CULTURE VERSUS GENDER

HOW THE MAINSTREAM CRIMINAL COURT SYSTEM IS STILL GETTING IT WRONG

by Professor Elena Marchetti

On 23 October 2010, a newspaper article criticising the use of Indigenous sentencing courts for sentencing offenders of family violence appeared on the front page of *The Australian*. The article claimed that 'prominent Indigenous activists' believe the courts are 'too lenient and ineffective' when dealing with offences involving family violence.[1] In making this claim the article referred to the Victorian Supreme Court of Appeal decision in *R v Morgan*,[2] in which the offender (who had imprisoned and violently assaulted his 15 year old girlfriend) was released from prison due to a reduction in his sentence as a result of having participated in a Koori Court process. The article failed, however, to address the fact that the decision to reduce the offender's sentence in that particular case was made by a Court of Appeal and not by an Indigenous sentencing court.

This paper compares and contrasts the original County Koori Court sentencing remarks in *R v Morgan*[3] with the Supreme Court of Appeal decision in order to illustrate how judicial reasoning in *mainstream* criminal courts can, in their attempt to be culturally inclusive, in fact lead to the marginalisation and disadvantage of Aboriginal and Torres Strait Islander women and children. Balancing the competing rights and interests of the Aboriginal and Torres Strait Islander, often male offender with the often female victim is difficult. However, this paper will discuss emerging sentencing court models which appear to more successfully achieve such a balance. This paper argues that a sentencing process which includes the participation of Elders and Community Representatives, and is thereby more appropriately informed of cultural protocols and knowledge, results in outcomes which better serve the rights and interests of *both* victims and offenders of family violence.

The portrayal of Aboriginal and Torres Strait Islander males as disadvantaged and oppressed by criminal justice processes attempts to recognise the devastating effects of colonisation. However, it leaves little room for considering the problems facing Aboriginal and Torres Strait Islander women and children.[4] Despite their attempts at being culturally inclusive by recognising certain traditional norms and laws, mainstream sentencing courts are nevertheless adopting a white patriarchal position by focusing on so-called 'community concerns'. These concerns typically reflect the rights of the male offender rather than the individual rights of female and child victims in matters involving family violence.[5] In order to properly consider all competing interests, courts need Aboriginal and Torres Strait Islander community involvement and input. Indeed, participants in the Indigenous sentencing court process have developed a culture of being mindful to ensure victims of family violence are heard and their interests protected. This is more likely to result in outcomes which benefit victims, offenders and the community.[6]

THE COUNTY KOORI COURT

In Victoria, the County Koori Court process commences by acknowledging and paying respects to the traditional owners of the land. The judge states:

> This is a court which respects Aboriginal culture and tradition. When this court was opened, there was a smoking ceremony and the Elders have explained to me that that is very significant. It means that people who come into this court and enter this process look to a new beginning and make a fresh start and put the past behind them and concentrate on the future … I sit in this court with two Elders and Respected Persons from the local community. … It is very important that you understand what their role in the process is. They are people with great wisdom and they are people who will assist the court understanding cultural matters and in relation to matters that affect you, your family and your community. They will talk to you and they will want to know what has happened in your life in the past and what you intend in the future.[7]

The judge makes it clear that she/he alone is responsible for making the sentence decision, not the Elders or Community Representatives, despite the fact that the Elders or Community Representatives take an active role in the discussion that ensues. The involvement of the Elders or Community Representatives is a crucial feature of the courts, since the Elders or Community Representatives who are present can speak frankly and personally with an offender, which 'can be more confronting (and also more constructive and positive) for a defendant in an Indigenous rather than a mainstream sentencing process'.[8]

R V MORGAN AT FIRST INSTANCE

Steelie Morgan appeared before the County Koori Court on 3 July 2009 for sentencing, after having pleaded guilty to committing 12 offences comprising eight counts of causing injury with intent, two counts of common assault, one count of threat to kill and one count of false imprisonment. He was 24 years old at the time he committed the offences against a 15-year old girl, with whom he had formed a relationship. The offending had occurred between 31 December 2007 and 16 March 2008. Lawson J sentenced Morgan to a total effective imprisonment term of three years and six months with a non-parole period of 18 months.

