THE AURUKUN RAPE CASE, INDIGENOUS SENTENCING AND THE NORMALISATION OF DISADVANTAGE

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This short article uses the so-called 'Aurukun rape case'[1] as a vantage point from which to argue that the judicial system, and media representations thereof, continue to confine the Indigenous subject within the expectations of colonial prejudice. Whilst this is hardly a novel statement within the context of critical legal studies, comparatively little attention has been paid therein to the contemporary discourse of Indigenous sentencing initiatives, which seek to recognise chronic disadvantage as a mitigating factor in the sentencing of Indigenous offenders. Given that the sentencing judge in the Aurukun rape case, Judge Sarah Bradley, is a judicial proponent of such initiatives, the original sentencing decisions in the Aurukun case provide a context in which to consider what Indigenous sentencing seeks to achieve, and why.

The literature concerning Indigenous sentencing initiatives, including extra-curial writings of Judge Bradley, posits that there is an 'Indigenous justice' that is necessarily different from, but ultimately subject to, white law. Drawing on judicial scholarship, media representations and critical theory, it will be argued that the impulse to recognise Indigeneity in sentencing decisions does not disrupt the colonial desire to enforce white sovereignty. On the contrary, this iteration of 'Indigenous justice' habitually reinscribes popular understandings of Indigenous people as inherently dysfunctional, so as to reconcile broader political demands of justice with the incontestability of judicial authority.[2] This discussion concludes that, so long as they can do no more than imagine the subjectification of the Aboriginal object to white law, Indigenous sentencing initiatives will do little to challenge the chronic prejudice that informs legal and political approaches to Aboriginal disadvantage.

I The Aurukun Rape Case: Facts and Background

The Aurukun rape case dealt with seven juveniles and two men charged with raping a 10 year-old girl, 'LK', on 12 occasions during May and June of 2006. In August 2007, the case was heard by Judge White in the Cairns District Court, with guilty pleas entered for all defendants. The public prosecutor sought 12 months' probation for the seven juveniles, and six months' wholly suspended imprisonment for the two adults. Judge Bradley sentenced the defendants accordingly in proceedings held in Aurukun on 24 October, and back in Cairns on 7 November. No appeal of these sentences was made from the Queensland Attorney-General's Office at that time.[3] On 10 December, *The Australian* newspaper reported part of the transcript of the juveniles' sentencing proceedings.[4] By 11 December, the Aurukun case was an international news story, reported in the USA and England as well as in all major Australian newspapers. By that stage, the transcript of the sentencing proceedings was suppressed by the Cairns District Court, and accordingly most of the coverage centred on the following part of Judge Bradley's closing comments as reported in *The Australian*: 'I accept that the girl involved, with respect to all of these matters, was not forced and that she probably agreed to have sex with all of you'.[5] The Queensland Attorney-General appealed the case on 12 December 2007 – outside the timeframe for appeal – on grounds that Judge Bradley erred in giving disproportionate weight to the offenders' social and cultural status.[6] The Queensland Court of Appeal handed down its decision on 13 June 2008, overturning Judge Bradley's sentencing decisions in all nine cases, and ordering terms of imprisonment from three to six years for five of the nine offenders.[7]

The dramatic media response to Judge Bradley's decision can be considered as a continuation of the coverage of the

Commonwealth Government's incursion during the second half of 2007 into the management of Aboriginal affairs in the Northern Territory, known publicly as 'the Intervention'. As is well known, the Intervention followed the completion in June 2007 of the report by the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: 'Little Children Are Sacred'* ('*Little Children Are Sacred*').[8] Detailed in the report were chronic health and safety threats to Aboriginal children due to sexual abuse, issues that – as later asserted by then Northern Territory Chief Minister Clare Martin – were already notorious policy problems at both Territory and federal levels.[9] The Howard Government used the report as a catalyst for the *Northern Territory Emergency Response Act 2007* (Cth) and other legislation,[10] thereby effecting a categorical sweep across all aspects of government interaction with Aboriginal people in the Northern Territory, from welfare quarantining, to curfews, to land-use agreements.

