

A COUNSEL OF DESPAIR: TGH STREHLOW AND RECOGNITION OF CUSTOMARY LAW*

I. INTRODUCTION

Werte, Mparntwerenye mape.

Those were my clumsily pronounced words acknowledging country and custodianship on the occasion of the ceremonial sittings of the Supreme Court of the Northern Territory almost exactly one year ago to mark the opening of the building in which we now sit. It was a privilege for me to participate in that ceremony, and an unprecedented opportunity to address in one go the assembled heads of the three arms of the Northern Territory state: the legislature, the executive and the judiciary. I used that opportunity to say this:

In this courthouse, when it comes to sentencing and, indeed, in most matters, generally speaking we do not notice, we do not recognise and we do not allow Aboriginal law. We used to, up to a point. But we do not much now.¹

When I said “we used to, up to a point”, I was thinking in particular of a remarkable law that was in force for fifty years in the Northern Territory, from 1934 until 1984, a period which embraces TGH Strehlow’s career as an administrator, enforcer, interpreter, custodian, scholar and critic of the laws of Central Australia.

During that period, judges were required to sentence everyone convicted of murder to capital punishment (and, when the death penalty was phased out in the 1970s, to life without parole). Everyone, that is, except Indigenous murderers: section 6(1C) of the *Criminal Law Consolidation Act No. 10 1934 (SA)* provided that “where an aboriginal native is convicted of murder, the judge shall not be obliged to pronounce the sentence of death, but, in lieu thereof, may impose such penalty as, having regard to the circumstances of the case, appears to the court to be just and proper”.

During his six years’ service as a Patrol Officer from 1936 to 1942, Strehlow attended every trial involving “Aboriginal natives” in this court,² which in those days sat in the modest bungalow diagonally across the road from us here, presided over by Justice Kriewaldt’s predecessor, the notoriously stern Justice Thomas Wells, who, by the way, dismissed the notion “that Aborigines should not be subject to the White man’s law as ‘sloppy sentimentality’.”³ Unlike Justice Kriewaldt, Justice Wells was not so readily disposed to exercise the power of clemency bestowed on him by section 6(1C). He declined to use it, for example, when sending Blue Mud Bay man Dhakiyarr Wirrpanda to the gallows for spearing Constable Stewart McColl. There was a tremendous lot of fuss about this down south, and

* I acknowledge the generous assistance of Helen Edney, Hon. Michael Kirby, Pip McManus, David Moore, Alex Nelson and the Strehlow Research Centre in the preparation of this paper. Any errors are mine alone.

¹ Accessed at <http://www.supremecourt.nt.gov.au/media/documents/TranscriptofOpening-05.05.17.pdf>

² Michael Kirby, “T.G.H. Strehlow and Aboriginal Customary Laws” [1980] *AdelLawRw* 172, p. 176

³ Peter Elder, *Australian Dictionary of Biography* Vol. 16 (MUP, Melbourne, 2002)

Mr Dhakiyarr was ultimately acquitted by the High Court. As far as we know, Strehlow didn't get involved in the Dhakiyarr case, which was conducted a thousand miles away from his stomping ground. But as we shall see, a quarter of a century later Strehlow weighed in on another similarly controversial inter-racial murder case that also troubled the High Court, the case of Rupert Maxwell Stuart.

Section 6(1C) is long gone: since the commencement of the Northern Territory *Criminal Code* on 1 January 1984, anyone convicted of murder in this jurisdiction, black or white, has been subject to mandatory life imprisonment. Furthermore, since 2007, Northern Territory courts have been prohibited by Federal law from having regard to cultural practice or traditional law for the purpose of assessing the seriousness of an offence.⁴

I reflected on these matters in a paper I delivered at a 2012 legal conference at Uluru.⁵ (As it happens, Justice Mildren also spoke at that gathering. I am delighted to be able to share a platform with His Honour again this evening.) And I quoted these chilling words from TGH Strehlow, words he penned in August 1978, just two months before his death:

Despite the white man's welfare handouts, the old sense of security and intra-group human dignity appears to have been almost lost. The young men have become, it seems, virtually a lawless community, with all the horrors which that term implies. The old 'law' has lost its force, its remaining guardians can no longer control the younger generations; the new 'white man's law' has not taken any real root among the young people either.⁶