Lawson J went to great lengths to discuss the impact of the crimes on the victim. Despite the fact that the victim declined to provide a victim impact statement, Lawson J told Morgan that it was evident 'from reading her various statements in the depositional material … [that he had] caused [the victim] considerable pain and made her feel bad'.[9] Lawson J quoted from the victim's statements, emphasising that she 'suffered greatly both physically and mentally as a consequence' of the abuse.[10] She acknowledged that despite the fact the victim engaged in a lifestyle that was beyond someone her age should be living, she still needed the protection of the law since she was 'weaker and in a position of vulnerability'.[11] Indeed, Lawson J made the point that '[a]ny violence by a man towards a younger woman is to be condemned in the harshest of terms, particularly in cases like this, involving a young female in her formative years of development'.[12]

The mitigating factors which Lawson J took into account were: the plea of guilty at an early stage of the process, which spared the victim the ordeal of having to give evidence at a trial; Morgan's personal circumstances and difficult family upbringing; and the fact that Morgan was now taking 'personal responsibility' for his actions and turning his life around.[13] He had apologised to the victim and her family and community, which Lawson J said was indicative of the fact that he had understood that it was not appropriate to have behaved the way he had. The Elders who participated in the sentencing hearing endorsed the judge's views. The male Elder had emphasised that Morgan had 'scarred the victim mentally and that she will carry those scars forever' and that it was not 'acceptable for a man to act in that way towards a woman'.[14] The female Elder focused on the victim's courage in coming forward and reporting the incidents to the police. This not only allowed the victim to remove herself from the situation, it also allowed Morgan to 'come to terms with [his] underlying offending behaviours and … [his need] to deal with [his] anger management issues'.[15]

Lawson J acknowledged that agreeing to participate in the sentencing conversation was not 'an easy process for any offender' and that in fact, it was 'a very challenging process', but that that was not a factor that could be used to mitigate the sentence.[16] She noted that the benefits an offender gains from participating in the sentencing conversation relate to the information that emerges from the discussion between the Elders or Respected Persons and the offender. It allows the court to 'understand all the matters that are relevant to the proper exercise of the sentencing discretion'.[17]

R V MORGAN ON APPEAL

Morgan appealed his sentence on the grounds that it was manifestly excessive and that the significance of his participation in the County Koori Court process had not been accepted as a mitigating factor by the sentencing judge.[18] The appellate court, comprising two male justices, Maxwell P and Buchanan JA, accepted the concession of the Crown that 'that the sentence imposed could be viewed as falling outside the sentencing range applicable to this case'.[19] After briefly describing the sentencing procedure of the County Koori Court, the Supreme Court of Appeal concluded that it was 'more burdensome than appearing at a traditional plea hearing, particularly in circumstances like the present where Mr Morgan had sought reconciliation with his indigenous heritage', and that 'Her Honour was in error in holding that Morgan's participation in the sentencing conversation could not be treated as a mitigating factor'.[20] It was this line of reasoning, which the article that appeared in *The Australian* used to support the claim that Indigenous sentencing courts are inappropriately used to 'downgrade assaults on women'.[21]

In stark contrast to its hearing at first instance, the appeal gave little consideration to the impact of the crime on the victim. Instead the court concerned itself with how best to do justice for the Indigenous offender. This may be what many consider is the role of a sentencing court. However, according to sentencing guidelines contained in various sentencing Acts, sentences are also imposed to protect the community and punish the offender in proportion to the harm suffered by the victim.[22]

After outlining the facts, Maxwell P and Buchanan JA considered the two grounds of appeal. In the discussion relating to whether or not the original sentence was manifestly excessive, the appellate court justices focused on the 'extraordinary effort made by a troubled Aboriginal

offender to turn his life around' noting that '[t]he evidence as to remorse and reformation was uniquely compelling, particularly for an offender who had suffered from an unfortunate disadvantaged background.'[23] The only reference to the victim in discussing both grounds of appeal was under this first ground where the justices admitted that 'the offending upon the young victim was profound' and that 'Morgan's actions were cruel, particularly as the conduct involved the commission of domestic violence upon a vulnerable partner'.[24]

In relation to the second ground of appeal, the justices used the description of the County Koori Court process contained in the written submission provided by the Crown to determine what influence such a process had on the sentencing discretion in the particular circumstances. Maxwell P and Buchanan JA were of the opinion that:

> The 'sentencing conversation' is designed to further the reformation of an Aboriginal offender through a unique blending of Aboriginal customary law and the English common law. Participation in the process is more burdensome than appearing at a traditional plea hearing, particularly in circumstances like the present where Mr Morgan had sought reconciliation with his Indigenous heritage.[25]

There was no reference in the decision to having had personally observed and experienced a Koori Court process. In order to fully appreciate the impact and significance of an Indigenous sentencing court process on an offender, one needs to observe the process first-hand. It is otherwise difficult to fully understand what role the Elders and Community Representatives have in sentencing an offender and how their participation assists with fashioning a sentence that is better suited to the offender's situation.[26] In deciding that the sentencing judge had erred in not allowing Morgan's participation in the sentencing conversation as a mitigating factor, the justices focused solely on Morgan's rehabilitative endeavours and the fact that participation in the Koori Court process could 'itself be rehabilitative'.[27] There was no acknowledgement of the fact that the process itself had already assisted the offender by virtue of the fact that Morgan had participated in a process that was culturally appropriate and therefore more likely to be more meaningful and culturally supportive.