Amongst the intense media attention attracted by the Intervention, most of the coverage openly advocated 'mainstream' involvement in the improvement of living conditions in remote Aboriginal communities as the solution to chronic disadvantage. However, it was evident by December 2007 that the Intervention was neither fully implemented on its own terms – that is, solely as a response to child abuse in remote Indigenous communities – nor yielding any identifiable improvement in the health and safety of Aboriginal children. Many commentators publicly questioned the motivation and validity behind the Intervention's policies, some spurred on by the Howard Government's loss of the federal election on 24 November that year.[11] Against this background, it is understandable why media coverage of the Aurukun case grew so rapidly. Not only did the case invoke the profitable theme of sexual violence, but it provided an opportunity to both pronounce the recently deposed Howard Government's Intervention a failure[12] (despite its operation within the Northern Territory, not Queensland) and, it is argued, to reiterate the intransigence of Aboriginal dysfunction in the face of that failure.

II Media Representation of the Case

Media coverage of the Aurukun case had a direct impact on legal and political responses to Judge Bradley's sentencing decision. The events of 10–12 December demonstrate the close interaction between media, judicial and political processes that attended the Aurukun case. As mentioned earlier, four or five weeks elapsed between Judge Bradley's sentencing decisions on 24 October and 7 November, and *The Australian*'s 'exposé' on 10 December. The period for appeal from the Queensland Attorney-General, Kerry Shine, lapsed a month after each decision, on the 24 November and 7 December respectively. On the morning of 10 December, the Attorney-General was contacted by journalist Tony Koch for comment. Official responses to Judge Bradley's decision was from thereon aggressively prompted by the media: that day, the Attorney-General lodged an application for an extension of time to appeal Judge Bradley's sentencing decision in the Cairns District Court; Queensland Premier Anna Bligh made statements to the media condemning the conduct of the prosecutor in the case, Steve Carter; and Prime Minister Kevin Rudd said he was 'disgusted and appalled'[13] at the outcome of the case. On 11 December, the prosecutor was stood down,[14] and the Attorney-General commissioned an inquiry into sentencing patterns in Cape York sexual abuse cases, with a particular focus on the Aurukun rape case.[15] On 12 December, the Chief Justice of the Queensland Supreme Court agreed to hear the Attorney-General's appeal despite the lapsed deadline, ensuring that the appeal would be heard 'swiftly'[16]. Whilst this blurring of media, political and legal processes is hardly confined to cases involving Indigenous defendants, it casts doubt on whether judicial approaches to Indigenous justice are inherently less susceptible to popular pressure than political ones.

In any event, media coverage itself was from the outset directed more to chronicling political and legal responses to *The Australian*'s 'exposé' than to investigating the case itself. In this sense 'the story' was Judge Bradley's sentencing decision, and possibly even the media's exposé of that decision, but not the abuse itself.[17] It is difficult to attribute this focus solely to the media's respect for child protection laws; few media reports consulted Indigenous people, or researchers on sexual abuse in Indigenous communities, or workers in the Aurukun community.[18] The result of this lack of context was the repeated rearrangement in media reports of Judge Bradley's comment 'she probably agreed to have sex with you', the prosecutor's comment 'although she was young, she knew what was going on', and Prime Minister Rudd's comment 'I'm disgusted and appalled by what I've seen'.[19] This recycling of quotes was accompanied by the recycling between news bureaus of photographs and news footage of Aurukun, most of it predating December 2007.[20]

This seeming laziness about facts and context arguably reflects a deeper tendency in media representations of the Aurukun case to normalise the sexual abuse at its heart. The focus on parts of the exchange between the prosecutor and Judge Bradley, and not on the fact of the repeated rape of a 10 year-old girl by seven juveniles and two adults, seems to indicate that such conduct in Aboriginal communities is inevitable. The issue became the 'inadequate' response of the legal system to such conduct, a response which, as repeated by Queensland Premier Anna Bligh in an interview on 11 December, was 'completely out of touch with community expectations'.[21] In the formulation of Hartley and McKee, media coverage shifted from 'Indigeneity as anomaly' to 'Indigeneity as law-formation';[22] away from deploring the facts of the case, and towards calling for stricter law enforcement and welfare policies across Cape York.[23]