I cited this passage because it seemed to me then, as it does now, that it is as relevant – and as depressing – in our times as it was when Strehlow wrote it at the dawn of the era of land rights and self-determination, when he and his views were widely spurned and scorned. As I concluded in my 2012 paper:

The young men Strehlow was writing about in 1978 are now old or gone, but their grandsons are today's young men, filling our prisons to overflowing, and living the grim reality Strehlow inconveniently, insistently and unfashionably bore witness to.⁷

And ever since, those words of Strehlow's have continued to haunt me. This evening, I want to drill down a little into what Strehlow, who, perhaps more than anyone, had observed both whitefella law and blackfella law at close quarters, thought about their conjunction, and how he came to the position he reached. I will argue that although he died swimming against the tide when it came to the turbulent issue of recognition of customary law, the tide has since turned, and Strehlow's obdurately unfashionable views support an emerging

⁴ Section 16AA, *Crimes Act 1914* (Cth)

⁵ Russell Goldflam, "The (Non-)Role of Aboriginal Customary Law in Sentencing in the Northern Territory" (2013) AILR 17 (1), p. 171

⁶ TGH Strehlow, "Aboriginal Law" *Australasian Nurses Journal* (August, 1978), Volume 7, No. 12, p. 12

⁷ Goldflam, *supra* n. 5, p. 78

new orthodoxy. And finally, I will dip my toe in the gloomy waters of despair: Strehlow's despair, and our own.

II. STREHLOW'S COUNSEL

We are fortunate to have an authoritatively sympathetic account of TGH Strehlow's views on the recognition of customary law. Before being made a judge, Michael Kirby was the Chairman of the Australian Law Reform Commission, and, in February 1977 the ALRC was given a Reference by the Commonwealth Attorney-General to inquire into, as Kirby summarised it, "whether existing courts or Aboriginal communities should have power to apply customary laws and punishments."⁸ Chairman Kirby immediately turned to the venerably eminent figure of Professor Strehlow for counsel, requesting an audience to "have a talk with you about the Reference and about its implication."⁹ In April 1977 they duly met at the Adelaide home of Ted and Kathy Strehlow, where the professor left Kirby with the impression that he proposed to assist by providing "the elaboration of at least the broad outlines of Aboriginal Customary Laws".¹⁰

This was not the first time Strehlow had been set a task like this: in 1946, the Anthropology Section of Australian and New Zealand Association for the Advancement of Science had appointed him to a Committee briefed to conduct investigations with a view to drafting legislation that, among other things, would "preserve [the natives'] tribal institutions and customs within the framework of our own society."¹¹ After some desultory correspondence, the Committee petered out without achieving any substantial results.

This time, again Strehlow stalled. In July 1977, he sent Kirby a lengthy list of impediments to undertaking his assignment, starting with "There is no consensus of opinion among present-day aboriginals as to what 'aboriginal customary law and practices' once were", and concluding with the stark assertion that "True 'tribal law' is probably dead everywhere."

It took almost twelve months for the professor to write again to Kirby, on what, as it transpired, would be Strehlow's final birthday, his 70th. The delay was embarrassingly lengthy, but Strehlow was, in his last year, in increasingly desperate straits. His health was failing, he was irrevocably alienated from the academic establishment, his financial circumstances were fragile, and his life's work – his largely uncatalogued and disorganised mountain of field notes, journals, correspondence, recordings, photographs, tapes, artefacts and crowded memories – must have been all but overwhelming.

⁸ Michael Kirby, "Should we recognize Aboriginal tribal laws" in *Reform the Law* (OUP, Melbourne, 1983), p. 122

⁹ Michael Kirby, correspondence to TGH Strehlow, 4 March 1977

¹⁰ Michael Kirby, letter to Strehlow, 3 May 1977

¹¹ Tim Rowse, "The Collector as Outsider – TGH Strehlow as 'public intellectual', *Occasional Paper 2* (Strehlow Research, Centre, Alice Springs, 1999), pp 66-67

When he did write to Kirby, he emphatically answered the questions at the heart of the ALRC inquiry, in the negative:

It seems therefore that in another fifty years or so there will be no aboriginals at all whose beliefs, languages, or culture have remained relatively unaffected by "white" ideas, concepts and values; and the original indigenous traditions in consequence are irretrievable [sic] on the way out...

