ARTICLES

*The Hon. Mr. Justice M. D. Kirby**

T. G. H. STREHLOW AND ABORIGINAL CUSTOMARY LAWS

In this article Mr. Justice Kirby recounts the career of Professor T. G. H. Strehlow, linguist and anthropologist, and his contribution to the debate on whether the Australian legal system should recognise and enforce Aboriginal customary laws. Strehlow's birth at Hermannsburg and his fluency in Aranda gave him a rare insight into Aboriginal society, customs and laws. In later years, he described and illustrated the operation of traditional laws and voiced concerns about certain features which, he believed, made it difficult or impossible for our legal system to countenance their recognition. Following the Sydney Williams case the Australian Law Reform Commission has been asked to inquire and report upon Aboriginal customary laws. In conducting its inquiry, the Commission consulted Professor Strehlow. This article represents a summary of Strehlow's views expressed to the Commission and elsewhere. Strehlow listed a number of features of Aboriginal customary laws as incompatible with recognition in the Australian legal system. The rule of secrecy of certain laws, the contents of which are confined to fully initiated tribal Elders, the enforcement of religious and "incest" rules without regard to intent and fault, the use of certain punishments and the adoption of unacceptable procedures are instanced by Strehlow. He also warned against a synthetic or "hybrid" traditional law leading to "a legal no man's land". Whilst cautioning against the unquestioning adoption of all of Strehlow's views, in a dynamic situation in which Australian society, Aboriginal and non-Aboriginal is changing rapidly, Mr. Justice Kirby makes it clear that careful attention must be paid by the Law Reform Commission to Strehlow's cautionary criticisms.

1. Introduction

It was my melancholy fate to be present when T. G. H. Strehlow died. After years of planning, arrangements had been made for the opening of an historical exhibition by the Strehlow Research Foundation at the State Library of South Australia on Tuesday, 3 October, 1978. The Foundation had invited me to perform the official opening. For this purpose,I travelled to Adelaide and had arranged to meet Strehlow and some of his friends and colleagues at the University of Adelaide on the afternoon before the official opening. At the University, I was met by Professor R. M. Berndt, scholar, colleague and friend of Strehlow, and then Chairman of the Strehlow Research Foundation. We waited at Strehlow's old room in the University. Shortly after 3.15 p.m. he arrived with Mrs. Strehlow. As he ascended the stairs, I remarked to myself how radiant was his expression. A day long anticipated had arrived. He was returning to the University at which for upwards of 20 years he had taught and in which he had been taught as a student. We entered his room and sat at his table. Modestly he offered the head chair to Berndt and to me. We declined and because we were insistent, he took the seat at the head of the table presiding over a meeting which he hoped would be one further step towards the preservation of the fruits of his unique scholarship.

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* B.A., LL.M., B.Ec. (Syd.); Chairman of the Australian Law Reform Commission.

Mrs. Strehlow, an indefatigable helpmate, herself a graduate of the University and a loyal wife began to take the notes of the meeting. "Let the record show", I began, "that Tuesday 3 October, 1978 has come and that we will tonight launch an historic exhibition which will celebrate the life and work of Professor Strehlow".

The program for the exhibition was produced: a most elegant and startling cover depicting in tones dark black and silver on vivid red an ornament worn in days past by the brides of the Aranda. I asked Strehlow to explain its significance to me. It was fashioned, he said, from bandicoots' tails. It was from the native bandicoot which had been driven from Central Australia by the rabbit, introduced by the Europeans. The native cat and the bandicoot were no more in these parts. The rabbit had so expanded in numbers and domain that there was little room for the survival of the bandicoot or the native cat. The environment upon which they depended for survival had been despoiled. The beautiful ornament depicted on the cover program could no longer be made. The component parts were gone, forever.

As I was to see, this was a symbolic utterance. Much of what Ted Strehlow said was full of symbolism. He hovered between the world which is familiar to me: that of the transplanted European civilization of Australia, and the world that is familiar to few only of this culture: that of the indigenous people of traditional Australia.

"Ingkaia", the name of the furry-eared bandicoot in the Aranda tongue was the last word he said. He collapsed. Despite every effort of his wife, his colleagues, medical and other personnel, he died. The long journey which had begun at Hermannsburg on 6 June, 1908 was concluded. On the insistence of his wife, who bravely attended it, the opening of the historical exhibition went ahead on the evening of his death. Undoubtedly this is what Ted Strehlow would have wished.

Professor Berndt delivered his address and called for the perpetuation of the extraordinary contribution which Strehlow had made. Strehlow's films of Aboriginal ceremonies now sadly extinct were shown to an assembled audience which included judicial, parliamentary, church, university and other representatives. In the Rare Book Room of the State Library of South Australia I then proceeded to open the exhibition. This article represents an expanded statement of what I said not five hours after Theodore George Henry Strehlow passed from this world in the arms of his wife and in my presence.

2. The Public Record

Lawyers are prone to look closely (more perhaps than those who know better) only at the public record of the life of a man. Strehlow was the son of the Reverend Karl Friederich Theodor Strehlow who had been born in the Prussian village of Fredersdorf, near Berlin, in December, 1871. The senior Strehlow was trained in the Mission Seminary of Neuendettelsau, in Bavaria and in 1892 was sent to South Australia, a British colony in which there had always been a large German minority. Karl Strehlow was posted, not to some hardy outpost of white settlement, but to the Killalpaninna Mission Station on Cooper's Creek, east of Lake Eyre. His task was to assist in bringing the Gospel of Jesus Christ to the Dieri Aboriginals. He mastered their tongue and amongst the papers of the

Strehlow Research Foundation are his notes for a German-Dieri vocabulary and a Dieri grammar.

Before the printing of this grammar could be completed, the elder Strehlow was posted to the newly acquired Hermannsburg Mission Station in Central Australia, now part of the Northern Territory of Australia. Hermannsburg was a Mission to the Aranda people. The same diligence that he had devoted to the Dieri vocabulary and grammar Karl Strehlow now turned to the Aranda.

In 1895 Karl Strehlow married Friederika (Frieda) Keysser who had been born in Bavaria in August, 1875. Without delay the young couple returned to Hermannsburg by means of rail to Oodnadatta, and mail coach north to the Mission. At Hermannsburg Karl Strehlow commenced his studies of the languages of the Western Aranda and of the Loritja. He prepared grammars and word lists for both of these languages; at the same time labouring on a translation of the New Testament into Aranda.

Theodore Strehlow, born in June, 1908, came into a strange world, in the midst of an almost empty continent, in a physical environment of many hardships but blessed with dedicated, scholarly parents moved by a zeal and energy that marked the pioneers and missionaries of the 19th Century. A pure German by blood, he was to grow up, in his early years, in the midst of anti-German hysteria which coincided with the Great War. The Mission rarely had fewer than 150 Aboriginals of full-blood, voluntarily gathered there around the Strehlow family. Theodore Strehlow learned the Aranda language virtually at his mother's knee. The friends and companions of his youth were mostly Aranda Aboriginals. From them he learned their dialect with total fluency. This was to give him a unique insight into Aboriginal Australia which few scholars who followed and none that went before could possibly equal.

In 1922 the elder Strehlow fell seriously ill with pneumonia complicated by pleurisy. He died on the way to receive treatment, in October, 1922. He was aged 50 years. The tale of his last journey, in the company of his son is set forth in *Journey to Horseshoe Bend.* Karl Strehlow is buried in Central Australia.

Ted Strehlow was educated at Immanuel College and the University of Adelaide between 1922 and 1931. He graduated in 1931 a Bachelor of Arts with first class honours in English language and literature. In 1932 he was called back to Central Australia, after 10 years' absence to research linguistic variations in the Centre. He saw the customary law of the Pintubi people in action: a Pintubi man killed with a spear and his spouse clubbed to death 20 miles north of Mount Liebig.

In 1933 Strehlow was introduced to the first major Aranda ceremonial performances which he was later to study and record with loving detail. In 1935 he accompanied a Board of Enquiry established to examine allegations of mistreatment and shooting of Aboriginals near Ayers Rock. The following year he was appointed as the first patrol officer of the Federal Government of Australia. This task took him throughout the Pitjantjara and Aranda districts. He spent his spare time preparing an Aranda grammar and a re-translation of the New Testament into Western Aranda. Other books followed including a hymnal and translations into English of the songs of Central Australia.

