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Universality: What Space Exists For Aboriginality?

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Abstract

This article explores the problem of universality and the historical exclusion and translation of Aboriginal perspectives within the context of human rights and social justice. Opinions based upon Aboriginal world views have been largely excluded from Australian mainstream society, and are generally absent for example in court decisions which refer to Aboriginal law, culture, and Aboriginality. In some instances anthropological evidence is given during court proceedings, but that evidence is still treated by Euro-centric perceptions. Translation is sometimes attempted, but it occurs across the expanse of a colonial history and as if Aboriginal culture was embedded and unaffected by the workings of colonialism. In the light of this, there is a need for an analysis of the impact of colonialism and its entrenched powers. But questions arise: to what extent can effective translations occur? How might they be determined, and what might they mean? And it is sure that the exclusion of Aboriginal community voices negates the possibility or capacity for any reliable translation of Aboriginal perspectives.

Introduction

In this article I explore the idea of universality and the possibilities of co-existence between the Australian state and Aboriginal peoples. During the initial drafting of this article in 2008 I saw a television program describing the spectacle of the Olympic Games in Beijing. China's Olympic slogan was: 'One world, one dream' and found myself drawing a comparison with conservative Australia's credo of one law, one people and asking the question which constantly arises: where is it that Aboriginal people fit within the typical nation state?

This is an 'old fashioned' article in the sense that it deals with the same old concerns which Aboriginal peoples in Australia have raised for two centuries. Each generation takes up the cudgels from our elders and predecessors who before us made the same calls for justice, and the recognition of Aboriginal sovereignty and space in which Aboriginality can live and resist assimilation into the nation state.

Fashion and trends come and go, but they also have a tendency to marginalise much of what we Aboriginal peoples have come to call the unfinished business of colonialism. In his 1978 Harvard address, Solzhenitsyn spoke on fashion and much of what he said then remains relevant today:

...in the West fashionable trends of thought and ideas are carefully separated from those which are not fashionable; nothing is forbidden, but what is not fashionable will hardly ever find its way into periodicals or books or be heard in colleges. Legally your researchers are free, but they are conditioned by the fashion of the day. ... a selection dictated by fashion and the need to match mass standards frequently prevent independent-minded people from giving their contribution to public life. (Solzhenitsyn 1978)

So what is it that is not fashionable now? Aboriginality. What is fashionable is the assimilation of Aboriginal peoples. From the time of Cook's arrival, Aboriginality has passed in and out of fashion, sometimes commodified exotica, sometimes problematic. Its fashionability is usually affected by cycles within the Australian economy. The British arrived here in a state of economic panic in 1788, and the current global economic crisis is once again affecting the displacement of Aboriginality. Germaine Greer gained media attention for her comments on Australia's colonial project. Greer, during an interview conducted by ABC Lateline journalist Leigh Sales and aired on 13th August, 2008, spoke about Aboriginal rage, in particular the rage of Aboriginal men. Aboriginal men are deemed as being incapable of getting over their rage against colonialism. She said that Australia expected Aborigines to 'get over it', but was incapable of comprehending what it was asking Aboriginal people to get over (Sales 2008). On Friday 15th August, 2008 *The Australian* ran a number of articles on Greer which alleged: she had missed the point on responsibility, (that is Aboriginal peoples taking responsibility for male violence, poverty, poor education and poor health) and she had missed the point on getting over it, (the traumas of colonialism should be repressed). Greer's attempt to engage with this central problem was exploded and recollected as a dispute between Greer and 'Aboriginal leaders' who were reported as sanctioning her for portraying Aboriginal people's future as grim and without hope, and Greer herself was written off in the accompanying editorial as being out of touch. I am citing Greer here not so much because I support her views (because on a number of occasions I have found them problematic (Watson 2007, 18-19) but because even Greer, who is accustomed to being given a reasonable media hearing, is sidelined when she supports the idea of internalized oppression as opposed to the idea of Aboriginal culture being inherently violent (Sutton 2009). The following is taken from the Australian's editorial on 15th August, 2008, p. 23:

It is no surprise that after more than 40 years abroad, she is locked in to the progressive consensus of the 1960s and 70s. What might come as news to Greer, however, is that the debate has moved on since she left in 1964. The views she espouses are no longer progressive but regressive. While she is in Australia, Greer should take the opportunity to read a Griffith Review essay by anthropologist Peter Sutton published in *The Weekend Australian* last week. Sutton said the left-wing consensus he once supported has collapsed under the weight of its own contradictions. The moral certainty of the Left "dulled our instincts about the sanctity of indigenous people's right to be free from violence, abuse neglect, ignorance and corruption.