To attempt to set up two legal systems side by side would be a major mistake. More correctly, it would be an impossibility...

I disagree with the notion that it would be useful for the ALRC to find aboriginal leaders who could have responsibility in any system of law, and also with the suggestion that "the States should recognize the authority of aboriginal chiefs in a more formal way".¹²

And that, said Strehlow, was that. This was his final, peremptory communication to the ALRC. Although he had accepted with alacrity the Chairman's personal and prestigious invitation to provide advice in his capacity as an elder of the anthropological tribe, Strehlow's recorded contribution boils down to two discursive letters amounting to less than four pages of typescript, peppered with gratuitous slurs directed at assorted perceived enemies, and a summary dismissal of the whole idea of recognition of customary law. Two months later, in August 1978, Strehlow elaborated and repeated these views in a self-published pamphlet.¹³

And then, on 3 October 1978, TGH Strehlow died. This had an extraordinary impact on Michael Kirby, not least because Kirby, who had never seen a dead person before, was present.¹⁴ Kirby had travelled to Adelaide to open an exhibition by the Strehlow Research Foundation. That in itself was remarkable, because in the wake of the scandal occasioned by the unauthorised publication in Australia on 10 August 1978 by *People* magazine of sensational photographs of secret-sacred Arrernte ceremonies from Strehlow's collection, most Australians of high degree had conspicuously turned their backs on Strehlow. Two did not: his long-standing friend and colleague Professor Ronald Berndt, whose introductory course of anthropology lectures I had attended in Perth a few years before; and Michael Kirby, who was never a slave to public sentiment, and who continued to respect Strehlow as a fine, scholarly and spiritual man.¹⁵

¹² TGH Strehlow, letter to Kirby, 8 June 1978

¹³ TGH Strehlow, *Aboriginal Customary Law* (The Strehlow Research Foundation, Pamphlet No. 5, Vol. 1, August, 1978)

¹⁴ Michael Kirby, "Book Review: *Broken Song*" (2003), accessed at https://www.michaelkirby.com.au/images/stories/speeches/2000s/vol52/2003/1895-BOOK_REVIEW_BROKEN_SONG.doc

¹⁵ Michael Kirby, Personal communication, 30 January 2018

Kirby delivered the remarks he had prepared for the opening of the exhibition, and then expanded them for an article subsequently published in *The Adelaide Law Review*, in which he assembled, analysed and succinctly summed up six reasons Strehlow opposed the recognition of customary law:

Unacceptable secrecy, unacceptable substantive rules, unacceptable procedural barriers, unacceptable punishments, a fear of the legal no man's land and a caution against synthetic customary laws.¹⁶

It would be another six years before the ALRC completed its wide-ranging inquiry and published its landmark report, and in his 1980 article Kirby, quite properly, took pains not to second-guess its findings. However, he presciently noted that “critics see Strehlow as a counsel of despair, as unacceptable for Aboriginal society as for the majority community in Australia.”¹⁷ And when the ALRC report was published, after a discussion of the opposing positions of Strehlow and his critics, it adopted Kirby’s words, to the letter: “The Commission believes that Strehlow’s views represent a counsel of despair.”¹⁸

The ALRC could hardly have come to a different view: not only had Strehlow been widely discredited before his death by the *People* magazine affair, and after his death by the embarrassing and unseemly wrangling over the fate of his priceless collection of sacred artefacts, but his view was counter to the prevailing paradigm. The ALRC Inquiry was conducted as the land rights movement crested, when confidence in the model of Aboriginal self-determination was at its highest, when young activists – like myself – were full of naïve optimism that the struggle to vanquish racism and discrimination was in its final stages. Professor Strehlow with his quaint, antiquated views, was, we thought we knew, a reactionary relic.