In 1936 he became Deputy Director of Native Affairs, a post which he held until 1942. His formal association as a teacher within the University of Adelaide began in 1946 when he took up a post as research fellow in Australian linguistics and lecturer in English literature. Between 1949 and 1951 he held a research fellowship within the Australian National University in Canberra, returning to the University of Adelaide in 1954 as a Reader in Australian Linguistics. This post he held until 1970 when the Council of the University appointed him Professor. When he retired in 1973, he was proposed for appointment as Emeritus Professor of the University. This honour was conferred upon him in 1974.

The worldly honours of recognition and distinction that came his way need not be catalogued. He was a foundation member of the Australian Institute of Aboriginal Studies between 1964 and 1973. Overseas governments, universities and institutions honoured his work. Shortly before his death, he had conferred upon him, *in absentia*, the Honorary Doctorate of the University of Uppsala in Sweden. He was the sole Australian chosen to receive this distinction on the occasion of that University's celebration of its fifth centenary. In his life of scholarship he witnessed, recorded and filmed complete ceremonial cycles. He recorded more than 8,000 secret verses. His published works are distinguished but complemented by an enormous variety of unpublished statements. It was natural, indeed inevitable, that when legal issues concerning Australian Aboriginals arose, governments, courts and lawyers generally should turn to this man as a bridge between our society and that of the traditional Aboriginal of Australia. It was this track, beaten by many who went before, that finally led me to Strehlow.

3. Lawyers and Linguists

Strehlow was no stranger to the impact of the Australian legal system upon traditional Aboriginals. In June, 1935, he furnished a report to the Board of Enquiry already mentioned. This report was printed in *Oceania* in March, 1936. Titled *Notes on Native Evidence and its Value*[1] it outlined clearly some of the difficulties of communication and contained insights on the reliability of evidence, a subject which had only lately attracted the attention of judges[2] and lawmakers[3]:

> "The value of native evidence is difficult to assess without full consideration of the circumstances in which it was given. When such an assessment is made, it is imperative that the person sifting the evidence of native witnesses and informants should know the personal characters both of the native witnesses and of the men against whom the evidence was given; he should know also the relationship in which the witnesses were standing towards both the accused and his or her judges."[4]

Strehlow set out to interpret the motivation and conduct of traditional Aboriginals in terms much more sympathetic than those who had gone before:

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1. (1936) VI *Oceania* 323.
2. *Eg., R.* v. *Anunga* (1976) 11 A.L.R. 412 (Supreme Court of the Northern Territory, Forster J.).
3. *E.g.*, Criminal Investigation Bill, 1977, cl. 25-26; Aborigines and Islanders (Admissibiliy of Confessions) Bill, 1978.
4. Strehlow, *Native Evidence, op. cit.* (*supra* n.1), 323.

> "[N]atives are naturally suspicious of the good intentions of strange white men because they have been so frequently deceived and exploited and robbed by unscrupulous whites. The native's habit of suspecting strangers and of deceiving them—if he thinks that by so doing he is best preserving his own interests—is the result, unfortunately, of much bitter experience. The white man deceived the black man; he is not very scrupulous about keeping a promise made to him; often he takes whatever he can, and the black man has no means of redress. The white man takes away his women and lives with them; but he does not fulfil any of the traditional obligations towards the native relatives of those women. White scientists under the promise of deepest secrecy towards all women, obtain the sacred objects of the black man and are admitted to his sacred ceremonies; but the native soon sees his treasured sacred objects in the hands of white women, and hears the scoffs of other whites about his ceremonies. These experiences embitter the natives; and just as the average white settler commonly classes all natives togther when speaking about them, so the native regards all white persons as members of *one* people—of a people whose main characteristics are greed and deceitfulness and immorality. It is hence hardly surprising that a native should view with suspicion the intentions of a white man who is unknown to him."[5]

Because of his fluency in the Aranda language, it was inevitable that between 1936 and 1942, while Commonwealth Patrol Officer for the Northern Territory Administration, he should have attended, in an official capacity, all trials in courts sitting at Alice Springs which involved Aboriginals during that period.[6]

In 1959 he leapt to prominence in celebrated legal proceedings which arose out of a challenge to the conviction of a near full-blooded Aboriginal, Rupert Max Stuart. Stuart had been convicted of murder. The evidence of the Crown relied heavily on a confession he was alleged to have made to police admitting to the murder and rape of a 9-year-old girl. He was sentenced to death. Stuart was reprieved from execution seven times, once within a few hours of the gallows. An affidavit was tendered to the High Court of Australia by Stuart's counsel. It set forth Strehlow's view that the confession, upon which the Crown had largely based its case, was unreliable:

> "In my opinion it could not have been dictated by a totally illiterate, part-Aboriginal who has never had any formal education of any kind. It includes many words, phrases and sentences which do not resemble any form of pidgin or broken English spoken in the Northern Territory. The style of the document is not in any way akin to the mode of expression found in the Arunta language which is the only tongue in which Stuart has any complete fluency of expression."[7]

Describing the confession as a "linguistic hotchpot"[8] Strehlow became a vital witness in the proceedings. Although the High Court refused leave

5. *Id.*, 330-331.
6. Affidavit tendered in the High Court proceedings *Stuart* v. *The Queen*, reproduced in Chamberlain, *The Stuart Affair* (1973), 35.
7. *Ibid.*
8. *Id.*, 36.

to appeal, the opening words of its written decision plainly derived from Strehlow's unsettling affidavit:

> "Certain features of this case have caused us some anxiety . . ."[9]

An application on Stuart's behalf for leave to appeal to the Privy Council in London failed. Subsequently a petition was lodged requesting the reopening of the case and a Royal Commission was appointed to which Strehlow gave evidence. The report of the Royal Commissioners tabled in December, 1959 claimed that there was no truth in the suggestions that Stuart's knowledge and understanding of English were inadequate. It is difficult nowadays to recall to mind the divisions of Australian society that were caused by the emotions raised in the Stuart case.

In the mid-1960's moves began in the Federal Parliament of Australia to develop laws and policies that were to affect profoundly the Aboriginal people. A referendum in 1967 altered the Australian Constitution by omitting certain references to Aboriginals that were considered pejorative. Placitum (xxvi) of section 51 was amended to delete the exception "the aboriginal race in any State", from the powers of the Commonwealth Parliament to make laws with respect to the people of any race for whom it is deemed necessary to make special laws. Likewise section 127 of the Australian Constitution was deleted. It had provided:

> "127 In reckoning the numbers of people in the Commonwealth or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

The declared aim of the Constitution Alteration (Aboriginals) Act, 1967 was to remove any ground for the belief that the Constitution of Australia discriminated against people of the Aboriginal race, and at the same time to make it possible for the Commonwealth Parliament to enact special laws for these people. The proposal was carried in each State of the Commonwealth and by a majority of more than 5 million to just over 500,000.[11] Such unanimity is not typical of the history of Australia's Constitutional referenda.

In the mood of the constitutional alteration, an Office of Aboriginal Affairs had been created in 1967 within the Department of the Prime Minister. Later it was attached to the Department entitled Environment, Aborigines and the Arts. The Department of Aboriginal Affairs was established by the Governor-General in Council on 19 December, 1972 under the Whitlam Administration. Under the influence of these administrative developments, important welfare, health and education services to the Aboriginal people of Australia were expanded. Following rejection of land rights claims under the Common Law,[12] a Commission was established under Mr. Justice A. E. Woodward to enquire into a statutory system of Aboriginal land rights. Legislation to implement the major proposals of the Woodward Report was later passed by the Australian Parliament and became the Aboriginal Land Rights (Northern Territory) Act, 1976.

9. *Stuart* v. *The Queen* (1959-60) 33 A.L.J.R. 113.
10. See Castles, "Executive References to a Court of Criminal Appeal", (1960) 34 *A.L.J.* 163.
11. Record of referenda in *Australian Parliamentary Handbook* (1973), 737. The exact figures were 5,183,113 (yes); 527,007 (no); and 91,464 (informal).
12. *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141 (Blackburn J.) *Cf.* Hocking, "Does Aboriginal Law Now Run in Australia", (1979) 10 *Fed. L. Rev.* 161.

Pursuant to that Act three land councils have now been established and more are in contemplation. Large areas of Central Australia have been designated as land rights areas under the control of these land councils. An Aboriginal Land Commissioner, Mr. Justice J. L. Toohey, has been appointed to investigate and report on Aboriginal claims to land under the Act. Several reports have been delivered.

