Casting a spell over the legal system: Aboriginal Customary Law in the Northern Territory.

Julie Condon[1]

1.Introduction

The consideration of the rights of the Aborigines to the enjoyment of their laws and customs, to the soil of the country, to its wild animals is done. The argument is sound, the chain of reasoning is complete. R. Windeyer 1842 [2]

Even in colonial Australia, the difficulties presented by the "rights of the Aborigines to the enjoyment of their laws and customs" eluded any definitive answer. Immediately after his powerful attack on Aboriginal rights, Windeyer prophetically mused, "How is it our minds are not satisfied? What means this whispering in the bottom of our hearts?"[3]

There is no doubt that Aboriginal Australians are subject to the laws of Australia. This much is clear, even on a post Mabo analysis. The confusion, and as is often the case, controversy, surrounds the question of recognition. To what extent, if any, should the Australian legal system recognize aspects of Aboriginal customary law?

This question is a vexed one. It is not prone to a neat, pithy conclusion and none will be offered in this paper. Analysis of the recent Northern Territory Court of Appeal decision in *Hales v Jamilmira*[4] supports the argument that the question of recognition is no closer to any satisfactory resolution.

This legal hiatus does not, however, reflect the political climate of the Northern Territory. In October of 2002, the Attorney- General, Dr Peter Toyne announced a Law Reform Commission Inquiry into Aboriginal Customary Law in the Northern Territory. The "whispering in our hearts" seems to linger in the political sphere, rather than the judicial.

2. Aboriginal Customary law

(i) A legal no–man's land?

Before examining the challenges posed by recognition, a preliminary question should be asked. How is aboriginal customary law to be defined? There is considerable anthropological debate surrounding this question, a detailed analysis of which is beyond

---

[1] Barrister, Victorian Bar

[2] R Windeyer, On the Rights of the Aborigines of Australia, quoted in H Reynolds, This Whispering in Our Hearts. 1998 at p 21

[3] ibid

[4] (2003) NTCA 9

the scope of this paper. However, it is important to consider this question as the conceptual difficulties of definition contribute to the problems surrounding recognition.

20 years ago, T.G.H Strelhow was sceptical when asked to give his views on the viability of a return to tribal law. In what became termed his 'counsel of despair'[5] he warned against the creation of 'a synthetic, loose kind of law which is neither Aboriginal nor Western, but depends upon the whim of those persons who are appointed to administer it.'[6]

The key to Strelhow's pessimism lies in his purist notion of what could be legitimately described as tribal or customary law. In Strelhow's view, aboriginal customary law was a static concept; its very essence lay in its immutability. Exposure to the corrosive effect of European influence was likely to 'lead to a legal no-man's land between white and black society in Australia.'[7]

Not surprisingly, Strehlow has his critics. Thankfully, his rather apocalyptic vision of the future of aboriginal customs and beliefs has not been realized. The problems of definition and inevitably, recognition of which he alluded to however, are still relevant. The difficulty as Strelhow saw it was this, if the correct definition of customary law included kinship, religious and moral belief systems (a much broader concept than any Western notion of law) how do we acknowledge that law when its sources have lost their authority? The alternative argument, and one recently expressed by Aboriginal leader Pat Dodson, is that the very fact of non-recognition undermines those traditional authority structures. [8]

(ii) Lore or law?

Maddock expressed the 'problem' of definition in the following manner:

Part of the difficulty for Aborigines is that their law (whether conceived broadly as julubidi or djugaruru, for example, or narrowly as "legal" law) originated within closed cultural perspectives which have since been broken open. Problems arise in defining the scope of laws that could formerly be taken for granted.[9]

Maddock's observations raise interesting questions. Clearly, the 'difficulty" to which he refers is one imposed on Aboriginal society by the historical fact of colonization. But are the consequential problems of definition, Aboriginal or Anglo-Australian? Strehlow perceived them as the former, stating:

---

[5] The Hon Justice M Kirby, TGH Strehlow and Aboriginal Customary Law (1980) 7 (2) Adelaide Law Review 172 at 198

[6] ibid at 197

[7] ibid at 198

[8] Speech given to the NT Reconciliation Council, 14 September 2002, Darwin. See also observations on this point made in respect of Yolngu society in Richard Trudgen's ' Why Warriors Lie Down and Die'.2000 at p 250