III. STREHLOW’S JUSTIFICATION

At first glance it may seem surprising that Strehlow, who had championed Aboriginal interests throughout his life, and had earlier been an outspoken proponent of land rights and sacred sites protection,¹⁹ would adopt such an apparently rejectionist standpoint. At the time, Aboriginal people themselves strongly and consistently spoke up in favour of recognition,²⁰ including even a large group from Hermannsburg who travelled to Alice Springs to oppose the fledgling Central Land Council and the pending *Aboriginal Land Rights*

¹⁶ Kirby, *supra*, n. 2, p. 187

¹⁷ Kirby, *supra*, n. 2, p. 198

¹⁸ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (1986, Report Number 31), [121]

¹⁹ See Rowse, *supra*, n. 11, at p. 96

²⁰ For example, see ALRC, *Report on a Visit to the Northern Territory of Australia 13-16 June 1977* (ALRC, Sydney, June 1977)

(Northern Territory) Bill, and who expressed “shock” that the Bill would not recognise Aboriginal law.²¹

Nevertheless, Strehlow’s uncompromising “all or nothing” view²² as articulated towards the end of his career seems inescapable when considered in the context of his heritage, his life and his work.

First and foremost was the issue of religion. Strehlow was born to missionaries, reared on the mission, steeped in its values and trained in its traditions, and remained throughout his life deeply connected to the Lutheran community and its intellectual and spiritual heritage. Accordingly, he approached matters of faith with great seriousness, and none more so than Arrernte religion, in which he immersed himself intensely, and which he studied prodigiously and respected profoundly, without, I should add, ever becoming either a convert or an initiate.

Strehlow’s vision of traditional Aboriginal society – and in this respect his views were, unusually, anthropologically orthodox²³ – was that, unlike modern society, there was no division between secular and religious authority, and no separation between the realms of politics and ritual:

[T]he old ceremonial chiefs who met as the council of elders and acknowledged religious head of the pmara kutata [the local totemic clan centre] itself were expected to formulate religious decisions which had the force of court sentences; for as ceremonial chiefs they were also the highest authorities on all norms governing traditions and conduct in the moral and political spheres.

...

The ingkata is a priest not a king, and he functions in a community of equals; but by reason of his priestly authority he may be called upon to give decisions concerning the punishment, by organised force, of grave evildoers disturbing the peace of his community.²⁴

In Strehlow’s Arrernte world, criminal sanctions were imposed not primarily to punish an individual, but to appease supernatural forces which threatened the safety of the clan.

²¹ “Traditional ‘owners’ don’t want land controlled by councils”, *Centralian Advocate*, 4 November 1976

²² Kenneth Maddock, cited in Barry Hill *Broken Song* (Vintage Books, Sydney, 2002) at p. 755, fn. 42

²³ Diane Austin-Broos, “On reading Theodore Strehlow’s ‘Agencies of Social Control in Central Australian Aboriginal Societies’” *Occasional Paper 1* (Strehlow Research Centre, Alice Springs, 1997), p. 53

²⁴ TGH Strehlow, “Agencies of Social Control in Central Australian Aboriginal Societies” *Occasional Paper 1* (Strehlow Research Centre, Alice Springs, 1997), p. 29 (reprint of paper delivered at seminar, London School of Economics, London, 1951)

Thus conceived, Arrernte religion underpinned all traditional Arrernte legal authority, and, so Strehlow reasoned, if the religious authority was undermined, the entire legal edifice it supported would necessarily crumble.

And it was Strehlow's conviction that traditional religious authority was indeed in a state of collapse.

The massing of natives around individual white station settlements within the last seventy years led to the immediate breakdown of law and order in these native camps... The destruction of the old religion meant also the destruction of the power of the elders and the ceremonial chiefs.²⁵

There was plenty of evidence to support this view: the depredations of European settlement, the "virtually lawless" young men living on the fringes of society, the drinking, the violence, and of course, the relinquishment of the tywerrenge, the sacred ceremonial objects which had, in their hundreds, been placed in Strehlow's custody. This last fact irresistibly suggests that there was an unattractive but powerful element of self-serving self-justification in Strehlow's conviction: unless Arrernte religion was in its death throes, there could be little excuse for hanging on for grim life, as he did, to the objects he had collected.