Many other developments have occurred in the space of the last few years. In 1969 a National Aboriginal Sports Foundation was established as an advisory body to encourage participation by Aboriginals in all forms of sport. In 1974 an Aboriginal Loans Commission was created under an Act of that year to provide financial assistance to Aboriginals by funding houses and personal loans and by assisting them to engage in business enterprises. In the same year the Aboriginal Land Fund Commission was established to purchase land for Aboriginal communities and groups.

Most of the developments just described have occurred with the unalloyed support of a broad cross-section of the Australian community, reflected in a basically bi-partisan approach at the level of the Commonwealth Government in Australia. The provision of a national administrative organisation (the Department of Aboriginal Affairs), the encouragement of the Aboriginal Legal Service to provide advice and assistance to Aboriginal Australians, the initiation of land rights, the provision of improved health and welfare facilities—all of these must be seen as a somewhat belated attempt by the majority population of European Australia to forge a new relationship with the indigenous people of this country. It is inevitable that such major changes should be accompanied on occasion by controversy, mismanagement, conflict and even bitterness. Attitudes do not change overnight and the mutual suspicion described by Strehlow in 1935 remains and may even be exacerbated on both sides by developments of the kind described. With some of the changes mentioned Strehlow was out of sympathy. In May, 1978, with his wife, he visited Central Australia for a short visit and was . . .

> "[D]eeply 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. Distrust between white and dark seems to have developed into an unbridgeable schism unknown before: carried to this logical conclusion the whole Territory could well become divided into two . . .'armed camps' "[13]

Strehlow it appears, received complaints from Aboriginals that neither Aboriginals nor white Australians knew where they were going or what the future held for them:

> "A vicious system of 'pay-back' 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."[14]

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13. Strehlow, "Central Australian Visit", *Strehlow Research Foundation Newsletter* No. 4, June 1978, I.
14. *Ibid.*

It was in these circumstances that a task to which I had been assigned brought me into communication with Strehlow upon a subject which was to preoccupy him in the months leading up to his death.

4. The Recognition of Aboriginal Laws

From the establishment of the penal colony in New South Wales until quite recently, it was considered unthinkable that any specific recognition and enforcement should be given to the societal rules of the Aboriginal people of the continent. As British colonisation was extended throughout Australia, the Common Law of England came to cover the country.[15] As early as 1824, it was declared that no title to land could be recognised by the law unless it had been acquired through express formal grant from the Crown. In 1837, the Colonial Office in London ordered the Governor of New South Wales to ensure that all Aboriginals within his jurisdiction were to be treated as British subjects.[16] In theory Aboriginals had rights, but they also incurred the obligations flowing from this status. At the time Australia was acquired, colonies generally were described as being either "settled" or "conquered". In the case of the former colonies, the powers of the Crown were much more circumscribed. In colonies that were conquered, it was usually assumed that non-English laws would continue to operate until they were changed by the Crown or by legislation. This theory, imported in practice with every boatload of immigrants, inhibited whatever notion there may have been that the laws of the local Australian Aboriginals should be respected by the incoming population of migrants:

> "[E]xcept to the extent that legislation has made some alteration, the whole of the criminal law, both substantive and procedural and the whole of the law of evidence, applies equally to whites and Aborigines."[17]

In this respect, the position of the Australian Aboriginals was distinctly different from the position in the United States where the Indian tribes were, virtually from the start, considered as "distinct, independent, political communities."[18]

Although some colonial judges were disinclined to subject Aborigines to the inherited British law in its entirety, the view prevailed, certainly by the end of the 19th century, that there was one settled legal system and that was for both black and white inhabitants of the country: single and undiscriminating between all races under its order. Gibbs J. in a recent decision of the High Court of Australia in *Coe* v. *The Commonwealth* put it thus:

> "The annexation of the East Coast of Australia by Captain Cook in 1770 and the subsequent acts by which the whole of the Australian Continent became part of the dominions of the Crown were acts of

15. *The King* v. *Cooper, Sydney Gazette,* 17 February, 1825 (No. 1109) 2.
16. Glenelg to Bourke, 26 June, 1837, *H.R.A.*, series I, Vol. IX, 47.
17. Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia", (1960) 5 *W.A.L. Rev.* 20. See Daunton-Fear and Frieberg, "Gum-tree Justice: Aborigines and the Courts" in Chappell and Wilson (eds.), *The Australian Criminal Justice System* (2nd. ed., 1977), 45. *Cf.* Rath J. in *R.* v. *Wedge* [1976] 1 N.S.W.L.R. 581; (1976) 50 *A.L.J.* 496 and cases there cited.
18. *Worcester* v. *Georgia* 31 U.S. 515, 559 (1832); *Cf.* Misner, "Administration of Criminal Justice on Aboriginal Settlements", (1974) 4 *Syd.L.Rev.* 259, 275.

> state whose validity cannot be challenged . . . [T]he history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall C.J. . . . of the Cherokee Nation that the aboriginal people of Australia are organised as a "distinct political society separated from others" or that they have been uniformly treated as a state . . . The Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial ordinance by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal national exercising sovereignty, even of a limited kind, is quite impossible in law to maintain . . . It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction is drawn between a colony acquired by conquest or cession in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilised inhabitants or settled law. Australia has always been regarded as belonging to the latter class".[19]

Coinciding with the expansion of welfare and other assistance to Aboriginal groups, the question has been raised during this decade whether the submission of the Aboriginal people of Australia to the one legal system ought to be continued in its totality, or whether the introduction of some recognition of Aboriginal customary law should be facilitated.

The matter was brought to a head by a number of developments, most notably a much publicised sentence passed in the Supreme Court of South Australia by Mr. Justice Wells. Sitting in the criminal jurisdiction on 14 May, 1976, his Honour passed sentence on Sydney Williams, an Aboriginal convicted of manslaughter. The sentence included the direction that Williams should be sent straight back to his tribe and handed over to the Old Men. He was required there to submit himself to the Tribal Elders and for a period of at least one year be ruled and governed by them and to obey their lawful orders and directions.

There was no reference whatever to any punishment to be inflicted by or on the orders of the elders of the tribe. This did not prevent publicity being given to the claim that the judge had handed Williams over specifically to be punished by spearing in accordance with tribal custom.[20]

The evidence disclosed that Williams had killed his wife after they had been drinking together. His wife, under the influence of drink, allegedly mentioned secrets which under tribal law women were not supposed to

19. (1979) 24 A.L.R. 118, 128-129.
20. (1976) 50 *A.L.J.* 386-387.

know, let alone speak of. It was argued that by customary law this outburst warranted her death.

After the trial, it seems that Williams was in fact speared and may face further spearing.[21] The case and the controversy which followed it raised the issue in Australia as to whether the course taken on this occasion was lawful and desirable. It was pointed out by some commentators that handing a person over to his tribal authority was scarcely novel. It was frequently done by Magistrates sentencing traditional Aboriginals in remote areas. However, in most such cases the offence was not one known to traditional Aboriginal law ("illegal use of a motor vehicle", "store breaking and larceny", etc.). Homicide of a wife was, of course, known and the punishment inflicted was predictable. The Sydney Williams case focussed attention on an important issue. Was it desirable and acceptable to the total Australian community, including the white population with its *de facto* control of the political and power organs of the country, to envisage the use of its courts as a means of sustaining and enforcing traditional Aboriginal law for traditional Aboriginals.

In February, 1977 the Commonwealth Attorney-General after consultation with the Minister for Aboriginal Affairs, referred certain questions to the Law Reform Commission relating to Aboriginal customary laws. After reciting the special interest of the Commonwealth in the welfare of the Aboriginal people of Australia and the need to ensure that every Aborigine enjoys basic human rights, plus the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race and the right of Aborigines to retain their racial identity and traditional life-style if they so desire, the Attorney-General set the Australian Law Reform Commission upon a task of enquiry and report. The project requires the Commission to report on whether it would be desirable to "apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only". In particular the Commission is asked:

> "(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;
> (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines."

In making its enquiry and report the Commission is required to give special regard to the need to ensure that "no person should be subject to any treatment, conduct or punishment which is cruel or inhumane".

Since the Law Reform Commission received this Reference, consultation and research have been conducted in all parts of the country with Aboriginal and white experts, from many disciplines and expressing all points of view. Field research visits have been conducted over many weeks by research officers of the Commission. They have lived with and consulted the traditional people in remote parts of Australia from the Great Victoria

21. Ligertwood, "The Trial of Sydney Williams", (1976) 2 *Legal Service Bulletin* 136, 140.

Desert to Indulkna, 200 kms. south of Alice Springs, Eastern Arnhem Land, the Kimberley region of North-West Western Australia and the reserves of Northern Queensland and the Torres Strait. The Commissioners themselves have visited most States and Territories of Australia for discussion with community leaders, Aboriginal and non-Aboriginal. The project is continuing. No final views can be stated.