The above cites the anthropologist Sutton as progressive and up-to-date, and the analysis of the 60s and 70s, seen as being representative of a shift towards the recognition of Aboriginal rights, and in particular self-determination, as being passé.

However, I maintain that whatever else might be leveled against the self-determination agenda, Sutton's conception of just what Aboriginal people expected of self-determination lacks depth in its political and legal scope (Sutton 2009). For example the changing of the guard from the mission-management days to the management by Aboriginal councils is seen by Sutton as representing Aboriginal self-determination. The reality was that this was a shift whereby Aboriginal management continued to manage colonial policies rather than policies determined largely by Aboriginal communities. For example the funding of community development continued to be determined by the state and federal governments. It is my argument that the shift to Aboriginal management in many ways has provided the state with the scape-goat it needed to further advance the policies of assimilation. What better way was there to secure public support for mainstreaming than to deploy Aboriginal management of the colonial project? The failure of Aboriginal-managed or designed programs, largely set up to fail due to inadequate funding and resourcing, could be then blamed upon the self-determination policy.

The emerged consensus then sees welfarism rather than colonialism, and separatism rather than assimilation, as the reasons why indigenous Australians are trapped in a cycle of disadvantage. Where Greer proposes a treaty and a conference about rage as the way forward, commentators such as Peter Sutton and Noel Pearson see education and employment as the way to break the destructive inter-generational welfare cycle. I might agree with Sutton and Pearson if not for their failure to examine other strategies which might break it. Greer correctly diagnoses the rage of Aboriginal men as a problem, but fails to enunciate its cause – the disempowerment and loss of identity that comes with long-term unemployment and a welfare-supported existence, both of which arise as a corollary of colonisation.

So Greer's ideas are out of fashion. The self-appointed fashion police at *The Australian* determine the 'proper' direction. As a result, the questions around the unlawful foundation of the colonial state and displaced Aboriginal sovereignty are archived and no longer requiring of an address. An argument airing the unlawful foundation of the Australian state is relegated to the too-hard file; it's too hard to think about, and being an old one, is deemed possibly outdated and old fashioned. Moreover, even if it were to be aired, any alternative conclusion which might alter the Australia as-we-have-it-now would be obviously unworkable. Of course, the reality of Aboriginal sovereignty has never been engaged by the Australian state. My argument is, however, that it could serve as a remedy to the ill-effects of colonialism and a way forward to developing a society based on co-existence rather than exclusion and an imposed assimilation of difference.

Of course, this article could be seen as unfashionable or outdated because it seeks to centre the Aboriginal space as a place of being forever returned to. I return to the question: Is this space one in which Aboriginality might resist and survive the demands for "one world, one dream", or in the rhetoric of the local: "one Australia, one law"? And can we have justice when Aboriginality is excluded by the call to a progress that is forever centered by western knowledge? Claims for universality overlook the facts and, again, in the words of Solzhenitsyn:

There is this belief that all those other worlds are only being temporarily prevented by wicked governments or by heavy crises or by their own barbarity or incomprehension from taking the way of Western pluralistic democracy and from adopting the Western way of life. Countries are judged on the merit of their progress in this direction. However, it is a conception which developed out of Western incomprehension of the essence of other worlds, out of the mistake of measuring them all with a Western yardstick. The real picture of our planet's development is quite different. ...It is a soothing theory which overlooks the fact that these worlds are not at all developing into similarity; neither one can be transformed into the other without the use of violence. (Solzhenitsyn 1978)

The imposition of 'one size fits all' policies always invokes resistance and subsequent winners and losers. Even a person of the stature of Greer and her competence under the interrogation of Leigh Sales has been belittled by the Australian media; Greer is a loser, a 'media slut' (Leak 2008, 22). The winners are left to bury and to screen off the foundational violence, but the Aboriginal perspectives on colonial violence still struggle to surface and establish a position somewhere else.

The exclusion of Aboriginal perspectives

With the coming of Cook and the planting of the Australian flag came the demise of an unrestricted Aboriginal space. From this historical event we are able to track the progressive exclusion of Aboriginal perspectives and ways of knowing the Australian landscape. From Cook onwards Aboriginality became contextualized as the 'Aboriginal problem'. Initially we were vermin, pests. Native did not equate to human in the coloniser's gaze. In contemporary times, that which stands as the 'proper' understanding of Aboriginality is the particular view promoted by the mainstream Australian media.