"Tywerrenge" is a word loaded with significance. In his *Western Aranda Dictionary*, Strehlow assigns it two meanings:

- (1) The sacred objects of the Aranda
- (2) All sacred Aranda traditions and ritual, including the ceremonies, myths and songs.

He then lists eleven examples of specific ceremonial items, sites or activities featuring the word.

However, the 1994 *Eastern and Central Arrernte to English Dictionary*²⁶ provides an important additional meaning: "traditional law", supported by an example used by an Arrernte speaker. This makes intuitive sense. In English, a book such as volume I of the *Northern Territory Law Reports* can be referred to as "the law", and so are its intellectual contents. Similarly, it seems that the word "tywerrenge" refers not only to ceremonial objects, places and events, but also to the rules and precepts they express and embody, namely Aboriginal customary law. Strehlow, though, appears to have been blind to this. "I did not see", he wrote to Kirby, "any words quoted [by anthropological experts and aboriginal spokesmen] in any of the aboriginal Australian languages themselves which are the equivalents of our terms 'laws', 'norms', 'regulating conduct', or similar things."²⁷ It is almost as if he is denying that the Arrernte had conceptualised law, and again, it is hard to

²⁵ Op. cit.

²⁶ Compiled by John Henderson, and Veronica Dobson (Institute for Aboriginal Development, Alice Springs, 1994)

²⁷ Strehlow, *supra* n. 12

avoid speculating that this was actuated, at least in part, by his own concern to avoid being accused of infringing customary law by failing to prevent secret-sacred material that had been entrusted to him from being exposed to the gaze of the uninitiated public.

There were also other cogent reasons for Strehlow's insistence that customary law not be recognised. Kirby has elucidated these with admirable clarity,²⁸ and I will not repeat them. However, I add a possible further reason, based not on what Strehlow said or wrote, but on what he experienced, and what he did. In his early twenties, Strehlow had personally witnessed two traditionally sanctioned executions, in Papunya, and Mt Liebig. He watched one man being fatally speared, and another being clubbed to death.²⁹ In 1936, Patrol Officer Strehlow, pursuant to powers recently conferred on him, authorised and supervised the whipping by "the old men of the tribe" of a jealous husband who had beaten his wife.³⁰ In the 1950s his intervention, at considerable personal cost, in the Stuart case helped save an Arrernte man who had been convicted of raping and murdering a non-Aboriginal child from being hanged. Having been face to face with matters involving the infliction of punishments which are now considered unacceptable by contemporary mainstream standards, not to mention incompatible with international human rights law, it is hardly surprising that Strehlow strenuously rejected the view, which then enjoyed substantial support in progressive legal circles,³¹ that punishments such as spearing carried out by "the Old Men" should be countenanced. I do not suggest that Strehlow was squeamish, but unlike armchair progressives from down south, he had seen the agonising reality of violent punishment at close quarters.

IV. STREHLOW'S VINDICATION

For the next three decades, traditional corporal punishment continued to be inflicted in the bush under the uneasily watchful eye of Northern Territory judges. In his 1992 judgment in *R v Minor*,³² Mildren J noted that a spearing to the thigh might not necessarily be unlawful, but he also emphasised that "it would be quite wrong for a sentencing judge to so structure his sentence as to actually facilitate an unlawful act".³³ However, after Martin (BR) CJ expressly granted bail in 2004 to a man on condition that he *not* return to Lajamanu to undergo payback by spearing,³⁴ Northern Territory courts have, in effect, accepted Strehlow's counsel and refused to tolerate any such application of traditional customary law.³⁵ Even the High Court has weighed in, stating that "courts should not condone the

²⁸ See text *supra* at fn. 16

²⁹ Kirby, *supra* n. 2, p. 174

³⁰ Hill, *supra* n. 22 at pp 235, 246, 291-292

³¹ For example, Andrew Ligertwood, "The trial of Sydney Williams" *Legal Services Bulletin* (December 1976), p. 136; and Alan Ward "The wholesome precedent of Sydney Williams" *Legal Services Bulletin* (December 1976), p. 141