In the midst of this Commonwealth endeavour, initiatives have sprung up in the States and in the Northern Territory of Australia which reflect a common concern to make the criminal justice system more relevant to the Aboriginal population and to uphold, at least in some measure, the right of Aboriginal Australians to be themselves, and to follow the rules of their own societies.

The first such initiative has been taken by the government of Western Australia. On 13 October, 1978, a plan was announced to give Aborigines in remote communities in the Kimberleys "a direct say in the administration of justice in their localities and control over liquor distribution". The plan which was accepted was one recommended by Mr. T. Syddall, S.M., the regular magistrate at Broome, Western Australia, and Mr. M. Capelle, an anthropologist. As reported, the proposal involved the implementation of the scheme in two phases. The first would involve the appointment of justices of the peace, bench clerks and honorary probation officers for trial periods in Aboriginal communities at La Grange Mission and at One Arm Point. If successful, the scheme would later be extended to other communities. The second phase would involve legislation in 1979 to empower Aboriginal communities to impose restrictions on liquor consumption by their members, if that were desired. The practical application of this second phase is stated to be confined, at first to La Grange and One Arm Point.

The object of the scheme is to see the appointment of responsible tribal or community elders as justices of the peace. These justices of the peace are to have a training period of about 6 months in which they will sit with the Magistrate to gain experience. A Cabinet Committee in Western Australia is reported as saying that the recommendation would be valuable in "making the law more realistic to the Aboriginal communities".[22]

In South Australia, a Committee has been appointed by the South Australian Government to investigate the recognition of Aboriginal traditional law. The Committee has terms of reference directed particularly at the recognition of customary law on the North West Reserve of that State. In particular, the Committee is to investigate the extent to which courts should recognise tribal law and authority and the extent to which legislation should recognise the exercise of tribal law and authority in tribal communities. Judge John Lewis, whose circuit takes him to remote, traditional Aboriginal communities, has been appointed to head the South Australian Committee. That Committee is consulting closely with the Law Reform Commission but has only recently begun its work.

In the Northern Territory of Australia, legislation has been promised by the Chief Minister and Attorney-General, Mr. Paul Everingham towards the introduction of special courts for traditional Aboriginals. A committee

22. As reported in the *West Australian*, 13 October, 1978, 1.

has been convened and it is examining a draft Village Court Ordinance which was prepared some years ago. The precise stage reached by the Committee is at the time of writing, unknown. What is known is that many of the magistrates of the Northern Territory have begun to experiment with involving traditional Aboriginals in court processes during their circuits. In some cases, Aboriginals have sat with the magistrate and have been invited to express views on penalty, in particular. Other innovations in the Northern Territory have sprung up, quite informally, as a response to the perceived need to render the legal system more relevant and understandable to the traditional people subjected to its discipline.[23]

In addition to the governmental initiatives at a Federal, State and Territory level in Australia, other relevant developments require mention. In Queensland, the Aboriginal and Torres Strait Islander Courts have been in operation (in various forms) for nearly a century. They have lately come under criticism and have even provoked Commonwealth legislative intervention.[24] A committee was established in Queensland to review their operations and to consider their continuance. That Committee's report has not yet been delivered or if delivered has not been made public.

More informally, a distinguished Australian, Dr. H. C. Coombs, has drawn up a scheme for informal dispute resolution within a traditional Aboriginal community, bypassing the orthodox justice system of Australia. He has indicated his desire, if there is no opposition from the Department of Aboriginal Affairs, to implement the scheme, extra-legally as it were, at Areyonga or Yirrkala in the Northern Territory. Within Aboriginal communities themselves, new social controls of various kinds have been introduced in recent years designed to cope with endemic problems of alcoholism, petrol sniffing and the general decline in authority which has attended the impact of Western civilisation on traditional Aboriginal cultures.

It is the decline in self-discipline and traditional authority, ineffectively replaced by Western laws and punishments, that has led observers of goodwill, Aboriginal and non-Aboriginal to the study of Aboriginal customary laws. Perhaps in the re-creation of respect for Aboriginal customary laws, fresh stability could be given to Aboriginal society and protection afforded to the erosion of Aboriginal identity. The unsatisfactory impact of our legal system is clearly recognised. Our law is silent upon many of the matters that are considered vitally important in Aboriginal traditional communities. For example, the calling out of secret things by a man while intoxicated is regarded as a serious breach of the law by many of the communities but is an offence which receives little if any recognition in the present criminal justice system. It is possible that the person could be charged with offensive behaviour if the act occurred in a public place but this would do little to give recognition to the real seriousness with which such an act is viewed in the communities. There are other problems which are related to Aboriginal culture which our system may fail entirely to recognise such as the calling out of names of the dead or the incest and marriage rules. Much importance is placed on the fact that individual

23. The Law Reform Commission (Aust.), *Report on a Visit to the Northern Territory of Australia* (1977, *mimeo*).
24. Aboriginal and Torres Strait Islander (Queensland Discriminatory Laws) Act, 1975 (Cth).

citizens are able to use, in the last resort, the established legal system. But what is the position in Aboriginal society? The support of the legal system is often not available in practice to many Aboriginal communities and individuals in order to provide for a resolution of disputes.

Our legal system provides no ready vehicle for resolving in a routine low key alternative way the disputes that arise from sacred matters, secrets, breach of kinship rules, calling out the names of the dead, or adultery. Our laws have removed the traditional forms of punishment by death, spearing, clubbing and so on, yet our forms of punishment may sometimes provide no effective sanction against anti-social conduct. Traditional Aboriginals have described to me the excitement and *kudos* which may attach to a sentence of imprisonment, at least if it is a short one. The aeroplane ride, easy meals, a visit to Darwin, all of these may represent a new form of initiation and, if incarceration is for a short time, little perceived penalty: sometimes quite the reverse. On the other hand, it may offend those in our criminal justice system to contemplate the imposition of a penalty under our laws knowing full well that the traditional Aboriginal may be subjected to double punishment when he returns to his clan.

There are some who call for a radical and simple solution: the recognition and enforcement of Aboriginal traditional law in a pluralist legal system in Australia. Supporters talk of Aboriginal identity, self-pride, self-government and effective law and order. The erosion of Aboriginal life by the impact of Western "greed, deceitfulness and immorality"[25] has gone in this view, far enough. The fundamentalist calls for a return to the virtues of the past, or at least some of them. Aboriginal customary laws disciplined and ordered a stable Aboriginal society which had fewer tensions and problems than does Aboriginal society today. Elders, seeing the erosion of authority in traditional societies and the undoubted social and personal mischief this has caused, appeal for return of customary law. Can it be done? Should it be done? These are issues before the Law Reform Commission.

It was Strehlow's role in this important controversy to sound the warning:

> "Aboriginal law was devised for the traditional situation with the elders in control and all powerful. This situation no longer exists. . . . 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? . . . [W]e are creating in our community scope for a small sector to get away with murder or to avoid punishment normally required under European law on the ground that tribal elders would extract retribution. These ill considered theories could therefore lead to a legal no-man's land between white and black society in Australia. I do not believe that thinking white or Aboriginal people want this".[26]

Obviously the views of a man of Strehlow's background, sympathies and scholarship demand the careful attention of lawmakers and those who advise them. It is premature to state the conclusions of the Law Reform Commission. Due weight must be given to every viewpoint, including that of the supporters of customary law and above all the views of Aboriginal

25. Strehlow, *op. cit.* (*supra* n.1), 331.
26. As reported in the *Adelaide Advertiser*, 19 February, 1977, 6. Similar views were expressed to the writer orally.

Australians. But it is important they pay heed to the problems which stand in the way of the simple acceptance of Aboriginal customary laws into the legal system of Australia. Of these problems Strehlow speaks directly and clearly. His writing on the subject is not complicated by doubt. To state it bluntly, it was Strehlow's view that it is now too late to dally with the idea of recognising Aboriginal tribal law:

> ". . . the danger will be that practices and attitudes developed and released in a social breakdown situation may be regarded and described as having formed part of the original behaviour pattern".[27]

In collecting some of the reasons he advanced for this view, no inference should be drawn concerning any conclusion which the Law Reform Commission or I have reached on the subject. No conclusion has been reached. When it is, it will be reported first to the Commonwealth Attorney-General and the Federal Parliament. Before that is done consultative papers will be published, setting out tentative views for the comment of Australians, and other Aboriginals and non Aboriginals, experts and laymen. Only after the most careful attention has been given to consultation with all groups affected will the Commission deliver its final report. There will be much time for debate and deliberation. No one can dispute that attention should be paid to the views of a pre-eminent and internationally renowned linguist and anthropologist whose understanding of their tongue took him into a unique relationship with some of the traditional Aboriginals of Australia.