III 'Justice': Aboriginality as Dysfunctionality

Popular resignation to chronic dysfunction in Aboriginal communities is perhaps an unusual place to begin consideration of how legal notions of justice operate within the discourse of Indigenous sentencing. It is nevertheless argued here that such resignation is implicit in the practice of applying distinct sentencing principles for Indigenous defendants. This acceptance of difference as normal might well spring from liberal, and less commonly, postmodern intentions;[24] as Judge Bradley quotes in the liberal mode, 'there is no greater inequality than the equal treatment of unequals'.[25] Yet it can also be argued that such resignation works to define the Indigenous defendant according to expectations of dysfunction.[26]

These postulations of an 'Indigenous justice' lead to an obvious question: what concept of justice is being invoked in the literature on Indigenous sentencing initiatives? The majority of legislative and judicial contribution to the discourse occurred in response to the 1991 Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'),[27] which concluded that

> substantial change in the situation of Aboriginal people in Australia will not occur unless government and non-Aboriginal society accept the necessity for Aboriginal people to be empowered to identify, effect and direct the changes which are required.[28]

The objectives of Indigenous sentencing initiatives, although generally articulated in similarly broad terms of 'self-determination and self-management',[29] are nevertheless quite difficult to glean. Magistrate Annette Hennessy, a prominent advocate of Indigenous sentencing initiatives, describes those objectives as 'promoting involvement of local Indigenous communities in the Court system resulting in more culturally appropriate sentencing processes'.[30] Judge Bradley uses 'Indigenous Justice' and 'restorative justice' interchangeably, and advocates 'more meaningful and effective' and 'more culturally appropriate' sentencing.[31]

Such generality of language generally works to obfuscate what 'justice' requires in the Indigenous context, and frequently omits to consider altogether why it is necessary to single out that context at all. In other words, Indigenous justice initiatives themselves do not define the content of the justice they invoke as their end. This tendency reflects Shklar's assessment of the predominant model of justice as indifferent to the causes of injustice in its quest for rationality and order.[32] Perhaps it should be unsurprising that Indigenous sentencing initiatives avoid engagement with the causes of injustice, given Brennan J's recognition in *Mabo* of the inability of the legal system to question colonial sovereignty.[33] The reluctance of the literature to look beyond symptoms such as 'over-representation in the prison system' and 'social dysfunction' functions as an implicit acknowledgment of the court system's inability to address the injustice of white sovereignty in any but palliative ways.[34] This inability creates two issues. Firstly, the ahistorical representation of social dysfunction in such cases creates an impression that dysfunction is not situational but inherent.[35] Secondly, if Indigenous sentencing initiatives are unable to implement the RCIADIC's recommendations for greater self-determination, 'Indigenous justice' as invoked in the literature is defined by its continuity with white law.

IV The Aurukun Defendants: Objects of and Subject to White Law

If Indigenous sentencing initiatives function to reinforce white authority, it must be asked whether and how their application affected the original Aurukun sentencing decisions. Direct consideration of these questions cannot address the absence of seven boys, two men and two girls from both the media and legal representations of the case. Nor is it within the capacity or intention of this essay to do so. It nevertheless warrants notice that the juvenile

defendants W, K, W2, P, A, Y and K3, adult defendants B and K2, the girl complainant LK, and the second complainant T,[36] exist beyond the confinements of these representations. It may be more correct to say that nothing of those 11 people exists in these representations, beyond their objectification as Aboriginal and therefore dysfunctional; or as Fanon would have it, inferior and uncivilised.[37] It is argued here that the Aurukun sentencing proceedings began from this presumption, and from there envisaged the transformation of the uncivilised object into the obedient subject.