³² (2002) 2 NTLR 183

³³ (1992) NTLR 183, 196

³⁴ *Anthony* (2004) 142 A Crim R 440

³⁵ See Goldflam, *supra*, n.5, p. 74

commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice.”³⁶ This is not to say that violent acts committed in the name of customary law have ceased. In the 2004 case just referred to, Mr Anthony, in defiance of the order of the Chief Justice, returned to Lajamanu to submit to spearing, an outcome markedly similar to that in the 1976 case of Sydney Williams, who, having been convicted by an Adelaide jury of the manslaughter of his wife, was sentenced by Justice Wells (not stern old Justice Thomas Wells, by the way, who had died in 1954), with the following words:

I am going to send you straight back to your tribe and have you handed over to the Old Men. You must behave yourself for two years and not get into any trouble. You must do what the Old Men tell you to do for one year. You must not drink beer or wine unless the Old Men allow you to.

Wells J then ordered that Mr Williams:

return forthwith to his tribe, the Kokota [sic] tribe, and shall there submit himself to the Tribal Elders and shall, for a period of at least one year from this date, be ruled and governed by the Tribal Elders and shall in all things obey their lawful orders and directions.³⁷

As ordered, Mr Williams returned to Yalata Reserve, where, it was later prominently reported, he was speared in the thigh.³⁸ There is some evidence Strehlow disapproved of this sentencing approach, and was miffed that he hadn't been consulted by Justice Wells.³⁹ In any event, it was the controversy occasioned by this sentence and its sequel that moved the Commonwealth Attorney-General to make his Reference to the ALRC.⁴⁰

Across Central Australia, cases in which traditional law is clearly raised as an issue still occasionally come before the courts.⁴¹ Far more commonly, however, are cases in which violent offences have been committed against a confused, grog-fuelled backdrop studded with vague allusions to old feuds purportedly rooted in dimly-understood matters of customary law. In other words, exactly what Strehlow observed:

I have great reservations about the validity of claims in some recent murder hearings involving tribal Aboriginals that the killings had resulted from breaches of tribal law. I suspect that the quarrels that led to at least some were more likely to have been

³⁶ *Munda v Western Australia* [2013] HCA 38, (2013) 249 CLR 600, [63]

³⁷ *R v Sydney Williams* (Sentencing remarks, May Sessions, No. 8/76 per Wells J, Adelaide, 14 May 1976); “The Sydney Williams Case” (Case note) (1976) 50 ALJ 386-387

³⁸ Ligertwood, *supra* n. 31, p. 140

³⁹ Kathleen Strehlow, letters to Kirby, 26 January 1978, 10 March 1978

⁴⁰ Kirby, *supra* n. 2 pp 180-181

⁴¹ Melanie Warbrooke, “To what extent is customary law raised as a mitigating factor in criminal cases in the Northern Territory?” (LLB Research paper, Charles Darwin University, 2006), p 34

domestic-based and, sadly, aggravated by alcohol a not too uncommon situation in society at large.⁴²

Since the 1986 ALRC Report, recognition of Indigenous customary law in relation to property rights, and in particular native title, has bloomed and flourished. In the field of criminal law, however, there has been no such progress. None of the ALRC's modest recommendations in relation to the reform of the criminal law in relation to either liability or sentencing were adopted.⁴³ In the area of sentencing, as previously stated, there is now less recognition than ever in the Northern Territory.

In these circumstances, were he still with us, Strehlow might well have indulged himself with a little tippie of schadenfreude. After all, he told us so. But he would not have approved of section 16AA of the *Crimes Act*. Strehlow had consistently maintained that although Aboriginal customary law should not be recognised when it comes to issues of guilt and innocence, it should be taken into account in sentencing.⁴⁴

In short, it is remarkable that, forty years after being almost universally rejected, Strehlow's opposition to the recognition of customary law, rooted as it was in both intensive observation and lived visceral experience, now closely reflects prevailing judicial and popular opinion.