[9] K Maddock, Aboriginal Customary Law, in Aborigines and the Law, Hanks & Keon-Cohen (Eds) 1984 212 at 235

There is little real understanding today by either black or white people of traditional Aboriginal law. In some recent instances I suspect the courts and the community have had the wool pulled over their eyes.....Who today can speak with real authority on tribal law? Who can advise the courts of the validity of claims of breaches of tribal law?[10]

The alternative argument is that Aboriginal culture is a dynamic force and therefore no 'problems' of definition should arise. In these circumstances, there would be no obstacle to elements of white and black law 'lying side by side.' [11]

The perceived 'problem' of definition may stem from a cultural perspective. Do we find ourselves unable to define aboriginal customary law because it has no analogous concept within our own legal institutions? Or in the tradition of Strelhow, do our problems of definition stem from an underlying cynicism regarding the legitimate existence of customary law? Given the unanswered questions surrounding this threshold question, it is no wonder that the prospects for recognition have always appeared a little gloomy.

3. Australian Law Reform Commission Inquiry into Aboriginal Customary Law

In 1979 the Australian Law Reform Commission was asked by the Fraser government to investigate,

(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines; and
(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

After an exhaustive inquiry into these issues, the Commission made extensive recommendations regarding recognition. In the Commission's view, the preferred avenue for recognition was legislative intervention. As far as the Northern Territory is concerned, legislative recognition of discrete aspects of customary law can be found in a number of Northern Territory statutes. [12]

Generally, the Commission adopted a pragmatic approach to the more controversial aspects of recognition. It rejected codification and the general incorporation of Aboriginal customary law within the general legal system, either as a basis for criminal liability or as a form of punishment. Significantly, it eschewed the Strehlow legacy and accepted that Aboriginal customary laws were subject to change and external influences.

---

[10] The Hon Justice M Kirby, TGH Strehlow and Aboriginal Customary Law (1980) 7 (2) Adelaide Law Review 172 at 197
[11] K Maddock, quoted by B Hill in 'Broken Song, TGH Strehlow & Aboriginal Possession' 2002 at 755
[12] See for example, the Evidence Act, the Community Welfare Act, the Adoption of Children Act, the Crimes (Victims Assistance) Act, and the Administration & Probate Act

For the purposes of the following discussion at paragraph 5 of the Jamilmira case, the following ALRC recommendations in relation to the criminal law and sentencing are worth noting;

(i) A general legislative endorsement of the practice of taking into account Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at a relevant time, a member of an Aboriginal community, is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed upon the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community. (para 517)

(ii) Attention should be given by prosecuting authorities to the appropriateness of declining to proceed in certain cases involving customary laws.(para 478)

(iii) Prosecutorial discretions may be relevant in those cases where ***Aboriginal customary laws, without necessarily justifying or excusing criminal conduct, are a significant mitigating factor***, and where the Aboriginal community in question has through its own processes resolved the matter and reconciled those involved. Factors relevant in such cases would include the following:

(a) that an offence has been committed against the general law in circumstances where there is no doubt that the offence had a customary law basis

(b) whether the offender was aware he or she was breaking the law

(c) that the matter has been resolved locally in a satisfactory way in accordance with customary law processes;

(d) that the victim of the offence does not wish the matter to proceed

4. Self – determination & Aboriginal rights - Treading water?

Much of the controversy surrounding the question of recognition stems from those acts, which are condoned pursuant to customary law obligations yet offend Australian law. The terms of reference of the ALRC's inquiry ensured the debate would continue. Recognition of customary law was to be contemplated only to the extent that it was consistent with the general law. Likewise, the Northern Territory Law Reform Commission's inquiry contains a similar rider.