It would unfair to level assertions of objectification at the approach of Judge Bradley to the sentencing proceedings were it not for the fact that the judge consistently neglected to distinguish between defendants. Subsequent commentary has suggested that this was due to circumstantial time constraints placed upon the judge on circuit.[38] However, such suggestions do little to justify why, in direct contravention of the *Juvenile Justice Act 1992* (Qld) and *Penalties and Sentences Act 1992* (Qld),[39] the criminal histories of all nine defendants were not considered or insisted upon in sentencing proceedings. Judge Bradley effectively provided two decisions – juvenile and adult – as opposed to nine.[40] Perhaps the gravest gesture of objectification was the failure of the judge to insist upon the provision of the child LK's victim impact statement, again in contravention of the two aforementioned Acts.[41] The effect of sexual abuse on the child LK was effectively erased from the case.[42]

This objectification of defendants and complainant as dysfunctional by the Court provided the basis onto which the subject of Indigenous justice was projected during the sentencing proceedings. The exchanges between Judge Bradley and the prosecutor and defence counsel project an expectation that the dysfunctional subject can be rendered obedient, if the appropriate modes of legal intervention are applied. The language used by the defence lawyer therein attempts to ensure the Court of his clients' future capitulation to white law.[43] Similar language was used by the prosecutor in seeking parole without conviction for the seven juveniles; at numerous points, he infers the offences are normal in the Aurukun community.[44] This impression is left undisturbed by Judge Bradley's sentencing decision, which accepts the defendants as obedient subjects by exhorting them to 'be good' and 'stay out of trouble'.[45] The transcript ultimately creates the impression that what is occurring is less judicial procedure than paternalistic management of a degenerate community.

This management indeed seems to be supported by Justice Geoffrey Eames, who argues that the vacuum of effective government in Aurukun has shifted the burden onto the justice system and members such as Judge Bradley, who should be 'commended' for taking on the community management role.[46] However, given Eames' disquiet about the failure of government in this regard, it remains unclear why the justice system should, in the absence of clear objectives or adequate funding, step out of its judicial role and into the breach left by government by engaging in sentencing practices unique to Aboriginal offenders. Given Brennan J's admission in *Mabo* that Australian courts cannot question the acquisition of sovereignty, and the susceptibility of legal processes to political and media influence, the dangers in doing so include avoiding the defendant's personal responsibility for their conduct, and shifting focus away from the government's failure to protect complainants. As Irene Watson asserts:

> the courts taking what is perceived to be Aboriginal culture into consideration, they contribute to making invisible the harm that is done to Aboriginal women, and while deeming Aboriginal men inherently violent they confirm the 'superiority of white men'.[47]

Despite the popular outcry around the Aurukun case – or perhaps because of it – the Queensland Government's inquiry into the sentencing decision repeatedly denied any connection between the parties' social dysfunction and their Aboriginality.[48] Although P J Davis SC, the author of the report, opens an opportunity to identify the roots of that disadvantage in insisting that any person would conduct themselves similarly if they lived in such circumstances of abject disadvantage, he immediately forecloses that potential by refusing to consider why or even acknowledging that white Australians rarely if ever do live in such circumstances.[49] Certainly such an acknowledgment is beyond his terms of reference; but it is precisely *because* it is beyond his terms of reference that his distinction between Aboriginality and Aboriginality as dysfunction collapses. If the distinction is immaterial to the law, Davis's justification of differential sentencing for Aboriginal offenders as referable to the living circumstances of those offenders and not to their Aboriginality is as likely to dehistoricise disadvantage as justifications of differential sentencing which argue to the contrary.

The Queensland Court of Appeal decision, handed down on the same day Davis's report was tabled in Queensland Parliament, engages directly with the risk of erasing the

individuality of offenders by recognising Aboriginality as a mitigating factor in sentencing. Acknowledging the history of this issue in Australian sentencing decisions,[50] the Court of Appeal ultimately cautioned that the justice system should not overestimate its ability to address the causes of chronic disadvantage in Indigenous communities such as Aurukun. Importantly, the Court recognised that such limitations are not merely practical, but fundamental to the nature of the courts' authority:

> To adopt an approach which proceeds on the basis that the courts may take judicial notice of the supposed effects of a community's dysfunction upon all or any of its members, is to engage in the kind of stereotyping which was deprecated by this and other Australian courts in the cases to which we have referred. This approach diminishes the dignity of individual defendants by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of observing the standards of decent behaviour set by law. A choice to implement measures specially adapted to the problems of particular local communities is a legislative choice open to the Parliament as a matter of policy; but, as a matter of principle, it is not the kind of choice open to the courts.[51]