5. The Basic Problem

When I first called on Professor Strehlow in April, 1977, he outlined to me the basic problems which he saw in any attempt to secure recognition for traditional Aboriginal law as he knew it and his fear that the moves towards recognition would lead to either a no man's land, misused by a minority, or a synthetic legal system that was neither truly white nor Aboriginal.

He stressed the complete and mandatory secrecy of much of the traditional law and the fact that even when there was a highly developed traditional Aboriginal society, relatively few knew the law. Male children did not begin their instruction until the age of 15 or so, and only a select and dedicated few attained all the secret lore of their clans. Women were excluded from such knowledge:

> "Our women are of no use at our ceremonial gatherings. They are altogether ignorant of the sacred tjurunga. They have fallen from the state of our great feminine ancestors".[28]

As the law's first tenets demanded preservation and respect of its secrecy, it was fundamentally unacceptable to disclose it, let alone codify it, for the purpose of its enforcement, whether by our courts or by Aboriginal communities.

Passing from the vital secrecy of the law, Strehlow said that at the heart of the substance of Aboriginal traditional law were two critical features of substantive law which the majority community in Australia would find it

27. Strehlow, "Aranda Regular and Irregular Marriages", unblished and undated *mimeo* MS, 3.
28. Strehlow, *Aranda Traditions* (N.Y., 1947), 94.

hard to accept, let alone enforce. The first of these was the central importance of religion in Aboriginal customary law. Because an offence against religion risked bringing supernatural wrath upon a whole clan, no notion of individual guilt or personal responsibility was relevant. " 'Clan vengeance' [meant] that an innocent man [might] be punished for an offence committed by a different member of the same clan."[29] Similarly the facts alone without any guilty intent or *mens rea* were sufficient to attract punishment, usually mortal punishment:

> "Even minor damage to a tjurunga ['A sacred stone or wooden object representative of the individual's original body which he bore in his previous existence'] resulted in death . . . Lurknalurkna's slipped out of its bundle and broke in halves . . . The youth was allowed to return to his father . . . But though he was safe for a time, he could not escape indefinitely . . . one morning, when he was alone, he looked up. Blood-avengers were standing around him. He was looking at the points of their spears. For his fault this mere youth was killed by the old men . . . To us the death penalty may seem excessive for accidents of this sort. However, the natives regarded these stone tjurunga as the actual changed bodies of totemic ancestors; and damage of this nature therefore represented an injury done to their persons".[30]

The second critical rule which Strehlow suggested would not find ready acceptance in modern Australian society dealt with kin relationships. He likened one aspect of traditional law on this subject to an incest taboo (although he asserted that this was as unhappy an expression as many in this area). Strict rules governed inter-personal relationships within an extended family. Any such rules would appear to the modern Australian to be irrational, on the one hand, and discriminatory against women, on the other:

> "Sexual relations were forbidden not merely with such near consangineous relatives as sister, mother, daughter and so forth, but also with any girl belonging to the class of the man's mother-in-law . . . I [Strehlow] am not sure why relations with a woman who is by class regarded as a mother-in-law have been singled out with horror for moral condemnation, generally exceeding that vented upon offenders guilty of incest with actual blood relatives".[31]

The substance of the law apart, the procedures also presented difficulty. The notion of simply appointing traditional Aboriginals as police or justices ran, in Strehlow's view, into the impossible difficulties of kin relationships which forbid any measure of disloyalty, let alone oppression, to persons in particular relationships to the subject:

> "It was always expected that members of a family should stand together and help one another. In the case of private disputes among persons belonging to two different families, the members of each family were always inclined to argue—'My family, right or wrong',

29. Strehlow, "Agencies of Social Control in Central Australian Aboriginal Societies", unpublished and undated *mimeo* MS, 51.
30. *Id.*, 43.
31. *Id.*, 40-41.

and stand together even if the justice of their cause was rather doubtful".[32]

Finally, he mentioned the prevalent use in Aboriginal traditional law of punishments which Australian society today would regard as unacceptable. Are we, after a half-century of debate, to restore the death penalty so recently removed from the Australian statute book? Yet death was an acceptable (and in some cases compulsory) punishment for offences against traditional law. Are we to countenance spearing, clubbing and other physical violence which would constitute a serious offence against our legal system, simply because in Aboriginal society there was no prison nor any effective means of extracting a fine or other form of punishment?

> "In every human community there are persons who are regarded as rebels or as criminals—persons who openly flout the dictates of the established authority or who wilfully break . . . moral and social restrictions . . . The generally accepted penalty [by the Aranda] for such incorrigible, habitual offenders was death."[33]

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. This was the message which Strehlow brought to those whose responsibility it is to consider recognition of Aboriginal customary law in modern Australia:

> "I believe that in 1978 no completely untouched aboriginal communities exist anywhere in Australia. All aboriginal Australians, even in the furthest regions of the outback, have by now come into contact with European ideas, with white Australian cultural notions, and with white Australian legal notions. I believe that this is a process that can be neither arrested nor reversed; for even aboriginals living in some form of tribal organisation wished to live on the white man's foods—flour, tea, sugar and beef; and everywhere the young people, *i.e.* the future 'black' folk, are demanding also access to liquor. It seems therefore that in another 50 years or so there will be no aboriginals at all whose beliefs, languages, or cultures have remained even relatively unaffected by 'white' ideas, concepts and values; and the original indigenous traditions in consequence are irretrievably on the way out . . . I [am] left with the impression that few, if any, . . . experts and spokesmen ha[ve] any deep knowledge of aboriginal customary laws anywhere . . . I know that the modern young aboriginals and part-aboriginals who have never been trained by any of the old local group elders in Central Australia are so inconversant with the old norms that they always use the term 'aboriginal law' when talking about matters in which they feel 'black' behaviour differs (or ought to differ) from 'white' behaviour. Others talk about 'The Law'; but few of them seem to know much about the old terms in which breaches of 'The Law' used to be defined. These terms themselves would at least indicate what breaches of 'The Law' were regarded as meriting death, which breaches could be punished by the infliction of what *we* might term 'grievous bodily harm', and which breaches could be left to be dealt

32. *Id.*, 28.
33. *Id.*, 38.

with by private persons (provided their 'punishments' were kept within certain limits). The loose use of 'The Law' or 'aboriginal law' so freely indulged in nowadays by people who have only the haziest notion of what it is all about I find completely misleading and just as obnoxious as the universally promulgated term 'The Dreamtime'—a completely misleading white man's term substituted originally for the Aranda word 'altjira' (which meant 'eternal' or 'uncreated' or—used as a noun—'eternity'). Single legal definitions do demand clarity rather than prevarication, I think that experts giving explanations before a legal commission should first be clear in their own minds what they are talking about. I note that . . . you say 'The Law, no doubt, as in ancient Hebrew times, is religious Law'. This is true. But . . . what happens when the old religion dies?"[34]

6. Unacceptable Secrecy

Despite a lifetime in scholarship, Strehlow was in many ways a practical man. He realised clearly that the Law Reform Commission must report to a Parliament comprising, almost exclusively, "white" representatives of a majority "white" population. He also realised that it was simply not feasible to present to the Parliament, for blind adoption, unstated, secret rules, the very existence of which could not be recounted to the Parliament. He also realised the practical fact that, the Australian legal system having asserted its dominance through the length and breadth of the continent, a revived recognition of Aboriginal customary law, in whatever form, would invove either a *de jure* or a *de facto* retreat by current Australian law from areas presently controlled (at least in legal theory) by it:

"Aboriginal law could be fully understood only by persons who had undergone years of training by the local group elders and in Central Australian (and probably elsewhere too), this was done mainly during the performances of the great ceremonial festivals. It was these highly-trained local group elders who knew all the sacred myths and sacred songs that were also the guardians of aboriginal law since it rested on and was validated by the religious beliefs expressed in these myths and songs. For more than forty years I myself have listened to many hours of discussions by Central Australian local group elders about their norms, their territorial rights, the duties of ceremonial assistants, the powers of the ceremonial chiefs, the punishments prescribed for 'sacrilege' and for other offences; and I soon came to realise on how deep a knowledge of (and reverence for) religious beliefs the arguments were invariably based . . . It would be improper for me, in aboriginal eyes, to discuss . . . such things as death charms, the operations of 'feather-boot men', or the ultra-secret practice of 'pointing the bone'. In all cases their magical efficacy was believed to come from secret verses left behind by certain greatly feared supernatural beings. These verses were known only to a few trusted men in the local groups. Many lesser men refused to learn them for fear of being accused of having played around with 'black magic' whenever any sudden deaths were reported either in their own community or in adjoining areas. . . . The younger generation of aboriginals merely had a general idea of

34. Letter from Strehlow to the author, 8 June, 1978, 1, 3.

> aboriginal law: it was their fully-trained guardians of the sacred beliefs that were also the unquestioned guardians of their norms."[35]

The secret nature of the customary law had two practical results, so far as Strehlow was concerned. In the first place it could only be disclosed to an outsider who had won confidence over many years of proved trustfulness and then only on terms that it would not be divulged. It would never be revealed, particularly to women; but especially to a national audience which comprised women and those who might sneer and mock its tenets:

> "[The old men] refused to part with the sacred traditions of their forefathers to men who scoffed at their beliefs and who desecrated their ceremonial centres."[36]

The second consequence was one to which he frequently returned in his writing. So secret was the body of the law that not even every adult, initiated male would get to know of it:

> "[The old men] preferred to take the tjurunga of their ancestors with them into the grave rather than surrender them into unworthy hands."[37]

As only a limited number in the purest traditional state would know Aboriginal law *in reality,* "loose talk" of the recognition of Aboriginal customary law was unacceptable because those who purportedly revealed it were almost certainly not the traditional recipients of it:

> "Th[e] vast body of tradition in myths and chants, together with the thousands of traditional ceremonies associated with the various ceremonial centres, has had to be preserved by a population whose numbers were estimated . . . in 1896 as numbering only some 2000 Aranda persons . . . If we exclude from this total all those persons who were not permitted to carry forward the sacred traditions, that is to say, all females and boys under the age of fifteen, we should still be left with perhaps a mere nine hundred potential culture bearers. Of these more than half, say five hundred, would have been young men still in the novice and early instructional stages; and of the remaining four hundred no more than perhaps half knew *all* the secret lore of their clans."[38]

The need to be clear in what we are talking about when we refer to "Aboriginal customary law" was a constant theme of Strehlow's later writing. To his mind, the equation was simple. Traditional law was part and parcel of traditional society. Break down that society and the limited number who at the best of times had access to traditional laws and such laws diminished or evaporated entirely:

> "Even in the local group area a veil of deep secrecy effectively shrouded the most important parts of the sacred beliefs and ritual from the younger men. All episodes in the sacred myths, all verses in the sacred songs, and all acts in the ceremonial cycles attached to each major totemic centre, were carefully graded in point of

35. Strehlow, "Aboriginal Law", *mimeo* note, August 1978, 3-4.
36. Strehlow, *op. cit.* (*supra* n.28), 172.
37. *Ibid.*
38. Strehlow, *loc. cit.* (*supra* n.29), 1-2.

> sacredness and secrecy. Young men were allowed to be taught only those sections of belief and ritual that were open to the novices. Middle-aged men (called Kngaribata) knew most of the sacred lore in the possession of their own local group area. But there were probably never more than two or three elderly leaders to be found at any one time in one of the major local totemic groups who possessed that fullness of knowledge that enabled them to function as the final repositories of the *complete* body of sacred lore which was the property of their local group. In the Aranda-speaking area such men received the title *Ingkata* (ceremonial chief)—a title that conferred on them also the privilege of meting out capital punishment on persons accused of sacrilege and of wielding in addition considerable secular powers . . . In other words, they were also the main moral guardians in their community, and what we may perhaps call the respected enforcing officers of what has been termed 'tribal law'."[39]

Strehlow asks, by inference, if not directly, can we seriously propose the retreat of the general Australian legal system to permit the enforcement of secret laws, the very revelation of which cannot be permitted? He also asks, in view of the decline of truly traditional society and the diminution of the ever scarce numbers to whom the law was passed orally from generation to generation, are there any true *Ingkata* left? If not, what is this law called "tribal" or "traditional" which it is suggested the Australian legal system should countenance and support?

7. Unacceptable Substantive Rules: Religion

In Strehlow's view the critical central force in Aboriginal traditional law was religion. To him the problem of latter day recognition of such law was twofold. First the evaporation in the belief in that religion and secondly, the plain unwillingness of the majority community to countenance the sanctioned enforcement of religious rules:

> "All aboriginal law was ultimately based on the religious beliefs; its rules varied in different parts of the Australian continent, since the beliefs too varied in different localities. In all cases of capital punishment, care was taken to convince the relatives of the victim that the execution had been, in a very real sense, decreed by the supernatural beings venerated by the local group in whose area the killing had been carried out. For instance, men killed on a ceremonial ground were immediately buried and had then a sacred object such as a ceremonial pole erected over them or (according to Dr. H. Basedow) ground painting set down over them. Broken tjurunga objects were shown as condemnatory evidence in other cases. Sometimes (probably very rarely) a man accused of 'sacrilege' was actually put before his judges and asked to justify himself again, against the accusations received by the elders. Sometimes he was believed. "Then all the old men felt sorry for him; they perceived—'it is certain that he has not committed such a crime'." But if they did not, a death curse was pronounced and he was killed on the spot. If, as often happened, the accused had fled or resided at a

39. Strehlow, "Aboriginal Religion", *Strehlow Research Foundation Pamphlet* No. 4, Vol. I, June 1978, 1.

> place too distant from the "court scene", a party of young men was sent out to execute the victim, who was sometimes unaware of the accusations secretly made against him; and the members of party then took him away from the main camp (perhaps on the excuse that he was to accompany them on a hunting excursion) and then killed him: this is what happened to a young Pitjantjara man . . . near Mt. Conner, late in 1934."[40]

The law, being based on supernatural phenomena, was immutable and unchanging. Young children were drowned for thieving religious objects as a "grim warning" to children to keep away from sacred places.[41] Strangers who came upon religious objects or ceremonial performances, even if by a perfect accident, might be subject to mortal punishment for the offence, being against supernatural laws, threatened the whole clan with supernatural peril that had to be assuaged:

> "[I]nstances of the fears in which all religious matters were wrapped up: doing anything wrong, even unwittingly, in the religious sphere constituted sacrilege and there was only one punishment for it—death . . . the supernatural beings had not merely existed in some shadowy 'Dreamtime' as is now being taught . . . they had created the landscape, composed the sacred songs, instituted the sacred acts, and put part of their own immortal lives into all human beings. Any breaches of the links between these supernatural beings and the human beings consequently upset the whole balance of nature, and disturbed the economic environment to a degree that, if persisted in, would cause the deaths, of all animals, the perishing of all plants and hence ultimately the death of the whole human race. . . . It is therefore easy to understand why all Aboriginal law was ultimately based on religious beliefs, and why the death penalty was accepted almost with demur. Even on the most joyful occasion of his life, that on which a young Aranda man who had successfully passed all the terrifying physical operations and tortures of his 'man-making' rites, *viz.*, circumcision, sub-incision, head biting, evulsion of fingernails, and so on, was at last being presented with his own Tjununga that symbolised his personal and indestructible link with the spirit world and the immortal supernatural beings, he was still cautioned against sacrilege. Among the western Aranda the formula was, according to my old friend Rauwiraks (who was given more than one object himself) 'look at those tjununga! These are to be yours when we die. You must never place (on any new tjununga) the engravings of other places (i.e. the totemic patterns proper to the other sacred sites): if you put down the patterns of other sites, you will bring down on yourself the death penalty'."[42]

The notion of individual intention and personal moral culpability had no place in this system. The facts alone constituted the offence. Many instances are told, including by Strehlow in his *Journey to Horseshoe Bend,* of the application of the principle of punishment for "corporate guilt". The case there recounted (of the massacre of Irbmangkara in 1875) saw the killing

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40. Strehlow, *loc. cit.* (*supra* n.35), 2-3.
41. Strehlow, "Aboriginal Customary Law", *Strehlow Research Foundation, Pamphlet* No. 5, Vol. I, August 1978, 1.
42. *Ibid.*

of about 100 men, women and children for an alleged act of sacrilege of which most of those slain were personally quite innocent:

> "It was this readiness to kill persons who had committed sacrilege either knowingly or unwittingly (the fact alone was looked at, not any *mens rea)* that caused a great revulsion against aboriginal religion in Central Australia after the arrival of the white population."[43]

8. Unacceptable Substantive Rules: Kin Relationships

Contemplating the enforcement of such religious rules by such punishments, constituted an insurmountable object in Strehlow's mind to the revival of Aboriginal tribal law as he knew it. But it was not the only substantive objection. Severe punishments were also meted out according to traditional law for what have been loosely described as "incest" offences. The term is loose because it has a different meaning in the Aboriginal context from its meaning in our society:

> "Most importantly [it is] intimately bound up with the classificatory kinship system. Thus an Aranda Kamara man could not marry or have sexual relations with any Kamara (or Nakamara or Watjala) woman anywhere: for such a female would have been classified as his sister. Again, the most heinous form of aboriginal 'incest' would have been to have had any sexual relationship with a woman classifiable as his mother-in-law. Thus an Aranda Kamara man could not marry any Ngala (or Nangala or Ngangkala) woman. In the pre-white days he was not even allowed to speak to her. After white settlement this sometimes caused much inconvenience and sometimes embarrassing or even comic situations. Thus one of the kitchen women in my Jay Creek home thirty years ago was according to classificatory kinship terminology the 'mother-in-law' of both of my trackers, though neither of them was married to any of her daughters. At meal times she would noisily slam the kitchen door when taking out the food dishes to these two men, who sat some distance away with their backs turned towards the house so as not to see her. She placed these dishes on a table and then returned to the kitchen banging the door as noisily as before to let them know that she had gone inside. The men would now come to the table and eat their food. No words ever passed between her and these men. If she wanted any firewood cut, she told me; and I would then pass on her request to my trackers. There were various punishments for breaches of these 'incest' laws; but any affair with a mother-in-law would have cost both this woman and her lover their lives. In the early days of white settlement, some white employers in similar circumstances used violence in order to induce their black servants to talk to each other, and this led to much trouble."[44]

Several tales are told in his writing of the punishment singled out for breaches of the incest prohibition:

> "Breaches of the incest prohibitions were punishable by death; and the council of elders appointed the persons who had to do the killing,

43. *Ibid.*
44. *Id.*, 2.

since no kinsman of the guilty pair would have been willing to do so. If the man had married the girl rating, for instance, as his mother-in-law, then the pair sometimes fled to some distant njinana group in the hope that no one there would undertake the killing, and that their own local section would be content with having got rid of them permanently. In other words they hoped that their social extinction would make unnecessary their physical extinction. Even in such cases they were lucky if they survived for long. The avengers sometimes travelled long distances to carry out the sentence; and the local njinana section itself might do the killing. After the advent of the whites, persons who had contracted 'incestuous' unions generally sought employments with white station owners or police officers in order to insure immunity for themselves from the verdicts of their elders."[45]

Quite part from the rigidities of the incest taboo many rules governing marriage were strictly enforced in traditional societies. Exogamy certainly existed among the Central Australian tribes and an accepted marriage pattern evolved, partly by reason of the small numbers of most clans and the limitations imposed by incest taboos:

"The choice of the individual in the determining of a permanent union was a factor of considerable importance among the Central Australian natives as it is among ourselves; and while the majority of them readily fell in with the marriage arrangements made for them by their elders, there were always a not inconsiderable number of men and women who preferred to choose their own partners. Sometimes the most desirable wife or husband belonged to a wrong class. Where incest was involved, particularly with blood relatives, society could not readily condone the offence; and in most cases the death penalty was inflicted upon the lovers, unless they managed to find asylum with some friends in other groups . . . if no incest was involved, the relatives of the wrongly-coupled pair generally tried to separate them, often using much physical force in trying to convince the obstinate lovers of the error of their ways. Often the latter would try to avoid the wrath of their relatives by eloping to neighbouring groups for a while. Upon return they were sometimes accepted without further comment as a properly married couple, and sometimes they might have to put up with further physical chastisement. But if nothing served to bring them to their senses, the community would gradually cease to interfere and accept what had originally been termed an improper liaison as a permanent union, though continuing to refer to its being *bailba* when asked to express an opinion as to its legality."[46]

The difficulty of reconciling the strict enforcement of incest taboos and the oppressive enforcement of arranged marriages in an Australian society which is increasingly asserting and defending the rights of women needs only to be stated to be perceived. The law may turn a "blind eye" to that which it does not know. But is it to decline its assistance to a woman, Aboriginal or non-Aboriginal, in today's society in Australia who seeks protection from the enforcement of marriage arrangements which she does

45. Strehlow, *loc. cit.* (*supra* n.29), 41.
46. Strehlow, *loc. cit.* (*supra* n.27), 35-36. *Cf.* Strehlow, *loc. cit.* (*supra* n.29), 19-20.

not wish? The clash between the competing forces, each of them in their own way desirable, is here seen starkly. That which would uphold the right of the Aboriginals to be themselves may clash with that which would uphold the right of women in our time to be free from forced marriages:

> ". . . [T]imes have altered; and with the example of their white sisters before them, native girls and women in Central Australia no longer submit passively . . ."[47]

9. *Unacceptable Punishments*

Enough has been said to disclose the fact that capital punishment played a critically important part in the enforcement of Aboriginal customary laws:

> "[I]n a community which uses no money (not even sea shells could have been used as currency over most of Australia) and possesses no gaols, the only punishments available are corporal punishment and capital punishment."[48]

Even if this is somewhat over simplified, (banishment and enforced solitude were among other alternatives) the point is fairly made that our regular and acceptable forms of punishment were simply not available in the circumstances of traditional Aboriginal life. For some offences against the whole community (particularly breaches of the religious or "incest" rules) death was the all but invariable consequence. For the rest, disputes between individuals were largely left to those individuals to redress:

> "Fights were the acknowledged means of settling disputes not only between individuals but also between groups of individuals, as long as the settlement of the dispute did not involve the death of the offender. Even parties belonging to different tribal sub-groups or different tribes could arrange to determine the rights of their quarrels in this way."[49]

In *Aranda Traditions* Strehlow tells the tale of a retaliatory raid at Hermannsburg in 1914 and concludes thus:

> "This episode strikingly illustrates native ideas on the punishment of murder. Murder, whether intentional or not, must be avenged by murder; blood alone can atone for shed blood; if the real 'murderer' cannot be brought to justice, the craving for revenge is satisfied equally well by the killing of some of his relatives or friends. None of the three men attacked . . . at Hermannsburg had been guilty of the original 'murder'; they merely happened to be the first men in the western Aranda camp who came within striking distance of the spears of the avengers."[50]

Strehlow is quick to defend the Aboriginal against the "primitivist" attitude of scientists.[51]

> "It must not be thought that aboriginal law was purely destructive . . . it also furnished a firm basis for the healthy functioning of Aboriginal society. Again, it must be remembered that in these

47. *Id.*, 33.
48. Strehlow, *loc. cit.* (*supra* n.35), 3.
49. Strehlow, *loc. cit.* (*supra* n.29), 33.
50. Strehlow, *op. cit.* (*supra* n.28), 64.
51. See *e.g.*, *id.*, xvi-xvii.

> small Aboriginal local groups, life was not thought of as being cheap: it is the great 'civilized nations' that from time to time engage in disastrous wars where the lives of millions of men are held to be expendable by their own rulers and where young men of military age are sometimes rated as being little better than 'cannon fodder'. In the Aboriginal world, all men, and all women too, rated as full human beings, and each human being carried in it some of the immortal 'life' of the supernatural beings who were believed to have instituted the 'divine' laws which sometimes required these executions and other punishments."[52]

In his writing Strehlow asked directly or by inference whether a return to capital punishment, possibly fatal spearing, and clubbing to death, would be countenanced in Australia today. The terms of reference of the Law Reform Commission specifically remind the Commission that it should give special regard to the need to ensure "that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane". Some Aboriginals, of course, assert that our form of punishment is "cruel or inhumane". Lengthy terms of imprisonment, on this view, are at least as "cruel and inhumane" as spearing and beating. Western law cannot turn its back because, increasingly, international conventions speak out against such punishments. The point made by Strehlow, however, is this. Such punishments are part and parcel of traditional Aboriginal law. Abolish them, remove the death sanction for sacrilege and spearing, fighting and beating for other offences, and you undermine traditional law itself. Calls for the return to "tribal law" originate in the desire to return to a cohesive, hierarchical society in which rules were carefully obeyed and severe sanctions were meted out to those who infringed. It is not so long since our society relied on terror and violent retribution as the means of controlling crime. A return to such sanctions, even as a result of the law's "turning a blind eye", would be unacceptable and contrary to international standards of conduct. Yet, unless the full vigour of Aboriginal punishments can be exerted, the power of the Aboriginal elders and council to enforce traditional law, as it was known, is completely undermined:

> "The young men realized that where tradition provided the authority, the old men had the power to inflict any amount of pain upon them; also that their own male relatives, instead of helping them to escape from these ordeals, actually assisted the old men to carry out their painful decisions. To the fear of magic and the supernatural was now added the fear of the old men assembled in council."[53]

This states a quandary for the enforcement of some at least of the customary laws of the Australian Aboriginal. Unless traditional punishments are countenanced the probable area of traditional law susceptible to modern day enforcement is severely narrowed.