Some Indigenous leaders view this kind of restriction on the terms of recognition as an artificial process leading to unsatisfactory results for aboriginal people. Ex Aboriginal and Torres Straight Islander Social Justice Commissioner Mick Dodson expressed it thus:

There appears an addiction in the Australian legal system of isolating components of Aboriginal law in order to place them into the artificial compartments which western legal systems are familiar with. This process of artificially selecting what is legitimate provides compromised justice for Indigenous people.[13]

Since the recognition of native title rights in Mabo, there have been increased calls from some Indigenous leaders for the full-scale recognition of customary law. Dodson posed the following proposition:

If native title is a title based on our laws and customs, it is an absurd position if our title to land is recognized but the laws and customs which give meaning to that title are treated as if they do not exist. The Australian legal system must take the further step of accepting that native title is inseparable from the culture which gives it its meaning. As Kulchyski eloquently states, Aboriginal cultures are the waters through which Aboriginal rights swim.[14]

At the core of the political groundswell for a system of two laws is the call for a treaty between black and white Australians. In 1988, in a small community on the edge of South- East Arnhem Land, the Hawke government signed the Barunga statement. It promised a treaty, which, among other things, would provide direction and policy on the question of customary law and recognition of Aboriginal culture and religion.

No Federal government has thus far entertained the prospect of legal pluralism in Australia. Since 1988, the political pendulum has swung firmly away from the prospect of a treaty for Indigenous Australians. It appears a long wait before this issue returns to the mainstream political agenda, at least at a federal level.

The current political climate in the Northern Territory appears ripe for change. In August of 2001, on the eve of taking office after 26 years in Opposition, Chief Minister elect, Ms Claire Martin, attended at the Ngaarra Legal Forum in Gove in East Arnhem Land. There she was reported to have signed a document, along with the chair of the Northern Land Council, Mr Galarrwuy Yunipingu which pledged her government's commitment to legal pluralism in the N.T. Clearly, the terms of the Law Reform Commission's inquiry do not reflect that pledge.

The question of recognition of Aboriginal customary law in the Northern Territory has been examined by the previous CLP government, albeit in the context of the push towards Statehood. The ALRC Inquiry into Customary Law drew upon extensive fieldwork conducted in the N.T. in making its recommendations. The Law Reform Commission is due to report to the Northern Territory parliament by the end of June of this year. Lets hope that it will silence the whispering.

---

[13] M Dodson, From Lore to Law: Indigenous Rights & Australian Legal System' Alternative Law Journal 1995 Vol 20 No 1 at p 2

[14] ibid

5. Jamilmira v the uninformed Australian? (The Jackie Pascoe Case)

(a) The facts

The defendant, Jackie Pascoe was a 49 year old man, and resident of Gamurru-Gayurra outstation, some 120 kms East of the Maningrida community in Western Arnhem Land. On the 30 April 2002, he appeared in the Maningrida Court of Summary Jurisdiction and pleaded guilty to one count of carnal knowledge pursuant to s 129 of the Criminal Code and one count of discharging a firearm, contrary to s 84 (1) of the Firearms Act.

The complainant in the matter, A, was 15 years 3 months old at the time of the offence. The agreed statement of facts provided to the court outlined one act of consensual intercourse between the defendant and A which occurred at the defendant's house on the 20th August 2001. The following day, A tried to leave Mr Pascoe's outstation and return (with relatives who were visiting) to Maningrida. The defendant became upset with her and retrieved a single barrel 12-gauge shotgun and after telling the complainant not to leave, fired the weapon once into the air. A then returned to the defendant's side and remained at his outstation.

When interviewed by the police some days later, Mr Pascoe was asked if he was aware that it was an offence under Northern Territory law to have sex with a 15 year old girl. He replied in the following way:

'Yes, I know it's called carnal knowledge. But it's Aboriginal custom, my culture. She is my promised wife.'

It is important to note that the agreed statement of facts contained *no* allegations of violence having been inflicted upon the complainant by the defendant either prior, during or after the act of consensual intercourse took place.

(b) The sentence

The learned Magistrate heard a plea in mitigation, received a pre-sentence report and heard some oral evidence as to the cultural significance of 'arranged marriages' within the kinship system of the defendants clan group (Burarra).

In respect of the count against s 129 of the Criminal Code, the defendant was sentenced to a period of 13 months imprisonment, to be suspended after serving 4 months. The operational period for the suspended sentence was declared to be 18 months. In respect of the second count (the firearms charge) the defendant was sentenced to 2 months imprisonment to be served concurrently with the sentence on the first count.

