboriginal law in NT courts'.[23]

In this environment, it is hardly surprising that courts no longer permit community participation in court processes. Stigmatisation justifies enforced Intervention. This is fertilised by trends continuing since the late twentieth century that privilege victims' interests, retribution, and protection of the wider community[24] and that increase fears based on dubious quantifications of risk.[25] This story must also be understood as part of an ongoing colonial narrative,[26] one in which a discourse and mindset of

anti-Indigeneity recurs. The current strategy of territorial stigmatisation may finally secure control of this space in which Aboriginal people have continued to exercise domain as Aboriginal people. In order to achieve this, Wacquant predicts that the social capital of Aboriginal people will be decimated, and notes that an effect of territorial stigmatisation is 'gentrification' or removal.[27]

Are Aboriginal people fated then to be victims of the predicted effects of Wacquant's model of territorial stigmatisation? The answer is: no. Wacquant's model is not deterministic. It is useful to help us make sense of our observations and to predict that we *may* continue on this trajectory. As in any social field, pressure can be brought to bear, and culture is constantly changing. Aboriginal people in the Northern Territory have already demonstrated that territorial stigmatisation can be overcome. Consider the changes that occurred over the course of the twentieth century. Once denigrated and excluded in reservations and missions and subjected to extreme governmentality, by the 1990s many Aboriginal people in these remote settlements reconstructed themselves not as located at the margins but at their own centre, running their own councils, issuing entry permits, etcetera. This is not to suggest that Aboriginal people had crafted for themselves out of colonisation some sort of utopia, but there had been a significant turnabout.

It is also important to remember that the denigration of Aboriginal cultural practice and customary law in Commonwealth law is only one construction, and that Intervention and anti-Indigeneity are hotly contested.

CONCLUSION

The means of the NTNER were supposed to justify the ends—the suspension of race discrimination laws, and the rejection of pluralism, self-determination, participatory planning and other reconciliatory engagements were all supposed to be temporary measures, subject to a five year sunset clause that expired in 2012. But reprehensible aspects of the NTNER have been saved by the *Stronger Futures* policy. The impacts of stigmatisation have been so effective that section 91, for example, was entrenched in the *Crimes Act 1914* (Cth) in a new section 16AA.

Community participation in justice processes present opportunities for positive engagement, consultation, understanding and reconciliation. These important opportunities for improving justice processes and outcomes are currently being undermined by the stigmatisation of Aboriginal people, their way of living and their communities. Legislative provisions that attempt to regulate the attitude of judicial officers to Aboriginal law and cultural practices represent significant obstacles to such an engagement. There is no legal impediment to most Community Courts preceding. Nevertheless, it will require wisdom and courage for a judicial officer to successfully take on the challenge of Community Courts in the current hostile environment.

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1 Mary Spiers Williams, 'The Impossibility of Community Justice Whilst There is Intervention' (Paper presented at the 5th Annual Australian and New Zealand Critical Criminology Conference, 2011) 2-3, 6-7.

2 This article refers throughout to field observations, interviews and personal communications conducted as part of doctoral research in the Northern Territory of Australia between 2010 and 2012.

3 Rex Wild and Pat Anderson, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (NT Government, 2007) recommendation 74.

4 Northern Territory Magistrates Courts website <http://www.nt.gov.au/justice/ntmc/specialist_courts.shtml> accessed 31 January 2013. The *Sentencing Act 1995* (NT), s104A only applies to adult offenders; there is a view that juvenile Community Courts can continue.

5 Chief Magistrate Bradley, 'Community Court, Darwin: Guidelines' (2005) <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf>.

6 Margaret Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87.

7 See, eg, Audrey Bolger, 'Aboriginal women and violence: A report for the Criminology Research Council and the Northern Territory Commissioner of Police' (ANU North Australia Research Unit, 1991).

8 Nanette Rogers, *Aboriginal law and sentencing in the Northern Territory Supreme Court at Alice Springs 1986–1995* (PhD Thesis, University of Sydney, 1999).

9 See, eg, Joan Kimm, *A fatal conjunction: two laws, two cultures* (Federation Press, 2004).

10 See Megan Davis and Heather McGlade, *Background paper on international human rights law and the recognition of Aboriginal customary law* (Law Reform Commission of Western Australia, 2005).

11 See for example Judy Atkinson, 'Book Review - A Fatal Conjunction Two Laws Two Cultures' (2006) 6(20) *Indigenous Law Bulletin* 20-2.

12 See, eg, Sally Engle Merry, 'Human rights law and the demonization of culture (and anthropology along the way)' (2003) 26 *Polar: Political and Legal Anthropology Review*.

13 Peter Sutton, 'The Politics of Suffering (The Inaugural Berndt Foundation Biennial Lecture)' (Paper presented to the Annual Conference of the Australian Anthropological Society, 23 September 2000).

14 See, eg, Jane Lloyd, 'Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council welcomes State and Territory legislation that will protect Aboriginal children from abuse' (2004) 6 *Indigenous Law Bulletin*.

15 s 104A of the *Sentencing Act 1995* (NT) is lengthy and can be accessed at <http://www.austlii.edu.au/au/legis/nt/consol_act/sa121/s104a.html>.

16 *Police v D* [2006-2007], Nhulunbuy Court of Summary Jurisdiction, before Blokland CM; cited in Jenny Blokland, 'Remote Justice' (Criminal Lawyers Association of the Northern Territory Conference, Bali, July 2007).

17 S 91 replicated s 16A of the *Crimes Act 1914* (Cth), introduced about a year earlier. For an account of the explanations for and objections to s16A see, Catherine Lorimer and Susan Harris Rimmer, *Bills Digest Crimes Amendment (Bail and Sentencing) Bill 2006 Information analysis and advice for the Parliament 27 November 2006* (2006). The full text of Section 91 can be found at <http://www.austlii.edu.au/au/legis/cth/num_act/ntnera2007531/s91.html>.

18 For example, where the offences relating to damaging sacred sites, see *Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd* [2011] NTSC 3; or where the offence arises from attempted Aboriginal dispute resolution processes, see *Police v Dickenson & Ors* (No. 20920499 etc). Alice Springs Court of Summary Jurisdisction, various dates including 1 December 2010 discussed in Spiers Williams, above n 1.

19 Mary Spiers Williams, 'Making sense of 'riot': the fragile legitimacy of public order offences in an Intervention' (Paper presented at the 6th Annual Australian and New Zealand Critical Criminology Conference, Hobart, July 2012).

20 Loïc Wacquant, 'Territorial stigmatization in the age of advanced marginality' (2007) 91 *Thesis Eleven* 66.

21 Russell Goldflam, 'The (Non-) Role of Aboriginal Law in Sentencing' (Uluru Criminal Law Conference, Uluru, July 2012) 11.

22 Thalia Anthony, 'Late Modern Developments In Sentencing Principles For Indigenous Offenders: Beyond David Garland's Framework' (Proceedings of the 2nd Australian & New Zealand Critical Criminology Conference, Sydney, 2008).

23 Goldflam, above n 21.

24 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001).

25 See, eg, Pat O'Malley, 'Criminologies of Catastrophe? Understanding Criminal Justice on the Edge of the New Millennium' (2000) 33 *Australian & New Zealand Journal of Criminology* 153.

26 Anthony, above n 22.

27 Loïc Wacquant, 'Relocating gentrification: the working class, science and the state in recent urban research' (2008) 32 *International Journal of Urban and Regional Research* 198.

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