HOW INDIGENOUS SENTENCING COURTS CAN ENCOURAGE AN INTERSECTIONAL APPROACH

The purpose of Indigenous sentencing courts was not to give offenders an opportunity to use their participation in the process to mitigate their sentence, [28] but to:

(1) address the over-representation of Indigenous people in the criminal justice system;
(2) address recommendations by the Royal Commission into Aboriginal Deaths in Custody, in particular, those centring on reducing Indigenous incarceration and increasing the participation of Indigenous people in the justice system; and
(3) complement Justice Agreements that have been forged in Australian states and territories.[29]

Indeed, the reason given by Magistrate Chris Vass for establishing the first urban Indigenous sentencing court in Port Adelaide, South Australia, 10 years ago, was to 'gain the confidence of Aboriginal people … and encourage them to feel some ownership of the court process'.[30]

There have been a number of Indigenous sentencing court evaluations; however, since the evaluations have been jurisdiction specific, comparisons are difficult. All of the studies identified limitations in the manner in which the data were either collected or analysed, such as a lack of an appropriate control group for the purposes of comparison. The evaluations have generally found that the Indigenous sentencing courts have improved court appearance rates, but they have not had a significant impact on recidivism.[31] Nonetheless, the evaluations have concluded that Indigenous sentencing courts provide a more culturally appropriate sentencing process, which encompass the wider circumstances of an offender's and victim's life, and facilitated the increased participation of the offender and the broader Indigenous community in the sentencing process.[32]

When it comes to the inclusion of customary or traditional law in a mainstream process, feminist critiques usually focus on the emphasis placed on cultural considerations as opposed to the rights of the victim.[33] It is claimed that all too often, in such cases, there is a 'double silencing of Indigenous victims … not only [is] the victim silenced, she [is] spoken for'.[34] Instead, in the case of Australian Indigenous sentencing courts, victims are encouraged to speak,[35] and the Elders or Respected Persons who are present to assist the court when sentencing an offender, provide the court with valuable cultural knowledge. It has been noted that Elders and Community Representatives involved with the courts are strongly opposed to domestic and family violence.[36] In this way, Indigenous sentencing courts are able to transform the Anglo-Saxon courtroom process into one that is more meaningful for both victims and offenders.[37] It is only when judicial officers take an intersectional race and gender approach in making their determinations that offences involving family violence or

sexual assault can be dealt with appropriately.[38] To do so requires cultural and community knowledge, something which is usually only acquired from having Elders or Respected Persons participating in the process.

It was not the County Koori Court itself that decided participation in a 'sentencing conversation' could mitigate a sentence, but a court of higher standing in which the justices had more than likely never observed the process of an Indigenous sentencing court and, unlike the County Koori Court, had had no input from community Elders or Respected Persons. For this reason any feminist critique of the Appellate Court decision must be made within this context and not within the context of the County Koori Court process. It is important to listen to the voices of Aboriginal and Torres Strait Islander people, particularly the women when they discuss what types of responses are most appropriate for addressing crimes of domestic and family violence. Unless this is done, whiteness and, as a consequence, patriarchal reasoning, will remain 'the invisible omnipresent norm' in Australian courtrooms.[39]