V. STREHLOW'S DESPAIR

The rehabilitation of Strehlow's view is remarkable, but it is also deeply troubling. As Kirby and the ALRC pointed out, Strehlow's counsel was one of despair. And that was because his advice was premised on the tragic belief that traditional Aboriginal religion, and hence traditional Aboriginal law, were dying. As Craig San Roque has observed, "It is an inconsolable loss to see the fabric of a society coming apart".⁴⁵

Michael Kirby recounts that the last word Strehlow uttered before he died was an Arrernte one: "ingkaia" – the bilby, which had succumbed to the invading ravenous rabbit, Strehlow's metaphor for the whole sorry story of dispossession, displacement, disruption – and death.⁴⁶ (I wonder if Mr Sitzler had this scene in mind when he chose to install his funny yellow bunny downstairs. Probably not.)

Strehlow bequeathed us a counsel of despair, and he died in despair. With characteristic pugnacity, his widow Kathleen blamed his enemies: "he was killed inch by inch by all the little people who were afraid his greatness would show up their own tiny efforts for what

⁴² TGH Strehlow, cited in ALRC, *supra* n. 18, [1190]

⁴³ ALRC, *supra* n. 18, [542]

⁴⁴ TGH Strehlow, cited in ALRC, *supra* n. 18 [119]

⁴⁵ Craig San Roque "The Lemon Tree: A conversation on civilisation", in Craig San Roque, Amanda Dowd, and David Tacey, (editors) *Placing psyche : exploring cultural complexes in Australia* (Spring Journal Books, New Orleans, 2011), p. 22

⁴⁶ Kirby, *supra* n. 2, p. 173

they were”.⁴⁷ But it is also clear that Strehlow was profoundly demoralised by the circumstances of Aboriginal people. This is a report of his last visit to the Centre, four months before he died:

Professor Strehlow... [was] deeply depressed by the situation there between the white and dark populations. Neither side seems happy despite the large amounts of government funds that are still being poured in. Instead a deep pall of fear seems to hang over the country... A vicious system of “payback” seems to have developed with no attempt to control it in which aboriginals are carrying knives as both offensive and defensive weapons: they seem to believe that they can “do what they like” since all authority seems either to have broken down or to have somehow been rendered innocuous.⁴⁸

Jaundiced and extravagant though this account is, it is also disconcertingly familiar. Dangerously alienated and disengaged men just like these figure prominently in the contemporary scarifying accounts of Kieran Finnane⁴⁹ and Rod Moss,⁵⁰ and in Warwick Thornton’s film *Sweet Country*, which, though set in the 1930s, when Strehlow first came to work in Central Australia, tells a story which resonates for our own time. A key character in *Sweet Country* is Philomac, a prototype of Strehlow’s “virtually lawless” youth. Philomac steals from whitefellas (even the just dead) and refuses to assist blackfellas (even the unjustly condemned). He is contemptuous of all authority, and all are contemptuous of him. His answer to all pleas and to all questions is “no”. An Old Man pithily sums him up, in Arrernte: “Tywerrenge arrangkwe” – “No law”.

Philomac, sly, beholden to no-one, always on the run and ever on the take, could drive one to despair. Strehlow saw him, and despaired. Those of us who work in today’s justice system – whether we are police, prison guards, social workers, lawyers, judges or royal commissioners – we see him, and despair. So too do his mother, and his grandmother. And the despair we all feel is a reflection of his own despair. To live in a state of what Durkheim called anomie – from the Greek for “no law”, the Arrernte “tywerrenge arrangkwe” – is to live in despair, without “espoir”, without hope, because in that state you are confronted with the existential horror of chaos staring you in the face.

Tragically, Strehlow failed to forge a path through and out of his despair. To use the image invoked by his poetic biographer Barry Hill, Strehlow’s song got broken. Craig San Roque interrogates this variety of despair – the shared despair of people who dwell in what he describes as:

⁴⁷ *Centralian Advocate*, 5 October 1978

⁴⁸ *Newsletter 4, June, 1978* (Strehlow Research Foundation, Adelaide, 1978)

⁴⁹ Kieran Finnane, *Trouble: On Trial in Central Australia* (UQP, Sydney, 2016)