What is not 'proper' is diversity of Aboriginal community perspectives, but it is these that provide the commentary and are able to contribute as the defining voices of Aboriginality. Evidence of this was seen in 2006-2007 in the buildup to the announcement of the Northern Territory Intervention. The media portrayal of Aboriginal Australia was one of large-scale dysfunction, and the lack of capacity to be otherwise without the intervention of the Australian military. Aboriginal culture was represented as being inherently violent and that without the intervention of the Australian military and the police Aboriginal women and children would be further damaged.

The Aboriginal voices that are most often represented in the Australian media are those which 'fit' with current trends and, taking up most of the space, they become the 'representative' Aboriginal voices. They are included because their opinions are tolerable to the Australian government. Voices which are close to the state's agendas are promoted and will appear to influence the direction of Aboriginal futures in Australia. Whether ultimately these Aboriginal voices will have an impact on a state agenda which has already been predetermined is unlikely. The assimilation of Aboriginal peoples has always been the aim. Aboriginal voices that either support or don't challenge the assimilation agendas of the state are the first

heard and are most often deemed to be representative by the press and its public, while critical Aboriginal voices remain marginal and are deemed irrelevant. It is difficult to create a space where both critical opinions and an Aboriginal-centered world-view approach can be represented to the Australian public. If we are to conclude that it is unlikely that the state will enable the representation of both a critical dialogue and one which centers Aboriginal world views, then what possibility exists beyond that of assimilation? I see no other possibility as long as the state fails to engage with both critical and Aboriginal world view approaches. If assimilation is the conclusion we have reached in the discourse on Aboriginal rights, then clearly there is no act of state recognition because assimilation is no right at all; rather it is a charted course to the annihilation and genocide of Aboriginal peoples.

Acts of translation

The translation of Aboriginality and its recognition occurs across the expanse of a colonial history and in the past this process of translation has been managed by the colonial project which has represented Aboriginality as though culture were embedded and unaffected by the effects of colonialism. But when we speak broadly of Aboriginal culture, whose culture is it? How much of the colonial project is part of the 'Aboriginal culture of violence' a concept which the state, with the assistance of the media, has come to represent.

As the colonial centre is held by its own force and power, to what extent is the Aboriginal problem, particularly violence against women and children, affected by that centre? When we interrogate the 'Aboriginal problem', what possibility is there to look at it through Aboriginal eyes, particularly when the power to speak from an Aboriginal horizon/world view is shut down and archived to the past and deemed to be out of fashion or irrelevant.

The history of the violent colonial frontier is not interrogated to the same extent as is Aboriginal culture for their effects upon contemporary forms of violence. This is even though there is substantial evidence of violence against Aborigines in colonial history. This lack of interrogation is not unique: The history of western civilization and its impact upon the territories of indigenous peoples world-wide are being suppressed in contemporary debates, as if the violence of colonialism was non-existent.

Katrina Schlunke (2004) invokes the historical writings of the missionary Threlkeld who wrote about the rape of Aboriginal children in the aftermath of a violent massacre by the same white settler who perpetrated the Myall Creek massacre of 1838:

After killing the majority of the bark-gathering party, the men, to quote the missionary Threlkeld, reserved two little girls who were 'dreadfully injured'. Elsewhere he describes what was done to them as 'inhumanly cut for lascivious purposes' and elsewhere again 'because they were too small for them they cut them with knives.' These two girls, 'about seven years old' were then given as wives to two young Aboriginal men who were with the party, Davey and Billy. The two girls stayed with Davey and Billy, for months later Threlkeld's son sees with his own eyes the 'miserable plight' of the girls. It is from Davey that we learn of the second incident, although there had been rumours. This was the final murder carried out by the group in this place. Threlkeld again: 'The last that was murdered, was an elderly woman whose throat they cut as she stood, and then let her run away, that the blood spurted out, and when she fell they took her up while yet alive and cast her into the triangular log fire, and her infant child they threw alive without any previous injury into the flames. (73)

These and other historical acts of violence passed without interrogation, let alone penalty. The critical Aboriginal voice would ask: What traces might these violent historical events have left in Aboriginal communities of the past, to be grown up into the present and stand threatening the future? Where does this violence belong or owe its origins and whose culture might own it? Who holds the power to disown the traces of its past? Who holds the power to construct what 'Aboriginal culture' is and the power to re-inscribe Aboriginal culture as being inherently violent?