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1 Richard Guilliatt, 'Aboriginal courts fail to deter offenders', *The Weekend Australian* (23 October 2010), 1.
2 (2010) 24 VR 230.
3 *R v Morgan* (Unreported, County Court of Victoria (Koori Court Division), Lawson J, 3 July 2009).
4 Elena Marchetti, 'The Deep Colonising Practices of the Australian Royal Commission into Aboriginal Deaths in Custody' (2006) 33(3) *Journal of Law and Society* 451.
5 Elena Marchetti, Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get it' (2008) *Social & Legal Studies* 17(2) 155.
6 For more information see Elena Marchetti, 'Indigenous sentencing courts and partner violence: Perspectives of court practitioners and Elders on gender power imbalances during the sentencing hearing' (2010) 43(2) *Australian and New Zealand Journal of Criminology* 263.
7 County Court (Koori Court Division), 'Procedure for the Judge to Commence a Koori Court Sentencing Conversation Hearing' (undated).
8 Elena Marchetti & Kathleen Daly, 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model' (2007) 29(3) *Sydney Law Review* 416, 437.
9 Above n 3 at 4.
10 Ibid 5.
11 Ibid.
12 Ibid.
13 Ibid 7.
14 Ibid 9-10.
15 Ibid 10.
16 Ibid 9.
17 Ibid.
18 There were three grounds of appeal but the third was not pressed. The Appellate Court did not state what the third ground of appeal was in their judgement.
19 *R v Morgan* [2010] 24 VR 230, 233.
20 Ibid 238.
21 Richard Guilliatt, 'Aboriginal courts fail to deter offenders', *The Weekend Australian* (Sydney), 23 October 2010, 1.
22 In relation to Victoria, see *Sentencing Act 1991* (Vic), section 5.
23 Above n 19, 234.
24 Ibid 233.
25 Ibid 237.
26 Elena Marchetti & Kathleen Daly, 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model' (2007) 29(3) *Sydney Law Review* 416, 422.
27 Above n 19, 238.
28 For more information on the types of documents and pieces of legislation that have outlined the goals and aims of the courts see: Elena Marchetti & Kathleen Daly, 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model' (2007) 29(3) *Sydney Law Review* 416.
29 Harry Blagg, *Crime, Aboriginality and the Decolonisaton of Justice* (2008); Daniel Briggs & Kate Auty, 'Koori Court Victoria – Magistrates Court (Koori Court) Act 2002' (Paper Presented at the Australian and New Zealand Society of Criminology Annual Conference, Sydney, October 2003); Diane Fingleton, 'The Law and Social Change' (Paper Presented at the Australian Fabians: The Inaugural Joe Harris Memorial Lecture, Brisbane, September 2007); Annette Hennessy, 'Indigenous Sentencing Practices in Australia' (Paper Presented at the International Society for Reform of the Criminal Law Conference: Justice for all - Victims, Defendants, Prisoners and Community, Brisbane, July 2006); Ivan Potas et al, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003); Queensland Government Department of Justice and Attorney-General, *Factsheet: Murri Court* (2003) Queensland Government Department of Justice and Attorney-General <http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm>.
30 Elena Marchetti & Kathleen Daly, 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model' (2007) 29(3) *Sydney Law Review* 416, 434.
31 Allan Borowski, 'Indigenous participation in sentencing young offenders: Findings from an evaluation of the Children's Koori Court of Victoria' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 465; Jacqueline Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' (2008) *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1; Anthony Morgan & Erin Louis, *Evaluation of the Queensland Murri Court: Final Report* (2010).
32 Cultural & Indigenous Research Centre Australia (CIRCA), *Evaluation of Circle Sentencing Program: Report* (2008); Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006); Anthony Morgan & Erin Louis, *Evaluation of the Queensland Murri Court: Final Report* (2010); Natalie Parker & Mark Pathé, *Report on the Review of the Murri Court* (2006); Ivan Potas et al, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003); John Tomaino, *Information Bulletin: Aboriginal (Nunga) Courts* (2004).
33 Heather Douglas, "She knew what was expected of her": The white legal system's encounter with traditional marriage' (2005) 13 *Feminist Legal Studies* 181; Rashmi Goel, 'No Women at the Centre: The Use of the Canadian Sentencing Circle in Domestic Violence Cases' (2000) 15 *Wisconsin Women's Law Journal* 293.
34 Heather Douglas, '"She knew what was expected of her": The white legal system's encounter with traditional marriage' (2005) 13 *Feminist Legal Studies* 181, 200.
35 This is particularly the case with Indigenous sentencing courts, which use the Circle Court model: Elena Marchetti, 'Indigenous sentencing courts and partner violence: Perspectives of court practitioners and Elders on gender power imbalances during the sentencing hearing' (2010) 43(2) *Australian and New Zealand Journal of Criminology* 263.
36 Elena Marchetti, 'Indigenous sentencing courts and partner violence: Perspectives of court practitioners and Elders on gender power imbalances during the sentencing hearing' (2010) 43(2) *Australian and New Zealand Journal of Criminology* 263, 277.
37 Ibid 278.
38 Indigenous sentencing courts in Australia do not, at present, deal with sexual assault offences.
39 Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (2000) xix.