(b) Decision of His Honour Justice Gallop

The sentence of the Magistrate was successfully overturned upon appeal. In His Honour's view, the sentence of 4 months was manifestly excessive and substituted a sentence of 24

hours imprisonment. In respect of the firearms offence, His Honour substituted a sentence of 14 days imprisonment. The Crown conceded that the sentence in respect of the carnal knowledge charge was manifestly excessive. The Prosecutor referred to the relevant provisions of the Sentencing Act (NT) and appeared to concede that this was a case where a sentence of actual imprisonment (beyond the minimum) was not required.

On the hearing of the appeal, the defence (with the consent of the Crown) adduced further evidence. It tendered the report of an experienced anthropologist, Mr Geoffrey Bagshaw, who had this to say about the significance of traditional marriages:

The enjoining of sexual relations between a significantly older man and his promised wife (often under the age of 16) or, indeed, between such a man and any socially legitimated post-menarche (i.e. after first menstruation) female spouse, is not considered aberrant in Burarra society. Rather, it is the cultural ideal, sanctioned and underpinned by a complex system of customary law and practice. That such behaviour may be at variance with contemporary Western sensibilities, mores and laws.... in no way diminishes the fact that it is regarded as entirely appropriate- indeed, morally correct – conduct within the traditional parameters of the Burarra life-world.

In the course of his reasons for sentence, His Honour expressed surprise that the defendant had even been charged with carnal knowledge, noting that the initial complaint had been one of rape which was subsequently withdrawn. In the course of submissions, His Honour also made the comment that the complainant did not need 'the protection of white law' and that she 'knew what was expected of her.'

(c) The response

Media coverage of what became known as a controversial sentencing decision was widespread. Some days after Justice Gallop's decision, an article appeared in the Australian newspaper by journalist Paul Toohey which revealed that the complainant, in her initial complaint to police, alleged that the defendant had assaulted her prior to intercourse taking place.

Predictably, the decision was erronously interpreted as testament to the application of two laws; one for aboriginal offenders, another for the rest of us. Media commentary also became focussed upon the suspicion that Jamilmira was exploiting his customary law obligations by using them as a smoke-screen to justify a random act of violence against a young Aboriginal woman. Commentators expressed their view that Justice Gallop's decision may be seen as a failure to protect Aboriginal women and children from the serious problem of domestic violence experienced in many Aboriginal communities through out Australia.[15]

[15] See The Law Report, Customary Law and Sentencing, ABC Radio 22/10/02 on www.abc.net.au and The Australian Newspaper Editorial, Custom alone can't overturn basic rights 10/10/02 on www.the australian.news.com.au

Legally, the revelation of the allegation of violence was irrelevant. As a matter of practical reality, however, it fundamentally changed the perception of the Pascoe case. Once it became cast as a decision which implicitly failed to protect the rights of aboriginal women and children, the Crown (despite the rather sanguine position on sentence adopted before Justice Gallop) must have considered itself bound to lodge an appeal, which it promptly did.

(d) The decision of the Court of Appeal

The majority of the Court of Appeal (comprised of Chief Justice Martin and Justice Riley) allowed the Crown appeal. The court found that the sentence of Justice Gallop was manifestly inadequate and substituted a sentence of 12 months for the offence of carnal knowledge, ordering that the sentence be suspended after a period of 1 month. His Honour Justice Mildren dissented, finding that no error had been disclosed by Justice Gallop' decision.

An application for leave to appeal to the High Court has been prepared by Jamilmira's legal representatives.

6. Commentary

(i) the use of prosecutorial discretion

Paragraph 478 of the ALRC's report (reproduced at paragraph 3 above) is relevant here. Applying those considerations contained therein to this case, the following comments can be made:

- There was no doubt that the genesis of Jamilmira's offence under the general law had a "customary law basis".

- It seems safe to assume that the victim had no wish for the matter to proceed to court, given that the initial complaint of rape was withdrawn.

- There was no evidence as to whether the matter had been 'resolved locally in a satisfactory way'. However the evidence contained in the pre-sentence report from the victim's maternal grandmother and maternal uncle had confirmed the existence of the 'promised' relationship and that they had consented to the cohabitation between the complainant and Jamilmira.

- Clearly, from his answers given to the police, Jamilmira was aware that he was breaking the general law, although he had assumed given the private nature of the act, it would not be reported.

With the exception of the final consideration, all the other factors point towards the exercise of the discretion not to prosecute. Of itself, the fact that Jamilmira made a deliberate or conscious choice to abide by his customary law obligations seems a tenous justification for a prosecution that may otherwise not appear in the public interest.