Although this conclusion may not satisfy those seeking a clear resolution to the questions raised by the Aurukun case, at the very least it is careful not to overstate the capabilities of the justice system in answering those questions. The Court of Appeal's decision implicitly acknowledges that substantive improvement in the options available to the men and women of Indigenous communities such as Aurukun cannot be achieved without broad political commitment. This is an uneasy conclusion, perhaps, but one that ultimately shifts the spotlight back onto the audience in front of which the tragedy of the Aurukun rape case was aired.

V Conclusion

It is not the intention of this paper to deny the existence of difference between Indigenous and non-Indigenous peoples, but rather to question the right of non-Indigenous peoples alone to define what that difference might be. This question implicates all arms of the state, including the judicial system, and at bottom, the Australian constituency; and so long as white sovereignty is incapable of questioning itself, the question will continue to go unasked and therefore unheard. Shifting the responsibility for demarcating Indigenous difference from government to the judicial system cannot alter the fact that white expectations continue to define the subject of 'Indigenous justice'. This is particularly so given the judicial system's acceptance of its fundamental inability to question colonial authority.[52] As Watson asks of the inability of sentencing initiatives to consider Indigenous sovereignty,

> what is really going on in those spaces which purport a recognition of Aboriginality; what is being recognised? The right to assimiliate? Assimiliation is no right at all, rather a charted course to annihilation.[53]

Unable to place the injustice of Aboriginal social dysfunction in an historical context that directly implicates white law, such sentencing initiatives work to normalise dysfunction as inherent to Aboriginality, rather than opening up real possibility for substantive self-determination as recommended almost 20 years ago by the RCIADIC. So long as principles of 'Indigenous justice' apply only to sentencing decisions, where the offender has already become subject to the authority of white law, the judicial system cannot challenge but only perpetuate the colonial prejudice that attends most interpretations of the historical and political causes of Aboriginal disadvantage in Australia.

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1 The original sentencing decisions of the case were unreported, though they have been summarised in P J Davis, assisted by Craig Eberhardt, *Review of Cape York Sentences* (2008) Queensland Parliament <http://www.parliament.qld.gov.au/view/legislativeAssembly/tableOffice/documents/TabledPapers/2008/5208T3682.pdf> 17 July 2009. The Queensland Court of Appeal decision in which the original sentencing decisions where appealed is *R v KU; Ex parte Attorney-General (Qld)* [2008] QCA 154 ('*R v KU*').

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, [31] (Brennan J).

3 'There was, initially, no appeal against the sentences by the Attorney-General. The Attorney-General had received no report from the Director of Public Prosecutions on the sentences and was therefore unaware of what had occurred. The matter then came to the attention of the Attorney-General via the media. The Attorney-General has filed applications for extensions of time to appeal the sentences.' From Davis, above n 1, 6.

4 Tony Koch and Padraic Murphy, 'No Jail for Rape of Girl, 10 – Judge Says Victim "Probably Agreed" to Gang Sex', *The Australian* (Sydney), 10 December 2007, 7.

5 Ibid. The remainder of that sentence went as follows: 'but you were taking advantage of a 10 year old girl and she needs to be protected, and the girls generally in this community need to be protected'. Davis, above n 1, 71.

6 *R v KU* [2008] QCA 154, [113]–[117].

7 Ibid.

8 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle – 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

9 Barney Zwartz, 'Martin Condemns NT Intervention', *The Age* (online), 3 September 2008 <http://www.theage.com.au/national/martin-condemns-nt-intervention-20080902-481z.html> at 17 July 2009.

10 These included the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); and *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth). See further Department of Families, Housing, Community Services and Indigenous Affairs, *NT Emergency Response: Legislation*, Australian Government <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/Pages/about_legislation.aspx> at 17 July 2009.

11 Jennifer Martiniello, 'Howard's New Tampa: Aboriginal Children Overboard' (2007) 26 *Australian Feminist Law Journal* 124.