Australian law: Translating Aboriginal law and culture

The common law is the historical tradition of a particular group and cannot be applied objectively or neutrally and be equally inclusive of groups which historically sat outside the circle of inclusion.

The common law is imbued with the perspectives of the colonising culture and it holds Aboriginal people as the colonised native subjects. There is an ongoing need to critically review the impact of colonialism and its entrenched powers upon the construction and translation of Aboriginality; this is particularly relevant with the perennial exclusion of Aboriginal-centred views or perspectives and also the lack of space that is allowed for Aboriginal people to speak for and to translate our own and unique perspectives. But to what extent can effective translation occur? And what might those translations mean and how might they be determined?

The act of translation involves considering the invader's system of law and the legacy of *terra nullius*, something we have never remedied in spite of the High Court decision in *Mabo*, its rejection of the principle *terra nullius* and its recognition of Aboriginal title. Australian law has been interpreted as one law, and it has grown out of a *terra nullius* foundation. The *terra nullius* position grew out of the British perception that the Aboriginal nations didn't exist, and the people that did exist didn't have the capacity to enter into legal relations. Aboriginal peoples were deemed unworthy to own land and also deemed to be without law and forms of governance with which the invaders could treat. Aboriginal peoples have always known otherwise and now post-*Mabo* Australians have also become aware otherwise. However this has not yet translated into a solid form of recognition. Some recognition followed *Mabo*; this was to provide Aboriginal title, which could be accommodated by Australian property law. It is however the most vulnerable form of title in the Australian property law system. It fails to translate Aboriginal relationships to land in any way which effectively encompasses Aboriginal frameworks or understandings. That would in any case be a complex and difficult task mostly because outside of Aboriginal communities there is little understanding of Aboriginal frameworks, knowledges, or Aboriginal ways of being in the world.

In the act of invasion the British colonial regime not only dispossessed Aboriginal peoples of our lands but also attempted to dispossess our ways of knowing ourselves, and our ways and frameworks for interpreting the world that we live in.

As a law student I began a journey to discover how I might better understand the law and as a part of that journey I sought possible remedies which would correct the imposed legal system's inhumane, unfair and unjust treatment of my ancestors and contemporaries. That system's laws continue to deny our capacity to be naming, enacting, and asserting our own understandings of Aboriginality. I cite as an example the differences in the Aboriginal understandings of the complexity of relationships to land from those of the colonial culture from which arose the Australian property law system. It has been a struggle to engage in conversations with the state about these very different relationships we have to land and property.

The following is a sample which I have taken from recent works in progress in which I raise a number of questions that are in different stages of digestion and analysis. This work is intended to provide an analysis of extracts taken from the sentencing remarks of justices in the Northern Territory, and reviews both earlier and more recent considerations the courts have made on Aboriginality.

In *R v Muddarubba* [1956] NTJ 317, Justice Kriewaldt, [at 320] was reported thus:

...and brought in another native, Nigger, who had knowledge...

More than 50 years later I am left wondering how it was that 'knowledge' could be translated and considered by Kriewaldt and others who followed him, from within a western cultural framework which perceived the witness as 'nigger'. The interrogation of Aboriginal knowledge is clearly defined, translated and determined by the dominant culture. The question is to what extent did Aboriginal people have a role in the representation, translation and communication of Aboriginality to a non-Aboriginal world-view and culture?

In *R v Lee* SCC No. 221 (*Unreported, Northern Territory Supreme Court, Foster J, 19 November 1974*), at [13], Justice Foster stated:

...I am satisfied this man acted, in obedience to tribal custom...Ruby had been misbehaving herself in some way...[M]y understanding of the custom of most of the Top End tribes is that a husband in those circumstances is not only encouraged, he is almost required to punish...

Justice Foster thus communicated an understanding of traditional culture, but from within a colonial court which held power to dispossess those same people.

Do we later come to understand this as 'truth', that is that Aboriginal men have authority to punish Aboriginal women? And in this case there is no representation from the Aboriginal context. How does Foster come to 'know' this is the rule of Aboriginal law and how much these rules are not differentiated or effected by the fact of colonisation and the power of colonial authorities?