Justice Mildren's observations in *Hales v Jamilmira* are apposite:

Finally, there is the fact that this is only the second occasion, as far as can be ascertained that an Aboriginal person has been charged with an offence against s 129(1) or its earlier statutory equivalents.....the point is to be made that, notwithstanding that tribally arranged marriages with girls under 16 is still wide spread in a number of Aboriginal communities, prosecution for offences committed against s 129(1) or its statutory predecessors by Aboriginal males involving Aboriginal females is ***extremely rare.***(my emphasis)[16]

Placed within the context of this telling observation, Justice Gallop's expression of surprise at the fact that the prosecution chose to pursue proceedings against Jamilmira seems fairly innocuous; nothing more than an acknowledgment of the cultural reality of life in Western Arnhem Land.

(ii) **Judicial Darwinism v Cultural Relativity ?**

Indeed, the real issue for the Court of Appeal in *Hales v Jamilmira* was to confront the rather thorny question of the weight to be given to the defendant's cultural reality. It is difficult to see how this question can be answered without some view also being expressed as to the legitimacy of the cultural practice or obligation that brought Jamilmira before the court.

For example, it is clear from the decision of the Chief Justice that His Honour, while accepting that the practice of 'promised marriages' was still prevalent in Western Arnhem Land, was disapproving of the practice. At paragraph 20, after noting some statistics from the 1970's which disclosed that a significant proportion of promised wives bore their first child under 16 years of age, His Honour made this observation:

I have no doubt that from the perspective of the wider Territory community such a consequence from breaches of the law here in question is a good reason to reinforce the operations (sic) of the law.[17]

His Honour then said this;

Personal and general deterrence must feature as significant factors in sentencing for an offence such as this. I am of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of

[16] (2003) NTCA 9 at paragraph 53
[17] ibid at paragraph 20

16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community. *To hold otherwise would be to trivialise the law and send the wrong message not only to Aboriginal men, but others in Aboriginal society who may* ***remain supportive of the system*** *which leads to the commission of the offence.*[18]

His Honour's comments are particularly interesting given that a defence would have been available if Jamilmira and A had been married according to Aboriginal tribal custom. In these circumstances, the fact that the complainant was only 15 years old would be irrelevant. Implicit in His Honour's reference to '*others in Aboriginal society who may remain supportive of the system*' is a kind of judicial Darwinism; this cultural practice produces negative results which are outmoded or at odds with the wider community and therefore should be discouraged. This is somewhat ironic in light of the legislative acknowledgement found in the Criminal Code (NT) of traditional marriages, irrespective of the age of the parties.

An alternative approach is found in the dissenting judgment of His Honour Justice Mildren. After noting that prosecutions against Aboriginal defendants for offences committed against s 129(1) was extremely rare, His Honour observed:

The fact that this Court has not previously dealt with such a case so as to give warning that this kind of behaviour will not be tolerated in Aboriginal communities even where what is done does not infringe customary law, is a strong reason for acting cautiously in this case.[19]

The 'caution' to which His Honour refers means refraining from making any judicial pronouncement on the question of general deterrence. The significance if this approach lies in its implicit acceptance of the legitimacy of the cultural practice of arranged marriages. This is highlighted by the emphasis placed upon the fact that at the time of the commission of the offence, the evidence suggested that Jamilmira and the complainant were close to achieving the status of husband and wife according to tribal custom. Further, His Honour accepted that the customary laws relating to arranged marriages within the Burarra community 'whilst slowly dying out, was far from dead.'[20]

Perhaps the doctrine of cultural relativity[21] does have a role to play in judicial discourse.

(iii) protection of the victim/ role of community

---

[18] ibid at paragraph 26
[19] ibid at paragraph 53
[20] ibid at paragraph 52
[21] Whilst it has its origins in anthropology, cultural relativism is a theory which challenges the notion of universal human rights and is premised on two basic assumptions. The first is that moral judgements cannot be made about another culture as such judgements are relative to the culture in which one is raised. Secondly, it argues that international human rights law is a construct of western moral concepts, which may have little relevance for those societies which exist outside that moral paradigm.