12 Zwartz, above n 9.

13 Cosima Marriner, 'Fury As Gang Rapists Avoid Prison', *The Age* (online), 11 December 2007 <http://www.theage.com.au/news/national/fury-over-aboriginal-rape-sentences/2007/12/10/1197135374429.html> at 17 July 2009.

14 Margaret Wenham, Peter Michael and AAP, 'Aurukun Rape Prosecutor Stood Down', *The Courier-Mail* (online), 12 December 2007 <http://www.news.com.au/couriermail/story/0,23739,22910310-952,00.html?from=mostpop> at 17 July 2009.

15 See Davis, above n 1.

16 Tony Koch, 'Gang Rape Appeal To Be Heard "Swiftly"', *The Australian* (online), 12 December 2007 <http://www.theaustralian.news.com.au/story/0,25197,22910379-601,00.html> at 17 July 2009.

17 Tony Koch and Padraic Murphy were awarded a Walkley Award in 2008 for breaking the story. Koch was also awarded the 2008 Sir Keith Murdoch Award for Excellence in Journalism for his coverage of the Aurukun case for *The Australian*.

18 Notable exceptions included footage of comments of Professor Boni Robertson on television channels ABC Television, Channel Nine, and Channel 10 on 11 December; and a feature interview on the ABC's *7:30 Report* on 12 December 2007 with Don Greene, former employee of the Queensland Department of Child Safety in Aurukun. See <http://www.abc.net.au/reslib/200712/r212919_820513.asx> at 17 July 2009.

19 Tim Johnston, 'Australia Shocked By Case of Raped Indigenous Girl', *The New York Times* (online), 11 December 2007 <http://www.nytimes.com/2007/12/11/world/asia/11australia.html> at 17 July 2009.

20 ABC Television, for example, showed the same footage of the Aurukun courthouse exterior and of a Range Rover sharing a road with stray dogs numerous times in each of its television news reports on Aurukun between 10 and 12 December.

21 See ABC Television, 'Child Safety Failed Rape Victim: Bligh', *The 7:30 Report*, 12 December 2007 <http://www.abc.net.au/7.30/content/2007/s2115957.htm> at 17 July 2009.

22 John Hartley and Alan McKee, *The Indigenous Public Sphere: The Reporting and Reception of Indigenous Issues in the Media* (2000) 71–95.

23 Editorial, 'Pack Rape Leads to Culture of Denial', *The Australian* (online), 14 December 2007 <http://www.theaustralian.news.com.au/story/0,25197,22921159-16741,00.html> at 17 July 2009.

24 Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (2005) 27.

25 Judge Sarah Bradley, 'Using Indigenous Justice Initiatives in Sentencing' (Paper presented at the Judges Conference, Perth, 20–24 January 2007) 1 <http://archive.sclqld.org.au/judgepub/2007/bradley200107.pdf> at 17 July 2009.

26 As Professor Marcia Langton has commented, '[m]ost people have such low expectations of Aborigines … [t]hey think it is normal for them to be sick, drunk and unemployed'. Marcia Langton quoted in Zwartz, above n 9.

27 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

28 John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (1997) 212.

29 Justice Geoffrey Eames, 'Criminal Law and Sentencing Issues Amongst Indigenous Communities: Questions from Aurukun' (2008) 12(2) *Australian Indigenous Law Review* 22, 33.

30 Magistrate Annette Hennessy, 'Indigenous Sentencing Practices in Australia' (Paper presented at the International Society for Reform of the Criminal Law Conference, Brisbane, July 2006) 1 <http://archive.sclqld.org.au/judgepub/International%20society%20for%20Reform%20of%20the%20Criminal%20Law%20Conference.pdf> at 17 July 2009.

31 Judge Sarah Bradley, 'Applying Restorative Justice Principles in the Sentencing of Indigenous Offenders and Children' (Paper presented at the 'Sentencing: Principles, Perspectives and Possibilities' Conference, Canberra, 10–12 February 2006) 1–2 <http://law.anu.edu.au/nissl/Bradley.pdf> at 17 July 2009.