In *R v Scott SCC No. 83 (Unreported, Northern Territory Supreme Court, Foster J, 24 November 1977)* at [12-13] Justice Foster makes the following distinction between "traditional punishment" and the excess of traditional limits in his sentencing remarks:

I take into account that you are a relatively unsophisticated three-quarter caste Aboriginal native accustomed to living in the bush and unaccustomed to relationships with women or, indeed, with any people at all outside the bush environment. According to the old ways you were entitled if not required to give your de-facto wife a beating. You may have thought in a muddled sort of way that a beating with fists was more merciful to her than beating with a stick which was prescribed by custom. But, of course, you went a good deal further than this and you inflicted injuries which would have been thought excessive by Aboriginal society just as they are by white society.

What is the source of this excess if as Justice Foster states this level of violence does not occur in traditional society? How might we measure those differences and approaches to excessive force then and now?

To what extent has western patriarchal and euro-centric traditions become absorbed by Aboriginal culture (Moreton-Robinson 2009)? In previous writings I have argued that violence against Aboriginal women has been constructed and misrepresented throughout Australia's colonial legal history as being inherent in Aboriginal culture and law (Watson 1998b, 2007). This misrepresentation was enlarged by the Howard federal government's intervention into Northern Territory Aboriginal communities. In June 2007 the Howard government announced it would lead an intervention into Aboriginal communities as a response to the findings of *The Little Children are Sacred Report*, (Wild and Anderson 2007) which reported upon high levels of community violence against Aboriginal children and women. Without negotiating with Aboriginal communities, the government announced its own strategy, and enacted the (Cth) *Northern Territory National Emergency Response Bill 2007*. It argued that its intervention was a 'just' and 'humanitarian' act and in response to an emergency (Watson 2009). Moreover, the short advent of a new federal Labor government saw no change: Rudd fully supports his opponent's intervention laws.

The intervention was underpinned by legislation and one aspect of those legislative measures is found in the (Cth) *Crimes Amendment (Bail and Sentencing) Bill 2006*. Prior to the amendments the (Cth) *Crimes Act 1914*, s16A allowed the court to consider any 'relevant' matter; the amended (Cth) *Crimes Act 1914*, new section 15AB(1)(b) directs that:

In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Commonwealth, or in determining conditions to which bail granted to such a person should be subject, a bail authority:

(b) must not take into consideration any form of customary law or cultural practice as a reason for: (i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or (ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.

The (Cth) *Crimes Act 1914* is unlikely to apply to the majority of crime in Aboriginal communities. The thinking was to remove the courts' discretion to consider the cultural background of offenders prior to

sentencing determinations. This shift serves as an indicator of contemporary thinking, that is that Aboriginal law condones violence against Aboriginal women and children (Keenan, M., MP 2006, 27). At the time of the debate on the Bill, the federal Attorney-General's Department was asked to identify cases in which the consideration of customary law had resulted in a more lenient sentence. Interestingly, the Department failed to provide a single case to the Senate committee (Roxon, N., MP 2006).

Australian courts appear to have shown 'sensitivity' towards Aboriginal men in matters of rape and where the cultural background of the offender has been considered by the court. Sherene Razack (1994) suggests that, at these moments, consideration

...is often about the culturalization of rape: how cultural and historical specificities explain and excuse the violence men direct at women.

In taking what is perceived by the courts to be Aboriginal law into consideration, the courts contribute to making invisible the harm done to Aboriginal women while at the same time constructing or deeming Aboriginal men as being inherently violent. Benhabib (2002) suggests that the court's use of the 'cultural defence':

...imprisons the individual in a cage of univocal cultural interpretations and psychological motivations producing stereotypes of race and culture. The paradox is that Aboriginal culture is viewed as being unaffected by colonialism, frozen in pre-colonial time as though the colonial frontier violence left no trace.

In the following Northern Territory Supreme Court decision, *The Queen v GJ (2005)*, SCC 20418849, Chief Justice Martin stated:

I appreciate that it is a very difficult thing for men who have been brought up in traditional ways which permit physical violence and sexual intercourse with promised wives, even if they are not consenting, to adjust their ways. But it must be done.

The assumption CJ Martin is making is that 'traditional culture' sanctioned violence, a view which relied upon 'expert' anthropological evidence; the views of the anthropologist's subjects remain absent from the court's considerations, as do the views of Aboriginal women. While violence within 'traditional culture' is examined from within a colonial context, the violence of colonialism and its effect upon Aboriginal peoples doesn't enter the frame. And neither the process of how an Aboriginal representation of culture and law is translated from Aboriginal to non-Aboriginal contexts is considered nor is it analysed for the accuracy of its cultural translation.