Much of the criticism surrounding Justice Gallop's decision lay in the perception, that by sentencing Jamilmira to 24 hours imprisonment, His Honour had failed to ensure the rights of A to the protection of Ango-Australian law. His comments in the course of submissions that "she didn't need protection (from white law) .. she knew what was expected of her.," no doubt assisted in engendering that perception.

It is trite to state that Aboriginal women are entitled to the protections afforded by Anglo-Australian law. The question to be posed here is, was this a relevant consideration in the circumstances of this particular case?

It seems it can be assumed that were it not for the incident with the firearm, the consummation of the promised marriage would not have come to the attention of the police. Beyond this, it is inappropriate to speculate how the complaint came to be made with respect to the carnal knowledge charge. What is clear is that, given the anthropological evidence as to the sanction by the Burrurra clan of arranged marriages, it is highly unlikely that any complaint would originate within the Maningrida community regarding Jamilmira's action.

Thus the question of the 'protection' of the complainant only becomes relevant if it is perceived that she required 'protection' from her customary law obligations. A brave assumption given the indirect manner in which the complaint arose and the significance of kinship systems upon which the practice is based.

How then to punish Jamilmira for an act which has no impact or affect (in the criminal sense) in the community in which it occurs? A difficult question, particularly when one must apply the principle of general deterrence.

Justice Brennan's observations in *Channon v R* are relevant:

The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes.....Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose.[22]

Thus the question here is this; which society requires protection? The Maningrida community? It would appear not. The wider community? Not so either, given that Jamilmira's actions have no impact (apart from moral consternation) nor pose no threat to wider society. If the protection of society seems a peripheral consideration, the remaining justification for punishment must lie in denunciation of Jamilmira's conduct. Given that it is upheld as the 'cultural ideal' within his immediate community, disapproval can originate only from the wider community. Which view, if any, should prevail? What weight should be accorded to the views of Jamilmira's community? His Honour Justice Mildren said this in *R v Minor*;

---

[22] (1978) 20 ALR 1 at 5

In my opinion, a sentencing judge is entitled to have regard not only to the interests of the wider community, but also to the special interests of the community of which the respondent is a member.[23]

Paragraph 517 of the ALRC's report (reproduced above at paragraph 3) is also relevant here.

Clearly, the wishes of the immediate community cannot prevail over what is a proper punishment. Alternatively, should the demands of the wider community prevail when the conduct produces nothing other than moral consternation? The decision of His Honour Justice Riley would suggest that the scales be tipped in favour of the wider community.

Whilst proper recognition of claims to mitigation of sentence must be accorded, and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community, including women and children, from behaviour which the wider community regards as inappropriate.[24]

It has a faint sniff of paternalism. If those members of the 'community' His Honour refers to do not consider they require protection from obligations pursuant to customary law, why should the wishes of the unaffected wider community prevail? Given the manner in which the complaint arose, it could not be inferred from that, that as a general proposition, female members of the Maningrida community who participate in tribally arranged marriages *require* protection. Indeed, the only evidence before the court was that this was acceptable, morally correct conduct within the defendant's and the complainant's community.

Moreover, given that the question of what is a proper punishment is rightly determined by the need to protect society, *not* by the wishes of the community (whether immediate or wider), it is difficult to sustain an effective argument for punishment of Jamilmira.

7. Conclusion

If the majority decision in Hales v Jamilmira is any indication, it seems that the judicial pendulum is swinging away from recognition of customary law. Nevertheless, the case raises a plethora of questions, none of which are prone to easy answers.

When he was asked for his views on the future of recognition of customary law, TGH Strehlow was cautious. From where he stood, which was Australia in the late 1970's, he was unsure about whether his views would be valid 20 years later. Here we are, 20 years later and whilst some of his views seem outdated, others do not.

---

[23] (1991-92) 79 NTR 1 at 14

[24] Hales v Jamilmira (2003) NTCA 9 at paragraph 33

At the time Strehlow wrote, he described Australia as being in an 'agonising time of transition'.[25] Perhaps we are still there. Any political debate surrounding a Bill of Rights or treaty with Aboriginal Australians has all but died away. If there is to be complete recognition of customary law, it seems we shall have to wait for the next (less agonising) time of transition.

[25] Quoted in B Hill, Broken Song, TGH Strehlow & Aboriginal Possession' 2002 at 754