⁵⁰ Rod Moss, *The Hard Light Of Day: An Artist’s Story Of Friendship In Arrernte Country* (UQP, Brisbane, 2010)

a “contact zone” where many people, in genetic code or in temperament, occupy a kind of “in between” position... in difficult places, where racial, cultural groupings grind into each other, [where] the insidious influence of unconscious pressures are felt.⁵¹

San Roque posits that in this contact zone we can become enmeshed in a “cultural complex”:

a collective response, a collective story... built around the experience of the primal traumatic events... a serpentine knotted, nuclear kernel of repetitive energies, wrapped into a kind of hard shell, a tumour of grief turning in upon itself yet also spreading like a contamination.... Like a turbulent sea current, this inner force is too big for any of us to navigate, even if we know it is there.⁵²

In a similar vein, Barry Hill, reflecting on “the melancholia endemic to Centralian history” describes a painting by Rod Moss of three camp dogs:

You see a pack of them turning in a circle. You are looking down on them, and their fury could be part of a dust-storm, as they chase each other’s tails. No: they chase nothing. They are their own vortex, a force field on the bare ground, their growling palpable to the eye – yes, a blind, wild turning that is beyond nameable relationships – feral through and through... in the large scheme of things, when we come to Alice Springs, we know it acutely. Grief and morbidity hang in the air.⁵³

It is a formidable challenge to break through this despair and navigate our way out of the cultural complex, but a necessary first step is to acknowledge the problem. Mouthing simplistic certainties such as wholesale rejection or for that matter wholesale recognition of customary law merely feeds the beast. San Roque proposes that people in the contact zone focus on what he calls the “civilisation of relationships”, building respectful person-to-person connections founded on trust and genuinely cross-cultural communication.⁵⁴ Surely, though, there is also a case to be made for systemic reform and political leadership. For a start, our lawmakers could do far worse than return to the ALRC’s thoughtful, measured and nuanced 1986 recommendations, which are themselves firmly based on values of trust and genuinely cross-cultural communication. Or, for that matter, to the recommendations made only last week by the ALRC, that governments work with relevant Aboriginal and Torres Strait Islander organisations to provide community-based culturally appropriate sentencing options; and for the establishment, where needed, of specialist Aboriginal and

⁵¹ San Roque, *supra* n. 45, p 5

⁵² *Ibid*, pp. 12-13

⁵³ Barry Hill, “Dogs and Grog: New Writing in Alice Springs” in *Reason and Lovelessness: Essays, encounters, reviews 1980—2017* (Monash University Publishing, Melbourne, 2018), p 334

⁵⁴ San Roque, *supra* n. 45, pp 25-26

Torres Strait Islander sentencing courts which are culturally competent, safe and appropriate.⁵⁵

On one fundamental issue, Strehlow, thank goodness, was mistaken. Neither traditional Aboriginal religion or law has died out. They continue to run and to adapt, notwithstanding the various ravenous rabbits foraging on their country. Songs continue to be sung, although some of them are inflected these days with other rhythms and harmonies.

In 1972, my partner's mother passed through Alice Springs. An old Aboriginal man approached her on the street and asked her for money, in return for which he gave her a painted stone, which she brought home and placed on her coffee table. There it stayed for ten years, until she asked me to return it to Alice Springs, to where I had recently moved, because she didn't think it was right for her to keep it. I took the stone to Arrernte lawman Wenten Rubuntja, and handed it to him. Unlike me, Mr Rubuntja recognised and understood this object, this tywerrenge, this law. He immediately placed it in his jacket pocket, and took it away. Mr Rubuntja, who sadly, Strehlow fiercely disparaged, said this of our town, Mparntwe, Alice Springs:

The town grew up dancing and still the dancing is there under the town. Subdivisions spread, but we still keep going. We still have the culture, still sing the song... It's the same story we have from the old people, from the beginning here in the Centre.⁵⁶

Mr Rubuntja held proudly onto his law. He refused to succumb to despair.

Neither should we.

Russell Goldflam
31 March 2018

⁵⁵ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (Report No. 133)* (28 March 2018), Recommendations 7-1, 10-2

⁵⁶ Wenten Rubuntja, Jennifer Green, Tim Rowse, *The Town Grew Up Dancing: The Life and Art of Wenten Rubuntja* (IAD Press, Alice Springs, 2001)