The injustice of colonial violence and its creation of inequality displaced sovereignty and the dispossession of Aboriginal peoples should be examined for its impact upon the construction and translation of Aboriginal traditional culture and law into contemporary contexts and in particular the law of sentencing. There is no space in Australia where Aboriginal culture is unaffected by colonialism, and attempts by the state to accommodate Aboriginal law and culture are done in ways which fail to accommodate its core principles. What is accommodated are those aspects which can be assimilated into the 'one-size-fits all' space. In this legal political landscape the possibility for the reception of Aboriginal frameworks is reduced to almost nil. Under the state paradigm, for example, Aboriginal relationships and obligations to country are not easily assimilated, but are easily extinguished (as we have found with native title law) and 'washed away'! However, it appears that the laws which impact upon women are less vulnerable to erasure by the law, for they are construed to assimilate into a male-centric system of laws.

Australian law has reserved to itself the power to extinguish Aboriginal laws; we have seen it in regard to Aboriginal title law and in the *Mabo* decision in particular. There are extensive writings on the failure of the High Court in *Mabo No 2* to examine the colonial foundations of Australia beyond the simple rejection of *terra nullius*. On this question see the following works by (Watson 1998a, 2002). The question might be asked then: Is there an end-point to the relevance of Aboriginal culture and law? In *R v Turner SCC No. 281 (Unreported Northern Territory Supreme Court, Gallop J, 28 November, 1979 at pp. 26-27)*, Justice Gallop made the following assumptions on pay-back, a term that is applied to Aboriginal law and is seen as providing balance and the restoration of harmony within communities, when he said:

I take account of the fact that no pay-back is contemplated, given the facts of this case, because the people he mixes with are too de-tribalised and therefore pay-back is not a consideration for me...

However, in the following dissenting minority judgement in *R v Fuller-Cust (2002) VSCA 168, Supreme Court of Victoria, Court of Appeal, 24 October 2002*, VSCA, 168, Justice Eames stated:

That to not consider the appellant's stolen-generations background, would be to sentence the appellant as 'someone other than himself'.

Commenting on the decision of the majority in the above Richard Edney (2003) suggested that:

...of the tribal/urban framework is an example of the placement of non-indigenous analytical frameworks upon indigenous communities, in the mistaken belief that such non-indigenous understandings are properly able to categorise indigenous communities. It is also a demonstration of a cultural arrogance that is associated with the colonizers in their attempt to frame and understand the experiences of persons they have oppressed.

The last two remarks make the distinction between tribalised and de-tribalised Aboriginal communities and in so doing invoke the idea of Aboriginal law and culture as having no application or place in those 'de-tribalised' zones. The perspective and view of Aboriginal peoples is negated and as Edney stated, this negation of Aboriginality or perspective constitutes cultural arrogance or the assumption that Aboriginality might be framed by those who sit outside those frameworks or understandings.

In *R v Mangukala SCC No 313 (Unreported, Northern Territory Supreme Court, Foster J, 18 April 1975)* at [16], the following sentencing remarks were made by Justice Foster, interpreting Aboriginal women as having different concerns and standards regarding sexual assault.

[T]his is a serious offence and young girls like this one must be protected against themselves. Nevertheless, I do not regard this offence as seriously as I would if both participants were white. This is of course not to say that the virtue of Aboriginal girls is of any less value than that of white girls, but simply that social customs appear to be different.

Also in *R v Lane, Hunt and Smith SCC Nos. 16-17, 18-19 and 20-21 (Unreported Northern Territory Supreme Court, Gallop J 29 May 1980)*, Justice Gallop stated:

...My function, as I see it...is not only to punish the prisoners but to encourage acceptance of the criminal law by them and by the Aboriginal Community as a step towards a more orderly and unified society. It would be inimical to this end if I imposed a harsher sentence because the prisoners are blacks...There is evidence before me, which I accept, that rape is not considered as seriously in Aboriginal Communities as it is in the white community...and indeed the chastity of women is not as importantly regarded as in white communities. Apparently the violation of an Aboriginal woman's integrity is not nearly as significant as it is in a white community.

A similar approach was taken in *R v Anglitchi & Ors SCC Nos. 316-322 (Unreported, Northern Territory Supreme Court, Muirhead J, 1 December 1980)*, where Justice Muirhead said:

This court makes allowance for what, in this case, has loosely been called tribal law, but the only law we apply must be careful to ensure that such old customs or laws are not falsely applied or utilised in exploitation of other people. I am confident that you all must have known that what you planned was quite indefensible and unlawful not only by the law that this court applies, but by the true standards of the traditional Aboriginal. True it is as I have said that there is evidence before me that an Aboriginal woman who offended, may in the past, traditionally have been required to repay sacred coitus referred to by Professor Stanner in one of his essays on mass rape...