32 'The normal model of justice, to which we cling, is not really given to investigating the character of injustice or its victims. … The ethical ends of a theory of justice, as of justice itself, limit its intellectual range … The judicial mindset looks only at what is relevant to its social aims, not to everything we know about misfortune and injustice'. Judith Shklar, *The Faces of Injustice* (1990) 50.

33 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, [31].

34 See Judge Marshall Irwin, 'Sentencing Options: Can They Incorporate Cultural Healing', (Paper presented at the Third National Indigenous Justice CEO Forum, Brisbane, 22 November 2007) <http://www.indigenousjustice.gov.au/resources/2007_NIJF/09_irwin.pdf> at 17 July 2009. See also New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report No 96 (2000).

35 See, eg, 'Court Transcript of the Case', *The Courier Mail* (online), 12 December 2007 <http://www.news.com.au/couriermail/story/0,23739,22911515-953,00.html> at 17 July 2009; Cosima Marriner, 'Aurukun Rapists Thought Behaviour "Normal"', *The Age* (online) 14 December 2007 <http://www.theage.com.au/articles/2007/12/13/1197135656392.html> at 17 July 2009.

36 Davis, above n 1, 44.

37 Frantz Fanon, *Black Skin, White Masks* (1970) 77–9.

38 Eames, above n 29, 37.

39 *Juvenile Justice Act 1992* (Qld), s150(1)(e); *Penalties and Sentences Act 1992* (Qld)), ss 9(2)(f), 11.

40 'Other than submitting that the juvenile offenders should be the subject of community based orders and that the adult offenders ought to receive terms of imprisonment and orders avoiding them actually serving the terms, there was no attempt to distinguish between offenders.' Davis, above n 1, 80.

41 Ibid 2, 50, 76.

42 The Court of Appeal expressed astonishment over an exchange between Judge Bradley and defence counsel, which inferred that recording convictions of one of the defendants for an unrelated break and enter was of more consequence than doing so for the rape charge. *R v KU* [2008] QCA 154, [84].

43 See ibid [25].

44 In making his submissions to the sentencing judge, the prosecutor stated that the defendants 'didn't force themselves on her, threaten her, or in any way engage in any of that sort of behaviour. So, to the extent I can't say it was consensual in the legal sense but in the other – in the general sense, the non-legal sense, yes, it was. So, I then ask on that basis not to seek any periods of detention, not to seek any periods of custody, immediate custody. Unless there's anything further, your Honour, that's – those are my submissions'. *R v KU* [2008] QCA 154, [20].

45 See Davis, above n 1, 71–2.

46 Eames, above n 29, 34.

47 Irene Watson, 'The "Recognition" of Cultural Background in Indigenous Sentencing' (Paper presented at the National Judicial College of Australia Sentencing Conference, February 2008) 13 <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2008/Sentencing%20Conference%202008/papers/watson.pdf> at 17 July 2009.

48 Although there are some legislative provisions which require a sentencing judge to take into account particular factors in the sentencing of an Indigenous person, there is, of course, no general principle that Indigenous persons as a group are sentenced differently, or on different general principles to other members of the community. Such an approach, to apply the law differently as between different groups within the community, would be contrary to the law and would be a breach of the judicial oath. However, Indigenous persons in remote communities no doubt have many things in common as between themselves and many of those things are relevant to the question of sentence. It is necessary to identify these sorts of matters and analyse how they are relevant to sentencing.' Davis, above n 1, 27.

49 'The special impact of incarceration upon an Indigenous person as a result of the offender's social and cultural background is a relevant factor on sentence. Again, it is the impact upon the offender caused by his Aboriginality not the Aboriginality itself which is relevant.' Ibid 41.

50 For a short summary of this history, see Richard Edney, 'The Retreat from *Fernando* and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8.

51 *R v KU* [2008] QCA 154, [133].

52 See Shaunnagh Dorset and Shaun McVeigh, 'Just So: "The Law Which Governs Australia Is Australian Law"' (2002) 13(3) *Law and Critique* 289.

53 Watson, above n 47, 1–2.