10. Unacceptable Procedure

Many writers sympathetic to the notional of a revival of Aboriginal customary law suggest that Aboriginals today have a clear "jurisdictional concept" which, except in the remotest desert, concedes that some crimes are apt for discipline by white law, whilst reserving some matters to

52. Strehlow, *loc. cit.* (*supra* n.35), 3.
53. Strehlow, *loc. cit.* (*supra* n.29), 28.

enforcement in the Aboriginal community. Again Strehlow points to the difficulties. As early as 1936, in his notes on native evidence, he drew attention to the special procedural problems arising out of the rules of kin relationship:

> "The natives have no uncertainty about the nature of a lie. They know the difference between truth and untruth as well as a white man. They have a word for 'lie' *(ortjerama* is the Aranda term, for instance). If a lie achieves its purpose, it is not regarded as a serious offence, but as a permissible means to achieve a purpose easily or when other means fail; only the deceived person must be a mere acquaintance or a stranger or an enemy. On the other hand, it is regarded as shameful to deceive blood relatives or friends. It is regarded as shameful to tell a lie to one's father or grandfather or brother. [In some groups the grown up native normally does not speak to his mother or grandmother unless compelled to do so]. It is regarded as shameful to tell a lie to the leader of the local totemic group to which the speaker belongs. It is sacrilege to tell a lie to the old men who are in charge of a great ceremonial gathering; even a young man withholding an animal which he has killed on the hunt during the day is guilty of sacrilege."[54]

The difficulties of a procedural kind created by the kin relationship simply cannot be glossed over. It would be unthinkable, at least in traditional Aboriginal society, for an Aboriginal policeman to arrest and detain a kin relation. It would be unthinkable for him to interrogate certain persons in kin relationship, particularly women. It would be impossible for him to give evidence against such persons. If he were a justice, it would be impossible for him to weigh independently and impartially the evidence against kin relations or even members of his clan. It would be quite unthinkable for him to condemn certain persons to punishment.

Additional problems abound. A recent criminal trial came to a complete halt when an Aboriginal witness was asked to name certain dead relatives.[55] Difficulties of this kind stand in the way of the public, curial application of traditional law. The need to face up to these difficulties and to avoid loose talk and loose thinking was constantly addressed by Strehlow both in his writing and in his conversations and advice.

11. Beware the Synthetic Law

Some of the problems to which Strehlow drew attention have now been stated. Critics say that his notions of traditional Aboriginal Australia are suspended in the Aranda communities of the 1930s. For good or ill Aboriginal Australia has changed never so rapidly as in the last few years. Welfare, education, land rights and more lately, the establishment of an elected National Conference,[56] all of these create changes from the dependent, mission-led, self-deprecating community into which Strehlow was born and in which he grew up.

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54. Strehlow, *op. cit.* (*supra* n.1), 331.
55. The reference is to recent proceedings before the Supreme Court of the Northern Territory.
56. The National Aboriginal Conference provides a forum in which Aboriginal views may be expressed at State and National levels, particularly on the goals and objectives in Aboriginal affairs. It commenced operations in 1977.

There is no doubt that some of his writings betray an impatience with the "so-called Aboriginal leaders". Those who most offended him were the noisy "mixed bloods", some of whom had "white spouses . . . and cannot speak any Aboriginal languages".[57] Undoubtedly Strehlow found it hard to accept as legitimate the leadership of such persons and their calls back to "customary law":

> "I would . . . agree . . . that the problem of 'revivalism' should be carefully investigated, particularly when modern urban or rural aboriginals suddenly discover Ancient Customary Law as assisting them to realise their own interests rather than having 'imbibed it in a traditional way'."[58]

But his principal concern here was one that is entirely legitimate and one which must be given full weight by the Law Reform Commission. He expressed a fear that, in the name of restoring so-called "customary law", we must be careful not to creat 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. Such a development would be dangerous for the Rule of Law and of uncertain value to Aboriginals generally:

> "I am concerned by the implications of some recent court cases and some of the theories being put forward by lightweight experts . . . it is one of those situations where well-meant sympathy plus a little knowledge is very dangerous, and people are attempting to establish very important principles on this sort of shaky foundation. 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. I don't suggest deliberate intent to mislead but rather an end result of general well-meaning effort based on wrong or sunsound premises. In present circumstances one could already go so far as to suggest the best defence against a murder charge, if you happen to be Aboriginal with links to traditional life-style, is to claim the victim breached tribal law and that everyone was drunk at the time."[59]

This somewhat acid comment, clearly directed at the Sydney Williams case, does however, contain a clear warning which was then spelt out in plain terms:

> "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? 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 lead to at least some were more likely to have been domestic-based and, sadly, aggravated by alcohol—a not too uncommon situation in society at large. If this is the case then we are creating in our community scope for a small sector to get away with murder or to

57. Strehlow, letter to the author, 8 June, 1978, 1. See also Strehlow, *loc. cit.* (*supra* n.35), 5.
58. *Ibid.*
59. As cited in the *Adelaide Advertiser,* 19 February, 1977.

> avoid punishment normally required under European law on the ground that tribal elders would extract retribution. These ill-considered theories could therefore lead to a legal no-man's land between white and black society in Australia. I do not believe that thinking white or Aboriginal people want this".[60]

Strehlow clearly recognised the problem before the descendants of the traditional Aboriginals:

> "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 people have become, it seems, virtually a lawless community, with all the horrors which that term implies .The old 'law' has largely 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. The remedy is, of course, a return to respect for the law. But how is this to be achieved? The old law rested on the old religious beliefs, and the young generation will no longer accept these . . . Perhaps white Australians, too, are finding themselves in a not very dissimilar 'transitional stage'."[61]

In other words, a return to the law is a solution. It is even desirable. But in default of a return to the old religions, the old power structures, the unquestioned authority and rigid ceremonial, the endeavour to resuscitate customary laws in today's society will produce, with varying success, nothing more than a hybrid of uncertain content, ineffective enforcement and dubious respect.

Those who answer Strehlow say that he underestimated the viability of Aboriginal customary law and construed too narrowly the meaning of law. Why of all the legal systems of the world should this one stand still when the community changes? Such critics see Strehlow as a counsel of despair, as unacceptable for Aboriginal society as for the majority community in Australia. These are the issues that must now be resolved by the Law Reform Commission and passed upon, in the end by the Parliament of Australia. They raise fundamental questions about the nature of law, its rules of procedures and enforcement. In scrutinising these questions in the context of Aboriginal society and in seeking to find answers that will restore acceptable social control, we of the majority community may find answers, as Strehlow suggests, to our own legal problems. Strehlow, as has been shown, clearly saw that Aboriginal law was not just destructive, but provided a well organised system and a "firm basis for the healthy functioning" of Aboriginal society. Although he rightly called to the attention of the over-optimistic the severe, even harsh aspects of traditional law, he also suggested that, some cases apart, the usual and consistent solution to community problems was one of peaceful discussion and sensitive resolution.

On his 70th birthday, Strehlow wrote to me in sincere but happily whimsical terms thus:

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60. *Ibid.*
61. Strehlow, *loc. cit.* (*supra* n.35), 5.

> "We in Australia are living in an agonising time of transition. It is therefore particularly difficult to make points *now* which will still be considered as completely valid in, say, twenty or fifty years time. I therefore do not envy you your task as Chairman of the Australian Law Reform Commission. But I sincerely wish you every success (and would I be correct in adding, good luck) in your endeavours."

Strehlow was a brave scholar; not contented with cloistered virtues, he went out into the world and said what he believed. This is the prerogative and duty of the modern scholar. Australians, Aboriginal and non-Aboriginal, should remember his life's work with gratitude.