In *The Queen v Moreen (2001) SCC 20012617*, Martin CJ more recently commented:

During the course of interview with police, you indicated that the victim had done the wrong thing in speaking to your wife as she did. That proposition was advanced before His Worship and

before this court and Mr Dumoo has been called on your behalf to support it. However, his evidence does not assist. He said that in the Aboriginal way, the victim could not talk to you at all and could not talk to your wife about what you may have been doing with that other woman.

He says that in Aboriginal culture if a man found out about such a thing being said about him, he would feel ashamed and the woman in the position of your victim would suffer punishment at the hands of older people. Prevalence of Aboriginal men beating their wives or other women is well-known.

Aboriginal women's law is given less recognition than that which is accorded the law of Aboriginal men and I have argued in other writings that this is due to the male-centricity of Australian law, (Watson 2007; Bird-Rose, D. 1996, 8). Similar arguments have been made in other colonial situations throughout the world where the position of Aboriginal women is de-centered as a result of colonisation. Rayna Green (1980) recorded: '...male-centred and inept interpretation(s) of Native American women's lives' that ultimately take over and result in an unbalanced representation of indigenous law. These interpretations then become that which is 'known' as Aboriginal law and culture, the mis-representation of Aboriginal law has also been identified in the USA, in the work of Gloria Valencia-Weber and Christine P Zuni (1995). The public know very little of the complexities of Aboriginal law, perceiving it only as being responsible for violence against women and children, rather than as a potential tool for community development (Wohlan 2005). Aboriginal women are portrayed as victims in need of rescue from violent bashing black males, and it is here that I want to make it clear and to highlight that I am not in denial of the contemporary position of Aboriginal women and children, and that it is, in some communities, critical. What I am suggesting is that the actions of individuals who are physically and sexually abusive towards women are taken as being representative of a culturally-approved norm and that Aboriginal law allows for violence against women.

Future steps

While I agree with Edney that there is a level of cultural arrogance within the judiciary in their determinations regarding questions of Aboriginality, I would also suggest there is a lack of resources, particularly in the area of translation (of both cultural context and language). Questions of culture in most contexts have more to do in fact with the socio-political and economic context of Aboriginal life in Australia. In *R v Iginiwuni SCC No. 6 (Unreported, Northern Territory Supreme Court, Muirhead J, 12 March 1975)*, Justice Muirhead made the following analysis and recommendation:

If you were European or an educated person I would have suggested that you should be psychiatrically and perhaps physically examined and I would certainly have called for a pre-sentence report to ascertain whether there were any underlying causes, disturbances or experiences which I should take into account in deciding what to do with you. But because of the difficulties inherent in your lack of so-called sophistication and language and because of the most limited facilities at present available in Darwin, I cannot avail myself of this help nor perhaps can you avail yourself of its possible advantages. I suspect there is probably some deep seated cause or factor other than drink which motivated this extraordinary act and that of course concerns me.

At the opening of the 21st Century we were taken to revisit early colonial history by a number of historians, including Keith Windschuttle. This re-visitation led to the public debate now known as the history wars, in which the validity of writings documenting a violent colonial history of massacres, cultural genocide and dispossession along the colonial frontier were refuted (Windschuttle 2002). Aboriginal peoples were advised as part of this debate to move on, to give up the 'blame game', to quit blaming Australia for the "Aboriginal problem", and to simply get over it. Instead of engaging in conversations on how to achieve the possibility of social justice, Aboriginal people were exhorted to simply move on with our lives. We were told to move on from the expectation that the state should take responsibility for the provision of essential services and resources or the return of our traditional land base.

But throughout this debate Aboriginal voices remained marginal and unreported. The dominant players asserted 'a white-washed view of history'. But the dominant conversation never engaged with the facts of inter-generational trauma and its source - colonialism, and so while the conversation is still somewhat

stuck in this space which excludes minority positions, and the colonial paradigm of blaming the “backward native” for our “failure to adapt to modernity” continues, so will Aboriginal traumas.

Is there a possibility that Aboriginal views of the world will survive and become more central to our lives? What might culture have to do with Aboriginal survival? Perhaps it has everything and nothing to do with it.

Douzinis (2000) argues that the tension between a universalist and cultural-relativist position is difficult to reconcile, particularly when both sides are convinced of the truth of their own position and committed to both a fear-of and a demonisation of the others’ position.

These tensions may be advanced by what Benhabib (2002,) describes as the insiders’ cultural space around which the boundaries of culture are ‘...securely guarded, their narratives purified, their rituals carefully monitored.’

Benhabib (2002, 8) further points out that the struggle for recognition among individuals and groups are really efforts to negate the status of ‘otherness’, insofar as otherness is taken to entail disrespect, domination and inequality. However, Aboriginality is concerned with more than the negation of otherness; it is also concerned with questions of capacity and the Aboriginal struggle to re-engage as sovereign peoples.

In conclusion I ask: Is it possible to relax the guarded borders of culture so as to navigate a peaceful settlement, where the principles of co-existence are given a more powerful presence? I am not convinced there can be a peaceful settlement when we are locked into protecting positions and where the positions being protected are compromised by fear, ignorance and misrepresentation. We need to critically examine who is locking whom into position and also to consider the extent to which Aboriginal peoples have a voice in the representation of our own Aboriginality.

References

- Benhabib, Seyla. 2002. *The claims of culture equality diversity in the global era*. Princeton, N.J.: Princeton University Press.
- Bird Rose, D. 1996. Land rights and deep colonising: The erasure of women. *Aboriginal Law Bulletin* 3 (85), 6-13.
- Douzinis, C. 2000. *The end of human rights: Critical legal thought at the turn of the century*. Oxford: Hart Publishing.
- Edney, R. 2003. The stolen generation and the sentencing of indigenous offenders. *Indigenous Law Bulletin*, 5 (23), 10.
- Green, R. 1980. Native American women. *Signs: Journal of Women in Culture and Society*, 6 (2), 248-67.
- Keenan, M. 2006. Commonwealth. Parliamentary Debates House of Representatives, 28 November.
- Leak, Bill. 2008. *The Australian*, 15 August, 22.
- Moreton-Robinson, A. 2009. Imagining the good Indigenous citizen: Race war and the pathology of patriarchal White sovereignty. *Cultural Studies Review*, 15 (2), 61-79.
- Razack, S. 1994. What is to be gained by looking white people in the eye? Culture, race, and gender in cases of sexual violence. *Signs: Journal of Women in Culture and Society*, 19 (4), 894-923.
- Roxon, N. 2006. Commonwealth, Parliamentary Debates House of Representatives, 28 November.
- Sales, Leigh (Executive Producer). 2008. *Lateline* [Television Broadcast], 13 August. Sydney, Australian Broadcasting Corporation.
- Schlunke, Katrina. 2004. Dumb places. *Balayi: Culture Law and Colonialism*, 6, 72-81.

- Solzhenitsyn, Alexander. 1978. A world split apart. Harvard Class Day, June 8, 1978. <http://www.columbia.edu/cu/augustine/arch/solzhenitsyn/harvard1978.html> (accessed September 17, 2009).
- Sutton, Peter. 2001. The politics of suffering: Indigenous policy in Australia since the 1970's. *Anthropological Forum*, 11 (2), 125-173.
- Sutton, Peter. 2009. *The politics of suffering*. Melbourne: Melbourne University Press.
- Valencia-Weber, G. and Zuni, C. 1995. Domestic violence and tribal protection of Indigenous women in the United States. *St Johns Law Review*, 69, 70.
- Watson, I. 1998a. The power of Muldarbi and the road to its demise. *Australian Feminist Law Journal*, 11, 28-45.
- Watson, I. 1998b. Naked people's rules and regulations. *Law Text and Culture*, 4, 1.
- Watson, I. 2002. Buried alive. *Law and Critique*, 13 (3), 253-269.
- Watson, I. 2007. Settled and unsettled spaces: Are we free to roam? In *Sovereign subjects: Indigenous critical engagement*, ed. Aileen Moreton-Robinson, 15-32. North Sydney: Allen and Unwin.
- Watson, Irene. 2009. In the the Northern Territory intervention what is saved or rescued and at what cost? *Cultural Studies Review*, 15 (2), 45-60.
- Wild, R. and Anderson, P. 2007. *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*. http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf (accessed June 30, 2007).
- Windschuttle, Keith. 2002. *The fabrication of Aboriginal history: Volume One Van Diemen's Land 1803–1847*. Paddington, NSW: Macleay Press.
- Wohlan, C. 2005. *Aboriginal women's interests in customary law recognition*, Background Paper No 11, Law Reform Commission of Western Australia, 1-10.